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Book Review

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Freedom and Force: Essays on Kant's Legal Philosophy
edited by Sari Kisilevsky and Martin J Stone*

According to Arthur Ripstein, the central animating idea of our law—especially private law, on which this review focuses—is a *relation* of *independence* between two *purposive* beings. (*Force and Freedom* (2009); *Private Wrongs* (2016).) You are *purposive* if you employ means to pursue purposes or ends. Two important means you might employ are your body and objects of property. You are *independent* from me so long as I do not put your means to my purposes, for example by using your body or property without permission. Independence, Ripstein insists, is a *relation*. It is not a quality an individual person can have in isolation, like height or welfare. One person can be independent only in relation to another, who is barred from purposing her means. By way of analogy, consider the purely relational judgment 'to the left of': nothing can be in any respect or degree left, considered by itself; it must be to the left of something else.

This striking formulation of our law's animating principle has attracted the attention of lawyers and philosophers around the world. Ripstein's recent work has been considered in symposia in the *European Journal of Philosophy* (2012), the *Jerusalem Review of Legal Studies* (2017), and two editions of *Jurisprudence* (2010; 2018 forthcoming). It is also the focus of Kisilevsky and Stone's new book, which collects eight philosophers' essays together with a reply by Ripstein. The book is a model of the genre: not only are all the essays exceptionally well developed, they unfold in a coherent sequence, aided by Stone's virtuoso introduction.

The book's key theme begins to emerge in the first essay, by Japa Pallikkathayil, who scrutinizes Ripstein's analysis of body and property rights. Pallikkathayil observes that Ripstein's principle of independence is to some extent indeterminate here. Often, where you allege I have committed a wrong against your body or property, it will be arguable whether I have truly put those means to my purposes, and so violated your independence. For instance, do I put your body to my purposes if I merely shout and startle you? What if you happen to be standing at the edge of a cliff? (39-40) Do I put your land to my purposes if I merely cast a shadow over it? What if I emit some water, or fumes? (38 and n8) As Stone notes in his introduction (15-16), to answer these kinds of questions tort law resorts to open-textured standards such as reasonable care in negligence, and, one might add, reasonable user in nuisance. By contrast, it does not seem possible to answer these questions merely by invoking Ripstein's principle of independence—the prohibition on purposing another's means.

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*Sari Kisilevsky & Martin J Stone, *Freedom and Force: Essays on Kant's Legal Philosophy* (Oxford: Hart, 2017) [ISBN 978-1-84946-316-4]. Page numbers in the text are to the book.

Andrea Sangiovanni's essay pushes this indeterminacy objection somewhat further. (Building on his earlier argument in the *European Journal* symposium. See also Laura Valentini's contribution there.) Sangiovanni contends that Ripstein's independence principle does not allow us to distinguish a very clear wrong, such as sexually violating someone while they are unconscious, from other conduct that is much less clearly wrongful, such as sketching someone while they sit in a public square. Surely there is an important moral distinction to be drawn between these cases. From the standpoint of the independence principle, however, they appear to be the same. In both cases, one person uses another's body, putting it to their purposes. Sangiovanni considers and rejects various ways Ripstein might try to distinguish the cases. Ripstein cannot say they differ because only the sexual violation involves physical touching. The independence principle confers no special normative significance on physical contact. In any event, one person can clearly wrong another without physical contact, such as by publishing intimate photos of them taken while they are asleep. Nor can Ripstein argue that there is tacit consent to the sketch, but not to the sexual violation (or photographs). That would just raise the question: why can we assume tacit consent in certain situations but not others? In doing so, we must be relying upon implicit assumptions about what sorts of conduct a person would reasonably object to. But then, those implicit assumptions, rather than Ripstein's independence principle, seem to be doing the normative work in determining what conduct is wrongful.

Two main lines of response to this indeterminacy objection emerge from the book. First, Ripstein claims we must distinguish, on the one hand, using another person's *means*, such as their body, and on the other hand, merely affecting the *circumstances* or environment in which they act. With this distinction in mind, Ripstein suggests, we can see that sketching someone in public is not wrongful, whereas sexual violation is. Sketching someone, Ripstein claims, merely changes the circumstances in which they act: it amounts to 'changing the context' in which they employ their body, or to '[t]aking advantage of the effects of [their body's] appearance or location.' It does not amount to using the body itself. (197-98; see also 19-20 and n55; 169-70.) By contrast, we can safely assume Ripstein believes that a sexual violation uses someone's body, rather than merely affecting the circumstances in which they act. However, this response will not satisfy everyone. Surely it is not enough just to draw a distinction between using someone's means, on the one hand, and changing their circumstances, on the other, and assert that sexual violation falls into the former category and sketching into the latter. We must explain why each case falls into each category. (88; see also 19-20.)

This debate prompts the reader to consider how Ripstein might explain why a certain case, such as my sketching you, amounts to changing your circumstances rather than using your means. It seems the explanation would have to supply some further information. For one thing, Ripstein would need to define the scope of a person's 'means.' Granted, your body is your means, but does this means end at the edge of your epidermis, or does it also extend to your image? Until we know, we cannot say whether my sketching uses your means, or

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merely alters the environment in which you act. Yet it is not clear that Ripstein's account is capable of plausibly defining the scope of a person's means. (See also Valentini's *European Journal* paper here.) Given his strikingly bare formulation of private law's animating principle, the only conceptual resource Ripstein has at his disposal is the notion of 'purposiveness.' So perhaps Ripstein might say: your 'means' are that which you put, or are capable of putting, to your purposes. (*Cf* 3 and n3.) On this view, to resolve our sketching case, we should ask whether your image is subject to your purposive control. However, this way of proceeding seems unlikely to be fruitful. Presumably, we cannot apply the purposiveness criterion subjectively—by reference to what you happen to believe about your purposive capacities. (*Cf* Anscombe, Intention, s 23: 'one might say of a madman "He is leading his victorious armies."') Instead, we should presumably adopt an objective approach, asking what a reasonable person would take to be within your capacity or control. But then, some conception of reasonableness, rather than the idea of 'purposiveness' as such, seems to be doing the normative work in defining the scope of your means.

In addition to defining the scope of the alleged victim's 'means,' in order to say whether Ripsteinian independence has been violated we must describe the alleged wrongdoer's purposive action. For example, one description might be: 'my sketching your figure while you sit in Trafalgar Square.' Only once we have settled on some such description can we say whether my action amounts to using your means. Perhaps less obviously, this too raises potential difficulties. In settling on a description of my action, we should presumably ask, not what my subjective purposes are, but how a reasonable person would characterize my purposes. Again, one might worry that the appeal to a conception of reasonableness here smuggles external normative content into Ripstein's account.

In sum, it seems that, to meet the indeterminacy objection, we need to fill in Ripstein's account somehow, to give the notion of 'purposiveness' more definite content, on both the victim and the wrongdoer's sides of any given dispute. However, attempts to supply more definite content seem doomed: a subjective approach produces implausibly arbitrary results; an objective approach must draw upon normative conceptions foreign to Ripstein's account. We are left with the bare notion of 'purposiveness,' which, we may now worry, is entirely empty.

The second main line of response to the indeterminacy objection is advanced by Martin Stone, both in his introduction and his own essay. (15-16; 20-22; 169-71.) Stone questions whether the indeterminacy of Ripstein's independence principle is problematic. A philosophical account of the law, Stone observes, need not provide a decision procedure for resolving or distinguishing particular cases. Instead, the account may supply abstract characterizations of the law that help us grasp its normative significance, enabling us to see it in a certain light. By way of analogy, Martin may explain why he is helping Arthur move apartments tonight, rather than attending the final performance of a play he wants to see, by invoking the abstract principle that he is Arthur's 'friend.' This principle does not determine exactly what Martin ought to do in the circumstances, but still it helps us understand what is going on.

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This response will not persuade everyone either. (See 88-90.) Ripstein's independence principle seems far more indeterminate than, say, 'friendship.' Friendship, we might suppose, involves one person having a certain regard for another's interests. And so, in explaining why Martin should help Arthur pack, an appeal to friendship allows us to consider the interests involved—such as Arthur's interest in minimizing the physical and emotional strain associated with moving, to which Martin should pay due regard. In this way, the principle of friendship makes contact with the details of the particular case. Contrast Ripstein's 'vertiginously abstract' principle of independence. (As Stone puts it at 4.) It directs us to consider whether one person is subjecting another to her purposiveness. Purposiveness is the employment of means to realize ends—in essence: causative concept-realization. As we have seen, efforts to give any more definite content to this idea seem doomed. So it is unclear how, limited to a consideration of this idea, we could make any contact with the details of a particular case—so as to reason for example about whether my sketching you is wrongful. We seem to be limited to asking whether my causative concept-realization incorporates or clashes with yours.

Thus, consideration of the indeterminacy objection discussed by Pallikathayil, Sangiovanni, and Stone may lead the reader to conclude that the role of 'purposiveness' in Ripstein's account is at least dubious. Katrin Flikschuh arrives at the same conclusion from another direction. She challenges Ripstein's claim that his independence principle is truly *relational*. As we have seen, Ripstein insists that independence is a pure relation, analogous to 'left of.' However, Flikschuh contends that, despite his 'general dyadic [relational] pronouncements,' Ripstein is 'trafficking in monadic [nonrelational] goods.' (As Stone puts it at 17.)

Flikschuh argues that independence could conceivably be understood in two different ways, each of which is problematic for Ripstein. On an 'impure' approach, the relation of independence is grounded on a monadic feature of the individual person, i.e., their purposiveness. (60) On this view, independence is morally valuable because individual purposiveness is. However, if we acknowledge that individual purposiveness is morally valuable, we should surely care about it irrespective of the individual's relation to another person. We should care, for example, whether Crusoe, alone on his island, can set and pursue his purposes—building the shelter he seeks, etc. It follows that on this approach one cannot claim, as Ripstein does, that the law should focus exclusively on safeguarding relations of independence, rather than promoting and protecting individual purposiveness.

On a 'pure' approach, by contrast, 'independence'—in some sense of that term—would be regarded as morally valuable in itself, irrespective of the value of individual purposiveness. For Flikschuh such an approach is plausible. For example, it may be morally significant that you are free from my domination, even if you are incapable of acting purposively, due to say disability or minority. However, on this pure approach, there is no longer any reason to link independence to purposiveness. '[W]hy invoke the notion of purposiveness at all?' (61) Instead, we should develop a freestanding relational conception of independence, which is not defined in terms of purposiveness.

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In response Ripstein, and Stone on his behalf, in effect propose a third approach designed to avoid Flikschuh's dilemma. Individual purposiveness, they say, is not the ground of the independence relation in the sense of providing its moral value or point. The only point of independence is independence. At the same time, the independence relation 'presupposes,' or has as one of its 'conditions,' the purposive individual—since only purposive individuals can stand in relations of independence. To explain what they mean here, both Ripstein and Stone appeal to analogies. Ripstein analogizes relations such as 'uncle-nephew' or 'aunt-niece': 'only members of a species that are biologically capable of having offspring and siblings' can stand in such relations, but the relations are 'not somehow a recognition or acknowledgement of the value of' those biological capacities. (194-95) Stone analogizes 'shaking hands to seal a deal.' This activity is conditioned on the presence of individual intentional agents, since only such beings can seal a deal. Still, the point or value of the activity 'won't appear in materials limited to what anyone is doing alone' (17-18).

Yet reflection on these analogies may lead the reader to conclude that they are crucially dissimilar from Ripsteinian independence. Let us grant that avuncular relations have a value not reducible to the biological capacities of the individuals involved, and commercial relations a value not reducible to that of intentional agency. If we want to understand these phenomena, then, it is necessary to elucidate the special value of the avuncular, or commercial, relation. The difficulty is that Ripstein's account seems to preclude any similar elucidation of the special value of the independence relation. 'Independence' is defined as one purposive being not purposing another. So when we seek to understand this relation, we are inevitably driven back to the notion of the individual purposive being. Which, everyone seems to agree, is fundamentally non-relational: purposiveness is a quality an individual person can have in isolation, like height or welfare. Crusoe alone on his island can act purposively.

Since Ripstein's principle of independence disallows appeal to anything other than 'purposiveness,' and purposiveness is fundamentally a monadic quality of an individual person, there does seem to be something troublingly 'impure' about his account, as Flikschuh suggests. However, it is difficult to specify the precise nature of the trouble. We can accept Ripstein's avowal that he does not want to ground independence in, or make it reducible to, the value of individual purposiveness. Nevertheless, Flikschuh's line of criticism does seem to undermine Ripstein's insistence that 'independence' is purely relational in the same way as 'left of.' ('Left of,' unlike independence, presupposes no content that can be specified monadically.) So there is at least a significant tension in Ripstein's account. To the extent this tension turns out to be symptomatic of deeper problems, the philosophical culprit will surely be 'purposiveness.'

Why does Ripstein construct his account of private law using the notion of purposiveness? (*Cf* 194.) One reason is that it is important to Kant, and Ripstein is developing a Kantian legal theory. (See 3-5; also 146ff.) Why does Kant deploy this notion? This is not, of course, an easy question to answer. Evidently, in developing a theory of private law, there is some felt need to look for a feature of the

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individual person that might help explain why certain interactions are wrongful. (See also Sangiovanni, invoking a person's 'interests' (84-85, 90).) If one feels the need, purposiveness will be a tempting notion to seize upon, not least because it is so 'vertiginously abstract'—such that it may strike one as capable of representing whatever normative content a theory of private law needs to capture. Only when the notion is scrutinized more closely one may begin to worry that it does not have any normative content at all—that it is empty.

A.J. Julius's engaging essay touches on the same theme from yet another angle. Julius observes that if, like Kant and Ripstein, we aim only to ensure that purposive beings act in ways consistent with each other's purposiveness, we could conceivably have a legal system that looks very different from our existing scheme of private law. Currently (at least on the Ripsteinian view) we have a system in which consistency of purposive action is ensured by, inter alia, assigning individuals property rights over certain spaces and objects. Other persons must then refrain from interfering with those spaces or objects in essentially all circumstances. (Except where the owner consents, or in other exceptional situations such as necessity.) Julius imagines an alternative system that has no such absolute property rights. Instead, he says, each individual could coordinate her purposive action with each other, by adopting plans of action of the form: 'I will do X, in a way that is consistent with your actions.' If everyone acted on this basis, people could spontaneously coordinate their behaviour, and avoid interfering with each other, without the assignment of absolute rights to spaces or objects. For example, I might plan to run laps around a certain field, to the extent this does not interfere with your gathering fruit from it, and vice versa. In this way we might use the same space to achieve our ends, but successfully avoid impinging upon each other. Just as people avoid each other at unsigned traffic junctions, each heading towards their destination while at the same time anticipating the other's movements and staying out of the way.

Julius's imagined legal system brings out just how much potential distance there is between the abstractions that underpin Ripstein's account and the detail of private law as we know it. But Ripstein responds that Julius's system is not compatible with the ideal of independence that he and Kant, at least, want to pursue, since Julius's system would mandate a certain purpose or end for each individual's action: each would be required to adopt ends that are conditioned upon what other persons happen to choose. (202)

George Pavlakos and Daniel Weinstock adroitly question the role, on Ripstein's account, of public lawmaking authorities. Their essays focus on aspects of public rather than private right, and so raise issues that are largely beyond the scope of this review. However, they also tackle the question of how abstract principles of justice, such as the principle of independence, may be rendered determinate. For Ripstein this is necessarily the job of public authorities, who must formulate detailed legal rules and apply them to resolve particular disputes. How, one might ask, can that activity be justified—does it not render private citizens problematically dependent upon the authorities' will? Ripstein's answer is that public lawmaking is legitimate because it in some sense reflects the 'omnilateral will' of all

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persons in a society. Pavlakos argues that this idea of an 'omnilateral will' creates more problems than it solves. Weinstock considers when it is appropriate to revolt against public legal authorities, challenging Kant's notorious claim that it is better to accept certain forms of despotism than to attempt revolution.

Finally, Allen Wood's magisterial contribution addresses Ripstein's treatment of the relation between Kant's ethics and legal philosophy. Wood argues that both ethics and law can be derived from a single master idea of rational agency (combined with a requirement of universalizability). However, ethics and law concern different aspects of rational agency. Roughly speaking, ethics concerns the ends you ought to set, whereas law protects your ability to take up means to achieve ends that you set, by prohibiting others from forcing you to realize their ends instead. (147) Ethical duties are not coercible, because nothing can compel you to adopt a certain end—that is up to you. On the other hand, legal duties are coercible: force can be used to prevent me from forcing you to realize my ends. Wood complains that Ripstein erroneously elides these two different domains of morality, by suggesting in an Appendix to *Force and Freedom* that Kant's legal philosophy is a 'legitimate extension' of his ethics. (160)

Ripstein's response confirms that he is, if anything, more dedicated than Wood to the separation of law and ethics. For one thing, he demurs from Wood's suggestion that Kant's legal philosophy could be derived from some master idea of rational agency. (215) And in the book's closing paragraph, Ripstein clarifies he did not mean to suggest in *Force and Freedom*, that law can be derived from ethics. While Kant's ethical and legal principles have a similar 'conceptual structure,' they are also fundamentally different. Ethics concerns an individual person's inner morality. Law concerns a kind of outer morality: the moral *relation* between two or more persons who have the potential to affect each other—for example, by colliding in space. According to Ripstein, law cannot be derived from ethics, because law—like space—is inherently relational, in a way that ethics is not.

> No argument can be made from inner morality to outer morality, because no argument from the inner (understood without reference to the form of the outer, that is, space) to the outer could ever be successful. … [T]he irreducibility of spatial relations provides the basis for the irreducibility of all concepts of right. (217)

This is a fitting end to a superb book that goes to the heart of Ripstein's legal theory—a theory that is itself justly at the heart of legal philosophy today.

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