Ripstein on Private Authority

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Since Arthur Ripstein's *Private Wrongs*[1] is so brimming with ideas, and its author so famously penetrating in his analyses, you will not be surprised to learn that there is much in the book with which I agree, and rather less with which I disagree. Nevertheless a few aspects of Ripstein's intellectual infrastructure strike me as incompletely explained in the book, and I offer this comment mainly in a spirit of curiosity, that is, in the hope of extracting some further explanation. I will be particularly concerned with what is said and presupposed on pages 33-34 of the book, and more particularly in footnote 3 on page 34. This is the point in the book at which Ripstein introduces his pivotal thought that 'authority-violations'[2] are central to private law, and in particular that tort law's special concern with our bodies and our property can best be understood as a concern to protect a certain special zone or sphere of authority that is reserved to each of us. Ripstein once spoke of this as a zone of 'sovereignty'[3] but this terminology, which always struck me as somewhat inflationary, is no longer used in *Private Wrongs*. Nevertheless the switch to talk of 'authority' does tend to keep alive a certain set of pressing questions that talk of 'sovereignty' already raised.

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[1] Arthur Ripstein, *Private Wrongs* (Cambridge, Mass. 2016). Parenthetical page references in the text or footnotes of this comment are references to this book.

[2] Here I truncate Ripstein's expression 'authority that was violated' (34).

[3] 'Beyond the Harm Principle', *Philosophy and Public Affairs* 34 (2006), 215. Ripstein borrows the word from J.S. Mill, whose use of it was even more ill-advised, for reasons that Ripstein's article helps to reveal.

They are questions about the appropriateness of carrying over concepts and themes from the theory of political organization into the theory of personal life. Do I stand to my limbs or my apartment as the state stands to its institutions or its territory? The use of the language of authority, like that of sovereignty, might be taken to invite a positive answer. Ripstein is cautious in the face of that invitation. He does not want his use of the language of authority to be taken to imply a perfect parallel between the political and the personal. Footnote 3 on page 34 is his attempt to forestall the implication of such a perfect parallel. His proposal is that at least one important question about political authority does not arise, and possibly has no analogue, in respect of the zone or sphere of personal authority that he is trying to explain in this part of the book, and that infuses the book as a whole.

Before I come to the question of whether he is right about this, I have a few preliminaries to clear up. They come of the lively and accessible way in which Ripstein presents his thoughts, sometimes postponing philosophical niceties for the sake of getting some important *leitmotif* to stick in the reader's mind. In saying this I intend no criticism. Ripstein's style helps to make his work a reliable source of inspiration and catlyst for debate. The remarks that will concern me here are no exception.

Ripstein kicks off those remarks, on page 33, with the 'simple and familiar' thesis that, morally speaking, 'no person is in charge of another'. Although I agree that this thesis is familiar, I do not agree that it is simple. Does 'in charge of' mark an authority relationship, or a responsibility relationship, or a representation relationship, or an ownership relationship, or what? Given what follows, I suppose that for Ripstein it must mark, if nothing else, an authority relationship. But then shouldn't the word 'comprehensively' be added to the thesis? Surely Ripstein must agree – given what he says in the following paragraphs – that there can be morally legitimate exercises of authority by one person over another. Surely he must agree, then, that one person can be in charge of another person, morally

speaking, for some particular purpose, on some particular occasion, in respect of some particular action, or subject to other similar particularizations. You are nobody's across-the-board 'subordinate' (33) but you may be my assistant in the organisation of this meeting, my apprentice in the testing of these circuits, or my sous-chef in the preparation of those appetisers. Probably, therefore, Ripstein is only warning us at the outset against claims of *general* legitimate authority of the kind which, some think, are to be found in the law, but which are more obviously made by slavers and feudal lords (these being examples mentioned by Ripstein, at 33). We should approach authority claims critically, the thought goes, looking carefully in each case to see what could be the moral basis of their legitimacy.

That thought leaves Ripstein standing shoulder-to-shoulder with Joseph Raz, who devoted many pages to arguing that, notwithstanding wholsesale claims to authority that are frequently made, the extent of legitimate authority is to be assessed on a strictly retail basis. Whether authority is legitimately exercised over people, as Raz puts it, 'varies from person to person and from one range of cases to another.'[4] This apparent convergence between Ripstein's view and Raz's is worth noting because in note 3 on page 34, as we will see, Ripstein juxtaposes his own thinking on the subject of authority with Raz's.

The second sentence of the same discussion on page 33 says: 'It is up to you, rather than others, what purposes you pursue.' It is natural to read this as a purported elucidation or implication of the first sentence, according to which nobody else is (generally) in charge of you. It is natural to think, then, that something must be 'up to' whoever is in charge of it. So one is easily led from the thought that nobody else is generally in charge of you (sentence 1) to the thought that *you* must be generally in charge of you

[4] Raz, 'The Obligation to Obey: Revision and Tradition', *Notre Dame Journal of Law, Ethics and Public Policy* 1 (1984) 139 at 140.

(sentence 2). This move is too quick, for it omits the obvious possibility that *nobody* is generally in charge of you. Maybe, to put it in the language of authority, your own authority claims over yourself should be approached with the same critical eye as the authority claims of others over you. Shouldn't we be just as sceptical about your ability to change your own normative position (e.g. by undertaking or promising) as we are about your ability to change the normative positions of others (e.g. by commanding or permitting)? These are difficult questions. But they are not the questions that Ripstein intends to raise. Within a few sentences, still on page 33, he disclaims the supposition that he is talking, at this point, about one's authority over oneself in the sense of one's ability to change one's own normative position. His is not, he says, 'a claim about a special relationship in which you stand to yourself' (33). No, 'its focus is exclusively on the relations in which you stand to others' (33). This remark, surprising at first, is soon helpfully unpacked. The point is that others are under duties – they are exclusively negative duties, or 'restrictions', says Ripstein – that come of '[y]our authority over your person and property' (33). So the authority Ripstein has in mind is your authority 'over' yourself in one sense: 'your person' forms part of its subject-matter. But it is not your authority 'over' yourself in another sense: you are not the one whose normative position is being changed by its exercise.

Ripstein also expresses some of this in the language of rights. 'Your rights to your body and property can be characterized as a form of authority relation,' he says towards the bottom of page 33. Notice that in this characterization the rights *are* the authority relations. Since the authority relations are what give rise to the duties, that must likewise be how the rights relate to the duties. The rights must give rise to the duties. That view differs from the Hohfeldian view according to which the rights are the duties,

merely viewed from the other side.[5] Here again Ripstein stands shoulder-to-shoulder with Raz, who argued against Hohfeld that duties owed to rightholders derive from, and so cannot be identical with, the rights of those rightholders.[6]

Yet Ripstein may part company with Raz at this point in thinking that having a right also means having a normative power over the incidence of the duties to which the right gives rise. Since authority is a normative power, the identification of the right with the authority relation seems to entail that there are no rights without normative powers. True, in a later footnote, on page 73, Ripstein may be understood to disclaim this view. That later footnote is hard to interpret. It focuses on whether rights are always waivable. The question of whether every right entails a normative power to waive another's duty is distinct from the question of whether every right comes with a normative power to waive the right itself. So it is not clear whether the note on page 73 should be read as tackling the same question as that which is introduced on page 33. Even if it should be so read, a possible explanation for the apparent tension would be that page 33 is concerned only with rights over one's own person and property, which for Ripstein do come with a normative power, whereas the note on page 73 is concerned to leave room for a range of other rights, which so far as he knows might not come with such a power. It is hard to be sure even about this solution, however, as the note on page 73 seems to point in various different directions. For present purposes it is enough to be aware that on pages 33-34, the rights under

[5] See WN Hohfeld, *Fundamental Legal Conceptions* (New Haven 1919), 38, where he says that X having a right against Y and Y having a duty towards X are not only 'correlative' but 'equivalent'.

[6] Raz, 'On the Nature of Rights', *Mind* 93 (1984), 194, developing ideas found in Neil MacCormick, 'Rights in Legislation' in P. M. S. Hacker and J. Raz (eds.), *Law, Morality and Society* (Oxford 1977) and in Kenneth Campbell, *The Concept of Rights* (unpublished DPhil thesis, Oxford 1979).

discussion are empowering in respect of duties owed by others: they enable one to 'forbid' and 'permit' actions by others (33). In that respect, although not in respect of the duty to which they give rise, one's own rights do after all bear on one's own normative position. They give one normative powers over others that one would not otherwise have.

This final preliminary brings me, at last, to Ripstein's remarks on the justification of authority in footnote 3 on page 34:

> Recent discussions of authority, under the influence of Joseph Raz's 'service conception', point to ... the ways in which authorities serve those subject to them by enabling them to better conform to the reasons that apply to them. ... The sort of authority you have over others with respect to your body and property lack this feature. What you say goes simply because of your say-so; there is no independent fact of the matter, no reasons as to what others should do about which your decisions are a reliable indicator. Your decisions determine, rather than indicate, what they may do.

There is something misleading about the way the contrast between the two 'sorts' of authority is set up here. It is somewhat overdramatized, especially in the final sentence. Raz's service conception is not a conception according to which an authority 'indicates' rather than 'determines' what is to be done by those who are subject to its authority. On the contrary, for Raz as for Ripstein, authorities determine what is to be done, and they do that simply by their say-so. That is the aspect of their 'service' that all authorities, by their very nature as authorities, provide. Raz calls it their 'pre-emptive' feature.[7] What Ripstein picks out for attention, when he refers to 'enabling [subjects] to better conform to the reasons that apply to them' is a quite different aspect of the service provided by authorities, and an aspect of the service that only some authorities provide. They are the authorities that serve us *wisely*, and (according to Raz) take their

[7] 'Authority and Justification', *Philosophy and Public Affairs* 14 (1985), 3 at 10.

moral legitimacy from how wisely they serve us. They serve us wisely, more particularly, by helping us to do what it is anyway, apart from the authority's intervention, wise for us to do. Raz does not say that this support for wise action by others is the only path to moral legitimacy for authorities. It is but the 'normal and primary' path. Hence Raz's name for this component of his service conception: 'the normal justification thesis'.[8]

Legitimate authority and its normal justification can come apart, and in both directions. First, there are cases in which I consent to an authority, or promise to obey it, or enter into other special relationships with it such that its authority over me is legitimate even though it is not serving me wisely. Secondly, and conversely, there are cases in which the authority can help me better to conform to the reasons that apply to me by merely indicating what those reasons are, indicating how to balance them, or such like. In these cases an exercise of authority is not needed, and may not be legitimate. An exercise of authority is needed, so far as the service conception is concerned, only if an indication of what I ought to do anyway is *not* enough to get me doing it – only if what it takes to get me doing it is a *determination* of what I am to do. When Raz's normal justification of authority is used to justify my doing something other than acting on another's say-so (e.g. when it is used to justify my merely relying on another's advice to work out what would be the best thing to do) then it is not being used as a justification of authority.[9] That is because authority is by its very nature pre-emptive.

Putting behind us the mistaken suggestion that Raz would be happy with 'indication' rather than 'determination' by authority,

[8] Ibid, 18.

[9] Regarding what I am to do. Raz rightly points out that there may still be normally justified authority in such a case regarding what I am to believe – what he calls 'theoretical' rather than 'practical' authority (ibid, 18). Ripstein alludes to this distinction in note 3, although I am not sure how it bears on the ways in which he seeks to distance his thinking from the service conception.

our attention shifts to the more important contrast that Ripstein draws in footnote 3. He says that 'with respect to your body and property ... there is no independent fact of the matter, no reasons as to what others should do' (34) such that you, with your authority in respect of your body and property, can help those others to conform to them. If that is true, the normal justification of authority does not apply to this 'sort' of authority; a different justification is called for. Note that this is not, however, an invitation to manage without a justification. It does not mean that the question of the legitimacy of the authority disappears. Ripstein merely invites us to search somewhere else for it, somewhere other than in the contribution that the existence and exercise of such authority makes to wise dealings involving bodies and property. For there is no such thing - claims Ripstein - as a wise dealing involving your body or property, where its wisdom is independent of your say-so, and hence can be used as a suitable standard by which to judge your say-so.

That, at any rate, is what Ripstein seems to claim. But maybe it was difficult to spell out his thought fully enough within the confines of a footnote. Maybe he means to allow that there can be independently unwise dealings with your body and property. It would be hard for him to deny it. Isn't it pretty stupid to get a whole-face tattoo of a giant squid in your early twenties, or to leave all your cash in secret trust for your children, appointing your gambling-addicted and drug-addled cousin as the sole secret trustee? Maybe Ripstein does not deny that these are unwise uses of authority over one's body and property. He just wants to say, more reasonably, that these kinds of unwisdom aren't fatal to the legitimacy of the exercise of authority by the person whose face it is, or the person whose cash it is. Unwise though such people are in the way they administer what is theirs, their say-so still properly settles the duties of others regarding what is theirs.

But we need not think that the unwisdom is *irrelevant* to the legitimacy of the exercise of authority in such cases in order to think that it is not *fatal* to the legitimacy of the exercise of

authority in such cases. Suppose we look beyond the wisdom of a particular exercise of authority and think about the net wisdom-yield of a wider system for assigning authority and thereby enabling its exercise. The classical defence of democracy, which still strikes me as the best defence, is that it is the least bad political system (of a bad lot) so far as minimizing unwise exercises of authority is concerned.[10] People will always be subject to misrule; democracy merely places superior controls or inhibitions on the misrulers. A parallel defence of liberal property rights, which confer wide authority on property-holders, is fairly easy to conjure up. While such a system leaves unfortunate latitude for wasteful, capricious, petty and cruel exercises of authority by individual property-holders - say, leaving perfectly good homes unoccupied, or overworking farm-land to the point of degradation - considered as a whole the liberal property system yields better use of the various things to which it applies, and more generally better engagements with the value of those things, than do other candidate systems. The trick is not to let the system get out of hand, such that the means (the grant of wide authority that may be unwisely exercised) becomes the enemy of the end (the minimisation of unwise exercises of authority). The candidate techniques for preventing the property system from getting out of hand are similar to those applicable to the political system. They include: taking certain exercises of authority out of the system altogether because the stakes are too high to risk even a few instances of unwisdom; making provision for independent review, on restricted grounds, of exercises of authority that remain within the system; and encouraging separations of power within the system, such as those associated with various well-known models of nested and relative title.

[10] For reflections on how this classical defence of democratic authority comports with his 'normal justification thesis' concerning authority, see Raz, 'Liberalism, Skepticism, and Democracy', *Iowa Law Review* 74 (1989), 761.

A regime with such checks and balances leaves logical space for you to have authentic Ripsteinian property rights – authority in respect of things such that generally 'what you say goes' where those things are concerned even when what you say is misguided – but without any abandonment of Raz's 'normal justification thesis.' The normal justification thesis still applies: the conferral of such wide authority on property-holders still enables people, in their dealings with the various things that can be owned, better to conform to the reasons that apply to them. There is less wastefulness, less caprice, less pettiness, less cruelty, and so on, than there would be under alternative systems. Or rather, there is when there is. And when there isn't, well then it's time, all else being equal, to go for an alternative system.

You may say that I have gerrymandered the normal justification thesis to yield this result. I have glossed over the fact that, when the normal justification holds, authorities enable *those subject to them* to better conform to the reasons that apply to them. Didn't I just sneakily expand my calculus to include a wider set of agents, not just those who are subject to the authority of property-holders, but also those who possess that authority, i.e. the property-holders themselves? That isn't so sneaky. It makes perfect sense. For in the property system, the property-holders too are subjects of authority. They are subject to the further authority that confers on them the authority, or recognises their authority, to impose duties on others. In a typical contemporary version, that further authority is the authority of law. But it need not always be. Property rights need not always be legal rights.[11] And even when they are legal rights, they need not always be rights *conferred* by law. As I just mentioned in passing, they may alternatively be legally *recognised* rights, i.e. rights that exist apart from the law but that are given legal effect,

[11] For good illustrations see Robert Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Cambridge, Mass. 1991).

or given legal effect under certain conditions. Either way, once we come to apply the normal justification thesis (as we should) at the level of the system as a whole, we have to apply it not only to the authority of the property-holder, but also to the authority in virtue of which the property-holder is a property-holder. Relative to that authority the property-holder is a subject and the question is whether, under this system, she conforms better to the reasons that already apply to her than she would under other possible systems for allocating authority in respect of things.

None of this should be taken to suggest that the normal justification thesis exhausts what there is to be said about the justification of authority. I already mentioned promising and consenting and similar normative powers, by the exercise of which people may bind themselves, within limits, to obey an authority even when it does not help them to act wisely. These are abnormal justifications of authority that come into their own in cases in which authority's normal justification does not hold. But more important for present purposes is the converse class of cases in which, athough the normal justification of authority does hold, the authority is still not justified. Sometimes, to take the most important situation of this type, it is more important that people act freely than that they act wisely. In that case the wise authority does not insist on getting its subjects to act wisely, but allows them to act freely, and maybe even helps them to do so, even at the price of some error in what they do.

This matters for our understanding of liberal rights, including liberal property rights. I already indicated how a case for freedom in the acquisition, use, and disposal of property might be made within the confines of the normal justification thesis. The case is that, as compared with alternative systems, such a system militates in favour of wise dealings in the things to which it applies. But we should now add that wisdom in these dealings is not the only possible aim. A distinctively liberal case for liberal property rights will treat a global wisdom-deficit in property-dealings as capable of being compensated, at least up to a point, by freedom-gains

that do not bring wisdom-gains. These gains manifest what we may call the 'distinct' value of freedom.[12] The distinct value of freedom is the basis for the characteristic measure of self-denial shown by liberal public authorities, e.g. when they work within the harm principle, submit to the ideal of the rule of law, respect people's individual rights, etc. In conformity with the normal justification thesis, they could sometimes tighten up regulations, ramp up penalties, step up enforcement, or take a range of other authority-extending steps. For they could sometimes thereby get people to act more wisely. But that would not always be the wisest thing to do, for sometimes the cost to freedom would be too high. Here meeting the conditions of the normal justification thesis is a necessary but not sufficient condition for the legitimate exercise of authority. One should not only support people to do what they already have reason to do. One should also factor in the distinct value of their being free to do it or not.[13]

Here, notice, we are once again thinking of the property-owner as a potential *subject* of authority. Her freedom in dealing with her own property is being threatened, as we suppose, by the

[12] I say 'distinct' rather than 'independent' because it is arguable that freedom is only distinctly valuable when used with *some* wisdom, or at least some sensitivity to value. Possibly when freedom is used very obnoxiously, the fact that the obnoxious path was freely chosen only makes things worse. This is Raz's view in *The Morality of Freedom* (Oxford 1986), ch 14. Note that this is consistent with regarding the distinct value of freedom as intrinsic value. Not all intrinsic value is independent value. This point was explored at length, and to good effect, by G.E. Moore in *Principia Ethica* (Cambridge 1903), 27-36.

[13] Tacit premise: The fact that my φing will be free is never a reason for me to φ, even though the fact that my φing will be free is capable, in suitable cases, of adding value to my φing. Without this premise helping people to act freely would always already count within the normal justification thesis as just another aspect of helping them to act wisely. On the possibility of value in action that is not a possible reason for that action, see John Gardner and Timothy Macklem, 'Reasons', in Jules Coleman and Scott Shapiro (eds), *The Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford 2002).

overzealous regulatory ambitions of an illiberal public authority. In looking at the problem from this end we may, however, forget to extend an identical anxiety to the authority of the property-owner herself. Her right has more far-reaching incidents than many other liberal rights. It is not merely that she is permitted to do stupid things with her property, such as filling her beautiful garden with junk. Nor is it merely that others are restricted in doing things in respect of her property, such as clearing away the junk. No, to spell it out one more time, the property-holder is herself an authority in respect of such requirements and permissions and others like them. The freedom of others is capable of being threatened by her exercises of authority in much the same way, and to much the same extent, that her own freedom is capable of being threatened by the exercises of authority of a public body. She is the one who permits the garden to be cleared. She is the one who requires the would-be garden-clearers to leave. The permissions and requirements, or many of them, arise or apply on her say-so, and her exercises of authority to create or uphold them enjoy, in turn, public authoritative support, such that the consequences of not going along with her say-so may be akin to the consequences of failing to obey, say, a police instruction (e.g. that physical force may properly be used against the disobeyer).

In defending such public authoritative support for the property-holder's private authority, and indeed the existence of the private authority itself, little is to be gained by pointing to the distinct value of the property-holder's freedom. I leave aside the obvious problem that these days the property-holder may well be a corporation. Since a corporation (like a public institution) has no life of its own to live, but exists only to serve others, its freedom has no distinct value. But the more important point is that even when the property-holder is a living human being, the distinct value of freedom figures on both sides of the equation, counting both for and against her authority. It counts for her authority inasmuch as it gives her options in how to interact with

her property (and gives those others options that depend on her options); it counts against her authority inasmuch as it limits the freedom of others to interact with her property independently of the property-owner herself. I see no reason to suppose that the value of freedom on one side of the equation will tend, in general, to be more significant than on the other.

Or more precisely, I see no reason to suppose that the *distinct* value of freedom on one side of the equation will tend to be greater than on the other. The value of freedom that has already been anticipated by the normal justification thesis is a different matter. As I said, one can see how the freedom of property-owners might make for wiser dealings in property, just as the freedom of voters in a democracy might make for wiser public policy. Such arguments for the freedom of property owners are indeed often made. No doubt, like the analogous arguments for democratic freedoms, they are often wildly overstated. Almost certainly they actually support a more modest ration of private authority for property-holders than the very generous allocation insisted upon by eighteenth-century 'possessive individualists' and twenty-first century 'neo-liberals'. My point is only that we should be highly sceptical of attempts to make up the 'neo-liberal difference', so to speak, by pleading the distinct value of freedom, meaning the value of freedom that was not already anticipated by the normal justification thesis. The case for the private authority of property-holders largely stands and falls, it seems to me, on the normal justification thesis alone. This being so, it is after all pretty much fatal to an exercise of authority by a private property holder that it cannot be defended according to the terms of the normal justification thesis, albeit that thesis applied wholesale (to the property-authority system as a whole) rather than retail (one exercise of authority at a time).

You'll notice that, over the last few pages, my discussion has been restricted to property rights. Ripstein's other category – rights over one's body, or perhaps more broadly over oneself – have slipped into the background. These, I should emphasise, are

not property rights. Nobody owns herself or her body, any more than she owns anyone else or anyone else's body.[14] But to what extent could the above lines of thought concerning property rights nevertheless be adapted to bear on the right to life, to sexual freedom, to self-defence, to free movement, and so on? The extent to which and way in which these rights confer authority on the rightholder varies. The justification of authority is relevant to each of them to a different degree and in different ways. So each requires its own separate discussion, which space does not permit me to enter into here. Even with property rights I have only been able to offer a few sketchy remarks. Perhaps, however, I have done so at enough length for you to have lost sight of the original aim of the whole exercise. So let me bring the discussion back to *Private Wrongs*, and resume my plan of asking Ripstein for a few further particulars.

Recall: I interpreted note 3 on page 34 as Risptein's attempt to forestall the implication of a perfect parallel between the personal and the political, or more exactly (as we might now put it) between private authority and public authority. I took the footnote to be of some importance in clearing the way for the book's overall campaign against 'the mistake that the Holmesian instrumentalist makes in imagining tort law to be a tool in the service of public purposes' (289). To clear the way, Ripstein set aside Raz's influential 'normal justification' for authority. Whatever appeal Raz's normal justification might have so far as public authority is concerned, Ripstein suggests, it does not apply to private authority, of the kind that is at least sometimes legitimately exercised by, *inter alia*, holders of liberal property rights. I do not see anywhere in *Private Wrongs* a replacement account of what, for Ripstein, *does* normally justify such private authority when it is justified. So in this comment I made two

[14] For a brief case against the self-ownership/body-ownership view, see John Gardner and Stephen Shute, 'The Wrongness of Rape', in Jeremy Horder (ed), *Oxford Essays in Jurisprudence: Fourth Series* (Oxford 1998).

brief inquiries of my own. I investigated, in outline, how Raz's normal justification might plausibly serve as a justification for the private authority associated with liberal propery rights, or at least how Ripstein may be underestimating its potential to do so. And then I investigated what difference it might make if we factored in the distinct value of freedom. Answer: not so much.

So the question remains, after all that, of what Ripstein proposes to put in place of Raz's normal justification, as a normal justification for the 'private authority' aspect of liberal property rights. And the question therefore also remains of what is wrong with the Holmesian view of tort law, or more generally private law, once 'public purposes' are understood broadly enough to include the purpose of helping people to interact wisely, or at least to mitigate the unwisdom of their interactions. Needless to say, once you have such a wide view of 'public purposes' the distinction between public and private purposes breaks down. Resorting to the authority of law, including private law, is just one of many possible techniques for helping people to do what they ought to do anyway. When you read this you will see that I am in a way reversing the Holmesian logic. The first question is surely the personal one: How should I act, and more specifically how should I interact with others? The question for public officials, whether armed with authority or otherwise, is simply that of how to help people act well, including interact well with others. There are no specifically public purposes. But there are some specifically public pitfalls: ways in which law, in particular, can backfire, hinder more than it helps. One can read Holmes more charitably as a student of those pitfalls, as providing warnings to those who begin from the thought that the law should help me to do what I should do anyway and jump hastily to an overmoralized, illiberal, authoritarian conclusion. Ripstein, it seems to me, may be the converse case: one who rightly resists overmoralized, illiberal, and authoritarian conclusions and jumps hastily to the thought that the law isn't there to help me do what

I ought to do anyway. I hope that at the very least I showed, in this comment, why we should regard that as too hasty.

I have deliberately stayed away from the interesting question of whether the justification of private authority is seen differently by (or 'within') private law, as represented by judges, barristers, and similar officials. It is an interesting meta-question about *Private Wrongs* whether it should be read as a (committed) defence of private law – as I have so far assumed – or instead as a (detached) explication of how private law might or does speak in defence of itself. If the latter, then the sidelining of the normal justification thesis is no great surprise. For authorities to offer up the normal justification thesis as the primary case for the legitimacy of their own authority, or that of others whose authority they recognize, is for them to invite the constant questioning of that legitimacy. Endless student essays denying that there is any 'independent fact of the matter' (34) about what I ought to do, or at least none that any authority can help me achieve better than I can achieve it myself, testify to the fact that advertising the normal justification thesis as the official position would tend to be counterproductive. It would tend to undermine whatever authority satisfies the standard set out in the thesis, by eroding people's willingness to submit to it. Naturally, no authority wants to head that way, and in my experience none attempts it. The justification of the legitimacy of authority (public and private) that is provided for public consumption by the officials of private law, and by legal officials generally, therefore tends to be something other than that laid out in Raz's thesis. Most often, it seems to me, a veil is wisely drawn over the whole subject by officials. That should not blind us to the possibility that the normal justification thesis is what primarily grounds the legitimacy (such as it is) of authority in private law, including the legitimacy of private as well as public authority. As theorists of private law we should not replicate the understandable silence of officials on the subject; we are there, inter alia, to *explain* the silence. That is already a reason not to

limit our theorizing about private law to explicating the way in which private law is or can be defended from within. Nor, I think, does Ripstein try so to limit it. Yet he does tend to keep some of the difficult truth to himself. Hence my curiosity.