

FREEDOM AND ENFORCEMENT: COMMENTS ON RIPSTEIN

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PROFESSOR Ripstein's rich and wide-ranging essay¹ covers many more topics than I can reasonably comment on here, including some on which I cannot comment. For instance, I am not a Kant scholar, and cannot say whether the position he outlines accurately reflects Kant's views. So, in the brief space available to me, I shall try to crudely sketch two points: first, that the notion of freedom cannot do the work that Ripstein and Kant want it to do; and second, that the argument, novel to his essay, that public authority is needed for enforcement of rights, is not cogent.

First, freedom. One of Kant's fundamental ideas, with which Ripstein seems to agree, is that the notion of a system of equal freedom, if its implications are followed in detail, can define, at least in broad outline, a system of basic rights and obligations which individuals must respect and which must be incorporated into any morally acceptable system of private law.

I have difficulty understanding exactly what concept Ripstein is employing when he appeals to the idea of freedom, so I shall review a couple of possibilities and explain why they are unsuitable for inclusion in an argument about the fundamental rights and obligations that should be protected by society.

The first concept of freedom I shall consider is the idea that freedom is control over one's own life. I think this is not Ripstein's conception, but it will be useful to see why it could not work for his purposes. The sort of control involved can best be explained by indicating the two major factors that interfere with our control over our lives: they are first our own desires, impulses, and passions, and second, the wills of other persons. External factors not connected with the wills of other persons, such as natural forces, illness, and so on, do not interfere with this control over our own lives, according to this conception.

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¹ Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 *Va. L. Rev.* 1391 (2006).

The first sort of interference, coming from our desires, impulses, and passions, can be overcome by reason, according to the view in question. When we conform our lives to the principles delivered by reason, which give us the moral law, we overcome slavery to our passions and become genuinely free persons. In turn, reason requires us to respect others equally with ourselves, and to recognize that the control over our lives must be limited by the equal control others have over their lives. Since freedom from slavery to our own passions plays little role in Ripstein's discussion, I shall not discuss it further.

Freedom from the will of others plays a large role in Ripstein's discussion, however. On the conception of freedom I am now discussing, the extent to which we can control our own lives as opposed to being controlled by others depends importantly on the extent to which the things that are important to us involve other people. True hermits and those cast away on desert islands may be entirely independent of others, but they perhaps do not really need legal systems either. For most of us, the important things in our own lives involve or depend upon others.

A serious problem with the ideal of control over our own lives is that so much of what is important in our own lives involves or depends upon the choices—wills—of others. As a result, I can be in control of my own life only to the extent that others are not in control of theirs. I will consider two simple examples to try to make this clear.

Consider marriage: can I be in control of whom I marry? I can, only if others have no control over whether I marry them. This would be grossly unequal control over this aspect of one's life. Exactly how equality is to be achieved here is not clear: perhaps we might consider the dominant pattern in contemporary Western society where each person has a veto over whom he or she marries but no one can marry another person without that person's agreement. This gives the two immediate parties to the marriage joint control (and denies any control to other interested parties, like family members), but it leaves each person subject to the will of another. Whether I marry a particular person is not up to me alone. The same point may be made about whether I have a good marriage or not: it takes two people to make a good marriage but

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only one to make a marriage bad. I am not completely in control of this aspect of my life.

Or consider a business venture: say I start a restaurant. It is important to me that this venture be a success. But whether or not it is a success is up to the will of other people, namely my customers (or potential customers). No restaurant can be a success without customers, and I cannot force others to patronize my restaurant (or, if I could, they would not be in control of this aspect of their lives). In the end, the success of my business venture is entirely subject to the wills of others.

It may be thought that contracts somehow give me control in these circumstances. But whatever else contracts may do, they do not give me control. Contracts, of course, tend to reflect underlying control of resources; I am obliged to offer someone something he or she wants before I can make a contract. The underlying distribution of resources says a good deal more about control over one's life than the resulting contracts. The upshot is that when control over our own lives must be equally distributed, each of us gets very little control over the aspects of our lives that involve others. For this reason, freedom on this conception does not seem to be important enough to play the key foundational role that Ripstein (following Kant) wants to give it. We are all, always, subject to the wills of others. Our plans, projects, and goals must be formulated with others in mind, and are always crucially limited and shaped by the choices of others. We do have some control left, of course, but it is not significant enough to play an important role in justifying the larger aspects of our laws.

John Rawls does not identify freedom with independence from the wills of others. Where freedom plays a role in his theory, it is in much more specific and limited forms. For instance, the first of his two principles of justice requires a fully adequate scheme of basic liberties be protected equally for each citizen.² But this is not founded on a general idea of control over one's own life; rather, the list of liberties is defended on grounds such as these: the basic liberties are held to serve the exercise of the second of the two moral powers—namely, the ability to form, revise, and act on a

² John Rawls, *The Basic Liberties and Their Priority*, in *Political Liberalism* 289, 291 (1993).

plan of life and a conception of the good³—and such a system of liberties is said to help provide the social bases of self-respect, one of the most important of the primary goods.⁴ There is here no general idea that one should be free of subjection to the wills of others.

I do not point out the difference between Rawls's conception and Ripstein's because I wish to defend the Rawlsian one, but only to emphasize that it is not subject to the difficulties I have been raising for the conception of freedom as control of one's own life.

I said above that this is not Ripstein's conception of freedom. He writes:

Second, there is a contrast between the means that are subject to your choice and the context in which you use them. The context in which you use your means is made up largely of the choices of other people, and the consequences of those choices. I am not entitled to compel another person to use his or her means in the way that best suits my use of my own means. I cannot compel you to refrain from opening a restaurant in order to make my use of my premises as a restaurant more successful; you cannot compel me to put up a fence to reduce your air-conditioning bills, or tear one down to protect your garden.⁵

But this leaves unanswered the question of what the conception of freedom is that is supposed to be at work. Perhaps we should take our clue from Ripstein's talk about compelling others. A familiar idea of freedom is the idea of absence of coercion. But this idea too is unsuitable for the fundamental discussion of basic rights and duties in a community, because the idea of coercion presupposes a background of fundamental rights and duties; hence, it cannot be used to justify or mark out the limits of such a set of rights and duties. The basic point here was made by Professor Robert Nozick;⁶ I have space here merely to sketch it.

Fundamental to the idea of coercion is the distinction between threats and offers: coercion involves threats, but offers not involv-

³ Id. at 302.

⁴ Id. at 308–09.

⁵ Ripstein, *supra* note 1, at 1404.

⁶ Robert Nozick, *Coercion*, in *Philosophy, Science, and Method* 440, 440 (S. Morgenbesser et al. eds., 1969).

ing threats do not coerce.⁷ If a storm knocks down your house, I may offer to rebuild it for a sum of money: if you pay me, I have not coerced you into paying. But if I threaten to destroy your house unless you pay me a sum of money, and you then pay it, I have coerced you. What makes the difference between threats and offers is not the language I use, but the options I present to you. In the simplest cases, in an offer, I will make you better off if you do what I want, but no worse off if you do not, while in a threat, I will make you worse off if you do not do what I want, but not better off if you do. In these characterizations, “better off” and “worse off” are comparative: they involve a comparison of states of affairs with a benchmark.

Nozick argued that this benchmark is determined by what is morally expected of the parties in the case—that is, by the rights and duties that the parties have.⁸ The argument proceeds by considering and eliminating other possibilities. The benchmark is not determined by what usually happens: if the local bully usually beats me up every afternoon and then one day says he’ll stop if I pay him a handsome sum, he has still threatened me with further beatings if I do not pay. Nor is the benchmark determined by what would happen if the threatening person did not intervene: perhaps if the bully did not beat me up every day, others would. Still, he has threatened, rather than offered. Similar arguments can be mounted against other alternatives to identifying the benchmark in terms of the rights and duties of the parties.

An illustration will perhaps make the point clear. Suppose you have a favorite tree. You have dreamed many sweet dreams in its shadows, carved many sweet words in its bark. I plan to cut down the tree and make a writing desk of its wood, but seeing your horror at the idea, I say that I will refrain from cutting down the tree if you pay me five hundred dollars. Have I made a threat or an offer? I have not told you enough to know. To decide whether I have made a threat or an offer, you need to know whose tree it is. If it is my tree, I have made an offer; if it is your tree, I have made a threat. When we speak about whose tree it is, we are speaking

⁷ See generally *id.* at 447–53.

⁸ *Id.* at 449–51.

about who is entitled, free from meddling by others, to do with the tree as he or she will.

Talk about coercion requires us to distinguish threats from offers. Distinguishing threats from offers requires reference to a background of rights and duties, liberties and entitlements. Because it depends on these, talk about coercion will not help us discover what the fundamental allocation of basic rights, duties, liberties, and entitlements in society should be.

Ripstein's discussion is full of more or less explicit reliance on such a background of rights and duties. He speaks repeatedly of persons with particular means at their disposal. But to talk about means is to talk about ownership: my means are the things I own. Ownership, in turn, is a bundle of liberties and rights: liberties to do what I like with something (within limits) and rights that others not meddle with what I own. To know whether I am being coerced, or whether, in Ripstein's terms, I am being made subject to the will of another, I must have these rights and liberties in place. I will not discover what they are by exploring the idea of equal liberty, conceived in terms of absence of coercion.

Things might be different if there were some basis for justifying exactly one set of basic ownership rights. John Locke notoriously tried to establish such a set of ownership rights,⁹ and I think it is widely conceded that he failed, though this issue is much too complex to discuss here. In fact, there are many different possible ways of defining basic rights to the things we live with and on, and no compelling argument for one of these ways rather than another. There is only a compelling argument that any society needs some definite arrangements about such things. But even if Locke's or some similar argument were to succeed, the fundamental argument would not be based upon freedom, but upon whatever justified the basic property rights. Once those are in place, the invocation of freedom serves mainly a rhetorical function.

To sum up my first point, control over our own lives, once distributed equally, is too attenuated and unimportant to be the basis for identifying fundamental social rights. Absence of coercion does not become so attenuated, but to make use of the notion of coer-

⁹ John Locke, *Two Treatises of Government* 303–20 (Peter Laslett ed., Cambridge Univ. Press 2d ed. 1970) (1690).

cion, we must already have the fundamental background rights in place. On either conception of freedom, it will not play a large role in defining the fundamental rights and obligations in society.

Now I turn to my second point. Ripstein, following Kant, holds that only public enforcement of rights can be legitimate.¹⁰ I agree with Ripstein about this, but not for the reasons he offers. This view about the illegitimacy of private enforcement of rights contrasts with that of Locke, who held that individuals have a right to enforce their natural rights quite apart from any society or government.¹¹ Furthermore, according to Ripstein, the argument against private enforcement of rights is supposed to make “no appeal to factual claims about the likelihood of conflict or its lack of resolution in a state of nature in which private parties would be left to their own devices for enforcement.”¹² The idea is supposed to be that there is a fundamental inconsistency in the idea of such individual and private rights to enforcement.

As I understand Ripstein, the key reason why equal private rights to enforcement are inconsistent is this: “[p]eople acting in good faith might disagree”¹³ about whether their rights have been violated in a particular case. You and I might disagree, honestly, reasonably, and in good faith, about whether you have wrongfully damaged property belonging to me; I think you have, you think you have not. If I try to take enforcement action, you see my action as violating your rights. Regardless of whether we are so bloody-minded as to turn to fighting to resolve our disagreement, it seems that we cannot consistently exercise our enforcement rights.

This argument clearly appeals to factual claims about the likelihood of conflict—or at least disagreement. But whatever Ripstein or Kant may think, it is none the worse for that. It is no defect in an argument that one of its premises is a contingent but uncontroversial truth. But there is a serious problem with this argument. It must understand the right to private enforcement as a right to take action whenever one reasonably and in good faith *thinks* that his or her rights have been violated. A plausible right would be a right to take action whenever one’s rights *actually* have been violated. The

¹⁰ Ripstein, *supra* note 1, at 1414.

¹¹ Locke, *supra* note 9, at 289–94.

¹² Ripstein, *supra* note 1, at 1414.

¹³ *Id.* at 1419.

argument cannot show that a right of this latter sort is subject to the same inconsistency. Few, if any, of our rights would be consistent if they were similarly understood in terms of what people reasonably think to be the case, rather than what actually is the case.

It is true that the results of people trying, even in good faith, to act on a right to private enforcement would be lamentable, but neither Locke nor most other philosophers would disagree with that. It is also true that this provides a perfectly good argument for public enforcement of rights, provided there is some reason to suppose that the public enforcement will not be equally bad (as under a repressive kleptocracy, for instance).

There is another argument for public enforcement, however, which does not depend on whether alternatives to it would be worse. It depends on the claim, impossible to defend here, that most important rights require social convention or enactment. According to this claim, there is no one correct set of basic rights to property, contract, torts, or any of the other areas of private law. Natural law, morality, and the ideal of a maximal equal system of freedom may constrain acceptable systems of basic rights, but still leave open a wide range of choices of systems satisfying all of the constraints that can reasonably be imposed. So communities must adopt one from among the acceptable possibilities in some morally legitimate manner. Whatever one's view about morally legitimate means of adoption, selection by a single individual is not going to be morally legitimate.

The need for choice among different acceptable possibilities extends to the area of enforcement of basic rights. There is not just one procedure for enforcement that is morally enforceable, and when punishment is required, there is not just one system of punishment that could be acceptable. Society must choose, in some morally acceptable way, one from among all the conceivable and acceptable systems of enforcement.¹⁴

A right of private enforcement is impossible because there is nothing definite to enforce and no definite type of permissible enforcement apart from some appropriately adopted system of rights and their enforcement. A single private individual cannot legiti-

¹⁴ Cf. Saint Thomas Aquinas, *Summa Theologica* IaIIae 95, art. 2, in *Political Writings* 126, 129–31 (R.W. Dyson ed. & trans., Cambridge Univ. Press 2002) (1273).

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mately adopt such a system; only the community can do that. So even if Ripstein's own argument for the necessity and legitimacy of public law is not sound, the conclusion can be defended. As far as I can see, this argument is available to someone working from a generally Kantian perspective; how compatible it is with Kant's actual views I would not venture to say.

I have tried to make two points about Ripstein's essay. The first is that freedom cannot play the roles that Kant and Ripstein think it does in defining the basic rights that society must enforce. If freedom is conceived as control over one's own life, it becomes too insignificant when distributed equally to bear the burden of such an argument. If it is conceived as absence of coercion, it presupposes the very system of rights it is supposed to explain. The second point is that Ripstein's argument that a right to private enforcement is impossible depends on an implausible account of what that right would be.

A Kantian approach to private law is interesting and stimulating, and Ripstein pursues it with admirable skill and impressive knowledge of Kant's view. I am not convinced it is as satisfactory as Rawls's approach, but the final judgment about that must be left to the reader.