

Rights and Interests in Ripstein's Kant

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Arthur Ripstein's powerful and compelling reconstruction of Kant's legal and political philosophy defends six main claims:

1. *The basic aim of political philosophy is to determine standards for assessing systems of public and private legal entitlements.*
2. *Both legal and moral entitlements are claims to compel (by force if necessary); a legal or moral entitlement is a **right** when it is a genuine **authorization** to compel (by force if necessary).²*
3. *We each have an innate [moral] right to freedom that serves as a basis for and constraint on all other rights (including private and public legal rights).*
4. *Freedom can only be restricted for the sake of freedom. Any entitlement or set of entitlements that does not serve to protect or establish a system of equal freedom under universal law cannot rightfully be enforced.*
5. *Freedom is independence from, i.e., non-subjection to, the choices of others. A system of equal freedom under universal law is a system in which each subjects' powers (including their body and means) are not usurped or destroyed by others.*
6. *What counts as independence, and hence as non-subjection, can be determined without appeal to interests, or harm, or well-being.*

In this paper, I will accept claims 1-5 but reject 6. Throughout I do not assess, at any point, whether Ripstein's argument is a faithful and illuminating interpretation of Kant (which I believe it is), or whether it is plausible to ground an entire political philosophy in the idea of freedom as independence alone (which I believe it is not).

¹ I wish to thank Ian Carter, Mathias Kumm, Pablo Gilabert, Oona Hathaway, George Pavlakos, Nicos Stavropoulos, Annie Stütz, Laura Valentini, Leif Wenar, and especially Arthur Ripstein for very helpful comments on previous drafts of this paper.

² Though Ripstein does not distinguish 'entitlements' from 'rights' I believe it is useful to do so to avoid confusion. An 'entitlement' in the sense I am using the term purports to be a Kantian 'right' though it may fail in actually being such a right, i.e., being justifiably enforceable. The distinction is analogous to the distinction between *de facto* and *de jure* authority. If we don't make the distinction, then we will be apt to overlook the difference between a legal entitlement that *succeeds* in providing an authorization to coerce because it is part of a justified system of entitlements (in my terms, the entitlement would then be a [genuine] right) and one that does not succeed but that purports to do so (in my terms, the entitlement would not be a [genuine] right). For example, Ripstein writes, the 'fundamental feature of all [genuine] rights is that they are parts of a system of equal freedom under universal law' (180). We must add the modifier 'genuine' here, otherwise any system of legal rights would be part of a system of equal freedom.

The Importance of Independence

The right to independence under universal law is the foundation on which Kantian legal and political philosophy stands.³ As Ripstein observes, the ‘idea of independence [under universal law] 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’ (14).⁴ A system of legal entitlements is justifiable, that is, if and only if it serves to protect or uphold every subject’s right to freedom *qua* independence, consistent with every other subject’s right to an equal freedom. There are three parts of this formulation (which restates the core of the Universal Principle of Right⁵) that need to be clarified before we can move on. First, what is it for two or more people to have rights to *equal* freedom (I)? Second, what does it mean for a system of entitlements to be *consistent*, such that every subject’s right to freedom is consistent with every other subject’s right to the same freedom (II)? Third, what is it for one person to be *independent* from another (III)?

(I)

The Kantian asserts that any pattern or distribution of freedom, to be rightful must be *equal*. Talk of equal freedom seems to presuppose that persons are free to different *degrees*, and that it is wrong if some are more free than others. Freedom would then need to be measurable (at least ordinally).⁶ Yet, Ripstein denies this. Ripstein writes:

[Freedom] is not a matter of people having equal amounts of some benefit, however it is to be measured, but of the respective independence of persons from each other. Such independence cannot be defined, let alone secured, if it depends on the particular purposes that different people happen to have. ... Instead, a system of equal freedom is one in which each person is free to use his or her own 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.⁷

³ The fact that it is foundational should not be taken to mean that it cannot be derived from a further concept or idea, or that it is somehow ‘self-evident’. The innate right to freedom, for example, could be given a transcendental justification as the necessary presupposition of any system of reciprocal legal coercion. All I mean by ‘foundational’ here is that the right serves as the most basic constraint on legitimate lawmaking, on which all other constraints must be grounded. I thank Katrin Flikschuh for discussion on this point..

⁴ See also Ripstein, *Force and Freedom*, pp. 3, 180.

⁵ The Universal Principle of Right states that ‘an action is right if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with universal law’. The UPR gives rise to each person’s innate right to ‘*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’, which ‘is the only original right belonging to every human being by virtue of his humanity’ (I. Kant, *Practical Philosophy*, ed. M. Gregor (Cambridge: Cambridge University Press, 1999), pp. 386-7, 93-4, *MM*, 6:230; 6:237-8).

⁶ Steiner, who begins with many (though not all) of the same premises as the political Kantians, sees the importance of this question, and grasps the nettle. See, e.g., H. Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), p. 44ff. For an excellent discussion of the measurement of freedom, see I. Carter, *A Measure of Freedom* (New York: Oxford University Press, 1999).

⁷ Ripstein, *Force and Freedom*, p. 33.

The thought seems to be this. Freedom does not depend on what people turn out (contingently) to want or desire or need. It only depends on whether people are able to use the means at their disposal to set their own purposes—*whatever* purposes those might be—unhindered by the attempts of others to compel them to choose otherwise. Like the relation ‘to the left of’ or ‘uncle of’, freedom is therefore *noncomparatively* relational: there is no ‘degree’ to which one be free independently of one’s relations to others. Compare the relation ‘heavier than’, which is only *comparatively* relational: If I am heavier than you, then I possess a nonrelational property (namely mass) to a greater degree than you. The relation is defined by a comparison between my mass and your mass. The relations ‘being to the left of’ or ‘being the uncle of’, on the other hand, do not consist in a comparison between one or more nonrelational properties possessed by the relata. It is not as if one person possesses ‘leftness’ or ‘uncle-ness’ to some degree independently of their relation to the other person. The same, then, goes for freedom: if there is no ‘quantum’ of freedom that one can possess independently of one’s relation to another, there can, therefore, be no sense in comparing the degree to which two people are free.

I do not see how the conclusion follows. We can grant that freedom defines a noncomparative relation between persons—such that, for example, it makes little sense to talk about Robinson Crusoe’s freedom—without conceding that it cannot be measured. Compare ‘to the left of’. While there is no nonrelational property of ‘leftness’ that a thing possesses, it surely can be said of A that it is farther to the left of B than C. This is because, while the relation ‘to the left of’ cannot be *reduced* to nonrelational facts about spatiotemporal location, it surely *supervenes* on them. So, once we fix a reference point, it becomes unproblematic to compare two things to see which one is farther to the left of something else. The same goes for freedom: once we have more than one person, we can begin to speak of degrees of freedom. Could one claim that freedom is more like ‘uncle’, which does not admit of degrees? The problem is that the property of ‘being an uncle’ is binary: either you are an uncle or you are not. Yet, it would be implausible to argue that freedom as independence is binary in the same way. Otherwise, we would be forced to say that the person whose pen was stolen is just as unfree as the slave, since in both cases the means at their disposal have been subjected to another person’s choices.

Perhaps the political Kantian will grant that degrees of freedom (and hence degrees of subjection) can be measured.⁸ And, in what follows, I will grant them this assumption. I flag the problem right at the beginning to show how important the concept of ‘subjection’ and its contrary ‘independence’ is within the Kantian system. It must not only be defined in such a way as to capture how both the slave and the person whose property has been stolen are ‘unfree’ in the relevant sense, but also explain why one is more unfree than the other. As we shall see below, the political Kantian cannot do this without an appeal to the interests upon which relations of independence supervene.

(II)

What does it mean for a set of rights to freedom to be *consistent* for Kant? Here we need to be careful. Kant cannot have in mind logical consistency (or compossibility) among *rights in a*

⁸ Hodgson and Stilz, for example, appear to accept that freedom can be measurable (though they provide no metric for how to assess it). See, e.g., Hodgson, ‘Kant on the Right to Freedom: A Defense’ at p. 816; Stilz, *Liberal Loyalty*, p. 51.

general sense. For example, a system of Hobbesian natural *liberty* rights—in which each of us has the same permission to pursue the means we judge to be necessary to our self-preservation—is logically consistent but not consistent in the Kantian sense. It is logically consistent because my liberty right to kill you if I want your hut only means that I lack a duty not to kill you; it says nothing about your duties to me. My liberty right to kill *you* is therefore logically consistent with your same liberty right to kill *me*.⁹ I believe the best account of Kant holds that logical consistency is meant to apply only to a *special* case, namely consistency among what I will call *protected liberties*.¹⁰ Protected liberties are liberty rights which correlate with third-party duties not to interfere with the exercise of that liberty. An example might be our protected liberty to determine what use to make of our body: we have a permission to do as we please with our body, and others have a duty not to interfere. Systems of protected liberties are consistent, then, when the exercise of one person’s protected liberty does not make the exercise of others’ protected liberties either impossible or impermissible. If we both had protected liberties to take whatever means we believed were necessary for our self-preservation, then our protected liberties would be inconsistent across a wide ranges of cases. They would be inconsistent, for example, in cases where I believe that killing you is necessary for my self-preservation, since that would entail that I have both a permission to kill you (derived from the drawing the implications of *my* protected liberty in this case) and a duty not to kill you (derived from the implications of *your* protected liberty in this case). This account fits with Kant’s claim that acquired rights in the state of nature are only *provisional* rather than *conclusive*: they can only *purport* to generate genuine duties on others not to interfere.¹¹ Until there is an adjudicatory mechanism to resolve conflicts generated by the exercise of our (purported) protected liberties, we cannot know which side’s claims win out. In the absence of such a mechanism, we therefore have a permission to do *not* whatever we like but ‘what seems right and good to us’, i.e., a permission to act in whatever way we sincerely believe would be permitted under a system of consistent rights *qua* protected liberties.

(III)

So far we know that freedom as independence is a noncomparative relation, that everyone ought to have the same rights to independence, and that rights to independence ought to be construed as protected liberties whose implications are logically consistent. But what does it mean, exactly, for someone to be independent, i.e., not subject to others’ choices? This is a crucial question for the political Kantian to answer because the right to independence (and its correct institutionalization in an actual system of private and public rights) provides the sole

⁹ There are interesting questions here about what counts as a logically consistent set of rights in general (i.e., across all instances of rights). Would, for example, a set of rights in which one has both duties to *x* and duties to not-*x* be logically consistent? Some, like Hillel Steiner, say it wouldn’t. Others, like Matt Kramer and Neil Simmonds, say it would. For Simmonds and Kramer, inconsistency requires much more than Steiner, e.g., it requires someone to both have a duty to *x* and lack a duty to *x*. The problem with Steiner’s view, they believe, is that it precludes the possibility of conflicts of rights. See M. Kramer et al., eds., *A Debate over Rights: Philosophical Enquiries* (Oxford: Clarendon Press, 1998), p. 185ff. I thank Ian Carter for alerting me to this distinction.. I cannot pursue this here but I believe that Kant’s view is closer to Steiner, so I adopt this reading in what follows. It is worth mentioning that deciding the dispute in any case doesn’t have any implications for the argument that follows.

¹⁰ On protected liberties in this sense, see also A. J. Simmons, *The Lockean Theory of Rights* (Princeton: Princeton University Press, 1992). Cf. Kant’s discussion of the priority of duties to rights in Kant, *Practical Philosophy*, pp. 394-5, *MM*, 6:239.

¹¹ See, e.g., Kant, *Practical Philosophy*, pp. 409-11, *MM*, 6:256-7.

basis and standard for the assessment of legal systems; as Ripstein himself notes, ‘Kant imposes an extreme demand for unity on his account of political justice’ (31).

It is striking that there is little sustained discussion of the concept of subjection in *Force and Freedom* (let alone the *Doctrine of Right*).¹² At the point where Ripstein introduces the right to freedom under universal law, he analyzes the notion of subjection in terms of actions that either *usurp* or *destroy* your powers to set ends. Agents *usurp* your powers when they, for example, coerce you or physically force you to do something, and they *destroy* your ability when they, for example, kill or maim you. I take it that in both cases Ripstein means that an agent A usurps or destroys a person B’s powers *in such a way as to subject their choices* only when they do so in a reasonably foreseeable and avoidable way (though not necessarily intentionally).¹³ Otherwise, when I maim you by falling by accident from a building onto your arm, I have violated your right to freedom by subjecting your choices, which would make my act (absurdly) wrong.

The trouble is that ‘usurp’ is a moralized concept: to usurp means to *illegitimately* take over a power or jurisdiction, or, alternatively, to take over a power or jurisdiction that is *rightfully* someone else’s. A moment’s reflection should reveal that to moralize the notion of subjection in this way would spell disaster for the Kantian view. Consider:

an action should be prohibited by a system of entitlements just when and because it subjects others’ choices.

If we substitute, ‘illegitimately take over another’s power or take over a power that is rightfully another’s’ for ‘subjection’ (and hence leave aside for the moment the other way in which we can subject others’ powers, namely by destroying them), we get:

an action should be prohibited by a system of entitlements when and because it illegitimately takes over another’s powers or takes over a power that is rightfully another’s.

This formulation says little more than: an action should be prohibited just when and because it should be prohibited (i.e. ‘illegitimate’). But what we want to know is *when* ‘taking control of another’s powers’ is illegitimate; what we want to know is *which* ‘powers’ or ‘means’ rightfully count as another’s. Indeed, the same problem potentially affects the idea of *destroying* another’s powers: if I foreseeably and avoidably kill you in self-defense, have I wronged you?¹⁴ It is tempting to say that your freedom is only violated when I *illegitimately* destroy your powers, but then the account never really gets off the ground.

¹² I draw the following few paragraphs from A. Sangiovanni, ‘Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights?’, *European Journal of Philosophy* 20 (2012): 460-9. On this point, see also L. Valentini, ‘Kant, Ripstein and the Circle of Freedom: A Critical Note’, *European Journal of Philosophy* 20 (2012): 450-9..

¹³ Much more would be needed to clarify the notion of foreseeability and avoidability used here, since both foreseeability and avoidability come in degrees, where wrongness, for Kant, does not. How foreseeable and avoidable must an action that destroys or usurps your powers be before it counts as violating your right to freedom, and hence wrong? I leave these problems aside.

¹⁴ The case of destroying another’s powers may be easier to deal with if we consider self-defense as an *excuse* rather than a *justification*. But there will be other cases, such as trolley cases, where this kind of option will be less easy to defend. On Kant and self-defense, see Ripstein, *Force and Freedom*, p. 177.

So we need to find a notion of subjection that *explains why* rather than *presupposes that* the actions it singles out are wrong. To bring out the importance of answering this question, it is useful to focus on a concrete case involving our innate rights to the use of our body. Innate right abstracts from questions regarding the means (other than the body) that persons use to set and pursue ends. This restriction simplifies our task: Because the arguments for the existence and limits of *acquired* right depend on the success of the argument for *innate* right, a problem in the latter will infect the former as well.

Consider the wrongness of rape. The Kantian seems, at first glance, to have a very powerful argument. Rape is prototypically an action in which someone's choices have been subjected to another, where someone has been used as a mere means¹⁵, where someone's control over their own body has been usurped. And, indeed, one might think that the Kantian view does very well with regards to a *special* case of rape, which competing harm- or interest-based views seem to have trouble with, namely what has been called the 'harmless rape'.¹⁶ Imagine someone sneaks into your house at night, and has sex with you while you are sleeping; you never find out, no one else knows, and the rapist is killed the moment he walks out your front door. The rape is clearly wrong, yet there is no psychological or physical damage, and no other interests of yours seem to have been set back. Harm- and interest-based accounts of the wrongness of rape therefore seem to fail in cases like this, much like they fail in cases of harmless trespass.¹⁷ The Kantian seems to do well on the other hand. As Ripstein writes, 'The person who uses your body or a part of it for a purpose you have not authorized makes you dependent on his or her choice; your person, in the form of your body, is used to accomplish somebody else's purpose, and so your independence is violated. This is true even if that person does not harm you, and indeed, even if he benefits you' (15).

But now consider a different case. Someone sitting across from you at the library is gazing intently at your hands, in order to sketch a portrait of them. You never notice and no one else ever sees the portrait; the drawing is then lost and the person dies soon after leaving the library. Notice that this case is, from the Kantian point of view, structurally *exactly the same* as the harmless rape. In both cases, someone 'uses your body or a part of it for a purpose you have not authorized' (15); and in both cases, there is no hurt or profit or other downstream

¹⁵ It should be noted that Ripstein (along with others such as Thomas Pogge, Marcus Willaschek, and Allen Wood) believes that the UPR does not presuppose the moral theory of the second *Critique* or the *Groundwork*: while it may be derived or justified by reference to it, it need not be. I mention the idea of 'mere means' here to signal that the challenge would apply even to accounts that insist that the UPR cannot be justified without some appeal to the moral theory. Taking a view of this latter sort would allow the Kantian to appeal to the resources of the moral theory (e.g., the formula of humanity) to 'fill out' or otherwise clarify the implications of the UPR.

¹⁶ The 'harmless rape' is discussed and used as an argument against harm-based views generally in John Gardner and Stephen Shute, 'The Wrongness of Rape', in *Oxford Essays in Jurisprudence, 4th Series*, ed. J. Horder (Oxford: Oxford University Press, 2000), pp. 193-217 and Ripstein "Beyond the Harm Principle," *Philosophy & Public Affairs* 34 (2006): 215–245; see also *FF*, p. 92n9. Gardner and Shute provide a distinctively Kantian account of the wrongness of rape, employing the idea of using someone as a mere means to make their point. Though Ripstein does not make use of the formula of humanity (he resists the idea that Kantian political and legal philosophy is just an 'application' of the Categorical Imperative), both accounts share a family resemblance. The arguments I adduce here against Ripstein can also be used to target Gardner and Shute.

¹⁷ Compare the case which Ripstein uses to prosecute his case against harm- and interest-based views (such as JS Mill's): "If I touch you without your consent while you sleep, or use your property without your consent while you are absent, I draw you into my purposes and wrong you, even if, as it turns out, you never learn of my action, and your body or property suffers no identifiable harm" (22).

effects of the act. *There is nothing in the account of usurpation or using as a means, I contend, that marks a significant difference between the cases.*

As we will see in a moment, I see no other way of plausibly drawing the desired distinction—a distinction any minimally plausible account of our innate right in our own bodies should be able to draw—without appealing to interests (and hence appealing to harm and well-being). What makes the harmless rape wrong in a way the portrait case is not is that we have a deep and important interest in *sexual integrity* that is lacking in the portrait case. What explains this interest, in turn, is the central place that a free sexuality plays at the center of any flourishing life, given the way we are as human beings.¹⁸ There is no equivalent interest in control over who draws us in public places that compares. So the best analysis of the harmless rape will say, quite naturally, that this interest in sexual integrity is sufficiently strong to ground a duty on the part of others not to rape us. Because there is no similarly strong interest in controlling who can draw us in public, there is no enforceable right that protects that interest. Once we put things in this way, it also becomes possible to argue that, in fact, raping someone who is unconscious *does* harm them (*contra* Ripstein and Gardner and Shute). Raping someone who is unconscious sets back their interests in sexual integrity. If we accept that setting back someone's interests counts as harming them, then the idea that there is no harm in the 'harmless' rape is false.¹⁹

There is of course much more to say about whether welcoming interests into the picture forces us to reject the Kantian account of right *in toto*. And, if not, further questions about how interests could be integrated into the Kantian framework without diluting its force and simplicity. But this would take us far beyond the limits of this chapter. Instead, I will briefly consider six objections one might make to salvage Ripstein's account from our initial challenge. The objections each aim to show that Ripstein could respond to the challenge without a further appeal to interests.

The first objection contends that I have overlooked the importance of physical touch. On this view, you only illegitimately use or usurp someone's body if you physically touch them. Because there is no touch involved in the portrait case, there is no wrong. But why should the metaphysics of touch—independently of how touch is connected to central human interests—matter for an account of our innate rights? Say that someone takes photographs of you in your bedroom, and then posts them on the internet. This strikes us as wrong, a blatant violation of our right to independence, yet no touch has been involved. How is the portrait case any different? But of course it is, its difference marked by the importance of *privacy* for a flourishing life. I return to privacy, and its connection to independence, below.

A second objection points to the role of hypothetical consent. Surely, the objector argues, you would have consented to have a portrait of your hand drawn and, similarly, you would not have consented to being raped. That is what marks the difference: we can count your hypothetical consent in the portrait case as if it had been actual consent. This is implausible. Suppose you would not in fact have consented to the portrait: should that matter? Or suppose that you would have consented, but did not in fact consent, to someone having sex with you:

¹⁸ A very convincing account of the wrongness of rape, which makes appeal to exactly such an interest in sexual integrity, is David Archard, 'The Wrong of Rape', *The Philosophical Quarterly* 57 (2007): 374-93.

¹⁹ On the idea of harm as a setback to interests, see Joel Feinberg, *The Moral Limits of the Criminal Law Volume 1: Harm to Others* (New York: Oxford University Press, 1987). See also Archard, 'The Wrong of Rape'.

should that matter? The answer, in both cases, is no. The permissibility of each action does not rely on knowing or estimating the truth of a counterfactual. Indeed, reflection on cases where hypothetical consent *does* seem, at first glance, to make a difference reinforce the point being made here. Consider, for example, cases of emergency medical intervention in which consent cannot be obtained. In these cases, it is tempting to say that medical intervention is justified because one *would have* consented. But this is a mistake. Suppose, to continue the example, that I, the paramedic, know that you would have asked not to be treated had you been conscious (you told me your views on these things in no uncertain terms just the other day). In the absence of proof of *actual* consent (e.g., a living will or non-resuscitation order) no paramedic should act on that special information. The reason is precisely that *hypothetical* consent is not *actual* consent. A better explanation of the paramedics' permission (or even duty) to intervene when someone is not conscious and alert makes no use of the idea of hypothetical consent. Rather, the explanation appeals to our strong *interest* in receiving medical intervention when incapacitated, which grounds a permission (and sometimes a duty on others, e.g., paramedics) to intervene. Hypothetical consent doesn't come into the explanation at any point.²⁰ Compare the harmless rape: We do not say that people have a right not to be raped while unconscious because they never would have consented to being raped in this way. Rather, we say that people have a strong interest in not being raped when unconscious, which grounds the duty not to do so. Whether they would have consented is irrelevant. Of course, we also believe that people in medical emergencies who are conscious and aware have a permission either to *waive*, by actual consent, the claim-right to treatment (or *block* the permission to intervene). But to conclude that the role of *actual* consent in such cases establishes that we ought to act on the basis of whether they *would have* consented is a non-sequitur.²¹ Again, it is the appeal to interests (rather than to consent) that marks the relevant distinctions between our rights in the medical intervention, rape, and hand portrait cases. Actual consent only becomes relevant once those rights have been defined and delineated in terms of the interests at stake.

The third objection refers to *tacit* rather than *hypothetical* consent.²² The objector claims that when you go into public you *tacitly* consent to a series of actions that would be prohibited were you to remain at home (e.g., to have my picture taken, to be drawn, accosted, and so on). If you had not wanted to be accosted, drawn, etc., you could have just stayed home. This is a much better objection than the previous one because, unlike hypothetical consent, tacit consent is widely considered a species of *actual* and so genuinely binding consent.²³ There are two problems. First, tacit consent is only genuine if the costs of expressing dissent are not too high. If I have little option but to appear in public, for example, then the idea that, 'if you didn't want to be photographed, accosted, looked at, drawn, and so on, you could have just stayed home' rings hollow. So let us suppose, for the sake of argument, that the costs of staying home are not too high. The second and more serious problem is that the objector has not specified how we ought to determine which actions to include on the list of actions to which I tacitly consent when entering the public. Compare: 'When you go into public (or,

²⁰ Or, at most, the appeal to hypothetical consent just summarizes or restates the guiding idea that people have a strong interest to be treated in such cases.

²¹ Similarly with rape: That we believe that people have a permission to waive their right not to be 'raped' should they genuinely and actively consent to an elaborate role-play does not establish that we ought to act *as if* they had consented when they did not in fact consent, even were we to know that they would have consented.

²² I owe this objection to Oona Hathaway.

²³ The classic account is A. John Simmons, *Moral Principles and Political Obligations* (Princeton, NJ: Princeton University Press, 1979).

alternatively, into a pub), you tacitly consent to being (harmlessly) raped if you happen to become unconscious. After all, some would say, 'it wouldn't have been too costly to stay home (or avoid drinking so much)'. In response, we would say that the claim overlooks the fact that being raped is very different in character than having our hands drawn. It would, *for this reason*, be unreasonable to put 'rape' alongside 'hand-drawing' on the list of things to which we consent when appearing in public (or going into a pub or drinking). What helps us to determine what gets on the list? The answer, I am suggesting, will invariably point to the weight and importance of our interests, to sexual integrity in one case and to not being drawn in the other. It is those interests that explain what can reasonably be put on the 'list' of actions to which you can be rightly said to tacitly consent by appearing in public (or going into a pub or drinking).

The fourth objection makes use of Ripstein's distinction between *affecting the context in which you act* and *subjecting your choices*. If I 'open a competing business that lures away your customers, or use my property so that you no longer have the pleasant view you once did' (21-2), Ripstein says that I have merely changed the context in which you act rather than made you dependent on me. Using this distinction, we might then say that when someone draws your hand they merely affect the context in which you act; when someone rapes you, on the other hand, they subject your choices. This response begs the question. We want to know *why* drawing a hand portrait doesn't subject your choices in the relevant sense but raping you does. The objection just assumes we already have the standard we are looking for.

The fifth objection has two variants. According to the first variant, the objector complains that Kant does not believe that examples in concrete cases can be used, on their own, to impugn a theory. As Ripstein notes, 'Kant's mode of argumentation reflects his attitude toward examples. He develops many examples in the course of his argument, but rejects the idea that examples can replace arguments, or that philosophy is charged primarily with accounting for examples' (6). A defense of Ripstein that appeals to this idea misses the point of the examples. The examples of the harmless rape, hand portrait, pictures, and so on, are meant to illustrate a broader point about the role of interests in grounding rights. They are not meant somehow to stand on their own.²⁴ In any case, I take it as obvious that any minimally plausible view about the rights we have must be able to account for the distinction between rape and drawing someone's hand. Rape, after all, is not just a borderline case. As Ripstein goes on to say, 'But to say that Kant does not regard examples as dispositive is not to say that his arguments lead to conclusions that cannot survive reflection' (7). The force of the examples here is meant to suggest that the account, as given, cannot survive reflection.

According to the second variant of this objection, Kant's legal and political philosophy does not aim to offer determinate guidance in particular cases such as the ones mentioned above. Its indeterminacy in these respects, the objector continues, is one of its *strengths*. As Ripstein writes,

²⁴ Indeed, one can produce any number of further examples to make the same point. Take, for example, the idea that it would be wrong of me to run my fingers through your hair without your authorization. But now say that your hair is on fire, and my hands happen to be wet. I don't have time to ask for your permission, and so I just douse the fire by running my fingers through your hair. Is that wrong? I submit, once again, that to account for the difference between these two cases we must appeal to a balance of interests and to considerations directly stemming from well-being. See also the examples adduced to make a similar point in Victor Tadros, 'Independence without Interests?', *Oxford Journal of Legal Studies* 31 (2011): 193-21; Sangiovanni, 'Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights?'

Kant's argument as a whole not only concedes indeterminacy, but, the indeterminacy of the application of basic concepts of right is a cornerstone of his argument for the need for a state. Abstract concepts do not classify particulars on their own, and people might, in good faith, disagree about their application, as Kant puts it 'no matter how good and right loving they might be' (Kant 1996a [1797]: 456).²⁵

Adapting this claim, the thought would be that it would be up to the state (via legislation) to determine whether people can legitimately be raped in their homes without their authorization, as it would be up to the state to determine whether people can have their hands drawn in public. As long as people have the same rights, it would be legitimate to enforce a system of entitlements allowing rape as it would be to enforce one that doesn't.²⁶ Once again, any minimally plausible account of freedom as independence ought to have the resources to draw a distinction here. While there are many areas of the law in which a theory at this level of abstraction could legitimately remain silent (or, perhaps better, indifferent), this is surely not one of them.²⁷ As Ripstein goes on to say, 'concepts of right provide conceptual resources for thinking through particulars, especially the distinction between interfering with a person's means and changing the context in which those means are used' (ibid.).

The sixth objection claims that I must reject the essentially Kantian idea that a system of entitlements grounded in independence is *noncomparatively* relational. Take the relation 'to the left of': there is no way to define what the relation consists in by referring solely to facts about the nonrelational properties of the relata. The relation 'taller than', on the other hand, is only *comparatively* relational: the relation 'taller than' consists in one thing having a nonrelational property, namely height, to a greater degree than another thing. There is no comparable degree of 'leftness' that a thing possesses independently of its relation to other things. Ripstein claims the relations of subjection are analogous: there is no way to define what subjection consists in by referring to some freedom-independent property of each of the relata. This is why Ripstein often says that freedom, as a relation, is *irreducible*—and, most importantly for our purposes, why he often says that freedom is irreducible to *interests*. Do I need to deny this?

²⁵ Arthur Ripstein, 'Form and Matter in Kantian Political Philosophy: A Reply', *European Journal of Philosophy* 20 (2012): 487-96 at p. 489.

²⁶ Cf. what Ripstein says in response to a paper of mine (in which I pursued a similar argument): 'Sangiovanni overlooks the explicit structure of the universal principle of right. It does not look to the effect of one person's action on another. Instead, it focuses on whether every member of plurality of interacting beings *could* enjoy such rights under universal law. As I sought to explain in *Force and Freedom*, you can have a right to decide what purposes you will pursue with your own body or property, because everyone *could* have that right, but, by contrast, you *could not* have a right that others use their bodies and property in ways that best serve your preferred ends' (490, emphasis added). I don't understand this response: In what sense is it true that a system of entitlements in which harmless rapes are permitted 'could not' be realized under universal law? If we take the constraint of universal law in a thinner sense, such that a system of entitlements is consistent with the idea of equal freedom as long as each person's rights are consistent with everyone else having the same rights, then the system of entitlements that permits harmless rapes *is* compatible with universal law, since it gives everyone an *equal* right to rape others. If, on the other hand, the constraint of 'universal law' is understood in the more substantive sense I suggested in (II) and (III) above, then the response begs the question. What is at stake is whether the idea of subjection implicit in the UPR has the resources to outlaw harmless rape but not hand portraits. Ripstein's reply has this form: 'The UPR does have the resources to outlaw harmless rape but not hand portraits, because everyone *could not* have the right to engage in harmless rapes without subjecting others, whereas they *could* have the right to draw hand portraits without subjecting others'. This leaves entirely unanswered the question: 'Why does a system of entitlements permitting harmless rapes count as a system of subjection, but not a system of entitlements permitting hand portraits?'

²⁷ Notice that the argument does not depend, like Sidgwick, on the claim that a theory that couldn't classify particulars in a determinate way must be faulty (cf. Henry Sidgwick, *The Methods of Ethics* (Indianapolis: Hackett Publishing, 1907 [1981]), p. 421).

I don't, and this is key to understanding the force of the argument. Return to the relation 'to the left of'. While it is true that the relation cannot be *reduced* to nonrelational facts about spatiotemporal location, the relation surely is a *function of* nonrelational facts about spatiotemporal location. The relation, that is, depends, or more precisely, *supervenes on* nonrelational facts about spatiotemporal location (while not being reducible to them). And that is exactly what I am claiming with respect to interests: while I accept that relations of freedom are not *reducible* to relations of interests, relations of freedom must be a *function of* relations of underlying interests. To determine whether two people stand in relations of freedom with respect to one another, we first need to know what interests are involved in their relation, just as we did in the harmless rape and portrait cases. Because interest-based theories of independence are not forced to deny that freedom is noncomparatively relational, the objection fails.²⁸

I conclude that on Ripstein's Kantian view what counts as independence cannot be determined without appeal to interests, or harm, or well-being. While this does not refute Ripstein's Kantian political philosophy *in toto*, it does show that, until an account of such interests is provided and shown to be consistent with our moral status as free and equal beings, the argument remains incomplete.

²⁸ Indeed, this is also true for most accounts of negative freedom which affirm that freedom is absence of interference *from other agents*; on such views, you are only free to the extent that others are not interfering with you. See, e.g., Ian Carter, *A Measure of Freedom* (New York: Oxford University Press, 1999), pp. 25-7. Carter also defends the idea that freedom *also* has a *comparatively* relational aspect; hence the title of his book.