Can the Innate Right to Freedom Alone Ground a System of Public and Private Rights?

Andrea Sangiovanni

Abstract: The state regulates the way in which social power is exercised. It sometimes permits, enables, constrains, forbids how we may touch others, make offers, draw up contracts, use, alter, possess and destroy things that matter to people, manipulate, induce weakness of the will, coerce, engage in physical force, persuade, selectively divulge information, lie, enchant, coax, convince, . . . In each of these cases, we (sometimes unintentionally) get others to act in ways that serve our interests. Which such exercises of power should the state forbid? Which should it permit? An intuitively appealing way to answer this question is, with Ripstein and Kant, to point to the role of freedom: exercises of social power can be legitimately prohibited when (and only when) they restrict people’s freedom. But this raises a further question: How do we identify when such exercises of power make people unfree in the relevant sense? Ripstein, in defending Kant, draws a crucial distinction between actions that subject others’ wills to our choices (and which it would therefore be presumptively legitimate for the state to forbid) and actions that merely affect the contexts in which others act (and which it would therefore be presumptively illegitimate for the state to forbid). I query that distinction, and argue that the idea of independence cannot bear, on its own, the weight it is expected to bear within the Kantian framework.

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In this paper, I query that distinction, and argue that the idea of independence cannot bear, on its own, the weight it is expected to bear within the Kantian framework. I first claim that the account of subjection we find in Force and Freedom presupposes rather than explains why the actions it singles out are enforceably wrong. I then go on to show that, on a revised understanding of subjection that deals with this problem, the Ripstein–Kant view still would not be able to generate a determinate and plausible way of distinguishing basic cases of subjection from basic cases of mere influence. My conclusion will be that, in trying to distinguish such cases, the Kant-Ripstein view must point to ideas other than independence or subjection.

The innate right to freedom under universal law—to ‘independence from being constrained by another’s choice’—is the load-bearing foundation on which the entire Kantian edifice is erected: ‘The idea of independence carries the justificatory burden of the entire argument, from the prohibition of personal injury, through the minutiae of property and contract law, on to the details of the constitutional separation of powers’ (Ripstein 2009: 14; see also p. 31). Kant’s theory (and by extension Ripstein’s reconstruction) is therefore extraordinarily ambitious: all actions that are enforceably wrong are wrong just when and because they violate other people’s independence. Can an entire system of enforceable moral rights, both public and private, be grounded in the single, simple idea of independence? I will argue that it cannot be; an intuitively plausible account of the rights we have requires appeal to concepts other than independence or subjection.

The innate right to freedom under universal law governs interaction among persons as purposive and embodied beings, and abstracts from questions regarding the means (other than the body) that persons use to set and pursue ends. The latter are dealt with by extending the universal principle of right (of which the innate right to freedom is a corollary) to other (non-bodily) means we use to pursue ends, such as property and contract. In this paper, I shall focus on innate right and leave acquired rights to the side. 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.

To bring out the need for a distinction between subjection and affecting someone’s choices, consider these two examples. I walk down the seaside cliffs and see you in my favorite place, basking in the sun. Since you are there, I can’t take my usual place. Have you subjected me to your choices? No, Ripstein says, I have at most affected the context or background against which I make my own choices, making it more difficult for me to achieve ends that I otherwise would have been able to achieve in your absence, but not subjected my choices in any relevant sense. I employ a very efficient production process that allows me to produce widgets much more cheaply than you, which foreseeably leads you, my competitor, to go out of business. A similar thing can be said here: By employing...
the more efficient process, I merely affect the background in which you act; I do not subject your choices to mine (even though I know you will go out of business, and may even intend to put you out of business by using the more efficient process). According to Ripstein, the distinction between affecting and subjecting others’ choices is ‘central to Kant’s argument’ (ibid.: 39). But now the question arises: How do we determine which actions lie on one side of the distinction and which on the other? Put another way: what are the criteria for determining which uses of one’s means (including one’s body) count as subjecting others’ choices, and which ones count as merely affecting them?

It is somewhat striking that there is no sustained discussion of the concept of ‘subjection’ in *Force and Freedom*. At the crucial point where Ripstein introduces the innate right to freedom under universal law, he analyses 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).\(^2\) 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. Recall: for Kant–Ripstein,

> an action is enforceably wrong 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 is enforceably wrong just when and because it illegitimately takes over another’s powers or takes over a power that is rightfully another’s.

That formulation squarely begs the question, saying little more than: an action is wrong just when and because it is wrong (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-defence, have I wronged you?\(^3\) 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.

\(^{1}\)\
\(^{2}\)\
\(^{3}\)

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So we need to find a notion of subjection that explains why rather than presupposes that the actions it singles out are wrong. Given Ripstein’s nod to the republican tradition, and the similar emphasis on independence, a modified version of Pettit’s account of nondomination might seem to be just the ticket. On that account, I subject you to my choices, if and only if, and because, I have the unhindered capacity to interfere with your choices on an arbitrary basis, and the mere presence or active exercise of the capacity raises the probability that you will behave in ways you otherwise would not have behaved. I have an unhindered capacity to interfere with your choices, in turn, when I can foreseeably and avoidably get you to do things by making things worse for you. While I can get you to do things by making an offer, offers make your situation better, and so do not count as forms of interference, and hence do not restrict your freedom. (So in the terms introduced above, offers only affect without subjecting your choices.) On this view, various forms of manipulation, deception, coercion, and force all count as forms of interference. Finally, my capacity is unhindered when no third party can reliably prevent me from interfering with you in this way.

For Pettit, my unhindered capacity to interfere with your choices is not sufficient to count as subjecting you to my choices. I must, in addition, be able to interfere with your choices on an arbitrary basis. If I interfere with your choices in ways that predictably and reliably ‘track your interests’, according to Pettit, then I do not dominate you. The ‘arbitrariness’ condition is a promising addition, especially insofar as it distinguishes republican from so-called negative views of freedom, where any interference, expected or actual, counts as restricting freedom, whether it reliably and predictably tracks our interests or not. But it, too, faces the same hurdle which we have just set, which becomes apparent when we ask: What count as actions that are ‘in our interests’? For example, if I am thrown in jail after a fair trial establishing that I have maimed someone (whom I have, in fact, maimed), do I count as suffering domination at the hands of the state? If we construe an ‘interest’ as something that will make my life go better, then the answer is clearly yes. But this admission should be unwelcome, because it would mean that the state wronged me in throwing me in jail, since it failed to reliably and predictably track my interests. If, on the other hand, we construe an interest as something that would make a reasonable person’s life go better (or make people’s lives generally better), we could then say that any reasonable person has an interest in the protection of their bodily integrity, which the state is ‘tracking’ in throwing me in jail. This move would come, however, at a significant cost, since the notion of a reasonable person or general interest is clearly moralized in the same way as ‘usurp’ was above: why should I, the criminal, care what the interests of a ‘reasonable person’ are, or what ‘general interests’ people have? The only reason I might have to care is if the interests of others should have (moral) weight in judging what is in my individual interest.

Our remarks so far are not yet conclusive against Ripstein. Ripstein need only drop the ‘arbitrariness’ condition, and refer to the difference between the enforcement and content of our innate rights. On that modified view, I subject you
to my choices, if and only if, and because, I have the unhindered capacity to unilaterally interfere with your choices. My unilateral, unauthorized use of force against you is wrong, on this view, because it assumes that my rational agency—an agency I share with you—is uniquely authoritative (and certainly more authoritative than yours). But what about the maiming case? Here Ripstein could say that both cases involve the omnilateral application of laws in a civil condition, rather than the unilateral subjection of my choices to yours, to which the (modified) definition of subjection refers. So when the state throws me in jail, it coerces me, but it does not wrong me, because it is acting to restore and preserve an equal system of freedom. The system of rights protecting those freedoms, in turn, are established by the determining the class of relations in which either (a) I have the unhindered capacity to unilaterally interfere with your choices, and the mere presence or active exercise of the capacity raises the probability that you will behave in ways you otherwise would not have behaved, or (b) I have the unhindered capacity to unilaterally destroy your ability to set ends. On this view, my maiming you clearly violates your innate right in this sense (since it counts as a significant unilateral interference that destroys your abilities), but not the state’s punishment of the crime (which only aims, via an omnilateral authorization, to restore and preserve the system of rights that I have violated).

So far we have shown that Ripstein’s account might be better placed than Pettit’s as an account of a political morality grounded in a basic right to freedom, but is it ultimately successful? I now want to argue that it would still fail, even with the refinements adumbrated in the previous paragraph. To set the stage, consider this set of examples, which have nothing to do with the state or omnilateral authorization.

You can take either the long or the short road to the meadow. You would much rather take the short route, and would do so were it not for the following considerations:

**Case 1:** You know that, if you take the short road, I will stop you on the way and bombard you with questions regarding travel details to Cambodia, which you’ll feel obliged to answer. The prospects of becoming entangled in conversation are sufficiently bleak to make you take the long route instead.

**Case 2:** You know that I will be perched at a café alongside the (short) road, hoping to stare at your voluptuous beauty as you walk by. Even though you know I will not attack or assault you, you don’t want to feel my eyes on you, so you take the long route.

**Case 3:** You know that I will be positioned at a café alongside the (short) road, ready to take pictures of you for my private collection of portraits. You don’t want to be photographed, so you take the long route.

**Case 4:** You know that I will be hovering on a rooftop along the (short) road, ready to throw a big bucket of cold water over you as you pass by.
(I'm an inveterate and obnoxious prankster). You don’t want to be drenched, so you take the long route.

**Case 5:** You know that I will break your kneecaps as you alight onto the short road. You take the long route.

In Cases 1, 2 and possibly 3, we want to say that my potentially stopping, looking, and photographing you merely affect the context in which you act, but don’t subject your choices in any way, whereas Cases 4 and 5 clearly do. But on what basis are we drawing the distinction? For the Kant–Ripstein view to work, the distinction must be drawn with the account of ‘subjection’ we have reconstructed. But it doesn’t look like it can. In Cases 1, 2 and 3, I clearly have the unhindered capacity to unilaterally interfere with your choices—i.e., make things worse for you than they would have been had I lacked this capacity. This capacity is sufficient to get you to take the long route in each case, which you otherwise wouldn’t have taken. By potentially accosting, staring, photographing, drenching, and kneecapping you, I hence deprive you of the power to decide whether or not you will take the short route unhindered; I make myself the ‘master’ of your choices over that option; I make it so that you are unable to choose to walk along the short route without being accosted, stared at, photographed, drenched or kneecapped. According to the account of subjection developed thus far, my actions would thus seem to restrict your freedom in the relevant sense, and therefore be wrong, which in turn entails, on the Kantian view, that a legitimate state would be authorized to prohibit them.

What strategies might be available to Ripstein’s Kant to resist this unwelcome consequence? One might think that Cases 1, 2 and 3 merely affect rather than subject your choices because you do not have an antecedent right (as part of a system of rights) to take the short route free of people looking at you, or photographing you, or speaking with you. I only subject your choices when the actions which I would perform were you to take the short route themselves violate your innate right to freedom under universal law. But how are those further claim-rights to not being drenched and kneecapped—but not to not being accosted, photographed, and stared at—themselves grounded? Why isn’t it a violation of your innate right under universal law to accost, photograph or stare at you, but it is a violation of your innate right to kneecap and throw water on you? In all of those cases, I use your body in ways that you did not authorize. In all of those cases, I make the option of taking the short route unhindered ineligible. In all of those cases, I therefore unilaterally interfere with your choices just as I do when you take the long route and thus avoid my intervention.

Perhaps the difference between accosting, staring, photographing on one hand, and drenching and kneecapping on the other is that in the latter ‘I stop you from using your body as you see fit’ (Ripstein 2009: 46) but not in the former? Can’t the difference be captured by the idea that in the first three cases I don’t decide for you what is to be done with your body, but in the last two I do? I don’t see how this can help. You prefer to use your body in such a way as to prevent its being accosted, just as you would prefer to use your body in
such as a way as to prevent its being stared at, photographed, kneecapped or drenched.9 Why doesn’t your control over how to dispose of your body as a self-directed agent extend to controlling who can stare at it, accost it or photograph it? These distinctions cannot, I am arguing, be grounded solely in an account of freedom as independence. Ripstein himself discusses a version of Case 2. Here’s what he says:

[Y]ou could not enjoy a right against others looking at you under a universal law, because embodied and motile persons can only avoid bumping into each other by looking where they are going, and so sometimes at each other.

Let us grant that there can be no general right not to be looked at. But that is not what is in question in Case 2. The right in question is a right not to be stared at. The same response is not available to block an affirmation of such a right, since it is surely possible for ‘motile and embodied persons’ to avoid staring. And the response clearly cannot deal with Case 3, or, indeed, 1.10

Finally, it might be objected that the way I have set up the discussion of the cases requires a rejection of the crucial Kantian idea that rights are relational (see Ripstein 2009: 21f). For the Kantian, we do not ask what interests are sufficiently strong or weighty enough to warrant holding another under a duty to promote that interest. We also do not ask directly what individual liberties we ought to protect, and then see how to balance them against other people’s liberties. Rather, rights are identified only as a part of a system of rights that defines constraints on the conduct of others. In the Kantian framework, you only have those rights to use the means available to you consistent with everyone else’s entitlement to do the same with their means. Kantian rights are therefore not rights simply to use your means, which then stand in potential conflict with someone else’s rights. Like the property of being an uncle, the property of having a right is non-comparatively relational: just as there is no such thing as an uncle without the children of one’s siblings, there is no such thing as a right without a system of rights. So when, in glossing the cases above, I say ‘I make myself the master of your choices over the option of taking the short route unhindered; I make it so that you are unable to choose to walk along the short route without being accosted, stared at, photographed, drenched or kneecapped’, I seem to be presupposing an account of moral rights that Ripstein rejects. The reason is that I seem to be assuming that there is some right, say, to walk along the short route unhindered, that needs to be balanced with another right, say, to take photographs without prior permission (a nonrelational view). Or I seem to be assuming that there is some right, to walk along the short route unhindered, that needs to be compared with, or ranked in relation to, some other right, say, to take photographs without prior permission, in terms of whether one or the other contains more ‘subjection’ (a comparatively relational account). But the Kantian view rejects both views.11

The objection doesn’t succeed because nothing in the setup of the cases—or in the demand to provide a non-question-begging account of subjection—
presupposes such a nonrelational or comparatively relational account of rights.

We can easily put the cases and our queries in more explicitly non-comparatively relational terms. The Kantian says that the specific content of rights to use the means at one’s disposal (in our case, the use of our body) have to be determined as part of a consistent set or system of rights, such that each person has the same rights as every other. So we ask: What determines the contours of that (non-comparatively relational) space of rights? What criteria do we use to determine what count as your means, and what count as mine, or what count as permissible uses of your means, and what count as permissible uses of mine? The Kantian responds: The idea of independence (and its opposite, subjection) provides a standpoint from which to draw the contours of that (non-comparatively relational) space. The specific (noncomparatively relational) rights that people have (to permissible uses of their means, or to the means themselves) must be understood, that is, as flowing from a more general right to independence from another’s choices. That further right does not provide a third ‘quantity’ or ‘dimension’ against which rights should be compared (in the same way as ‘height’, say, is the underlying comparative dimension according to which things counts as taller or shorter than other things), but provides a set of criteria or principles or standards for the determination of those rights. The cases then pose this challenge to the Kantian: Do rights not to be accosted, drenched, photographed, kneecapped form part of the consistent set of (noncomparatively relational) rights? Does the best account of subjection available to the Kantian help us to determine whether they do? As should be clear by now, nothing in the setup—or in the argument showing why the idea of subjection (as reconstructed) cannot provide answers to these questions—assumes a nonrelational or comparatively relational account of rights.

A summary of the argument may be useful. We began this section by wondering how we are to draw the crucial distinction between subjecting and affecting someone’s choices. We then considered whether Ripstein’s official view, which glossed the notion of subjection in terms of usurping and destroying another’s capacity to set and pursue ends, could aid us in drawing the distinction. I then argued that it could not: usurping means illegitimately taking control of another’s powers, or taking control of powers that are rightfully another’s. The idea of usurping someone’s powers, therefore, cannot be used to explain what actions count as violating someone’s enforceable moral rights (within a system of such rights) because it presupposes them. To remedy this defect, we reconstructed the Kantian conception of subjection in terms of a modified republican account of nondomination. According to this conception, I subject your choices if and only if, and because, either (a) I have the unhindered capacity to unilaterally interfere with your choices, and the mere presence or active exercise of that capacity raises the probability that you will behave in ways you otherwise would not have behaved, or (b) I have the unhindered capacity to destroy your ability to set ends. We then saw that this modified view, while more promising than the first, also cannot successfully draw the desired distinction between affecting and subjecting choices without appealing to ideas other than independ-
ence or subjection. We illustrated this by canvassing a number of cases involving interference with the use of our bodies. To put the point in a different way: If you were required to explain to an aspiring Kantian legislator which uses of people’s means (including their body) violate other people’s independence by subjecting their choices (such as in cases 1 to 5), and hence which (noncomparatively relational) rights should constrain people’s use of their own means, you would be forced to point to moral considerations other than independence or subjection.

The upshot of our discussion is simple: either the Kant–Ripstein view must formulate and defend an account of subjection that can deal with cases like the ones discussed above, or it must give up on its main motivating ambition, namely to provide an entire philosophy of right grounded solely in the idea of freedom under universal law.12

Andrea Sangiovanni
Department of Philosophy
King’s College London
UK
andrea.sangiovanni@kcl.ac.uk

NOTES

1 I am here using Ian Carter’s broad definition of social power: ‘Let us say that A exercises power over B when A’s behaviour induces B to modify her course of action in accordance with A’s interests’. The main idea is that B’s actions track A’s interests in ways they would not have done in the absence of B. A slight extension of the definition can allow us to ask similar questions with regards to A’s mere possession of power, a power she can have without exercising it. This would be the case, for example, if A has the ability to exercise power but does not exercise it (does not, that is, behave in such a way as to induce action). In many cases, B’s knowledge of A’s power will be sufficient to get B to track A’s interests even without any explicit action on A’s part. But, because such possession of power usually comes in the wake of actions by A intended to demonstrate or reveal her power, I will leave it aside in what follows, and only speak of actual exercises of power. See Carter 2008.

2 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.

3 The case of destroying another’s powers may be easier to deal with if we consider self-defence as an excuse. 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-defence, see Ripstein 2009: 177.

4 The second conjunct is necessary to avoid situations in which someone might have a capacity to interfere on an arbitrary basis but the presence of this capacity does not affect our behaviour in any way. See, e.g., Pettit 2010.

5 Make things worse compared to which baseline? Here it is evident that the baseline must be nonmoralized for the account to go through. I cannot discuss this further here,
but I believe that there are plausible accounts of interference that use nonmoralized, contextually determined baselines to determine what counts as making someone ‘worse off’.

6 See the excellent piece, Carter 2008, to which I am much indebted.

7 For a different, and very helpful, comparison between Kant and Pettit, see Hodgson 2010.

8 Other examples of this general kind could also be marshalled for the innate right to be ‘beyond reproach’ as well.

9 Another example could help us to make the same point: Imagine I can control your cortisol levels remotely via some sort of radio waves. By raising and lowering your cortisol levels, and hence your perceived levels of fear and stress, I can get you to do take the short route rather than the long route. This clearly should count as violating the innate right to freedom, if anything does, but in what sense does it prevent you from disposing of your body as you see fit? How is it different (in the relevant sense) from my photographing, or staring at, or speaking to you?

10 In a footnote Ripstein discusses a variant in which the ‘leering’ is rightly deemed anticipatory of some sort of assault, but that is has explicitly been excluded in the description of Case 2.

11 I owe this objection to Arthur Ripstein.

12 I would like to thank Katrin Flikschuh, Pablo Gilabert, Arthur Ripstein, Annie Stilz, and Leif Wenar for very helpful written comments on previous drafts of this paper.

REFERENCES


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<td>words affected</td>
<td></td>
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</tbody>
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USING e-ANNOTATION TOOLS FOR ELECTRONIC PROOF CORRECTION

**Required software to e-Annotate PDFs:** Adobe Acrobat Professional or Adobe Reader (version 8.0 or above). (Note that this document uses screenshots from Adobe Reader X)

The latest version of Acrobat Reader can be downloaded for free at: [http://get.adobe.com/reader/](http://get.adobe.com/reader/)

Once you have Acrobat Reader open on your computer, click on the Comment tab at the right of the toolbar:

This will open up a panel down the right side of the document. The majority of tools you will use for annotating your proof will be in the Annotations section, pictured opposite. We’ve picked out some of these tools below:

1. **Replace (Ins) Tool** – for replacing text.
   - **How to use it**
     - Highlight a word or sentence.
     - Click on the Replace (Ins) icon in the Annotations section.
     - Type the replacement text into the blue box that appears.

2. **Strikethrough (Del) Tool** – for deleting text.
   - **How to use it**
     - Highlight a word or sentence.
     - Click on the Strikethrough (Del) icon in the Annotations section.

3. **Add note to text Tool** – for highlighting a section to be changed to bold or italic.
   - **How to use it**
     - Highlight the relevant section of text.
     - Click on the Add note to text icon in the Annotations section.
     - Type instruction on what should be changed regarding the text into the yellow box that appears.

4. **Add sticky note Tool** – for making notes at specific points in the text.
   - **How to use it**
     - Click on the Add sticky note icon in the Annotations section.
     - Click at the point in the proof where the comment should be inserted.
     - Type the comment into the yellow box that appears.
5. **Attach File Tool** – for inserting large amounts of text or replacement figures.

Inserts an icon linking to the attached file in the appropriate place in the text.

**How to use it**
- Click on the **Attach File** icon in the Annotations section.
- Click on the proof to where you’d like the attached file to be linked.
- Select the file to be attached from your computer or network.
- Select the colour and type of icon that will appear in the proof. Click OK.

6. **Add stamp Tool** – for approving a proof if no corrections are required.

Inserts a selected stamp onto an appropriate place in the proof.

**How to use it**
- Click on the **Add stamp** icon in the Annotations section.
- Select the stamp you want to use. (The **Approved** stamp is usually available directly in the menu that appears).
- Click on the proof where you’d like the stamp to appear. (Where a proof is to be approved as it is, this would normally be on the first page).

7. **Drawing Markups Tools** – for drawing shapes, lines and freeform annotations on proofs and commenting on these marks.

Allows shapes, lines and freeform annotations to be drawn on proofs and for comment to be made on these marks.

**How to use it**
- Click on one of the shapes in the **Drawing Markups** section.
- Click on the proof at the relevant point and draw the selected shape with the cursor.
- To add a comment to the drawn shape, move the cursor over the shape until an arrowhead appears.
- Double click on the shape and type any text in the red box that appears.

For further information on how to annotate proofs, click on the **Help** menu to reveal a list of further options: