Private Law and the Value of Choice

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Introduction

SOME THEORIES SAY that private law ought to correct wrongs, or to protect rights. Others say that it ought to minimise social cost, or to maximise social welfare. This book says that private law ought to make our responsibilities to others depend on the opportunities we have to affect how things will go for us. One might perhaps call this the 'opportunity' theory of private law, but I have opted to name it after the 'value-of-choice' account of moral responsibility on which I have based most of my argument. That account has been developed by TM Scanlon, who credits HLA Hart as his own inspiration. The purpose of the book is to explain how we can deploy that account to measure the moral merits of private law (which for my present purposes means contract and tort law).

The main idea is simple. We have reason to want what happens to us to be sensitive to our choices. Most obviously, life is more likely to go well for us—we will enjoy our meal, our profession, our evening's entertainment, a nice and safe drive—if what happens depends on how we choose. Hart saw that this does not matter just for our own decisions about what to do. It also matters for our responsibilities to others, and the role of the law in holding us to those responsibilities. Hart was making a point about criminal punishment, but he found it easier to state his idea by drawing what he called, drily, a 'mercantile analogy' with private law contexts. He asked us to look at legal rules that create certain familiar institutions, such as those of a will or a contract or a marriage, as setting up a '*choosing* system', in which individuals can find out, in general terms at least, the benefits they may expect to receive and the costs they may expect to pay if they act in certain ways.[1] Such institutions, Hart argued,

> provide individuals with two inestimable advantages in relation to the areas of conduct they cover. These are (1) the advantage to the individual of determining by his choice what the future shall be and (2) the advantage of being able to predict what the future will be. For these institutions enable the individual (1) to bring into operation the coercive forces of the law so that those legal arrangements he has chosen shall be carried into effect and (2) to plan the rest of his life with certainty or at least the confidence (in a legal system that is working normally) that the arrangements

[1] HLA Hart, 'Legal Responsibility and Excuses' in *Punishment and Responsibility: Essays in the Philosophy of Law*, 2nd edn (Oxford, Oxford University Press, 2008) 44 (emphasis in original). Hart's essay first appeared in S Hook (ed), *Determinism and Freedom in the Age of Modern Science* (New York, Collier Books, 1958) 95.

> he has made will in fact be carried out. By these devices the individual's choice is brought into the legal system and allowed to determine its future operations in various areas thereby giving him a type of indirect coercive control over, and a power to foresee the development of, official life.[2]

Scanlon argues that the value for a person of having a choice does not matter only in the justification of the institutions that Hart wrote about. It matters in the justification of any principle that requires a person to bear a substantive burden (duty, liability, obligation) in their relations with others. In this view, which Scanlon has put forward as the 'value-of-choice' account of responsibility, to justify the imposition of a substantive burden on people in a given situation, we must attend to the reasons people have to value the opportunity to affect, through their choices and other responses, how things will go for them in that situation. As he puts it:

> Once we understand the positive reasons that people have for wanting opportunities to make choices that will affect what happens to them, what they owe to others, and what others owe to them, we can see also how their having had such opportunities can play a crucial role in determining what [principles] they can reasonably object to.[3]

I propose to take this general idea back to the private law settings that Hart first applied it to. In particular, I suggest that we should see principles of contract and tort law as making up a 'choosing system', which does its job well when it makes a person's responsibilities in a situation depend on the value for that person of the opportunities they have to affect how things will go for them. In this view, it is OK for the law to force a person to make repair for breaching their bargain, as long as that person has reason to value the opportunity to make and receive legally enforceable voluntary commitments. It is OK to impose the burden of repair on a careless driver, as long as this person has reason to value the opportunity to decide where, when, and how to drive, and so on. We can generalise: it is OK for a principle of private law to impose some burden on a person in the context of an activity, as long as that person has reason to value the opportunities that the principle affords them to affect how things will go in relation to that activity. Applying that idea in specific settings will involve asking questions like the following. What sort of opportunities does a given principle of private law allow a person in a certain situation or in the context of some activity? Under which conditions is that person called upon to act on those opportunities? Does giving that person a choice in that situation make it generally more likely that things will go well

[2] Ibid at 45.

[3] TM Scanlon, *What We Owe To Each Other* (Cambridge, Mass, Belknap Press of Harvard University Press, 1998) 251.

for them? Our answers to these questions may lead us down several different paths. Sometimes they will match our view about the responsibilities of the contract-breaker or the careless driver. Those persons have a valuable opportunity to choose how they go about their respective activities, so they must bear the responsibility in case their choices—to breach the contract; to drive carelessly—cause harm to others. Sometimes we will conclude that the burden of repair may not be imposed on a person precisely because they do not have reason to value the opportunity that they were presented with, eg because the other party deceived them about the cost of certain options, or because they lacked the capacity to avoid causing certain outcomes. Sometimes we will reach more complex conclusions, eg that we may require a person to bear the burden of repair only as long as we have given that person a measure of protection against the consequences of their poor choices, say, by giving them access to affordable insurance coverage. Maybe *that* is the proper conclusion in the careless driver's case.

This way of thinking is strikingly dissimilar to that of a corrective justice or of a consequentialist account of private law. It does not ask who wronged whom, or who violated whose rights. It does not ask which principle is likely to be socially optimific. Rights and costs matter under the value-of-choice account too, but their significance is 'filtered' though the idea of the value for people of having certain opportunities in certain contexts. Consider rights first. Promising, driving, hunting, operating and working in a factory are activities that come with bundles of rights and corresponding duties. Promisors may serve their interests by giving certain commitments, but they also incur the duty not to mislead promisees; drivers may drive where and when they please, but they also incur the duty to exercise a level of skill and advertence; hunters may go about their activity, but they also incur a duty to comply with the applicable regulations; entrepreneurs are entitled to a managerial prerogative, but may be required to bear the burden of repair for a worker's mistakes, and so on. Change the design of those bundles (eg give promisees a right to force promisors to perform rather than compensate; abolish car insurance; ban certain types of hunting weapons; make workers personally liable for workplace negligence) and you change the value for each of those persons of the opportunity to engage in the relevant activities. The value-of-choice account says that the justification of any particular design for those bundles of rights and duties turns precisely on whether those persons have reason to value the opportunities that the bundle comes with, eg on whether having those opportunities is more likely to make things go well for those persons. In turn, the application of this 'filter' suggests a particular explanation of the significance of rights in the justification: rights matter *because* they provide people with certain opportunities to affect how things will go for them. Similar filtering applies to costs. The cost of the options available to a person affects the value for that person of the opportunity to act on those

options. Driving would be too risky and expensive if people were prohibited from insuring themselves. People would not start enterprises unless they could pass on the cost of insurance for industrial accidents to their consumer base, and so on. Again, the value-of-choice account filters the idea that costs matter into the particular claim that considerations of cost are an element in the assessment of the value for a person of the opportunities that they have in the context of an activity. But the same token suggests that certain other aspects of the idea that rights and costs matter should be filtered out. This goes for the claim that one ought to make repair because one has committed a *wrong*, except when this is shorthand for the idea that one had reason to value the opportunities one had under the bundle of rights and duties that now requires one to make repair. The same goes for the claim that one ought to bear the burden of repair because a principle to that effect maximises *aggregate* (or social) welfare or minimises social cost. Under the value-of-choice account, costs matter only as grounds on which particular *individuals* may object to a principle that imposes a burden on them, not as social aggregates.

That is the value-of-choice account in a nutshell. I claim two broad advantages for it. One is that it allows us to explain in a reasonably straightforward way why both rights and costs matter in private law. We do not have to say that considerations of cost matter only in the context of determining what rights people have or that rights matter only insofar as protecting them is socially optimific. We can say that considerations of cost and rights matter because they concern the opportunities people have, and the value for them of having those opportunities. Furthermore, focusing on the opportunities people have can help us decide when the law ought to prohibit some activities altogether, and when it ought to give people the choice to engage in them; when the standard of liability in the context of those activities ought to be negligence-based and when it ought to be stricter, and so on. And it does this without being committed to a consequentialist view of reasons.[4]

Another advantage of the value-of-choice account is that it shows why certain ideas that have been often thought to lie outside the domain of private law are, in fact, an integral part of its moral justification. Take the availability of *insurance*. Those who think about private law in terms of rights and wrongs have tended to say that problems of insurance and insurability are 'downstream' matters, ie problems about managing liabilities one already has. The value-of-choice account disagrees. The availability of insurance in relation to some activity will sometimes be part of the reason why a person has reason to value

[4] In that sense, the value-of-choice account picks up the gauntlet that Barbara Fried has thrown to non-consequentialist accounts of tort law, see B Fried, 'The Limits of a Nonconsequentialist Approach to Torts' (2012) 18 *Legal Theory* 231, 259–61.

the opportunity to engage in that activity, and to bear the practical burdens that the activity involves. People value the opportunity to decide where, when, and how to drive in part because our compulsory car insurance laws make it easier for them to obtain affordable insurance against the possibility that they will make a driving mistake and cause a traffic accident. If Parliament, in a fit of libertarianism, abolished car insurance in order to encourage people to 'take responsibility' for their driving, it would not just make driving less valuable for everyone. It would also undermine the justification of private law principles that make drivers pay for the harms caused by their driving mistakes. Something similar goes for our growing understanding of the impact of certain *rational biases* that make us choose poorly in some situations. The value-of-choice account can explain how far such biases affect people's responsibilities in private law without appealing to the idea that decisions made under their influence are not really 'free' or 'voluntary', or that a principle that took those decisions as a basis for enforcement would be socially suboptimal. It simply asks whether, despite the fact that a person's choice is affected by such a bias in a given situation, things are more likely to go well for that person if what happens in that situation depends on that person's choice. That is why product advertising that trades on such biases does not excuse adults from the responsibility to pay for what they have purchased, but distance selling that denies consumers a reasonable 'change of mind' period may well do so. If you find all this trivially true, try generating similar explanations through a corrective justice account. It will be a challenge.

The book has seven chapters. Chapter 1 discusses the most characteristic burden that private law principles place on people, the burden of repair, and aims to destabilise the intuition that the reason one ought to bear that burden is that, in failing, say, to perform one's side of a bargain or to drive safely, one has done something *wrongful*. This intuition, I argue, invites the following challenge: wrongful conduct is not a condition for imposing on one the *original* burdens of performing one's bargains or driving safely. One bears those original burdens because a range of substantive considerations about the reasonable interests of the persons involved, the demandingness of the burden, the ease of discharging or of avoiding it etc, say so. If wrongfulness is not a condition for imposing those original burdens, why should it be a condition for imposing on one the *further* burden of making repair whenever one has failed to discharge the original ones? To give the challenge bite, I contrast wrongfulness-based accounts of the burden of repair with a 'direct' alternative. The 'direct' account treats the burden of repair just like any other original burden and justifies its imposition accordingly. It asks whether a principle that imposes that burden on a person is sufficiently sensitive to the applicable substantive considerations, such as the reasonable interests of the parties concerned, how easy it might be for someone to discharge the relevant burden or

to avoid it by choosing appropriately, and so on. That account does not take the fact that a person's failure to discharge some original burden is wrongful as determining either on whom the burden of repair ought to fall, or what form such repair ought to take. I then claim that the 'direct' account is consistent with many moral ideas that underlie wrongfulness-based accounts. However, the overlap is partial, not total. So we have a fight.

Chapters 2 and 3 try to settle that fight by appealing to our ideas about moral responsibility. Chapter 2 distinguishes two kinds of judgements of moral responsibility. One involves expressions of moral praise or criticism of a person and their conduct. Scanlon calls these judgements of *attributive* responsibility. The other involves allocations of practical burdens (duties, obligations, liabilities etc) to people. These are judgements of *substantive* responsibility. I claim that private law is concerned only with the latter kind of judgement: the job of private law is to decide whose problem it is to make repair or to bear certain other practical burdens (eg to desist from certain conduct), not to express moral criticism or praise. I hope that this claim will sound banal. The less banal aspect of it is that the two senses of responsibility are so different that it does not help to think that they even have a common root, say, in certain ideas about capacity for reason-responsiveness or our acting, rational agency. Many important theorists think otherwise, and I try to show why they are mistaken.

Chapter 3 lays out Scanlon's value-of-choice account of substantive responsibility. It considers the different reasons for which people may value having the opportunity to choose in a situation, and how those reasons help explain why people may not object to principles that make their substantive responsibilities contingent on them having that opportunity (I discuss and deflect certain objections to Scanlon's argument along the way). The account's punchline, anticipated by Hart, is that one's responsibilities turn on the choices one *has*, not on the choices one *makes*. You are not responsible to make repair for injuring me because you were careless. You are responsible because you had the opportunity to take care, and that opportunity was something you had reason to value in the context of the activity you were undertaking. This idea has a less apparent, but equally important aspect. Whether you have reason to value that opportunity will sometimes depend on what others have done to ensure that you will choose well, or to protect you against the consequences of your poor choices. That is, sometimes you value having a choice because there is a safety net in place to catch you if you fall. If all this is right, the case against accounts that emphasise wrongdoing, wrongfulness, corrective justice etc is reasonably obvious. Those accounts place the moment of responsibility too late: they miss that who is responsible for the harm is settled before any wrong has actually occurred. The value-of-choice account cuts against consequentialist theories of private law in a different way. While it shares their interest

in the costs of the opportunities people have, it treats costs as grounds of individual complaints against principles rather than as social aggregates.

Chapters 4 and 5 begin the task of applying the value-of-choice account to some familiar questions of private law theory. They go about it in a slightly unusual order. Chapter 4 takes up the idea that sometimes the opportunity to engage in an activity will be valuable for a person on the condition that others have done enough to give that person a measure of protection against the risk of choosing poorly. Chapter 5 then looks at the significance of the fact that this person could have avoided some harmful outcome by choosing appropriately. The intuitive way of doing things is the reverse: to begin by asking why avoidability matters for responsibility, and then to discuss whether a person might nevertheless be entitled to some protection against the consequences of their avoidable mistakes (eg to require others to give them access to certain insurance structures). I do not object to this order, but in Chapter 4 I argue that it carries the risk of portraying the provision of protection as a 'bail out', ie to make us think that the responsibility belongs originally to that person, but that we then have good reason to 'lift' or 'shift' it onto someone else. That is true in some situations, but not in others. Sometimes giving a person some protection against the consequences of their mistakes in some activity is part of what makes the opportunity to engage in that activity valuable for that person. That is, sometimes others may require that person to take on certain duties or to observe certain standards of conduct in part *because* they have that person covered in case that person makes a harmful mistake (ie that person's complaint against not having such protection would be 'it is not OK for you to be putting me in this situation!'). When that is the case, no protection means no responsibility, even if that person could have avoided the mistake in question by choosing appropriately. I then fashion a 'protection principle' out of the value-of-choice account in order to describe the situations in which protection has that function. I also claim that this principle identifies a moral thread running through familiar common law principles, including those of contributory negligence and mitigation, principles of vicarious liability for workplace accidents and various activity- or hazard-specific compulsory insurance schemes.

Chapter 5 turns to the significance for a person's responsibilities of the fact that this person could have avoided a certain outcome. I claim that this significance is best explained by treating avoidability as an opportunity, and reflecting on the value for that person of having that opportunity. In turn, this idea can account for two important features of private law. One is the distinction between contexts in which a person's liability is negligence-based, and contexts in which the conditions of such liability are stricter. The other is the allowance that private law sometimes makes for persons whose capacities fall below the normal standard. I conclude by discussing how the value-of-choice

account would approach a very recent English statute which purports to be driven by considerations of responsibility, the Social Action, Responsibility and Heroism (SARAH) Act 2015.

Chapter 6 applies the value-of-choice account in the context of contracting, and takes issue with a set of principles proposed by Scanlon regarding the enforceability of voluntary undertakings. I argue that the main principle Scanlon puts forward requires amendment because it is insufficiently sensitive to the fact that the value for a person of the main opportunities that contracting offers—not to seek a deal in the first place, to negotiate, to weigh one's options, to say yes or no to the deal on the table—depends on that person's *structural position*, ie on the position from which the social structure causes that person to enter into transactions with others. More specifically, Scanlon's principle fails to justify what is often the most plausible institutional response to the fact that the value of those opportunities is compromised for persons in a weaker structural position, namely to keep the transaction alive and enforce it under modified terms (eg enforce the minimum wage in the place of any lower agreed rate). I propose a modified version of that principle, and claim two things. First, that the modified principle is not exposed to certain objections levelled against accounts that see the aim of contract law as the pursuit of social justice. Secondly, that it can justify not only familiar common law doctrines like unconscionability, but also modern statutory regimes for the protection of consumers, especially legislation on fair terms.

Chapter 7 considers vicarious liability in tort. It notes two ideas that have tended to underlie accounts of vicarious liability. One is that vicariously liable persons *participated* in the conduct that is being attributed to them. The other is that those persons are well *placed* either to deter that conduct, or to deal with its consequences. While many justifications of vicarious liability have tended to hedge their bets between the two ideas, existing accounts have not been able to account properly for their respective significance. I claim that we can do this by treating vicarious liability as an instance of the 'protection principle' proposed in Chapter 4. In this view, the aim of principles of vicarious liability is not to hold entrepreneurs liable for the costs of their activities, or to give victims a more secure route to compensation, but to protect employees against the consequences of their workplace mistakes.