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Means, rights, and opportunities - on Arthur Ripstein's *Private Wrongs*

Emmanuel Voyiakis[#]

Arthur Ripstein is not the only theorist who thinks that tort law is the law of private wrongs, but the case he makes for this view is one of the most direct to have appeared in the literature, and all the stronger for that reason. So far, those who see torts as wrongs have tended to claim that tort law instantiates a special kind of justice, which aims to 'correct' wrongs, or that it provides people with the power of 'civil recourse' against such wrongs. Those claims are very plausible, but if correction and/or civil recourse are due only when one has suffered a wrong, we need an account of what constitutes a wrong. And if a wrong, as most of those theorists have tended to accept, is the infringement of a right, we need an account of people's rights. Without such an account, all we have is a description of a cart, and we are waiting for the horse that moves it. The problem is not just that the cart cannot move itself. It also takes a particular kind of horse to run it. For a start, the claim that tort law does 'corrective justice' has only as much strength as the substantive case for thinking that this form of justice is worth attending to –in a way that, say, 'vigilante justice' is not. The same goes for the bipolar structure of a tort action and the omnipresence of ideas of duty, wrongs and wrong-doing in tort law. Theories of tort law should certainly aim to account for those standard features of the law, but that does not show either why any or all of those features are significant, or how much significance we should accord them. More importantly, both the idea of corrective justice and the relevant features of tort actions and tort law could be explained by appeal to views of reasons that those who see torts as wrongs have tended to distance themselves from. For example, maybe tort law is the law of private wrongs because looking at it like that helps reduce the social cost of accidents. On that hypothesis, the significance of wrong-doing would be contingent on whether thinking about tort law in those terms would help achieve that consequentialist aim. The cart of corrective justice may turn out to be dead weight.

Private Wrongs puts the horse before the cart. It argues that tort law is the law of private wrongs, not because it instantiates a form of corrective justice or civil recourse, but because people have two general rights, neither of which is extinguished when violated: the right to set and pursue their own aims in conditions of mutual independence, and the right that the means they have to pursue those aims, mainly their body and their property, not be subjected to another person's choice. With these simple thoughts in hand, Ripstein is able to do a lot of work. He is able to account for the relationship between those rights and the remedies that tort

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law provides when these rights are violated. He is able to explain why tort law, tort actions and tort remedies have their familiar bipolar structure, and the extent and limits of the protection they offer. And he is able to do all this in non-consequentialist terms. This last aspect matters because it shows that, although *Private Wrongs* does not set out to defeat economic accounts of tort law, it can hold its own against them. Ask other fans of the idea that torts are wrongs why we should not endorse economic accounts of tort law, and they will say that economic accounts are not consistent with corrective justice, and/or that they do not take certain typical features of tort law and tort actions seriously. Ask Ripstein, and he will say that those accounts are not compatible with our right to mutual independence. It is not hard to see that the simpler among those claims is also the more powerful. My aim in this note is to draw attention to certain distinctive payoffs of that claim, but also to suggest that, in putting the case for the view of torts as private wrongs in such clear and forceful terms, *Private Wrongs* has also exposed some of that view's normative and explanatory limitations.

Ripstein argues that tort law determines whether you may require a defendant to bear the burden of repair for some harm or injury (the difference is not germane to my present purposes) to your means on the basis of the following test. Were you able to set your own ends and were you free to use your means to pursue your ends in the situation in which the harm occurred? If the answer is yes, then the defendant is not liable to make repair for the harm you have suffered. If the answer is no, but the defendant neither set your ends nor used or destroyed your means, they are not liable to make repair either. The defendant incurs such liability only when and insofar as they assumed charge of your ends or means without your authorisation.

This invites us to ask what it takes for a defendant to assume charge over your ends or means (for simplicity, I will henceforth refer to means only). We can easily think of examples. If someone steals your camera, they put themselves in charge of your means and, for Ripstein, that is why they are liable to you for conversion. By contrast, if they move into the frame just as you are taking a picture in the park, and thus spoil your shot, they are not assuming charge of your means, and owe you no compensation for the inconvenience. What makes photobombing different from stealing your camera, Ripstein says, is that

many other things that make up the context in which you use your means are not among the means you have. Changes to the context in which you use your means may make your means useless (at least temporarily) for the specific end you seek, but leave the means intact, in the sense that they remain subject to your choice.¹

¹ At 32.

The park and its other users are not amongst your means. Other people's actions are, as far as your own activities are concerned, only part of the context in which you use your camera. The photobomber may ruin your shot, perhaps at great cost to you, but their action does not make it any less the case that you are in charge of the means you had to take that shot, namely your body and your camera. This suggests that the test Ripstein has in mind is both negative and relational in character, i.e. that what matters for the purposes of tort liability is not whether your means remain subject to your choice (after all, they may be destroyed by natural causes), but whether they have become subject to *another* person's choice.

Ripstein describes your core moral right that others not subject your means to their choices with the phrase 'no person is in charge of another person's means'.² The shorthand is appealing, but the translation it involves is not perfect, largely because the notion of being 'in charge' is a little too categorical for Ripstein's purposes. On a plausible understanding of what it means to be 'in charge', you either are in charge, or you are not, and being in charge of something entitles you to call all the shots in relation to that thing. As Ripstein develops his account, it becomes clear that he understands the phrase in a more relaxed manner. For example, when he turns to negligence, he says that another person's taking charge of your means need not involve them taking anything like full control of your means, or depriving you of such control. In some cases, it is enough that the other person has undermined the 'security' of your means, an idea that Ripstein then explains in terms of whether they have subjected your means to their choice.³ I drop a banana peel on the pavement. You could avoid stepping on it by exercising just a little more caution than a person who walks with their chest high, as you do, naturally would. My negligence does not take control of your body, but it does increase the risk to your physical health in a way you could object to. We might say that, while you are in charge in the sense that you are still the master of your stroll (after all, you are still able to look around you and to stop, go, or swerve at any moment), I am in charge in the sense that I have made your means less secure by subjecting them to the risk caused by my choice to drop the banana peel on the pavement. Ripstein believes, very plausibly, that this more attenuated sense is enough to make me a wrongdoer, and he never leaves the reader in doubt as to the precise case for that claim. However, the fact that sense in question is attenuated suggests that Ripstein's shorthand of choice is not always a natural expression of his account of wrongdoing.⁴

² At 35.

³ At 79-80. But Ripstein does not regard exposure to risk of harm to your means as harm in itself.

⁴ In other passages, Ripstein calls another person's being in charge of your means 'interfering' with those means, but since he takes both 'subjecting' and 'interfering with' to be different from 'changing the context' in which your means are used, I take the first two terms to be synonymous.

Quibbles about phrasing aside, Ripstein is clearly right to assign a central justificatory role to the idea that you can reasonably want to be in charge of your means, and that you have a legitimate complaint against anyone who subjects those means to their choice. His explanation of why tort law distinguishes between the thief of your camera, the banana peel-dropper and the photobomber is intuitively compelling. It also affords us simple and natural solutions to some puzzles that have tended to cause trouble for existing wrong-based accounts of tort law. I note two that seemed to me particularly instructive.

One is *Vincent v Lake Erie*, where the defendant was held liable for having caused damage to the claimant's dock, even though the defendant's decision to enter the dock in order to escape a storm that threatened to sink his ship was held to have been wholly reasonable. If the defendant did not commit a wrong on entering the claimant's property, how can we explain his being held liable in repair? Ripstein is not the first to argue that the real basis of the court's decision was trespass rather than negligence. The distinctive character of his argument lies in his explanation of why the defendant could be liable to make repair without having committed trespass on entering the claimant's dock. The defendant did not commit trespass, Ripstein argues, because one's ownership of one's means can sometimes entitle one to enter another person's property to retrieve chattels that have accidentally found themselves there or to protect one's chattels from destruction, that person's general right to exclude others from their property notwithstanding. And the reason why, in entering another person's property momentarily for that purpose, one is not subjecting the other person's means to one's choice is that this privilege flows from the nature of the parties' respective property rights. If entry in these circumstances counted as subjecting the other person's property to one's choice, then so would the other person's refusing to allow one to retrieve one's chattel from that person's property. By the same token, one's entitlement is *exhausted* in entering to recover the chattel or to keep it safe. Any damage that one causes in that process is damage caused in trespass, and is recoverable on that basis. Ripstein is therefore able to explain why the claimant succeeded in *Vincent* through an account of the parties' respective right to be in charge of their own means.

The merits of that account lie in even plainer view in Ripstein's treatment of contributory negligence (comparative negligence, in US terms). If tort law is about correcting wrongs, explaining why claimants may sometimes be required to bear part of the burden of repair becomes puzzling. When I fail to spot the banana peel you have dropped on the pavement, even though I would have done so easily had I been watching my step just a little, I have done something foolish, but I have not wronged anyone. How can my carelessness be taken as a basis for reducing my entitlement to damages for your own negligence in dropping the peel? Ripstein argues that the

puzzle is resolved if we focus on our respective entitlements to constrain each other *before* the accident. My entitlement to keep my means secure allows me to require you not to create unusual risks to my health by dropping the banana peel on the pavement. But that entitlement does not also allow me to require you to protect me against my failure to watch my step. Such an entitlement would subject your means to my decisions about how to protect myself against usual everyday dangers in respect of which you owe me no duty of care.

These merits notwithstanding, I want to suggest that the role of choice and ownership of means in the justification of tort principles is more complex than Ripstein's account makes out, and that this leads his account to certain conclusions that look much too strong, both as a matter of morality and as a matter of tort law. I propose to make the point in moral terms, and extend it to tort law, relying, unsurprisingly, on tort doctrines and principles that Ripstein opts to say little about. I begin from the assumption that the sort of situations to put Ripstein's account to the test are those in which (i) a person subjects your means to their choice, but they have a legitimate complaint against being saddled with the burden of repair for that wrong, which would therefore need to be borne by other persons, including perhaps yourself; and, conversely, (ii) you are entitled to require another person to bear the burden of repair even though they have not subjected your means to their choice.

Consider a situation of the first sort. Suppose that I am employed as an assembly line worker in your factory. I am a good worker, and you pay me a good wage. In the years I have been with you, I have been careful and diligent, and the system of work in your factory is fully compliant with the relevant health and safety regulations. One day I lose my concentration, press the wrong button, and injure a fellow worker. In doing that, I have subjected my fellow worker's means to my choices, and therefore have wronged them. Leave aside for the moment what tort law tends to say in these situations, and consider whether I might have a legitimate moral complaint against having to bear the burden of repair for the wrong I have committed.

On a surface reading of Ripstein's account, it is hard to see how that could be so. What is true of me, namely that I subjected my fellow worker's means to my choices, is not true of anyone else in the situation. There is no action or omission by you, as our common employer, or others that either me or the victim could have pointed to in advance of the accident and said 'don't do this, you are undermining the security of our means!' (e.g. neither of us could have required you to put more safety systems in place). Your status as our common employer simply sets the context in which we, as your employees, get to use our respective means. It follows that, were I to ask you, as our employer, to bear the burden of repair for my having subjected my fellow worker's means to my choice, I would be putting myself in charge of *your* means too.

Consider now a different way of looking at the situation. Working for you requires me to exercise skill and advertence for long periods of time. The industrial nature of the work entails that even a moment's carelessness on my part can sometimes cause great harms. *Errare humanum est*, so we can estimate that even the most diligent worker will have such moments in the course of their career. Finally, the structure of market economies entails, first, that workers need employment to secure their basic well-being and, second, that they do not generally have the means to repair the wrongs they commit in the industrial context, as taking out insurance for that purpose can be a very costly option. You want me to exercise my skills under those conditions, and I complain that agreeing to work for you would be a terrible deal for me if it leaves me to bear the burden of repair in case I make mistakes while exercising those skills. Note the focused character of this complaint. I am not asking for a socialist revolution that would challenge your ownership of the means of production (though I am game). I am not doubting the reasonableness of the standards of care and skill that I am required to observe, or protesting against the potential impact of my mistakes on my job security. I am only complaining about having to bear the burden of repair for my workplace negligence.

Does my complaint carry any moral force? The fact that not being protected against the burden of repair for my negligence would leave me in a tight spot is not enough to justify why I may require you, as my employer, or anyone else to provide me with such protection. It is, however, a start. You know everything about my structural position, and the means, opportunities and risks that come with it. In particular, you know that I need to take up dependent labour in order to secure my basic well-being, and that getting me to work for you would expose me to the risk of making mistakes and cause harms liability for which I cannot possibly bear alone. The structure that puts me in that position also gives you access to insurance and market mechanisms that allow you to pass on and spread the cost of repair to the community of consumers of the goods or services that your business produces (this makes you, effectively, a middle-person in the distribution of that cost). Moreover, you have reason to want that structure to have the shape that it does, with you and me occupying our respective positions in it, because that is central to the pursuit of your own entrepreneurial ends. You want there to be people willing to work in your enterprise, and under your terms. The moral force of my complaint is a function of the fact that, were you not to protect me against the burden of repair, you would fail to make acceptable to me the social structure that you want me to accept.⁵

⁵ You would, of course, prefer a structure that did not require you to function as a middle-person for the distribution of the cost of repair, but, as I and my fellow workers can tell you, you can't get everything you want in life.

If this story adds up, workplace negligence is an example of a situation in which the burden of repair ought not to fall on the person who subjects other people's means to their choice -the negligent employee- and it ought to fall on a person who has done so such thing -the employer. I have framed the argument in moral terms, but it is reasonably clear that tort law tends to reach a similar result in holding employers vicariously liable for the torts of their employees. To be sure, there are differences. Most notably, tort law tends to allow employers and their insurers to claim back an indemnity from their employees. However, that right has been abolished in some jurisdictions, and is hardly ever exercised in those that have not. Save for some intentional torts, employees do not have to bear the burden of repair for their workplace negligence, and perhaps the moral force of the argument I have outlined explains why. It follows that this example raises a genuine challenge to Ripstein's guiding idea.⁶

Private Wrongs puts vicarious liability to one side, though it acknowledges that the doctrine raises questions that need to be addressed. I hope to have shown that honouring this IOU is important for the success of Ripstein's account.⁷ At the same time, it seems to me that the 'spirit' of the justification of vicarious liability that I have outlined is not radically different to Ripstein's own. It too accords fundamental significance to the parties' ability to set ends for themselves and use their means to pursue those ends. It agrees that the negligent employee is a wrongdoer and explains this on the basis of the distinction between subjecting another person's means to one's choice and merely changing the context of their use. And, like Ripstein's account, it tries to justify the imposition of vicarious liability on employers in a 'systematic' way, by treating the respective rights and duties of the parties as aspects of an interdependent scheme of mutual entitlements. What it denies is the further claim that the parties' entitlements at the stage of repair are fixed by the parties' original entitlements over their respective means. That claim may be true in many instances of tort liability, but it is not true in all of them.

A similar conclusion seems to follow *a fortiori* in situations where you are entitled to require a person to bear the burden of repair, even though they have not subjected your means to their choice. The typical example of that situation would be products liability. Most tort systems say that a producer is liable for harms caused by defective products, and tend to define 'defective' by reference to consumer expectations of safety, attributing only limited significance to producers' right to use their means for

⁶ The puzzle is not resolved by saying that the employee's conduct can be attributed to the employer's agency too, as the justification for such attribution would itself need to be defended on the basis of one's general account of tort liability.

⁷ If you think that Ripstein might be unable to explain vicarious liability (and, as I will say below, strict products liability), but that his account still succeeds 'as far as it goes' or as an account of *some* parts of tort law, maybe I can also interest you in my account of two thirds of an elephant.

their own ends. The contrast with the position of non-producers is stark. If the cake I baked and served to my guests makes them ill, my tort liability will be negligence-based. If I bought the cake from your company, your liability will be strict. The only thing that changes from the first situation to the second is the identity of the defendant. The risk posed by our respective activities to the security of the claimants' health remains the same. On Ripstein's account, it should follow that my guests may not restrict your company's activities to a greater extent than they may restrict mine. But that is not the law in any modern tort system I am aware of.

Private Wrongs does not discuss products liability, and perhaps Ripstein is not worried about its compatibility with his argument, but it would have been good to see the case for this. My impression is that, like vicarious liability, strict products liability raises a challenge not so much to the broad structure of Ripstein's account as to his more particular claim that tort liability turns on whether a person is using their own means only, or subjecting other people's means to their choice. Ripstein invites us to think that you owning your means as a business is just like me owning mine as a dinner host, and that therefore our respective activities ought to be constrained under similar terms. However, there is a clear aspect in which our positions do differ. That difference does not have to do with our rights over our respective means, but with the opportunities that come with owning the means that each of us does. The position of a business comes with certain opportunities that the position of a dinner host does not. Most notably, it comes with the opportunity to take advantage of a social structure that allows businesses to pass on and spread the cost of their activities to the community of consumers of the goods or services produced. This opportunity is not part of a business's means in the way Ripstein understands the notion (in his contribution to the issue, Peter Vallentyne calls it 'proprietary'), but it seems to me to have moral significance for tort liability for reasons analogous to those I outlined in respect of the employer's vicarious liability for workplace negligence. Perhaps your business cannot complain against being held strictly liable for harm caused by defective products because such liability makes acceptable to consumers a social structure that you, as a businessperson, have reason to want consumers to accept. Note, again, that accepting this does not commit us to the conclusion that tort law is there to do social or distributive justice. We could still see torts as wrongs and endorse most of the basic setup of Ripstein's account. What we would need to drop is the claim that for you to be liable in tort, you must have subjected another person's means to your choice. Producers of defective products do not subject the consumer's means to their choice any more than non-producers do. The former incur liability for repair because and insofar as the particular sort of thing they own comes with some special opportunities for interaction with consumers. If that is correct, ownership of means (and its lack) matters less for tort liability than *Private Wrongs* would have you think.