

Phil 290-1: Recent Work on Political Coercion
September 25, 2012, Ripstein, *Force and Freedom*, Ch. 3–4

Force as a response to wrongdoing:

Ripstein claims that when A violates the independence of B, then using force against A need not violate the independence of A (or at least need not be similarly objectionable). This is because:

- it is “the hindering of a hindrance to freedom.”
- it “upholds” the freedom of B
- it is “an incident of [B’s] antecedent right to be free.”

Ripstein suggests that this contrasts with the received view,

1. where coercion takes the form of a *threat*
2. and where coercion is *extrinsic* to the wrong to which it responds.

How deep is this contrast, though? Let us distinguish to kinds of uses of force as “responses” to wrongful force: prevention and punishment.

- Prevention needn’t involve threats, and it seems to aim at upholding, restoring, etc. the freedom of the victim.
- Punishment does involve threats, and it doesn’t seem to uphold, etc. the freedom of the victim.

Perhaps the only difference, then, is that the received view has *focused first* on punishment, whereas Ripstein focuses first on prevention. One each view turns its attention to the *other* topic, one wonders how different the resulting positions will be.

Note that *prevention* includes *repulsion* or *specific restitution* “after the fact.” Suppose Colette has succeeded in sitting on Eddie, without Eddie’s consent. If Colette refuses to get off, then, going forward, there will be a *future* use of force, a continuation of Colette’s on-Eddie-sitting, against Eddie. So when Jessica pulls Colette off Eddie, she prevents Colette from using force, in the immediate future, against Eddie. Although it is “after the fact,” it is still forward-looking.

Might one add a third category of responses to force: *redress*? It would aim somehow to “make the victim whole,” rather than, say, to deter others or to give the criminal his just deserts.

Ripstein writes: “sometimes a wrong will be completed, and if it is, its effects must be hindered in order to maintain the external freedom of the aggrieved party... You must be made whole, so that the embodiments of your external freedom are as they would have been had I not wronged you.”

But how can I be made whole for the loss of *independence* itself? That is purely negative and relational: *not* being subject to force by others. By being “more not subject” to force by others in the future? (It is clear enough how I can be made whole for the *loss of means*, as an insurance company might make me whole after a hurricane. And it is clear enough why responsibility for making me whole may lie with the thief, just as it might lie, in the hurricane case, with the structural engineer who wasn’t sufficiently careful. But it isn’t clear what this has to do with restoring my independence. And, in any event, there can be losses of independence without losses of means, such as when you take a nap in my bed.)

In evaluating proposed justifications of force in response to force, we should ask how they answer:

- A. May force be used only as a response to *force*?
- B. Must force be *necessary* for this response?
- C. Must force be somehow *proportional* to the force responded to?
- D. May force be used only against someone who is *responsible* for the force (or, in cases of deterrent punishment, force *of the kind*) responded to?¹
- E. Is force *in response to permissible force in response to force* impermissible?

A “no” answer to A seems at odds with the Kantian view. “No” answers to B–E seem independently implausible.

Why is a “hindrance to a hindrance” to freedom “consistent with freedom”? The natural analogies to double negation, or to the composition of vectors lead one to expect “yes” answers to questions A, C, and E.

- Re A, force may *only* be used *against force*, because other wrongs are not hindrances to freedom.
- Re C, response must be *proportional*: the same in “magnitude,” but opposed in “direction” to the aggression.
- Re E, responsive force by the original aggressor is the hindrance of the hindrance of the hindrance of freedom. That is itself a hindrance of freedom, just as the negation of a double negation of P is a negation of P.

However, one is led to expect “no” answers to B and D, which seem implausible.

- Re B, if force *actually* hinders a hindrance, then it is a hindrance to a hindrance and so compatible with freedom. Whether it is *necessary* to hinder that hindrance doesn’t arise.²
- Re D, it would seem that an “aggressor” can hinder freedom even without being responsible for that hindrance of freedom. Ripstein accepts that I can inadvertently violate your independence, as seems to follow from the definition: I can inadvertently use or destroy your means without consent.

In any event, why accept the basic idea? Surely, the analogies to negation, vectors, etc. carry no moral weight.

Set aside punishment for the moment, and consider only the justification of prevention. Perhaps the crux is one or both of the following:

- I. Force used in prevention is permissible, because it upholds what the victim has a right to.³
- II. Force used in prevention is permissible, because it does not deprive the aggressor of anything he has a right to, since, by hypothesis, he does not have right to the object of his aggression.⁴

¹ Regarding a “no” answer to D, one might object that it is not implausible that I may use force to remove an *unwitting* trespasser from my property. But may I use force *before* informing him that he is trespassing and giving him an opportunity to leave? That I can use force if he *then refuses* is compatible with a “yes” answer to D. In that case, he is responsible for the continuing trespass.

² Ripstein does write, however: “provided ...that...they do not interfere with freedom any more than they must to hinder the initial hindrance” 84.

³ “Against the background of norms of equal freedom, the person prevented from completing a wrong is not being made to bear a cost she would otherwise not have borne; she is just being made to respect the rights of others” 84.

First, how is “right” to be interpreted?

- “the victim has a right to X” “the aggressor has no right to X” = “if others use force to prevent the aggressor from using or destroying the victim’s X, they do not thereby act impermissibly”—unhelpful tautology.
- “the victim has a right to X” = “others have corresponding duties”; “the aggressor has no right to X” = “the aggressor is required to refrain from X”—implies “no” to question A, licensing uses of force to prevent, say, the telling of lies.

Second, do I and II give plausible “yes” answers to B, C, and D? According to II, for instance, it would seem to *suffice* to make your preventive use of force permissible that I have no right to the force that you are preventing. The *necessity* of your preventive use of force, its *proportionality*, and my *responsibility* don’t seem to enter into it. Whatever may be the case, it would seem, you are not depriving me of something I have a right to.

Finally, it does not seem to follow—here, regarding II—from the fact that *what I am defending* is not something to which you have a right that *nothing I do in defense of it* can deprive you of something to which you have right. If I build a high wall, with my own means, to keep you off my land without my permission, then, *in keeping you off my land*, I am not depriving you of anything you are entitled to.⁵ But if do this *by locking you in a cage, demolishing your house, and using its timber to build my wall*, then I certainly *am* depriving you of much to which you are entitled. If you leave inadvertently stolen property in a public place, then in returning it to the victim, I am not depriving you of anything to which you have a right. But is it so obvious if I tear down your house and send you to the hospital in my efforts to find it? Similarly—regarding I—from the fact that *what I am defending* is something to which the victim *has* a right it simply does not follow that *nothing I do in defense of it* can deprive you of something to which *you* have right.

To be sure, one could just *build into* the definition of “independence” that necessary, proportionate, etc. nonconsensual force used in prevention or punishment does not count as a

⁴ This seems to be the tack taken by Japa Pallikkathayil, “Deriving Morality from Politics: Rethinking the Formula of Humanity” *Ethics* 121 (2010): 116–47, whose views are often quite close to Ripstein’s:

In attempting to violate another’s right, the violator attempts to take control of a feature of the world that another is entitled to control. In other words, the violator encroaches on the discretionary sphere of another. If the victim acts to thwart the violator’s action, this only involves limiting her freedom to do something she has no claim to be permitted to do. In other words, actions needed to thwart a rights violation only prevent the would-be violator from performing an action that is not in her discretionary sphere. Hence, such defensive actions are consistent with the violator’s equal external freedom.

Consider the matter more concretely. Suppose you try to grab an apple from me that I have the right to be holding. If I push you away, I thwart your action. But I am not doing so in a way that is inconsistent with the equal freedom of all because, *ex hypothesi*, you had no claim to be able to grab the apple from my hand. So, I have only prevented you from making a choice you had no claim to be able to make (134).

⁵ Witness Ripstein: “you can lock your doors to hinder me from taking my afternoon nap in your bed” 81–82; “you can grab your coat to prevent me from taking it” 82; “I can reclaim my property from you, even if you took it by mistake” 83; I may take “the bicycle you promised [better: sold, but never delivered to] me” 84; when “I mistakenly take your coat... you get to reclaim your coat because it is your coat” 85. None of these preventative measures involve, in any intuitive way, my use of force against you, which is what we are trying to justify. They simply involve permissible uses of my own property.

violation of independence. But, first, this wouldn't be very explanatory. And, second, it isn't, as far as I can tell, quite how Ripstein defines independence. What he does say is that uses of force *for public purposes* do not infringe independence, where public purposes are those that secure of a scheme of *equal independence*.

So perhaps what justifies force as a response to force is it achieves *equality of independence*. The aggressor has taken "too much," so to speak, and we are evening things out by "giving some back" to the victim. The more general view would be:

Distributive Permission: Nonconsensual force in response to force is permissible insofar as it plays the right sort of role in achieving (e.g., is necessary and sufficient for achieving, or necessary for and contributes to achieving, etc.) the right sort of distribution (e.g., equality, "leximin" satisfaction, etc.) of freedom from force overall.

Ripstein would deny that force used to achieve an equal distribution violates independence at all. But one might say, instead, that while such force does indeed infringe the *aggressor's* interest in controlling others' uses of force against him, this is justified on distributive grounds: it furthers the *victim's* like interest, and the victim would otherwise be "worse off" in the relevant respect.

When is "independence" equal? When people are free from the same "amount" of actual nonconsensual force? But that's crazy. Take punishment. Suppose I have hit you. If I am hit back, then the distribution of batteries is equalized. But this is not just "leveling down," but leveling down that doesn't obviously deliver a more equal result. Moreover, taken to its logical conclusion, it would require, insanely, that not just I, but everyone else, should suffer a battery.

It doesn't help to appeal to a different distributive principle, such as "leximin." How then do we explain punishment at all? If I am hit in response, then the distribution would seem to be worse; two people suffer a battery each, rather than only one person. It might be said that my being hit prevents batteries in the future, by deterring others. But my being hit might, in certain cases, reduce batteries even if I never hit anyone at all. This justification of punishment would seem to justify using force against one innocent to save the five from force in the classic "paradox of rights."

Things are not much better with respect to prevention. I am the aggressor, and I am responsible for putting you in a situation in which either you get hit by me, or I get hit by you. It is true that the distribution of batteries suffered if I get hit by you is no worse in terms of equality or leximin than the distribution if you get hit by me. So, perhaps, you are permitted to hit me. But, by the same token, it is no *more* equal. So I am permitted to hit you. So this gives a highly implausible "no" answer to E: aggressors may fight back.

I suspect that if the general approach of the Distributive Permission is to be made to work, we need to view what is to be distributed not as *actual freedom* from nonconsensual force, but instead *opportunity to avoid nonconsensual force through one's choices*. We aren't distributing *unconditional* control over others' uses of force against one, so to speak, but instead *control over whether* one will or will not enjoy such control.

Opportunity-Based Distributive Permission: Nonconsensual force is permissible insofar as it plays the right sort of role in achieving the right sort of distribution of *opportunity* to be

free from nonconsensual force through one's choices and—the *Opportunity Constraint*—the target of this force had a reasonable opportunity to avoid it through his choices. Note that we need the “Opportunity Constraint” to avoid licensing using force against one innocent to save several others from force.

Compare two schemes of opportunity to be free from force. In the “punishment scheme,” if one refrains from using force, then one will be free from state force and very likely free from criminal force. However, if one uses force, then one will suffer more severe state force. In the “no-punishment scheme,” whether or not one uses force, one will be free from any state force, but will very likely suffer criminal force. Arguably, the punishment scheme offers better opportunities than the no-punishment scheme.⁶ Suppose that there are no alternatives that the state is capable of bringing about. So the opportunities under the punishment scheme are better for everyone, and they are equally distributed. The “prevention scheme” would be exactly parallel and justified in the same way, except that state force would reduce criminal force directly, rather than via deterrence.

Can the criminal (or would-be) criminal object to our punishing (or preventing) him? Granted, the outcomes for the criminal—in terms of freedom from nonconsensual force—may be worse than the outcomes—in terms of freedom from nonconsensual force—that anyone else suffers. But we are assuming that the “currency” of this distribution is not actual freedom from force, but instead *opportunity* to be free from force. And, even if we punish (or prevent) him, he still enjoyed the same opportunity to be free from force as anyone else, which, we are assuming, was better than in the no-punishment (or no-prevention) scheme. There are difficult questions about whether and why we should be aiming to provide people with opportunities, rather than outcomes. But once we have decided in favor of opportunities, there is nothing, in general, illicit about the form of argument that says: “Yes, this outcome is worse for you than some other outcome that we might bring about, but we may do it, because it is the realization of a scheme of better opportunities, justly distributed.” We can make this argument outside of the context of punishment: for example, to someone who refused to take the opportunity to apply for some publicly provided benefit and now complains about his not receiving it.

The Opportunity-Based Distributive Permission explains D straightforwardly. *Responsibility* for force matters because it means that one had the *opportunity to avoid* the responsive force by choosing differently. It also explains E straightforwardly: why the aggressor can't fight back. Force against the aggressor is permissible since it is compatible with his having the opportunity to avoid force through his choices. Force against the victim is not permissible, since it is not so compatible. It also goes some way to explaining B. If state force is not necessary to respond to the force in question, then perhaps some alternative system would improve the opportunity to be free from force. And it goes some way to explaining C. If state force is intuitively disproportionate, then perhaps some alternative system, with more moderate, or no, punishment, would improve the opportunity to be free from force.

⁶ Not at all obvious, but not implausible either, at least if we assume that the punishment won't be too much more severe than what is suffered by victims of crime. While the punishment scheme exposes one to a somewhat worse use of force, it also allows one, through one's choices, to be completely free from force. Moreover, those choices are not particularly burdensome. One simply needs to refrain from deliberately attempting to use unjustifiable force against another, which one is anyway duty-bound to refrain from doing.

Is Opportunity-Based Distributive Permission in keeping with the spirit of the Kantian approach? Is it independently plausible?

It does not deny that independence, or the interest in controlling others' uses of force, *takes priority* over all other interests. People are not being punished in order to increase happiness, autonomy, etc.—only to secure freedom from force.

It does not sacrifice the *greater* interests of the few for the *lesser* interests of the many. The distributive principle in question is equality or leximin, not aggregation.

It *does* deny an absolute form of the Doing/Allowing distinction: that we may never use force against one even in order to save others from force. But that absolute form of the Doing/Allowing distinction would seem to be denied by *any* view, like Kant's on any interpretation, that permits force as a response to force.

Given the Opportunity Constraint, it does not license using force against one "innocent" to save many others from force.

Suppose that to *threaten* to use force is *already* to use force or, at any rate, to do something that raises a similar bar of justification. Then it is hard to see how the state satisfies the Opportunity Constraint. For even if the state provides people with the opportunity to avoid the *fulfillment of its threats*, it typically does not provide people with the opportunity to avoid the *threats themselves*. This is a more immediate problem for punishment, since, as we have been understanding it, the purpose of punishment is deterrence, and deterrence requires threats. It is a less immediate problem for prevention, since its purpose is just prevention itself, and prevention can occur without threat. But this would still be somewhat odd: the state could protect citizens against attempts to use force, but not announce that it would do so with the aim of deterring those attempts in the first place. Why should *threats* to use force raise a similar bar of justification?

- Is it a worry about subordination, about a superior ordering you around? It is not clear that this is a concern about independence so much as about social equality.
- Is it a worry about the way the threat limits, worsens, etc. your opportunities? But we are assuming that the threats produce a better distribution of opportunity.
- Is it a worry about announcing that one will do something impermissible? But then, so far as the actions threatened are permissible, the threat is not objectionable.

The Opportunity-Based Distributive Permission makes non-aggressors fair game. Suppose we are speeding to prevent a use of force against several. A pedestrian is standing on the side of the road ahead of us. He has no valid reason to step out into the road. We make the situation perfectly clear to him, and we remind him of public service announcements that warn that in situations like this, the authorities will not stop. Nevertheless, with full responsibility, he steps out into the road. Must we stop?

Property

In some cases, interference with some external object (e.g., the apple you are presently holding) is also interference with you (e.g., your hand) and so a violation of innate right. But with acquired property, interference with an external object violates your independence, even when it does *not* violate your innate right. By an affirmative act, one's "means" expand beyond one's body to encompass something that, unlike your body, could have been someone else's.

The alternative system would be one of *usufruct*: anyone is permitted to use anything, so long as he is not thereby interfering with another's person.

Ripstein argues that acquired property is not only *consistent* with equal independence, but moreover is *required* by equal independence.

- "acquired rights are the only possible extension of the Universal Principle of Right to the situation in which there are external things that can be used by free persons in setting and pursuing ends."
- "So any restrictions on the possibility of a person having objects as her own would restrict one person's purposiveness for the sake of something other than freedom, and so interfere with each person's right to be ... her own master. That is, they would limit freedom on the basis of something other than its own conditions."

But why would usufruct violate equal independence?

Of course, one might think that property better promotes *welfare* (e.g., because of the "tragedy of the commons"). But that has nothing to do with equal independence.

One might also think that property expands "*purposiveness*": i.e., allows a better, perhaps because wider, range of purposes to be pursued (e.g., one can build settled dwellings, till the soil). But an expansion of purposiveness is not an expansion of *independence*. Again, independence is negative and relational: it is simply not having whatever means one may have used or destroyed by others. If independence can be "expanded," it would seem, it is only by greater insulation from interference by others. But increasing the means that can be interfered with doesn't, in itself, increase one's insulation from interference. For example, Robinson Crusoe's purposiveness can expand as the sea casts its fruits on his beach, but his independence remains unchanged, since there is no possibility of sentient interference. (Tied to Jay's point from last time.)

At times, Ripstein seems to argue:

1. Independence is purely "formal": i.e., independent of the content of the purposes that one might pursue.
2. In a system of usufruct, one would not be able to pursue certain kinds of purposes (e.g., ones that required "putting things down").
3. So, a system of usufruct would be incompatible with independence.

But:

- Isn't it also true that a system of property would prevent one from pursuing certain kinds of purposes (e.g., rambling aimlessly over the countryside, nomadic hunter-gathering)? Is any system perfectly neutral between purposes?

- Certainly, it is a violation of independence when *someone else* decides what purposes you are to pursue. This presumably why it matters that independence be “formal.” But in this case, it wouldn’t be someone else deciding that you could not pursue, say, settled agriculture, but, as it were, morality itself + physical limitations (e.g., having only two hands).

Ripstein’s main argument seems to be:

1. You may rightfully X (i.e., people may not use force to prevent you from X-ing) unless X-ing would infringe the independence of others.
2. Therefore, you may rightfully *have something as property* unless it would infringe the independence of others.
3. You infringe the independence of others only if you use or destroy their means.
4. By having something *otherwise unowned* as property, you do not use or destroy others’ means.
5. So, by having something *unowned* as property, you do not infringe their independence.
6. So, you may rightfully have something as property.
7. Any limit on what you may rightfully do—i.e., any limit on what you do when your doing it does not infringe the independence of others—would infringe your independence.
8. So, it would be a violation of your independence if you could not have something unowned as property.

But:

- But 8 seems inconsistent with 3. If you could *not* have something unowned as property, no one would be using or destroying *your* means. So how would it infringe your independence?⁷
- Can’t we run the same argument with X = “*not* having property but being free to use anything so long as it does not infringe on the innate rights of others?”

Property and the state:

“the structure of property rights... can be explicated fully in terms of a ‘state of nature’ without any reference to public law, but property rights are only enforceable in a rightful condition.”

In particular, the *acquisition* of property raises an issue of political authority. By acquiring property, you unilaterally impose enforceable obligations on others to refrain from using or destroying it without your consent. But, like, who died and made you king? “Such a unilateral act could only be consistent with the freedom of others provided that it has a more general, omnilateral authorization,” which requires the state.

⁷ An illustrative passage:

“Any other arrangement would subject your ability to set your own ends to the choice of others, since they would be entitled to veto any particular use you wished to make of things other than your body. The innate equality of all persons entails that nobody could have standing to limit the freedom of another person, except to protect his or her own independence. *Nobody else is deprived of his means simply because you have external things as yours*.... So it must be possible to have external means as your own.”

The italicized bit seems correct: your coming to have something unowned doesn’t violate the independence of others, since it doesn’t mess with their means. But if so, then how do we sustain the underlined bit? If you don’t own it, then others’ vetoes of your use of it don’t mess with your means and so, by the same token, don’t violate your independence either.

Contract:

Perhaps, the argument is like the argument for property, with “having something unowned as property” replaced by “having the action of another as property with their consent.” In this case, they do “own” their actions beforehand, but since they consent, there is no violation of their independence.

Again, though, it isn’t clear how the alternative system—in which you may do things for other people, as you may do anything that doesn’t infringe independence, but you are always free to back out—would violate anyone’s independence either.

Status:

When A is unable to consent, B may rightfully make arrangements for A, but not for B’s own ends, only for the benefit of A.

Perhaps, again, the argument is that making such arrangements (like having property) is something that B *can* do without infringing anyone’s independence, so it is something that B can *rightfully* do. Presumably it does not infringe A’s independence because A is unable to consent. It does not infringe anyone else’s independence, since A is not anyone else’s means.

Benefit of A = ?

= development of A’s purposiveness?

= what A could consent to, which is simply limited by A’s rightful honor?

“The wrong in status is using another person to advance your ends.”

- But that is a wrong intelligible without the notion of status. It’s just a violation of innate right.
- Presumably, the *specific* wrong of status is *C’s interference with B’s making arrangements for A*. (Later: “the person who is entitled to make arrangements for another can constrain the conduct of anyone else who interferes with the possibility of doing so.”)