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### A life of one's own: republican freedom and disability

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## A life of one's own: republican freedom and disability

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This article outlines a republican perspective on disability. We argue that a commitment to ensuring the republican freedom of disabled citizens offers a promising account of what disabled citizens are owed as a matter of justice. A republican perspective offers a particular diagnosis of the injustice of disability disadvantage, both in relation to individuals (*dominium*) and the state (*imperium*), that is congenial to prominent concerns voiced by the disability rights movement. This article also offers a brief outline of three republican remedies: the right of social participation, the right of opportunities for civic contribution, and the right of democratic contestation. These remedies constitute key guidelines for the robust institutional protection of disabled citizens' republican freedom.

**Keywords:** contestation; disadvantage; domination; republicanism; social justice

### Points of interest

- Contemporary theories of justice either fail to appropriately include disabled citizens at the core of their theories of what people (or the state) owe each other as a matter of justice or, worse, completely ignore the distinctive disability perspective.
- Republicanism is a political theory asserting that each citizen has a core interest in living a life free from domination.
- Republican freedom captures many of the ways in which disabled citizens are currently under threat of domination by other individuals (*dominium*) or the state (*imperium*), and manages to do so within a theory that continues to reassert the fundamental moral, social and political equality of all individuals.
- Republican political theory requires that disabled citizens are robustly protected from any instances of domination through three institutional rights: the right of social participation, the right of opportunities for civic contribution, and the right of democratic contestation.

### Introduction

There is little disagreement that disabled people face considerable disadvantages across many social dimensions, affecting their well-being and opportunities to live a

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decent, meaningful and dignified life (Brownlee and Cureton 2009). In most contemporary advanced societies, disabled persons are effectively excluded from social and political life, which many believe reflects a particularly nasty form of social injustice. It may come as a surprise that, until recently, philosophical accounts of social justice have systematically ignored concerns of disability and the equal treatment of disabled persons. Lawrence Becker argues that this long neglect is:

partly due to the fact that until the last half of the twentieth century, the number of severely disabled people who had any reasonable hope of long-term survival was small, and until recent medical advances, the medical treatment and social arrangements that could help them were limited and relatively cheap. (Becker 2005, 9)

Adding insult to injury, to the extent that disability is considered, the leading approaches in contemporary political philosophy appear to lock disabled persons into a permanent marginalised social status by building their respective theories of social justice on a foundation in which 'normal' bodily, cognitive or emotional functioning is taken for granted. Political philosophers often follow the lead of John Rawls, who in *A Theory of Justice* (Rawls 1999) and subsequent work explicitly side-steps considerations of disability:

I have assumed throughout and shall continue to assume, that while citizens do not have equal capacities, they do have, at least to the essential minimum degree, the moral, intellectual, and physical capacities that enable them to be fully cooperating members of society over a complete life. (Rawls 1996, 183)

The problem is not restricted to Rawlsian contractualism, however.<sup>1</sup> Competing philosophical approaches ranging from libertarianism to utilitarianism share a similar outlook. The consequences for a disabled individual's status as a moral person can be dire. David Gauthier's (1986) mutual advantage contractarianism, for instance, holds that since any solution to competing claims on social resources would require taking into account the bargaining position of the respective stakeholders, the disabled have no claims of justice on us because they allegedly bring nothing of value to the negotiation table. Gauthier's is an extreme position that most political philosophers are keen to avoid. Nevertheless, while in other approaches the disadvantage suffered by disabled persons merits *some* moral consideration, disability disadvantage typically falls short of constituting a central problem of social justice. In contemporary political philosophy, disability remains an outlier problem (Silvers and Pickering Francis 2005).

In recent years a number of philosophers have started to take disability more seriously in an attempt to move disability concerns to the core of a philosophical theory of social justice (for example, Silvers, Wasserman, and Mahowald 1998; Nussbaum 2006; Brownlee and Cureton 2009; Kittay and Carlson 2010). The capability approach, pioneered by Amartya Sen (1992, 1999a, 1999b) and further developed in the context of disability by Martha Nussbaum (2006, 2009), in particular, has made important in-roads in constructing a theory of social justice that takes disability seriously (see also Burchardt 2004). However, not everyone agrees that capability theory<sup>2</sup> succeeds in granting disabled citizens full equal status (Silvers and Stein 2008; Stark 2009).

In this article, we propose an alternative approach for theorising disability, grounded in the renewed attention for the republican ideal of freedom as non-domination<sup>3</sup> in contemporary political philosophy. A republican perspective on disability effectively reconstitutes the problem of ‘disability disadvantage’ as being centrally concerned with the agency, freedom and political participation (i.e. citizenship) of disabled people. This, republicans maintain, is a key interest disabled citizens emphatically share with their non-disabled fellow citizens. In this, republicanism<sup>4</sup> offers a perspective that has clear affinities with the leading concern of disability rights activists, namely that the disabled are excluded from social and political decisions that affect their ability to live a life of their own (Oliver 1990; Charlton 1998). Unfortunately, like the mainstream political theories mentioned above, republicans have so far failed to consider the implications of their approach for the field of disability and disability policy. The work on this has to start in earnest, and this article is a first attempt to address this lacuna.

### **Disability and theories of social justice: two challenges**

A successful theory of justice for disabled persons needs to meet two key challenges. First, a theory of justice must ensure that disabled persons obtain the necessary material and social support to enable them to lead a decent and dignified life. But it must do this while simultaneously ensuring receipt of such support does not violate their equal social status. A theory that either fails to grant disabled persons a level of support sufficient for them to lead a minimally flourishing life, or grants such support on conditions that infringe on their human dignity – for instance, by having to shamefully reveal themselves as ‘dependent’ or ‘in special need’ compared with the non-disabled majority (Wolff 1998; Anderson 1999) – is unsatisfactory.

A second challenge is foundational. A plausible theory of social justice must ensure that the fate of disabled citizens remains at the centre of its account. Disability concerns should not be relegated to a ‘mere extension’ of the core theory, to be addressed with a set of special arguments after having sorted out issues common to the non-disabled majority. In other words, a satisfactory theory of justice must incorporate the particular interests of disabled persons in a way that puts them on an equal philosophical footing with non-disabled persons. The principles governing relations of social justice should affect disabled and non-disabled citizens alike, and the moral foundations of those principles must remain indifferent between various forms of ability or disability.

In this article we propose that the republican political philosophy offers a third alternative in which considerations of disabled people’s interests are given critical attention in a manner that does not depend on them having a distinctive status from the non-disabled majority. Republicanism offers an account of what it means to be a free political agent – a citizen – in a modern society, and what obligations the polity incurs for safeguarding political agency. Historically, the republican theory of political freedom as the basis of a just social order originates in the work of political thinkers as diverse as Aristotle and Cicero, Machiavelli, Marsilius of Padua or James Harrington, and should not be confused with the US Republican Party or Sinn Féin in Ireland. In recent years, political philosophers such as Philip Pettit (1997, 2001) and Quentin Skinner (1998) have recast republicanism as a third form of freedom, distinct from both the negative freedom (‘freedom from interference’)

associated with classical liberalism and the positive freedom ('freedom as self-mastery') against which Isaiah Berlin riled in his famous lecture 'Two Concepts of Liberty' (Berlin 1969). Having thus put what Benjamin Constant (1989) terms the 'liberty of the ancients' on a strong philosophical footing, contemporary republican theorists want to establish a social order in which citizens can live lives of their own – free from the arbitrary interference of others.

### The idea of republican freedom

Republicanism is a political theory with a specific notion of freedom at its core; *freedom as non-domination*.<sup>5</sup> A just society, according to republican political theory, is a society that robustly safeguards the freedom from domination of all its citizens, which implies the ability to put one's life-plans into practice without having to suffer the arbitrary interference from another individual or group (Pettit 1997; Lovett 2010). Republican freedom can be best understood as encompassing three key dimensions.

First, republican freedom is a distinct form of social freedom. It focuses on the intervention of another agent into our plans, not merely on expanding the set of options or capabilities of a person to do what she might want to do (Van Parijs 1995). Republicans value an individual having more options available to choose from rather than less, but to suffer from unfreedom it must be the case that some options are closed off because of the (possible) intervention of a third party, whether this is an individual, a group or an institutional agent such as the state (Pettit 1997, 2001). Not having the option to do *x* is *unfortunate* in many ways, but being restricted in doing *x* because of the potential intervention of another is *wrong*. Republicanism is primarily geared at addressing this wrong. The focus on social (un)freedom easily applies to disability: as we know from the literature on the social model of disability, what turns an impairment into a disability is in many cases the social structure in which an impairment is embedded (Oliver 1988, 1990). It is not just the absence of functioning legs, but also the presence of stairs or narrow corridors making it difficult to manoeuvre a wheelchair that restrict a paraplegic person's mobility. Since the social structure is a direct consequence of human agency (or of the purposeful lack of agency), the republican perspective on social freedom covers the full range of disability considerations.

Second, a crucial aspect of the republican notion of freedom as non-domination is that the mere possibility of interference is sufficient to render someone unfree in the republican sense (Pettit 1997). Republicans distinguish themselves from classical liberals favouring 'freedom as non-interference'<sup>6</sup> by arguing that you can be made unfree simply because someone has the ability to intervene, quite independent of whether this person actually intervenes. A person who is free to choose *x* over *y* simply because a powerful person (capable of intervening) approves of this choice is not really free, for if she would have opted for *y* she would have been prevented from doing so. More troubling even, in many cases an individual's freedom depends on currying the favours of a powerful person, which effectively gives someone else a say over how I choose to comport myself towards her. For republicans, domination often manifests itself through the social mechanism of deference. Here the application to disability is straightforward, for disabled individuals often have to adjust their perspective to what others believe they 'can do', or 'should do', or even 'should want'.

The cultural domination entailed by the spectre of ‘normal expectations’ is perhaps one of the most devious instruments for the non-disabled majority to exercise domination over the lives of disabled citizens (McRuer 2006). Normal expectations drive non-disabled persons’ evaluation of the level of functioning that a disabled person is supposed to be capable of (or *not* capable of) in such diverse areas of social participation as living independently, engaging in social and sexual relations, getting involved in politics, moving around town, obtaining an education, working in a regular job, and so on (Silvers 1998). Normal expectations also ground an attitude of pity and charity as opposed to one of rights and justice towards the needs of disabled people (Barton 1999). In most cases, this attitude results in the literal exclusion of disabled individuals in key areas of social life.

Third, domination occurs for republicans when an individual suffers arbitrary interference, not just any type of interference. Roughly, we can define arbitrary interference as that interference in which another agent is able to shape my choices without regard for my own interests; that is, when there is no requirement for interference to track what Pettit (2001) calls the ‘avowable interests’ of a person. For republicans, interference that reasonably tracks a person’s avowable interests cannot be said to impede freedom in the relevant sense. More still, interference for republicans is regularly justified precisely to protect freedom as non-domination, in which case it is itself not dominating. This third feature is perhaps the most controversial aspect of the republican conception of freedom, for it remains unclear how precisely to determine when we have appropriately taken account of other people’s interests (Lovett 2010). When it comes to the interests of disabled individuals, we should certainly move with extreme caution when trying to determine what is in their best interests. It is important, however, to keep in mind that republicans are appropriately wary of any form of overt or hidden paternalism: they are adamant that each person is given a genuine opportunity to assert their own perspective and contest the views of others in this regard. We return to this point below.

Phillip Pettit, the leading republican political theorist, summarises the core of the republican ideal as follows: an individual enjoys freedom as non-domination when she is capable of making choices from a social position that protects her from potential alien control (Pettit 2001):

Enjoying social freedom (having a status that guards you against arbitrary interference) means being proof or at least being relatively proof against [arbitrary] interference. No matter what your preferences are, and no matter what the feelings of others happen to be, your social standing will still serve you well. It will provide a protective field that makes you resistant to the arbitrary incursions of others. It will ensure that, intuitively, you are in control of what you choose. (Pettit 2006, 136)

A free person is a citizen in the fullest sense of the term: a person who is free by virtue of being an equal and an equally protected member of a polity shared with others who occupy a similar position.

### **Republican freedom and disability: *dominium* and *imperium***

Institutionally, republicanism calls for robust protection against the power of individuals or groups to interfere in our lives without due regard for our avowable interests. Failure to do so constitutes domination, expressed in two main forms: *dominium* and *imperium* (Pettit 2001, 152ff).<sup>7</sup>

*Dominium* refers to situations where certain individuals or groups retain the systematic ability, often mediated in complicated ways through social structures and state institutions, to arbitrarily interfere with the lives and plans of others. We only have to think about the many ways in which disabled citizens are socially discriminated against through a combination of norms, expectations, cultural frameworks and established rules or conventions to appreciate the widespread existence of *dominium* in the lives of disabled citizens.

One of the most important ways in which *dominium* manifests itself is by regulating (access to) the workplace. To date, despite considerably legislative effort, employment participation by disabled workers lags behind those of their non-disabled colleagues in both times of economic growth and recession (Stein 2000; Barnes and Mercer 2005). Disabled people still face considerable structural problems entering the labour market (Barnes 2000; Russell 2002). All too often, 'the types of jobs offered to disabled people are low status, low waged occupations with poor working conditions and few opportunities for advancement' (Barnes 2000, 450). Even where decent jobs are on offer, disabled workers continuously face the problem of normal expectations and the implied assumption that, even with reasonable accommodations, disabled workers are less productive. Employers and those representing business interests typically fail to appreciate that relatively few disabled people require major accommodations; that many of the accommodations that disabled people do require are not costly in themselves; or that accommodations often benefit the workplace more generally through spillover effects and are thus 'rational' in a strict economic sense (Stein 2000).

Pettit (1997) argues that combating domination requires significant state action, but this in turn introduces the substantial risk that the state and its subordinate institutions and policies themselves become agents of domination by failing to take into account the avowable interests of disabled citizens. Such domination originated in the state is called *imperium*, and unfortunately the problem is rife when it comes to disability. The arbitrary interference of state bureaucrats of all sorts in the lives of disabled people has taken on pandemic proportions, often producing unacceptable forms of exclusion. It is symptomatic that disabled citizens are systematically under-represented in political institutions, which not only implies a failure of the democratic state to attend to a requirement of democratic presence (Phillips 1995) but has profound effects on disabled citizens' power to shape the policy agenda (Witcher 2005).

*Imperium* also features prominently in the legal system, even in those parts of the law specifically designed to protect disabled persons. According to some critics, one of the most significant pieces of legal protection of disability rights, the Americans with Disabilities Act, has failed to deliver on its promise since for disabled people to enjoy protection under the law they must first establish that the law applies to them (Pickering Francis and Silvers 2000). There exist numerous cases where disabled people failed to obtain proper protection in large part because the legal categories were construed in a narrow sense, and consequently many disabilities were left outside the scope of the law (Kelman 2000). The Americans with Disabilities Act experience demonstrates the extent to which well-intentioned political legislation may be thwarted by the perspectives and actions of another powerful branch of the state, the courts and associated legal institutions.

The experience of domination suffered by disabled citizens, as recorded by disability rights activists and disability studies scholars (Charlton 1998; Oliver

1988, 1990; Silvers, Wasserman, and Mahowald 1998), corresponds well to the two modes of domination – *dominium* and *imperium* – analysed by Pettit. Employing the criterion of freedom as non-domination as a diagnostic tool, republicans hold that disabled people have a core interest in living their lives in accordance with their own values, interests and reasons, protected from arbitrary interference from other individuals as well as the state. Disabled people will naturally want to live their lives to the fullest of their capacities, which requires real opportunities to participate in the polity in a form and to the extent they themselves choose. In all of these things, disabled people are assumed to be no different from non-disabled persons: all citizens, disabled or not, equally aspire to be maximally free agents and citizens. This shared foundation of moral, social and political equality – one we believe is affirmed by the bulk of disability activism and scholarship – is what underlies the republican diagnosis of disability disadvantage.

### Republican rights as remedies

A republican theory of freedom diagnoses disabled individuals as being under threat of domination by the non-disabled majority and by the state. Countering such domination in the personal and public sphere in turn requires a robust set of institutional remedies. This section sketches in outline three broad types of rights that follow quite naturally from adopting a republican perspective on disability.

#### *A right to social participation*

A republican perspective insists that disabled citizens are granted robust access to the public sphere, and are in no way marginalised or rendered invisible as was historically often the case. Such a republican requirement of participation supports strong anti-discrimination legislation as well as positive accommodation measures that enable disabled persons to participate in the social and political life of a modern citizen. As such, this appears to offer little new. However, in our view a republican perspective amounts to a novel and robust vindication of such legislation by reconstituting the interests and concerns of disabled persons as those of dominated citizens, a genuine moral affront in a republican society.

Discrimination on grounds of disability in any social sphere – be it employment, education, health, sexuality or, indeed, politics itself – is an obvious source of domination, and therefore must be outlawed on republican grounds. The discriminated citizen suffers an uncontroversial instance of arbitrary interference whenever she fails to obtain a goal in life merely by being singled out because of her impairment. For republicans what is socially harmful is not differential treatment as such, but the increased vulnerability to arbitrary interference or domination that inevitably accompanies discrimination. Negative discrimination on the basis of a physical, cognitive or emotional impairment clearly renders a person vulnerable to domination by others (and the state). On the other hand, positive discrimination of those requiring special accommodation to enable them to participate on equal terms with other citizens has no such negative effect: differential treatment here is not merely permissible, it is required.

This means that a republican right of participation in principle sanctions extensive measures of accommodation, no matter how costly to society at large, to safeguard the republican freedom of all its citizens (disabled and non-disabled



alike). In practice, the precise form and scope of accommodation will require balancing a number of practical policy concerns, such as negotiating competing claims from distinct vulnerable groups (including different disability groups with their own specific demands). Disagreement about the particulars of disability accommodation does not imply that we fail to respect the republican requirement of participation; it merely reflects the fact that implementing a general goal can be achieved through different practical measures, and reasonable disagreement about those at the level of detailed policy proposals is the hallmark of a vibrant polity.

The goal of participation nevertheless sets robust principled boundaries on the scope and form of substantive disagreement about reasonable accommodation. For instance, when the value of a particular option is negatively affected by its policy format (say, by requiring the recipient to submit to intrusive acts of ‘shameful revelation’ in order to obtain a particular form of assistance), this inherently affects a disabled citizen’s avowable interests. Republicans therefore must pay close attention to the precise manner in which a policy is instituted, and not merely to the formal options it delivers. Similarly, a form of accommodation that is less secure because its successful implementation depends on the discretion of external agents (e.g. social workers) may rightly be challenged by disabled citizens on republican grounds. After all, for republicans the mere possibility of interference is sufficient to threaten republican freedom. What this means in practice is that republican political theory significantly favours policy options that offer disabled citizens as much individual control as possible.

It follows that republicans question the continued existence of quasi-institutionalisation, where disabled citizens continue having to rely on services inside institutions for lack of appropriate support within their own homes and communities. The disability movement has rightly focused much of its attention in recent years on advocating service models that leave the disabled client in charge of the terms under which a service is acquired and used. A well-known example is the use of direct payments allowing service users themselves to contract service providers for a variety of forms of assistance (Carmichael and Brown 2002; Pearson 2000; Riddell et al. 2005; Hassler 2004). While this model is not a panacea, the extent of republican control it offers disabled clients in a key dimension of their lives is hard to fault.

### *A right to civic contribution*

For republicans a vibrant polity is not merely a framework ensuring that citizens’ freedom as non-domination is respected. There is a strong, albeit controversial, strand within republican political thought suggesting that in a republican polity citizens affirm a particular conception of the ‘good political life’ (Dagger 1997; Honohan 2002). This civic strand envisages that citizens engage in active politics not merely to instrumentally protect their own republican freedom, but because they assign independent value to the political act of jointly constituting the republican society.

This perspective bears a close relationship with the work of Anita Silvers (1998; Silvers and Pickering Francis 2005, 2009), who in the past decade has argued that social justice for disabled individuals requires granting disabled persons equal opportunities to contribute to society. In our modern society, she argues, ‘[t]he dominant institutional infrastructure for productive interaction determines who will

and who will not be disabled' because 'the dominant cooperative scheme sets the demands that social participants must satisfy' (Silvers 1998, 108). Some philosophers have insisted that efficiency considerations – in part driven by the dynamics of the majority–minority numbers game – offer sufficient reason to accept the terms of the current cooperative arrangement, even where these actively serve to deny disabled citizens the full capacity to contribute (Buchanan 1996). Silvers (1998, 109ff) disagrees and counters that there is no reason to accept the idea that a dominant cooperative scheme is efficient merely because it is dominant. Facile references to 'efficiency' commonly mask ignorance and special interests on the part of dominant groups, who fail or stubbornly refuse to consider alternative ways in which optimising alternatives may be instituted.

Silvers continues her argument, stating that '[t]he state has an interest in protecting people with disabilities, one predicated not on their being weak and incompetent but rather on their having been arbitrarily, incorrectly, or unfairly excluded from contributing their strengths and talents to the community' (1998, 112). This is grist to the republican mill. If civic contribution is held to be a crucial aspect of being a citizen, republicans must insist the state ought to seriously address any obstruction (or lack of real opportunity) that 'disables' citizens in this dimension.

There are several good reasons to think that civic contribution is indeed of sufficient importance to citizens, disabled and able-bodied alike, to warrant strong enabling measures. For starters, to not have the capacity to contribute to the collective project of the polity is to be effectively relegated to the status of a second-class citizen. The precise form of civic contribution matters less than the fact that whatever contribution is made is regarded as a genuine civic contribution – and certainly that whatever contribution someone is willing to make is appropriately supported and not actively frustrated (Kittay 2005).

In addition, when the nature of the impediment for civic contribution of disabled citizens takes the form of structural constraints, this constitutes an 'intervention' in the strict sense of the term. For republicans, such intervention is only justified on terms that take appropriate account of the avowable interests of the person interfered with: it is hard to imagine cases of systematically denying disabled citizens opportunities to contribute that would fit this criterion.

Relatedly, republicans are committed to changing any impediments on disabled citizens' ability to contribute that are arbitrary in the republican sense: that is, impediments that take little or no note of the reasons why disabled citizens may want to contribute to a society in a form that fits their capacities. To put it in simple terms, who are we to deny disabled citizens their desire to contribute to society – and their reasons for doing so – by regarding these desires (or reasons) as irrational or flawed? If a large number of non-disabled citizens, for whatever reason, take pride in being full contributing members of society, ignoring similar motivations of the disabled, and denying them the same opportunity to act on their respective views of civic contribution, constitutes a clear case of republican *unfreedom*. A republican polity is a cooperative arrangement that allows each citizen to express her 'civicness' in line with her own abilities, and safeguards her capacity to do so.

### *A right to democratic contestation*

When the requirements of participation and civic contribution are robustly enshrined in a republican polity, disabled citizens will be reasonably well protected from

forms of *dominium* as well as *imperium*. Many would nevertheless regard this as insufficient, however, and republicans also insist on a further procedural remedy in the form of a right to democratic contestation.

The philosophical foundation underlying this idea has been developed in Philip Pettit's republican ideal of a contestatory democracy (Pettit 1999, 2000, 2012). For Pettit democratic decision-making cannot merely rely on electoral systems but also requires mechanisms by which citizens can contest decisions taken between electoral rounds. Where electoral systems bind citizens to policies initiated by representative candidates, contestatory democracy offers a much more fine-grained system of individual citizens (dis)approving collective decisions or actions.

This model of contestatory democracy fits well with key concerns of the disability rights movement (Charlton 1998; Oliver 1990). Contestation mechanisms importantly shift the balance of decision-making back to a state where disabled people are not mere recipients of policy, as in the social welfare model, but are instead regarded as genuine political partners in policy design and delivery. Democratically speaking, being able to challenge decisions is an apt way of making oneself visible (and audible), and therefore rightly regarded as amongst the most important political rights. In addition, effective contestation ensures that public policy, and state action more generally, remains firmly grounded in the avowable interests of disabled citizens by introducing a politics of presence into disability policy and legislation (Phillips 1995). For republicans, securing accommodation and support is not all that matters; of equal importance is the symbolic value expressed in how disability accommodation is organised, and in particular the extent to which this in turn expresses the values of respect and dignity associated with citizenship status.

The goal of contestation requires that disabled citizens are given genuine political power over a policy agenda that will likely affect their lives in profound ways – specifically, the power to challenge or even veto particular policy proposals. This may require instituting particular legal remedies, such as a 'justiciable right to challenge' (De Wispelaere and Walsh 2007), whereby disabled citizens are granted access to legal mechanisms that enable them to challenge every aspect of the process leading up to a particular disability policy, including needs assessment, decisions over resource allocation and the organisational structure underlying disability support services, and the implementation of disability support (notably the quality or timeliness of policy implementation). In some cases this may imply disability administrators instituting internal review or complaints procedures, but ultimately it is envisaged that a robust contestation mechanism will only operate effectively when backed by the full power of the law (De Wispelaere and Walsh 2007).

Disability scholars have expressed legitimate concern about the accessibility of legal remedies for disabled persons, so careful attention must be given to matters of practical design:

Taking action to gain redress for a grievance always requires knowledge, support, confidence, energy and staying-power. Due process is complex and frequently time-consuming. Worthwhile outcomes cannot be guaranteed. These issues, problematic enough in any circumstances, are likely to be magnified for many people with impairments. (Clements and Read 2005, 23)

It follows that the institution of robust advocacy services for disabled citizens who face severe difficulties accessing legal remedies is essential (Clements and Read

2003). Amongst disability rights activists and scholars, there exists understandable scepticism about the capacity of legal action to bring about social change (Engel and Munger 2003; Roulstone 2003; Runswick-Cole 2007), but it is important to keep in mind that a justiciable right to challenge is but one of many mechanisms aimed at safeguarding the freedom as non-domination of disabled citizens. Its success depends crucially on operating effectively and efficiently in conjunction with other republican remedies.

Nevertheless, republicans firmly believe there are distinct advantages to granting citizens a justiciable right to challenge (De Wispelaere and Walsh 2007). A contestatory mechanism, such as the justiciable right to challenge, robustly ‘tracks’ reasons for making a policy decision on disability accommodation. The arguments informing this decision are in the public domain and can be traced through the various stages of the decision process. Such a perspective fits very well with recent work in political philosophy that emphasises the crucial importance of publicity and public reason in the justification of social practices (Rawls 1996; Gutmann and Thomson 1996). A justiciable right to challenge ensures that relevant reasons for decision-making are open to public scrutiny, which will restrict the use of reasons to those that are acceptable to a wider constituency. This mechanism counters the sort of technocratic reasoning typically carried out by bureaucratic agencies – in many cases behind closed doors.

This process is likely to favour freedom as non-domination by creating a public space for giving (individual) disabled citizens’ avowable interests appropriate airing. Publicly available reasoning mediates between different perspectives and interests regarding reasonable accommodation decisions by insisting that arguments should be brought to the fore in an attempt to reach an acceptable compromise, or else a democratic way of agreeing to disagree. Contestation offers interesting opportunities for all parties to engage in an open debate on what type of accommodation a disabled person is entitled to, given important and legitimate competing claims on scarce resources. The justiciable right to challenge is best regarded as a mechanism that extends deliberation on disability accommodation into policy-making, a view that chimes with Anita Silver’s (1998) demand for a democratic theory of disability.

The justiciable right to challenge is characterised by a deep commitment to fair proceduralism. ‘Fair proceduralism’ sets itself apart from ‘substantive fairness’ in that outcomes are held to be fair because the procedure is fair, not because of the intrinsic properties of the outcome itself (Rawls 1996, 421ff). However, to safeguard robust republican freedom these procedures must ultimately deliver substantive outcomes. The contention of a republican form of fair proceduralism is that deliberation about reasons is in itself conducive (albeit not sufficient in all cases) to promoting republican freedom.

To those who believe procedural mechanisms are useless in this regard, the republican can offer several replies (De Wispelaere and Walsh 2007). First, the explicit recognition of disabled citizens as key participants in the process of deciding on appropriate accommodation policies in itself expresses an important republican value. Second, republicans can point at various plausible dynamics that will reinforce republican freedom under such a system: altering incentives of disability policy administrators who will want to avoid being challenged in the courts, the use of legal precedents as guidelines for best practices, information effects due to regular mutual engagement of different stakeholders, increased accountability and decreased administrative discretion because of the explicit requirement to motivate

the reasons behind decisions. With respect to the last point, we should not underestimate the importance of requiring administrative agencies to offer publicly acceptable reasons for making decisions for the promotion of democratic accountability and overall responsiveness of policy-makers. The persistent failure to offer reasons that are publicly acceptable is likely to trigger popular indignation, and anticipating this response offers an important administrative (and political) incentive to take the needs and views of disabled service users more seriously than hitherto.

While contestation can never mechanically produce a single 'correct' policy outcome – nor should it – we have good reasons to believe it will probably shift the balance in favour of many disabled citizens who are currently systematically excluded from having a say in disability policy. Although ultimately a procedural mechanism, republican political theory not only attaches important 'process value' to institutions that directly recognise and promote the equal political status of disabled citizens, but furthermore underwrites the instrumental importance of contestatory mechanisms for arriving at a substantively just outcome; a republican polity in which disabled citizens can live their lives free from domination.

### Conclusion

Disabled citizens all too often lead restricted lives and they suffer significant disadvantages associated with being disabled. This fact has been documented for many decades by the disability movement and is further analysed in disability studies. Contemporary political philosophy, however, has largely lagged behind in capturing this reality. Competing accounts of what we are owed to each other as a matter of social justice have failed to include disability concerns in their respective theories. In fact, they typically proceed by explicitly assuming the normal bodily, cognitive and emotional functioning of the subjects of social justice, pushing disabled persons to the margins. This situation requires urgent rectification. While political philosophers have started to examine how to put disability at the centre of a theory of social justice, the theories that lend themselves straightforwardly to such accommodation are scant and many require extensive revision.

In this article we suggested that a republican perspective, which gives central place to living one's life free from domination, offers good prospects for taking disability seriously. On the one hand, republicanism can ground disabled persons' interests on a similar philosophical foundation as that of the non-disabled majority. For republican political theory argues that disability disadvantage constitutes a genuine problem of justice understood as a failure to secure disabled persons' freedom as non-domination, a fundamental human interest that disabled and non-disabled citizens share alike. On the other hand, republicanism proscribes institutional remedies that fit well with the main concerns of disability rights activists and thus pay careful attention to the specific ways in which disabled citizens' republican freedom is threatened. In line with important insights gleaned from the disability studies literature, republicans appreciate that the spectre of domination has many faces, from *dominium* (by others) to *imperium* (by the state), which in turn requires carefully designing a set of remedies aimed at safeguarding disabled citizens being able to live a life of their own. To be sure, the development of a republican political theory that adequately responds to the many complex challenges surrounding how citizens experience disability requires a lot of work. But in our view, republicanism offers the building blocks for constructing a suitably 'crippled' theory of freedom

and justice (McRuer 2006), and this article aims to contribute to the rethinking of the complex relationship between justice and disability disadvantage in political philosophy and disability studies alike.

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### Notes

1. Contractualism is an approach in contemporary political theory (typically associated with the work of John Rawls) which argues that we should understand a just society as governed by the agreement of free and equal parties in a social contract.
2. Capability theory is a political theory associated with the work of Amartya Sen and Martha Nussbaum, which argues that a just society should focus on individuals' real opportunities to do and be what they have reason to value.
3. Non-domination is a type of freedom in which a person is considered free when she is protected against the mere possibility of arbitrary interference by others.
4. Republicanism is a tradition in western political thought that shares several common ideas, such as the importance of civic virtue and political participation; in its contemporary variant, the paramount republican value is political liberty.
5. Republican freedom is a form of political liberty understood as the absence of arbitrary power or alien control.
6. Non-interference is a type of freedom in which a person is considered free when she is not actively interfered with in her choices by others.
7. *Dominium* is the systematic arbitrary interference by private agents in the choices of an individual. *Imperium* is the systematic arbitrary interference by the state and its associate structures (e.g. the legal system) in the choices of an individual.

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