

Life or Death on a Plank—Ripstein and Kant

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What, we may ask, can the law legitimately demand of us? What are the limits of its power to act coercively against citizens? These are the very general background questions against which Ripstein's discussion of Kant's position must be understood.¹ Thus, Ripstein rightly argues that Kant's seemingly puzzling remark in the *Doctrine of Right* concerning the sailors on the plank (in which one shipwrecked sailor dislodges a second from a plank that can hold only one, perhaps a less fanciful example of being *in extremis* in Kant's day than in ours) makes more sense once we set it against the wider structure of Kantian theory, the main tenets of which are familiar enough. The plausibility of the claim that the sailor is "culpable, but not punishable" flows from the requirement of respect for persons as ends not merely as means, the fundamental value of freedom, the structure of the social contract theory, and the clear distinction between prudence and conscience.

All of these matters Ripstein quite rightly develops as the crucial background to his argument. That argument sets strict boundaries to the law, ruling out any suggestion that the law can require virtue of citizens, and providing a structure of reasons for action that limits those reasons to considerations of right and not of the good. It is only within this particular structure of reason that the law can speak to us. That is why, Ripstein argues, we should understand the argument as one which is not dependent upon empirical reasoning: that is to say, in showing why the sailors grappling for the plank are "culpable but not punishable," the argument does not depend on what the sailors might happen to think or feel, but on how *reason*, understood in Kantian terms, makes sense of their situation. It is not, then, a matter of what their actual motivations might be, but a matter of what, according to the Kantian picture, makes sense as a motivation. The Kantian account is then in this way strongly normative.

Whether we should accept the Kantian view of reason and all that goes with it is an important philosophical question, which any full account of action and indeed of the criminal law would need to address. Similarly, we may ask whether we should accept the Kantian account of the state, of what it may require of us, and of what citizens can legitimately expect of one another. Clearly, these are questions that I cannot tackle in this comment, but it will be difficult to go very far with the arguments here before we bump up against these quite fundamental philosophical

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¹ Arthur Ripstein, *In Extremis*, 2 OHIO ST. J. CRIM. L. 415 (2005). In my response to Ripstein's paper I shall simply take it as read that his interpretation of Kant is sound for two reasons: firstly, expert Kantian scholarship is beyond my competence, but secondly, and more importantly, even without the backing from Kant, the view Ripstein offers is more than philosophically serious, and interesting enough to warrant our attention.

questions. It is enough to say that Ripstein's subtle account of Kant's position sets a serious challenge for such further discussion.

Ripstein's argument is, however, intended to do more than render Kant consistent. It will, he claims, provide a new and better understanding of the boundary between justification and excuse within the criminal law,² in particular with respect to cases of necessity. The more important question for me, then, is not how far Ripstein succeeds in defending Kant against accusations of inconsistency, but how far the account (let us call it the "K-Ripstein account") does provide a better understanding of that distinction than the available alternatives. The K-Ripstein account is intended to show why the sailor on the plank (or rather the sailor off the plank but fighting to get on it by pushing another sailor off it) is culpable but excused. He is, after all, required not to treat others merely as means to his own ends and to respect fundamental freedom. The sailors have rights that the law protects, and one of those is surely the right not to be killed.

I shall leave aside, for the moment, questions about culpability, and assume with K-Ripstein that the sailor does a wrong in that he violates the right of another. Why then should he not be punished? The K-Ripstein account turns upon the *logical* structure of threats. If the law is to guide action, it must provide us with reason to act one way rather than another, and in this case, the argument goes, it cannot do so. It cannot do so, because it cannot deter in such a paradigm case of necessity. For a deterrent to work, it has to threaten something that is both worse and more certain than the immediate prospect of harm that the agent faces. But the state cannot make such a threat, since even death as a punishment is no more certain and no worse than the immediate death by drowning that the sailor faces. K-Ripstein is surely right about the general logic of threats, and is quite crucially right to point out that that logic has nothing to do with the doubtlessly justified assumption that, as a matter of psychological, empirical fact, agents *in extremis* (or even in less taxing circumstances) would not heed the law's dictates. Therefore, he argues, even if the state threatens the sailor on the plank with death, that cannot be a threat of punishment, since punishment must be capable of deterring; that is the sense in which the sailor on the plank is not *punishable*.

Notice, however, that the undoubted plausibility of the K-Ripstein account depends upon two assumptions: (i) that the two occasions of death are commensurable, and that death at the hands of the state, as a punishment for wrongdoing, is not worse than death by drowning; and (ii) that the framework of *reason* is very strictly limited—the law cannot require or assume virtue, i.e., it cannot guide action through appeals to reasons that belong with virtue, only through deterrence. Both these assumptions can be challenged. This is the point at

² I am going to assume for the purposes of this response to Ripstein's paper that we understand "justified" to mean that the action is permissible, and "excused" to mean that while the action is impermissible, and the agent is responsible, she is not to be blamed or punished. This is a crude way of characterizing the distinction, and there is much argument to be had about what it comes to, but not here.

which the background political/moral theory which provides the framework for the K-Ripstein account comes to the fore, since it is this which sets the very narrow range of values in terms of which the normativity of the criminal law is to be structured. It does not seem to me obvious that death is to be understood as simply the same whether it is death by drowning or death as a punishment for wrongdoing. We can and do, for example, distinguish between honorable and dishonorable death. Thus, it is possible to view death as punishment for wrongdoing imposed by the law as worse, because more shameful, than death by drowning in an accident such as that suffered by Kant's sailors.

Isn't this point met, though, by following the argument concerning trial and conviction?

Yet if the fear in question is fear of being thought, or found, to be a wrongdoer, Kant's point still goes through. Some particular drowning sailor might well fear a trial and conviction, but the law does not have trials and verdicts as a way of shaping the behavior of those who happen to fear them It is also perhaps worth noting that if the thing that the imagined sailor most fears is it becoming known that he did wrong, that might well move him even if he is not punished. The criminal law cannot presuppose such motivations of honor, so it cannot make them part of the measure of punishment.³

It does not seem to me that this argument does speak to the point raised above, for the idea of a shameful death is not to do with its being known, but with the *character* of the death itself. Nor is the shame of death as a punishment for wrongdoing collapsible into a fear of trial and conviction, although clearly unless it were the outcome of a proper (just) judicial process and conviction it would not be punishment by the state at all, and therefore not shameful as a punishment. K-Ripstein's argument here would need to engage then more fully with the rather large claim quoted above, about what motivations the law can or cannot presuppose.

Indeed, that way of putting the point looks misleading. It might be hard to imagine many, or indeed any, particular agents *as a matter of fact* being so moved by considerations of a shameful death that they would desist from shoving innocent fellow sailors off planks to save themselves from drowning, just as it might be hard to imagine sailors being motivated by the Kantian construction of reason employed in the K-Ripstein account. This is the point at which we bump up against the larger questions that I flagged at the beginning. It is not obvious what the law should presuppose as constituting reason, nor is it clear that the law should not recognize a wider range of rational possibilities than K-Ripstein attributes to it. Recognizing that one's actions are shameful is a matter of judgment and reason, not mere feeling, for a start. Seeing death under a

³ Ripstein, *supra* note 1, at 421–22.

description is likewise a function of judgment, informed by values, and this is as much true of death as punishment as it is of any other form of death.

It is at this point that one might begin to suspect that the position advocated in the K-Ripstein account is rather more constrained by at least some empirical facts about motivation than it is willing to admit. It will make no sense to suppose that punishment can deter if it does not appeal to the kinds of consideration that make sense for human beings situated as they are against a background of values that make sense of their lives.

Suppose, though, that we were to accept that the K-Ripstein account works for the paradigm case of necessity in the example of the sailors on the plank, and shows how and why they should be excused. Will the argument then run across to the cabin case (of a hiker, caught in a sudden and dangerous storm, who breaks into a cabin to save his life)? Here the nature of the K-Ripstein account is admirably clear, for “the conceptual connection to which Kant draws our attention holds in each of these cases, not as a matter of how ordinary people will reason, but rather as a matter of *how the criminal law must conceive of their reasoning*.”⁴ The problem one might have with this case has to do not with the argument as it relates to the structure of reasoning imputed to agents as a matter of logic: that is to say, if one accepts that the hiker is culpable, then the argument goes through, and Kant’s position looks consistent enough. The problem is, however, with the supposition about culpability. Why suppose that the hiker needs an *excuse* at all rather than being justified in what he does? K-Ripstein’s grounds for rejecting any claim that the hiker’s action is justified, i.e., that he does not commit a wrong against the cabin owner, are not, strictly, that life does not take priority over property, but rather that “for Kant, right must abstract from ‘the matter’ of choice, and so from both wish and need.”⁵ To allow that the hiker is justified in using the cabin without the owner’s consent would on this account apparently be to “allow one person to be a mere means for another’s purposes, because it would make my title to use what is mine in pursuit of my own purposes subject to the needs of another person.”⁶

What it means to use one person “merely as means for another’s ends” is notoriously difficult to interpret, beyond some extreme examples, of which this is not one; but it is difficult to see why we should accept that the case of the hiker can be made sense of in this way. The problem here is in understanding how anything that could count as a human life at all could be one in which one was not “subject to the needs and purposes of others.” The kind of “independence” which the account is designed to preserve is one which does not appear to make much sense.⁷ K-Ripstein’s argument also presupposes a particular account of property rights,

⁴ *Id.* at 425 (emphasis added).

⁵ *Id.* at 426.

⁶ *Id.*

⁷ This, I suggest, is an aspect of the more developed argument between (roughly) communitarian accounts and (roughly) Kantian political and moral theories.

and that is something that it is not obvious that we need either to accept or to suppose to be internal to the law.

It is also worth mentioning that the extension of the K-Ripstein account to deal with “third party excuses” raises questions about these ideas of independence, agency and being used as a means for another’s ends. In this argument a good deal hangs on the distinction between acting for the sake of another and acting on behalf of another. In the case of the parent breaking the law to save his child, the argument is for what we might call the transitivity of excuses. The parent acts as an agent for the child, and this agency is structured by obligation, so that the “parent’s act must be treated as the child’s.”⁸ What is to stop us supposing then that the parent is being used as a means to the child’s ends, rather than acting for his own ends—and being used not simply by himself, since his acts are no longer his own, but by the child whose acts his now are?

These might be thought to be mere cavils about particular examples that do not undermine the general strategy of the K-Ripstein account, which is not just to provide a vindication of Kant but to show that it provides “a satisfying account of the normative boundary between justification and excuse in the criminal law.”⁹ Does it succeed in this? I shall argue, though all too briefly here, that it does not. Rather, it offers a more interesting argument, one that it is worth taking seriously.

If we return to the background features of the argument that form the early part of Ripstein’s paper, and pay careful attention to the core features of his account of the relationship between citizen, state and the law, a different picture begins to emerge. It is utterly fundamental to the account of law in the K-Ripstein account that its function is to guide citizens by offering them reasons. In cases of necessity, according to K-Ripstein, the law cannot offer such guidance, because it cannot offer reasons that will guide the agent: threats are structured by reason, but in the case of necessity the threat of punishment cannot operate, for punishment as deterrence has to be different from mere brute force. The whole point about stressing the fact that this is not an empirical claim, but a logical one, is that it sets a limit on what can count as legitimate coercion by the state.

What seems to result from the K-Ripstein account is, then, not that the person who acts from necessity is culpable but excusable, i.e., not punishable by the law, but that in these cases the law *runs out*. It has, one might say, no jurisdiction. This is not because people will simply pay no attention to it in such cases even if it does attempt to punish them, but rather that it cannot speak to them at all; since it has nothing to say that could count as guiding their actions, it cannot offer any reason that could *count* as motivating.

This might seem worrying if we supposed that somehow this would open up the possibility of all sorts of killings falling outside the law. Such a fear would, however, be unfounded, since what counts as necessity in the relevant sense restricts the range of possible cases considerably. If the paradigm case is that of

⁸ Ripstein, *supra* note 1, at 430.

⁹ *Id.* at 415.

the sailors on the plank, then it is clear that not many cases will replicate the structural features that make it a case of necessity, such that the agent is beyond guidance by the law.

This is not to say that there would be no moral responses to be made to such actions. Indeed, we might reflect here on Aristotle's claim that there are some things that one cannot be compelled to do,¹⁰ and recognize that the claim of necessity is not simply an empirical claim but a normative one. The sense then in which the K-Ripstein account does illuminate the distinction between justification and excuse in the criminal law is not so much that it makes the boundary between them clearer than other accounts succeed in doing, but rather that it shows where those accounts have no purchase at all in the context of necessity. At least, that is what it shows if one is prepared to start from the same place as Ripstein does; but that, as I said at the beginning, is really where these arguments need to go next.

¹⁰ ARISTOTLE, *NICOMACHEAN ETHICS* bk. III. ch. 1, 1110a26–29 (Christopher Rowe trans., Oxford Univ. Press 2002).