

Freedom and Force

Essays on Kant's Legal Philosophy

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Ripstein and His Critics

MARTIN J STONE*

POLITICAL PHILOSOPHY HAS many questions: one idea—*Right-as-independence*—underlies most of Ripstein’s answers. As this idea is Ripstein’s argumentative starting point, it is also the background, and sometimes the explicit focus, of the following chapters. What is Right-as-independence? And does political philosophy *have* to start there? By way of introduction, I address these two questions and—in light of this—sketch the contours of the present controversies.¹

I. RIGHT-AS-INDEPENDENCE

Each person has an ‘innate right to freedom’, Kant says; and freedom, he adds, is ‘independence from being constrained by another’s *choice*’.²

In explaining what Kant means by this, Ripstein recalls Aristotle’s observation that *choosing*, unlike *wishing*, extends only to things in my power.³ I cannot *choose* who will win the next election or choose to make a mushroom omelette if I have no workable plan for obtaining some mushrooms. Hence Ripstein says that Kant is talking about my freedom to use the means or powers I *have*. If it turns out that the local mushrooms are all yours and that you’ve priced them—as it is said—beyond my *means*, that’s no limitation of my freedom, on this conception: for you haven’t affected my powers of choosing, only—by making choices of your own—failed to create the ideal environment (ie the one I’d prefer) for my exercise of my powers. I’m free to choose in ways that

* Thanks to Chris Essert, Micha Glaeser, Rafeeq Hasan, Arthur Ripstein and Ernest Weinrib for comments on an earlier draft and to Jordan Parker for editorial assistance.

¹ My sketch (starting in Section III) is an elaboration of the issues, not merely a paraphrase.

² Immanuel Kant, *Metaphysics of Morals* (Cambridge, Cambridge University Press, 1996) 6: 237 (hereinafter *MM*).

³ Aristotle, *Nicomachean Ethics*, III.2, trans CCW Taylor (Oxford, Clarendon Press, 2006) 19–21; cf Kant, *MM* 6: 213.

create a non-ideal environment for you too. We're both free, in other words, to pursue our *own* ends with the means we *have*, without depending on the leave or cooperation of the other.

Doubtless, this first idea of our *practical independence* is vertiginously abstract. Is it even possible at all? Aren't we all in the same boat of vulnerability to each other's plans? Whether it *is* possible, and if so, how it could be realised is Kant's entire topic: 'Right is the *sum of conditions* in which the choice of one can be united with the choice of another in accordance with a universal law of freedom'—so his Doctrine begins.⁴ 'Can be united' means united in principle but also in practice—and (this is to say) *perpetually*.⁵ Right isn't merely something to be contemplated, after all: 'wrongs are to be rectified' states what Right *is*, not some exotic development of it. Hence, by the end, Kant's Doctrine expands, from this first and abstract statement of it, to say that 'independence' requires 'conditions' of two broad types: first, there must be various *rights* (personal, proprietary, etc); and second, there must be public institutions exercising rights-determining (and related) powers. These are the doctrines of Private and Public Right.

Right as a *whole* is one part of morality and distinct from a second part (ethics) which concerns the conditions of *self*-unity or self-governance. So described, Kantian ethics manifestly continues the oldest idea of that subject as one concerning 'parts of the soul', their conflicts, and their coalition in a good or just person. This is worth mentioning for the sake of a contrast. Plato affirms that the question of the soul's unity and that of the justice of the state are really the same question or at least co-dependent ones.⁶ Kant emphasises that these are separate questions: that 'uniting people's choices' is a moral problem of its own, which presupposes only that there are choosers, however devilish or deformed they might be.⁷ The political world—Kant's Republic—appears as his answer to a single question: how (ie under what conditions) is this (social) uniting possible?

To see how practical independence is possible will be, then, just to see what is specifically required for several persons to be free to choose—and this naturally starts with the idea of what choice *is*. Kant mentions two questions that are applicable to any instance of choice among us. First, the *matter*: what are

⁴ Kant, *MM* 6: 230.

⁵ Unlike concepts, practices are *actual*—they go on. cf GWF Hegel, *Philosophy of Right*, trans A White (Cambridge, Hackett Publishing, 2002) s 4: 'The system of Right is the realm of freedom made actual.'

⁶ See Plato, *Republic*, trans GMA Grube, rev CDC Reeve, (Indianapolis, Hackett Publishing, 1992) 369, 434–35.

⁷ See Immanuel Kant, 'Toward Perpetual Peace', in MJ Gregor (ed), *Immanuel Kant: Practical Philosophy* (Cambridge, Cambridge University Press, 1996) 8: 366; cf Kant, *MM*, 6: 231.

you going after? Everyone generally knows the answers (in their own case) self-consciously, ie without observation: these are one's *ends*. Second, the *relational* aspect of choice: how are you affected by my choice? This goes beyond practical self-knowledge or my conception of what I'm doing—it concerns your *suffering*, not just my *doing*.⁸ When he introduces 'the concept of Right', Kant says that it applies in questions about 'the *relation* of choices' and, moreover, that these questions concern only 'the *form* of this relation', because—or in the sense that—they ignore 'the end each has in mind':

The concept of Right ... has to do ... only with the external and indeed practical relation of one person to another, insofar as their actions can have ... influence on each other. But [Right] does not signify the relation of one's choice to the mere wish (hence also to the mere need) of the other, as in actions of beneficence or callousness, but only a relation to the other's choice. ... [I]n this reciprocal relation of choice no account at all is taken of the *matter* of choice, that is of the end each has in mind with the object he wants. ... All that is in question is the *form* in the relation of choice on the part of both ... and whether the action of one can be united with the freedom of the other.⁹

This passage underlies many of Ripstein's distinctive views as well as some of his critics' objections. I'll spell out Kant's main point—namely the point about the '*form in the relation*'—as two theses: (1) Right pays no heed to our ends and therefore—though this may not at first be obvious—(2) it doesn't *compare* you and me.¹⁰ This will furnish a more exact idea of our 'independence'.

(1) Right relates our choices, but not (on the present hypothesis) our ends. As an example, consider that one day I might choose this: to move a certain handle up and down. Strange just by itself, such goings-on are subject to a distinctive form of elucidation, a sense of the question *why*, where answers explain my choices not (just) by relating them to efficient causes but by characterising them more broadly:¹¹

Why are you moving that handle up and down?
I'm operating the pump.—*Why are you doing that?*
I'm replenishing the house's water supply.—*Why do that?*
I'm helping out these people's campaign.—*Why?*
And so on.

⁸ I can know that I'm 'using you' just as a matter of my own self-consciousness of what I am doing (eg I'm people-watching in a café). It *defines* Kant's second question to say that it asks about something that can't be known in this way. See Section IV below.

⁹ Kant, *MM*, 6: 230.

¹⁰ On 'non-comparative', see A Ripstein, *Private Wrongs*, (Cambridge, MA, Harvard University Press, 2016) 36–38; see also the chapter by Sangiovanni below.

¹¹ See GEM Anscombe, *Intention* (Oxford, Blackwell, 1957) s 5, whose example I'm borrowing. 'Just': inserted here to acknowledge discussions of whether rationalisations of action *are* causal explanations. The answer doesn't matter here.

This series discloses my ends—that in view of which I’m doing what I’m doing. But it lies in the nature of any such series that it can be reversed, by asking not *why* but *how* I’m doing that:

I’m helping out these people’s campaign.—*How are you doing that?*

I’m replenishing the house’s water supply.—*How?*

I’m operating the pump.—*How?*

I’m moving a handle up and down.—*How?*

And so on.

In one direction, we get progressively wider characterisations of what I’m doing; in the other, progressively narrower specifications of *how* I’m doing that.¹² The present hypothesis (that Right ignores our ends) implies that it relates our choices through the *how* series.

To say *how* I’m replenishing the water supply (or helping out) is to reveal my *approach* to my choice but not to explain it: if you were perplexed to see me pumping (‘what are you up to ...?’), my telling you *how* I’m accomplishing this feat won’t be responsive. Yet, for this reason, the *how* series is the more basic of the two, for I must have reckoned some approach to my end if there is to *be* an action of mine to explain.¹³ *How* is an agent’s own deliberative question.¹⁴ And this indicates the basis for a commonplace about Right, namely that it ubiquitously involves claims regarding our *bodies*, whatever else it involves. The reason lies in the way the *how* series must continue. Pumping water by using a handle can only be done by way of further specification of means: by grasping *this* or *that* handle and ...—and this implies that I have various physical powers. (It also implies that I have various normative powers, as will emerge.) Of course, there’s nothing special about pumping: if I’m to do anything, or even to try, deliberation must disclose something in my power to do now; otherwise, the thing is beyond *choice*. Moving your body is only occasionally your end (eg ‘I’m doing yoga—that’s *why*’), but it is innate to Right as your means of doing anything-at-all.

If Right ignores ‘the end each has in mind’,” this doesn’t mean that there is some part of choice it ignores; for my *ends* in one series are my *means* in the

¹² This can of course be represented without dialogue: I’m moving a handle *in order to* operate the pump, in order to replenish the water, etc; or I’m replenishing the water *by* operating the pump, by moving a handle, etc.

¹³ On the primacy of the deliberative perspective, see A Ford, ‘The Progress of the Deed’, in R Stout (ed), *Process, Action and Experience* (Oxford, Oxford University Press, forthcoming 2017). Ford points out that ‘why’ is the question of an observer of action.

¹⁴ cf Aristotle, *Nicomachean Ethics*, III.3: deliberation starts from an end and considers ‘how and by what means it is to be attained’.

other. Like the road from A to B, choice is the same thing whichever way you're headed. 'Form in the relation' specifies an interrogative orientation: towards our *final means* (as it might be put), our ways of getting things done. No doubt, it can seem that Right looks in the other direction too, eg when it prohibits choices defined in terms of certain *aims*—taking your things or plotting your destruction. But this is only an effect of the series' reversibility. On closer inspection, it doesn't generally matter, as Kant says (and as lawyers know), what I was after or hoped to gain: taking your thing or injuring you (or trying to) are significant just as long as I was after *something*—ie if acts of this description can be exhibited as part of my deliberation.¹⁵ Right's focus on goings-on like stealing or killing or defrauding is not a matter of these being bad ends—depending on *why* you're going in for them, they might be *noble* ones—but a matter of *how* you mustn't go about things, whatever it is you're about.

How to do things with things has perhaps received less philosophical attention than its venerable identical twin, the question of final ends; yet the unification of choices, on Kant's view, involves reflection on just this. And the answer must naturally start in the sensate world of bodies and materials—with our moving things, or our moving ourselves by means of things (eg in walking), or with our just being on some bit of *ground* (while doing whatever). The reason for such crass materialism can be put like this. I may be pumping for various reasons, and what they are—to keep fit, neighbourliness, general happiness, etc—says a lot about *me*: my widening conception of what I'm doing may or may not be a story about you. In contrast, my narrowing deliberation of how to do any of this discloses an immediate relation to you; or at least it does if we are practically separate, meaning that we have some ultimate *means-of-our-own*.

Tarrying with matters aquiferous, what might my operating the pump have immediately to do with you?

The answer appears in Right's more specific form—*rights*. Property law might debar my whole enterprise, whatever its purpose, if it is *your* pump and you haven't authorised my use; or tort law might make using even *my* pump wrongful if this injures you; or contract law might bring it about that I must operate the pump *for* you. Property and tort specify your rights directly as constraints on my powers of getting things done; and contract builds on this, opening a way, besides beneficence or coercion, for my bodily efforts to become *your means* of doing something. As constraints on how to do things (and their cooperative modification), these laws illustrate the general form of thinking about Right. Right systematically demarcates I/you in its practical aspect: ie mine or yours (to do things with). As Ripstein puts it, we are independent

¹⁵ In law, evidence concerning my ends and motives is used to prove this deliberative aspect.

when you get to decide what to do with what is yours and I get to decide what to do with what is mine.¹⁶ This pithy formula needs a loose interpretation: choices affecting you accidentally (not by decision) are also an ubiquitous possibility about which Right must have something to say.¹⁷ Yet Ripstein's formula conveys the basic idea: when each of us is in charge of ourselves (or our own), neither of us is in charge of the other.

On this conception, you don't *first* have a right to freedom—eg a right protecting your interest in choosing—and *then* I'm required to forbear. Interests are not, as such, your means of doing things; and, on such a two-step account, your freedom would be affected by much besides my choices. As 'a relation of choice on the part of both', your right to freedom is nothing *other* than this, that some ways I might get things done would be a *wrong-to-you*. Hence, it is potentially misleading—though it may be common—to describe Right as marking out spheres of individual 'autonomy'. While autonomy may be a fundamental interest, and even part of an account of what choosers are, this description leaves out the relational aspect. Right concerns not what you are free to do, but what you can constrain me *not* to do. This is a special doctrine: there's no route to it, Kant suggests, from monadic concepts of freedom, however significant these might be.¹⁸

(2) Since Right doesn't constrain me on account of your freedom in a monadic sense, it doesn't put my wrongdoing into relation with your suffering as *several* different items: the *wrong-to-you* (eg of my taking your thing) is not a matter of anything happening to you (like losing your thing) considered apart from what I'm doing or vice versa. (A friendly neighbour might restore your thing; I've still wronged you.) Wrong-to-you is an unjust *transaction*. The logic of this might be illustrated in two ways: first by contrast with relations that *do* have several parts; and second, by contrast with a different account of rights.¹⁹

Locke said, 'Relation is a way of comparing, or considering two things together; and giving one, or both of them, some appellation from that Comparison, and sometimes giving even the Relation itself a Name.'²⁰ Relations of measure or degree inspire this account, for these can be applied to any

¹⁶ See, eg, A Ripstein, *Force and Freedom: Kant's Legal and Political Philosophy* (Cambridge, MA, Harvard University Press, 2009) 14–15.

¹⁷ My affecting you 'accidentally' means that *why?* is applicable to *something* I do, but the relevant effect on you does not appear in the resulting series. On Right's doctrine in such cases, see Section III below; see also Ripstein (n 10), ch 4.

¹⁸ See, eg, Kant, *MM*, 6: 231; *cf* 6: 442.

¹⁹ The remarks below are illustrations, not a full analysis.

²⁰ John Locke, *An Essay Concerning Human Understanding* (Oxford, 1894) 429–30.

relevant pair by first ascertaining, and then indeed comparing, two distinct values. We could discover many relations between *us*—taller, wealthier, nobler, more accident-prone—in just this way. But there are many practical relations we *can't* discover in this way. Matrimony, for (a homespun) example, isn't a comparison, though it also 'joins two together'. Right is like matrimony in two ways: (a) the *relational* nature of the acts involved and (b) the nature of the *parts* related.

(a) Can a combination of thoughts and acts which are yours or mine *severally* suffice to get us married? It appears not.²¹ For example, my thought that I am, by a certain ceremony, marrying you (which is necessary for marriage to occur) is only marriage-creating when it is—non-accidentally—the very *same* as your thought that you (yourself) are marrying me. Nor would it suffice, as Michael Thompson has argued, if our thoughts had the right content but rested on independent grounds, each of us coming into them in our own way: eg if my way of identifying that it is *you* I'm marrying were something other than your way of apprehending that you (yourself) were marrying me.²² Relational thought has taken a special turn here: it is *intrinsically dyadic*, not merely about a pair of things. Such thought features a relation with two poles, where what is to be thought about one is the same (and has the same ground) as what is to be thought about the other. Just so, my obligation to you and your right against me comprise the poles of a single thought.

Here it seems equally instructive to notice a difference. Marrying makes for a transparent case of intrinsically dyadic thought (and for an accessible example) because, here, our joint activity must also be self-conscious. Part of getting married is our both thinking we are doing so: if we don't share the relevant (dyadic) thoughts (about what we are doing)—perhaps I think it's only a rehearsal—the thing isn't actually happening.²³ Relations of Right *can* be self-conscious and often are, but they don't *have* to be in order to be actual.

²¹ This paragraph follows M Thompson, 'You and I: Some Puzzles about "Mutual Recognition"', lecture, available at www.pitt.edu/~mthomps/i+you.pdf, which argues for the irreducibility of some dyadic practical thought to a sum of our several propositional attitudes. See also M Thompson, 'What Is it to Wrong Someone? A Puzzle About Justice', in R Jay Wallace et al (eds), *Reason and Value: Themes from the Moral Philosophy of Joseph Raz* (Oxford, Clarendon Press, 2004) 333.

²² As Thompson points out, the philosopher's imaginative hypotheticals can insert themselves into a marriage situation involving nominal or even demonstrative identification, showing that we lack the sort of mutuality needed to get married. On this basis, he argues that 'you' is a form of 'I'.

²³ At least, this is so on the 'liberal' conception of marriage, to which these points may be restricted. See GEM Anscombe, 'On Promising and its Justice, and Whether it Need Be Respected in *Foro Interno*' in *Ethics, Religion and Politics* (Oxford, Basil Blackwell, 1981).

On Kant's account, this reflects *Right-as-independence*: if the reality of your rights required my discernment of them (not to mention my caring about them), your rights wouldn't make a relevant difference, for your freedom would be no less dependent (than it was without rights) on my judgement and will. Hence, for the actuality of Right, though not of matrimony, it is necessary and sufficient that the form of thought described in section 1 be applied through *public agencies* such as a court.²⁴ Public agency embodies a 'we' consciousness, a 'united will'; it is in court, if not elsewhere, that Right is conscious of itself.

(b) Although the parties to marriage are you and me—we who bear proper names, different origins, singularity in death, etc—the parts of this relation obviously aren't separately determined. Since to get married is not to compare but to share our acts, *my* getting married (and everything this consists in) evidently refers to a transactional whole—to something we are doing together, not in several parts. Anything I might do which has no immediate correlative in what you are doing (eg driving to the place of ceremony) won't be what our marrying consists in, though it might be some antecedent to it. Just so with wronging you: we do this *together*, not because you need to actively participate (though you do need to be an agent), but because a characterisation of something *I did wrong* that doesn't yet have in view your suffering—or that is only a causal antecedent to it—isn't relevant, even if it is morally interesting in other ways.

Perhaps one implication of this seems troubling: a mere *part*—eg my part in the affair—refers to the *whole*.²⁵ How can that be? A brief answer is that the relevant notion of 'a part' is our transaction *under a certain description*, and that this way of having parts is unexceptional: it is, after all, the way *any* action forms an (articulated) unity rather than being items merely added together. For example, a part of my *sending water to the house* was *my operating the pump* (which itself has parts). But these aren't several different actions: here, parts

²⁴ See Kant, *MM*, 6: 312.

²⁵ This has been a source of trouble in the law. The controversy in *Palsgraf v Long Island Railroad Co* [1928] 248 NY 339, 162 NE 99, for example, is partially about whether the defendant's negligence can be treated as a self-standing *part* of the tort relation. In this well-known case, the defendant helped a passenger board the Long Island Railroad and thereby caused injury to the plaintiff (a different passenger standing on the end of the platform) through an unusual causal sequence; the passenger boarding the train was carrying fireworks in an unmarked package which exploded when dropped. On one analysis (that of Cardozo J), the defendant simply wasn't 'negligent in relation to the plaintiff' and there is no such thing as 'negligence in the air'—negligence in a non-relational sense; on a different analysis (that of Andrews J), the defendant had been negligent all right, but liability requires a further determination of the nature of the causal relation to the plaintiff's injury.

and whole are *one* action under different descriptions.²⁶ In the same way, an unjust transaction (eg my pumping water and thereby injuring you) has many distinguishable parts—my *doing* and your *suffering* wrong (and everything these consist in)—but each of them refers (by way of different descriptions) to an antecedent unity. ‘Wronging’ involves a special *form* of cognising events (which could, of course, be cognised in other ways); but it is, on this score, just like any action as such.²⁷

Rights are sometimes said to protect weighty *interests*—weighty enough to be grounds for another’s obligation. Rights will be determinable, at least on one elaboration of this view, in the way we determine which of us is taller, for each has her own interests and her own standing ends. Of course, rights might be comparative conclusions that bring us into dyadic relation once they are determined, by comparison, to exist.²⁸ The case of marrying makes vivid a different possibility: a relation based on joint practical activity that is (publicly, in Right’s case) consciousness of itself as such. On this conception, Right can’t be reduced to a comparison of interests because our independence isn’t just a consequence of the determination that you or I have a right but the very *basis* of such a determination.²⁹ Hence, when the law specifies rights regarding your body, this is not because bodily integrity is a monadic interest of yours, or an interest of sufficient gravity to justify restricting my liberty interests, but because my interference with what is yours is a way of wronging you.³⁰ It is a transaction inconsistent with your independence.

In answer to my first question, I’ve mainly characterised Right-as-independence as a form of thought, while only alluding to the further conditions (such as rights and various public institutions) which, on Kant’s account, it also requires.

II. WHY START HERE?

The second question I was to consider might now be put like this: if interests, even basic ones, are not what makes Right significant, what *is* the point of Right? Doubtless, independence is a basic concern. Other political values—such

²⁶ This is one of Anscombe’s better known teachings in *Intention* (n 11) ss 23, 26.

²⁷ See *ibid*, s 47.

²⁸ There are much-discussed problems fitting the dyadic aspects of obligation—such as its being owed *to someone*—into such two-level accounts, but this may be left aside here.

²⁹ *cf* Kant, *MM*, 6: 238: the innate right to freedom can be appealed to in cases of disputes about rights, ‘as if ... appealing to various bases of rights’.

³⁰ See Ripstein (n 10) 13.

as treating persons with equal respect or advancing welfare—seem to presuppose it in some way, at least if it is independent choosers whose fair treatment or welfare matters. But some think this should be reserved: independence matters because this conduces to our faring well.

Understandably, some have attempted to ground Right in something they take to be more fundamental: eg in the moral law or rational agency or the nature of finite rational being.³¹ Besides offering leverage against other views, these foundational efforts are sometimes thought to be required for Kant's doctrine to succeed philosophically. By this standard, Ripstein's account is more juridical than philosophical. He argues that, starting with Right, various features of our political world become intelligible; but he doesn't try to prove that an account of political order must start with Right. Indeed, he develops the grounds of Kant's remark that Right is 'a postulate ... incapable of further proof'.³² Kant evidently isn't hoping to explain why people are in charge of themselves, only to explain how, in light of this, it could be possible for anyone else to be in charge of them—to rule them. Similarly, Ripstein makes no appeal to anything supposed to be more fundamental—more certain or valuable—than relations of right themselves.

Yet to lack proofs of Right is not to be without ways of elucidating its point or value. It is just that not *any* way will do.

It has been said that Right's only point is to be *Right*. That's a vivid rejection of Right-reductionism. It is apt to appear in contexts where someone thinks that there are no rights, only monadic interests, at the most basic level, the level at which the point of anything (ultimately) lies.³³ But beyond this dialectic, 'Right is Right' isn't appealing, since this way of defending against reductionism seems to concede that non-trivial accounts of something's value must refer to monadic interests—and that seems implausible. The value of love or friendship, for example, isn't ineffable, even if it is irreducible to more basic goods. Indeed, elucidations of the value of love can be found in the lover's own discourse; the study of love by other disciplines presupposes this.³⁴ By analogy,

³¹ See Allen Wood's essay below, and R Pippin, 'On the Moral Foundations of Kant's *Rechtshre*', in *Idealism as Modernism* (Cambridge, Cambridge University Press, 1997). On self-conscious being, see JG Fichte, *Foundations of Natural Right*, ed F Neuhouser, trans M Baur (Cambridge, Cambridge University Press, 2000).

³² Kant, *MM*, 6: 231.

³³ See, eg, E Weinrib, *The Idea of Private Law* (Cambridge, MA, Harvard University Press, 1995), which argues that doctrines of private law are incomprehensible on the basis of monadic features of the parties it relates.

³⁴ See R Barthes, *A Lover's Discourse: Fragments*, trans R Howard (New York, Farrar, Straus, and Giroux, 1978) where this is the methodological principle.

‘Right is Right’ really means to say only that elucidations of Right should be of a juridical—ie a non-reductive—kind:

[*Condition R*]: In explaining the point or value of Right, the concepts which figure in the *explanans* should have the same non-comparative relational structure as the right to freedom.

It would be strange if there weren’t more to say, consistently with this, about the point of Right, and *Force and Freedom* says a number of such things.

One refrain, for example, is that Right’s point is non-subordination, where slavery is a paradigmatic negation of this value but other (impersonal) forms of dependence are as well.³⁵ This builds on one of Kant’s explanations of innate right: ‘a man’s quality of being his own master (*sui iuris*)’.³⁶ This formulation (imported from Roman law) satisfies *Condition R*, since being your own master just means you are not anyone’s subordinate; ‘master’ and ‘subordinate’ are parts of a non-comparative relation.

Similarly, if Right grounds public authority (as one of its conditions of possibility), this gives it a credential by reconciling us to a problematic feature of political practice: Right answers the anarchist. Or, again, if Right illuminates the form and unity of legal practices—tort, property, etc, or the public law of state and subject—then we might reverse things and take jurisprudential reflection on these problems as an elucidation of Right. The law *is* a theory of Right: ie the interpretation (and application) of Right in various types of cases shows, more concretely, what is at stake.³⁷ (The law is a *doctrine* but not a *metaphysics* of Right.) Of course, these elucidations move in a circle, revealing Right in terms of its consequences. Perhaps they bring out the value of Right only for someone who already (at least dimly) appreciates it—so they don’t ground anything. They might be illuminating nonetheless, by exhibiting how a number of elements—independence, wrongs such as slavery, different types of rights, their doctrinal elaboration, political authority, public obligations to remedy systemic dependency (like poverty)—cohere and support each other. All this is open to criticism; but, as a structure of explanation, does it compare poorly to what other political theories claim to accomplish?

³⁵ cf P Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford, Oxford University Press, 1997) and P Pettit, *Just Freedom: A Moral Compass for a Complex World* (New York, WW Norton, 2014). Pettit gives wider application to the idea of impersonal subordination than Ripstein, who treats this concern as a systemic extension of dyadic right.

³⁶ Kant, *MM*, 6: 238.

³⁷ Applications of an idea are one way of explaining it. Law professors often explain the law to their students in this way—by exhibiting how it sorts out real and imagined cases.

To be clear, *Condition R* is not defended but only mentioned here to characterise Ripstein's mode of explanation. If someone were to ask, 'Why is *non-subordination* so important?', various responses might be given in this mode: they would present reasons for thinking about things in Kant's way but not for why one *must* do so. (How *do* we inherit the (non-empirical) idea of another as neither master nor servant?) But, on a different hearing, the question looks for some more basic value—something among 'the permanent interests of a man', in Mill's phrase.³⁸ The difficulties with 'interest' approaches (in accommodating either rights or political authority) are only incidentally part of Ripstein's topic—only as they illustrate something about the nature of Right. For example, it says something about Right that the following is a structurally open question: whether people will do best, on whatever non-relational measure is chosen, by being in charge of themselves.³⁹

Kant's own elucidations of innate right—independence, being *sui iuris*, innate equality, being beyond reproach, the entitlement to do whatever doesn't wrong others—all conform to *Condition R*; indeed, they aren't 'really distinct from' innate right, Kant says.⁴⁰ Such language indicates articulated unity and thus characterises Kant's overall form of account.⁴¹ Since his entire topic is how independent choices can be united, the 'conditions' of this are to be understood as increasingly specific determinations of an abstract idea, not as self-standing theses that are somehow added together. Mutual dependency is to be expected in such an account: for example, it is internal to Right that its content be expressed through public laws;⁴² but to understand how public law-giving is possible, you must understand what Right is.⁴³

Ripstein's project unfolds, then, as an account of Right's conditions of possibility, and the following chapters confront this project at different levels. Some accept Right but question its specifics: eg whether Innate Right involves our having, directly, certain *rights*; whether 'independence' requires property rights; and whether 'mutual freedom' grounds an obligation to obey political authorities. For these critics, abstract Right is a fine idea, but the devil's in the

³⁸ John Stuart Mill, *On Liberty*, 4th edn (London, Longmans, Green, Reader and Dyer 1869) 24.

³⁹ Textbooks on Roman law remind us that benevolently governed slaves were sometimes envied by those who were *sui iuris* but poor in the Empire. Perhaps starting with Right does have *this* going for it: it takes rights seriously.

⁴⁰ Kant, *MM*, 6: 237.

⁴¹ cf Immanuel Kant, *Critique of Practical Reason*, trans MJ Gregor (Cambridge, Cambridge University Press, 1997) 5: 10.

⁴² cf Kant, *MM*, 6: 312.

⁴³ cf Kant, *MM*, 6: 229–30.

specifications, so to speak. Other chapters raise radical doubts about Right itself, especially about its *formality*. Or they raise neither specific nor radical doubts but ask whether Right can be supported on some independent *ground*, rather than just via mutual dependencies.

III. TWO CONTROVERSIES ABOUT INNATE RIGHT

A. Pallikkathayil

In speaking of the body as a *means* of doing things, Ripstein isn't committed to a suspect ghost-in-the-machine, only to the commonplace that practical deliberation must eventually disclose something to be done with the body, if anything is to be done at all; the body is my practical being-in-the-world.⁴⁴ Ripstein thus describes bearers of Innate Right as having bodily *rights*. And he takes this to be Kant's view too, when Kant contrasts 'a wrong with regard to what is *internally* mine' (wresting an apple from my hand) and 'a wrong with regard to what is *externally* mine' (taking my apple when I'm not holding it).⁴⁵ The first apple-taking is, legally, a battery, since it upsets something contiguous to my body (even if I make no further claim to the thing); the second taking illustrates the idea of a right regarding something 'outside myself'—a right I must *acquire*. Kant's double contrast (innate-acquired, inside-outside) suggests that everyone already has *something* which is (internally) their own.⁴⁶

Japa Pallikkathayil doesn't exactly disagree with this, but she thinks it requires further conditions to make it hold good: our bodily rights are not so *immediately* available; they need political institutions to be 'conclusively' established. Kant says that claims to *property* in the state of nature are merely 'provisional': they don't create binding obligations until they are publicly (legally) established.⁴⁷ Using Ripstein's account of why Kant holds this view—an account of the defects of property rights without law—Pallikkathayil argues that the same problems affect bodily rights as well.

One problem ('indeterminacy') may be illustrated by supposing that—pumping water again—I *unintentionally* scald you.⁴⁸ Although your body is the topic of your complaint, your right remains an abstract one (as lawyers know)

⁴⁴ 'Using one's own body' isn't un-colloquial in any case: eg how to spread the caulking—by using the spatula or one's fingers?

⁴⁵ Kant, *MM*, 6: 250.

⁴⁶ See Kant, *MM*, 6: 248; *cf* 6: 250, 6: 254.

⁴⁷ Kant, *MM*, 6: 255–57.

⁴⁸ *cf* *Ferringer v Crowley Oil & Mineral Co* [1908] 122 La 441, 47 So 763.

until a legal authority determines whether, in *these* circumstances, it was actually infringed. Such further determinations seem *inevitable*, moreover, on any Kantian account of what is at issue—a unification of our equal freedom. For various rules that might better settle rights in advance—eg (1) ‘My action is wrong if it injures you’ or (2) ‘My action is all right, whatever happens, unless I meant to injure you’—end up subordinating *one* of us to the other: they sort right from wrong on the basis of some feature of the situation (your welfare, my purposes) that concerns only *one* of us. What other rules are possible? If this problem (of accidental injury) starts to explain why your specific bodily rights await a determination of whether I took ‘reasonable care under the circumstances’ (the universal legal standard),⁴⁹ it thereby also exhibits those rights as *naturally* indeterminate: the specific ways anyone can constrain anyone are available only by way of some constitutive public decision.

Positing purely ‘natural’ rights seems to face other problems too. For suppose your bodily rights weren’t *indeterminate* but merely uncertain—not everyone can discern them clearly; or suppose everyone can discern them, but some people just don’t *care*. In the former case, the reality of your rights would depend on my good judgement; in the later, on my goodwill. Either way, your rights depend on *me*—and that’s not Right.

There’s more. My example raises the spectre of indeterminacy without doubting that your scalded skin is—no-acquisitive-act-needed—*yours*. In fact, Pallikkathayil thinks that this, too, can be doubtful—that the indeterminacy of bodily rights can extend (beyond questions about their specific infringement) to questions about their physical basis or boundary in the first place. To show this, she considers various scenarios of bodily alienation and incorporation—severed or extracted parts, and prosthetic parts. Can rights in severed parts be lost or transferred? Do they need to be claimed or (re)acquired? Is interference with a prosthetic part to be modelled on battery or property? Exploring these puzzles, Pallikkathayil concludes that we need public rules for the classification *internally* mine—for the same reasons we need public rules, on Kant’s account, governing the acquisition of apples and the like.

Pallikkathayil thus finds in the problematics of bodily right an alternative argument for political authority, distinct from Kant’s argument from notionally special features of property. Of course, she uses Kant’s argumentative strategy—of deriving public authority from the nature of private right—but, in doing this, she finds ‘an even deeper justification for the establishment of political institutions than Kant himself imagined’. Readers of Kant might

⁴⁹ For a Kantian approach to the standard of care in negligence law, see Weinrib (n 33) ch 6.

imagine that independent persons could live without political institutions, were it not that their purposes sometimes involve using objects. They can't, Pallikkathayil argues, because the moral problems of using things without public laws are already present in claims regarding the body. Our most basic rights are ours as *political beings*.

B. Flikschuh

Katrin Flikschuh also finds that rightful 'mine and thine' is a politically mediated achievement. But while Pallikkathayil takes Ripstein to keep faith with Kant's (insufficiently deep) account, Flikschuh thinks Ripstein gets Kant's (deep) account wrong. *No* rights are entirely 'natural', on her reading: Innate Right describes only the a priori *form* of determinable rights, not any 'substantive entitlements'.

Flikschuh thus raises the question: (Q1) 'Can wrongs regarding the body be pre-politically in view?' But she raises two further questions about Innate Right as well:

(Q2) *Value*: is Innate Right supposed to protect some valuable feature of the person—eg their capacity for choice?

(Q3) *Argumentative role*: is Innate Right supposed to provide a 'foundational' justification for public authority?

These questions hang together. If Innate Right *is* supposed to protect the capacity for choice (*yes* to Q2), there's a motive for linking it to the requisites of this capacity, the body (*yes* to Q1); and this makes it a 'natural' foundation for public authority (*yes* to Q3). Affirmative answers to all three questions comprise what Flikschuh sees as a familiar, but mistaken, account of Kant's ideas—a liberalism of private freedom—and this is an account she thinks Ripstein is flirting with, if not fully embracing. To be sure, *Condition R* (Section 2) says *no* to Q2. But Flikschuh finds Ripstein equivocal on this point: doesn't his argument treat bodily rights as requisite to *individual purposiveness*? Doesn't he then treat practical agency as the *point* of Right, notwithstanding his more general dyadic pronouncements?

Perhaps this charge (that Ripstein is trafficking in monadic goods) might be reduced by distinguishing two questions. First, does Ripstein sometimes suggest that 'practical agency' is Right's point or value? Second, does his thesis of the immediacy of bodily right *need* this suggestion: could this thesis flow instead from (embodied) practical agency being merely a *condition* (but not the point) of applying concepts of Right? By analogy, the concept 'shaking hands' applies only among practical agents—that is its condition. But the point of 'shaking hands'—eg to seal a deal—won't appear in materials limited to what

anyone is doing alone. Like marrying, sealing deals is a dyadic affair: if we don't do it *together*, there's no deal.⁵⁰

The issues here might partly stem from equivocalness on *Kant's* part. On the one hand, Kant emphasises *distinctive* features of property that render it 'naturally' problematic: in claiming bodily rights, you claim just what I claim; in claiming property you (purport to) unilaterally bind me in non-reciprocal ways.⁵¹ Yet, elsewhere, Kant casts his point about the defectiveness of 'natural' Right more widely, suggesting that 'concepts of Right' only find application by way of public judgement.⁵² In different ways, Pallikkathayil and Flikschuh push the latter point.

In any case, Flikschuh's suggestion—that a resolute dyadicism entails negative answers to Qs 1–3—leaves to be considered, as she notes, the question of how Right does become (specific) *rights*. She sketches an alternative answer that refers to regulative values of 'public law-making'; and she suggests that the state would enjoy more robust powers, on this alternative, than those which 'private freedom' accounts can support. Flikschuh is not alone in worrying that 'private freedom' won't support all that we've come to expect from modern states—other chapters raise this question too.

IV. TWO CONTROVERSIES ABOUT FORMALITY

A. Sangiovanni

For Andrea Sangiovanni, Ripstein's starting point isn't too substantive—it's too *formal*. When Hegel introduced 'formalism' as a term of philosophical criticism, he meant that no content could be derived from Kant's moral law without the aid of assumptions about what we owe each another—ie without *Right* as realised in social practices. In a similar vein, Sangiovanni thinks that Right lacks content unless it is supplemented with assumptions about a person's basic *interests*.

On Ripstein's formal account, *wrongs* and *harms* are exogenous categories: harm, a monadic notion, is a setback to your interests; wrong, a subjection of what is yours.⁵³ Sangiovanni thinks this won't do. Let Right be *non-subjection*, he

⁵⁰ On condition versus value, see Ripstein's chapter below; on making deals, see Kant, *MM*, 6: 262.

⁵¹ Kant, *MM*, 6:255–57.

⁵² Kant, *MM*, 6: 312.

⁵³ Hence, trespass to property is a wrong independently of whether it tends to be harmful. See A Ripstein, "Against the Harm Principle" (2006) 34 *Philosophy & Public Affairs* 215.

grants, and let subjection be a choice that *uses* or *usurps* your means or powers. Still, no determinate application of *these* concepts is possible except by way of applying notions of basic interests and their setbacks.

Sangiovanni's incisive argument for this conclusion contrasts a pair of cases: *first*, raping (a wrong); *second*, sketching-someone-in-a-public-place (innocent enough, at least without further complications). If this classification of the cases is a matter of Right, it must be possible to *explain* the basis of our judgments in terms of Right. (Isn't this—namely that it can be explained—just what it means to think that the difference between right and wrong is *intelligible*?) But with resources limited to *formal* concepts, the two cases are structurally indistinguishable, Sangiovanni claims: in each, another's body is *used* for purposes he hasn't authorised. The explanation, Sangiovanni says, must be that our *interest* in 'sexual integrity' is sufficiently strong to constrain the rapist, but no similarly strong interest is affected by the sketcher.

'Using people' is both socially rampant and only sometimes wrong: I use you (for my pleasure) when I people-watch in a cafe; I use your parked car to hide from my enemies.⁵⁴ A defender of formal Right might say these aren't wrongs because, by going about in public, you've implicitly consented to being used in these ways. But this strikes a false note: these aren't even presumptive wrongs, nor could you make them wrong by withholding your consent. If the formalist is to maintain his claim that 'using people' is a main category of wrongs (and to reject Sangiovanni's account of the cases he describes this way), it seems he must say that the counter-examples aren't *really* instances of what he means by 'using'. Of course, this looks suspect. What could be easier—or emptier—than to defend 'All A is B' by saying of some A (ordinarily so-called) that apparently *isn't* B: 'That doesn't count as A for my purposes.'

But maybe the formalist can do better. What if he said this bit (about such cases not 'counting') but *also* said:

The moral *point* of Right is non-subordination. So it is only to be expected that Right will ubiquitously apply a distinction between (say) 'Using Another' and 'Merely Taking Advantage of the Choices they Happen to Make.'⁵⁵ In watching you or standing behind your car, I'm enjoying the effects of your choices. But I'm doing so only by fitting my activity into them, not by affecting your powers to choose. Moreover, given the *point* of Right, I must have the right to do this as the incidence of my own

⁵⁴ I've benefited from a conversation with Joseph Raz about such cases.

⁵⁵ This distinction is the *passive* mirror image of one which Ripstein claims is central to judgments of right: namely between interfering with someone's purposiveness and merely unfavourably altering the context in which they act. See, eg, Ripstein (n 16), 16, 39, 41, 45, 47–49, 51, 153; see also Ripstein's response below.

freedom. If you could constrain me from enjoying the ways you've changed the world (eg if I must lower my eyes as you walk by), I would be your subordinate. Right would be impossible if people couldn't *fit themselves in*.

No longer a simple refusal to count the counter-examples as 'usings', this is an explanation of what counts and why. Equipped with this, the formalist might say: 'The rapist *uses* you, because his occupation of your body, however harmless, affects your powers of choice—you might have other corporeal plans. But *some* cases of sketching (no need here for a general rule) are merely cases of *fitting in*.' Could this be the answer?

Sangiovanni suggests that answers like this beg his question, and perhaps the structure of the issue could be represented as follows. *Using* was already an explanation of what *subjecting* is; it could have been produced—in the face of some earlier counter-example—to avoid the empty answer, 'that doesn't count as *subjecting* for my purposes'. In the formalist's speech above, an account is given of *using* in terms of *fitting-in vs affecting*. But Sangiovanni asks: why does harmless *touching* have significance as 'affecting' but not gazing or sketching?⁵⁶ Again, the answer had better not be the empty one (about 'what *counts*...'). Perhaps the formalist could say that sketching isn't *moving* or (non-semantically) *communicating*. But while this probably exceeds the needs of routine legal work, it apparently needn't stop philosophical questions. Structurally, the situation looks like this: The formalist is asked to state his *basis* for 'judging that...', but his replies don't seem to reach all the way to sorting the cases out; so—on the (modest) assumption that sorting right from wrong is intelligible—it is felt that a different form of thought must be operating in the wings.

Could the formalist try again, but this time—having spotted a regress—boldly say that no further basis is needed? This would mean that one of the 'empty' answers is good enough; and that while further distinctions might be drawn—ie as needed in explaining particular cases—eventually something does *count* as an instance of the relevant formal category while something else does not.

At this point, Right's content frankly depends partly on *judgements* that extend or withhold its categories—judgements that *count* something as a case of something. But maybe this is ok: don't we operate with many everyday concepts in this way? Judgements about my obligations as a *friend*, for example, are needed in different situations, and these can't be fully codified. Yet explanations are always available of why I'm obligated *here* but not *there*—these typically

⁵⁶ No doubt, merely *thinking* about someone won't be affecting them: it isn't a transaction since such *intentional* verbs allow no inference to the passive: eg if I worship Zeus, it doesn't follow that someone *is worshipped*; but if I sketch you, you've *been sketched*.

describe and contrast various facts of the different cases. My judgement does carry a significant burden here, for such explanations may not suffice to resolve a dispute with someone who doesn't see the matter as I do.⁵⁷ Doubtless, this might be less than could be hoped for. Judgement doesn't always bear such a burden: eg in deciding what combination of conflicting activities will maximise their economic value, the verdict can be exhibited (given sufficient information) as one that follows from the stated goal by dint of mere theoretical rationality. Yet if someone were to propose that (eg) a comparative schedule of interests could aid practical thought about friendship (ie reduce its burdens), there would naturally be two objections. *First*, it isn't the demand for intelligibility, but only for a particular kind of it—a route to verdicts from outside the circle of thought in question—that makes such a supplement necessary. And *second*, it is in such ways that the *friend* does *not* think. Application of a schedule of interests won't cure friendship of indeterminacy, though it might cure people of friendship: ie someone who avoids the burdens of judgement in this way is already favouring some value *other* than friendship.

Might Right be like friendship in this regard? If so, the formalist judge must do her best to be a judge. She won't lack explanations of what counts and why: using the local legal idiom, she will (in effect) characterise some defendants as merely 'merely fitting in' or describe the facts of the case in light of previous holdings applying similar distinctions. This might not suffice to settle a dispute with her colleagues. Her opinions will be *interpretive* of Right—in a non-trivial sense, they will be *hers*. But, in judging in this way, she engages the relevant form of practical thought.

None of this argues against Sangiovanni's thesis that interests play an essential role in judgements about rights; it merely casts doubt on one argument for thinking they *must*. And it raises a question: can the relative determinacy of two forms of practical thought be considered, just as such, invidious to one of them?⁵⁸ Explanations of how particulars are to be classified must, after

⁵⁷ My burden can be represented like this: I implicitly claim to embody the situational judgement of someone good at friendship. John McDowell has pursued this theme in various essays. See, eg, J McDowell, 'The Role of Eudaimonia in Aristotle's *Ethics*', in AO Rorty (ed), *Essays on Aristotle's Ethics* (Berkeley, University of California Press, 1980).

⁵⁸ This question may reflect an argument that isn't Sangiovanni's. A classic of 'invidious comparison' is Henry Sidgwick's suggestion that 'ordinary moral knowledge' is defective, given utilitarianism's superior power to codify moral judgement. H Sidgwick, *The Methods of Ethics*, 7th edn (Cambridge, Hackett Publishing, 1981) 421 and book IV, chs II, III. For a similar idea, see also John Stuart Mill, *A System of Logic* (London, Longmans Green and Co, 1889) book VI, ch XII, s 7; John Stuart Mill, *Utilitarianism* (London, Longmans Green and Co, 1901) ch V, paras 26–31. For a contemporary version, see L Kaplow and S Shavell, *Fairness Versus Welfare* (Cambridge, MA, Harvard University Press, 2002).

all, end *somewhere*.⁵⁹ So there is a sense in which Right *does* (on any account) ultimately depend on *counting as*—all thinking does. This is why I'm imagining the formalist to ask: 'Must there be some further account of classifying judgment to be given here? Isn't it enough that (1) the moral point of Right is accessible; and (2) jurisprudence *does* work out Right's content—with explanations as needed and with appropriate authority—through thinking that involves (burdened) judgements about particulars?' It is partly around such questions—about the nature of determinative judgement—that the issue between Sangiovanni and Ripstein seems to be joined.

B. Julius

AJ Julius argues for a different anti-formalist thesis: namely, that Right is possible only if people act in view of certain *ends*. Ultimately, this would put into question Kant's division of Right and Virtue.⁶⁰

Following Ripstein, Julius takes the target notion ('Right-as-independence') to be that of being free to choose for yourself (where to *choose* is to be *able* to realise your ends: Section 1). This immediately suggests a difficulty. Since anything I might choose to do (eg standing here now) might collide with something you might choose, how is it conceivable that each of us could be free to set ends independently of the other's choices? The solution previously sketched—people having rights to means of their own (Section 1)—Julius finds inadequate.

All solutions to the 'independence' problem—Julius observes—must (in the nature of the problem) lie in my rightful ends being conditioned *in some way* by your freedom. Indeed, he takes this to be Kant's doctrine at its most abstract: the Universal Principle of Right protects my action as rightful *if* it can coexist with everyone's freedom. Hence, if I set the *absolute* end of being in a determine region of space-time, this cannot coexist with your setting the end of occupying that same region; our choices are mutually dependent. But if I make my end *conditional* (eg to occupy that region *if* it is not already occupied), I do not hinder your similarly described action (nor you mine). When some rule or policy conditions our rightful choice of ends, our choices can be independent.

⁵⁹ This is one of the upshots of Wittgenstein's reflections on 'following a rule'. See Ludwig Wittgenstein, *Philosophical Investigations*, 2nd edn, trans GEM Anscombe (Oxford, Blackwell, 1958), ss 185–201; cf Immanuel Kant, *Critique of Pure Reason*, trans P Guyer (Cambridge, Cambridge University Press, 1998) A133/B172.

⁶⁰ 'Virtue' as a doctrine of mandatory ends: see Kant, *MM*, 6: 380–81; 6: 384–85.

Generalising from this, Julius's considers three rules of freedom-consistent action, three versions of what abstract Right might mean, at least for the case of our using external objects and spaces:

1. *The Law of Property*: I have the Right to set out to [E if I have or come to own the means to E].
2. *The Law of Usufruct*: I have the Right to set out to [E if you aren't already using the means of doing so].
3. *The Maxim of the Virtuous*:⁶¹ I will set out to [E if it is consistent with your freedom].

(1) and (2) instantiate the Kantian schema, 'a right to [E consistently with others freedom]'. Our choices are made consistent by my using either (1) only *what I own* or (2) only *what you're not already using*. In contrast, (3) determines no rights, and no specific way of not obstructing one another, in advance; instead, it finds a solution in our cooperative adjustments to each other's purposes. But any solution arising in this way—ie one of us yielding to the other—preserves our independence, according to Julius, because each of our choices bends to no *alien* purpose.

To show this, Julius focuses on the everyday situation in which, moving about the world on some collision course, we *work it out*. (A traffic law could have given one of us a *right of way*, but, by hypothesis, no such thing applies here.) How is *working it out* to be regarded? If the only possibility is to think that one of us must eventually yield *because* of what the other is doing, then the situation is no doubt one of subordination. Kant thinks of 'lawless freedom' in this way—a law of the jungle. But, according to Julius, there is another possibility. I might yield not out of a mere collision-avoiding motive but out of a freedom-regarding one. Being virtuous, my end was never *simply* to get from A to B, but rather: to get from A to B *consistently with your freedom*. If you've also set such an end, then our convergence on a solution preserves independence because it is a realisation—it is rationalized by—our ends of freedom-consistent movement: each of us does what he set out to do.

In light of this, Julius sees property and usufruct not exactly as alternatives to (3) but as specific forms of it—forms of social cooperation-for-freedom. But they are, he argues, defective forms. For under both, my choices are shadowed by something alien. For example, if I decide not to make a mushroom omelette

⁶¹ This is my terminology, not Julius's.

because you've acquired all the mushrooms and put them beyond my rightful means, I may be making a *concession* to your choices rather than realising my purpose as it previously existed; your choices operate as givens, not as realisations of my ends. In this way, Julius doubts one of Kant's central claims: that wherever people have object-requiring purposes, property rights are essential to their independence. Given the possibility of *working it out*, property isn't necessary for independence. But neither is it *sufficient*—on Julius's argument, a certain practical attitude, a will to act for freedom, is also required.⁶²

Such a conclusion doesn't seem unheard of—at least not to students of post-Kantian philosophy. Actualised freedom, on Hegel's teaching, is a will that is *with itself*, not dependent on something alien;⁶³ and since this requires practical mutuality (or *Sittlichkeit*: 'an I that is we and we that is I'),⁶⁴ Abstract Right is, by itself, only one of freedom's defective forms. Julius reaches this conclusion, moreover, as Hegel would recommend—via *immanent* critique: he questions Kant's specific idea of Right (as something realised in enforceable obligations), but he questions this on the grounds of the *point* of Right in the first place ('independence'). He suggests a way to ask: does Right depend on *rights*?

V. TWO CONTROVERSIES ABOUT PUBLIC RIGHT

A. Pavlakos

Rejecting 'lawless freedom', Kant avers that overcoming it requires no special virtue: even 'a race of devils' may enjoy just relations in a legal state.⁶⁵ Thus, he can be found asserting what Julius denies: life without law remains sunk in dependence and violence, 'however well disposed ... men might be'.⁶⁶

Remarks like this are based not on Kant's observations of human nature, but on his cognisance of a defect that conceptually characterises private Right: without law, 'each has its own right to do *what seems [to him] right and good*'.⁶⁷ This sentence means to express a contradiction. If the actuality of Right rests on

⁶² Could I cooperatively work anything out with you if I don't already have *some* means which are exclusively mine to decide about? That is, does an argument such as Julius's touch Kant's argument that Right requires rights (enforceable obligations) with respect to the *body*?

⁶³ Hegel (n 5) s 23.

⁶⁴ GWF Hegel, *Phenomenology of Spirit*, trans AV Miller (Oxford, Clarendon Press, 1977) s 177.

⁶⁵ Kant, 'Toward Perpetual Peace' (n 7) 8: 366.

⁶⁶ Kant, *MM*, 6: 312. Or compare Julius's 'right obligates me to act for freedom' by making 'consistency [with your freedom] my maxim' with what Kant says at *MM*, 6: 231.

⁶⁷ Kant, *MM*, 6: 312.

what *seems* right (*in foro interno*), then—even with universally good intentions—each would *depend* for their rights on everyone else. Right-as-independence thus requires procedures for adjudicating rights which are themselves *rightful*—ie dependence-free. This implies that some agent is to decide about rights who isn't *me* or *you* or any other party. That could only be *us*: Right requires a common or 'omni-lateral' will—*public agency*.⁶⁸

George Pavlakos approaches this Kantian thesis with one of contemporary legal theory's problems in mind: are legal obligations a *special kind*—not necessarily moral obligations but not merely putative moral obligations either? Some say *yes*, adding that legal obligations also enjoy a special *normativity*—neither moral normativity nor the mere 'obliging' of coercive threats.⁶⁹ Pavlakos worries that Ripstein too is making a 'special kind' claim: 'omni-lateral' willing as a distinctive *ground* of legal obligation. He finds this both implausible and inconsistent with Kant's own story about obligation: *implausible*, because the mere say-so of a collective agent can't create genuine obligations (it is an 'open question' whether any putative obligation survives rational reflection); and *inconsistent* with Kant's story, because this *is* a story about my rational reflection and endorsement.

Two discourses meet here: the post-positivist explanation of legal obligation and the Kantian explanation of political authority. Could Ripstein renounce the suspect (special kind) thesis of the first discourse while continuing to think of public authority as a condition of Right? Pavlakos himself wants to affirm a view like this—public authority as (what he calls) an 'enabling condition' of legal obligation—but he suggests that this view has first to be won by disentangling it from the suspect thesis.

To this end, he offers a diagnosis of how the suspect thesis comes to seem compelling. It is product of a framework in which:

1. an explanation is sought of how legal directives can create genuine obligations, consistent with:
2. a 'standard picture' of all obligation as grounded in acts of willing; and
3. the commonplace that legal obligations, unlike moral obligations, admit of coercive enforcement.

Since the person who is legally *compelled* to act does not make obligation his incentive, (3) entails that legal obligation couldn't be grounded in *individual* acts of willing. So it comes to look like the only alternative (for success with 1) must be for some *other* kind of willing to play this grounding role. Pavlakos would

⁶⁸ See Kant, *MM*, 6: 256–57, 6: 26–66, 6: 306–13.

⁶⁹ See, eg, HLA Hart, *The Concept of Law* (Oxford, Oxford University Press, 2012) ch 1.

discard (2) in favour of what he takes to be both Kantian and common sense: obligations are grounded in rational reflection. How, then, do public authoritative directives make a difference to our obligations? Here Pavlakos applies the distinction between *grounds* and *enabling conditions* of legal obligations; and as an example of the later, he suggests that authorities often concretise our obligations or give them a particular instantiation from among a number of possibilities.

B. Weinstock

Kant stressed the moral impossibility of revolting against public authorities: beyond the duty to leave the ‘state of nature’ (to create an ‘omni-lateral’ will) there is a duty not to *regress* from a political state (no matter what).⁷⁰ Daniel Weinstock recalls why Kant held this view, before challenging Ripstein’s defence of it.

Locke’s ‘right to revolt’ accompanied his idea of the state as the instrument of rightful proprietors: their antecedent rights—the state’s *raison d’être*—could also be grounds for dissolving it. A doctrine like Kant’s, which views public authority as a precondition of Right, obviously can’t follow Locke. Similarly, ‘the will of the people’—the idea invoked by the French revolutionaries—affords, for Kant, no ground for revolt, since only public law can determine what counts as a *people’s* acts or views. Kant also stresses (as I might put it) that the state, despite its name, isn’t ‘static’: it is a public *act-in-progress*, and, as such, something reformable. Weinstock’s criticism of Ripstein puts this last point to use.

Kant’s argument against revolution presupposes one thing: that public authority *exists*. Suppose, in the state of nature, a small band exploits others for their own purposes. Perhaps they follow rules of procedure (as efficient exploitation requires) and call themselves the Governing Authority (since ideology helps). Since this is only a more organised structure of private subjection, one’s duty would be to *resist* the Governing Authority if that is a way out of the state of nature. Kant’s argument, we may say, requires application of a distinction between the *constitutive* and *regulative* conditions of public order: the former say when public order *exists* (the rule of law, public offices, etc); the latter describe its *justice* and its mandate (innate right and its ‘authorisations’).

⁷⁰ See Kant, *MM*, 6: 320; see also Immanuel Kant, ‘On the Common Saying: “This May be True in Theory, but it does not Apply in Practice”’, in MJ Gregor (ed), *Immanuel Kant: Practical Philosophy* (Cambridge, Cambridge University Press, 1996) 8: 299.

Corresponding to this distinction—according to Ripstein—are two kinds of political privation: in a *despotism*, public authority exists but acts unjustly; in *barbarism*, public authority is absent, so the argument gets no grip.⁷¹

Is this distinction sharp enough to sort out historical cases?⁷² Unless it can be applied without asking whether things are *bad enough* so that people should revolt if they can, the categories aren't doing the right sort of work. Weinstock's objection is different: he thinks Ripstein's account *does* sort out particular cases—*unpalatably*. In particular, he finds that Ripstein's *constitutive* conditions for public order allow for a particularly bad possibility: namely, a *hopeless* despotism. Here, the regulative ideals of justice aren't just publicly violated but also publicly unacknowledged. In short, the state *has* become static; or, if it is going anywhere, it is likely going backward, to barbarism.

Weinstock is troubled by the thesis that revolution would be morally wrong in such terrible conditions, and he proposes a solution: understand the Kantian argument as presupposing not merely the *existence* but the *progressive* character of public order. I take this to be a claim about what *really matters* about public order: namely, its being an act-in-progress, and not, apart from this, its comprising various institutional structures *as such*. Ripstein's categories of political defect only roughly track what matters: judging by the possibility of progress, despotism can be as bad as barbarism.

Weinstock is a reformer in the Kantian realm, not a revolutionary. He would continue to distinguish despotisms from barbarisms, but among despotisms, he would distinguish regimes that realise the social contract imperfectly (this characterises all historical regimes) from those that fail to recognise the contractual ideal they fall short of. In such *unenlightened* despotisms, citizens considering revolt will weigh the risks to Right against the prospects of something better. On some Kantian views, this would be to compromise morality with exigency or enthusiasm; on Weinstock's view, a revolt from hopelessness can be just *right*.

VI. RIGHT AND ETHICS

A. Wood

Can duties of Right can be derived from (some formulation of) the Supreme Principle of Morality or Categorical Imperative (CI)? Some say they *must* be

⁷¹ This follows Immanuel Kant, *Anthropology*, trans RB Louden (Cambridge, Cambridge University Press, 2006) 7: 331.

⁷² J Weinrib, *Dimensions of Dignity: The Theory and Practice of Modern Constitutional Law* (Cambridge, Cambridge University Press, 2016) offers some helpful guidance on issues of classification.

derived if Kant's doctrine is to succeed philosophically; others, like Ripstein, say they *can't* be. Both views have their motivations.

On the one hand: Kant distinguishes between legal obligation (which depends on coercive enforcement: external law-giving) and ethical obligation (which depends on free self-constraint: internal law-giving); the former concerns the formal unification of our choices, the latter, my self-governance and mandatory *ends*.⁷³ Now suppose that the Principle, 'Choose only consistently with the equal freedom of others' *could* be derived from the CI. Arguably, this is no derivation of *Right*. For it only shows that the other's status as a chooser makes a dent on a good person. She might decide against making lying promises, as Kant says.⁷⁴ She might even decide that she must carry out her *sincere* promise, whatever the circumstances. But even this (which is implausible) falls short of showing that anyone has a power externally to constrain her. The point is simple: the CI describes my self-conscious principle of action; but *Right* isn't, in the first instance, about 'how I *myself* should limit my freedom'⁷⁵—it's about how *you* may do so. Indeed, this is just what Kant says when he presents the Law of *Right* as a 'postulate incapable of further proof': following directly upon a contrast between *Right* and *virtue*, this assertion registers the lack of an inferential route from internal to external morality.⁷⁶

On the other hand: *Right* and *Virtue* are divisions of a higher category—*Morals* (*Sitten*). If only *one* of these divisions (*Virtue*) is grounded by the CI,⁷⁷ what is this higher category about? There is also the trouble raised by Pavlakos: all genuine obligations should be able to appear *as such* in rational reflection—but doesn't the CI purport to describe the shape of any such reflection? Last but not least: if *Right* isn't grounded in the CI, it risks being an unsupported, further principle—and Reason wants more than that.⁷⁸

⁷³ On these contrasts, see especially Kant, *MM*, 6: 218–21, 6: 239, 6: 380–83, 6: 395–96, 6: 406–08.

⁷⁴ See Immanuel Kant, *Groundwork of the Metaphysics of Morals*, trans MJ Gregor (Cambridge, Cambridge University Press, 1998) 4: 402–03.

⁷⁵ Kant, *MM*, 6: 231.

⁷⁶ The summary nature of my discussion shouldn't be taken to minimise the controversy that exists about these arguments. Considerations in favour of derivation have been advanced by Paul Guyer, Otfried Hoffe, Wolfgang Kersting, Mary Gregor, Leslie Mulholland, Bernd Ludwig, HF Fulda, Roger Sullivan, and Onora O'Neill among others. On the other side (non-derivation), Wood, Ripstein and Marcus Willaschek have made important contributions. For a brief but helpful overview, see R Pippin, 'Mine and Thine: The Kantian State', in P Guyer (ed), *The Cambridge Companion to Kant and Modern Philosophy* (Cambridge, Cambridge University Press, 2006).

⁷⁷ Kant earlier seemed to say that the whole of *Morals* is grounded: eg *Groundwork* (n 74) 4: 391–92.

⁷⁸ Not that grounding *Right* in *Morality* would remove all given-ness—according to Kant no deduction of *Morality's* principle is possible—but it would remove it for *Right*. See Kant, *Critique of Practical Reason* (n 41) 5: 46–48.

Allen Wood guides the reader through this dense region, in part by prising apart and then answering *three* questions: that of Right's *derivation* from Morality, that of Right's *foundation*, and that of the *unity* of Morals. *Derivation*: Right's property of coercive constraint makes it underivable from moral self-governance. *Foundation*: yet this needn't mean that Right has no supporting ground—it is grounded in the nature of rational agency. *Unity*: although there is no route from internal Morality to Right, both (1) are grounded in rational agency and (2) employ a concept of obligation as conformity to universal law; this is what makes each a branch of Morals.

Among these points, Right's *foundation*—a problem 'not explicitly solved by Ripstein', Wood says—is the most intriguing:

The foundation of right ... consists in a rational ground that all rational beings have for requiring the protection of external freedom of all according to universal law. What could such a ground be? It is this: As a rational being, I necessarily set ends. This implies a rational requirement that I be free to choose the actions by which I pursue those ends.

Does Wood mean to derive Right from monadic features of my own case? If not, how might his argument be further articulated?⁷⁹ Say that I'm rationally committed to being free to choose for myself—this is a 'rational interest' of mine, as Wood also says. I grasp this and so do you, and we grasp that we grasp it. Does this way of figuring in each other's thought mean that we apprehend ourselves as standing in relations of Right and not just relations of potential conflict? After all, in grasping your rational interest, I grasp that you *won't* be interested in leaving me free to choose when this limits you. Prudence might get us to relations of Right from here, but that's of course not what Wood is suggesting. By what steps does my rational commitment to choosing my own actions rationally commit me to *your* being able to *constrain* me from doing this very thing?

Foundations aside, Wood also asks whether the powers of modern states can really take root in Kant's abstemiously unmixed soil of mutual independence. Answering *no*, libertarians have found an ally in Kant; champions of the 'welfare state' have found an objection to his doctrine. Both are mistaken, according to Wood: Right incurs no commitment to a minimalist state, because economic inequality threatens people's independence, not just their welfare.

As an example, consider the homeless. They do not *fare well*. But this is also an effect of a property system under which the homeless need the leave of

⁷⁹ The present paragraph may articulate part of Ripstein's concern below.

others—and this characterises what they *are*—to be in a place and to do many other things as well. The latter description roots public action in ‘independence’, not monadic needs, and it shows why private charity couldn’t solve the problem.⁸⁰ Similar points can be made about poverty.⁸¹ In this way, the Kantian state has a duty, according to Wood and Ripstein, to remedy poverty and homelessness (and to support health and education and much else) precisely as part of its mandate to sustain the conditions of reciprocal freedom. This argument suggests that while Right *begins* with dyadic thought, the conditions of sustaining a *public system* of Right bring in considerations that are not immediately dyadic. How are these further considerations constrained by their origins in Right, or how far do they go? Since ‘independence’, for Wood and Ripstein, is a broader idea than the absence of *personal* subjection, there is room for the ‘social-democratic’ state; but since the state’s powers originate from dyadic Right, Kantian political thought must spell out the transition from personal subjection (whose paradigm is master and slave) to its systemic analogues.⁸²

B. Stone

I agree that Kant can be liberated from libertarianism, but I still wonder if he can go as far as embracing *discretionary* public powers, like supporting the arts, developing parkland or preserving history. These are good things for a state to do, but they don’t seem to be requisites of equal freedom: if they were, they would be *mandatory*.

My main focus, however, is on one aspect of Right’s independence of ethics. Political philosophy has often begun outside the *political*, with values that are supposed to be self-standing—ie fully there to be engaged-with, even with no political practices in view. On such accounts, legal and political thought is to *apply* these standing values to our circumstances;⁸³ the values are the external touchstone of what political institutions should be. Right is *not* self-standing in this way: it is useless apart from its realisation in public institutions; and it is *proprietary* to such institutions—it has no other use.⁸⁴

⁸⁰ See C Essert, ‘Property and Homelessness’ (forthcoming).

⁸¹ Besides Wood’s chapter, see Ripstein (n 16) chs 8, 9; see also E Weinrib, ‘Poverty and Property in Kant’s System of Rights’ (2003) 78 *Notre Dame Law Review* 795.

⁸² Here I have benefited from an exchange with Rafeeq Hasan.

⁸³ See Ripstein (n 16) 1, 23–24, 28.

⁸⁴ Right does have the *philosophical* role of exhibiting the grounds and unity of these institutions. But this becomes important—on Kant’s view—only because Right, like morality more generally, gets dialectically obscured. Philosophy is defence. For this point in relation to practical philosophy, see especially Kant, *Groundwork* (n 74) 4: 403–05.

The most prominent version of ‘law as applied ethics’ brings the structure of Right into bold relief. For the *utilitarian*, whatever specific value is supposed to be morally relevant to choice (eg preference-satisfaction, wealth, etc), it:

1. is *self-standing*: grasping its content doesn’t require law or legal rights to be in view.
2. *fully determines* what we are to do: limitations lie only in uncertainty about what will lead to what.
3. involves *no essential* role for law: whether following legal authority is the best way to realise this value is a contingent matter, not basic to the theory. A book on morality is complete without mentioning law.
4. can determine what our laws should be without need for thinking of a distinctively *practical* kind—merely by predictions of what will lead to what.

In contrast, Right-as-independence:

1. is *not self-standing*: its content isn’t fully available without public laws.
2. is *indeterminate*: it can be realised in different ways, so some public, constitutive decisions are needed.
3. involves an essential role for *law*: the most direct (and indeed the only) way of complying with Right is to follow public laws and procedures.
4. is made more concrete through practical specification in different circumstances—not just by reckoning how particular rules might bring about a value that is fully graspable on its own.

Institutions of Right, in sum, *express* or *interpret* an abstract part of morality—they don’t bring some self-standing value about.

Item (3)—to comply with Right is to follow what is publicly *laid down* as Right—is apt to suggest that Kant is a ‘legal positivist’ in contemporary terms. Something seems right about this suggestion but something doesn’t. Legal *positivity* must play an indispensable role in any account of political life, like Kant’s, that views law as a concretising expression of an (abstract) part of morality. But *positivism* is something else, and Kant’s idea (that a part of morality is proprietary to law) doesn’t fit the prominent versions of it. Today there are three much-discussed positions about the nature of law: Either self-standing moral truths (1) *do* or (2) *might* play a role in determining the content of the law-in-force, or (3) morality is external to law and never determines its content. Since Right is internal to law but not *self-standing*, none of these positions captures Kant’s view: (1) and (2) describe how the-law-in-force might depend on *morality*; but for Kant, one part of morality (Right) depends on *law*.

* * * *

Ripstein’s response to these chapters presents a doctrine of Right that is formal and involves coercible obligations (not virtue); that affirms the

immediacy of bodily right and emphasises the role of property in grounding political authority; that restricts the right to revolt beyond what some find palatable; and that grounds many of the familiar powers of the 'social-democratic' state. Is this Kant's doctrine of Right? Is it the right doctrine of Right? This volume reflects the present state of these questions and invites the reader to join in.