

Ian Shapiro's 'On Non-domination' is the prolegomenon to a major re-statement of democratic theory to be published by Harvard University Press. Shapiro's work in political theory is characterized by a thorough-going pragmatism, by, that is, a deep concern with the way that ideas work in practice.¹ Yet this article is a fairly abstract exercise in theory, for the most part 'conducted,' as he says of Quentin Skinner's account of freedom as non-domination, 'at a pretty high altitude' (321); for it is at that level that Shapiro positions himself against the other leading contenders in the bid to provide a satisfactory theory of democratic justice. Shapiro himself descends from this altitude only when he considers the work of Philip Pettit, Skinner's close ally in developing a 'republican' account of non-domination, because, as Shapiro says, Pettit, in contrast to Skinner, engages 'with institutional arrangements more directly' (321). My response examines some of the possible institutional implications of Shapiro's position that arise from his exercise in establishing a critical distance between himself and Pettit; in particular, the implications for the legally regulated processes in which democracies arrive at their judgments about policy and implement them.

In one significant respect, Shapiro's account is closest to both Skinner and Pettit because for him non-domination is the foundational principle of democracy and they are the principal exponents of a neo-republican account of freedom as non-domination. At the outset of his argument, Shapiro sets out what he takes to be the basic problem for democratic theory to address: people's vulnerability to domination. Neither democratic justice itself nor the role of a principle of non-domination within it can be explained, he argues, by a fundamental commitment to egalitarian or distributive considerations; and thus, he provides a detailed set of reasons for rejecting egalitarian theories of justice aimed principally at John Rawls but including a variety of other members of the egalitarian family.

* Professor of Law and Philosophy, Toronto.

† Ian Shapiro, 'On Non-domination' (2012) 62 UTLJ 293 [this issue]. All subsequent references are to this article.

1 See, for example, Ian Shapiro, *Democracy's Place* (Ithaca: Cornell University Press, 1996) especially at 260–1 [Shapiro, *Democracy's*].

One could quibble with Shapiro about how successfully he distinguishes his position from positions within the egalitarian family, despite the cogency of his arguments against Rawls and others. Shapiro says that non-domination has to take equality seriously insofar as ‘egalitarian distributive arrangements serve the goal of non-domination’ (296) and his ‘power-based resourcism’ (293-95, 308, 315) requires attention to people’s ‘basic interests in the security, nutrition, health, and education needed to develop into, and live as, normal adults’ (294). The basic interests include ‘developing the capacities needed to function effectively in the prevailing economic, technological, and institutional system, governed as a democracy’ (294).

Now Rawls’s redistributive principle – that social and economic inequalities are to be arranged so as to benefit the least advantaged members of society² – can, without any violence, be understood as intended to ensure that all can participate effectively in the collective life of their society. And his constraint on such redistribution that it must be consistent with the equal right of all citizens to ‘a fully adequate scheme of equal basic rights and liberties’³ is one that Shapiro would surely endorse, since such a scheme is part of the constitutional structure of democracy. In addition, there is hardly any difference between standard liberal formulations of the egalitarian intuition that one of the marks of a just society is that individuals should be able to pursue their own conception of the good in their own way, on the one hand, and formulations that talk of effective participation in collective life, on the other, unless the latter suggest that individuals’ lives are impoverished if they are not active participants in politics or fail to accept some robust account of the community’s values. And Shapiro makes no such suggestion. Rather, he says that ‘the basic challenge from the standpoint of non-domination [is] to enable people, as much as possible, to pursue the activities that give life its meaning and purpose while limiting the potential for domination that accompanies those activities’ (314). Democracy, on his view, is instrumentally valuable: it is essential to the project of ‘domesticating the power dimensions of human interaction while leaving the other goods people pursue as unfettered as possible’ (314).

Finally, Shapiro’s list of basic interests is likely one that all egalitarians will consider have to be secured in order to make possible whatever formulation of democratic justice they find congenial. Hence, it is not altogether clear why Rawls and Shapiro would disagree when it comes to basic political intuitions about the kinds of substantive reform a just

² John Rawls, *A Theory of Justice*, revised ed (Oxford: Oxford University Press, 1999) at 53.

³ *Ibid* at 60–1.

society needs to undertake, however much they might disagree when it comes to trying to elaborate the theoretical justification for the intuitions.

More important for the purposes of my response is that it is not that clear that the differences in theoretical justification between Shapiro and the egalitarians have any direct implications for institutional design, except for the fact, I suspect, that a clue to the most significant difference between Rawls and Shapiro is that Shapiro is a political theorist in a Department of Political Science, while Rawls was a professor in a Philosophy Department. My point here has nothing to do with rivalries between different branches of the academic profession that study much the same subject matter and everything to do with the question of power, a question which has at best a marginal place in the Rawlsian egalitarian family.⁴

It is because Shapiro thinks that it is crucial to pose that question correctly and to find an answer to it that, in his own account, he gives such a prominent place to Foucault's theory of power and of its ubiquity in human relations. And it is for the same reason that he does not think egalitarian reforms are important simply because they enhance equality but when, and only when, they serve to mitigate domination and so diminish human vulnerability to others.

Finally, it is for that reason that Shapiro finds Pettit's theory the most congenial of those he examines. For Pettit not only makes the question of power central to his political philosophy but goes beyond a philosophical analysis of power to examine its social and institutional manifestations, especially those institutional manifestations that have the potential for ensuring that individuals are not vulnerable to each other or to the state in ways that the principle of non-domination finds illegitimate. For, as Shapiro emphasizes, neither he nor Pettit finds the ubiquity of power troubling. For them, the question of power is not about how to eliminate its exercise; rather, it is about how to ensure that its exercise is non-dominating, indeed, aimed at ensuring the elimination of domination. Posing the question in this way requires siding with egalitarian liberals against Foucault, as Shapiro amply recognizes, at least in the claim that there are objective criteria of justice that tell us when an exercise of power is legitimate.

It is worth noting, in this regard, that Pettit thinks that high-altitude disagreements about the nature of freedom do have low-altitude implications for institutional design. In a recent article, he distinguishes between

4 'Power' has no entry in the index of, for example, Ronald Dworkin, *Justice for Hedgehogs* (Cambridge, MA: Harvard University Press, 2011) nor in John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993).

freedom as non-frustration, which focuses on whether an actual preference you have is obstructed by another; freedom as non-interference, where obstruction of non-preferred options counts as a limit on freedom; and freedom as non-domination, which requires more than that I can, in fact, choose between options, since the choice must in addition not be subject to the will of another. To use a standard example in the republican literature, a slave with a benevolent master might be given lots of latitude to make choices, but he is unfree in the sense of freedom as non-domination because the master is entitled to interfere at any moment. In other words, domination is subjection to the whims or arbitrary will of another.

Pettit claims that the issue between these different theories is of immense importance in political theory, since the 'institutional requirements for promoting freedom as non-frustration across a society are weaker than the requirements for promoting freedom as non-interference, and they are in turn weaker than the requirements for promoting freedom as nondomination.'⁵ He does not elaborate his claim in this paper, but his earlier monograph suggests that the institutional requirements include at least the following: that decisions about the collective good be made by a democratically elected parliament; that the executive's decisions about how to implement the legislative programs enacted by that parliament be subject to robust rule-of-law requirements, supervised by an independent judiciary; and that the political rights of citizens should be guaranteed by an entrenched bill of rights, again supervised by an independent judiciary.⁶

However, this is not enough to distinguish the institutional implications of republicanism from many standard liberal accounts of justice, including some that not only make no reference to non-domination or to some analogue but are even also infected by the virus of freedom as non-frustration, an infection which Pettit believes, with Skinner, was cooked up by Hobbes in his bid to subvert the republicans of his own day and their conception of a free man as a citizen in a parliamentary democracy. For, as Pettit is willing to recognize, albeit in footnotes, even FA Hayek's conception of freedom under a system of public laws might not, at the low altitude of institutional requirements, look that different from freedom as non-domination.⁷ Thus, Pettit finds himself having to distinguish himself from Hayek, one of the leading freedom as non-frustration

5 Philip Pettit, 'The Instability of Freedom as Noninterference: The Case of Isaiah Berlin' (2011) 121 *Ethics* 693 at 694.

6 Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Oxford University Press, 1997).

7 *Ibid* at 50, n 9, 89, n 2.

theorists of the twentieth century, by pointing out that his own version of freedom as non-domination is as much concerned with the potential for social arbitrariness – for example, domination in the workplace and the family – as it is with the potential for political arbitrariness.⁸

But even this does not, as Pettit recognizes, distinguish his theory from that of John Stuart Mill, another advocate of freedom as non-frustration, who was as much if not more concerned with the tyranny of the social as he was with the potential for political tyranny.⁹

Nor is it clear that Hayek was as much unconcerned with social domination as he was worried that giving an extensive role to the state to use law to combat such domination was likely to backfire by multiplying the amount of state interference in our lives and thus increase the number of occasions when we might find ourselves subject to the coercive and arbitrary (because unpredictable) judgment of some state official. That concern becomes more heightened when we notice that the dominating influence over agencies set up to implement complex legislative regimes is quite likely to be the influence of those with more economic and other kinds of power. As Hobbes pointed out in 1651, bad laws are 'but trapps for Mony.'¹⁰

This is a particular problem for Pettit because it seems to be the case for him that the more the institutional opportunities given to citizens to contest public decisions, the better. It is this perhaps rather naïve view of politics that leads Shapiro to comment that Pettit's

account of public institutions is a recipe for protecting the status quo, which could only be appealing from the point of view we share if one did not perceive it as heavily laden with domination. In this respect our disagreement has less to do with the meaning of domination than it does with our perceptions of how power is distributed in the world and how politics works. (331)

Indeed, Shapiro accuses Pettit and republican thinkers in the American tradition of a 'fulsome embrace of institutional sclerosis' (331) that will

8 Ibid at 89–90.

9 Ibid at 139. Moreover, I have argued that if Pettit and Skinner were to pay some attention to Hobbes's own legal theory and his understanding of civic liberty as the liberty of the subject under a system of public law, they would find it a lot more difficult to cast Hobbes as the principal villain in their tale of the history of political thought as one which has been running on the wrong tracks ever since Hobbes's successful sabotage of the republican theory of his day. See, for example, my 'Hobbes on the Authority of Law' in David Dyzenhaus & Thomas Poole, eds, *Hobbes and the Law* (Cambridge, UK: Cambridge University Press, forthcoming).

10 Thomas Hobbes, *Leviathan*, ed by Richard Tuck (Cambridge: Cambridge University Press, 1997) at 239–40.

paralyse any attempt to enact and implement the kinds of legislative programs necessary to do away with social domination.

What then does Shapiro advocate? We have to take into account his point that people are

more vulnerable in collective settings when their basic interests, thus conceived, are at stake than when they are not. If I control resources that you need to vindicate your basic interests, that gives me power over you. This fact legitimates more stringent democratic constraints on our collective endeavours when basic interests are at stake than when they are not. (294)

One can ask two sorts of questions about such constraints. The first is how they can be made most effective for the purpose of transmitting and implementing policy judgments. The second is concerned with efficacy but also with ensuring that the judgments are, indeed, properly formed judgments about justice. For those who think that only the first kind of question is appropriate, the justice in democratic justice is simply the content of whatever judgment is arrived at within the deliberative body that has the legitimacy to make such judgments. Indeed, to suppose there is more to such judgments – that they have to meet some external criterion of justice – is to risk that officials in those institutions that are charged with implementing the policy will rely on that criterion to superimpose their judgments on the judgments made by the deliberative body. Since that superimposition is generally effected by unelected officials and the judgment that results supersedes, in this way, the judgment of those whose legitimacy stems from the fact that they are elected to make precisely those sorts of judgments, the superimposition is illegitimate.

Just this view, and hence the question it asks of legal constraints, is at the heart of Bentham's utilitarian doctrine of politics and law, and it explains his desire to discipline, even to marginalize, judicial review in order to preclude judges from imposing their vision of justice on the law of the democratic assembly.¹¹ In Bentham's time, judges claimed to be interpreting the law in light of the principles of justice embedded in the common law, which Bentham disparaged either on the ground that this justice was completely arbitrary, the kind of law one gives to one's dog, or that its content was what served best the interests of the propertied elite from which the judges were drawn. These criticisms are not inconsistent for the reason already suggested – that the occasions for official

11 Samantha Besson & José Luis Martí, 'Law and Republicanism: Mapping the Issues' in Besson and Martí, eds, *Legal Republicanism* (Oxford: Oxford University Press, 2009) ch 3 at 32–3 suggest that 'legal republicanism ought to encompass a positivist theory of law, because it cannot rely on the existence of a natural, pre-political validity.'

arbitrariness are likely to be controlled by those with more power and are thus liable to capture by what Bentham termed 'sinister interests'.¹²

My sense from Shapiro's article, especially from his concluding paragraph in which he charts James Madison's process of disillusion with the US institutions of republican government, is that he favours a strong form of Westminster-style parliamentary democracy, in which the principal constraint on non-domination is democratic competition both prior and subsequent to the formation, enactment, and implementation of policy. That is, in contrast to Pettit's institutional strategy that involves 'multiplying checks on collective action' (329) Shapiro wishes to diminish the checks that already exist and that induce sclerosis. Moreover, he says that

[i]mperfect as competitive parliamentary systems might be, they turn out to be the stablest democracies and at least as good as any other from the standpoint of protecting vulnerable minorities. Given the propensity of republican arrangements to protect entrenched systems of domination and powerful minorities, the reasons to reject them in favour of parliamentary systems seem to me to be decisive. (331-32)

It might be, then, that the political order Shapiro favours is one that shares much with Bentham's mature views about how to construct a system that enables a strong parliament to engage in extensive social reform and that is freed to the greatest extent possible from the influence of sinister interests by sustaining a political climate of open criticism of publicly articulated measures both before and after enactment, a climate in which an independent press (or media) plays a significant role.¹³ And if that is right, then Shapiro would not be that interested in, indeed might perhaps even be opposed to, institutional opportunities designed to call into question whether policy judgments are, in fact, properly formed judgments about justice, even when it is clear that basic interests are at stake. For while he says that if 'basic interests are compromised or threatened the state rightly takes an interest,' he adds that what the state should do depends not only on the seriousness of the threat to basic interests but also on 'the availability of remedial instruments that do not create more serious violations of basic interests than those that they prevent' (309).

However, this interpretation of the institutional implications of Shapiro's theory is hard to square with his claim that 'every domain of

¹² Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press, 2006) at ch 5.

¹³ The best account of Bentham's views in this regard is to be found in Schofield. See *ibid.*

human interaction should be subject to democratic conditioning constraints . . . [including] mechanisms to participate in decision making about the nature of the goods in question and rights of opposition to try to get them changed' (315). And in other work, Shapiro has made it clear that he is not opposed to judicial review of legislation based on an entrenched bill of rights that gives to the judges authority to invalidate statutes that they consider fail to comply with the rights in the bill, as long as the courts refrain from engaging in the 'substantive due process' kind of review associated with *Lochner*.¹⁴ Democratic justice might well be served, he argues in *Democracy's Place*, by an 'activist' constitutional court as long as its activism is 'circumscribed and negationist';¹⁵ that is, the courts rule out practices as undemocratic without seeking to impose what they consider democratic practices, and similarly rule policies to be constitutionally invalid without seeking to dictate policy themselves. In taking this stance, the courts recognize the 'relatively greater legitimacy of legislatures.'¹⁶

Moreover, it is not that clear why Shapiro's criticism of Pettit for supposing that 'empowering social movements to resist democratic government will, on balance, lead to progressive change' (326) would not apply to Shapiro's own strategy of empowering Parliament by doing away with the multitude of republican institutional checks that Pettit advocates. If the Tea Party movement in the United States should be a warning to those who would empower social movements, one should pause to imagine an equivalent in the United Kingdom, where the prize of a supreme Parliament awaits the winner of a general election and where the sweeping reforms brought in by a Conservative *minority* within the coalition government since the last election seem designed to increase the presence of the domination of sinister interests in social and political life.

One intriguing clue as to the kinds of institutional arrangements Shapiro might have in mind is that he says that

if we want to press deliberation into the service of reducing the kinds of domination that should concern us, then rights to insist on deliberation should be limited to those who have basic interests at stake. To be sure, they might deploy those rights to bargain instead of to deliberate, but at least in that instance it is those who are vulnerable in ways that we should care about whose interests are being protected. (328)

Consider, in this regard, John McCormick's recent book on Machiavelli, in which McCormick constructs a powerful argument against both

¹⁴ See Shapiro, *Democracy's*, *supra* note 1 at 37–42, 256–60.

¹⁵ See generally *ibid.*

¹⁶ *Ibid* at 259–60.

the contemporary republican interpretation of Machiavelli as one of the main founders of their tradition of thought and the kind of institutional prescriptions contained in Pettit's republican account of institutions.¹⁷ According to McCormick, Machiavelli is best understood as a political theorist who wanted democratic institutions designed so as to enable those who are most vulnerable because of their relative lack of material resources to participate in collective decisions about how to improve their situation by participating in forums from which members of the power elites are excluded. The inspiration for these ideas is Roman; that is, institutions and offices that were reserved for plebeians.

McCormick himself uses such ideas in his design for the contemporary United States of a new constitutional entity: a college of tribunes chosen by lot for a one-year non-renewable term, which would exclude the members of power elites and whose membership would be weighted in favour of the more vulnerable groups within the non-elites. The college would have the power to veto one piece of legislation, one executive order, and one Supreme Court decision; to initiate a referendum on one issue, which if it won majority support from the electorate would have the force of federal statute unless defeated by a vote of two thirds of the Senate and House of Representatives; and to impeach one federal official from each branch of government.¹⁸

Whatever Shapiro might think of this particular proposal, it has several formal features that I think he should endorse: it is predicated on an objective indicator of vulnerability to domination – social and political inequality; it designs an institution that ensures that there will be democratic deliberation by those whose basic interests are affected by such domination; it does not in any way seek to dictate the outcomes of such deliberation; it provides effective instruments for implementing the outcomes; and it builds in safeguards against its becoming yet another site for elite domination.

There is reason, however, to think that the proposal is too grand for Shapiro's taste. At one point he speaks of his ideal of non-domination as 'reactive' (307, 334), one that 'appeals to human ingenuity to design and implement practices that can ameliorate sources of domination as and when they arise. As a result, it always operates at the margin – eschewing the project of designing a basic structure for society as a whole' (334). Nevertheless, the proposal is in line with Shapiro's general admonition to move away from engaging in 'endless debates about "kinds" of freedom' (320) and to 'change the subject and focus instead on the

¹⁷ John P McCormick, *Machiavellian Democracy* (Cambridge, UK: Cambridge University Press, 2011).

¹⁸ *Ibid* at 183–5.

conditions in the world that shape not only the status of agents, but also the actions they might aspire to perform, and the resources and constraints affecting those aspirations' (320). Moreover, it marks a distinct and radical conceptual break with conceptions of freedom under a system of public law that create more commonality among, say, Hobbes, Bentham, Mill, Hayek, Rawls, Skinner, and Pettit than the last two are willing to recognize.

My question ultimately for Shapiro is whether he wishes to effect a comparable break and to come up with concrete proposals for reform of our legal institutions. After all, he quotes in his article with approval Anatole France's famous quip about how formal equality perpetuates the substantive inequality between rich and poor that France took to mock liberalism's commitment to formal equality. And what McCormick's proposal does is to give constitutional recognition to substantive inequality in a way designed to empower the vulnerable to set themselves free from domination.