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CRITICAL NOTICE

Crime, Freedom and Civic Bonds: Arthur Ripstein's Force and Freedom: Kant's Legal and Political Philosophy

Ekow N. Yankah

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Abstract There is no question Arthur Ripstein's Force and Freedom is an engaging and powerful book which will inform legal philosophy, particularly Kantian theories, for years to come. The text explores with care Kant's legal and political philosophy, distinguishing it from his better known moral theory. Nor is Ripstein's book simply a recounting of Kant's legal and political theory. Ripstein develops Kant's views in his own unique vision illustrating fresh ways of viewing the entire Kantian project. But the same strength and coherence which ties the book to Kant's important values of independence blinds the work to our shared moral ties grounded in other political values. Ripstein's thoughts on punishment are novel in that he embeds criminal law, both in its retributivist and consequentialist facets, into Kant's overarching political philosophy to show how criminal law can be seen as one aspect of the supremacy of public law. But a criminal law solely focused on the preservation of freedom takes little notice of the ways criminal law need expand its view to account for how a polity can restore the victim of a crime back to civic equality, reincorporate offenders after they have been punished and cannot leave past offenders isolated and likely to reoffend, resulting in the rotating door prison system and communities of innocents who remain preyed upon by career criminals. Lastly, a political theory that does not prize our civic bonds will ignore the startling balkanization of our criminal punishment practices, where policing, arresting and imprisonment become tools of racial and social oppression. In illustrating the benefits in viewing criminal law as a coherent part of Kant's political theory of freedom, Ripstein also highlights what is absent. It then becomes clear that though Kant presents one important facet of punishment, only a republican political theory can meet the most pressing moral demands of punishment by reminding us that criminal law must be used to preserve and strengthen civic society.

Keywords Ripstein · Kant · Force and freedom

E. N. Yankah (✉)
Cardozo Law School, New York, NY, USA
e-mail: yankah@yu.edu

Introduction

There is no question Arthur Ripstein's Force and Freedom is an engaging and powerful book which will inform legal philosophy, particularly Kantian theories, for years to come. The text explores with care Kant's legal and political philosophy, distinguishing it from his better known moral theory. This clarification, by itself, is important; even after years of philosophical finger wagging following the resurgence of interest in Kant as a legal theorist, some still too easily elide Kant's moral philosophy and its iconic formulations of the categorical imperatives, with fully formed legal duties. Thus, in one famous and endlessly variable set of examples, whether redirecting lethal runaway trolleys from killing five workmen to a separate track where it will kill only a single worker impermissibly uses the lone worker as a means to save the others is taken by too many to answer whether legal duties are deontic or consequentialist. Ripstein book puts to bed that easy mistake by insisting on and carefully explicating Kant's distinctive legal theory.

In contrast to those simply unaware of the distinction, there are thoughtful readers whose knowledge of Kant's distinct legal theory has only led to frustration at the comparison. Particularly in criminal law, where Kant's work has exerted the greatest influence in legal theory, many have lamented the lack of coherence, systematicity and depth in Kant's sparse writings on punishment (Murphy 1987). Indeed, it is a testimony to the power of Kant's writings, particularly his thinking on deontic duties and retributivism, that Kant is taken to be the foundational thinker of one of the most important poles in criminal theory despite comparatively little sustained writing on the subject. Thus, as important as Ripstein's book is for separating Kant's legal and moral theories, it is just as interesting in articulating a coherent and novel view of Kantian criminal law.

Of course Ripstein's book is not simply a recounting of Kant's legal and political theory. Ripstein develops Kant's views in his own unique vision. Ripstein manages to clarify Kant's writings in a way which seems perfectly natural to his texts, while simultaneously illustrating fresh ways of viewing the entire Kantian project. It is a compliment to the author that in reading this book one so often finds the ideas nearly obvious. It is Ripstein's clarity that leads the reader to realize or, more honestly, imagine that they had long held this view of Kant. Ripstein's view is important not just because he shows how Kant's sometimes scattered and inconvenient writings on criminal law can be brought together but also how these writings naturally extend from Kant's complete political theory. While this review focuses on Ripstein's novel view of Kant's criminal theory, one of the strengths of the book is Ripstein's efforts to show that Kant's views on punishment can be understood only by placing it in the context of Kant's more general political theory.

Innate Right and Politics

One of the strengths of Ripstein's book is that he situates the disparate parts of Kant's theory into the larger total project. His efforts to provide a unifying framework is particularly valuable in Kant's criminal theory, leading him to a novel view of Kant's goals with no less ambition than bringing together Kant's retributivism with his incongruent musings on the relevance of deterrence. Thus, before turning directly to Ripstein's thoughts on criminal law, it is important to review Ripstein's account of Kant's political project.

As mentioned, Ripstein's focus is on the distinction between Kant's moral and political theory. Whereas Kant's moral theory focused on the purity of one's intentions or will, Kant's political theory takes freedom from interference by others as its central value. The

fundamental idea is that the basis of legal right is the ability to decide for yourself what your purposes will be, or, put another way, to be your own master and slave to none. For Kant, the only pure pre-political or innate right is to be free in your own person; to have no one batter or assault you or pry the things you hold from your hand.

Highlighting Kant's view of freedom provides an important answer to one of the deep question of political justification which appears in various forms. The core question is what fundamentally justifies the use of coercion by the state. One old but bruised answer transforms the Kantian intuition that legal coercion is justified by individual freedom into the modern locution of maximizing "liberty". Liberty, defined in the modern sense as the ability to do what one pleases, fails as a justification for coercion because the liberty the law protects must be traded off as against the liberty to do the prohibited act. On this overbroad modern definition, the right to be free from someone assaulting you requires restricting the "liberty" of those who would assault you. Kant's construction dissolves this critique in a perfectly intuitive way. Because Kantian freedom is freedom from external interference, the assailant was never "free" to assault you in the first instance; such an assault would constitute a violation of your innate right.

For Kant your innate right to your bodily freedom is the only one which is, well, innate. That is to say, your freedom in your body, along with things immediately related to that freedom, e.g. things you are holding, are the only freedoms which exist outside of a political community. Even in the state of nature, others wrong you by attacking you or taking something from your hand. That is because your innate right to freedom is your right to set your own purposes and your body are your naturally given means to pursue your purposes. Thus, force is justified only to hinder those who would interfere with another's external freedom. (Indeed, for Kant, the claim is stronger—freedom encapsulated in legal right is constituted by the ability to employ coercion to secure all from interference with their external freedom. Thus, force, in this sense, is a constitutive element of freedom.)

All other rights in a state of nature, however, are at best considered provisional by Kant. This is a consequence of innate right which requires that each person is free from the domination of another; master to none, slave to none. To take a now classic example, if I walk up to a particularly valuable water well or oil field only to discover you have planted your banner on it, I am perfectly justified to ask, what gives you the right to declare it is yours. Contra Nozick's famous position, your merely getting there first does not, by itself, provide an answer as to why this should be yours (Nozick 1974:151). For you to be able to simply declare it your property would be for you to impose a duty upon me by an act of your unilateral will. The intuition behind the Kantian language is as simple as "What gives you the right to take these riches, merely because you got here first?"

All rights outside of one's innate right of freedom for Kant are provisional because others could otherwise place you under normative bonds merely by the unilateral imposition of their will, making them, in one sense, your master. Yet, Kant recognizes what is obviously true, given the natural fact that we will crash into each other, that is, have competing claims of rights and differing but incompatible reasonable plans to pursue our objectives, we must find a way to make rights concrete. Importantly, the indeterminacy of rights on this picture is not merely epistemic or empirical. It is not simply that we would be confused about or disagree about our rights. It is that rights would be normatively indeterminate; the shape of rights themselves could not be made concrete without one person arbitrarily imposing them on another (169). The question then is how to define property and contractual rights, criminal law prohibitions and all the rest of without subjecting anyone person to the arbitrary will of another. The Kantian answer is for all to leave the state of nature and enter into a condition of right, that is, a condition of lawfulness (164).

To enter into a rightful condition is to exit the state of nature and enter into a civil society governed by law. It is to submit one's unilateral view of how things should be to officials and institutions that govern in the name of us all (190–195). Because public institutions are exactly that, the laws they establish define our rights without being the imposition of one private person's will over another. In Kantian language, the creation of a rightful condition moves us from a world in which the unilateral will of a private individual seeks to dominate to one in which the omnilateral will can legitimately define the shape of rights.

The omnilateral will is empowered to act for all its subjects, it can make rights definite without any individual's freedom being sacrificed for another's. Where an individual's unilateral will would be a case of imposing on another's freedom, the omnilateral will represented by law can counteract that. So Kant writes that in a condition of rightfulness, one can be authorized by public law to prevent and resist interferences with the freedom of another. Law may rightfully stop those who attempt to interfere with your freedom, to "hinder a hinderance" of one's freedom to use the famous invocation. That is why for Kant, the right to coercively prevent interference with another's freedom is constitutive of legal right. Though the language may seem abstract, the intuition is accessible enough. Were I simply to push you out of the way to enter a space I wanted, you could rightful complain that I am violating your rights, treating you as though you ought to be subject to my will. If, on the other hand, I pointed out that I am authorized by law to take possession of the apartment, the argument that I am unilaterally imposing my will on yours loses much of its force. The use of coercion pursuant to a system of laws which are enacted in the public name and (formally) treat each of us equally can be seen as equally preserving the freedom of all (54–55). Kant's view dramatically recasts one of the enduring questions of political philosophy; rather than attempt to show how any state coercion can be justified, Kant shows how a world of enforceable legal rights necessarily incorporates a view of law as inherently coercive (Yankah 2008).

It is important to note that because this Kantian view focuses on securing external freedom, it prohibits justifying a legal system by citing utilitarian calculations regarding the ability to increase welfare, securing advantageous distributions or tradeoffs of goods between people or virtue-centered concerns about nurturing the ethical development of a person's character (185–190). Just as importantly, the law does no one wrong, on this view, if it does not accommodate their actually accomplishing the goals they pursue. Kantian legal right is focused on protecting your freedom from being dominated by others, it is not based on one's ability to achieve one's ends and collect their rewards. Freedom is the ability to aim at your ends not the right to succeed in reaching them. In one nice example, Ripstein points out that if someone buys the last quart of cream you wished to use for cooking dinner tonight, they have done you no wrong. While you remain free to set your own goals the world does not owe you successful conditions in achieving them—for that would require dominating others to force them to manufacture your success.

That freedom requires coercion to only be employed by law in the public name, of course, tells us little about what particular shape individual laws must take. One cannot simply leap from the idea of freedom to determine whether a particular tax rate or zoning law is justifiable, as philosophers can be tempted to do and politicians make an occupational habit. In any given situation, a legislature must thoughtfully consider various empirical considerations to choose between various reasonable legal standards.[1] It does,

[1] Onora O'Neill points out that this is as true in Kant's moral theory as in his legal theory. The idea that Kantian "rules," be they moral, ethical or legal are simplistic algorithms or automatistic has always been a bum rap. Onora O'Neill, *Kant: Rationality and Practical Reason* in The Oxford Handbook of Rationality, eds. Alfred J Mele and Piers Rawling 104 (2004).

however, establish some important requirements of a legal system as well as define certain limits. A legal system that is justified by the protection of freedom must secure some basic level of individual freedom from being purely at the mercy of another's whims. A state without any public land or thoroughfares would leave those unable to purchase private land at the mercy of others; simply by existing they would be wronging those on whose land they were unless the land owner granted them permission. Thus, Ripstein points out that that the universal convention of public roads is not simply a matter of social or economic coordination but required by the Kantian state in order to guarantee a minimal level of freedom (232). More intuitively, Kant writes that a state must assure citizens some minimum protection against extreme poverty for the same reason. Notice here the reason is not owed to efficiency, utility or social coordination. Indeed, for Kant, the state would be obligated to do so even if private charities were robust enough to provide for the basic needs of the poor. The reason is the same as that for roads; to rely on private charities would be to rely on the private choices of individuals thus undermining freedom by subjecting it to the wishes of others (274–278). From the same requirement, Ripstein argues that the Kantian state may require the adoption of universal health care in order to prevent the spread of diseases that may undermine the state or cause individuals to fall into a state of dependency. Similarly, a state grounded on freedom will not allow legal recognition of a legal condition which undermines or abrogates freedom; this makes sense of the classic example of why the state cannot recognize a willful act which forever abdicates the use of one's will such as a contract to sell oneself into slavery (217–223).

With the broad shape of Ripstein's Kantian argument, if not every detail, in view we can now see how Ripstein situates Kant's criminal theory into an entire framework of law that seeks to secure freedom. Indeed, by assembling this coherent Kantian theory, Ripstein builds a novel Kantian theory of criminal law; one that blends together Kant's thinking on retributivism with his sparse words on consequentialism. Ripstein's unique view on Kantian criminal theory dramatically shifts the conventional view of Kant as a unifaceted retributivist and incorporates our robust intuitions on the moral value of deterrence in the criminal law. Ripstein ultimately claims that Kantian criminal law can only be understood as part of a theory which takes securing freedom as its touchstone. It is to Ripstein's view of Kantian criminal theory we now turn.

Freedom and the Criminal Law

Kant's position in criminal law as a foundational retributivist is so well fixed in the popular consciousness it seems inconceivable that it could be wrong or dislodged. It is Kant who argues that our reasons to punishment must be treated as an imperative and admonishes us against using punishment instrumentally to serve consequentialist or welfarist concerns (Kant 1965). So powerful is the imperative to punish that in what may be his most famous passage, Kant supposes that even a desert island society which is disbanding would be obligated to execute the last murderer so that the community would not be stained with bloodguilt for having ignored their duty (ibid. 333). Kant highlights the retributivist nature of punishment when he argues that the scope of punishment should be determined by the harm done by the criminal (*lex talonis*) and match the inner viciousness of the criminal (ibid.). This combined with Kant's assertions in his moral theory that the moral worth of an act can only be measured by the purity of will with which it is done makes reading Kant as a foundational retributivist quite natural.

While these passages of Kant's work dominate the popular imagination, further excavation reveals a more complicated picture. There are three problems with the simple view of Kant as the grounding father of retributivism. First and foremost, it is unclear how to marry the commonly held view of Kant as a retributivist with Kant's insistence on the sharp divide between moral and legal censure. Kant does argue that we have inviolable duties to self to preserve our own inherent dignity and informs us that it is only the purity of the will which determines the moral worth of an action (Kant 1930 pp. 117–124; Yankah 2012a). And though legal retributivism need not necessarily respond to every moral failing, Kant's tantalizing words have instilled in the popular retributivist imagination that legal punishment must at least partially track moral blameworthiness. Yet elsewhere, Kant insists that the role of legal punishment and moral censure are and must be kept distinctly separate (Yankah 2012a). After all, Kant's view of law is concerned not with inner moral worth but with the preservation of the external freedom of others (ibid 13–14, 19–21, 139; Kant (Rechtlehre):231; Fletcher 2007: 208). In Kantian language, law is a matter of justice not a matter of morality. The nature and justification of state law is based not on one's moral wickedness but on the enforcement of perfect duties to others, the prohibition of external actions that interferes with the freedom of others (Yankah 2012a).

If the first problem with viewing Kant as a simple moralistic retributivist is that it is inconvenient with Kant's distinction between legal and moral duties, the second is that his writings in the Rechtslehre are equally inconvenient with a number of his written thoughts elsewhere. Elsewhere, Jeffery Murphy has written persuasively of the difficulty of aligning Kant's "official" position on criminal punishment with his various thoughts on punishment throughout his other philosophical writings (Murphy 1987: 513–518).

In his thoughtful piece, Murphy examines the way Kant's writings outside of the Rechtslehre paint a very different picture than the received retributivism of the Rechtslehre. Were one to collect the various strands of Kant's writings outside the Rechtslehre, the picture one would most naturally construct is a Kant who is focused not on a categorical impulse to level retributivist punishment but one who is rather modest about the need to use state power to match the inner wickedness of a criminal offender (ibid.). Murphy points out that setting aside the Rechtslehre, Kant's writings combine to suggest a rejection of retributivism, modesty about the aims of criminal law and perhaps an adoption of deterrence as the most critical function of punishment (ibid at 516–518). On the whole, a startling different picture of Kant than presented in his political writings on punishment and certainly than in the popular imagination.

Kant's internal inconsistency reveals the third and most important shortcoming with the view of Kant as a unifaceted retributivist. Whatever the strength of retributivism, a view to which I have been committed in past writings, a theory which accords no value whatsoever to the deterrent effects of criminal law surely strikes our intuitions as peculiar. This problem is more important than the charge of scholarly inconsistency. A complete refusal to acknowledge the moral value of criminal punishment in reducing future crime rates, saving future victims of rape, beatings, theft and murder, makes retributivism fanatical, bizarre and unattractive. For many, it is a reason to reject or modify this overly simple view of retributivism. For some, the value of deterring future violence, harm and rights violations is such a self-evident moral good that retributivism is best seen as a side constraint to the general justifying aim of deterrence (Hart 1968). Even the most committed retributivists can admit, whatever the importance of retributivist justice is, there is moral importance in the deterrence benefits of punishment.

Ripstein's reconstruction of Kant's addresses these three serious weaknesses and, in doing so, presents a novel view of Kantian criminal law; one that holds on to Kant's

retributivism without shunting the clear moral value of deterrence in criminal punishment. Ripstein does so by again embedding Kant's criminal theory into the superstructure of the entire political theory and using one to inform the other. The result is intriguing and original though some will think it is less than faithful to Kant's "official" position as staked out in the Rechtslehre.

For Ripstein, Kantian criminal law and punishment is another instance of the law's justified effort to secure equal freedom for all (301–303). Coercion in criminal punishment is justified, in the rightful condition, because it secures mutual freedom. Punishment ultimately makes clear the supremacy of the law, that is, the supremacy of our omnilateral will, over the individual will of those who would violate the law and invade another's freedom (311–312). Punishment thus prevents the criminal from exempting themselves from the law (Fletcher 1996). Viewing criminal law this way, Ripstein insists, illustrates why we need not deny the value of deterrence.

Understanding that criminal law, like all law, is justified by securing mutual freedom makes perfect sense of the retributivist impulse in punishment. Enforcement of our criminal laws points out in no uncertain terms to the offender the way in which rights are not vulnerable to violation. Our perfectly common intuition is that punishment shows the criminal offender that he is not free to cast aside our rights and ignore our equal freedom (303–306). At the same time, that law threatens to punish all who violate rights and signals prospectively that our freedom will be, to the extent possible, inviolable. That is to say, the deterrence value of law is not coincidental. It is another way in which the law secures our freedom by communicating to those tempted that violations of our rights will be rebutted, that their gains will be reversed and their freedom curtailed in equal measure to that which they sought. This not only upholds the law's supremacy but by disincentivizing criminal acts further secures our freedom (318–319). Though a person is punished *because* they commit a crime, public law is effective "in space and time" insofar as it hinders those acts inconsistent with it. By understanding criminal law as an extension of Kant's general political philosophy that law is justified by securing equal freedom for all, one can see how our instincts that retributivism and deterrence are both morally valuable goals are convenient rather than at war.

Ripstein's is a fresh take on well worn fights in criminal law and certainly a novel (some will argue reconstructed) Kantian view of the justification for punishment. That he proposes a view at once original and still deeply embedded in the whole of Kant's theory can be admired for its own sake. More importantly, however, Ripstein's view of Kantian criminal law garners admiration for dissolving the natural tensions above. First, it allows a view of retributivism which remains focused on individual freedom, thus preserving Kant's insistence on the divide between moral and legal censure. Secondly, if it does not erase the inconsistencies between the Rechtlehre and Kant's other writings, it softens the violence with which the retributivism in his criminal theory clashes with his other scattered thoughts on punishment. Most importantly, Ripstein's view makes sense of our deeply felt intuition that whether deterrence could be sufficient justification for punishment, it must surely have some moral weight. By linking together retributivism and deterrence, Ripstein no longer charges retributivists with the somewhat bizarre task of sticking their head in the sand and insisting that the criminal law ought pay no attention to whether sanctions will prevent people fro0m being beaten, raped, stolen from or killed in the future. If nothing else, this novel view takes a sophisticated starting point and uses it to make sense of our plainest moral commitments.

The Imperialism of Freedom

If the value of Ripstein's view is the impressive way in which he locates both retributivism and deterrence underneath the singular structure of Kant's commitment to equal freedom, the worry is that he both demands too much of freedom and cares too little, at least intellectually, for what freedom cannot offer. Freedom, as least so plainly put, is a nearly universally attractive value. As such, many potential readers will find it easy to sign on to a project which takes equal freedom to be the fundamental justifying ambition of the law—who isn't attracted to being their own master? Still, one fears that the initial attractiveness built into the idea of freedom is traded upon to secure independently valuable moral goods which bear only a passing relationship to freedom as such. Let us begin with inspecting the heavy lifting freedom is required to do in Ripstein's text.

Because Ripstein's Kant takes only the protection of freedom to justify law, law is indifferent to the potential harms that befall one outside of the protection of freedom (48). Indeed, Ripstein repeatedly points out that a Kantian legal structure cannot premise legal coercion on any other benefits it can secure (185–190). The law, in such a world, is utterly insensitive to any other interests a person might have insofar as they are not freedom preserving (Tadros 2011). This, Ripstein insists, includes even your most fundamental interests, yes, life itself (274–275). Yet Ripstein, like most of us, must be well aware that many, perhaps most of the activities of the thick modern state reach deeply into the lives of citizens in ways that seem aimed at preserving their health, wealth and standards of living. One finds it hard to imagine that Ripstein, the proud Torontonian, would be willing to give up all the public parks in that city to say nothing of the Canadian national healthcare system. The tug of this dilemma will be equally felt by all who are tempted to take freedom not simply as a unique but as the sole justification for a legal system (Tadros 2011:200–201, 205–206).

In order to placate, if not entirely satisfy this intuition, Ripstein must pack an awful lot into his concept of freedom. To do so, Ripstein relies on Kant's notion, earlier raised, that equal freedom can only be secured in a "rightful condition." Thus, the only powers the state can justifiably wield are those aimed at perfecting the rightful condition (23). Ripstein argues, however, that securing the rightful condition confers broad powers. Some of these state powers are quite naturally described as preserving freedom. As earlier noted, Ripstein argues that freedom allows the state to protect citizens against extreme poverty or reliance only on private charities, for this would make such citizens dependent on (and dominated by) the private will of other individuals. In the same vein, roads are required not for convenience or utility but to allow public movement and thus freedom. Likewise, the modern state may provide for public health in order to secure freedom in the rightful condition by, for example, quarantining and treating potentially dangerous epidemics (240).

This strikes me as true as far as it goes but one cannot help to eventually grow suspicious that Ripstein's concept of freedom has ironically imperial ambitions, seeking to include much of what we have come to think of as perfectly natural functions of the modern state. Let's take a recent controversial example in America. I think that the connection between healthcare and freedom draws on more than dangerous epidemics which threaten the very integrity of the state. One ought not underestimate the ways in which the recurring illnesses and chronic pains that beset so many erodes, pinprick by increasingly hobbling pinprick, the ability to engage even basic freedoms.

Still, it seems overly ambitions to describe the entire range of modern health care services provided by most developed countries as plausibly justified as merely freedom

securing. Modern health care services in Canada, to take one example, quickly outrace the basic services that preserve basic freedom in order to contain costs and distribute a basic good for the welfare of its citizens. Secondly, it remains unclear to me, despite Ripstein's confidence, why freedom as such would permit, much less could require, the *State* to provide health services. This is true for two reasons which undermine his earlier arguments. Perhaps one can understand why having citizens only rely on private charity alone could pose a risk to freedom. All too often, particular charities capture the public imagination, receiving disproportionate amounts of funding, while other problems insufficiently championed by glamorous advocates or afflicting poor, minority or other populations go largely unaided. What is harder to describe as required by freedom alone is a state needing to provide healthcare if there were a functioning private market, even if government intervention could assist others in securing better healthcare outcomes at better prices for all. If this worry is correct and the concept of freedom is being overworked here Ripstein cannot, despite his seeming equanimity on the subject, justify even the simplest government actions that improve health beyond quarantines and crippling disease, to say nothing of public parks, international aid to the most desperate of countries and support for the arts. One worries that Ripstein, married to the idea of freedom as a singular justification for law, reaches to find a way to include aspects of public action that stretch well beyond securing freedom, lest he present too bare a picture of government for most to stomach. Unless Ripstein is willing to sacrifice, indeed prohibit, much of the modern state, in which case the reader should be clearly informed, Kantian freedom begins to look too thin.

So, on the one hand, Ripstein may be smuggling in an array of attractive public goals that cannot be defended as solely justified by the securing of freedom without stretching the concept well beyond its intuitive boundaries. One the other hand, it may be that Ripstein embeds these public goods because Kantian freedom alone may be much too thin to sketch an attractive or even plausible picture of justified government. The thinness of a rigorously Kantian view has been severely indicted by another reviewer (Tadros 2011). Victor Tadros argues that it is implausible to hold that the only way one can wrong another is to interfere with their freedom and, inversely, one may sometimes quite justifiably interfere with another's freedom without doing them any wrong (Tadros 200–201, 208, 212). Tadros takes as his example needing to bump into someone, thus interfering with their Kantian freedom to have their body free of interference, in order to avoid a charging rhino. While the Kantian is concerned with allowing others to impose on you for their own needs, Tadros notes that to deify freedom to such a degree as to make the escape from the rhino at such little cost wrongful is implausible.

Tadros' example points to something important that can be seen even with less exotic examples. One of the most emotionally charged subjects to teach in criminal law is the duty to rescue or, to be precise, the lack of any legal duty to rescue in the overwhelming number of jurisdictions in the United States. It is emotionally charged because precisely because American law's unwillingness to impose a duty to rescue even where a nearly costless and minimally inconvenient rescue could save the life of an innocent victim cuts so starkly against our moral intuitions and the actual motivations which drive people to place their lives at great risk to save those in distress (Hyman 2006). Of course, a law professor may try to confuse those strongly held reactions and pique Kantian instincts with line drawing questions and analogies which threaten to expand the duty to rescue such that it makes everyone a slave to the needs of the poor and the hungry. Still, it is hard to shake the original intuition that a law which cannot, as a normative matter, so much as address a person who watches a baby drown when one could with no risk save

the child is severely deficient in some way.[2] That a legal system premised only on the preservation of freedom leads to that result makes one question the thinness of freedom as the sole justification for law.

Likewise, it is not clear how a government focused solely on protecting one's freedom from interference from others could mandate special considerations to provide disabled citizens with access to buildings or private facilities. Of course, greater ability to negotiate the world despite being in a wheelchair can increase one's ability to pursue their life goals. But it does not seem obvious that it is an action which frees you from another imposing on you—asserting themselves as your master—rather than taking into account a disability which we collectively believe should not dominate your life choices to the extent possible. This strikes me as especially true given Ripstein's earlier arguments against a legal right to necessity even in one's life is in danger. So long as the threat to one's life (and thus freedom) is not imposed by another person, it is not an interference with one's freedom. Likewise, the countless ways in which a disability can interfere with a person's life plans strike me as similarly beyond the reach of a government which can only be justified by the protection of freedom.

To take another example, Ripstein argues that Kant's principle of freedom includes being beyond reproach except for performing culpable acts. That is, one's freedom includes something like having your honor and dignity only turn on your actions rather than some inherent social disdain. This commits a government to protecting minorities against systemic discrimination for being judged as a lesser type of person merely for being Black, Hispanic or female would breach the right to be beyond reproach. Prohibiting the systematic denial of basic rights and opportunities because of discrimination due to your sex, your skin color or your sexual orientation fits nicely into the Kantian view of protecting freedom (Moreau 2010).

What remains unclear is how we are to understand freedom in more complex situations. Hate crimes legislation, for example, has presented a challenge for many who we may very loosely describe as both political and philosophical liberals. The political impulse is to protect vulnerable minorities by punishing those who target and harm someone specifically because of their skin color, religion, sexual orientation or some other innate characteristic. The philosophical liberal balks at the idea that punishment should be increased not because of the criminal act but in virtue of the underlying immoral character of the offender; the role of the state as thought police cuts against their philosophical commitments (Hurd and Moore 2004). How does a strictly Kantian view of law, dedicated to preserving freedom dissolve this tension? If freedom is defined by interference with a person's body and property, then a person killed because he is black, gay or Jewish seems to have been equally harmed as any other murder victim. I do not suppose there are no replies to such dilemmas but one worries that protecting freedom alone is not enough to address many of our deep and legitimate moral concerns.

Take another controversial example. We have seen that Ripstein explicates Kantian freedom to prohibit insidious discrimination. Harder to square is whether a government may seek to take active measures to address past discrimination. Imagine a group of African-Americans illustrate that dire and systemic discrimination has shut them out of

[2] Every law professor or philosopher has a particular horror story of the failure of a duty to rescue in law that haunts them. Among the most infamous is that of David Cash, who witnessed his friend, Jeremy Strohmeyer, lure 7 year old Sherrice Iverson into a bathroom, trap her in a stall and sexually attack her. He left the bathroom and did nothing to stop the crime. Strohmeyer subsequently killed the young girl. Despite the immense publicity surrounding the crime, David Cash remained immune from criminal prosecution.

elite jobs, neighborhoods or school systems. Ripstein's model seems to allow the government to prohibit discrimination but powerless to do anything, even hire a search firm to increase advertising in disadvantaged communities, to redress the past injustices. Ripstein's Kantian government seems equally unable to promulgate even the mildest paternalistic laws, say requiring the wearing of seatbelts when it is known that this would prevent tens of thousands of deaths and major injuries a year. This is to say nothing of a government which could not assist in requiring even minor dispensations which may contribute greatly to the flourishing of a society, such as special laws for religious communities which impose inconveniences on others, support for the arts or securing public parks for recreation.

My point, I hope, is obvious. If Ripstein is accused above of trying to sneak a great deal into the idea of freedom it is because most of us are attracted to many of the various functions of the modern state and the benefits it secures. These functions span from criminal law to our political and legal institutions generally, rightfully mandating equal access for the handicapped, protecting vulnerable communities by punishing hate crimes, redress past discrimination, requiring seatbelts, control healthcare costs and countless other goals. Obviously, these points are controversial and many reject some without rejecting others. Under any theory of justified government, including my own, there are countless ways in which the reach of the modern state is unjustified or simply mistaken (Yankah 2011, 2012a). But if freedom is not going to be stretched so that it simply becomes a banner for anything attractive, Ripstein's theory, I fear, commits us to foregoing all of these goods. Freedom is a deep and important value and in the past I have been attracted to views akin to Ripstein's. I find it increasingly difficult, however, to align all my fixed intuitions of justified government action under the singular justification of Kantian freedom. Ripstein faces a tall task, caught between making freedom much too imperial in what it describes or requiring one to give up on much of what we consider the natural and justified province of the modern state.

Freedom or Civic Bonds?

I have argued that if we are to cabin public actions to solely preserving freedom from the imposition of others, the government would be unable to require a host of other actions we now take quite naturally to be appropriate state action. A government justified solely by the preservation of Kantian freedom would be radically thinner than the modern state. Ripstein, I suspect, would deny many of these critiques, perhaps finding me guilty of an overly cramped reading of his notion of freedom. Indeed, though Ripstein's text makes clear that the justified state he describes would require important legal changes, nowhere does he assert his vision prohibits such vast swathes of our modern public law. Indeed, he often finds room for many features of the modern state under one facet or another of Kantian freedom, e.g. anti-discrimination laws as a feature of the right to be free from reproach.

While space does not allow the inspection of every possible aspect in which Ripstein might embed these modern features, the most overarching feature requires attention. Ripstein implies many of the functions of the modern state, presumably including those which have no immediate connection with the protection of freedom as such, are permissible in securing a rightful civic condition. Remember, all rights outside of one's innate right in your body are provisional for Kant in the state of nature. Once people come together to enter a rightful civic condition they can create coercively enforceable rights without it being the case that any particular person is arbitrarily imposing her will on

another (198–199). Within this rightful condition, however, a community has great latitude in determining the shape of their legal rights and duties (223). Kant even goes so far as to argue the state may aim at promoting the happiness of citizens generally if it increases the stability of state as against foreign enemies. All in all, Ripstein concludes that the state maintains broad powers to act in the name of securing a rightful condition so long as officials can give a public justification for government actions.

But this seems an unsteady ship to carry the freight of many modern state projects. After all, Ripstein often reminds us that no matter how great the needs or benefits one cannot agree to nor subject others to laws if those laws impose on freedom (192–193, 208, 211, 218). Further, Ripstein argues that where a state constructs laws that are not in conformity preserving freedom, the state is not simply falling short of an ideal but it threatens individual freedom and commits a wrong against others (202–203, 214). Even if the state has wide scope in pursuing public purposes, to the extent we premise state action on securing the *welfare* of the general public, on this Kantian picture, it would not obviously be a public purpose at all (254). Nor is the throwaway line that the modern state is justified in pursuing happiness to secure the civil condition against foreign enemies persuasive. Not only is the idea that support of the arts is necessary to prevent Americans from handing over the country to Canada far-fetched but allowing happiness in through the back door threatens to consume the careful fortifications of freedom constructed at the gates. Perhaps the solution is found in the idea that these duties are internal to the state and thus, no person has an individual right to enforce them (203–204; Waldron 1996) but that leaves us in the position of finding much of the modern state not just falling short of an ideal but wrongful. This view will only be attractive to those favoring a radically thinner modern state.

Ripstein's Kantian picture distills the most important and attractive normative feature of Kant's political philosophy, the individual freedom from the interference of others and the preservation of an important personal space of innate right which the state cannot invade. Yet, to ensure that this picture is plausible, Ripstein must find in Kant's imperative to secure a condition of civic rightfulness a great deal more scope for state action than can be justified by the need to secure the mutual freedom of citizens. To be sure, there are those who read into Kant a great deal more civic concern than Ripstein's singular focus on maintaining a rightful condition. Sarah Holtman has recently proffered an interesting view which sees Kant's political philosophy as much more deeply inflected with civic respect and concern (Holtman 2011). On Holtman's reading, a proper consideration of Kant's view of civic respect allows us to exhibit concern and understanding in the application of law that exceeds preserving freedom. So, for example, in imposing criminal punishment on a remorseful first time drunk driver, the law can properly consider the role of human weakness in calibrating her sentence (Holtman 2011: 136). In the alternative, one could search views cousin to Kant's, Hegel's for example, to find a retributivist view which protects the rights of citizens by punishing criminal actors while still showing concern for the restoration of civic equality of even those punished (Yankah 2004; Johnson 2011).[3] I am suspicious that Holtman's picture, as attractive as it is, can be squared with the same Kant who intones that committing a crime permits us to no longer consider you a fellow citizen. In any case, the broad civic concern of Holtman's Kant is not the same as Ripstein's Kant.

What is needed is a way of preserving the importance of Kantian independence while maintaining other important values embedded in a well functioning civic community.

[3] I am very grateful to Sarah Holtman, Jane Johnson and Joshua Kleinfeld for a very enriching conversation on this and related subjects.

Unfortunately, I must leave to another time a fuller development of an alternative political theory as well as to spell out its consequences for criminal law. Here I can only gesture at the shape it might take. Ultimately, what an exclusively liberal Kantian view cannot provide is the civic resources to explain not only the primary value of freedom but the civic bonds which justify much of what we find important in the modern state. It is only by bringing our civic virtue to the fore that we can complement the liberty of Kantian freedom with the necessary richness of civic bonds.

In casting about for the appropriate resources to provide the features missing from the starkest image of a Kantian rightful condition, the natural place to land is within a classic model of republicanism, which takes civic bonds to be central to political obligation. Modern "civic republicanism" has been so powerfully influenced by Quentin Skinner that its traditional roots in civic virtue and civic bonds have not only been obscured but nearly reversed (Skinner 1978, 1984). Skinner grounded his view of republicanism in the Machiavellian contention that a government must ensure a balance of power between different political factions in order to ensure that no person or group can use government to dominate another faction. Though Machiavelli remained convinced that the checks and balances of power were ultimately in service of the common good (Viroli 1993) this "Roman" tradition of republicanism, through Montesquieu and then the American republicans, has ultimately come to represent a philosophical commitment to freedom from arbitrary government power, a view that more fits with Kant's theory than provides an alternative. Even important political voices which have criticized Skinner's view as insufficiently robust have pursued ideas such as freedom from domination, which if more robust than Skinner's non-interference, lack the civic resources to provide a rich alternative to Kant (Pettit 1997, 2002).

Rather than the current focus of republicanism as freedom from interference, what we see missing in Kant's singular fixation is a view which recalls the political obligation found in the civic ties of Aristotle's "Athenian" republicanism. Here again, caution is urged in reading a rich tradition colored only by the current conventions. Modern virtue jurisprudence, much of which is neo-Aristotelian, has been primarily concerned with the appropriate role of law in promoting and nurturing personal and private virtues, in measuring them in judicial decision makers or in tracking the moral quality of a person's practical wisdom (Solum 2006; Huigens 1995).

Careful inspection of Aristotle's writings, however, reveals a focus not on private virtue but on the way law is grounded by civic virtue. As opposed to Kant's view that we are first and foremost independent of each other, Aristotle starts from the perfectly natural view that man is a social animal that seeks, indeed longs for, interdependence. If trapped on a desert island, one's first thought upon spotting another castaway would not be a concern for independence but great relief and a deep human instinct to band together for safety, company and comfort. Aristotle shares Kant's idea that the fact that we must live next to each other necessitates entering into civic society. The fundamental difference in perspective is that Aristotle rightly notes that we do not merely live *around* each other but we live *together* (Cooper 2005). Aristotle argued that our social interconnectedness was the basis of our political obligation and law is how we establish the way we must govern our lives together. Because we are naturally social animals, the function of law is to permit us to flourish in a society as a community. In this way, law provides normative guidance not only in the particular actions but in "setting parameters within which individuals carry on together their social interactions, pursue their individual and common projects, and the means for repairing the relationships when things go wrong" (Postema 2010: 1856). In

doing so, law provides the standards by which we evaluate and hold accountable the actions of others in our community (Kraut 2002: 124–125, 127–128).

To be sure, flourishing together as a community requires having that important Kantian space to be the master of one's own life. On Aristotle's picture, it was important in a healthy polity to maintain personal room for citizens to pursue their own projects. This is why Aristotle rejects Plato's arguments that citizens merge their personal projects, including their wealth and turning over their very children for communal parenting, in order to erase the boundaries between them. Aristotle understood that the ability to favor those dear to you, to pursue personal and professional projects and to give time and energy to those projects most meaningful to each individual are important parts of civic flourishing. But while a moderately viewed concept of civic duty can properly accommodate large parts of Kantian freedom, it does not do so at the price of excommunicating laws justified by obligations outside of the preservation of freedom or requiring us to violently stretch the concept to accommodate these instincts.

Elsewhere, I have made some first steps at sketching a distinctly republican view of law and its connection to the obligation to obey the law (Yankah 2012b) but here I can offer only a few words indicating how republicanism provides a fuller picture of our political obligations by highlighting our civic duties. As noted, a republican theory will capture much of the attractiveness of Kant's call to freedom. No theory which takes seriously our civic duties to each other can allow selfish violence to be visited on one citizen from another. Aristotle's observation that private property allows each to pursue their personal projects supplies explanation as to why property crimes must be prohibited. Lastly, a commitment to civic equality will powerfully ground many of the same instincts behind the Kantian maximum that no private individual may be permitted to make you slave to their own project. Indeed, preserving the health of the republic is an important way to ensure that citizens do not fall into being a means to the ends of other, either internally or externally (Skinner 1984: 217, 231).

Notice, however, that a republican view allows us to account for many of the features were missing from the Kantian picture. A view of law which elevates our duties to contribute to the civic excellence of our polity can explain why we have a duty to reach out to those who are disabled in order to help them participate more fully in our civic life. A view that recognizes that we have some obligations to care for each other explains why a law requiring seat belts may be controversial but is not obviously unjustified. A republican view shows why though a community may struggle to determine the scope of its obligations to affirmatively redress past discrimination against ethnic and racial minorities which may have occurred even before present citizens were born, we must, as a political community, wrestle with this question. Our rightful pride in our civic excellence explains why the state can rightfully promote, in some measure, public happiness, whether it be through the arts or public playgrounds without adopting the cramped view that such measures can only be justified by the threat of an unhappy populous on the edge of revolt. At the same time, that each citizen is owed equal civic concern and must be allowed space to pursue her own projects erects a barrier which prevents the government from imposing too intimately into her personal life even if ostensibly for her own good.

Civic Bonds and Punishment

I have only sketched the broadest strokes of how a republican view would complement the important features missing from a purely Kantian structure. Let me conclude by contrasting

a few republican facets of law as they relate particularly to criminal law and punishment. To first state the obvious, many of acts which are prohibited by a Kantian theory of crime will be equally outlawed under a republican theory of law; no theory of law would be plausible if it did not prohibit murder, rape or theft. That being said, a republican theory of law provides a very different emphasis as to why we punish those who violate our civic rights. Rather than focus on upholding the supremacy of law, as Ripstein does, a republican theory reminds us that law and punishment is ultimately about upholding civic equality, illustrating civic concern and preserving civic bonds. Thus, a republican view naturally reminds us that while punishing criminal actors is critical to upholding civic equality, our responsibilities to the victims of crime may not end with punishing the offender. A criminal law system which focuses exclusively on visiting punishment on criminal offenders without devoting appropriate resources to counseling rape victims, attending to the healing of people assaulted and addressing the fears of family and neighbors of crime victims is attending to only a portion of its responsibilities. It is unclear how a legal system justified only by the protection of Kantian freedom can properly attend to these values unless it imports into perfecting a rightful condition the very civic duties naturally located in republican theory.

A theory which focuses on our civic bonds changes the purpose of punishment from upholding law's supremacy, as such, to maintaining civic equality, which in turn alters the scope and aim of our duties towards crime victims. Criminal acts call for punishment that leaves in no uncertain terms our outrage that a person has taken it upon themselves to steal from, hurt or kill a fellow citizen. At the same time, a republican view of criminal law highlights that our civic bonds with the criminal offender do not evaporate upon punishment. A legal regime justified only by freedom finds little room to explain why a polity must also extend itself to reincorporating criminals after they have been fully punished (Braithwaite and Pettit 1993: 91–92). Modern criminal law systematically shows a stunning lack of civic concern for those we must and should punish. One clear symbol of our willingness to sever our civic bonds with past offenders has been the practice of disenfranchising felons (Fletcher 1999). In recent years, states were tempted by "Three Strikes and Out" legislation, which amounted to little more than a thirst for lifetime warehousing of criminals (Yankah 2004: 1028). Collateral sanctions further reveal our lack of civic concern, prohibiting ex-offenders from running for office, sitting on a jury, participating in government programs and restricting employment, in short systematically excluding from civil, economic and social participation.

> These sanctions even extend to the deprivation of social and welfare rights including welfare support programs, federal benefits, contracts and licenses, grants, and small business and educational loans. In fact certain ex-felons are denied federal monies solely meant to assist with the purchase of food. These benefits are often crucial in preventing vulnerable citizens from falling beneath an acceptable threshold. Social and welfare benefits evidence a communal commitment to honor the needs of citizens. Denying these rights demonstrates that this concern does not extend to the ex-offender (ibid).

This break down in civic concern is not only a philosophical point. A society which lacks any civic concern for offenders is doomed to the frustration and futility that characterizes modern American criminal justice, with its stunning recidivism rates and revolving door prison system. Such a system not only leaves the offenders we have punished marginalized upon release and all too willing to return to crime but, more

importantly, leaves citizens vulnerable to being future victims of crime; too likely to become victims in a system which is unable to address the roots of criminality.

A republican theory of criminal law which focuses on civic excellence brings into stark relief another feature of modern criminal law which is insufficiently emphasized by a Kantian fixation on individual rights. No fair minded observer can fail to be deeply unsettled by the deep racial and class divide reflected in our criminal justice system. From any remove, the modern penal system increasingly looks like an administrative system of social control aimed at the Black, Brown and poor. Whatever one's individual views on the source of this inequality—a history of deep racism, structural discrimination, maliciousness by those in power or pathos within minority and poor communities—no one should doubt that this disparity is a matter of deep concern and erodes trust both within minority communities and generally. Because a Kantian view focuses nearly exclusively on the individual rights of each individual citizen, it obscures the complaint of so many minority communities infuriated that they are the subject of disproportionate police monitoring and punishment even when engaged in identical behavior (Yankah 2011:21). The deep racial and class factionalism in the application of criminal law, reflected in the ways our laws are drafted, policed and enforced is one of the most disturbing stains in our current criminal law practices. Ripstein's Kantian picture may have the resources to address this but that it does not bring this into relief illustrates an important way in which the Kantian picture is incomplete. Indeed, one important benefit to highlighting our civic bonds is that it highlights the way in which the overly broad reliance on criminal law as a (some would say "the") method of social control is dangerous and deficient.

Conclusion

Arthur Ripstein has written a remarkable and important book, one that explicates a rich and coherent view of Kant's political philosophy while insisting on its distinctiveness from his moral theory. This is a book that has and will continue to reward multiple readings and will shape thinking on Kant's legal and political philosophy for a some time to come. The strength of Ripstein's work is his systematic exploration of how a Kantian political theory informs various fields of law, from private to public law. It is an outstanding quality of the book that it illustrates and guides the way law must, on Kant's account, be premised on individual freedom.

But the same strength and coherence which ties the book to Kant's important values of independence blinds the work to our shared moral ties grounded in other political values. Because Kant's focus on independence is in direct tension with the ways in which we are very much bond together, Kant is unable to accommodate important ways the state is justified in using law to pursue republican values. Thus, the singular importance of freedom leaves little natural room for a political community to pursue through law the greater incorporation of disabled citizens, protect and assist vulnerable populations or build a flourishing community by pursuing in some degree public appreciation of artistic or natural beauty. To be fair, it is not the case that Ripstein's Kant cannot make room for these important values. But the unifaceted Kantian value system requires him to smuggle these things into the idea of perfecting a condition of rightfulness as a prerequisite to freedom, even where the connection with freedom is attenuated at best. If we are convinced of the intuition that many of these public actions are justified, why should we smuggle them in as derivative of independence rather than explore the values of those civic bonds directly? If, on the other hand, Ripstein rejects these intuitions in mass, the reader is entitled to know

how radically Ripstein would strip the modern state so that one can test the attractiveness of this Kantian vision.

The same thinness leaves the exploration of Kant's theory of punishment incomplete. Ripstein's thoughts on punishment are novel in that he embeds criminal law, both in its retributivist and consequentialist facets, into Kant's overarching political philosophy to show how criminal law can be seen as one aspect of public law's asserting its own supremacy; the supremacy of our collective will as captured in the law to defeat the unilateral imposition of the criminal offender who would make us slave to their own wishes. But a criminal law which is solely focused on the preservation of freedom takes little notice of the ways criminal law need expand its view to take into account how a polity can restore the victim of a crime back to civic equality. Secondly, as Kant's brooding observation of how one who commits a crime forfeits his citizenship shows, a singular focus on individual rights disregards the civic duties we have to reincorporate offenders after they have been punished. Ignoring our civic duties even to those who have rightfully been the object of our outrage leaves past offenders isolated and likely to reoffend, resulting in the rotating door prison system and communities of innocents who remain preyed upon by career criminals. Lastly, a political theory that does not prize our civic bonds will ignore the startling balkanization of our criminal punishment practices, where policing, arresting and imprisonment become tools of racial and social oppression. In illustrating the benefits in viewing criminal law as a coherent part of Kant's political theory of freedom, Ripstein also highlights what is absent if the law is married to only one moral value; one that insists on our independence and isolation no less. It then becomes clear that though Kant presents one important facet of punishment, only a republican political theory can meet the most pressing moral demands of punishment by reminding us that criminal law must be used to preserve and strengthen civic society (Byrd 1989).

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