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A Civic Republican Analysis of Mental Capacity Law

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Abstract: This article draws upon the civic republican tradition to offer new conceptual resources for the normative assessment of mental capacity law. The republican conception of liberty as non-domination is used to identify ways in which such laws generate arbitrary power that can underpin relationships of servility and insecurity. It also shows how non-domination provides a basis for critiquing legal tests of decision-making that rely upon 'diagnostic' rather than 'functional' criteria. In response, two main civic republican strategies are recommended for securing freedom in the context of the legal regulation of psychological disability: self-authorisation techniques and participatory shaping of power. The result is a series of proposals for the reform of decisional capacity law, including a transition towards purely functional assessment of decisional capacity, surer legal footing for advanced care planning, and greater control over the design and administration of decision-making capacity laws by those with psychological disabilities.

Should the legal capacity to decide for oneself be dependent upon mental capacity? For example, ought it be legally permissible to make decisions for others if their own decision-making abilities seem to be curtailed by dementia or depression? Supporters claim this ensures respect for choices people are able to make competently, while protecting them when poor mental health or cognitive disability impairs their decision-

making.¹ Whereas opponents maintain that this would deprive people with mental disorders or cognitive disabilities of the same legal capacity enjoyed by others.² In the wake of the UN Convention on the Rights of Persons with Disabilities, which requires “that persons with disabilities enjoy legal capacity on an equal basis with others in all aspects of life”, these opponents have proposed dismantling or radically truncating legal structures that allow decisions to be made for others which depart from their will or preferences.³ However, this invites the objection that it would expose many people with psychological disorders or disabilities to significantly greater self-neglect, risky behaviour, and exploitation by others. Thus, we find ourselves at an impasse: opponents of deciding on behalf of others identify problematic discrimination and paternalism, while its supporters object that the alternatives involve an intolerable risk of harm to individuals when they are at their most vulnerable.

No easy resolution to this conflict is in sight, nor do I propose one here. My aim is instead to shed light on a related cluster of problems with decision-making capacity legislation by using resources from the civic republican tradition of political philosophy.⁴ I contrast this civic republican approach to a liberal egalitarian tendency

¹ See J Herring and J Wall ‘Autonomy, Capacity and Vulnerable Adults: Filling the Gaps in the Mental Capacity Act 2005’ (2015) 35 LS 698.

² See A Dhanda ‘Legal Capacity in the Disability Rights Convention: Stranglehold of the Past or Lodestar for the Future?’ (2006) 34 Syracuse J.Int’l L.& Com. 34 p 460; G Quinn ‘Legal Capacity Law Reform: The Revolution of the UN Convention on the Rights of Persons with Disability’ in Centre for Disability Law and Policy, Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality (Galway: NUI Galway, 2011) p 41.

³ UN General Assembly, Convention on the Rights of Persons with Disabilities, Dec. 13, 2006, Art 12.

⁴ For an introduction to civic republicanism, see P Pettit *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); Q Skinner *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); I Honohan *Civic Republicanism* (London: Routledge, 2002). For relevant work on civic republicanism and health, disability, or legal capacity, see L Series *The Mental Capacity Act 2005 and the Institutional Domination of People with Learning Disabilities* (Doctoral

which is ubiquitous among existing defenders and detractors of mental capacity law alike. In particular, civic republican conceptions of domination allow us to identify forms of unfreedom generated by decision-making capacity legislation that go undiagnosed by even vehement critics who adopt an implicitly liberal egalitarian approach.⁵ These republican resources can explain how arbitrary social power arising from legal regimes premised upon capacity assessment can pose a threat to an individual's freedom even when it does not result in direct interference with their decisions.

We shall begin by unearthing the shared philosophical foundations of the existing discussions of decision-making capacity law, before outlining a distinctive civic republican framework which provides new purchase on these debates. The republican conception of liberty as non-domination will then be used to identify how arbitrary power grounded in the legal regulation of psychological disability can give rise to relationships of servility and insecurity. It also provides an independent basis for

thesis) (Exeter: University of Exeter, 2013) ch 2; J De Wispelaere and D Casassas 'A Life of One's Own: Republican Freedom and Disability' (2014) 29 *Disability & Society* p 402; T O'Shea 'Disability and Domination: Lessons from Republican Political Philosophy' (2015) *Journal of Applied Philosophy* doi: 10.1111/japp.12149 p 1; T O'Shea, 'Civic Republican Medical Ethics' (2017) 43 *Journal of Medical Ethics* p 56; A Arstein-Kerslake and E Flynn 'The Right to Legal Agency: Domination, Disability, and the Protections of Article 12 of the Convention on the Rights of Persons with Disabilities' (2017) 13 *Int J.L.C.* p 22; T O'Shea 'Civic Republican Disability Justice' in A Cureton and D Wasserman (eds) *Oxford Handbook of Philosophy and Disability* (Oxford: Oxford University Press, forthcoming). For a non-republican approach that nevertheless touches on some of the problems outlined here, see M Dunn, I Clare, and A Holland 'To empower or to protect? Constructing the "vulnerable adult" in English law and public policy' (2008) 28 *Legal Studies* p 234.

⁵ No judgement is made here about the extent to which contemporary civic republicans are faithful to the tenets of the classical republican tradition. The term 'republicanism' is instead here used to "designate the attempts by current political scientists, philosophers, historians, lawyers, and others to draw on this classical republican tradition, adapting and revising its various ideas, in the development of an attractive public philosophy intended for contemporary purposes." P Pettit and F Lovett 'Neorepublicanism: A Normative and Institutional Research Program' (2009) 12 *Annual Review of Political Science* p 12.

critiquing mental capacity assessments that rely upon ‘diagnostic’ rather than purely ‘functional’ criteria. In light of this analysis, we shall consider republican strategies for securing freedom in the context of decision-making capacity legislation, including democratic authorisation, self-authorisation, and participatory shaping of power. This will culminate in a defence of a ‘popular’ rather than ‘constitutional’ approach as the most promising civic republican set of resources for reform of decision-making capacity law. The conclusion recapitulates three normative recommendations emerging from this republican analysis: functional assessment of decisional capacity, increased advanced care planning, and greater participatory control over the construction and implementation of mental capacity law.

I – Liberal Egalitarian Approaches to Decisional Capacity

The fiercest critics of decision-making capacity legislation believe that “mental capacity can no longer serve as a proxy for legal capacity.”⁶ This legal capacity has been characterised as “a construct which enables law to recognise and validate the decisions and transactions that a person makes.”⁷ It thereby underpins the juridical accreditation of decisions such as those concerning medical treatment, research participation, financial transactions, and residence, insofar as acknowledging the legal validity of a decision implicitly depends on recognising the decision-maker as someone with the legal personality and authority to so decide. For a large range of decisions in the relevant jurisdictions, the legal capacity to decide currently requires possessing

⁶ M Bach and L Kerzner A New Paradigm for Protecting Autonomy and the Right to Legal Capacity: Prepared for the Law Commission of Ontario (Ontario: Law Commission of Ontario, 2010) p 58.

⁷ Oliver Lewis ‘Advancing Legal Capacity Jurisprudence’ (2011) 6 E.H.R.L.R. p 700.

sufficient psychological abilities.⁸ For instance, English law regarding adults, which shall be our main focus throughout, outlines conditions that permit deciding on another's behalf in their best interests on matters like whether they should undergo a medical procedure for a physical condition, continue to live with their family, or give a financial gift to a relative. Someone is deemed to lack capacity to decide for themselves when, due to an impairment or disturbance of their mind or brain, they are unable to communicate such a decision, or to understand, retain, or 'use or weigh' relevant information.⁹ It is measures of this kind which critics oppose when they deny that "the right to legal capacity is dependent upon, or equitable with, requisite mental/functional capacity."¹⁰ Let us call legal orders which institute or retain such requirements 'decisional regimes'.

The sundering of legal and mental capacity would have momentous consequences. Yet, this recommendation emerges from a surprisingly familiar liberal egalitarian framework. While liberal egalitarianism is a broad philosophical and political tendency rather than a single easily demarcated position, it is possible to present a stylised account of common assumptions made by its proponents.¹¹ The liberal egalitarian seeks to protect and promote individual freedom in the context of equal respect for each person. The primary liberal conception of freedom has been negative liberty: the absence of interference from others. Liberals also now commonly

⁸ More precisely, we might say that the possible use of legal capacity presupposes mental capacity in these cases, since some have argued that legal capacity can be held by someone and exercised for them by another they have previously appointed to do so, even when they cannot directly use it themselves. For discussion, see P Bieby 'The Conflation of Competence and Capacity in English Medical Law: A Philosophical Critique' (2005) 8 *Medicine, Health Care, and Philosophy* p 357.

⁹ Mental Capacity Act 2005, s 3(1).

¹⁰ Lewis, above n 7, p 700.

¹¹ For a more comprehensive survey, see D Glaser 'Liberal Egalitarianism' (2014) 140 *Theoria* 26.

champion personal autonomy in addition to negative liberty, aiming to cultivate the abilities and opportunities necessary for individuals to govern their own lives. It was once common to characterise autonomy in hierarchical terms: where, for example, someone is autonomous with respect to those first-order desires which they have a higher-order desire to be motivated by, such that they want to want to act on them.¹² Discussions of disability have more often foregrounded relational conceptions of autonomy, however, with less emphasis on the precise intra-psychological structures needed for self-government, and greater focus on the idea that self-government is not only compatible with benign relations of social dependence but often requires such social infrastructure.¹³ Supporters and opponents alike of decisional regimes typically accept these broadly liberal egalitarian commitments to the value of negative liberty, autonomy, and equal respect for persons.

We can distinguish opponents of decisional regimes in terms of their more uncompromising position on what equal respect for persons implies for how commitments to negative liberty and relational autonomy are understood. In particular, they believe that decisional regimes are too paternalistic towards those deemed to have

¹² This was originally proposed as an account of free will in H Frankfurt 'Freedom of the Will and the Concept of a Person' (1971) 68 *The Journal of Philosophy* p 5. For an introductory overview of philosophical challenges to it, see J Taylor 'Introduction' in *Personal Autonomy: New Essays on Personal Autonomy and Its Role in Contemporary Moral Philosophy* p 1. For reasons to resist hierarchical and related procedural accounts of autonomy in the context of debates over mental capacity, see F Freyenhagen and T O'Shea 'Hidden Substance: Mental Disorder as a Challenge to Normatively Neutral Accounts of Autonomy' 9 *Int. J.L.C.* p 53.

¹³ For an overview of this approach in philosophy, see C Mackenzie and N Stoljar (ed) *Relational Autonomy: Feminist Perspectives on Autonomy, Agency and the Social Self* (Oxford: Oxford University Press, 2000), and for a critical review of its use in discussions of decisional capacity law, see L Series 'Relationships, Autonomy and Legal Capacity: Mental Capacity and Support Paradigms' (2015) 40 *Int'l J.L.& Psychiatry* 80. See also C Kong *Mental Capacity in Relationship: Decision-Making, Dialogue, and Autonomy* (Cambridge: Cambridge University Press, 2017).

a disorder or disability, by striking a mistaken balance between respecting their freedom and protecting their welfare.¹⁴ As Gerard Quinn has claimed in this context: “Equality of respect means extending to persons with disabilities the same expansive latitude allowed to others to shape their own lives and make their own mistakes.”¹⁵ When this latitude is different for people with and without disabilities, then these critics believe that the latter will, unjustifiably, not enjoy legal capacity on an equal basis with the former.

Decisional regimes are therefore accused of being inegalitarian for imposing excessively onerous and rationalistic criteria for permitting people to make decisions for themselves.¹⁶ This is thought to restrict the freedom of people with psychological disorders or disabilities in an unequal fashion, since requiring significant abilities to understand, recall, reason, and communicate will often mean preventing them from exercising legal capacity to the same extent as other people. Thus, these radical critics deny that, within an egalitarian framework, the extent of an individual’s functional capacities to decide should determine whether they possess legal capacity. For example, Bach and Kerzner propose that we reject tests of individual functional capacities to “understand information and appreciate the nature and consequences of a decision”.¹⁷ In the absence of these functional abilities, does any recognisable will or preference remain to be honoured? Bach and Kerzner take a significantly less demanding standard

¹⁴ G Quinn, ‘Seminar on Legal Capacity: An Ideas Paper’ in Centre for Disability Law and Policy, Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality (Galway: NUI Galway, 2011) pp 90-91; see also Bach and Kerzner, above n 6 p 167. Discussion of further objections can be found in E Flynn and A Arstein-Kerslake ‘Legislating Personhood: Realising the Right to Support in Exercising Legal Capacity’ (2014) 10 Int. J.L.C. 81.

¹⁵ Quinn, above n 14, p 93.

¹⁶ Bach and Kerzner, above n 6, p 60.

¹⁷ Bach and Kerzner, above n 6, p 66.

to suffice: best interest decisions are only to be countenanced when a “minimum threshold of human agency” goes unmet.¹⁸

Advocates of such alternatives to decisional regimes can make a plausible case to be pursuing liberal egalitarian desiderata of negative liberty and relational autonomy. Negative liberty in the context of disability has been characterised by Bach and Kerzner as “the absence of coercion, regulation and intervention by the state and other entities”.¹⁹ The recognition of legal capacity wherever a will or intention is discernable seems to protect this liberty because it acts as a juridical shield against attempts to non-consensually override or intervene in people’s decision-making. Opponents of decisional regimes also understand legal capacity more positively as a tool used to “express our selfhood [...] in the lifeworld – in the myriad of tiny daily transactions that make up who we are.”²⁰ The strong presumption of legal capacity is intended to shift our focus away from deciding for others and towards providing the social support needed to create the conditions in which each individual can develop, scrutinise, communicate, and enact their will or intention. Thus, in championing social relationships which promote effective self-expression, the radical liberal egalitarian not

¹⁸ Ibid: “This minimum threshold of human agency we might characterize as: to act in a way that at least *one other person who has personal knowledge of an individual can reasonably ascribe to one’s* actions, personal will and/or intentions, memory, coherence through time, and communicative abilities to that effect.” Furthermore, even if decisions are made for others in their best interest on this basis, Bach and Kerzner claim that such a “facilitated status would not define them as being ‘legally incapable’” Bach and Kerner, above n 6, p 92.

¹⁹ Bach and Kerzner, above n 6, p 40.

²⁰ G Quinn ‘Rethinking Personhood: New Directions in Legal Capacity Law & Policy’ in Centre for Disability Law and Policy, Submission on Legal Capacity to the Oireachtas Committee on Justice, Defence & Equality (Galway: NUI Galway, 2011) p 54.

only aims to reduce interference from others but also seeks a positive relational autonomy.²¹

Supporters of decisional regimes need not deny that negative liberty and relational autonomy are important goals. For example, they can claim that while the negative liberty of those with psychological disorders or disabilities is genuinely valuable, it is sometimes outweighed by welfare considerations. These supporters might also maintain that relational autonomy is similarly valuable but sometimes unachievable even with assistance from others if someone's psychological capacities are sufficiently inhibited by disorder or disability. In fact, there is evidence that each of these attitudes do animate decision-making capacity legislation. Consider the Mental Capacity Act 2005 in English law. While it can permit interference with negative liberty for the purposes of welfare, it still acknowledges the value of this liberty by requiring regard to be had to whether best interest decisions can be implemented in ways "less restrictive" of "freedom of action".²² Furthermore, it also requires that an individual "is not to be treated as unable to make a decision unless all practicable steps to help him to do so have been taken without success", thereby recognising both the possibility of relational autonomy and its potential limits.²³ Therefore, there are reasons to attribute liberal egalitarian conceptions of freedom to many opponents and supporters of decisional regimes alike, despite their disagreement as to whether a commitment to equal respect makes it appropriate to pursue both negative liberty and relational autonomy to the same extent irrespective of the effects of disorder or disability.

²¹ Bach and Kerzner, above n 6, pp 38-44.

²² Mental Capacity Act 2005 s 1(6).

²³ Mental Capacity Act 2005 s 1(3).

II – Liberty as Non-Domination

We have seen how liberal egalitarianism provides a conceptual and normative framework for understanding both sides of the current debate about decisional regimes. Indeed, it is sufficiently commonplace to have needed explicit philosophical excavation to render it visible. Yet, liberal egalitarianism is not the only way to approach the relationship between decision-making and legal capacity. I shall argue that hitherto unexploited resources from the civic republican tradition enable us to tighten our grip on problems produced by decisional regimes and point towards potential solutions to those problems.

We can begin with prominent republican conceptions of freedom, which identify liberty with non-domination. For someone to be dominated is for them to be “dependent on a social relationship in which some other person or group wields arbitrary power over them.”²⁴ Two features of civic republican accounts of domination are especially noteworthy. The first is their modal articulation: liberty can be diminished by the capacity to exercise power and not simply when that power is actually exercised. The second feature is that domination arises only from arbitrary power. This arbitrariness is sometimes understood minimally as the absence of reliable constraints on power by rules and procedures which are common knowledge.²⁵ For our purposes, however, arbitrariness is understood more substantively. Social power is arbitrary insofar as it can be exercised over someone on an unequal basis through another agent’s uncontrolled or unaccountable will. We see both modal and arbitrariness dimensions in Cicero’s discussion of slavery: “the most miserable feature of this condition is that, even if the master happens not to be oppressive, he can be so

²⁴ F Lovett *A General Theory of Domination and Justice* (Oxford: Oxford University Press, 2010) p 2.

²⁵ Frank Lovett ‘What Counts as Arbitrary Power?’ (2012) 5 *Journal of Political Power* 137.

should he wish.”²⁶ The master dominates because his power over the slave is controlled by nothing other than his own choice (or arbitrium).

Civic republicans often construe the power involved in domination in terms of the capacity to interfere on an arbitrary basis with the decisions of another.²⁷ This throws the contrast between non-domination and negative liberty into sharper relief. Domination is compatible with the presence of negative liberty because someone can be vulnerable to arbitrary interference even in the absence of actual interference (e.g. slaves whose masters happen not to interfere). Conversely, someone can have their negative liberty infringed without being dominated, because the interference with them can avoid arbitrariness (e.g. citizens whose states impose fair and democratically controlled taxation). Liberty as non-domination is therefore distinct from negative liberty.²⁸

Why is domination without actual interference problematic? The first reason is that those who are at the mercy of others suffer an affront to their social status: they are subordinated to others irrespective of whether this leaves them materially harmed. In addition, domination can foster two politically salient psychological harms: the fearful uncertainty which arises from not being assured that one will avoid interference, and the servility that can develop in an effort to actually forestall it. Recall Cicero’s example of the non-oppressive master. While he does not directly interfere with the slave’s

²⁶ Cicero quoted and translated in Quentin Skinner ‘Classical Liberty and the Coming of the English Civil War’ in M van Gelderen and Q Skinner (eds) *Republicanism: A Shared European Heritage: Volume II* (Cambridge: Cambridge University Press, 2002), p 10, emphasis mine.

²⁷ Pettit, above n 4, p 52; C Laborde *Critical Republicanism: The Hijab Controversy and Political Philosophy* (Oxford: Oxford University Press, 2008) p 11.

²⁸ However, see the debates in C Laborde and J Maynor (eds) *Republicanism and Political Theory* (Oxford: Blackwell, 2008), part I. For a response from a civic republican approach to disability, see O’Shea, above n 4, pp 6-8.

choices, she faces pressure to ingratiate herself with him nonetheless, since her actions are conditional upon him not changing his mind.

III – Sources of Domination in Decisional Regimes

Do decisional regimes generate domination? An initial cluster of concerns surrounds the latitude granted to decisional capacity assessors and those deciding on behalf of others. This is manifested in their leeway with respect to whether to exercise their powers to assess or decide for others, the interpretation of rules determining who lacks decisional capacity and how to decide on their behalf, and the translation of these rules into judgements about particular individuals. Each creates an opening for alien control – even in the absence of actual interference.

Civic republicans aim to ensure that “non-interference you enjoy at the hands of others is not enjoyed by their grace and you do not live at their mercy”.²⁹ This security against arbitrary interference can be eroded when decisional regimes grant powers rather than impose duties to assess decisional capacity and to decide on behalf of incapacitous others. Granting powers allows a choice to be made as to whether authority that could be exercised will be exercised. This is not a de facto power to flout the law but rather an ability that the law permits a range of people to use without obliging them to do so. Admittedly, the discretion enabled is not entirely arbitrary, since it is democratically delegated, often accompanied by forms of professional oversight, and limited to initiating assessment and decision-making procedures that are themselves legally circumscribed. Significant control can nevertheless rest with those whose forbearance averts a process that may impose decisions upon someone else.

²⁹ Pettit, above n 4, p 71.

Consider a social worker who chooses not to pursue nascent doubts about an elderly woman's capacity to decide where to live. Since the woman is beholden to the inclinations of another, then her freedom is diminished irrespective of any actual interference. If she actively fears being compelled to move to a care home, then her unfreedom can also create the kinds of insecurity and pliancy that republicans identify: she cannot be confident about what will happen to her, and she has incentives to keep in the social worker's good graces. Note the somewhat perverse effect whereby, in such cases, greater dependence on the will of the powerful is generated when the unwanted intervention is merely possible than when it will necessarily take place.

In addition to discretion over whether to initiate the assessment process, another potential source of arbitrary power is the indeterminacy of decisional legislation. Both legislation and case law do attempt to provide clear criteria for analysing concepts like decision-making capacity. For example, we have seen that English law analyses someone's inability to make a decision into an inability "(a) to understand the information relevant to the decision, (b) to retain that information, (c) to use or weigh that information as part of the process of making the decision, or (d) to communicate his decision."³⁰ However, the meaning and implications of these criteria remain highly contested. To take one recently debated example: when, if at all, does an anorexic with

³⁰ Mental Capacity Act 2005 s 3(1). Similarly, the landmark MacArthur study of decision-making competence of patients in state law in the U.S. has identified four related (albeit not identical) necessary conditions for decision-making capacity: "understanding information relevant to their condition and the recommended treatment, reasoning about the potential risks and benefits of their choices, appreciating the nature of their situation and the consequences of their choices, and expressing a choice." T Grisso, P Appelbaum and C Hill-Fotouhi 'The MacCAT-T: A Clinical Tool to Assess Patients' Capacities to Make Treatment Decisions' (1997) 48 *Psychiatric Services* p 1415. See also the presentation of the legal and clinical results of the MacArthur study in T Grisso and P Appelbaum *Assessing Competence to Consent to Treatment: A Guide for Physicians and Other Health Professionals* (Oxford: Oxford University Press, 1998).

high-functioning cognitive abilities become unable to use or weigh relevant information in decisions about their caloric consumption? Do they lack this ability only once the formal validity of their reasoning about relevant information is impaired, or can being motivated by consistent but seemingly pathological values be sufficient to render them unable to use or weigh this information? Judgements on such matters continue to be deeply divided among psychiatrists and lawyers, as well as the non-specialist healthcare workers who must also interpret and apply the law.³¹

The main problem with this openness of decisional law from a republican perspective is that it can increase arbitrariness and decrease transparency in how power is capable of being exercised. Significant plasticity in the interpretation of fundamental concepts in decisional legislation provides greater leeway to those assessing or deciding for others to frame the law in ways most congenial to their favoured result. This then functions to increase the extent to which non-interference is enjoyed without confidence and by the grace of another.

Of course, the courts adjudicate in many situations where the law is unclear, and in doing so they develop the otherwise relatively thin conceptions of decisional capacity and best interests to be found in legislation and attendant codes of practice. Yet, considerable legal indeterminacy remains.³² Only a tiny fraction of the actions performed under the authority of decisional legislation can ever be directly scrutinised

³¹ J Tan, A Stewart, R Fitzpatrick and T Hope 'Competence to Make Treatment Decisions in Anorexia Nervosa: Thinking Processes and Values' (2006) 13 *Philosophy, Psychiatry, & Psychology* 267; Louis Charland 'Anorexia and the MacCAT-T Test for Mental Competence: Validity, Value, and Emotion' (2006) 13 *Philosophy, Psychiatry, & Psychology* 13:4 (2006) 283; T Grisso and P Appelbaum 'Appreciating Anorexia: Decisional Capacity and the Role of Values' (2006) 13 *Philosophy, Psychiatry, & Psychology* 293; J Tan, A Stewart, R Fitzpatrick and T Hope 'Studying Penguins to Understand Birds' (2006) 13 *Philosophy, Psychiatry, & Psychology* 341.

³² On the wider problem of legal indeterminacy, see T Endicott *Vagueness in Law* (Oxford: Oxford University Press, 2000).

in court, and scholars have observed how courts themselves “will take a flexible approach to the legal definition [of mental capacity] to enable them to reach their preferred outcome.”³³ Furthermore, the more determinate understanding of decision-making capacity and best interests which crystallises out of the judicial process under common law still allows considerable latitude in how the limits of power are construed. Again, significant room for manoeuvre in how power over someone might be exercised – here stemming from the indeterminacy of decisional law – can contribute to domination even when those with such power are inclined to protect negative liberty. If I can gloss the rules to make it more or less difficult for you to avoid interference, then our relationship is marked by an important imbalance in power and social status, whether or not I actually do so.

The final related concern is that particular applications of decisional capacity law can be underdetermined in practice even when its requirements are relatively clear in the abstract. Consider the commonplace principle that interventions made on behalf of people without decisional capacity must be made for their ‘benefit’ or in their ‘best interests’. The law may provide clear general guidance about these interests, such as that subjective happiness is to be privileged over health outcomes or reduction of risk. But translating this guidance into a determination of a particular person’s interests is a process which is difficult to codify, because it relies upon highly contextual judgements about the salient features of their life. For example, not only are the interests of a gregarious teenage girl with schizophrenia likely to differ from that of an ambitious but temperamental middle-aged man with pronounced autism, but simply determining what

³³ G Richardson ‘Mental Capacity in the Shadow of Suicide: What Can the Law Do?’ (2013) 9 Int. J.L.C. p 90.

these interests are in any specific case will involve fine-grained ethical and psychological judgements that others may not share.

Likewise, we know that assessors working with the same broad understanding of decisional capacity sometimes disagree among themselves in borderline cases as to whether someone is competent to make certain choices they face. The fine discriminations involved in much capacity assessment and best interest decision-making creates extra 'wobble room' with respect to the powers granted by decisional regimes. This adds an additional dimension of flexibility – further untrammelling the power to interfere and increasing its opacity – again potentially contributing to domination irrespective of whether it leads to increased interference.

We have encountered reasons to think that decisional regimes diminish freedom in ways not immediately identifiable by the negative conceptions of liberty that are adopted by their existing supporters and opponents. This is because the powers they establish to interfere with whole areas of decision-making are manipulable by those who choose whether to assess or impose decisions, how to construe general legal procedures for assessing and deciding, and how to apply these general procedures to particular individuals. As a cumulative effect, individuals authorised to assess and decide for others often possess a non-negligible degree of alien control over people deemed to be psychologically impaired. The very possibility of increased interference through these channels can be sufficient to generate insecurity and servility when nothing but the dispositions of capacity assessors and best interest decision-makers forestalls intervention.

Liberal egalitarian supporters of decisional regimes are likely to demur at the idea that scope for discretion in the triggering, interpretation, and application of decision-making capacity legislation constitutes a major problem. Other laws that can

result in interference also depend upon judgements which resist exhaustive codification – consider public interest tests for initiating criminal prosecution – where such flexibility helps avert perverse outcomes arising from a mechanical legalism. Furthermore, it may seem obtuse to be concerned about the manipulability of decisional legislation, given the assumption that most people in caring roles and professions are motivated much more by beneficence than any desire to use legal ambiguities to impose their own wills.

However, the prevalence and potential desirability of de jure or de facto legal discretion should not blind us to its attendant costs, which still need to be recognised, mitigated wherever possible, and carefully weighed against alternatives. Nor is it a decisive objection that significant discretionary power to interfere is present elsewhere in the legal process, since these other instances are also ripe for republican reevaluation. Moreover, the insecurity and servility which domination can engender is so insidious precisely because it is compatible with malice, indifference, and goodwill alike. In order to identify domination, we do not have to presuppose unkindly or callous holders of power. As Cicero demonstrates, the harms of domination are not contingent upon an express will to dominate: vulnerability to the dispositions of the presently non-oppressive is vulnerability all the same. The seventeenth century English republican Algernon Sidney was to underscore this idea when he remarked: “he is a slave who serves the best and gentlest man in the world, as well as he who serves the worst”.³⁴

IV – Diagnostic Criteria

³⁴ A Sydney Discourses Concerning Government (Indianapolis: Liberty Classics, 1990) p 441.

Domination can arise in decisional regimes not only from the problem of legal discretion but also from the form taken by decisional capacity assessment. Hybrid models – combining functional tests and diagnostic criteria – are one problematic kind of capacity assessment from a republican perspective. Functional tests seek to determine which decision-making tasks someone is currently able to perform. For example, can they understand enough relevant information about the nature and risks of a specific surgical procedure to be able to decide whether to consent? Diagnostic criteria seek to determine whether the failure to meet the requirements of a functional test are due to a psychological disturbance or impairment – such as delirium, intoxication, mental disorder, or intellectual disability. English law incorporates a diagnostic criterion insofar as decisional incapacity is only recognised when it occurs “because of an impairment of, or a disturbance in the functioning of, the mind or brain.”³⁵ While one might think that, by its very nature, decisional incapacity implies a disturbance or impairment, this condition is understood more robustly, such that a substantive diagnosable psychological problem is necessary, where cases like an inability to use relevant information simply because one happens to be angry or distracted do not count. In terminology resonant for civic republicans, it has been described as an assessment of a person’s “status”.³⁶

Liberal egalitarian opponents of decisional regimes will object to measures that rely upon a diagnosis of cognitive or psychosocial disability in apportioning legal status.³⁷ This is because the negative liberty of individuals with disabilities will be decreased disproportionately to others, and so there will be a failure to meet the

³⁵ Mental Capacity Act 2005 s 2(1).

³⁶ Law Commission Consultation Paper 128, *Mentally Incapacitated Adults and Decision-Making – A New Jurisdiction* (London: HMSO, 1993) para 3.11.

³⁷ Dhanda, above n 2, p 445.

stringent conception of equal respect for persons adopted by these opponents. In contrast, the civic republican ideal of liberty as non-domination allows us to offer a deeper account of the problems posed by diagnostic criteria in determinations of legal capacity.

We have seen that republicans take liberty to be compromised by the arbitrary power to interfere rather than by actual interference alone. Their primary goal will not be to ensure that people with psychological disabilities encounter no more interference than other people – since, in the right circumstances, interference can help protect people’s interests without being a fundamental affront to their freedom. For republicans, the problem with a diagnostic criterion will be that it subjects people with psychological disabilities to a power of interference on an unequal basis. Different constraints on the power of the state, and those the state empowers to interfere, will apply to people with psychological disabilities even when the extent of their decision-making abilities is the same or greater than those without a disability. This can contribute to relationships of personal and institutional domination even in the absence of actual interference. Consider the chilling effect upon the behaviour of someone who knows their authority to decide can be called into question in ways that the abilities of people without a disability cannot be. This unequal standard creates the conditions for a cautious and deferential attitude towards carers, healthcare staff, and social workers, who they must take extra care not to alienate in ways that other people with the same level of decision-making function do not.

Republicanism is also able to capture the sense in which a diagnostic criterion imperils the freedom which arises from an equal recognition of legal and social status (and not simply equal opportunities to act free from interference). Analytically distinct from any actual interference or increased vulnerability to interference for those who

meet the diagnostic criterion, it creates a differential social status between those capable of being deemed unfit to decide for themselves and everyone else. The traditional concerns here would be with stigmatisation and ‘othering’ of those with mental health problems or cognitive disabilities. However, civic republicanism allows us to identify an additional recognitive harm which threatens people’s freedom even more directly. This is because it accommodates the intuition that to find oneself symbolically relegated to a subaltern position can be an affront to one’s liberty. In this respect, some civic republicans appeal to a distinctive conception of the *liber homo*, whose freedom depends upon social recognition:

I am free when I am recognized by others as enjoying a status that resiliently protects me against arbitrary interference and guarantees my equal status as a citizen living in community with others.³⁸

Diagnostic criteria threaten recognition of equal social and legal status because of how they mark some people as different – subject to different rules and accorded different rights – not directly based on what they can do but on who or what they are deemed to be. Orthogonal to whether it actually impedes their decision-making, this introduces a symbolic form of subordination that action-centric negative liberty accounts are poorly placed to identify. Both the problems of discriminatory vulnerability and recognitive subordination support a transition to an entirely functional approach to decisional capacity assessment.

This civic republican account of diagnostic criteria also provides conceptual resources to make sense of the recommendations of the UN High Commissioner on Human Rights regarding the Convention on the Rights of Persons with Disabilities. We find the Commissioner denying that “persons with disabilities cannot be lawfully

³⁸ Laborde, above n 27, p 11.

subject to detention for care and treatment or to preventive detention”, while maintaining that “the legal grounds upon which restriction of liberty is determined must be de-linked from the disability and neutrally defined so as to apply to all persons on an equal basis.”³⁹ This strategy has the advantage of resisting the reification of disability into a distinct socio-legal status that attaches to a person on a continuous basis. Equality of status is conserved without this meaning that a difficulty in decision-making associated with an impairment can never restrict the use of legal capacity. The Roman influence on civic republican thought has made this political tradition particularly sensitive to status differentials that find expression in the law, and the egalitarian commitments of its more recent proponents militate against such legal codification of status even on an implicit basis. ‘De-linking’ promises to avoid these prohibitions so long as the law does not simply revert to a status or hybrid model when it is applied and enforced.⁴⁰ In either case, republican attention to unequal status rather than merely different outcomes provides tools to understand the problems raised by reliance on diagnostic criteria.

V – Two Objections to Domination by Decisional Regimes

Domination arising from legal discretion and compounded by diagnostic or hybrid capacity assessment may seem like grist to the mill of opponents of decisional regimes. However, these difficulties are not yet conclusive reasons to abandon decision-making capacity legislation, especially as various mitigation strategies are available. Can

³⁹ Thematic Study by the Office of the United Nations High Commissioner for Human Rights on enhancing awareness and understanding of the Convention on the Rights of Persons with Disabilities, A/HRC/10/48 (26 January 2009), para 49.

⁴⁰ For concerns about such reversion, see Dhanda, above n 2, p 445.

decisional regimes sufficiently avoid domination to remain justifiable public policies? We shall examine a number of ways in which these potential problems might be accommodated, focusing on the subjects of domination, and the democratic authorisation, self-authorisation, and participatory shaping of power.

An initial defence of decisional regimes focuses not on mitigation but rather on demonstrating that domination is not a live possibility for people with impaired decision-making. Indeed, it can seem downright paradoxical to object to powers to interfere with the decisions of people who are unable to make decisions. This might help to explain why leading contemporary civic republican theorists explicitly restrict their analyses of political freedom to citizens who are “able-minded”.⁴¹ However, such restrictions are misguided, and the subjects of decisional legislation are almost always at least potential subjects of domination. To this end, it is important to distinguish an ability to decide simpliciter from an ability to decide for oneself, competently, or authentically. For example, in *Re E*, a woman with anorexia nervosa, E, was found to be both intelligent and articulate, yet, in virtue of her anorexia, lacking in mental capacity to make treatment decisions about tube feeding.⁴² While in a basic sense E could and did decide – she had formed a clear and settled intention to refuse tube feeding – in a more demanding sense, whereby genuine decisions depend upon sufficient functional abilities to use or weigh relevant information, the court determined that she could not decide. This distinction defuses the paradox because domination arises from arbitrary power to interfere with decisions in the minimal sense, whereas

⁴¹ For example, see P Pettit ‘Freedom: Psychological, Ethical, and Political’ (2015) 18 *Critical Review of International Social and Political Philosophy* p 386 and P Pettit *On the People’s Terms* (Cambridge: Cambridge University Press, 2012) pp 75, 78, 87, 94, 130 and 138.

⁴² *Re E (Medical Treatment Anorexia)* [2012] EWHC 1639 (COP).

decisional legislation concerns the ability to make decisions in a more expansive and demanding sense.

In rare situations, such as comatose patients who have given no indication of their will, or for some affected by very pronounced cognitive disabilities, then it may no longer make sense to identify any relevant decisions or capacities for making them that could be dominated even in the minimal sense. However, these outliers do not prevent the vast majority of those with psychological disabilities being potential subjects of domination. But perhaps the fundamental thought goes further here: that it is simply unimportant to ensure decisions made without sufficient competence are undominated. If so, this is a normative rather than conceptual claim about domination, which ought to be kept analytically distinct from the latter. In other words, it would not affirm that domination of people lacking robust decision-making capacities was impossible, but only that such domination is comparatively unimportant when contrasted with the domination of people with these capacities. But this inegalitarian claim would stand in need of further argumentative support – especially to establish the stronger conclusion necessary to render republican liberty irrelevant, namely that domination of those without decision-making competence should be given no weight rather than relatively less weight.

Another objection holds that the democratic authorisation of power under decisional regimes renders it non-arbitrary, and therefore non-dominating, irrespective of the kind of control it places in the hands of others. Laws that one gives to oneself are not expressions of alien control, and as equal members of a democratic citizenry which has legislated a decisional regime for itself, then those subject to such laws would not be dominated by them. So understood, no arbitrariness arises from foreseeable features of administering the power to interfere – including hybrid regimes and the three

dimensions of legal discretion identified here – since no arbitrariness is present in the institution of this system.

The democratic rejoinder to concerns about domination arising from decisional capacity law can be challenged on several fronts. For people with psychological impairments, there is not formal democratic equality in many jurisdictions – for instance, people deemed to have diminished mental capacity around voting are denied proxy votes on this basis.⁴³ Additionally, the formal right to vote alone does not secure the material capabilities necessary to meaningfully exercise voting rights or participate in the wider democratic process of public debate and scrutiny of policy. Nor does the mere presence of these capabilities ensure sufficient control by people with psychological disabilities over powers to interfere with their decision-making. The problem of majoritarianism means that someone can possess an equal electoral and public voice without the guarantee of equal respect for their interests and worldview. Thus, what currently passes for democratic endorsement does not itself rule out the possibility of domination. On the contrary, the difficulties in securing genuinely inclusive democratic grounds for decision-making capacity legislation suggests that all the powers to interfere which it licenses will be somewhat arbitrary when its institution is not sufficiently controlled by those subject to it.

Let us suppose that remedies can be found for a lack of formal voting rights, capabilities for participation in public discourse, and majoritarian neglect for the interests and worldview of people with psychological disabilities. While this would be a welcome contribution to reducing domination, it is only a partial solution which does

⁴³ M Redley, J Hughes, and A Holland ‘Voting and Mental Capacity’ (2010) 341 *BMJ* p 466. For more extensive disqualification of voters on the grounds of mental disorder or incompetence in some U.S. states, see P Appelbaum ‘“I Vote. I Count”: Mental Disability and the Right to Vote’ (2000) 51 *Psychiatric Services* 849.

not resolve the problems of legal discretion and of hybrid assessment regimes. Classical republican vocabulary distinguishes domination arising from dominium and from imperium: the former concerns the power of citizens over other citizens, and the latter concerns the power of the state over citizens. While broad and inclusive democratising measures will help to combat imperium – the ways in which state power can confront citizens as a form of alien control – it does not fundamentally challenge dominium. Relationships between citizens which are marked by important elements of personal mastery and arbitrary power of some over others can obtain despite a macro-political context in which laws bolstering this power receive fulsome democratic support from citizens. Thus, it is too hasty to think that eliminating arbitrariness from the institution of decisional regimes will thereby eliminate domination arising from arbitrary power fostered in the administration of such regimes. We need to attend to the micro-political relationships between people with psychological disabilities and their families, friends, carers, and the health and social care workers with power over them, rather than pursuing a macro-political strategy of democratisation and inclusion alone.

VI – Advanced Care Planning and Republican Freedom

If democratic authorisation of power is not sufficient to combat domination in a way that recognises and remedies the problems of decisional regimes, then what other responses can republicans offer? Two complementary approaches that would seek to reduce the arbitrariness of power by increasing meaningful control over it are evaluated here. The first is the use of advanced care planning which is shaped by the care recipient – including, in extreme cases, the self-authorization of the use of coercive force. The second is participatory influence over implementing, scrutinising, and determining the necessary conditions for proxy decision-making.

Advanced directives are a familiar, much-vaunted, but relatively underused tool, which allow people to provide instructions for what decisions should be made when they can no longer decide for themselves.⁴⁴ This can involve a Ulysses structure in which someone engages in a form of social self-binding: soliciting resistance or constraint in advance when they believe that they may begin to act against what they take to be their long-term interests. A similar framework is found in advance care planning – involving pre-agreed policies and crisis cards that record what should be done when someone’s decision-making may deteriorate.⁴⁵ For example, for someone who anticipates a manic episode, this might involve them distinguishing conditions under which they should be left alone from conditions under which they should be made to do something they would no longer want to do (such as take their heart disease medication despite feeling invincible). Given the limited uptake and scope of advanced directives, then advance care planning could focus much more on decisional issues – both when to assess capacity, how decisional tests should be applied, whether there are individualised signs that someone is lacking or retaining capacity, in addition to what they believe should be done in each case. This would have both a clarifying role that reduces ambiguity and an authorising role that increases control over power.

Liberal egalitarians of both stripes can also endorse such measures as a means to increase people’s freedom; however, it can be difficult for them to provide a satisfactory account of how this happens. From the perspective of negative liberty, there are two ways to classify such measures. We could say that interference takes place but

⁴⁴ On the limits to their use, see R Jox, S Michalowski, J Lorenz and J Schildmann ‘Substitute Decision Making in Medicine: Comparative Analysis of the Ethico-Legal Discourse in England and Germany’ (2008) 11 *Medicine, Health Care and Philosophy* pp 153-4.

⁴⁵ See C Henderson, C Flood, M Leese, G Thornicroft, K Sutherby and G Szumkler ‘Views of Service Users and Providers on Joint Crisis Plans: Single Blind Randomized Controlled Trial’ (2009) 44 *Social Psychiatry and Psychiatric Epidemiology* 369.

that it is nevertheless justified by pre-authorisation. The problem with this analysis is that it entails that the person facing interference is being made less rather than more free – however warranted this unfreedom might be. Alternatively, we might claim that pre-authorisation ensures that any interventions do not count as genuine interference, and thereby do not infringe negative liberty. However, simply denying that there is any interference can be hard to maintain when someone is confronted with coercive force that they are currently vehemently rejecting. Thus, within the framework of negative liberty, it is hard to capture the idea that social self-binding can involve genuine interference with someone whilst still preserving or increasing their freedom.

The idea that advanced care planning can increase our freedom is more consonant with a relational autonomy approach which claims that active social supports can help secure individual freedom – perhaps even when such support takes the form of self-authorized friction or coercion. However, the appeals which liberal egalitarian opponents of decisional regimes make to relational autonomy are significantly underdetermined: it is suggested that social interventions can enable rather than thwart individual liberty, but a robust theoretical explanation of why these structures are freedom-promoting or freedom-preserving in a disability context is lacking.⁴⁶ Republican conceptions of freedom allow us to make this kind of relational autonomy intelligible.

Advanced care planning will be compatible with the ideal of non-domination when any potential interference it involves is not arbitrary. Happily, interference

⁴⁶ For such an underspecified appeal to relational autonomy, see Bach and Kerzner, above n 5, p 40. Hierarchical accounts of autonomy are also not well-placed to explain why advanced care planning enhances freedom, since they ascribe autonomy to a synchronic psychological relationship (such as one between desires and volitions). Respecting the wishes of the earlier self or otherwise giving it control over the social environment of the current self does not secure the appropriate concurrent psychological relationships in which autonomy is located.

emerging from such planning has an excellent claim to be non-arbitrary because the power to interfere – say, ensuring someone takes their medication when they no longer want to – will be controlled in ways that give due respect to a person’s judgements about their own interests. It is former rather than current judgements which are deferred to, which raises the question of whether a care plan agreed upon at one time can remain binding in perpetuity. Indeed, even presupposing a continuity of personal identity may be controversial here when the former and latter selves exhibit important psychological differences. Nevertheless, these metaphysical scruples aside, there is a strong intuitive case that when the social power to interfere is constrained by a plan authorised and shaped by a person who is seemingly the same as the one over whom the power is held, then such power will be amply non-arbitrary.⁴⁷ Therefore, it will not contravene the republican requirement for liberty as non-domination, even when genuine interference is exercised over someone in the execution of the plan.

Of course, advanced care planning is not always possible or appropriate. Someone may not have had an opportunity to agree a plan before a crisis situation arises – for example, if they are experiencing an unanticipated medication-induced psychosis. Similarly, situations may arise which an existing plan does not cover – such as whether to compulsorily treat a new medical condition that emerges during a period in which someone is already experiencing protracted problems making decisions. What then might be done to promote non-domination other than advanced care planning?

⁴⁷ Pettit offers an example with the same preauthorisation structure: “If I allow you to keep the liquor cabinet key or to hide my cigarettes, you still interfere with me when you act under that permission. But your interference will not be control or domination; the interference will be controlled or nonarbitrary.”

P Pettit ‘A Republican Right to Basic Income?’ (2007) 2 Basic Income Studies p 6.

VII – Participatory Strategies

Liberal egalitarian opponents of decisional regimes have sometimes recognised that when there is no-one who can interpret someone’s intentions or will then decisions concerning that person might need to be ‘facilitated’ by others.⁴⁸ Yet, even this facilitation would not seek an ‘objective’ best interest decision, instead being constrained by an “understanding of the person’s prior wishes, instructions and values”, with respect to what would benefit them and improve the quality of their life.⁴⁹ Other than the kind of self-binding directives which also feature in advanced care planning, no other kinds of deciding for others are treated as warranted.

In light of these restrictions on deciding for others, this latitudinarian approach to legal personality must confront some difficult cases – particularly those in which someone acts in ways that are both seemingly under the influence of an impairment and likely to be very detrimental to their long-term wellbeing. The response of some critics of mental capacity legislation has been to emphasise the importance of the ‘dignity of risk’, as well as to claim that in an “emergency situation”, in which “supporting the person’s wishes would constitute civil or criminal negligence”, then a supporter is permitted to act against these wishes.⁵⁰ However, civil or criminal negligence is a high bar, ruling in a great deal of self-harming behaviour, which the support paradigm not only requires others to tolerate but to actively assist in undertaking.

This should give us pause for thought. Can we retain decisional regimes that would lessen these problems, while simultaneously reducing domination, and doing

⁴⁸ Bach and Kerzner, above n 6, p 91.

⁴⁹ Bach and Kerzner, above n 6, p 93.

⁵⁰ Flynn and Arstein-Kerslake, above n 11, p 99. See also the discussion of “serious adverse effects” in Bach and Kerzner, above n 6, pp 130-58.

justice to the value of self-determination that animates liberal egalitarian critics of such regimes? I shall outline a participatory republicanism which, in broad outline, indicates how this might be achieved.

In Hannah Arendt's influential account of statelessness – in a line resonant for our own discussion of legal capacity – she tells us that “[t]he first essential step on the road to total domination is to kill the juridical person in man.”⁵¹ She is concerned with the “right to have rights”, where some commentators understand this to mean little more than a right to an effective state which will enforce an individual's other rights.⁵² However, this ignores the deeper republican strain in Arendt's political thought, which insists on the agency of a politically active citizenry that secures its own rights: “We are not born equal; we become equal as members of a group on the strength of our decision to guarantee ourselves mutually equal rights.”⁵³ In developing the idea of the right to have rights, Étienne Balibar concludes “no one can be liberated or emancipated by others, from ‘above,’ even were this ‘above’ to be right itself, or the democratic state”.⁵⁴ Whether we endorse the strong claim that emancipation must always be self-emancipation, the republican ideal of citizens participating in collective action to free themselves from domination is an attractive one, and it is likely to appeal to many who believe that current decisional regimes are not sensitive enough to the agency of those whose lives they shape.

To that end: how might a decisional regime move towards a republican form of participatory self-rule? It could start with the proposals mooted above to allow

⁵¹ H Arendt *The Origins of Totalitarianism: New Addition with Added Prefaces* (San Diego: Harcourt Brace & Company, 1973), p 447.

⁵² Arendt, above n 51, pp. 296 and 298.

⁵³ Arendt, above n 51, p 301.

⁵⁴ É Balibar ‘What is a Politics of the Rights of Man?’ in J Swenson (ed) *Masses, Classes, Ideas: Studies on Politics and Philosophy Before and After Marx* (London: Routledge, 1994) p 213.

individuals more input into shaping both how decisional assessment criteria are applied and how best interest decisions are made in their case. In addition, even when a finding of incapacity is made and an objective test of best interests is employed – which asks neither simply what the person wants or would have wanted were their decision-making capacities less diminished – then the individual can be given greater procedural control. For example, this might include powers to stipulate that certain people be excluded from the process, either as primary decision-makers or people whose views are solicited as evidence – such as a parent or care worker who the individual does not feel understands their needs.

At a macro-political level, people with cognitive disabilities and mental health problems could have a greater role in determining what the general conditions of decisional capacity are and how they should be applied in the context of certain impairments. This could entail greater contributions from advocacy groups in the drafting of legislation and codes of practice, in order to do more to reflect the experiences of those with psychological impairments, rather than predominantly psychiatric, psychological, and legal experts. For example, in determining if legal tests for decision-making capacity should be predominantly cognitive, or whether they ought to give more weight to emotional, evaluative, or motivational abilities, then those deemed to struggle to decide for themselves need to be given a greater role in informing the design and oversight of such tests, insofar as they are experts-by-experience in such matters and will be at the sharp end of inaccurate assessments.

While there is some input from affected groups through the ordinary democratic process of voting in elections, we saw how this is indirect and is diminished further by practical obstacles to political participation that can be encountered disproportionately by those with psychological impairments. Thus, providing greater scope for those most

affected by decisional capacity laws to scrutinise and help shape the construction of the relevant assessments and procedures for best interest decision-making would strengthen the degree to which the rules which govern people with psychological impairments are meaningfully fashioned by them.

VIII – Against Constitutional Republicanism

We have encountered various republican remedies to the problems of domination that arise in the context of decisional regimes. The self-authorisation involved in advanced care planning can render the power to interfere non-arbitrary, as well as reducing undue legal discretion by making it transparent under what conditions power will be exercised. In addition, an increase in participatory roles for people with psychological disabilities in the drafting, review, and post-legislative administration of the law also serves to bolster an indirect and collective form of control over how the criteria for making decisions for others are formed and understood. It thereby reduces arbitrariness in their institution as well as discretion over their interpretation.

The self-authorisation and participatory strategies recommended here are not the only possible civic republican tools for combatting domination. Contemporary republicans have often turned to constitutional and judicial remedies to arbitrary power. This includes provision for judicial review, ombudsmen, and expert commissions with powers of redress when citizens face domination. What has been called ‘constitutional republicanism’ has sought an unelected apparatus of this kind to act as a check on an excessive and majoritarian popular power.⁵⁵ Whatever the merits of this approach to political governance as a whole – I, for one, remain sceptical – this is not a set of

⁵⁵ L Hamilton *Freedom is Power: Liberty Through Political Representation* (Cambridge: Cambridge University Press, 2014) p 52.

republican tools which should be recommended for addressing domination in the context of psychological disability and disorder.⁵⁶

Why reject constitutional republicanism as an approach to the reform of decisional regimes? In short: it involves acting for others rather than enabling them to act for themselves.⁵⁷ Of course, by their very nature, decisional regimes recognise some limits on the ability of people to act for themselves, insofar as deciding on behalf of others is permitted. However, it is not a promising solution to delegate the responsibility to regulate power over a marginalised and potentially vulnerable group to those with little democratic mandate, and who will likely be drawn from an existing juridico-political elite. In this respect, despite calls for “many institutional sites for challenge and contestation, discussion and decision-making”, constitutional republicans like Pettit place too much faith in the non-alien nature of undemocratic legal and quasi-legal institutions.⁵⁸ This overreliance on top-down responses to arbitrary power is both too complacent about the domination that can arise from an insufficiently accountable elite, and fails to take the importance of self-rule seriously enough.⁵⁹

Self-rule is particularly important in the context of disability. However, constitutional republicans sometimes give the impression that they have little to add to

⁵⁶ For critical discussion of these wider problems within republicanism, see J McCormick ‘Machiavelli against Republicanism: On the Cambridge School's “Guicciardinian Moments”’ (2003) 31 *Political Theory* p 615 and A Gourevitch *From Slavery to the Cooperative Commonwealth: Labor and Republican Liberty in the Nineteenth Century* (Cambridge: Cambridge University Press, 2015) ch 1.

⁵⁷ See also the discussion of self-rule in Robin Celikates ‘Freedom as Non-Arbitrariness or Democratic Self-Rule?’ in C Dahl and T Anderson Nexø (eds) *To Be Unfree: Republicanism and Unfreedom in History, Literature, and Philosophy* (Bielefeld: Transcript Verlag, 2014) p 37.

⁵⁸ Pettit, above n 41 p 260.

⁵⁹ For an alternative account of republican opposition to elitism, see J McCormick *Machiavellian Democracy* (Cambridge: Cambridge University Press, 2011).

our understanding of positive forms of self-determination, both in relation to the depoliticised remedies to domination they recommend or more generally. For instance, Philip Pettit, the leading contemporary republican theorist, tells us, “people can be trusted to look after their own autonomy, given that they live under a dispensation where they are protected from domination by others”.⁶⁰ However, in the context of illness and disability, this might seem naïve, since resilient protection from arbitrary power is compatible with a lack of those freedoms necessary for substantive self-governance. For example, even in conditions of non-domination, someone with an acquired brain injury who lacks positive support from others may struggle both to think through whether they ought attempt to live on their own, and to actually arrange the process of moving house and entering into a tenancy agreement. For such a person, then the combination of resilient protection from arbitrary power and trust in their endogenous resources and abilities alone may not be sufficient to secure a sufficiently significant level of autonomy.

In the more restricted context of depoliticised tools to combat domination – such as ombudsmen, commissions, and review boards where citizens can contest arbitrary power – outsourcing authority to unelected experts poses problems. Indirectly, it contributes to the political deskilling of those with psychological disabilities and disorders, since action is not taken by them but only for them, with a concomitant lack of opportunities to hone one’s abilities. Furthermore, radical republican traditions have stressed the importance of a “politics of solidarity, in which those who suffered from servitude were also expected to be the agents of emancipation”, since they possess the shared interests and insights to undertake the right kinds of political intervention.⁶¹ The

⁶⁰ Pettit, above n 4 p 83. For a republican rejoinder, see Honohan above n 4 p 186.

⁶¹ Gourevitch, above n 56 p 183.

alternative places people in the position of supplicants rather than agents of their own emancipation, which reproduces rather than unsettles the unequal socio-political statuses that republicans are committed to opposing.

While it may not always be possible for someone to meaningfully participate in shaping the authority held over them – and many people will have little inclination to do so even when they can – we should seek to maximise the routes through which self-rule is at least possible. This does not completely exclude use of the tools mooted by constitutional republicans in some form. However, they ought not to be the main policy recommendations associated with a republican approach to decisional regimes, and should be severed from the anti-politicising ethos out of which they emerge. In contrast, popular republicanism, rather than a predominantly constitutional one, will favour participatory controls upon the power held over those with psychological disabilities and disorders.

Conclusion

In this article, I have identified and denaturalised a broadly liberal egalitarian conceptual framework which informs evaluations of decisional capacity law, and developed a civic republican approach which goes beyond it. I do not claim to have shown that this civic republican framework is unassailable. Nor do I suppose that liberal egalitarians - especially characterised with such a broad brush - can find no retort to the objections raised against them. My aim has instead been to take the first steps in offering an alternative way to understand the desiderata of mental capacity law reform. To those ends, civic republicanism provides resources for demonstrating how decisional law can generate forms of dominating unfreedom to which other accounts are insufficiently sensitive. It also foregrounds the value of non-domination and

participatory self-rule, and indicates some of their implications for legal and sublegal governance of illness and disability. This results in initial proposals to reform rather than necessarily dispense with mechanisms that would permit decisions to be made for others that might conflict with their current will and preferences.

The first such proposal is to adopt functional rather than diagnostic or hybrid tests of decisional capacity. This is supported on the republican grounds that the alternatives intensify relationships of domination over people diagnosed with psychological disabilities and threaten their equal civic status as free persons (rather than on the basis that it discriminates against them in relation to their negative liberty of action). The second proposal is to make greater use of the self-authorising structures of advanced care planning to reduce domination that can arise in negotiating the problem of legal capacity. I have argued that civic republicanism not only recommends such measures but can also give a more determinate theoretical account of the relationship between self-authorisation and freedom than the liberal egalitarian alternatives. The third main proposal calls for participatory input into the institution and administration of decisional capacity law, including greater procedural controls over who can assess and decide for oneself, more scope for contributions from advocacy groups in the construction of legislation and codes of practice, and more recognition of expertise-by-experience in review and oversight mechanisms.

This civic republican analysis leaves the door open to more trenchant opposition to mental capacity law as well as to resurgent defences of it. In the absence of a more decisive case for the abolition of decisional regimes, it offered three desiderata for their reform, underpinned by philosophical argumentation building upon nascent republican engagement with medico-juridical power. These are not yet detailed policy prescriptions but rather indicate a promising direction of travel for the appraisal of

medical and disability law. I have resisted endorsing a further set of depoliticising tools associated with constitutional republicanism, since the non-domination they promise to secure comes at too heavy a cost in terms of the agency of those with psychological disabilities. This discussion of legal capacity thereby brings home a wider moral for republicans themselves: civic freedom is hindered by the usurpation of our own activity and not only its domination.⁶²

⁶² For further discussion of the relationship between domination and usurpation of agency, see P Markell 'The Insufficiency of Non-Domination' (2008) 36 Political Theory p 9.

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