

Kant, Ripstein, and the Circle of Freedom: A Critical Note*

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I. Introduction

Contemporary liberal political philosophy is much-indebted to the work of Kant. Reference is often made to his remarks concerning the dignity of the person, the public character of reason, and the resulting need to justify political institutions to every individual subject to them (see Waldron 1987). Although key contributions to contemporary political theory – beginning with Rawls’s *A Theory of Justice* (1999) – claim a Kantian pedigree, their aim and method differ from Kant’s own. One may thus wonder what an orthodox Kantian, as opposed to Kant-inspired, approach to political morality looks like, and whether this approach is superior to much self-styled Kantian political theory.

In his recent book *Force and Freedom*, Arthur Ripstein (2009) answers both questions. He offers a comprehensive interpretation of Kant’s political philosophy, and presents it as a valuable alternative to the dominant approaches in contemporary legal and political thinking. The most striking feature of this orthodox Kantian outlook is its attempt to ground the whole of political (enforceable) morality in one right – the right to freedom – understood as the right to be independent of others’ choices. Whether this Kantian approach stands or falls, then, depends on whether:

- i. the right to 'freedom as independence' can plausibly constitute the basis of an entire political morality;
- ii. the idea of independence of others' choices offers an appealing interpretation of the concept of freedom.

In this note, I suggest that *Ripstein's articulation* of the right to freedom as independence fails on both counts. My argument is structured as follows.

In section II, I offer a brief sketch of Ripstein's Kantian approach. In section III, I show that there is a vicious circularity in Ripstein's definition of the right to freedom, which prevents it from grounding all other rights. On the one hand, individual rights are said to derive from the right to freedom; on the other, freedom itself is defined by reference to individual rights. To be unfree/dependent on others is to have one's own means or resources used by others for their, rather than one's own, purposes. But in order to know what qualifies as *one's own*, we need a prior account of a person's rights (i.e., a theory of justice), which is precisely what freedom is meant to deliver. Since Ripstein's (Kantian) notion of freedom surreptitiously presupposes an account of justice, it cannot be the sole ground of political morality.¹ In section IV, I further argue that Ripstein's justice-based account of freedom is normatively unappealing. If freedom is defined by reference to persons' rights, then only rights violations can count as restrictions of freedom, which is counter-intuitive. There are many actions which restrict persons' freedom without violating rights. Think of prohibitions on using others' legitimate property. Such prohibitions clearly diminish one's freedom, and yet are perfectly consistent

with rights. In section V, I conclude by briefly suggesting how to modify Ripstein's Kantian view so as to make it immune to the objections raised in this note. The modifications I suggest, however, bring the view much closer to contemporary theories of justice than Ripstein originally intended.

Before getting started, let me make two prefatory remarks. First, my argument is not of an exegetical nature. I do not comment on the accuracy of Ripstein's interpretation of Kant, but only assess whether Ripstein's Kantian approach successfully delivers what it promises. My focus is on what contemporary political philosophy can learn from this 'orthodox' Kantian approach, rather than on the extent to which the approach is consistent with Kant's texts.

Second, there is much to admire in Ripstein's book that I won't have the space to discuss. In this short piece, I only limit myself to raising some challenges to his view, with the constructive aim of contributing to the development of a sound Kantian approach to political morality.

II. Ripstein's Kantian approach: a sketch

Contemporary liberal political philosophy is overwhelmingly preoccupied with the question of how benefits and burdens of social cooperation ought to be distributed.ⁱⁱ A just society, on the dominant view, is one that fairly distributes such benefits and burdens, thereby equally protecting the interests of all its citizens.ⁱⁱⁱ The Kantian approach Ripstein defends has instead at its core a concern with individual freedom and the justification of coercion. From this perspective, what matters to the design of a theory of justice – the central task of political philosophy – is not the combination of harms and benefits befalling people, but the particular relations in

which people stand vis-à-vis one another. So long as such relations are consistent with each being her own master – so long as they are consistent with everyone’s freedom – a (coercive) social order is justified.

Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law ... is the only original right belonging to every human being by virtue of his humanity (Kant, 6:237, in Ripstein 2009: 13).

The right to freedom as independence is the pillar supporting the whole of Kant’s political philosophy. It constitutes the ground on which individuals’ rights and entitlements are defined, and specifies the conditions under which the use of (state) coercive power is legitimate. As Ripstein says: ‘[t]he idea of independence carries the justificatory burden of the entire argument, from the prohibition of personal injury, through the minutiae of property and contract law, on to the details of the constitutional separation of powers’ (Ripstein 2009: 14).

But what is freedom as independence? An agent enjoys freedom as independence when she is not subject to the will of others, i.e., when nobody uses her means for ends she has not consented to. In Ripstein’s words, ‘[y]ou remain independent if nobody gets to tell you what purposes to pursue with your means’ (Ripstein 2009: 34). As anticipated, from this perspective, whether someone is acting unjustly towards you does not depend on the benefits you gain or the burdens you have to carry, but on whether their actions are consistent with your freedom.

For instance, Sam might make John much worse off by opening a shop right next to his, selling similar products at more competitive prices (Ripstein 2009: 49).^{iv} Yet, in so doing, Sam does not wrong John, he does not interfere with his freedom as independence. What happens to John might be regrettable, but does not constitute an injustice, since John is still 'his own master', despite being made worse off. By contrast, the relationship between a master and a slave is paradigmatically one in which an agent's (the slave's) independence is violated. Although the slave might *de facto* enjoy a wide set of benefits and opportunities thanks to his master's generous disposition, the slave's decisions are always ultimately subject to the master's authorization (Ripstein 2009: 36). Non-interference in the pursuit of his ends is not 'robust', but extremely fragile, and this is why the slave is appropriately said to be unfree (cf. Pettit 1997: ch. 2, and List 2006).^v

A perfectly just Kantian social order is one where nobody is subordinated to the will of others, and all enjoy freedom as independence. Indeed, from Ripstein's Kantian perspective, the preservation of this state of affairs constitutes the only basis for justified coercion. The state is justified in using coercion against law-breakers only to the extent that doing so is necessary to preserve the freedom of all, to 'hinder hindrances to freedom' (Ripstein 2009: 30).

Ripstein's Kantian view is appealing. Its focus on freedom sits well with the normative concerns animating most contemporary liberal thinkers. After all, a political philosophy based on freedom alone is quintessentially liberal, and more so than one based on other values (e.g., reciprocity, equality, happiness etc.). Moreover, the notion of freedom at the heart of this Kantian approach seems highly plausible, allowing us to account for judgments about freedom and unfreedom (e.g.,

the case of the slave with a benevolent master) which other conceptions of freedom (e.g., freedom as *actual* non-interference) arguably fail to deliver.

This approach is not only substantively appealing, but also elegant and justificatorily powerful. It reduces the complex set of people's rights and entitlements to one single master-right, the right to freedom, which grounds them all. As Ripstein says, '[b]y making the innate right to freedom the basis for any further rights, Kant imposes an extreme demand for unity on his account of political justice. The rights that each person has against others must be derived from it, as must the fundamental constitutional rights that protect political freedoms and freedom of religion' (Ripstein 2009: 31).

In light of the above, the Kantian outlook advocated by Ripstein seems to offer a powerful way of articulating the demands of a liberal political morality, so powerful as to put into question alternative, mainstream, approaches to the topic. But does this first appearance stand deeper scrutiny? In what follows, I suggest that it does not.

III. The circle of freedom – why freedom as independence cannot ground the whole of political morality

In this section, I argue that Ripstein's 'right to freedom' cannot ground all other rights because the notion of freedom on which it relies *presupposes* the very rights it aims to establish. This is what I call the 'circle of freedom'. This vicious circularity arises from Ripstein's endorsement of the following claims:

- a. The right to freedom grounds all other rights.

- b. The right to freedom is the right of each individual to be his/her own master, to be independent of the will of others.
- c. Independence of the will of others consists in the ability to use one's own means to pursue one's own purposes robustly unhindered by others.
- d. One's own means and purposes are the means and purposes one has a right to.
- e. The right to freedom is therefore the right to use the means and pursue the purposes one has a right to, robustly unhindered by others.

As Ripstein puts it, a system where all have freedom as independence 'is one in which each person is free to use *his or her powers*, individually or cooperatively, to set *his or her own* purposes, and no one is allowed to compel others to use *their* powers in a way designed to advance or accommodate any other person's purposes' (Ripstein 2009: 33, added emphasis). But how are we to determine what one's powers and purposes are? Certainly not by looking at their *actual* powers and purposes. To be sure, when policemen stop a thief, they prevent him from using his (positive, as opposed to normative) powers for his (positive) purposes, yet we would hardly regard such an intervention as unjust, as a violation of the thief's right to freedom. This is paradigmatically a legitimate intervention, aimed at 'hindering a

hindrance to freedom' (i.e., the freedom of the victim, whose means would serve someone else's, the thief's, purposes).

The freedom referred to in the expression 'hindering a hindrance to freedom' cannot be *any* freedom, but must be the freedom one is entitled to *on grounds of justice*. Until we have an independent account of justice, then, we cannot know whether someone is free or unfree. Unless we know what is ours, we cannot know whether constraints on our *de facto* agency are violations of our independence or consistent with it. Rather than *grounding* all rights and entitlements, Ripstein's Kantian notion of freedom is derivative of them (i.e., it presupposes them).

This appears clear once we notice that the cases Ripstein offers to illustrate instances of dependence and independence only work for his purposes if we *assume* a certain background account of justice. For instance, in the example offered earlier, involving market competition between Sam and John, a tacit assumption was made about the entitlement-generating character of free market processes. Recall that, in Ripstein's view, Sam's driving customers away from John does not constitute a violation of John's freedom as independence. This can only be so on the assumption that free market exchanges are entitlement-generating independently of their outcomes. This assumption is controversial, and certainly not 'implicit' in the meaning of freedom. On some accounts of justice (Rawls's, for instance), free market processes need to be regulated in order to be *consistent with* individuals' rights. If such processes lead to excessive inequalities, Rawls argues, their outcomes need to be rectified in order to preserve free market exchanges over time (Rawls 1993: 266).^{vi}

Whether the interaction between Sam and John involves a breach of freedom as independence, then, depends on what particular account of rights and entitlements one holds. The right to freedom as independence is not the answer, but an independent (and necessarily controversial) account of persons' rights is needed to know what freedom as independence is.

If my argument up to this point is correct, the unified nature of the Kantian approach offered by Ripstein is only illusory. His articulation of the right to freedom cannot constitute the ground of all other rights because freedom *itself* is defined in terms of persons' rights. Without a prior account of what those rights are, the notion of freedom as independence is empty; with such an account, it is expositively parsimonious, but surreptitiously presupposes a complex theory of justice.

IV. Moralized freedom – why freedom as independence is counter-intuitive

I have suggested that *Ripstein's articulation* of the notion of freedom presupposes an account of individual rights and thus cannot strictly speaking *ground* any such rights. Despite its lacking rights-grounding capacity, this notion may still be of value. That is, it may offer a plausible account of freedom, which we might want to employ in elaborating our all-things-considered theory of persons' rights and entitlements. After all, as we saw earlier, this notion is more in line with at least some of our intuitive judgments about freedom than the popular notion of freedom as non-interference.^{vii}

Freedom as independence conceives of persons' freedom in relation to their in-principle subjection (or lack thereof) to the will of others. Recall that a slave with a benevolent master is still unfree because in principle subject to the master's will.

Even though the master does not interfere with the slave in the actual world, there are many nearby possible worlds in which such interference would occur (the master is indeed legally entitled to interfere with the slave), and this fact, says the proponent of freedom as independence, must be taken into account when judging whether the slave is free (cf. the discussion in Pettit 1997: ch. 2, and List 2006).

Although such a focus on the robustness of non-interference renders freedom as independence rather appealing, the appeal is significantly undermined by this notion's reliance on a prior conception of rights. If to be independent of the will of another is to not have one's rights violated (robustly across possible worlds), then limitations of one's capacity to act that do not violate rights do not count as restrictions of freedom. On this view, my freedom is not restricted when I am not allowed to access property that is not mine.^{viii} Or else, my freedom is not restricted whenever I am forced to pay taxes (if such taxes are demanded by justice). Even more strikingly, I cannot say that my freedom is restricted if I am justly incarcerated for violating others' rights.

All of these judgments are deeply counter-intuitive, but they inevitably follow from an understanding of freedom according to which someone is free if she can robustly use the means and pursue the purposes *she has a right to* use and pursue. What we would intuitively call 'justified' restrictions of freedom are no restrictions of freedom at all, on Ripstein's account.^{ix}

It is worth noting at this point that these counter-intuitive implications of freedom as independence are not fully transparent from Ripstein's text. In fact, there are passages, discussing the use of coercion, which explicitly exclude them. Ripstein tells us that 'Kant does not conceive of coercion in terms of threats, but

instead as the limitation of freedom' (Ripstein 2009: 54). From this it would seem to follow that acts of coercion that are consistent with freedom (i.e., with people's rights) simply do not count as coercive because they do not limit freedom. Again, forcing a criminal to go to jail, on this view, would not be 'coercive' because it would be consistent with his freedom as independence (i.e., the freedom he has a right to). Yet Ripstein does not use the language of coercion in this way. Instead, he distinguishes between legitimate and illegitimate coercion, the former being coercion exercised in accordance with people's rights, the latter being coercion exercised in breach of those rights. He illustrates this with the following example:

Using force to get the victim out of the kidnapper's clutches involves coercion against the kidnapper, because it touches or threatens to touch him in order to advance a purpose, the freeing of the victim, to which he has not agreed. The use of force is rightful because an incident of the victim's antecedent right to be free (Ripstein 2009: 55).

In this quote, Ripstein appeals to a notion of freedom which differs from the moralized one we encountered in the previous section. If it is true that the use of force to free the victim limits the kidnapper's freedom because it prevents him from using his resources to achieve his purposes, then 'his resources' and 'his purposes' have to be interpreted in positive rather than normative terms. 'His' resources and purposes are not those he has a right to, but those he happens to possess.

There thus appear to be two notions of freedom at play in Ripstein's work, one (the dominant one, it seems to me) is moralized, the other non-moralized:^x

F_{Moralized} = A is free if, and only if, A can use the means and pursue the purposes A has a right to, robustly unhindered by others.

F_{Non-Moralized} = A is free if, and only if, A can use the means A happens to possess and pursue the purposes A happens to have, robustly unhindered by others.

The former notion of freedom presupposes an account of justice, and for this reason leads to rather counter-intuitive judgments (e.g., the use of force against the kidnapper does not limit his freedom). The latter notion delivers much more plausible judgments but can hardly form the basis of a tenable political morality. Specifically, understanding the right to freedom as the right to use the means one happens to possess and pursue the purposes one happens to have (robustly unhindered by others) generates two difficulties for a freedom-based account of justice.

First, it leads to an implausibly *status-quo*-biased political morality, according to which people's positive entitlements automatically determine their moral entitlements. Second, given that people's ends inevitably conflict, a world in which each can pursue the ends she happens (or wants) to have unhindered by others cannot exist, and therefore represents an invalid ideal of justice (on the Kantian assumption that 'ought implies can'). As Ripstein himself notes, '[t]he Kantian right to independence ... is always an entitlement within a system of reciprocal *limits* on freedom' (Ripstein 2009: 34, emphasis added). But if this is the case, then one is not either free or unfree, but one can enjoy more or less freedom, depending on the

nature of the relevant limits. This idea of reciprocal limits on freedom, I think, implicitly contains a solution to the difficulties discussed in the present piece.

V. Conclusion

The most fruitful way of reading Ripstein's Kantian proposal, I suggest, is to see the right to freedom not as a right to freedom (or independence) simpliciter, but as a right to a certain 'quantity of freedom'. From this perspective, each should robustly enjoy a sphere of agency, delimited by her rights and entitlements, in which to pursue her ends and goals without being interfered with by others. In turn, the principles determining how much freedom each should have (equal, sufficient etc.) are best kept 'outside' the notion of freedom itself. So understood, the notion of freedom would not surreptitiously presuppose an account of justice, it would not indicate 'the freedom one has a right to'. The questions of (i) what freedom is and (ii) how much freedom each ought to have (i.e., how much freedom each *has a right to*) would be kept separate. This would of course make the account openly less unified, relying on a variety of different considerations, but would avoid the circularity and counter-intuitiveness problems highlighted earlier in my discussion.

A full development of an account of political morality based on a 'right to a certain amount of freedom' would also necessitate a defence of a particular metric of freedom.^{xi} For instance, it would need to answer questions such as: Should freedom be measured only by reference to the quantity of options available to the agent, or should it also include reference to their quality (i.e., to specific freedoms protecting particular interests)? Should considerations about quantities of freedom

take into account the robustness of the options available to the agent (across different possible worlds), or simply focus on the actual world? And so forth.

Ripstein's Kantian view does not directly engage with these questions, and unsurprisingly so, since these are precisely the sorts of questions that mainstream contemporary theories of justice ask (e.g., think of Sen's (1999) and Nussbaum's (2000) capabilities approach, or Rawls's own theory – both of which can be seen as offering different accounts of how much freedom each person ought to have in a just society). On the view I suggest, freedom is not 'self-limiting' in the way Ripstein believes it to be (Ripstein 2009: 32), and theories of political justice *do* deal with the 'distribution' of something: benefits and burdens in the form of freedom and unfreedom.^{xii}

If I am correct in suggesting that this is a fruitful way of avoiding the difficulties with Ripstein's Kantian approach, then it may very well be that the latter approach, in its original form, does not offer a viable alternative to existing, more 'mainstream', accounts of justice. There is much, I believe, we can learn from Ripstein's book – and some of those lessons would be kept in the heavily revised version of his view I am suggesting – but it may be that the best we can draw from Ripstein's Kant are precisely *lessons*, rather than a whole theory.

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ⁱ Kyla Ebels-Duggan (forthcoming) has independently raised a similar worry concerning Ripstein's view. See also Andrea Sangiovanni's contribution to this symposium. For other recent discussions of Ripstein's view see Tadros (2011) and Edmundson (2010).

ⁱⁱ This is famously the question at the heart of Rawls's *A Theory of Justice*.

ⁱⁱⁱ This may be seen as a statement of what liberal normative individualism – the idea that human beings are ultimate units of moral concern – requires of social institutions.

^{iv} To be precise, Ripstein offers an example with an identical structure, but without mentioning the names Sam and John.

^v The term robustness is not used by Ripstein himself, but strikes me as fully consistent with his view. Indeed, as he acknowledges, the view has much in common with the republican account of freedom as non-domination (Ripstein 2009: 42-3). One of the key features of republican freedom is precisely its robustness. See Pettit (1997) and List (2006), the latter for a more technical treatment of the notion of robustness.

^{vi} This is one of Rawls's main arguments against Nozick's libertarianism, recently repropounded by Ronzoni (2009) in the context of debates on global justice.

^{vii} This is also known as negative freedom. See Berlin (1969).

^{viii} For the opposite conclusion, see the discussion in Waldron (1991).

^{ix} A very similar problem arguably arises in the case of the republican 'cousin' of freedom as independence, namely freedom as non-domination. See Carter (2000) and Valentini (2011: ch. 7) for discussion. As Ripstein (2009: 43) acknowledges, there are many affinities between non-domination and independence. See also G. A. Cohen's (1995) critique of moralized notions of freedom.

^x Cf. the independently developed discussion in Ebels-Duggan (forthcoming).

^{xi} On the topic of developing a metric of freedom see Carter (1999).

^{xii} I sketch how such an approach could be developed in Valentini (2011: ch. 7).

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