

Saving Private Wrongs

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Arthur Ripstein's *Private Wrongs* defends a non-consequentialist, Kantian, theory of tort law. The first part of this article provides an overview of the main claims of this theory. The second part advances three lines of critique.

PRIVATE WRONGS: AN OVERVIEW

This part is in three sections. The first describes the nature of the theory developed in *Private Wrongs*. It suggests the theory has both normative and explanatory aims. The second describes its main normative claims. The third describes its main explanatory claims.

i. What kind of theory?

The book is about a subset of private wrongs, namely, torts. It is not concerned with the law of contract. But what kind of inquiry does the book conduct into tort law?

It is not a causal-historical inquiry. It does not seek to tell us why, causally, we have the tort laws we do. Nor is it a purely analytical inquiry: it does not seek to tell us about the necessary and sufficient conditions for some rule to count as a rule of tort law or for some set of rules to count as tort law, though the book does make some claims of this kind.

Beyond these negative points, it is not entirely clear how best to characterize the nature of the book's inquiry. Ripstein himself writes that, if posed the question "is the account descriptive, prescriptive, or interpretive?" that he is "inclined to answer 'yes'".¹

In my view, it is probably best to understand the book as having both normative elements and explanatory elements.

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¹ ARTHUR RIPSTEIN, *Private Wrongs* 19 (2016).

The book makes normative claims: it criticizes some cases or rules as mistaken.² Why, then, the reluctance simply to say the book is an exercise in normative theory? Ripstein explains that “the prescriptions [he makes] are not from a standpoint outside of what is presupposed in the legal materials [that he] seek[s] to render intelligible”.³

This might give the impression that Ripstein’s prescriptions are based fundamentally upon a kind of an internal inconsistency (or ‘incoherence’) in a tort law which did not live up to the demands of his theory. It might suggest that any problems identified in the positive law of tort are problems in virtue of their divergence from tort law’s immanent presuppositions. This would make his approach to the theory of tort law very similar to Ernest Weinrib’s.⁴ It would also be a rather thin normative theory, since it would not say much about the value of the things presupposed in tort law.

But unlike *The Idea of Private Law*, *Private Wrongs* seems rather to begin with a commitment to a moral idea – ‘the moral idea that no person is in charge of another’.⁵ Unlike Weinrib, Ripstein does not claim to work backwards from the bilateral structure of tort law, deeper and deeper into the abstract normative presuppositions of tort law. Rather, he *begins* with an appealing normative idea (without seeking to derive that idea from the structure of tort law) and seeks to how show a commitment to the idea would support something like our existing tort law systems, while also using it to criticize parts of tort law which do not conform to the idea. This is the sense in which the account is normative.

As this suggests, the book also has explanatory aims: it also seeks to show features of existing tort law are explained by the normative idea. In fact, most of the book is given over to showing that the normative idea that no one is in charge of another itself explains the contours of existing tort law in common law jurisdictions.⁶ So chapter 3 is devoted to showing that the idea explains the general absence of positive duties of assistance in tort law and other

² *Id.* at 20.

³ RIPSTEIN, *supra* n 1, at 21.

⁴ See ERNEST WEINRIB, *The Idea of Private Law*, ch. 1 (2012) and ERNEST WEINRIB, *Corrective Justice* (2012). For a discussion of Weinrib’s methodology, see Sandy Steel, *Private Law and Justice* (2013) 33 OXFORD JOURNAL OF LEGAL STUDIES 607, 612-617.

⁵ RIPSTEIN, *supra* n 1, at 6.

⁶ The book floats somewhat freely over different common law jurisdictions.

situations where being a cause of harm to others, even culpably, does not give rise to liability. Chapter 4 tries to show that the tort of negligence is a reflection of the moral idea. Chapter 5 seeks to explain away strict liability harm-based torts which are potentially inconsistent with the moral idea. And the account of remedies in chapters 8 and 9 is sensitive to explaining features of the existing law.

What is the relationship between the normative and explanatory aspects of the theory? Any normative theory has to show that its normative ideal(s), however independently appealing they are, also explain aspects of tort law. Otherwise the theory is not a normative theory of *tort law*. So we might understand the explanatory aspects of Ripstein's account as the necessary concomitants of his normative theory – necessary in order to make it a theory of *tort law*. Yet the extensive effort expended in *Private Wrongs* to explain a large number of parts of the existing law of tort in different jurisdictions seems to go beyond the analysis necessary for his normative theory to count as a theory of tort law.⁷ It may be that Ripstein attaches an independent value to explaining existing parts of tort law, apart from the contribution this makes to showing that such a tort law is recommended by the idea.⁸ Indeed, some readers might prefer to think of the explanatory aspect of the book as predominating. This is because the normative defence of the idea that 'no one is in charge of another' is brief and, though its implications for the law are traced throughout the book, the implications are generally just stated, without further normative defence being offered when the implications are controversial.

ii. Normative claims

⁷ A normative theory of tort law can count as a theory of tort law even if the tort law it recommends has never been instantiated in any legal system at any time; the recommended system need only share enough conceptually necessary features of tort law to count as a theory of tort law. This is a relatively easy requirement to satisfy.

⁸ A normative theory might also seek to explain parts of the existing law as part of an exercise in reflective equilibrium. It might thus seek to show that its normative motivations explain parts of the existing law which reflect firm intuitions of fairness (etc.). This is not Ripstein's strategy; and it seems doubtful that the law on misfeasance/nonfeasance, for example, reflects firm intuitions of fairness.

The normative centre of the book is Chapter 2. The core normative idea of this chapter, which resonates throughout the book, is the idea that no one is in charge of another.

What this means is that it is “up to you, rather than others, what purposes you pursue.” This itself is just another way of saying that you are “your own person” and not “another’s slave, serf, or subordinate”.⁹

Now, for it to be true that I am the one rather than you, who decides what purposes I pursue, it must be the case that you are restricted from interfering in certain ways with what Ripstein calls my ‘means’. This is because, whenever I set something as my purpose, by which Ripstein means “acting in the world” in such a way as to go beyond “making up one’s mind inwardly” (travelling to Israel, skiing on a mountain, walking down a street), I must take up means to achieve it.¹⁰

Further, since “you don’t ever do anything except with your body”, your body is a particularly special kind of means.¹¹ If I, rather than you, am in charge and thus I, rather than you, get to decide what purposes I pursue, and if my purposes are thoroughly body-dependent, then I must have rights over my body. So you have bodily rights because your bodily powers are the “precondition of your setting and pursuing any purposes”.¹²

Ripstein does not here explain why, morally, we have property rights. Rather his main claim in this respect reverts to the explanatory: it is that we can *understand* the way in which tort law protects property through the lens of the idea that no one is in charge of another. The law extends its concern to protect against violations of this idea to external objects. He writes: “Nothing so ambitious as a general justification of property is required to understand wrongs against property. All that is required is an account of how property can stand in-charge-of relation”.¹³ Yet Ripstein does not tell us much about *why* we should treat property as falling within this relation, just that we can do so and that tort law does.

So the normative argument in a nutshell seems to be:

⁹ RIPSTEIN, *supra* n 1, at 33.

¹⁰ *Id.* at 31.

¹¹ *Id.* at 30.

¹² *Id.* at 40.

¹³ *Id.* at 41.

- (1) We are rational beings who set and pursue purposes
- (2) This requires us to have the use of means
- (3) If we are each to be in charge rather than in the charge of each other, we each must set out own purposes
- (4) Given the centrality of means to the setting of our own purposes, this, in turn, requires there to be prohibitions on interferences with our means.

Which prohibitions? Ripstein says there are two basic ways in which people can interfere with your means – i.e. your body and your property; these amount to two ‘types’ of wrongs.¹⁴

One way is by *using* your means without authorization. This seems to be the clearest case of one person taking a decision that was another’s to make and, in that way, wrongfully being ‘in charge of’ them. I take your horse for a ride without your consent. I touch your hair when you are asleep on the train next to me.

The other way is by *damaging* your means. Here I wrong you by “depriving you of the use of means that were available for your pursuit of whatever purposes you set for yourself”, but not by intending the interference with constitutes the wrong.¹⁵ For reasons I’ll explain later, damaging means is not, however, sufficient, for Ripstein, for a violation of right.¹⁶

iii. Explanatory claims

These ideas are then put to work throughout the main part of the book in explaining core features of some tort law systems. I will describe four central lines of argument.

First, the distinction between use-based wrongs and damage-based wrongs is said to map on to the distinction between the intentional torts (like battery, false imprisonment, conversion, trespass to land) on the one hand, and negligence and nuisance on the other.

The distinction is supposed to illuminate two features of these sets of torts. First, it explains why the trespass torts are actionable per se: you can use someone’s means without damaging them.

¹⁴ RIPSTEIN, *supra* n 1, at 43ff.

¹⁵ *Id.* at 48.

¹⁶ See below, at p.6, pp.8-11.

Second, Ripstein claims that it explains why liability in the intentional torts is strict, in the sense that liability attaches even where a person reasonably believes that another consents to their use, while liability in damage-based torts requires ‘inappropriate’ conduct on the part of the defendant.

Ripstein writes that “liability is strict because someone can use something without knowing who is in charge of it”.¹⁷ I am not sure why that is an explanation: the same thing could be said of damage-based torts. The thought here seems to be simply that the wrong-making features of certain acts of use are simply that they are unauthorized uses and their being unauthorized doesn’t require any knowledge on the part of the defendant.

Why is it that a reasonable belief in authorization does not preclude a use-based wrong, but reasonable care *does* stop a damage-based wrong from coming into being? Why doesn’t my smashing into you, faultlessly, amount to my being in charge of your body in the same way that touching you with a reasonable belief in your consent does?

This, claims Ripstein, is a consequence of the fact that damage-based wrongs involve the “side effects of the defendant’s use of his or her own means”.¹⁸ Unlike use-based torts which involve intentionally putting to use another’s means, damage-based torts involve injurious side-effects of the defendant’s use of his or her own means. It cannot be, claims Ripstein, that your own entitlement to set and pursue purposes is limited “by the mere potential effects of your doing so on the security of the bodies and property of others”.¹⁹ The idea is that, if all side-effects were prohibited, then we would not be free to set our own purposes at all.

Is this distinction – between torts involving damage to means and use of means – exhaustive of the domain of private tortious wrongs? No, Ripstein treats of defamation separately. He tells us that the right protected by defamation can “be understood only in relation to the possibility of legal proceedings”.²⁰ This is because, in his view,

¹⁷ RIPSTEIN, *supra* n 1, at 47. The point might also be made that even if the appropriate conception of wrongdoing in private law is fact-relative wrongdoing, there is still a question of why it is fair to hold people legally liable in respect of such wrongs.

¹⁸ *Id.* at 49.

¹⁹ *Id.* at 49.

²⁰ *Id.* at 198.

the right is itself a reflection of the law's commitment to a principle of attribution – namely, that you are not accountable for something unless you have done it. If the law permitted false statements as to someone's having done wrong to go unchecked, it would offend against this pre-supposed principle of attribution.²¹ We might also wonder whether other torts fall between the cracks of this taxonomy – such as harassment, invasion of privacy,²² deceit,²³ and intimidation.

Second, the idea that we are each equally entitled to set our own purposes and that no one is in charge of another is said to underline the common law's approach to failures to provide assistance and pure economic loss. In relation to failures to provide assistance, the idea here is that (to take the standard example) by failing to remove a drowning child from a shallow pool, I do not use the child's body or property, nor do I damage its body. As Ripstein puts it at another point, the distinction is between doing 'something *to*' the plaintiff and failing to do something 'for' him or her.²⁴ This, in turn, is said to be traceable to the overarching idea that no one is in charge of another. If the child had a right that you removed her or made efforts to remove her from the shallow pool, she would be in *charge of you*: she would have an entitlement to set your purposes.

Third, Ripstein offers an account of strict liability harm-based wrongs in tort law. He seems to argue that there are none. An obvious contender for such a wrong would be the cause of action recognized in *Rylands v Fletcher*, where it was held that the defendant would be liable for damage caused to the claimant's land by the escape of water from a reservoir which he had built on his land, even if he had taken what is usually described as reasonable care.²⁵ To the extent that *Rylands* is understood as involving the breach of a duty at all, it is usually understood as involving the breach of a strict duty: a duty to succeed in not causing harm by using one's land for certain purposes. But Ripstein spends considerable time in Chapter 5 arguing that *Rylands* and principles of liability based upon abnormally dangerous risks fit within his

²¹ Ripstein is aware of the objection that the tort of defamation is not restricted to false attributions of *legal* wrongs, but does not consider it decisive. Yet it is unclear to me how the explanation extends to such cases.

²² See RIPSTEIN, *supra* n 1, at 207-208 n 33.

²³ See *id.* at 50 n 32.

²⁴ *Id.* at 55.

²⁵ *Fletcher v Rylands* (1866) LR 1 Ex 265; *Rylands v Fletcher* (1868) 3 HL 330.

category of damage-based torts, where the conduct generating the liability involves the extra-dangerous use of a person's means, which generates, as a side-effect, injury to another's body or property.²⁶ So, if the damage had been to the body in *Rylands*, the defendant should have been liable in *negligence*, according to Ripstein. The basis of his argument, in a nutshell, is that, just as in negligence, the defendant's conduct is 'defective', not because it fails to conform to a social expectation, not because it is morally culpable in failing to attend to relevant reasons, but simply because it is too dangerous.

Fourth, the book offers an account of why it is that, when a right is violated, the law grants remedies to the right-holder. The basic idea here is that though the material object of a right may be destroyed or damaged by violation, the right as a normative relationship between the right-holder and the duty-bearer continues to exist and in the post-breach circumstances calls for the duty-bearer to bring the world as close as possible to the position the victim has the right to be in.

PRIVATE WRONGS: CRITIQUE

This part is also in three main sections. First, I will consider whether the idea that 'no one is in charge of each other' leads to the picture of tort law which Ripstein presents in *Private Wrongs*. My main argument here is that the idea does not explain the existence of negligence-based wrongs.

Second, I consider whether Ripstein's picture of tort law, whether or not it is justified by the normative idea, is appealing. Here I will suggest that it leads to conclusions in certain cases of failure to provide affirmative assistance, and necessity, which are difficult to defend.

Third, I tentatively explore some deeper questions about the idea. I suggest that Ripstein fails to provide a theoretically robust account of how the idea justifies particular rights.

i. Negligence and Strict Liability Wrongs

If I am the one (rather than you) who gets to decide how my body is used, then I have an entitlement against you that you do not use my body without my consent. If you were entitled to set the agenda for

²⁶ RIPSTEIN, *supra* n 1, at 123-144.

how my body is used, then you would be in charge of me. This is intuitively objectionable. The idea that you are not in charge of me, then, is an argument for the claim that I have an entitlement to decide the uses of my body (as against you).²⁷

Suppose that X reasonably believes that Y consents to X's touching Y. In fact Y does not consent. In English law, X wrongs Y.²⁸ In Ripstein's view, this is correct. Trespass is justifiably strict in the sense that one can commit the wrong without intending [to interfere²⁹ with the other's body without the other's consent]. One only needs to intend [to interfere with the other's body] in circumstances where the other does not in fact consent to the interference.

If X could permissibly touch Y's body without Y's consent in such a case, would X be 'in charge of Y'? Ripstein claims so. Notice, here, that, if this were true, if X could permissibly act in this way, it need not follow that X has a *normative power* to determine the permissible uses of Y's body. A normative power can only be exercised intentionally. If X comes to have a reasonable belief in Y's consent only because of an odd constellation of natural events, X's intentions alone do not render X's act permissible. So, if X's action were permissible, X is not necessarily 'in charge of Y in the sense of having a normative power to decide the uses of Y's body. In short: it is not X's say-so which determines the permissibility of the touching.

Nonetheless, it does seem odd that the use of my body by you becomes permissible just because you have certain incorrect, even if

²⁷ On whether this argument can be supported by deeper theoretical considerations, see below at 20-27.

²⁸ However, the position may change. Interference with another taken on the basis of a reasonable, if incorrect, belief that another is attacking one is a defence to trespass in English law: *Ashley v Chief Constable of Sussex Police* [2008] UKHL 25. That self-defence and consent should differ in this way is difficult to sustain.

²⁹ Ripstein employs a somewhat technical understanding of what it is to use something. If I falsely imprison you, I use your body, according to Ripstein: *supra* n 1, 48. This technical understanding of 'use' seems to me to undermine his taxonomy of private (tortious) wrongs into use and harm based (plus defamation). Battery, false imprisonment, assault, conversion are not really all about 'using' other people's bodies or property in any coherent sense of 'use'. Similarly, the taxonomy is incomplete – it is not clear whether invasion of privacy or harassment fall into either category.

reasonably formed, beliefs about my consent to that use.³⁰ In an extended sense, you are in charge of me if your beliefs determine the permissibility of using my body. Hence, it is, plausibly, fact-relative permissibility that matters here.³¹ Perhaps it is better just to say that I have a right to decide how my body is used against you without also saying that *I* rather than *you* get to decide how my body is used; the former is a broader right than the latter, since the latter just excludes the possibility of intentional exercises of normative powers on *your* part over my body, while the former excludes your intentional action with my body determining the permissibility of that action.

Consider now a case where X unintentionally causes foreseeable physical injury to Y's body by X's action. In English law, this description does not allow us to say whether X wrongs Y. Ripstein agrees that causing physical injury as a side-effect of one's action is not *ipso facto* a wrong to the injured. It is only when X causes Y physical injury through *defective* use of X's (or another's) means that X wrongs Y. A person's use of their means is defective, for this purpose, when it imposes an extraordinary degree of risk to Y's body. This is how Ripstein understands 'negligence': extra-ordinarily dangerous use of means.³²

Why, then, am I not 'in charge of' you when I smash into your leg through ordinary use of my means? Suppose that due to a freak malfunction in the signalling system at a crossroads, I drive through, exercising ordinary care, but run you over.

Ripstein's answer is that, if ordinary use of means were prohibited, then everyone would be subject to the choice of everyone else.³³ We would each be in charge of each other because none of us would be entitled to use our means. We would not be

³⁰ Ripstein's position is also supported by intuitions about permissible self-defence against aggressors who act permissibly in an evidence relative sense. See H Frowe, *Claim Rights, Duties, and Lesser-evil Justifications* (2015) 89 Aristotelian Society Supplementary Volume 265.

³¹ For distinctions between *evidence-relative*, *fact-relative* understandings of permissibility and wrongdoing: see DEREK PARFIT, *On What Matters*, vol. 1, 150-153 (2011).

³² See RIPSTEIN, *supra* n 1, ch. 4.

³³ *Id.* at 103: "To require you to refrain from activities that carry those small risks would effectively disable you from using your means at all, requiring you to accept limits based on the mere possibility of affecting others, and so would be inconsistent with your independence".

entitled to use our means because our means necessarily give rise to certain (ordinary) risks. Prohibiting ordinary risks entails prohibition on use of means. The fact that we would all be subject to the same constraint does not change matters any more than a mutual permission to punch each other would mean that we are each in charge of our own bodies.³⁴

It does not seem correct as a general principle that if the use of one's body *necessarily* gives rise to a certain effect, that entitlement to determine the uses of one's body means that the effect is permissible. (Ripstein does not formulate such a general principle, but it might be taken to be implicit in what he says). Suppose that we were like sardines in a box, such that every movement of any one's body pressed hard against another person's body. Perhaps this is a situation where we are doomed to wrong each other, rather than one where the necessity of touching each other is licensed by its being required for one to be in charge of one's body. If so, there are some acts that are simply intrinsically, or necessarily, against our status as free beings.

Even if that is true, it does seem implausible that every non-consensual risk imposition is a wrong. To that extent, Ripstein's view is surely correct. But his argument for the claim that only *extra-ordinary* risk impositions which materialise in injury are wrongs is unsuccessful for a different reason. The argument relies on the premise that our freedom over our bodies would be impermissibly constricted if the ordinary use of our means were *prohibited*.³⁵ But we do not need to posit *this* prohibition in order to argue that causing foreseeable physical injury by one's action is a wrong. Just as Ripstein rejects the idea that any risk imposition *per se* amounts to a wrong, the defender of the idea that causing foreseeable physical harm by one's action is a wrong (regardless of negligence) need not accept that the very imposition of an ordinary risk is a wrong. Such a person can rather argue that the imposition of ordinary risks is entirely permissible – except and until it materialises in physical injury. In arguing this way, one is not committed to the view that ordinary use of one's means is impermissible.

To spell this out – here is Ripstein's argument:

³⁴ Cf. RIPSTEIN, *supra* n 1, at 103.

³⁵ See n 32 above.

- (1) I am entitled to decide the uses of my body.
- (2) The use of my body necessarily gives rise, as a side-effect, to risks of injury.
- (3) If these side-effects amounted to wrongs, then I would not be entitled to decide the uses of my body.
- (4) If a person commits a wrong when they cause injury through ordinary use of their means, side-effects of ordinary use of means count as wrongs.
- (5) Therefore, such strict liability requires us to give up on the idea that I am entitled to decide the uses of my body (or at least conflicts with it).

I am suggesting that (4) is false because strict liability for harm does not entail a duty not to use one's means for ordinary purposes and so we cannot conclude (5).

Ripstein might respond to this by claiming that a prohibition on causing physical injury through ordinary use of means really does entail a prohibition on ordinary use of means. One immediate difficulty with this response is that it would seem to be inconsistent with Ripstein's insistence that a duty not to injure by defective use of one's means does not entail a duty not to use one's means defectively. If one rejects that entailment, *a fortiori* the entailment between a duty not to injure and a duty not to use one's means with the effect of imposing ordinary risks. In any event, it is implausible that a duty to succeed in not causing harm entails a duty not to impose any risk of harm. This is not true of other duties to succeed. If I have a debt to you of £10, payable next year, (which is also a moral duty), I am not morally obligated to stop engaging in business transactions lest I become bankrupt between now and then and thereby become unable to pay the debt; but entering into such transactions creates a risk that I will be unable to repay the money.³⁶

ii. Nonfeasance and misfeasance

Another fundamental limning feature of Ripstein's Kantian picture of private right is the distinction between nonfeasance and

³⁶ See also, rejecting this entailment, John Gardner, *Obligations and Outcomes in the Law of Tort* in Peter Cane and John Gardner (eds), *Relating to Responsibility: Essays for Tony Honore* (2001) 110, at 112-116.

misfeasance. Nonfeasance denotes a category of conduct which negatively affects people's means but not in such a way as to amount to a wrong to the person affected. The following two examples would fall within this category:

Ambulance. D is stopped at a red light in traffic. An approaching ambulance, carrying a dying child, C, needs D to move his car to the side, to allow the ambulance to pass. D, hearing the sirens, refuses to move, believing that everyone should wait their turn. Had D not behaved in this way, C would have received effective treatment.³⁷

Damaged Pipe. D negligently physically damages T's electricity cable. This foreseeably affects C, whose factory depends upon this cable for power. C suffers economic losses.³⁸

Why are these cases ones where D merely *changes the context* in which C has C's rights rather than ones in which D *violates* C's rights? Here is Ripstein's explanation: "You are in charge of your own body and property, but other people are in charge of their bodies and property. You lack the power to require someone to perform an affirmative act because any such a power would put you in charge of that person or his or her property".³⁹

I'll divide my remarks between *Ambulance* and *Damaged Pipe*. Consider *Ambulance*, first. The idea is that if D were under a duty to C to move then C could legitimately demand that D use D's means (D's body, D's car) in a certain way. In this sense, C would be entitled to set the agenda for D's use of D's means in this particular situation.

As Ripstein recognises, this is not objectionable in itself. I am entitled to act in self-defence against an aggressor and in doing so I am entitled to set the agenda for the aggressor's use of her means. Why is this a non-objectionable interference with another person's means, while a duty to assist persons in dire need is objectionable?

³⁷ RIPSTEIN, *supra* n 1, at 61: "You need to move out of the way of an emergency vehicle, but the person who arrives late to hospital...because of your failure to move, does not have a private cause of action against you. You have failed in your civic duty, but have not committed a private wrong".

³⁸ See RIPSTEIN, *supra* n 1, at 56-57 and chapter 3 generally.

³⁹ See *id.* at 34.

Ripstein claims, in the self-defence case, that I am entitled to act in this way because I am acting in a way which is consistent with our each having an *equal* entitlement to set the purposes of our bodies. By attacking me, you are acting in a way which is inconsistent with our *both* having an entitlement to decide the use of our bodies. We can only both have this entitlement if you are not allowed to punch me without my consent. So, by acting in self-defence, I am acting in such a way as is consistent with us both having a right to decide on the use of our bodies. But, your being entitled to demand that I come to your assistance in *Ambulance* is not necessary in order for us to enjoy an equal right to determine the use of our bodies because my failing to assist you does not involve my exercising authority over your body (unlike punching you).

Although it may be true that D's being under a duty is not *necessitated* by C's right to determine, as against others, the use of C's body, it does not yet follow that such a duty would violate D's right to determine the use of D's body. This only follows if D's right can only permissibly be restricted in order to preserve C's equal right over C's body.

This is where I find Ripstein's general framework really difficult.⁴⁰ Why believe that this is the only ground on which D's right may be restricted? It seems insufficient to say that D will be like a slave to C if anything other than C's power to determine the uses of its body restricts D's freedom. Being under a duty to move your car out of the way of an ambulance to save a child's life is very distant from being a slave to the child. What one wants to say, but Ripstein will not allow, is that one can be under an enforceable obligation to assist another when a very important interest of theirs is at stake, you are the person best-placed to assist, and a very minor incursion to your freedom is at stake. Yes, this means you have less normative control over the use of your body than you otherwise would have. But it seems legitimate to trade this off against the extremely powerful interest in life that another might have. Nor does this lead to the conclusion that you are treated merely as a means to serve my particular ends. That you can be required to assist others in dire need when you are best placed to do so at little cost to yourself does

⁴⁰ See, similarly, Victor Tadros, *Independence without Interests* (2011) 31 OXFORD JOURNAL OF LEGAL STUDIES 193.

not entail that you are open to use by anyone for any of their purposes.

There are further unappealing consequences of Ripstein's view on nonfeasance cases which have not received much, if any, attention. English law recognises that A can wrong B where:

- (i) where A innocently (non-negligently) physically harms B, A knows or ought to know this, but A does not then take steps to alleviate B's injury, and had A taken reasonable steps, B's injury would have been ameliorated.
- (ii) where A prevents C (without wronging C) from taking steps which C would have taken to protect B from physical injury, where it was reasonably foreseeable that A's conduct would have this effect, and C's steps would have been effective in protecting B from (some) injury.⁴¹

(i) seems like a very plausible moral principle. If I cause you physical injury by my action, I can reasonably be expected to take some steps to prevent that injury becoming worse than it would otherwise have been by taking reasonable steps to seek out aid for your injury. And plausibly, I owe this duty *to you*. Yet, for Ripstein, if having run you over, non-negligently, I drive off, I have done no wrong. My initial act counts as no wrong (given the argument discussed in the previous section). If I demanded that you seek help for me, I would be claiming an entitlement to set your purposes, so the same objection seems to apply here as in the *Ambulance* case.

One way out of this would be to say that, if I injure you on a public road, I have a duty to remove the obstruction I have caused (a duty I would have if I dislodged some rubbish, too), a duty sounding in public right. But the current law clearly would not say I have discharged my duty if I shuffle your body to the side of the road in circumstances where I could have called for medical assistance. Nothing in the current law suggests this is an artefact of any special rule about roads, either.⁴² In any event, this would only

⁴¹ NICHOLAS J. MCBRIDE and RODERICK BAGSHAW, *Tort Law*, 5th edn, (2015) 233-243.

⁴² See the brilliant discussion of roads in ARTHUR RIPSTEIN, *Force and Freedom: Kant's Legal and Political Philosophy* ch.8 (2009).

generate a non-relational duty, or, at least, a duty not owed to the person whom I have run over.

Similarly, English law would most likely find that D owed C a duty of care in English law not to obstruct the ambulance in *Ambulance*. D's conduct here seems morally different from the more familiar case where D walks past a drowning child in a pool of shallow water. Preventing a rescue is worse than failing to rescue. Ripstein's framework finds no wrong here and cannot explain this moral difference in terms of private right.

Now consider *Damaged Pipe*. Ripstein describes this as a case of nonfeasance and thus one where C's right is not violated.⁴³ Here, intuitively, I agree with Ripstein that no right of C's has been violated. But Ripstein's arguments for this view seem flawed. Here is one way in which I think the argument can faithfully be reformulated:

- (i) In order for D to owe C a duty to take care not to cause foreseeable economic loss to C in *Damaged Pipe*, it must be that C has the entitlement to determine D's interactions with T's property
- (ii) Only a property right in T's thing grants this entitlement
- (iii) C has no property right in T's thing
- (iv) Therefore, D owes no duty to C.

(i) seems false. If C has a right that D not cause C foreseeable economic loss by negligently damaging T's property, this is not equivalent to a right that D not negligently cause damage to T's property. It is a narrower right: it only grants an entitlement to demand that *economic loss* not be caused by the damaging of T's property. It seems implausible that C would have a right to determine the entitlement to use/damage another person's property, but much less implausible that C would have a right that other people not cause economic loss to C by negligently damaging T's property.

A different way of running the argument is to start with a case where T negligently damages T's own property with the result that

⁴³ For similar criticisms, see Nicholas J McBride, *Rights and the Basis of Tort Law* in Donal Nolan and Andrew Robertson (eds), *Rights and Private Law*, 336ff (2011).

C suffers loss. If T is under no duty to C here, it looks very odd that D would be. So consider: T negligently poisons T's beautiful garden. As a foreseeable consequence, C's coffee shop loses custom, its customers previously attracted by T's garden's blooms. Here is an argument:

- (i) T's right to use T's land entails a right to decide whether to have a beautiful garden or not
- (ii) T's right includes the entitlement intentionally to make the garden ugly
- (iii) If T has the right to do this intentionally, T must also have the right to produce this result through negligence
- (iv) Therefore T owes no duty to C not to cause C foreseeable economic loss by changing the use of C's property

(i) seems very plausible, but once we formulate it properly it loses that immediate plausibility. The right T needs (in order not to commit a wrong against C) is more properly specified as: the right (i.e. the liberty-right) to cause economic loss as a side-effect of deliberate uses of one's property.

Does Ripstein offer any further support for this right? A distinction is drawn between merely affecting the circumstances in which someone has their rights and violating them. My causing your business economic loss does not mean you are not free to decide what to do with your land – you can still set purposes for your land. It only changes the circumstances in which you have your property rights. In short, causing economic loss, on its own, does not interfere with freedom, in the Ripstein sense.

I think this argument relies upon an idea of freedom which cannot explain other, familiar, kinds of wrongdoing. If I build a building on my land, that is 'consistent' with your equally being able to decide to build a building on your land, in the sense that my building does not *physically* interfere with your ability to do so. Our mutual liberties to build on our land are 'physically' consistent. But it cannot be 'physical' consistency that Ripstein has in mind. My playing loud music 24 hours a day is 'physically' consistent with your being permitted to play loud music 24 hours a day on your

land.⁴⁴ But it is wrongful. This must be for some reason other than lack of physical inconsistency. It seems that Ripstein would say: it is inconsistent with each person's freedom to decide their use of their land. And yet, each person is still free, in the Ripsteinian sense, to decide what to do with their land, even if they are being blasted with 24 hour music. There are no physical impediments to their uses. The distinction between causing economic loss and causing 24 hour musical interferences cannot be drawn in terms of one being an interference with freedom and the other not being. The effect of both is just to make certain options less attractive (like sleep). To decide which is wrongful, it seems we need an account of how many options, and what kind of options, are denied to the person by the interference. But Ripstein provides no such account.

iii. Necessity

Consider:

Dock. D faultlessly finds himself in a storm at sea. The only way D can save himself and his property is by anchoring his boat to C's dock.

Ripstein's analysis is that D wrongs C, by trespassing on C's dock. However, C would not be entitled to exclude D from the dock, sending D to his death. C's property right cannot entirely be identified, then, with the right to exclude. The right also involves a right to decide to what uses the property is put.⁴⁵ This right is violated in *Dock*.

Why does D obtain a privilege to remain on C's dock here? The basis of the privilege is that it resolves a conflict which arises between property rights: 'The way to render property in immovable objects consistent with property in movable objects is incomplete privilege'. Property rights in immovable and movables 'do not automatically form a consistent set, because my chattel can find its

⁴⁴ Even if this is denied, there will still need to be some criterion other than 'physical' consistency which determines which interferences are wrongful or not.

⁴⁵ This rather weakens the conceptual connection between rights and authorization to use coercion. Cf RIPSTEIN, *supra* n 42.

way onto your land'.⁴⁶ So if my wallet finds its way onto your land, a (potential) conflict arises because you have a right to use that spot of your land, but I have a right to exclude you from my wallet. Of course, the conflict could be resolved (avoided) by giving me a property right in your land or giving you ownership of my wallet (or rendering the wallet *res nullius*), but the only way of resolving the conflict in a way which does not annihilate both our rights is to give me a privilege to enter the land for the purpose of recovering the displaced wallet and you one to deal in certain ways with the wallet.⁴⁷

Consider now:

Big Toe: D is faultlessly adrift in a stormy sea. The only way D can prevent his own death is by gripping on to C's big toe (which protrudes from the shore) for a few seconds. D does so.

There is no conflict of property rights here. Yet it would be extremely odd if C were permitted to thrust D away.

Ripstein is willing to allow that if C makes it on to D's *property* and the effect of D throwing C out would be near certain death for C, D is not permitted to exclude C. But at one point he seems to limit the analysis to cases where at least one person's right is a property right in land, describing the fact that the use of land is involved as 'pivotal'.⁴⁸ This seems *ad hoc*, and it would lead to very odd conclusions, as in *Big Toe* itself, but it is perhaps understandable given his wider commitments. For instance, it seems reasonable that D cannot exclude C from his big toe for a few seconds in order to allow C to avoid certain death, but not reasonable if D has C attached for 2 years.⁴⁹ But if these distinctions are to be drawn, it seems we do need to balance the costs to C with

⁴⁶ RIPSTEIN, *supra* n 1, at 151.

⁴⁷ In fact, the current law in England and Wales appears to be that one is not permitted to go on the land to take back the wallet. Even at common law, it seems that the defendant had to done some wrongful act before entry was permitted. See Tribunals, Courts and Enforcement Act 2007, s 65. Thanks to Nick McBride here.

⁴⁸ RIPSTEIN, *supra* n 1, 152 n 69.

⁴⁹ Compare Judith Thomson's example of the person who wakes up with a violinist attached to them.

the costs to D – of course, it is not that we treat the costs as symmetrical so that C has to bear any injury so long as it prevents a greater injury to D. Yet Ripstein seems to disavow this kind of balancing exercise in private right as a whole.⁵⁰

There may be a further, more fundamental, problem lurking here. Consider again:

Ambulance. D is stopped at a red light in traffic. An approaching ambulance, carrying a dying child, C, needs D to move his car to the side, to allow the ambulance to pass. D, hearing the sirens, refuses to move, believing that everyone should wait their turn. Had D not behaved in this way, C would have received effective treatment.⁵¹

Is C (or C's representative) permitted forcibly to push D's car out of the way if D refuses to move it? It seems very plausible that C should be entitled to do so: does C really have to die because D will not move to the side of the road? The problem is that if Ripstein allows this case to enter the necessity fold, the central distinction between misfeasance and nonfeasance becomes blurred. If C is entitled to move D's car to rescue himself – to subject D's means for the purpose of saving his life – this brings one close to a duty of easy rescue. A privilege to use another's means is less invasive than a duty to positively intervene, but in both cases a person's means are subjected to the choice of another for the purpose of saving the other's life.

iv. Is the idea that *no one is in charge of another* empty?

A concern with Ripstein's Kantian framework is that it is profoundly incomplete.⁵² This concern might be thought to arise in the following way. Ripstein argues:

- (1) Each of us has an innate right to freedom consistent with the same right to freedom of everyone else.

⁵⁰ Cf, e.g. RIPSTEIN, *supra* n 1, 213.

⁵¹ *Id.* at 61: "You need to move out of the way of an emergency vehicle, but the person who arrives late to hospital...because of your failure to move, does not have a private cause of action against you. You have failed in your civic duty, but have not committed a private wrong".

⁵² This concern is articulated in roughly the manner that follows in the next paragraph in the text in Laura Valentini, *Kant, Ripstein, and the Circle of Freedom: A Critical Note* (2012) 20 *European Journal of Philosophy* 450.

- (2) Freedom is the entitlement to set the use of one's means, consistent with equal entitlement of others.
- (3) One's means are the things about which one is entitled to decide the ends for which they will be used

The incompleteness concern arises because the specification of one's right to freedom (1) depends upon a specification of what one's means are (2) and this, in turn, depends upon an account of what means one has a right to (3). But, it has been claimed, Ripstein offers no account of the source of rights to one's means.⁵³ In a nutshell, the objection is: Ripstein tells us that rights consist in our having authority over certain things in relation to others - but he does not give a robust philosophical account of *which things*.

There are some parts of *Private Wrongs* which do not pacify this concern. For instance, the 'core moral idea' which animates the whole book is that 'no person is in charge of another person's means'.⁵⁴ This makes it seem that the idea that no one is in charge of another depends upon an antecedent normative account of what one's means are. Indeed, Ripstein defines means as follows: "Your means are just those things about which you are entitled to decide the ends for which they will be used".⁵⁵ So the core moral idea is then: 'no person is in charge of things about which you are entitled to decide the ends for which they will be used'. But this makes it seem that the core moral idea does no justificatory work in *explaining* what your means – your entitlements in relation to some object – are.⁵⁶

But, ultimately, the criticism is uncharitable. Although Ripstein unfortunately does not deal with the criticism explicitly in *Private Wrongs*, I take it that his response would be along the following lines. The idea that no one is in charge of another is only consistent with *certain* specifications of what one's means are. That is: *if* one is

⁵³ *Id.* at 453-454.

⁵⁴ RIPSTEIN, *supra* n 1, 35.

⁵⁵ *Id.* at 9. There are other passages where Ripstein cannot intend 'means' to mean this. E.g. "A system of rights governing who is in charge of which means does not attend to the ends for which you might use those means" (*Id.* at 35). Since the idea of 'means' already includes the idea of a system of rights, I cannot make much sense of this sentence, unless means is given a non-normative reading.

⁵⁶ It seems to be a tautology.

not in other's charge, *then*, necessarily, one has an entitlement to set purposes within a certain domain.⁵⁷

But what is the argument for the claim that the idea that 'no one is in charge of another' (henceforth, *N*) entails an entitlement to decide for what purposes one's body will be used?

Sometimes it seems to be presented as just an intuitive part of *N*. If *N* means anything, it means, at the very least, that I rather than you get to determine the uses of my body.⁵⁸ The intuitive argument can also be bolstered by pointing to how *N* seems to explain very easily the wrongness of particular acts, such as harmless trespasses – for instance, where X caresses Y, a fellow commuter, who is asleep on a train carriage, but Y nor anyone else finds out.

In the remainder of this section, I tentatively explore some possible ways of filling out the intuitive argument.

A. Logical consistency

- (i) If we have *any* entitlements over what others do to our bodies *and*
- (ii) If those entitlements are *equal*, then
- (iii) The only possible right that we can have, *on pain of a logically inconsistent set* of entitlements, is that we each have the normative power to decide upon the uses by others of our own bodies.

An initial problem here is that there are several sets of (claim-)rights in relation to our bodies which could be enjoyed equally and are not logically inconsistent. We could each have a right that others not touch our *toes* without our consent or a right that others not touch our toes and fingers without consent. Why does *N* lead to the right that we have a right that others not use *our entire body* without our consent?

What if we added that the entitlements *in relation to our physical body* must be (ii) equal; (iii) logically consistent; and (iv) *maximal*, in the sense that the entitlement grants the most extensive normative power over a domain, consistent with (ii) and (iii)? This would require us to have a way of measuring levels of freedom, in

⁵⁷ This is in tune with his remarks at RIPSTEIN *supra* n 1, 37-38 that being in charge of is relational to the core.

⁵⁸ Cf the reference to idea as "simple" and "familiar": RIPSTEIN, *supra* n 1, at 33.

the relevant sense. Ripstein seems to deny that the freedom picked out by *N* is measurable. But this is implausible. Suppose one were judging whether system A or system B was more consistent with *N*. System A grants each person the entitlement to determine the use of their bodies against others, except on Fridays at 12 noon, where no one has the power to determine whether their hair will remain its current colour (suppose everyone has the factual power to determine each person's hair colour by mentally deciding which colour it will be); System B grants each person the entitlement to determine the use of their bodies, except from Wednesday – Friday, where anything goes. System A, surely, is closer to conformity to *N* than System B. More generally, it does seem possible that one person can be *more* or *less* in charge of another – and not merely in terms of a factual ability to influence the other.⁵⁹ Perhaps by insisting that the normative power to decide upon the use of one's body covers the greatest physical extent of one's body (though this does seem somewhat ad hoc) and through the greatest temporal duration, this problem could be avoided.

A more fundamental problem is that there seems to be no *logical* inconsistency involved in our each being in charge of each other in certain ways and yet having equal rights. Consider the following set of entitlements:

- (1) A owes B a duty not to use B's fingers
- (2) A has a normative power to waive A's duty to B

It's not clear that these are logically inconsistent. The contradictory of a duty not to X is the liberty to X. But if I have a power to waive the duty not to X, I am not *ipso facto* at liberty to X. I have the power to make it the case that I am liberty to X. Since there is a difference between having the power to make it the case that one is at liberty to X and being at liberty to X, there is not a logical contradiction here.

My tentative conclusion, therefore, is that the logical inconsistency argument fails since there are logically consistent, equal, sets of entitlements in which we are in charge of each other

⁵⁹ And there are clearly more or less serious violations of the constraint imposed by *N*. For instance, rape of an unconscious person is worse (where the victim does not find out) than the non-consensual touching in the example above.

in certain ways.⁶⁰ So we do not yet have a theoretical argument for the claim that *N* generates certain rights.

B. Rational consistency and rational nature

In interpreting the Formula of Universal Law,⁶¹ others have suggested that the kind of inconsistency involved is not logical.⁶² It is rather that there is a ‘practical contradiction’ in one’s willing that a maxim be acted upon by everyone. In one version, there is a practical contradiction in one’s willing as a universal maxim where one’s purpose in acting on that maxim would be frustrated if everyone acted on the maxim.⁶³ So acting on the maxim ‘lying is permissible’ in order to obtain £10 from another is wrong because if everyone acted on this maxim, your lie would not be believed because no one would believe what you say, so you would not be able to obtain the £10.

Some have tried to motivate the existence of the right to freedom (which includes the right that others not use one’s body without one’s consent) by trying to show that a rational agent will be caught in this sort of contradiction by failing to accept that they and others have such a right.

⁶⁰ In RIPSTEIN, *supra* n 42, sometimes Ripstein seems to rely upon an idea of *spatial or physical consistency*. For example: “because they occupy space, the only way their activity can be rendered consistent under universal law is if they neither occupy nor interfere with the space occupied by others” (373). But you are permitted to interfere with another’s space, when you damage them non-negligently – at least, according to Ripstein. So it is not clear that spatial inconsistency suffices for wrongdoing.

⁶¹ “Act only according to that maxim by which you can at the same time will that it should become a universal law”: IMMANUEL KANT, *Foundations of the Metaphysics of Morals*, translated by Lewis White Beck, 39 (1959). What you can will, in the relevant sense, is what you can will without contradiction. Note that I am not suggesting that the Universal Principle Right is just an application of the Formula of Universal Law to external actions. I am just drawing attention to a kind of inconsistency which might be thought to exist in denying the existence of the right I am discussing. For Ripstein’s view of their relationship, see RIPSTEIN, *supra* n 42, Appendix.

⁶² CHRISTINE KORSGAARD, *Creating the Kingdom of Ends*, 82 (1996).

⁶³ *Id.* at 82ff.

Louis-Philippe Hodgson proceeds in this way.⁶⁴ His argument runs something like this:⁶⁵

- (i) We are rational beings who can set ends.
- (ii) In virtue of this, we are subject to certain normative requirements to which we would not be if we were not so capable.
- (iii) For instance, if you choose some end (learning the piano), then you are required to take up the necessary means to this end (piano lessons).
- (iv) This is in virtue of the fact that ‘implicit in our activity of practical deliberation, there is a recognition of our rational nature as a source of practical necessity’.
- (v) If I am an agent, I must accept my rational agency as a source of practical necessity.
- (vi) Since there is nothing special about *my* agency as such, I am also committed to accepting *your* rational agency as a source of practical necessity.
- (vii) The practical necessity arising from rational agency itself is the only necessity I am required to accept *qua* rational agent.
- (viii) Consequently, this necessity is the only justification for interfering with my freedom which can be given which I am required *simply by being agent* to accept.

This argument is still far from establishing the kind of bodily right I have been discussing (even if we accept that that we should only be justifying interfering with others in ways they can be required to accept by their rational nature). It is one thing to say that there is a category of reasons which we must accept as having force simply *qua* rational agent, it is another to show that that category of reasons actually forbids the type of normative power relations that Ripstein thinks are objectionable. Maybe my rational nature requires me to accept your happiness as having normative force. If

⁶⁴ Louise-Philippe Hodgson, *Kant on the Right to Freedom: A Defense* (2010) 120 ETHICS 791, 795ff. Hodgson is not directly engaged in showing that the right to freedom entails the bodily right I am discussing, but he does suggest that if a person does not have such a right it would be contrary to their right to freedom: 818.

⁶⁵ This is supposed to be, in Hodgson’s view, a reconstruction of Kant’s argument for the Formula of Humanity in the *Groundwork*.

so, that might mean that my freedom could be restricted to promote your happiness. Everything depends on what class of considerations one must accept simply in virtue of one's rational nature.

Ripstein himself seems to argue along the following lines:

- (i) As a rational being, I am capable of setting purposes
- (ii) Setting purposes 'is not a matter of making up your mind inwardly; it is instead a matter of acting in the world, of taking up means to achieve a purpose'.⁶⁶
- (iii) To set any purpose, in the sense of (ii), requires the use of my body.

I am not clear what the next steps in the argument are. Ripstein would likely deny (given his hostility to interest based theories of rights):

- (iv) Since I need my body in order to act, and given my rational nature, having my body free from your use or damaging it is a fundamentally important interest of mine, which is sufficient to give rise to a duty in others not to do these things to me.

He seems rather to endorse something like:

- (v) For beings capable of setting purposes, it is apt, simply in virtue of that capacity, that they have a right to control the object (their body) which is necessary for the realisation of this nature.⁶⁷

⁶⁶ *PR*, p.31.

⁶⁷ This is pretty much how Pallikkathayil argues: see JAPA PALLIKKATHAYIL, *Deriving Morality from Politics: Rethinking the Formula of Humanity* (2010) 121 *ETHICS* 116, 133-136. The difference between (iv) and (v) comes out in cases of putatively harmless trespass. If X caresses Y's hair when Y is asleep and Y never finds out, X has plausibly wronged Y. And yet, it seems difficult to say that this is so because there has been an interference with one's ability to act. If one's body is protected in order to secure its availability for action, it is less clear that X wrongs Y under (iv). However, if it is just a normative fact about human beings that others' using of their bodies is wrong unless consent is given, then obviously X has wronged Y.

Maybe the argument could be put as:

- (i) If you are committed to valuing humanity in yourself and in others (i.e. yours and others' rational nature)
- (ii) Then apt commitment to that value requires you to respect the necessary means by which that humanity is realised (i.e. the body).

From this spare foundation, perhaps we could generate some bodily rights.

CONCLUSION

The idea that we each have a special authority over our own bodies in relation to others is intuitively very plausible. In *Private Wrongs*, Ripstein persuasively shows that this idea underlies a part of tort law. I have suggested that we will need to look beyond this idea to explain the existence of negligence-based wrongs and that, unalloyed, it leads to unpalatable results in cases of duties to assist and necessity. Finally, I offered some thoughts on how the idea could be given deeper theoretical support and suggested that it cannot be grounded in an argument from the necessary logical features of a set of equal entitlements.