Andrei Poama
PhD, Sciences Po, Paris
Fox International Fellow, Yale University

Liberalism and Republicanism: Public Policy Implications
School of Public Policy, Department of Political Science, UCL
13 February 2013

EARLY DRAFT: Please Do Not Cite Without the Author's Permission!

NOT JUST REPUBLICANS: TWO PROBLEMS FOR A REPUBLICAN THEORY OF PUNISHMENT

Abstract: A republican theory of punishment faces at least two kinds of problems. First, I claim that republicanism, as developed by John Braithwaite and Philipp Pettit, has no specific normative input when it comes to justifying state punishment. I call this the *volatility problem*. The problem is that, when it insists on equal legal treatment, republicanism collapses into a liberal theory of punishment. Second, I argue that republicanism faces an *oversight problem*. This means that, because it prioritizes the civic component of liberty, penal republicanism does not have enough resources for criticizing a range of *prima facie* unacceptable punitive practices, such as the criminalization of immigrants. I conclude by indicating how paying less attention to what makes republicanism special can actually add to its value as an insight into the question of punishment.

Key-words: punishment, republicanism, liberalism

I. INTRODUCTION

Most modern theories of state punishment have been articulated in either retributivist or preventive/utilitarian terms.[1] The retributivist asserts that punishment is justified insofar as the guilty deserve to suffer; the utilitarian claims that punishment is unwarranted unless it deters past offenders from becoming recidivists or prevents potential ones from offending in the first place. Neither of these two justificatory strategies, however, seems to be successful. On the one hand, the utilitarian cannot convincingly account for the statistical fact that the criminal justice system is often better at nurturing criminal careers than at effectively lowering crime rates. The retributivist, on the other hand, is unable to indicate what forms of punishment should be attached to given offences either as a matter of principle or of policy. To put it more abruptly, the utilitarian justification is empirically improbable, while the retributivist one proves outwardly impracticable. Caught between the retributivist Scylla and the utilitarian Charybdis, state punishment seems destined to justificatory wreck.

---

1 One proof for this is editorial. Most books on punishment typically start with a chapter dedicated to retributivist theories of punishment, followed by one about utilitarian/consequentialist justifications and then end with an attempt at synthesizing these two positions.

John Braithwaite and Philip Pettit (1990) offer a republican account of state punishment that is meant to avoid this justificatory disaster.[2] They do this by taking both the retributivist's and the utilitarian's concerns seriously, while at the same time trying to translate these concerns into a vocabulary that is normatively less vulnerable.[3] From the retributivist, they keep the idea of punishing only those defendants found to be guilty beyond a reasonable doubt. From the utilitarian, they borrow the requirement of punishing only for the sake of socially beneficial consequences.

Furthermore, and more importantly still, Braithwaite and Pettit's republican theory of punishment comes as an alternative to the liberal's apparent unwillingness to give a justification of punishment that would short-circuit the retributivist/utilitarian debate and reconciliate the fact of punishment with the more fundamental values of liberal democratic societies. The question raised at this level is an arresting one: how can one coherently advocate that there are, *as a matter of general principle*, certain basic liberties that belong to *all* the members of a society, while, *as a matter of concrete practice*, accept that these same liberties be intentionally violated by state officials through institutions such as punishment?[4] More clearly, how can coercive institutions such as the penal one be compatible with a liberty-oriented society?

Braithwaite and Pettit seem to have a strong argument. Liberals have seldom explicitly tried to come up with a positive justification of punishment. Worse still, on the rare occasions that they have tried to do so, the results were quite discouraging. Thus, a daunting idea has been recurrently emphasized in the academia, according to which liberalism is normatively incapable of recognizing retribution as a form of justice or of justifying punishment at all (Brubaker 1988). More generally, the fact that punishment has been normally thought of as a form of coercion makes it hardly compatible with the inherent requirements of justice, such as the equality and liberty of the parties partaking in the justice process (Lucas 1980). What allegedly comes out of this is that liberals have either avoided the problem of punishment and delegated it

---

2 Braithwaite and Pettit's penal republicanism is one version among other possible many. For a more populist (and also more problematic) form of penal republicanism, see Blattberg, C. 2008. 'The Scales of Injustice', *Windsor Yearbook of Access to Justice*, 26: 1-24.

3 By a conception that is normatively less vulnerable than its alternatives, I mean a conception of punishment that is not exposed to the empirical improbability critique (which is the case for the utilitarian justification) or to the principled impracticability critique (which is the case for the retributivist justification).

4 For the more general problem, see Dubber, M. 1998. 'The Right to Be Punished: Autonomy and its Demise in Modern Penal Thought', *Law and History Review*, 16(1): 113-146.

to the realm of non-ideal theory (Rawls 1971) or advocated for even more problematic alternatives, such as purely administrative detention (Hanna 2009).

Read from Braithwaite and Pettit's perspective, however, the absence of a liberal justification of punishment is not the result of punishment being unjustifiable as such, but a corollary of the liberal's poor account of the concept of liberty itself. Their proposal is not that we should take an abolitionist stance on the question of punishment, but that we should modify our conception of liberty. We don't have to give up on punishment when we can abandon liberalism.

II. THE REPUBLICAN'S PENAL PROMISE

More specifically, Braithwaite and Pettit's republican theory of punishment is meant to do two things. On one hand, it tries to reconcile punishment with a 'republicanised' idea of liberty. In particular, Braithwaite and Pettit's argument is that the penal institution should be oriented toward the active promotion of what they call *dominion*. By dominion they mean a certain neo-republican understanding of liberty. This is the liberty of Roman *libertas* and of medieval *franchise*, i.e. the liberty of 'being given equal protection before a suitable law' (57). Dominion refers to the equality between persons considered as citizens, i.e. as members of the same political community. Dominion is thus a kind of liberty that is meaningful only within the bonds of the city, unlike the more modest 'freedom of the heath' (64). More clearly still, dominion is equated with *non-domination*, i.e. with the absence of arbitrary interference either from state authorities or particular groups or individuals. Republican punishment, in short, is meant to protect and promote liberty understood as the absence of arbitrary interference.

The second benefit of republicanism[5] is that it can inform penal policy from a more realistic and humane standpoint. In this, republicanism is presented as a superior option, as considered in relation to retributivism and utilitarianism. A republican theory is more realistic in that it envisages the punitive institution in a systematic way. It does this both internally, by looking at the different punitive institutions and agencies (police forces, penal legislation, trials, sentence enforcement

5 In what follows, I will use the terms 'republicanisms', 'republicans', 'neo-republicanism' or 'neo-republicans' to refer to the position articulated by Braithwaite and Pettit (1990), and especially by Pettit (1993; 1997a; 1997b; 2002; 2005). The metonymy is meant to make this both an easier read and to encourage the reader to concentrate on the actual arguments rather than on the persons advancing the arguments.

agencies) and externally, by addressing the relationship between the penal system and society at large. This comprehensive view of punishment tries to address the question of resource allocation in a more effective and efficient manner.[6] It is also meant to control for cases where a policy adopted within a particular sector of the criminal justice system risks leading to perverse effects in some of its other areas.

A republican theory is, on the other hand, presented as a more humane conception, when compared with its retributivist and utilitarian counterparts. This humanity argument relies on two premises. The first one is that dominion is both an individually and collectively desirable good. This is because everyone wants to be protected from the possibility of arbitrary interference and societies that protect their members in such a way are globally preferable to those that do not.

The second premise of the humanity argument is that dominion-oriented forms of punishment are preferable to those grounded in a retributive or utilitarian manner. They are preferable to the purely retributive ones, insofar as, by insisting on the link between punishing and promoting dominion, they provide penal sanctions with more substance and a more positive outlook. The retributivist's foremost problem was that she was unable to come up with a way of indicating what should count as a substantively reasonable fit between types of crime and types of punishment.[7] The value of dominion is advanced as a value for filling in this substantive gap. Dominion is designed to tip the scales of penal justice in the right direction.

Also, dominion-oriented forms of punishment are better than those justified on a strictly utilitarian basis. This is because dominion has an inbuilt anti-arbitrariness that is missing from the value of utility. If, as the utilitarian contends, the goal of punishing is simply that of increasing the overall level of social utility, then there might be cases where state officials could be justified in punishing innocent people in order to reach that goal. This might arguably happen in situations where an angry mob is asking for the punishment of the unknown perpetrator of a horrendous crime – say, the raping and murder of a two-year old child. The mob threatens to torture one hundred suspects in order to find out who the guilty one is. Isn't then the sanitized

---

6 For a more detailed account on what a comprehensive ideal means, both in terms of the political feasibility and normative desirability of that ideal, see Pettit (2005).

7 For a more detailed critique of retributivism, see Honderich, T. 2006 (1969). *Punishment: The Supposed Justifications*, Pluto Pres.

killing of only one individual utility-preferable to the brutish torturing of one hundred others? The utilitarian would argue that it is. However, the justification of sacrificing innocent people conflicts with our intuitive moral judgments.

Luckily, republicanism does not have to face the problem of punishing the innocent. This is because punishing the innocent would represent an arbitrary interference with the individual's freedom and would thus violate the goal of punishing in the first place. On the contrary, because it rests on the individual-sensitive value of dominion, republican punishment will encourage parsimony both at the level of the extent of criminalization and at the level of sentencing and law enforcement (whether at the pre- or post-sentencing level).

A republican theory of punishment is, then, supposed to do a better job than its alternatives on at least two accounts. First, it performs better than liberalism when it comes to reconciling punishing with the foundational good of liberty. Second, it provides us with a normatively denser and less troubling policy implication than the ones offered by the retributivist or utilitarian options. I want to selectively question these two claims.[8]

My argument is structured as follows. In Section III, I question the normative distinctiveness of Braithwaite and Pettit's republicanised conception of liberty, as compared to its liberal counterpart. I call this the volatility problem. The upshot of this problem is that what seems to be a republican victory in justifying state punishment is actually a liberal one: equal treatment and non-arbitrary interference are values a liberal would not reject, at least when the term liberal is construed in sufficiently broad terms. In Section IV, I raise a few doubts about the republican's unremitting humanism in punitive matters. Because of its civically centred definition of dominion, republicanism does not have the resources for reacting critically to socio-legal phenomena such as the criminalization of immigration. I call this the oversight problem.

Finally, in Section V, I argue that both of my previous arguments – i.e. republicanism's lack of normative distinctiveness and its narrow critical potential – should not worry us too much. There are two main reasons why we should remain

---

8 I think that republicanism *does* better than retributivism and constitutes a more realistic account of punishment than utilitarianism. In this respect, it is a solution that is superior to retributivism. Consequently, and pace Dagger (2008), republicanism cannot be transformed into a version of retributivism. In what follows, I concentrate on what makes penal republicanism problematic and concentrate less on its advantages.

serene about the republican's penal limits. The first one is that the idea of a liberal or republican *theory* of punishment is a conceptual non-starter. The second one is that what republicans such as Pettit are really pushing for is not a justification of punishment in terms of dominion, but a justification in terms of (penal) rectification.

III. REPUBLICANISM AND LIBERALISM: BETTER FRIENDS THAN FOES

Braithwaite and Pettit argue that republicanism is better than liberalism at establishing a coherent connection between punitive practice and the value of liberty. This is because republicanism offers a thicker conception of liberty. The argument, in short, has the following form.[9] Liberals understand liberty as the absence of actual or probable interference. This implies that, as long as there is a low probability of groups or state authorities actually interfering with an individual's affairs, the individual is free, as considered from a liberal perspective.

Authors as diverse as Thomas Hobbes, Jeremy Bentham, John Lind, William Paley or, closer to home, John Rawls, have elaborated the liberal conception of liberty. Despite their differences, all of these authors have thought of liberty in strictly negative terms. Liberal liberty is invariably negative liberty. Liberals conceive liberty as the absence of interference from anything besides an individual's will. It is, therefore, always liberty *from* something, whether that particular something might refer to a tyrannical ruler or to an otherwise legitimate law. Liberal liberty deploys itself in the rather confined space where the decisions of one single person matter. Liberal liberty, to this extent, is an atomistic form of liberty.

The neo-republicanised version of liberty is supposed to be less restrictive than its liberal counterpart. Republican liberty still has something of the structure of negative liberty, in that it continues to rely on 'the absence of interference by others' (55). However, the republican interprets this absence of interference in a way that is different from the liberal one. For the liberal, liberty seems to be defined in strictly stochastic terms: it is *actual* non-interference or, at least, *probable* non-interference. For the republican, the qualification is, as Pettit puts it, 'modal' and not purely probabilistic:

---

9 Here, I am exclusively drawing both on Braithwaite and Pettit (1990) and especially on Pettit's later elaboration on the concept of republican liberty.

'To enjoy non-interference (*m.n.* in the liberal sense) is not to be interfered with in the *actual* world where I choose what I want and, equally, it is not to be interfered with in those related worlds where my wants vary and I choose some other options; this is a modal or counterfactual aspect of freedom that often receives mention. To enjoy the same non-interference with the security of non-domination (*m.n.* non-interference in the republican sense) is to satisfy that condition *plus a further modal condition*: it is also not to be interfered with in those *possible* worlds where the attitudes of powerful agents vary, or my ingratiating capacities are lessened, or my native cunning is not what it was, and so on. It is to remain resiliently possessed of non-interference across this range of possible worlds, as well as in the worlds originally considered.' (Pettit 2002: 69-70; *emphases added*)

It seems that there is a strong moral component to Pettit's idea of modality. Modality basically refers to (a particular aspect of) morality. To wit, republican non-interference is not simply a kind of non-interference that extends to nearby possible worlds; it is essentially the absence of 'interference that is sufficiently intentional, negligent, reckless, or indifferent to count as blameworthy or culpable' (Braithwaite & Pettit 1990: 55). Unlike the liberal one, the republican absence of interference exists in other possible worlds as well – say, in worlds where other groups or authorities are less benevolent than they are in liberal societies. Liberty as the modal absence of interference, then, means lack of access to potential domination for all the individuals and groups that belong to a given society.

More specifically, the republican version of liberty performs better than the liberal one on at least three accounts. First, it is an *egalitarian* conception of liberty, in that all the citizens enjoy the same liberty prospects: no person has access to resources that could allow one to potentially exert a form of domination over other persons. This is allegedly not the case of the liberal form of liberty. By virtue of being purely negative, liberal liberty might tolerate situations where the inequalities between individuals are so great that some might experience them as forms of domination. This can happen even if the dominating individuals or groups are not actually (and not even probably) intervening in the affairs of the dominated ones.

Second, this equality of liberty among citizens is common knowledge, in that everyone knows that the prospects of liberty are basically equal. What is more, this knowledge of equal liberty prospects develops recursively, in that 'nearly everyone else knows that the others generally know too [that liberty prospects are equal], and so on' (65). The situation is supposedly different in the case of liberal liberties. These are exclusively the liberties of the individual. To this extent, all that there is required for

liberal liberty to exist is that the individual be aware of her own actual or probable liberty. No common knowledge and no inter-subjective experience of liberty is required in the liberal universe. Liberal liberty, it can be said, is *self-referential*: it is the knowledge that the individual has of her own liberty, period. Republican liberty, instead, is *recursive*: it is the knowledge that each individual has both of her own liberty and the other's liberty *and* the knowledge that each individual has of the other's knowledge of one's own liberty and of the knowledge of the other's liberty, and so on.

Third, republican liberty performs better than liberal liberty in that the former refers to 'the best [prospect of liberty] that is compatible with the same prospect for all citizens' (65). At first blush, this seems to restate the first feature of republican liberty, namely, its strong egalitarian dimension. But it arguably does more than this: the modal 'best' is there to indicate, once again, that republican liberty is not simply something that happens by mere *actual* absence of interference. Republican liberty is the *categorical* absence of arbitrary, that is morally problematic interference with an individual's life or actions. To this extent, republican liberty is considered to be both negative, in that it does not allow for arbitrary interference and positive, in that it allows for non-arbitrary forms of interference.

One such form of non-arbitrary interference is the punishment of the guilty, insofar as this carries potential beneficial consequences for the offender, the victim and the larger public.[10] This, of course, means that not all forms of punishment can be considered as non-arbitrary. Massive imprisonment, for example, seems to be an arbitrary form of interference with individuals' freedom, in that it doesn't bear any positive consequences, neither for the offender (whose life prospects become worse), nor for the victim (whose moral standing and social status are not restored as a consequence of imprisonment) or the general public (who is paying for an institution that causes systematic recidivism). Community service, on the contrary, would count as a dominion-compatible form of punishment.

These three formal features of republican liberty (equality, common knowledge and optimal equality) seem normatively desirable. They are also useful tools for criticizing a whole array of morally and politically disturbing practices, such as mass imprisonment or the death penalty. The question is: are they specifically republican features? I think that the answer to this question is negative. There are two

10 Another (typical example) of non-arbitrary interference is education.

reasons as to why this is so. The first, weaker reason, is that there are liberal conceptions of liberty that come very close to satisfying all three formal conditions of republican liberty.

Take, for example, John Rawls's (1971; 1993) conception of liberty, as developed from the standpoint of political liberalism. Rawls's first principle of justice clearly states that 'each person has an equal right to a fully adequate scheme of *equal liberties* which is compatible with a similar scheme of liberties for all' (289). Rawls's egalitarian account of basic liberties, both in terms of his equal liberty and equality of opportunity principles, constitutes only one (and perhaps the most obvious) example of a form of egalitarian liberalism that meets the equality condition.

Also, the common knowledge condition plays an important normative role in Rawls's liberalism, though it is not expressed in terms of common knowledge about the prospects of liberty, but in terms of the *publicity* of the principles of justice. Rawls insists on the fact that the principles that regulate the basic structure of a society have to be subject to public scrutiny in order for them to be operative, i.e. to be effective at an institutional level. This draws on the traditional liberal demand for transparency. Thus, in 'public political life, nothing need be hidden' (Rawls 1993: 68).[11]

Finally, it is difficult to say that liberals could be opposed to arbitrary forms of interference, whether they be physical (direct forms of coercion) or psychological (brainwashing, manipulation, etc.). If liberalism is indeed a theory about the primacy of the individual, it is hard to imagine how there might be a liberal case for condoning or, worse still, justifying arbitrary interferences. Furthermore, the more insidious threats to individual autonomy (like manipulation) can be considered as violations of the publicity condition. If, however, the liberal position is firmly linked to the publicity condition, then liberalism is normatively incompatible with psychological threats to individual liberty. Consequently, liberalism will, like neo-republicanism, dismiss any form of arbitrary interference.

The upshot of this is that the three formal conditions that should have been allegedly distinctive of republican liberty are not the conditions of republican liberty only. They are equally liberal conditions. To this extent, republicanism could be construed as a specific form of liberalism. This constitutes the *volatility* of the

---

11 For a more detailed examination of liberal publicity, see Rawls, J. 1993. *Political Liberalism*, New York: Columbia University Press and Rawls, J. 1999. *The Law of Peoples, with "The Idea of Public Reason Revisited"*, Cambridge, MA: Harvard University Press.

republican position. This means that the republican might turn out to be a liberal after all.

Pettit himself agrees that there is more proximity between liberalism and republicanism than his emphasis on the superiority of republicanism normally implies. Liberalism, as Pettit points out, is a 'broad church', ranging from 'left-of-centre liberals, who stress the need to make non-interference an effective value, not just a formal one, and who embrace values like equality or the elimination of poverty in addition to the value of non-interference, and a right-of-centre liberals – classic liberals or libertarians' (1997: 9). Republicanism could then arguably be said to belong to the left-of-centre part of the liberal spectrum, right next to more egalitarian forms of liberalism. Even so, the republican could reply that the egalitarian version of liberalism is merely a reminiscence of republicanism. Liberals such as Rawls might be unaware of their republican identity, much like Mr. Jourdain was ignorant of the fact that he had been speaking prose all of his life. Republicanism, in other words, might be the hidden prose of liberalism.

Nevertheless, saying that egalitarian liberalism constitutes a form of republicanism looks like an *ad-hoc* solution to the volatility problem. Such an easy way out would also fail to account for Pettit's systematic emphasis on the distinctiveness of republicanism, as opposed to liberalism. In any case, it remains quite unclear why a republican would want to turn away from a normative ally as close as the egalitarian liberal.

What is more, there is a second, more robust argument as to why the liberal conception of liberty *cannot* be opposed to the republican one. The account that Pettit give of liberal liberty is actually not an account of a *normative* concept of liberty at all. When he puts forward his theory of liberty as dominion (or non-domination), Pettit presents it as a forgotten alternative of the (incomplete) Berlinian distinction between negative and positive liberty. Negative liberty is, as we have seen, the liberal version of liberty. Positive liberty comes close to the old republican conception of liberty and it refers to negative liberty and 'something more in addition' (1990: 55). This additional dimension can be the capacity of the individual of being the autonomous author of her life. Alternatively, it might refer to some extrinsic values that the individual should achieve, mostly through political participation.

The distinction is articulated in the negative/positive terms by Isaiah Berlin (1958). Though conceptually elegant, the distinction is not an exhaustive one, insofar

as it allows for a third conception of liberty. This third possibility is that of liberty as non-domination. Non-domination is both negative, in that it depends on the absence certain forms of interference and positive, in that, unlike negative liberty, it has a substantive social and political dimension. Non-domination is possible only in a situation where one can look the other person in the eye and can say '*You are not my master!*' Non-domination is the 'absence of mastery by others' (1997: 22). As such, it can only be experienced and confirmed in the presence of others.

Two things should be said about the way the theory of liberty as non-domination comes in as an alternative conception to the ones in place. First, I want to emphasize that Berlin's distinction does not allow for only *one* additional construal of liberty. The Berlinian distinction between negative and positive liberty is not a *division* of the concept of liberty. This implies that negative and positive conceptions of liberty are not exhaustive of the concept of liberty. As a result, the distinction leaves the field open for an indefinite number of conceptions of liberty. Negative and positive liberty are, as Berlin puts it, only two senses of liberty, among 'more than two hundred senses of it recorded by historians of ideas' (168). Consequently, there should be nothing contentious about finding a third or fourth or fifth conception of liberty in addition to the negative and positive ones.

My second observation is that the conception of negative liberty that Pettit presents is not the same as Berlin's. Pettit insists on the fact that negative/liberal liberty is simply the absence of actual or probable interference with an individual's action. But this is not exactly what Berlin says about negative liberty. Negative liberty, as liberals have conceived it, is something more than non-interference. To put it in Berlin's terms:

> 'What troubles the consciences of *Western liberals* is (…) the belief, not that the freedom that men *seek* differs according to their social and economic conditions, but that the minority who possess it have gained it by *exploiting*, or, at least, *averting their gaze from*, the vast majority who do not. They believe, with good reason, that if individual liberty is an ultimate end for human beings, none should be deprived of it by others; *least of all that some should enjoy it at the expense of others.* Equality of liberty; not to treat others as I should not wish them to treat me; repayment of my debt of those who alone have made possible my liberty or prosperity or enlightenment; justice, it is simplest and most universal sense – these are the foundations of *liberal morality*.' (172; *emphases added*)

The upshot of this is that negative liberty is not just non-interference. It is, furthermore, a specific process of reaching and maintaining non-interference. Non-interference, in the liberal's sense, must be obtained through non-exploitative means. Negative liberty, therefore, is possible only in a context were one can look the other in the eye and can authentically say: '*I am not your master!*'. Although this seems to turn the neo-republican conception on its head, it normatively comes down to the same thing. The state of affairs where there is no individual able to say that she could enjoy the master's position is substantively equivalent to the situation where no individual is threatened by the others' mastery. The two above declarations – '*You are not my master!*' and '*I am not your master!*' – are merely alternative descriptions of the same inter-subjective experience consisting in the absence of domination. In this, neo-republicanism is not exactly a 'rival axiomatization' (1997: 12) of (left-centred) liberalism. Rather, it is a *reformulation* of liberalism from a different perspective. The republican and the liberal are, then, seeing the same thing from different places.

The republican might, however, resist this point. Berlin was probably mistaken in describing the liberal's conception of liberty. Or perhaps Pettit is pointing us to the most negative form of a plurality of negative liberties. Neither of these replies seems very convincing, though. This is because Pettit's account of negative liberty ends by turning negative liberty into a non-normative concept. Saying that actual or probable non-interference is all there is to the liberal's conception of liberty reduces liberty to a simple physical reality and the knowledge one can have about it. Negative liberty, in this sense, is the knowledge an individual might have of one's *physical* movement in an environment coming very close to a vacuum. To this extent, negative liberty describes a *physical* state of affairs; it does not say anything about its normative dimension.

This takes me back to Berlin's formulation of negative liberty. In his 1958 Chichele lecture on the two concepts of liberty, Berlin emphasizes the following point when he analyzes the idea of negative liberty:

> '(…) if a man is too poor to afford something on which there is no legal ban – a loaf of bread, a journey round the world, recourse to the law courts – he is *as little free to have it as he would be if it were forbidden him by law*. If my poverty were a kind of disease which prevented me from buying bread, or paying for the journey round the world or getting my case heard, as lameness prevents me from running, this inability would not naturally *be described* as a lack of freedom, least of all political freedom. It is *only because I believe that my inability to get a given thing is due to the fact that other human beings have made arrangements*, whereby I am, whereas others are not, prevented from having enough money with which to pay for it, that I think myself a victim of coercion or slavery. In

other words, this *use of the term* depends on a particular social and economic theory about the causes of my poverty or weakness.' (169-170; *emphases added*)

This means that there is a categorical difference to be made between the situation where one is able to do certain things as a consequence of the other individuals' actions and decisions and a situation where one's actions depend on her inherent natural limitations. Saying that an individual cannot run because she has always had knee problems is not a statement about freedom, but about natural abilities. Saying, instead, that an individual cannot run because her knees have been smashed or weakened by some form of pollution is a statement about that individual's freedom.

The upshot of this is that either negative liberty refers, pace Pettit, to a conception of liberty that comes very close to the neo-republican one *or* it dissolves into a natural science concept that tells us something about our physical abilities. Republicans might prefer choosing the first option and thereby acknowledge their essential affinity with liberals. Such a change of normative attitude can be captured in the simple dictum of 'better friends than foes'. Indeed, it seems that the republican's emphasis on what separates her from the liberal fosters, at best, an over-simplified picture of what liberalism has to say about liberty.

The more particular corollary of the proximity between liberals and republicans is linked to punishment proper. The initial republican contention was that the liberal's idea of liberty could not have been meaningfully taken to be the target of punitive practice. When liberty is construed strictly in terms of non-interference, *all* forms of interference will invariably violate liberty.[12] Since punishment constitutes a highly intrusive form of interference, it will necessarily violate – and will thus be incompatible with – liberty.

On the contrary, the republican conception of liberty as the absence of mastery will present punishment as an affirmation of the victim's status as a non-dominated person. Hard penal treatment is meant to convey the message that crime is, first of all, a violation of the victim's status of non-domination. As such, punishing the offender is a way of rectifying the unwarranted domination relation between the

12 An explicitly liberal position has been articulated by R.A. Duff, especially in Duff, R.A. 2001. *Punishment, Communication and Community*, Oxford: Oxford University Press.

offender and the victim. Punishment is, or at least should try to be, the process of restoring non-domination.

Penal restoration, however, will have to be done in a parsimonious way, since one cannot achieve a state of non-domination through an excessive stigmatizing of the offender. Turning the offenders into future dominated persons is not exactly the best way of fulfilling the overall desideratum of non-domination.

Such a justification of punishment is nonetheless equally open to liberals – or at least to some of them. This is because, as I have argued, the liberal's idea of negative liberty cannot be reduced to actual or probable non-interference. Liberal liberty has a non-exploitative dimension that brings it very close to the idea and ideal of non-domination. Thus, if liberal liberty is merely a different formulation of republican liberty, the republican justification of punishment will also count as a liberal justification.

IV. DOMINION'S DOMAIN

Republicanism and liberalism, then, appear to be on a par when it comes to justifying punishment. There is nevertheless one aspect of punishment where liberalism seems to be preferable to republicanism. Unlike their liberal contenders, republicans such as Pettit typically emphasize the civic content of liberty. Non-domination is the ideal of a given *political* community. This means that

> 'there can be no hope of advancing the cause of freedom as non-domination among individuals who do not readily embrace both the prospect of substantial equality and the condition of communal solidarity. To want republican liberty, you have to want republican equality; to realize republican liberty, you have to realize republican community.' (1997: 125-126)

Republican liberty is not only equality under the law; it is equality under the law for the members of a circumscribed political community. Saying that non-domination is a socially thick ideal also implies that it is politically confined. To wit, non-domination can benefit only those individuals who are part of the community and 'it can be enjoyed by the salient groups to which those individuals belong' (125). In order to be able to claim the good of non-domination, one has to be a member of a group existing *within* the broader political community. More specifically, non-domination is an ideal available to all the groups that are potentially affected by a

given type of socially and politically defined vulnerability. The aim, then, as Pettit puts it, is to structure society in such a way that it becomes one single vulnerability group:

'The community as a whole should approach the point of being a single vulnerability class. Non-domination would tend to be a fully common good in those circumstances, for it would become more or less impossible for any individual to increase their enjoyment of the good without every- one else increasing their enjoyment at the same time. The closer we approximate to the enjoyment of perfect non-domination, then, the more common that ideal will become: the more it will appear that our fortunes in the non-domination stakes are intimately interconnected.' (125)

When it comes to punishment, this implies that the way crimes are defined and sentences are enforced will have to take into account what the particular vulnerabilities of those involved are. Thus, physical aggression against a child might constitute an aggravating circumstance, as compared to the same aggression against an adult. This is because a child is arguably more vulnerable than an adult. Similarly, theft committed on account of poverty or defective education might count as a mitigating circumstance. This is because the offence should not be entirely imputed to the thief. The offender's socio-economic situation and education background have a causal import in explaining criminal behavior. Given that poverty and poor education are, in large part, the results of particular social arrangements, society should assume part of the responsibility for certain offences.

The attention that is given to the problem of vulnerability protects republicanism from the excesses of utilitarianism, such as those of punishing the innocent. The fact, however, that vulnerability is inherently politically defined exposes republicanism to a different charge. To wit, republicans cannot account for – nor critically react to – some of the forms in which immigration has been recently (and increasingly) criminalized. Immigrants do not enjoy the same legal protections as citizens do. In particular, the current (US and Western European) trend in the penal treatment of immigrant people includes measures as harsh as the abrogation of the right to judicial review in the case of detention or deportation, as well as a looser version of due process in the treatment of non-citizens seeking to enter a particular country.[13] This means that, when it comes to punishment, immigrants do not have the

13 The literature on the criminalization of immigration is very extensive. As a useful starting point, see Miller, T.A. 2003. 'Citizenship and Severity: Recent Immigration Reforms and the New Penology', *Georgetown Immigration Law Journal*, 17: 611-666.

same constitutional rights as normal citizens do. Such a situation conflicts with our intuitive moral judgments: why should one be treated differently on account of one's arbitrary absence of membership to a specific political community?

My contention is that republicanism does not have the resources for criticizing the unequal criminalization of immigration. Though immigration constitutes a significant vulnerability, it is not a vulnerability that belongs to individuals as citizens, i.e. as members of a political society. I call this the *oversight problem*. The term 'oversight' should be understood in both of its possible meanings. On one hand, it refers to the watchful care for the rights and protection of citizens. On the other, it points to a failure to notice or consider the importance of the rights of non-citizens. I think that there are different ways in which the republican might try to play down the seriousness of the oversight problem.

A first reply could be that immigrants can be naturalized. Unfortunately, this is not a very convincing solution. First, it is not a feasible solution, given that it is politically and economically too costly. There are simply not enough resources to naturalize all the immigrants that ask for citizenship. Second, it might not be a morally justified solution, insofar as some immigrants might refuse naturalization as a condition for their equal penal treatment. One cannot justifiably coerce an individual into becoming a citizen in order for that individual to enjoy the same anti-coercive protections as normal citizens do. Third, those who are already citizens will most probably resist this form of open-access naturalization. Citizens can legitimately worry that mass naturalization will individually dilute the resources allocated to the effective protection of their rights. They might also complain that mass naturalization devalues the symbolic status of what it means to be a citizen.

A second reply the republican might want to put forward is that immigration laws can be contested. Indeed, republicans do not say that, because non-domination strongly depends on equality before the law, *any* law is inherently justified. To speak like Pettit:

> 'the fact that certain local institutions constitute the freedom as non-domination that people enjoy does not mean that freedom is to be defined by reference to those institutions. Freedom as non-domination is defined by reference to how far and how well the bearer is protected against arbitrary interference. Even if it is assumed that the only protections available are institutional in character, this definition still enables us to judge different sets of institutions, local ones included, by reference to their promotion of non-domination.' (109)

If the mass naturalization strategy fails, then one can arguably argue in favour of changing immigration laws so as to bring immigrants under the same legal protections as normal citizens. This seems like a weak solution. From a republican standpoint, laws can be contested by those who already belong to society in one way or another, whether they are *de jure* citizens or are entitled to reclaiming citizenship – say, on account of their long stay on the territory of that country, their having paid the required taxes, and so on. This contestability option is not, however, open to those immigrants who are newcomers to a country.[14] This is because they have no particular political or historically based entitlement to criticizing domestic laws. Consequently, an important number of immigrants depend on the willingness of actual citizens to criticize current immigration law. Such a status of contestatory dependence is incompatible with the ideal of non-domination.

A third reply is that the criminal laws and the criminal justice administration should be insulated from the vagaries of politics. If non-domination is threatened by politics, then the means to attain it should be depoliticized:

> 'if criminal justice practice is not to continue on its present, dominating pattern, then the responses that shape the practice must be decided by autonomous, professionally informed bodies that are not exposed to the glare and the pressure of public debate; the responses must be determined in a depoliticized way. In a case like this, contestatory democracy requires that the demos, and the legislative representatives of the demos, generally tie their hands and gag their mouths.' (197)

This could be done, for example, by creating a penal board composed of criminal justice experts (lawyers, criminologists, political scientists, etc.) and representatives of the community (victims' and offenders' rights groups). The role of such a board would be to issue an advisory opinion in matters of criminal law. There are a few problems with this political insulation strategy as well. The first problem is that the de-politicization under consideration is only a very partial one. The board of

---

14 The fact that republicanism can account for some of the contentions of multiculturalism does not involve any particular guarantees as to the rights of newly arrived immigrants. The problem is that penal republicanism cannot properly address the unequal criminalization and penal treatment of the immigrants with short immigration stories. Republicanism can do a better job at accommodating the complaints of immigrants who might have proven in time to be law-abiding and respectable members of the political community. This is an argument that newcomers, by definition, cannot rely on.

experts would merely have an advisory role: their recommendations are neither legally nor judicially binding.

The second problem is that the presence of a penal board might actually condone problematic legal and administrative measures under the banner of scientific knowledge. This is an old critique and it connects to the potential perverse effects of expertise and technocratically justified government.[15]

The third problem is that de-politicization cannot be consistently grounded in republican terms. The republican conception is an essentially *political* conception of freedom and institutional protections. As such, it stands or falls by its ability to show that and how non-domination as a political ideal can call for legitimate institutions. Trying to implement the conclusions of a primarily political conception of liberty by arguing in favour of de-politicization is not the best way of translating a theory of politics into real-life policy. This point becomes even more acute when one considers that the proper task of political theory is to assess and guide concrete political practice, as Pettit explicitly does. He argues that

> '[t]he aim of political theory is to *find a yardstick for political institutions* that it is hard for anyone to question but that proves on examination to prescribe all the measures and patterns that it seems proper, by our considered judgments, to require: an ideal that proves, on reflection and perhaps after revision on both sides, to equilibrate with our judgments about proper political responses, and to help in the extrapolation of those judgments to new cases.' (102; *emphasis added*)

Finding a yardstick for policy is, without a doubt, not the same thing as defining an algorithm for policy. Republicanism is not a policy platform, but rather a heuristic, in that it is meant to 'direct us to the kinds of questions the policy-maker should ask' (1990: 86). Even so, there still has to be some minimal degree of normative coherence between the heuristic and the policy it tries to inform. This does not seem to be the case when one compares a deeply political ideal such as non-domination with concrete recommendations in favour of de-politicization.

There is a diagnostic to this second critique of penal republicanism. The oversight problem and the failure to solve it in republican terms are not exclusively linked to the strong political dimension of non-domination. That domination is a

---

15 On the risks of the insulation strategy, see Loader, I. 2010. 'Is it NICE? The Appeal, Limits and Promise of Translating a Health Innovation into Criminal Justice', *Current Legal Problems*, 63(1): 72-91.

political ideal is, strictly speaking, not a problem at all. The problem is that republicans want to turn non-domination into the ultimate ideal of any practice and policy that exists a given community.

The function of political theory, as Pettit sees it, is double. First, it is meant to offer a 'medium of debate which no one has a priori ground for dismissing' (131). This means that the kind of justifications that are advanced in the meta-language of political theory should be true to the language of those who are concerned by that particular theory. To this extent, the ideal on which a political theory rests should be practically and morally adequate.

Second, political theory should rest on an ideal that 'enables those in every quarter of the society to give a satisfying articulation of their particular grievances and goals' (*idem*). In this, the ideal is not only adequate. It has to be also ultimate. More precisely, this implies that all the justifiable grievances that arise within a given society should be potentially expressed in terms of that particular ideal. Political theory should look for ideals that subsume all the other, non-ultimate ideals. Non-domination is taken to be such an ultimately subsumptive ideal; there is no other ideal to which non-domination is normatively subordinated. The claim, at this level, is that *all* the problems of our political institutions should, in the end, be described in reference to the non-domination ideal. My contention, then, amounts to saying that pushing for only one subsumptive ideal might go against the first normative desideratum of any political ideal, i.e. the adequacy of an ideal in relation to those individuals that are concerned by it.

This becomes clear when we try to assess the criminalization of immigration from the standpoint of non-domination. The problem is that non-domination works quite well within a given political community, but it performs rather poorly when it has to deal with phenomena that happen at the borders of that community. Non-domination, in short, cannot appropriately subsume the ideal of non-exclusion.[16]

Thus, non-domination does not exhaust the space for contestation. One way to solve the oversight problem, then, would be to relax the subsumption requirement

16 For a more detailed discussion of the tenuous normative relation between domination and exclusion, see Allen, D. 2005. 'Invisible Citizens: Political Exclusion and Domination in Arendt and Ellison', in Williams, M.S. & Macedo, S. (ed). *Political Exclusion and Domination*. New York & London: New York University Press, Nomos XLVI: 29-76.

and to go for a more pluralistic form of political theory. By a pluralistic political theory, I mean a theory that insists on the need for a plurality of equally commanding ideals. Moving toward a plurality of ideals would allow for two things. On one hand, it would keep the non-domination ideal in place, but use it to a more frugal way. Non-domination would still count as an ideal for criticizing excessive forms of punishment or cases where one might consider punishing the innocent. On the other hand, introducing other ideals would allow us to consider those grievances that cannot be properly accounted for by using the vocabulary of non-domination, such as the criminalization of immigrants.[17]

V. WHAT'S IN A NAME?

The problem with such a pluralistic move is that it implies that we give up on a *republican* theory of punishment, insofar as the validity of republicanism depends on the ultimately subsumptive status of the ideal of non-domination. But that is a problem for those who are attached to saving republicanism at any price. It is not a problem for those interested in finding the appropriate justificatory ground for practices such as punishment.

Let me briefly indicate two reasons as to why I think this is so. The first reason for not worrying too much about sacrificing republicanism is that we can give up on terminological qualifications without entirely abandoning the normative positions behind them. We are quite often not sufficiently clear about what we mean when we talk about a liberal or a republican (or a libertarian) theory. We use these denominations in a rather loose way. One of the consequences of loose usage is that we sometimes come to assimilate the normative validity of a theory with its terminological identity. We thus come think that, if we cease to speak in the *name* republicanism or liberalism, we are forsaking their substantive normative commitments. On this account, giving up on names implies giving up on norms.

---

17 I still haven't shown that liberalism behaves better when it comes to the criminalization of immigration than republicanism. While I do not have the time to go into the details here, here are two indications as to why (and how) liberalism might do a better critical work than its republican contender. The first advantage of liberalism is that it interprets the law (whether criminal law or other types of law) in strictly negative terms: law is, in the liberal's definition, an encroachment upon the individual's liberty. This happens even in cases where law is needed if the system of liberty is to be better protected overall. The second advantage of liberalism has to do with its protean structure: there is at least one form of liberalism (luck egalitarianism) that could give us sufficient grounds for criticizing practices such as the unequal criminalization of immigrant status.

Such a position is unwarranted. This is because a theory is not republican in the same sense in which a person or politics can be. Even when they are theories about specific practices such as punishment, theories are not about dictating the substantive content of those practices. Instead, theories should be about the way in which those practices are to be conceived in a *conceptually* accurate way. The kinds of characteristics that are naturally attributable to theories are epistemic, logical or broadly conceptual. Theories can be heuristic or not, informative or not, coherent or not, systematic or not, reductionist or not, consistent or not, sound or not. They cannot, properly speaking, be republican. Nor, for that matter, can they be liberal. Being liberal or republican cannot non-problematically qualify as an epistemic, logical or conceptual predicate. Theories cannot be republican, and this is roughly for the same reasons that they cannot be quarrelsome or charismatic. In any case, theories are not republican in the same way in which individuals, parties, practices, policies and institutions can or should be. This is, of course, easily compatible with saying that theories are *about* republican (or liberal) practices and institutions. So, in order for a theory to be accurate in relation to a republican practice, it does not have to be republican itself. Nor could it be. Talking about a republican (or liberal) theory of penal justice, then, constitutes at best some sort of metonymy.

There is a second reason why renouncing penal republicanism should not cause us too much trouble. This has to do with the fact that republicans themselves have eventually come to abandon non-domination as a *direct* justification of punishment. Pettit's later work on the justification of punishment is symptomatic of this change of position. In his 1997 article on 'Republican Theory and Criminal Punishment', Pettit insists more on *rectification* as the direct ground for punishing. Non-domination is, to this extent, pushed to the back of the scene.

Rectification refers to the process whereby the penal institution tries to restore the equality of rights and status between a victim that has been wronged and an offender that is responsible for the wronging. Rectification operates on three levels. These are what Pettit calls the three *R*s. The first *R* is recognition: the arrest and custody of the offender send a message as to the seriousness of violating the rights and status of the victim. The second *R* is recompense: the offender is expected to make an effort toward actually restoring equality, whether through economic compensation or more long-term activities such as community service. The third *R* is reassurance:

punishment is supposed to comfort both the victim and the members of society at large that they will be properly assisted once they have been the targets of crime.

My contention is that what actually does the justificatory work is rectification, not non-domination. Rectification of *actual* rights and status is all that is needed in order to justify punishment. That rectification is itself further justified in terms of non-domination is a different issue. To put it more directly, rectification is needed for the sake of non-domination, but punishment is needed for the sake of rectification. There is no appropriate direct justificatory link between punishment and non-domination.

There are at least two arguments as to why this is so. The first, weaker argument is that if non-domination were to count as the *direct* justification for punishment, it would be impossible to choose between punishment and other alternative responses to crime, such as re-education programs. It could be argued that non-domination could be fulfilled just as well through a concurrent compensation of the victim by the state authorities *and* a parallel re-education of the offender into respecting the value of non-domination. If, instead, what is wanted from punishment is the rectification of the wronged relation between the victim and the offender, punishment will become the appropriate option.

The second, stronger objection to a direct justification of punishment in terms of non-domination is that this would encourage a more extensive use of the punitive institution for purposes of non-domination. This could promote, for example, a criminalization of economic wealth beyond a certain level. No one would be allowed to own capital above a given threshold. While there might be a case for doing that in the future, it is not very clear how state authorities are to deal with the further difficulties that such a measure would create. One cannot justify the imposition of this measure retrospectively: neither expropriation, nor the punishment of those who are currently too wealthy seems to be non-problematically justified from a non-domination standpoint. This implies that those who are already too wealthy would still be entitled to their wealth. Such a protection would, however, create a deep inequality between the already too wealthy and those who might want to be as wealthy as them. Maintaining such an inequality cannot be justified in non-domination terms either.

Such measures are obviously not justified. But they are unjustified not on account of the fact that they cannot in principle be connected to the cause of non-

domination. Rather, their lack of justifiability lies in the fact that they are not directly connected to the intermediate ideal of rectification.

Consequently, punishment should aim at rectification only: *just punishment is just rectification*. It should not vaguely aim at non-domination. Braithwaite & Pettit (1990) seem to acknowledge this when they say that non-domination should never be pursued directly (76). In other words, they do recognize that the justification of punishment and other political institutions – say, a public health system – actually happens at the level of middle-range theory and not at the macro-level of ultimately subsumptive ideals. To put it somewhat abruptly, meso-ideals like rectification are doing the actual justificatory work, while macro-ideals like non-domination are taking all the credit for it.

All this bears a double implication for the possibility of a republican theory of punishment. On one hand, we can rest assured about being able to keep the substantive normative position of republicans without thereby having to stick to a republican denomination. The republican cause can be defended under a different banner. On the other hand, there is no need to go as far as a republican theory if what we really want is to render punishment morally and politically acceptable. We can stop at rectification; there is no need to go all the way up to non-domination.

VI. CONCLUSION

My argument was that a republican theory of punishment faces at least two kinds of problems. First, I claimed that republicanism, as developed by John Braithwaite and Philipp Pettit, has no specific normative input when it comes to justifying state punishment. I called this the *volatility problem*. The problem is that, when it insists on equal legal treatment, republicanism collapses into a liberal theory of punishment. Second, I argue that republicanism faces an *oversight problem*. This means that, because it prioritizes the civic component of liberty, penal republicanism does not have enough resources for criticizing a range of *prima facie* unacceptable punitive practices, such as the criminalization of immigrants. I concluded by indicating how paying less attention to what makes republicanism special can actually add to its value as an insight into the question of punishment. We should, in short, pay more attention to what republicans say and be more indifferent to who they are.