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Scott, P. (2016) Democracy, law and relationships of domination – a response to ‘can republicanism tame public health?’. *Public Health Ethics*, 9(2), pp. 134-135.

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Deposited on: 16 September 2016

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## **Democracy, Law and Relationships of Domination – A Response to ‘Can Republicanism Tame Public Health?’**

This is a commentary on Daniel Weinstock’s paper for the PHE Special Issue on Republicanism and Public Health.

This brief comment addresses, at a broad level, issues raised by Daniel Weinstock’s thoughtful attempt to explore the implications of republican thought for the practice of public health (Weinstock, 2016). Four observations might be made about Weinstock’s argument. The first relates to the reasons Weinstock gives for the inadequacy of the democratic process in ensuring the impossibility of non-arbitrary interferences. The problem of ‘democratic opacity’ – whereby much of what is done by the state is so disconnected from the process by which the public, in whose name it is done, endorses it that we cannot rely upon democratic constitutionalism to ensure that interferences tracks the interests of those to whom they are done and are therefore non-arbitrary – is (as Weinstock notes) heightened in the context of public health, but is not special to that context. This fact has implications for our assessment of the solution offered by Weinstock to the problem he identifies.

Second, Weinstock, in identifying as the crucial aspect of non-dominating public health interventions that they not implement a conception of public health (and an implicit relative valorisation of public health) with which those who are its supposed beneficiaries disagree, but instead “target obstacles to people’s agency” (Weinstock, 2016) captures the tension – under-explored in the republican literature, which has often grafted the ideal onto debates about the place of rights in the constitution (Pettit, 1997; Bellamy, 2003) – between the subjective interests of the real individual and the putative objectivity of policy in certain areas. If the interests which interferences must track in order to be non-arbitrary are not simply those professed by the individual being interfered with, then no account of how non-domination might be achieved based upon democratic mechanisms would seem adequate (that is, it would not suffice to replace opacity with transparency and to seek to strengthen the link between democratic contestation and state action). If, alternatively, state action must (if the state’s capacity to act is not to give rise to republican unfreedom) reflect the opinions of those being interfered with regardless of the substance of those opinions, then there would seem to be no room for the deployment of expertise-based policy making of the sort that public health reflects or, perhaps, for any policy which reflects a substantive conception of the good, even if that conception is endorsed through democratic mechanisms. Either way, democratic constitutionalism fails us. To address the noted tension head on therefore provides a second reason to doubt the achievability of the republican ideal – again, not merely in relation to public health, but generally.

A third point relates to Weinstock’s account of how we might ensure that interferences in fact promote individual agency. The republican ideal is powerful precisely because it addresses not only what happens but also what might happen. It requires that the obstacles to arbitrary interferences (or, conversely, that the guarantees of interferences’ non-arbitrary nature) be in some way institutionalised. Where they are not, freedom is undermined regardless of the form of the interferences which in fact take place. Weinstock acknowledges this point (“our focus should not exclusively bear on what public health bodies do... we should look at the way in which their power is institutionalized” (Weinstock, 2016) but the form of institutionalisation he endorses – the transposition of respect for individual agency into the professional ethics of public health practitioners – falls at the weaker end of any hypothetical spectrum we might draw. If republicanism was the normative underpinning of the attempt to institute the rule of law rather

than the rule of men (Harrington, 1992), we are justified in asking whether professional ethical guidance sufficiently resembles law in the relevant respects as to adequately substitute for it within the republican project. What, for example, are the sanctions which might follow from a failure to adhere to these ethical rules? Without adequate mechanisms for the detection and censure of breaches, it is only a contingent commitment to the idea of individual autonomy which prevents arbitrary interference from taking place, in which case there subsists, notwithstanding the content of the relevant ethical rules, a relationship of domination as between public health practitioners and the public in whose interests they profess to act. And, viewed from the perspective of the public health practitioner, does a set of guidelines intended to ensure that there is no capacity for arbitrary interference (and so no domination) meet standards of certainty and predictability that would make the imposition of those guidelines fair and reasonable? But more broadly, even if we consider the use of professional ethics to go far enough in institutionalising non-arbitrariness as to overcome the problem of democratic opacity in the specific context of public health, we have suggested that that problem is in fact of broader (perhaps general) applicability. Yet in most other areas of policy there is no relevant analogue to the professional ethical regulation on which reliance is here placed. The counter-intuitive conclusion at which we might therefore arrive is that public health is not inimical to the republican ideal but is in fact exceptional in its ability to be reconciled with the republican understanding of freedom.

This leads to a fourth, bigger, point. Absent from Weinstock's article, as from much of the modern republican project, is a concern for the interaction between public and private power in relationships of (un)freedom. Not only is the invocation of the republican ideal of freedom as non-domination often motivated by the need to remedy the apprehended defects of liberalism; republicanism tends also to take the lead of liberalism in focussing upon the vertical relationship between the citizen and the state. But unlike the ideal of non-interference, that of non-domination can sensibly be pursued also where the relationship in question is a horizontal one. And when we consider public health, it may be that some of the most important relationships of domination are horizontal – those between the individual and other private actors. And if they are not 'pure' horizontal relationships of domination (in that they do not subsist outside of, and without reference to, the state), they may be horizontal relationships of domination in which one party is able, precisely because of what the state does (enforce property rights?) or does not do (criminalise certain conduct?), to arbitrarily interfere with the interests of another party. Rather, then, than use republicanism to 'tame' public health, it may be more fruitful to step back and, with reference to the multiple types of dominating relationship which exist, re-consider its ability to justify, and to define the appropriate scope of, public health in the first place.

## References

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Weinstock D. (2016) Can Republicanism Tame Public Health? \_\_\_\_ *Public Health Ethics* \_\_\_\_.