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Article (Accepted version)
(Refereed)

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Republican Freedom and the Rule of Law

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Abstract. At the core of republican thought, on Philip Pettit's account, lies the conception of freedom as non-domination as opposed to freedom as non-interference in the liberal sense. I revisit the distinction between liberal and republican freedom and argue that republican freedom incorporates a particular rule-of-law requirement, whereas liberal freedom does not. Liberals may also endorse such a requirement, but not as part of their conception of freedom itself. I offer a formal analysis of this rule-of-law requirement and compare liberal and republican freedom on its basis. While I agree with Pettit that republican freedom has broader implications than liberal freedom, I conclude that we face a trade-off between two dimensions of freedom – scope and robustness – and that it is harder for republicans to solve that trade-off than it is for liberals.

Keywords. Freedom, republicanism, liberalism, non-interference, non-domination, rule of law, robustness, liberal paradox

1. Introduction

The tradition of republican thought, as described by Philip Pettit, is characterized by its emphasis on a distinctive conception of freedom.[2] Whereas liberals define freedom as 'non-interference', i.e. the absence of certain constraints on an agent's choices, republicans define it as 'non-domination'. To be free, on the republican account, an agent must stand in a certain relationship with others: no-one must be in a position to interfere arbitrarily with the agent's choices. An agent vulnerable to the possibility of arbitrary interference suffers 'domination'. Interference is 'non-arbitrary' only if it 'track[s] people's avowed or readily avowable interests'.[3] This account of freedom differs from the liberal one in at least two respects. First, non-interference by others is insufficient for freedom if these others have the power to exercise arbitrary interference (although presently unexercised). Second, non-interference is unnecessary for freedom if the interference in question – say, by the state – is non-arbitrary in the appropriate sense.

Republicanism, according to Pettit, is the view that social institutions and policies should be designed so as to secure freedom in the republican sense: to protect people against domination. Republican political theory explores not only what republican freedom is,

but also what institutions and policies it requires. For example, republicans advocate an extensive system of equal individual liberties, a deliberative approach to collective decision-making, a dispersion of power, basic welfare provision, and so on. Although these institutional and policy recommendations are similar to familiar liberal ones, Pettit emphasizes that republican *arguments* for these recommendations are different from liberal ones. To make such recommendations, liberals usually invoke multiple normative desiderata, such as liberty, equality, fairness, the rule of law, and so on. Republicans, by contrast, can derive them from a single desideratum alone, namely freedom as non-domination. If successful, republicanism thus offers a particularly parsimonious basis for making a broad range of normative recommendations.[4]

In this paper, I revisit the distinction between liberal and republican freedom and ask why republican freedom seems to have much broader implications than liberal freedom. I suggest that a key difference between the two conceptions of freedom lies in the fact that republican freedom has a built-in rule-of-law requirement, whereas liberal freedom does not. I argue that liberal fredom, at least as characterized by Pettit, captures the freedom an agent contingently enjoys in the actual world, whereas republican freedom captures the freedom an agent robustly enjoys by law, i.e. across a range of legally permissible and socially possible worlds. Although most liberals also endorse a rule-of-law requirement, they usually endorse that requirement over and above their commitment to freedom, as an additional desideratum. Republicans, by contrast, endorse it as part and parcel of their commitment to freedom.

I offer a formal analysis of this rule-of-law requirement and compare liberal and republican freedom on the basis of this analysis. While I agree with Pettit that the implications of republican freedom go well beyond those of liberal freedom, I argue that, in consequence, the assignment of republican freedom to two or more agents in society may be so demanding as to conflict with other important desiderata. In particular, extending work in an earlier paper,[5] I argue that what Amartya Sen has called a 'liberal paradox' reemerges in a strengthened form as a 'republican paradox': republican freedom clashes with Pareto efficiency.[6] Further, I suggest that the 'republican paradox' illustrates a trade-off between two important dimensions of freedom: scope and robustness.

Whereas liberals can solve that trade-off by adjusting freedom along each of the two dimensions, the republican commitment to robustness seems to restrict such adjustments to one dimension alone – that of scope – which makes the trade-off harder to solve. In my present analysis, I set aside the question of how to handle the (non-)arbitrariness qualification in the republican definition of non-domination, but I believe that future extensions of the analysis will need to tackle this question.

2. Positive laws: laws as modal facts

Before discussing the rule-of-law requirement in the republican conception of freedom, let me begin with some philosophical preliminaries on how we may think about the concept of 'law'. The same term 'law' is used in two very different senses. It is used to refer to the kinds of laws discovered by scientists, i.e. the laws of mathematics, physics, biology, sociology or economics, but also to the kinds of laws created by legislatures and interpreted (and enforced) by judiciaries. The former are positive laws, the latter normative or regulative ones. Positives laws are regularities in the way the world *actually* works. Normative or regulative laws are prescriptions – typically human-made and context-specific – for the way the world *should* work.[7]

Although positive and normative laws are distinct from each other, I suggest that they can be represented in formally similar ways, namely in terms of certain modal propositions: positive laws as propositions stating 'modal facts' (truths across relevant possible worlds), normative laws as propositions stating 'modal desiderata' (truths across relevant permissible worlds). The difference lies in how the modality is interpreted in each case. In this section, I sketch a simple account of positive laws; in the next section, I turn to normative laws.

So what is a positive law? As noted above, a positive law is a regularity in the way the world works. More formally, a proposition represents a positive law if it states a fact that is true not just in the actual world, but in all relevant possible worlds. The larger the class of possible worlds in which that fact is true, the more 'robust' is the law. Depending on how we demarcate the class of possible worlds – i.e. depending on our interpretation of 'possibility' – a law can be a logical, physical, biological or social one.

For example, the proposition that the sum of the three angles of a Euclidean triangle is 180 degrees is true in all logically possible worlds; hence it represents a logical law. The proposition that the equivalence of energy and matter is given by the relation $E = mc^2$ is true in all physically possible worlds; hence it represents a physical law. The proposition that, other things being equal, an increase in the price of a good leads to a decrease in the demand for that good is (at least approximately) true in all socially possible worlds given certain market-economic background conditions; hence it represents a social or economic law.[8]

What all these examples of laws have in common is that they can be interpreted as modal facts, i.e. facts that are true across all relevant possible worlds, although different laws have different levels of robustness. There may be logically and even physically possible worlds in which the laws of supply and demand do not hold, such as ones in which biological or social background conditions are different and yet fundamental metaphysical and physical underpinnings are the same. Likewise, there may be logically possible worlds in which the familiar laws of physics do not hold, such as ones hypothesized by mathematicians investigating alternative physical assumptions. By contrast, we must dramatically revise our logical assumptions to imagine possible worlds in which the sum of the three angles of a Euclidean triangle is not 180 degrees.[9]

To represent laws formally, let me introduce some basic notation of modal logic. An ordinary, non-modal proposition P states a fact that may or may not be true in the actual world. If we put a modal operator in front of P, then the resulting modal proposition states something about the truth of P in certain possible worlds over and above the actual world. We can construct the following modal propositions:

P ('It is necessary that P.'):

    P is true in *all* possible worlds in a relevant class (relative to the actual world).

$\Diamond P$ ('It is possible that P.'):

    P is true in *some* possible world in a relevant class (relative to the actual world).

The necessity and possibility operators,   and ◊, can be defined in terms of each other:

  P is equivalent to $\neg\lozenge\neg P$, and $\lozenge P$ is equivalent to $\neg\ \neg P$, where $\neg$ is the 'not' symbol.

The precise interpretation of   and ◊ depends on how we specify the relevant class of possible worlds. For example, if that class includes all logically possible worlds, then the operators   and ◊ denote *logical* necessity and possibility, respectively. If it includes only all physically possible worlds (but not all logically possible ones), then they denote *physical* necessity and possibility, respectively; and so on.

Diagram 1: Possible worlds

Class of all
socially possible
worlds under
certain conditions

Class of all
biologically
possible worlds

Class of all
physically
possible worlds

Class of all
logically
possible worlds
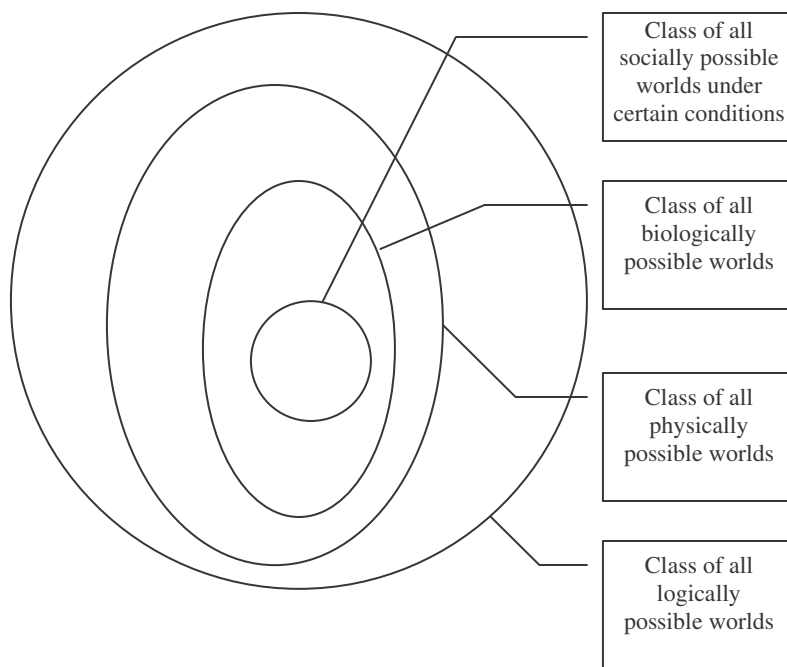
Diagram 1 represents different nested classes of possible worlds. The outermost circle represents the class of all logically possible worlds, the intermediate circles the classes of physically and biologically possible worlds, the innermost circle the class of all socially possible worlds relative to certain social background conditions. As those background conditions may vary from society to society, the class of socially possible worlds may also vary accordingly.

My remarks suggest that a law can be represented formally as a modal proposition of the form $\Box P$, for a suitable specification of the class of relevant possible worlds. If that class includes all logically possible worlds, then $\Box P$ states a law of logic; here P is true throughout the outermost circle in diagram 1. If the class includes all physically possible worlds, then $\Box P$ states a law of physics; here P is true throughout the second largest circle in diagram 1; and so on. Moreover, as the innermost circle in the diagram may vary with the social background conditions in place, the facts that hold throughout that circle may also vary with those background conditions. Hence social laws of the form $\Box P$ may depend on the relevant social background conditions. This observation will become important when I discuss the rule of law below. Finally, as noted above, the larger the class of relevant possible worlds, the more robust is a given law.

3. Normative laws: laws as modal desiderata

I have suggested that positive laws – the kinds of laws discovered by scientists – can be represented in terms of simple propositions of modal logic, interpreted as propositions stating modal facts. I now suggest that normative laws – the kinds of laws created by legislatures or proposed by moral and political theorists – can be represented in formally similar terms, but interpreted differently, as propositions stating modal desiderata.

What precisely is a normative law? I have noted above that a normative law is a prescription for the way the world should work. Usually, such a prescription is human-made and context-specific, and the prescription alone carries no implication as to whether it is actually adhered to. There may well exist many normative laws that are not obeyed.

Formally, a proposition represents a normative law if it states a certain fact that is true in all *permissible* worlds, relative to a given standard of permissibility. There are at least two ways of looking at this definition. *Either* we can let the law be given and then determine the class of worlds that are permissible according to that law; this class would include all those worlds in which whatever is asserted by the given law is true. *Or* we can let the class of permissible worlds be given and then determine what laws would single out precisely those worlds as permissible; the resulting laws would assert propositions that are true in all those permissible worlds. Depending on how we demarcate the class of

permissible worlds – i.e. depending on our interpretation of 'permissibility' – a law can be a constitutional, ordinary legal or moral one.

For example, the proposition that the House of Representatives is democratically elected is true in all worlds deemed permissible by the US constitution; hence it represents a US constitutional law. The proposition that people do not breach contracts and that, if they do, they are liable is true in all worlds deemed permissible by ordinary civil law; hence it represents an ordinary civil law. The proposition that people do not lie to each other is true in all worlds deemed permissible by many moral standards; hence it represents a moral law relative to those moral standards.

A common feature of all these examples of normative laws is that they can all be interpreted as modal desiderata, i.e. facts that are true across all relevant permissible worlds, although different normative laws are based on different standards of permissibility. Whereas positive laws become more robust as the relevant class of possible worlds grows, normative laws become more restrictive as the relevant class of permissible worlds shrinks: the fewer worlds are deemed permissible, the more restrictive is the law. Presumably, the class of worlds deemed permissible by a constitution is broader than the one deemed permissible by ordinary law. That class, in turn, may still be broader, or otherwise differ from, the one deemed permissible by a given moral standard.

Normative laws can be formally represented analogously to positive ones. Let me introduce two modal operators that are formally similar to the necessity and possibility operators,   and ◊, introduced above:

O*P* ('It is obligatory that *P*.'):

   P is true in *all* permissible worlds in a relevant class (relative to the actual world).

P*P* ('It is permissible that *P*.'):

   P is true in *some* permissible world in a relevant class (relative to the actual world).

As in the case of   and ◊, the operators **O** and **P** can be defined in terms of each other:

OP is equivalent to ¬**P**¬P, and **P**P is equivalent to ¬**O**¬P.

Again, the interpretation of **O** and **P** depends on how we specify the class of permissible worlds (relative to the actual world). If that class includes all constitutionally permissible worlds, then **O** and **P** denote *constitutional* obligation and permissibility, respectively. If it includes all worlds deemed permissible by ordinary law, then these operators denote *ordinary legal* obligation and permissibility, respectively; if it includes all worlds deemed permissible by a given moral standard, then these operators denote *moral* obligation and permissibility, respectively.

Diagram 2: Permissible worlds
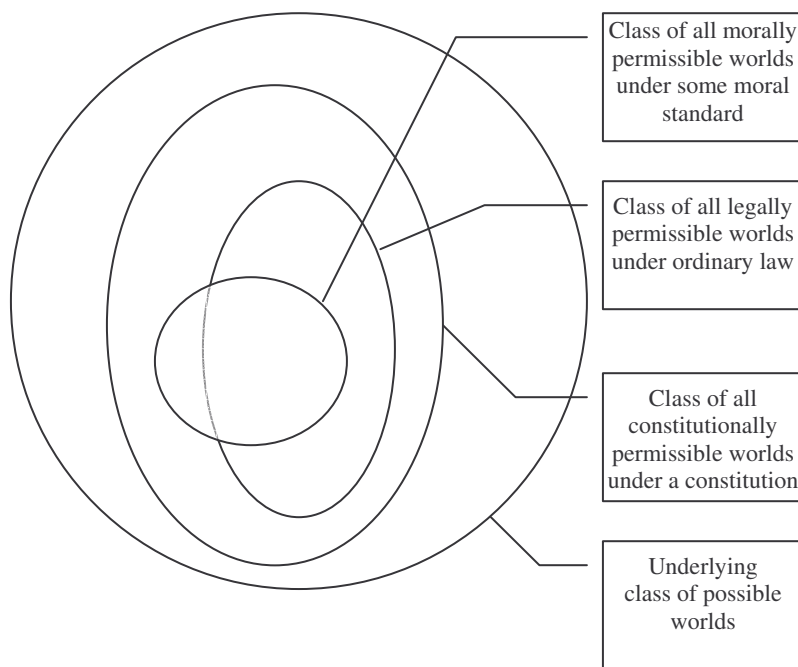
Diagram 2 represents different nested classes of permissible worlds. The outermost circle represents the underlying class of possible worlds (under a relevant interpretation of possibility), the second largest circle represents the class of all permissible worlds relative to a given constitution, the third largest one the class of all permissible worlds relative to ordinary law, and the smallest circle the class of all permissible worlds relative to a given moral standard. In the example of diagram 2, there is a certain 'mismatch'

between legal and moral permissibility: not all legally permissible worlds are also morally permissible, and not all morally permissible ones are also legally permissible.

In analogy to my formalization of positive laws, I suggest that a normative law can be represented formally as a modal proposition of the form **O**P, for a suitable specification of the class of permissible worlds. As before, depending on how that class is specified, **O**P may state a constitutional, ordinary or perhaps moral law. To assert **O**P is to assert that P is true throughout the relevant circle of permissible worlds in diagram 2. As noted above, the smaller the class of relevant permissible worlds, the more restrictive is the law.

4. The rule of law: a match between modal desiderata and modal facts

How can we think about the rule of law? Obviously, positive laws 'rule' by themselves. They are, by definition, regularities in the way the world works, and we are only prepared to call something a positive law – say, a law of nature or even a law of economics – if it has a sufficient level of robustness. But we usually refer to the 'rule of law' with regard to normative laws, particularly in politics, not with regard to positive laws in science.

So what does it mean for a normative law to 'rule'? As defined above, normative laws are prescriptions for the way the world should work. Suppose that a certain normative law has been passed by the appropriate authority, say by a legislature; so a certain prescription has been made by that authority. Suppose, further, that the law is considered legitimate by the people affected by it. Is this sufficient to guarantee that the law will be adhered to? Is it sufficient to guarantee that only those worlds that are deemed permissible by the law will also be realized?

Clearly, the answer to this question is negative. It is one issue whether a certain prescription has been made; it is an entirely different issue whether the world obeys that prescription. Consider a law against theft. According to that law, only those worlds in which there is no theft are permissible. But although those worlds in which there *is* theft are impermissible, they are not impossible: there are many possible worlds in which there is theft and in which thieves are never even prosecuted. And such worlds are possible despite the fact that laws against theft are formally in place.

For a law – say against theft – to 'rule', we need to ensure, as far as we can, that worlds deemed impermissible by that law are never realized. We must somehow organize society in such a way that only permissible worlds are socially possible and that impermissible ones are not. If we were to merge diagrams 1 and 2 into a single diagram – perhaps projecting the outermost circle in diagram 2 onto the one representing physical or biological possibility in diagram 1 – then we would somehow have to shape social background conditions in such a way that the circle representing the class of socially possible worlds lies wholly inside the circle representing the class of worlds deemed permissible by the law in question.

So the rule of law requires that we organize the world such that our modal desiderata are matched by corresponding modal facts. But can we achieve this? Can we ever change any modal facts about the world? Obviously, we cannot change the most robust modal facts about the world: we cannot change the laws of logic or the laws of physics. By contrast, we can change some of those modal facts that depend on certain social background conditions. Institutional reorganizations or policy interventions may change an entire range of modal facts in this sense.

Take the theft example again. Suppose that there is a lot of theft in a particular street: this means that many impermissible worlds are possible and that these worlds become actual on a regular basis. Now imagine a policy intervention whereby regular police patrols are introduced on that street. As a result, several modal facts about the street may change. For example, it is now robustly the case that thieves attempting to steal something are caught straightaway, so that theft is no longer possible under the new social background conditions, created by the introduction of police patrols. In this example, the presence of patrols might ensure that the law against theft 'rules' on the given street: the policy intervention has the effect that our modal desideratum is matched by a corresponding modal fact.

Formally, these considerations suggest that, to achieve the rule of law, we must organize the world – through institutional design or policy interventions – in such a way that, whenever a normative law is given in the form of a modal desideratum $\mathbf{O}P$, then a

corresponding positive law holds in the form of a modal fact   P. Such a modal fact will typically not be as robust as a law of physics: *P* will be true neither in all physically possible worlds, nor even in all socially possible worlds in a broad sense. But, ideally, *P* will be true in a large range of socially possible worlds relative to the appropriate social background conditions – those shaped by our institutional design or policy interventions. The more robust the modal fact we have achieved through that institutional design or policy intervention, the more robust is the rule of law.

5. Freedom in a given world versus freedom by law

Let me now reexamine the distinction between liberal and republican freedom in terms of the conceptual framework I have set up. As noted in the introduction, liberals define freedom as 'non-interference': the absence of certain constraints on an agent's choices. Although there are different accounts of what kinds of constraints matter as impediments to an agent's freedom, all standard liberal accounts, on Pettit's reading, focus on *actual* constraints, i.e. constraints that are in place in the actual world, not on *possible* constraints, i.e. ones that might be in place in some alternative possible worlds. Republicans, by contrast, define freedom as 'non-domination': the absence not just of *actual* interference – specifically, arbitrary interference – but of the *possibility* of such interference. To illustrate the difference between these two conceptions of freedom, consider three situations.

Situation A. Henry is a slave in a society in which there exists slavery, and his master treats Henry badly. In particular, Henry is unable to choose between *x* and *y*. His master makes this choice for him, not taking Henry's preferences into account.

Situation B. Henry is a slave in a society in which there exists slavery, but his master treats Henry well. In particular, Henry is able to choose between *x* and *y*. His master chooses not to interfere with Henry's choice.

Situation C. Henry is a citizen of a liberal country with many constitutional rights and liberties. In particular, Henry is able to choose between *x* and *y*. No-one would be in a position to interfere with Henry's choice.

In which of these situations is Henry free to choose between *x* and *y*? Most people will share the intuition that Henry is unfree in situation A and free in situation C. The liberal and republican conceptions of freedom both support this intuition. In situation A, Henry suffers both interference and domination, and hence he is unfree under both conceptions of freedom. In situation C, Henry suffers neither interference nor domination, and hence he is free under both conceptions.

But it is less clear what to say about situation B. Henry is not *actually* constrained in his choice between *x* and *y* in this situation. So if interference is defined as the absence of actual constraints (which is Pettit's reading of the liberal tradition), Henry suffers no interference and is therefore free in the liberal sense. By contrast, Henry is clearly vulnerable to the *possibility* of arbitrary interference in situation B. There is a nearby possible world in which Henry's choice is interfered with, namely the possible world in which Henry's master withdraws his goodwill from Henry and interferes with Henry's choice. So Henry suffers domination in situation B and is therefore unfree in the republican sense.

This illustrates that the liberal and republican conceptions of freedom draw the dividing line between freedom and unfreedom differently: the liberal conception describes situations B and C as ones of freedom and only situation A as one of unfreedom, whereas the republican conception describes only situation C as one of freedom and situations A and B as ones of unfreedom.

But can we say more than this? What, on the republican account, is the source of Henry's unfreedom in the choice between *x* and *y* in situation B? After all, options *x* and *y* are each within Henry's reach in that situation. The actual world in situation B is such that, if Henry chooses *x* over *y*, then *x* is the outcome, and if he chooses *y* over *x*, then *y* is the outcome; so Henry is, at least in some sense, 'decisive' between *x* and *y*. Adopting Sen's terminology, let me call the set of options open to an agent in a given world the agent's 'capability set' in that world. Henry's capability set in situation B includes both *x* and *y*. But although *x* and *y* are both in Henry's capability set in situation B, his decisiveness between *x* and *y* is not very robust: it is dependent on his master's goodwill. Henry is not

what Pettit calls 'favor-independently decisive' between *x* and *y*.[10] In particular, it is *not* the case that, *for all relevant possible worlds*, if Henry chooses *x* over *y*, then *x* is the outcome, and if he chooses *y* over *x*, then *y* is the outcome. In the nearby possible world in which Henry's master withdraws his goodwill, *x* and *y* are no longer both in Henry's capability set. Define an agent's 'rights set' as the set of options open to the agent not just in a particular world, but across all relevant possible worlds – say across all those worlds in which the same social background conditions are in the place. In situation C, Henry's rights set includes both *x* and *y*, whereas in situation B, it does not.

While an agent's capability set in a given world captures the range of choices the agent is able to make *in that world*, his or her rights set captures the range of choices the agent is *guaranteed* to be able to make *across all relevant possible worlds*. An agent's capability set in a given world thus represents the agent's contingent freedom in that world; his or her rights set represents the agent's robust freedom by law, in the sense of a law that 'rules', as discussed above.

The distinction between contingent freedom in a particular world and robust freedom by law is an important one. The former expresses what an agent can do in a particular world; the latter expresses what an agent can reliably do in virtue of the relevant social background conditions and laws in place. My suggestion is that the liberal conception of freedom, as defined above, focuses on an agent's contingent freedom in a particular world, whereas the republican conception focuses on an agent's robust freedom by law.

If correct, my suggestion supports the claim that the republican conception of freedom has a built-in rule-of-law requirement, whereas the liberal one does not: for an agent to enjoy robust freedom by law, a rule-of-law requirement must be met, but no such requirement must be met for an agent to enjoy contingent freedom in some world. To illustrate, let *P* be the proposition that Henry does not suffer (arbitrary) interference. For Henry to be contingently free in a particular world, *P* must simply be true in that world, no more and no less. For Henry to be free by law, on the other hand, *P* must be true, not only in a particular world, but in all relevant possible worlds: *P* must be robustly true.

Formally, a modal fact of the form P must hold. But this modal fact is precisely what it means for a modal desideratum of the form $\mathbf{O}P$ to 'rule': a rule-of-law requirement.

Let me give an example to illustrate the distinction between contingent freedom in a given world and robust freedom by law. Imagine two countries. The first is a dictatorial country with an absolute ruler, where the citizens – or perhaps subjects – are at the ruler's mercy. But the ruler is favorably disposed towards his citizens and gives them a large range of resources and choices. Nonetheless, the citizens are not entitled to these resources and choices by law; rather, they are entirely dependent on the ruler's goodwill. The second country is a republic with a democratic government, where the country is well-ordered by its constitution. The country is not rich and, due to various economic and social pressures, the citizens have only a limited range of resources and choices. But they are constitutionally entitled to these resources and choices, and that entitlement is fully supported by the rule of law.

In the first country the citizens have a considerable range of options in their capability sets, but none of them in their rights sets. They have considerable contingent freedom in the actual world, but no robust freedom by law. In the second country the citizens have a more limited range of options in their capability sets, but all of these options are also in their rights sets. Their freedom has a more limited scope, but it is not just a contingent freedom in the actual world, but a robust freedom by law.

Clearly, republicans will prefer the second country to the first one. It is less clear how liberals will rank these two countries relative to each other. If liberal freedom were their only desideratum, then they would have to prefer the first country to the second one. But, as noted in the introduction, liberals usually endorse several other desiderata over and above that of liberal freedom, and they may well disprefer the first country on the basis of some of those other desiderata.

6. A simple formalization of liberal and republican freedom

Let me now offer a simple formalization of liberal and republican freedom, drawing on earlier, more technical work.[11] This formalization reinforces my claim that republican

freedom has a built-in rule-of-law requirement, whereas liberal freedom does not. My approach is inspired by Pettit's observation that there are certain parallels between republican freedom and freedom as individual decisiveness in the sense defined by Sen in his paper on 'The impossibility of a Paretian liberal'.[12]

Consider a society of two or more agents, and suppose that there are multiple social options, for example, different policies, actions or allocations of goods or resources. Each agent has a preference ordering over these options, with standard properties.[13] A 'possible world', under this formalization, is a particular combination of preference orderings across agents in the society; so different possible worlds are given by different possible combinations of preference orderings. A 'constitution' is a mechanism that assigns to each world – i.e. to each combination of preference orderings across agents – a corresponding socially realized preference ordering, also with standard properties.[14] This socially realized preference ordering is the basis for society's choices over the available options in the given world: if the socially realized preference ordering ranks option x above option y, this means that, when faced with a choice between x and y, society will choose x rather than y.

What does it mean for agent i to be (contingently) free to choose between options x and y in a particular world? As informally suggested in the previous section, it means that, in the given world, the following holds:

$F(i,x,y)$: If agent i prefers x to y, then society prefers x to y; and if agent i prefers y to x, then society prefers y to x.

Note that $F(i,x,y)$ is a non-modal (or at most narrowly modal) proposition;[15] it is not a proposition of the kind that states a robust modal fact, neither does it state a modal desideratum. It is certainly possible for $F(i,x,y)$ to hold in a particular world, i.e. for a particular combination of preference orderings across agents, without holding in other worlds, such as when preferences across agents are different.[16]

Now suppose that a legislature or other authority passes a normative law prescribing that agent i should be free to choose between options x and y. Given the account of normative laws above, such a law will be of the form:

O$F(i,x,y)$: For all permissible worlds, if agent i prefers x to y, then society prefers

$\quad\quad x$ to y; and if agent i prefers y to x, then society prefers y to x.

As discussed above, the mere assertion of such a normative law does not guarantee that the law will 'rule'. To ensure the rule of law here, the modal desideratum **O**$F(i,x,y)$ must be implemented – through appropriate institutional design or appropriate policy interventions – in terms of a matching modal fact:

$F(i,x,y)$: For all possible worlds (relative to the actual world and to the constitution in

$\quad\quad$ place), if agent i prefers x to y, then society prefers x to y; and if agent i prefers y

$\quad\quad$ to x, then society prefers y to x.

The modal fact $F(i,x,y)$ captures precisely the type of decisiveness that Pettit associates with republican freedom: 'context- and content-independent decisiveness'.[17] An agent is 'context- and content-independently decisive' between options x and y if the agent is decisive between x and y, not just in a particular world, but in all relevant possible worlds.

Obviously, the modal proposition $F(i,x,y)$, which captures agent i's republican freedom by law, is more demanding than the (essentially) non-modal proposition $F(i,x,y)$, which captures agent i's liberal freedom in a given world. It is therefore unsurprising that the implications of republican freedom go beyond those of liberal freedom. But how much further do these implications go?

If the set of all possible worlds is given by the set of all possible combinations of preference orderings across agents in the society, then the modal proposition $F(i,x,y)$ is logically equivalent to agent i's decisiveness between x and y as defined in Sen's paper 'The impossibility of a Paretian liberal'. For an agent to be 'decisive' between x and y on Sen's definition, the agent must be a 'local dictator' over x and y: regardless of the

preference orderings held by other agents, the agent must be able to determine society's preference over *x* and *y*.

Although this shows that republican freedom is no more and no less demanding than freedom as individual decisiveness under Sen's original definition (contrary to Pettit's claim that republican freedom goes further than Sen's freedom as decisiveness), it also suggests that the assignment of republican freedom to two or more agents in society may lead to a problem similar to Sen's famous liberal paradox. I now turn to this problem.[18]

7. A republican paradox?

Is it possible to assign republican freedom to two or more agents in society and also to implement other important desiderata, such as Pareto efficiency? To answer this question, recall that a constitution, as defined above, assigns to each world, represented by a particular combination of preference orderings across agents, a corresponding socially realized preference ordering.

First, let us say that a constitution respects the 'republican freedom requirement' if the following holds: there exist at least two distinct agents *i* and *j* and two pairs of options *x*, *y* and *v*, *w* (one for each of these two agents) such that $F(i,x,y)$ and $F(j,v,w)$ hold. This is a minimal requirement in so far as we would ideally like to assign republican freedom not merely to two agents in society, but to all agents, and we would ideally expect these freedoms to extend over more than one pair of options for each agent.

Secondly, let me introduce the Pareto efficiency requirement. Note that the socially realized preference ordering in a particular world is Pareto efficient if the following holds:

E: For any pair of options *x* and *y*, if all agents prefer *x* to *y*, then society prefers *x* to *y*.

Accordingly, a normative law prescribing Pareto efficiency is the modal desideratum **O***E*, and, for the rule of law with respect to this modal desideratum to hold, a matching modal fact must hold:

E: For all possible worlds (relative to the actual one and to the constitution in place),

the following holds: for any pair of options *x* and *y*, if all agents prefer *x* to *y*, then

society prefers *x* to *y*.

If *E* holds for a given constitution, then we say that this constitution respects the 'Pareto efficiency requirement'.

Is it possible, then, to design a constitution that respects both the republican freedom requirement and the Pareto efficiency requirement? Sen's well known theorem on the impossibility of a Paretian liberal gives a negative answer to this question.

Theorem. (Adapted from Sen) If the set of all possible worlds includes all possible combinations of preference orderings across agents, then there exists no constitution satisfying the republican freedom requirement and the Pareto efficiency requirement.[19]

In short, it is impossible to achieve a rule of law whereby *both* (minimal) republican freedom in society *and* Pareto efficiency are guaranteed. Notice that the inconsistency does not arise at the level of any *normative* laws of the form $OF(i,x,y)$, $OF(j,v,w)$ and OE. As modal desiderata, these propositions are mutually consistent: to satisfy them simultaneously, all that is needed is a sufficiently restrictive specification of the class of permissible worlds, ruling out as impermissible those possible combinations of preference orderings across agents for which we cannot simultaneously have $F(i,x,y)$, $F(j,v,w)$ and E. The inconsistency stated by the theorem above arises at the level of achieving the rule of law: at the level of designing a constitution for which the modal desiderata $OF(i,x,y)$, $OF(j,v,w)$ and OE are matched by corresponding modal facts $F(i,x,y)$, $F(j,v,w)$ and E.

How can we respond to this 'republican paradox'? Are there any possible escape-routes?[20]

Giving up republican freedom or Pareto efficiency. One logically possible way to avoid the problem is to give up the republican freedom requirement or the Pareto efficiency requirement. Clearly, republicans would not wish to pursue the first route, but

they might consider pursuing the second. Whether relaxing the Pareto efficiency requirement is consistent with republicanism depends on how Pareto efficiency is interpreted. If it is interpreted as a condition of economic efficiency, then it is perhaps unsurprising that such a condition may sometimes need to be sacrificed to secure individual freedom. On this interpretation, guaranteeing Pareto efficiency by law might not seem to be a compelling republican requirement in the first place.[21] But if Pareto efficiency is interpreted as a fundamental democratic condition – namely that unanimous preferences should be respected, as they capture people's unanimously 'avowed' interests – then Pareto efficiency is much harder to give up for a republican. If so, the republican may have a hard time deciding which of the three modal desiderata $OF(i,x,y)$, $OF(j,v,w)$ and OE not to implement by law.

Achieving a less robust rule of law. If the class of socially possible worlds (relative to the actual one) satisfies certain favorable conditions – i.e. if certain combinations of preference orderings across agents never occur in society – then it becomes possible to design a constitution for which the relevant modal facts $F(i,x,y)$, $F(j,v,w)$ and E simultaneously hold. This result holds for example when the preference orderings across agents are 'tolerant', 'empathetic', 'non-meddlesome' or 'self-supporting' in technical senses defined in the literature.[22] But although such preferences might seem normatively desirable, it is not easy to see how social background conditions could be shaped so as to *guarantee* that only those worlds are socially possible in which agents in society have preferences of those favorable kinds. If social background conditions can be shaped in this way, then we will have found a satisfactory solution to the 'republican paradox'. In practice, however, some unfavorable worlds, i.e. those combinations of preference orderings violating all of the favorable conditions, may still occur. We might at most be able to achieve a less robust rule of law with respect to the modal desiderata $OF(i,x,y)$, $OF(j,v,w)$ and OE, namely a rule of law that applies only in favorable worlds, but not in unfavorable ones.

Redefining robustness and the rule of law probabilistically. My approach to positive laws above refers to non-probabilistic laws, where whatever is asserted by a given law, say proposition P, is true without exception in all relevant possible worlds. Such non-

probabilistic laws can be contrasted with probabilistic ones, where whatever the law asserts, say again *P*, is highly likely to be true, but not true without exception in all relevant possible worlds. Non-probabilistic laws correspond to *modal facts*, probabilistic ones to *probabilistic facts*. My definition of robustness above is a modal, non-probabilistic one: the robustness of a law depends only on how large the class of possible worlds is in which the relevant proposition *P* is true, not on how probable these worlds are. We may contrast this modal definition of robustness with a probabilistic one. On the alternative definition, the robustness of a (probabilistic) law depends on how probable the worlds are in which the relevant proposition *P* is true. My account of the rule of law above is based on the modal notion of robustness; i.e. the rule of law with respect to some normative law **O***P* requires a corresponding modal fact   *P* to hold. But, alternatively, we might give a probabilistic account of the rule of law. On such an account, the rule of law with respect to **O***P* requires a corresponding probabilistic fact to hold: the worlds in which *P* holds must be highly probable. Applied to freedom by law, this account requires, not that *F(i,x,y)* is true in every socially possible world, only that those worlds in which *F(i,x,y)* is true – i.e. 'favorable' combinations of preference orderings across agents – are highly probable. Again, a suitable institutional design or policy intervention might induce such a probability distribution over possible worlds, i.e. over possible combinations of preference orderings across agents. A probabilistic account of freedom by law gives up the *guarantee* that an agent will enjoy certain capabilities; it only secures a *high probability* of their enjoyment by the agent. The account 'probabilifies' freedom, as Pettit says.[23] In a similar spirit, Keith Dowding and Martin van Hees suggest that freedom should not be interpreted as an unconditional trump, but only as carrying a certain probability of being respected.[24] Liberals might regard this solution as an attractive compromise, but it is doubtful whether republicans will find it satisfactory too. Freedom by law in a probabilistic sense would no longer mean that, conditional on every combination of preference orderings across agents, an agent is guaranteed to enjoy certain capabilities. Rather, it would only mean that 'unfavorable' combinations of preference orderings for which the agent does not enjoy these capabilities are unlikely. According to Pettit, republican freedom requires that 'the conditional probabilities [of an agent's enjoyment of certain capabilities, given a particular combination of preference

orderings] are relatively stable across different ways in which the relevant preference-variation may materialize' and '[these] conditional probabilities count as important independently of the degree to which the preference-variation is itself probable.'[25] On the probabilistic approach, by contrast, freedom by law is driven precisely by ensuring a low probability of 'unfavorable' preference-variation, not by the guarantee (or at least high probability) that an agent will enjoy certain capabilities *irrespective of the combination of preference orderings across agents that arises*. For this reason, a probabilistic approach to robustness and the rule of law cannot easily satisfy republicans.

8. Conclusion: scope versus robustness?

In this paper, I have revisited the distinction between liberal and republican freedom, as emphasized by Pettit. In particular, I have juxtaposed the liberal's essentially non-modal focus on an agent's contingent freedom in a given world with the republican's modal focus on an agent's robust freedom by law. Thus republicans build into their conception of freedom a rule-of-law requirement, whereas liberals do not. Clearly, robust freedom by law is more demanding than contingent freedom in a particular world.

My discussion suggests that we face a trade-off between two different dimensions of freedom: the scope of freedom on the one hand and its robustness and protection by the rule of law on the other. The scope of an agent's freedom in a particular world is given by the agent's capability set in that world: the larger that capability set, the greater the scope of the agent's freedom. The robustness of an agent's freedom (and its protection by the rule of law) is determined by the extent to which the agent's capability set remains stable across different socially possible worlds, i.e. the extent to which the agent's enjoyment of these capabilities is a modal fact. The agent's rights set includes all those capabilities that the agent enjoys most robustly, guaranteed by the rule of law.

Under favorable conditions, it may be possible to grant everybody in society a large capability set and thereby to maximize freedom along the dimension of scope. But as the 'republican paradox' shows, it may be difficult to achieve this robustly. If we wish to grant everybody in society a non-empty rights set and to maximize the robustness of the

corresponding freedom, then the resulting rights set may turn out to be vanishingly small; robustness may be achieved, but at the expense of scope.

Consider an informal example which illustrates that the trade-off between scope and robustness is not just a theoretical artifact of the 'republican paradox'. Imagine two alternative policies of welfare provision in a large pluralistic society. One is based on redistributive taxation and an extensive welfare state, the other on minimal state intervention with little formal redistribution but a flourishing culture of charity among citizens. It is conceivable that under favorable conditions the second policy might lead to greater capability sets for disadvantaged members of society than the first one. This is particularly conceivable if we consider the possibility that redistributive taxation and state welfare provision might 'crowd out' charitable behavior among citizens.[26] Yet the first policy but not the second ensures that the citizens enjoy their capabilities robustly; the citizens' rights sets might be larger under the first policy, even though their actual capability sets might be larger under the second.

Liberals will wish to maximize the scope of an agent's freedom, subject to giving other agents freedom of an equal scope. Perhaps they are also concerned with robustness, but if they are, that concern stems not from their commitment to liberal freedom itself, but from their commitment to other desiderata beyond freedom: a rule-of-law requirement is not built into their conception of freedom itself. My discussion suggests that, when faced with a trade-off between scope and robustness, liberals are likely to solve that trade-off primarily in favor of scope, not robustness.

Republicans, by contrast, build a rule-of-law requirement into their conception of freedom and hence give primary importance to the robustness of an agent's freedom. Of course, they may also care about scope, but if they face a trade-off between robustness and scope, their solution is likely to favor robustness, not scope. Republicans even have an argument at their disposal in support of favoring robustness over scope. A restriction in the scope of freedom might be seen as an instance of interference, and such interference would be problematic from a liberal perspective. However, if the interference is required in order to secure the robustness of certain other freedoms that are

deemed more important, then that interference might count as 'non-arbitrary' for the republican and might therefore be licensed from a republican perspective.

However, as the 'republican paradox' suggests, republicans may have to reduce the scope of freedom to such an extent that very little individual freedom can be preserved if maximal robustness is to be achieved. If this is correct, then it casts doubt on the republican solution to the trade-off between scope and robustness. Rawls and others characterize the assignment of freedom in society as a constrained optimization problem: each agent in society is to be given the largest possible system of individual freedoms subject to giving an equally large system to all other agents.[27] Finding a solution to this optimization problem may well require adjusting the different freedoms along two dimensions: scope and robustness. But if a robustness requirement is already built into these freedoms, then the optimization problem becomes harder to solve: one dimension is unavailable for adjustment. I offer these thoughts not in order to reject republican political theory, but to identify a challenge that it will have to confront.

[1] This paper was presented at the PPE Conference on 'The Economic Implications of Republicanism', held at Tulane University in April 2005, and at the Fifth European Congress for Analytic Philosophy, held at the University of Lisbon in August 2005. I am grateful to the participants at both of these occasions for comments and suggestions. Particular thanks to Geoffrey Brennan, Franz Dietrich, Gerald Gaus, Philip Pettit, Henry Richardson, Jonathan Riley and John Weymark. Address for correspondence: C. List, Department of Government, London School of Economics and Political Science, London WC2A 2AE, UK.

[2] P. Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997). See also Q. Skinner, *Liberty before Liberalism* (Cambridge: Cambridge University Press, 1997).

[3] P. Pettit, 'Deliberative Democracy, the Discursive Dilemma, and Republican Theory', in *Debating Deliberative Democracy*, edited by J. S. Fishkin and P. Laslett (Oxford: Blackwell): 138-162, at 151.

[4] For a recent critique of this claim, see C. McMahon, 'The Indeterminacy of Republican Policy', *Philosophy and Public Affairs* 33 (2005): 67-93.

[5] C. List, 'The Impossibility a Paretian Republican? Some Comments on Pettit and Sen', *Economics and Philosophy* 20 (2004): 65-87.

[6] The classic paper is A. K. Sen, 'The Impossibility of a Paretian Liberal', *Journal of Political Economy* 78 (1970): 152-157. My argument is consistent with Pettit's claim that the republican conception of freedom as non-domination is similar to, but more demanding than, Sen's conception of freedom as individual decisiveness. See P. Pettit, 'Capability and freedom: A defense of Sen', *Economics and Philosophy* 17 (2001): 1-20.

[7] The terms 'positive' and 'normative' are used here in the same way as they are used in the philosophy of logic and language, in ethics and in theories of rationality; the distinction here is not meant to refer to debates concerning legal positivism.

[8] For an argument for the existence of laws in the social sciences, see H. Kincaid, 'Defending Laws in the Social Sciences', in *Readings in the Philosophy of Social Science*, edited by M. Martin and L. McIntyre (Cambridge/MA: MIT Press, 1994).

[9] Notice that I have already made the law explicitly conditional on a Euclidean geometry, so the possibility of a non-Euclidean geometry does not undermine the law.

[10] Pettit, 'Capability and freedom': 18.

[11] List, 'The Impossibility a Paretian Republican'.

[12] Pettit, 'Capability and freedom'; see also A. K. Sen, 'Reply', *Economics and Philosophy* 17 (2001): 51-66. Crucially, Sen's earlier account of freedom as individual decisiveness is distinct from his more recent account of freedom as capability.

[13] Reflexivity, transitivity and completeness.

[14] Again, reflexivity, transitivity and completeness.

[15] It is a non-modal proposition provided that the 'if-then' conditionals in $F(i,x,y)$ are interpreted as material conditionals. In this case, $F(i,x,y)$ simply states that agent i's actual preference between x and y is satisfied in the given world. It does not imply that agent i's preference between x and y would continue to be satisfied if agent i were to reverse that preference, while all other agents' preferences remain the same. So $F(i,x,y)$ is weaker than what Pettit in 'Capability and freedom' calls 'content-independent decisiveness'. However, if we interpret the 'if-then' conditionals in $F(i,x,y)$ as subjunctive conditionals, then we can generate a narrow modal context, whereby all 'i-variants' of the given world matter: all those worlds in which agent i's preference may change while other agents' preferences remain the same. This captures precisely what Pettit calls 'content-independent decisiveness'.

[16] In List, 'The Impossibility of a Paretian Republican', I have represented *both* liberal *and* republican freedom as modal conceptions, but have described the liberal conception as more narrowly modal than the republican conception. Moreover, unlike here, I have represented both conceptions of freedom in terms of a modal proposition of the form ◻$F(i,x,y)$ (translated into the present notation) and argued that the difference between the two conceptions lies solely in the interpretation of the modal operator ◻. In the present paper, by contrast, I represent the liberal conception as a proposition of the form $F(i,x,y)$, which is at first sight an entirely non-modal proposition. But, as pointed out in an earlier note, a narrow modality may come into play here, too, if we interpret the conditionals in $F(i,x,y)$ as subjunctive conditionals rather than material ones (an interpretation not investigated in the earlier paper).

[17] Pettit, 'Capability and freedom'.

[18] For a more technical exposition, see List, 'The Impossibility of a Paretian Republican'.

[19] For the original statement of Sen's theorem, see 'The Impossibility of a Paretian Liberal'. For further details on the application of Sen's result to the republican framework, see List, 'The Impossibility of a Paretian Republican'.

[20] For a recent response to Sen's liberal paradox based on John Stuart Mill's philosophy, see J. Riley, 'Liberal Rights in a Pareto-optimal Code', *Utilitas* 18 (2006), forthcoming.

[21] Note, however, that some liberal paradoxes may occur even without the condition of Pareto efficiency, and it is plausible to assume that these paradoxes will also reemerge in a republican framework. See A. Gibbard, 'A Pareto Consistent Libertarian Claim', *Journal of Economic Theory* 7 (1974): 388-410.

[22] J. H. Blau, 'Liberal values and independence', *Review of Economic Studies* 42 (1975): 395-401; J. Craven, 'Liberalism and individual preference', *Theory and Decision* 14 (1982): 351-360; W. Gaertner and L. Krueger, 'Self-supporting preferences and individual rights: The possibility of Paretian libertarianism', *Economica* 48 (1981): 17-28; G. A. Gigliotti, 'Comment on Craven', *Theory and Decision* 21 (1986): 89-95; A. K. Sen, 'Liberty and social choice', *Journal of Philosophy* 80 (1983): 5-28.

[23] P. Pettit, 'Freedom and Probability', Working paper, Princeton University.

[24] K. Dowding and M. van Hees, 'The construction of rights', *American Political Science Review* 97 (2003): 281-293.

[25] Pettit, 'Freedom and Probability'.

[26] For a discussion of this possibility, see for example Roberts, 'A positive model of private charity and public transfers', *Journal of Political Economy* 92 (1994): 136-148.

[27] J. Rawls, *A theory of justice* (Cambridge/MA: Harvard University Press, 1971).