

The
Myth
of
Choice

*Personal Responsibility
in a World of Limits*

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Introduction

MOST OF US, MOST OF the time, like to think we are in control of our lives. We are the masters of our own fate. We make our own decisions. In the words of the cheesy poster that hung on my bedroom wall during high school, we “follow our own star.”

Whether politically liberal or conservative, we balk at government limitations on choice and fight those limits with legal arguments about rights and political rhetoric about freedom. Liberals demand access to abortions, want to be able to purchase “medical” marijuana, and don’t appreciate being patted down to get on a plane. Conservatives don’t like requirements to buy health insurance or pay taxes, bristle at limits on gun ownership and school prayer, and decry government regulation of everything from food to the environment. If you’re on the left, you’re called a civil libertarian; if you’re on the right, you may call yourself a Tea Partier. Civil libertarians want the government out of their bedrooms; Tea Partiers want the government out of their wallets.

Liberals and conservatives may disagree about the specifics of what they want to be free to choose, but both sides believe that Choice is Good. And of course they are both correct that freedom and individual decision making need to be protected, applauded, and engendered.

But there are a couple of big problems with this fixation on choice.

The first is that we face a host of choices that we’re unsure should “count” as choices. Examples abound. If your boss gives you a choice between losing your job and sleeping with him, that is not a choice that merits deference. In fact, he’s not allowed to give you that choice at all. But it hasn’t been this way for long. As we know from watching *Mad Men*,

such understandings were long implicit in the workplace. What if you're on a bus trip and a policeman stands over you and gives you a choice between getting off and allowing him to search your luggage? Courts have said this is a choice that counts, even though it might not feel like much of a choice. The choice between serving your country in the armed services and being openly gay was seen as valid until recently; now it's not. A choice to engage in consensual sex gets respect—it counts—unless the choice is to have sex for money, in which case it does not count (at least in most parts of the United States). If a woman “chooses” to wear a burqa because of cultural expectations and religious beliefs, such a choice is usually respected (I saw a woman wearing one recently in my local mall), but not in France, where burqas are now banned in public.

All in all, we might think we like choice, but the question of which choices count and which do not is very, very tricky.

The second big problem with our fixation on choice is that both the civil libertarians and the Tea Partiers assume that if the government is not involved, what remains is a sphere of freedom, choice, and personal responsibility. But the reality is different. In fact, the most significant constraints on choice come not from government but from a host of other forces.

For example, we are constrained by our own biology. You can't open a newspaper or magazine these days without learning of some new study showing that our behavior is predictable and explainable as a matter of brain science. There is nothing hotter in the world of science, and no area of science that has captured more of the public's attention, than the study of how our behavior, beliefs, and decisions are profoundly influenced by what goes on in different areas of our brains. It is as if the brain is the new focus of science's age-long effort to explain seemingly random events in the world around us. The more we know about the brain, the easier it becomes to explain and anticipate the seemingly random behavior of any one of us.

Other constraints are just as profound. For example, the influence of culture is easy to ignore, but cultural norms about everything from gender roles to religious mores are pervasive and powerful. Most of us do not even recognize them, much less resist them. In all honesty, did you choose your gender role, or was it “chosen” for you by the culture you live in? Also consider the role of power and authority when it comes to choice. Most of us, most of the time, respect authority figures and do what they say. We follow orders, even when we shouldn’t and even when they’re not really orders. If a scientist told you to shock someone with an electronic pulse as a part of an experiment, would you do it even after it was clear you were causing pain? We’d like to think we wouldn’t, but good evidence says we probably would, and we might even say that we “had no choice.”

A final example of a pervasive influence is the market. Markets are wonderful in allocating goods and services to the highest bidder, and they might seem to embody the very notion of choice. (Coca-Cola recently ran an ad in my hometown newspaper crowing that it offers “over 650 ways to help you achieve a balanced diet and active lifestyle.”) But depending on markets means that if you have few resources, you have little choice. Also, markets limit choice by making manipulation of our choices profitable. Markets also put price tags on things we don’t want to commodify—left to their own devices, markets sweep up all kinds of things we’d otherwise choose to protect from markets, like babies or kidneys.

So we are faced with a tension. On the one hand, our political and legal rhetoric applauds and deifies choice, autonomy, and personal responsibility. On the other hand, we face profound questions about when choice is real, and about the reality of pervasive constraints on our choices. Once we take into account the influences of biology, culture, authority, and economics, the scope of our choices is much narrower than we have long assumed.

This book is about that tension. Can our legal system and our political debates become more sophisticated in their understanding of the nature of human choice? Can we craft public policy so that it takes into account these limits on choice? Can we use the insights we are gaining from neuroscience and psychology to create more opportunities for more of us to make more genuine choices more of the time? Can we find ways to build our individual capacity for choice, while creating the situations in which that capacity can be exercised? Can we use the understanding we are gaining about the real limits we face to help us determine when choices should count and to be more understanding when we or others screw up?

It's possible to be aware of the limits on choice and also believe in the importance of autonomy and personal responsibility. Possible, but not easy. This book is intended to help. I hope you choose to read on.

I

Choices, Choices, Choices

It is not our abilities that show what
we truly are. It is our choices.

—Albus Dumbledore in *Harry Potter and the
Chamber of Secrets* (Warner Bros. 2002)

I always believed that it's the things you don't
choose that make you who you are. Your city,
your neighborhood, your family.

—Patrick Kenzie in *Gone Baby
Gone* (Miramax 2007)

PEOPLE MAKE CHOICES ALL the time. We choose jitter-inducing coffee or waist-expanding frappuccino. Gluttonous SUV or holier-than-thou hybrid. A ponderous grad school life or a nine-to-five rat race. We choose our spouse; we decide whether and when to become a parent; we pick our place of worship. We live the straight and narrow or a life of cheap whiskey, meaningless sex, and bad disco. What we choose defines who we are, and not only according to Dumbledore. Among the actually existing, Eleanor Roosevelt said, “We shape our lives and we shape ourselves . . . And the choices we make are ultimately our own responsibility.” Albert Camus

argued that “life is the sum of all your choices.” William Jennings Bryan offered that “destiny is not a matter of chance, it is a matter of choice.” W. H. Auden opined that “a man is responsible for his choice and must accept the consequences, whatever they may be.”¹

We’re told early in life that we have choice and that we bear responsibility for our decisions. When I was in the third grade, my teacher—let’s call her Mrs. Connor—had a rule that no one could utter a word while in line on the way to the lunch room, library, or restroom. We were required to walk quietly in our eight-year-old bodies from the time we left the classroom until we reached our destination. For someone like me, this was impossible. By the time we made it to the lunch tables, library, or little boy urinals I had invariably begun talking to whatever kid was in earshot about whatever synapse was then firing in my brain.

I was also pretty honest. When we got back to the classroom, Mrs. Connor would often ask who had talked in line that day. I would raise my hand. She would then impose her penalty of making me write sentences recalling the behavioral objective: “I will not talk in line on the way to the lunch room.” I don’t remember how many times she had me write the dreaded sentence—it felt like a thousand but was probably twenty-five or fifty. But whatever it was, the number increased each time I violated the rule. And I grew more righteously indignant, thinking the rule was inconsistent with the pedagogical goals of third grade and out of proportion to the offense. Okay, what I really thought was just that the rule was stupid.

So one day I refused to write the sentences.

This civil disobedience created quite a stir. I was called in for a chat with the school counselor, who reminded me of the importance of following rules. I told her the rule was stupid. The counselor was not impressed by my analysis and sent me back to Mrs. Connor, who wrote a letter to my parents, describing my intransigence.

My dad listened to my side of the story and wrote back to Mrs. Connor that he understood and supported my decision not to write the sentences.

But he included a line I did not know about: “Kent will also accept the consequences of his decision.”

So after reading my dad’s note the next morning, Mrs. Connor took me out to the hallway. In the wisdom of Nixon-era Kentucky public school education, she had decided to change the punishment and paddle me instead. Another teacher stood by to pay witness—if not homage—as Mrs. Connor told me to bend over. She then hit me on my rear five times with a wooden paddle. The paddle had little holes drilled in it to make it extra painful, a design innovation that at the time struck me as quite effective. My rear end bore the consequences of my decision.

I wish I could report that my civil disobedience led Mrs. Connor to see the error of her ways and adjust her rules for hallway conversations, but I have no memory of that. I do remember being more careful about my loose lips on the way to the lunch room. The next year, Mrs. Connor and the school principal recommended me for admission into a “special” educational program that, not coincidentally, was located at another school.

I had learned a lesson. Choices have consequences, some bad—a paddling on my behind—and some unexpectedly better—the special program, which turned out to be quite good. I also learned that I was supposed to accept the consequences of my decisions even if I had not anticipated them.

The notion that we’re defined by, and responsible for, our choices is at the core of the American story. Even eight-year-olds are supposed to understand it. But it’s not just something we teach our children. It is at the center of our political theory and our legal system, as well as our advertising. Our nation’s founding documents base the legitimacy of government on the “consent of the governed.” Our laws are based on the fundamental

notion that people know what they're doing, whether in committing crimes or signing a contract. We idolize choice, using it to market everything from political causes (the right of access to an abortion, to its supporters, is the "right to choose") to fast food ("Have It Your Way").

But what if choice is fake?

What if we have much less ability to choose than we think we do? What if our choices—even the ones we *think* we are making—are so limited that we are less like wild horses on the plains and more like steers in a cattle chute? What if we are driven much more by the demands of economics, culture, power, and biology than we realize?

What if people "choose" outcomes in the same way I "chose" to be paddled when I stood up to my teacher? That is, hardly at all?

I.

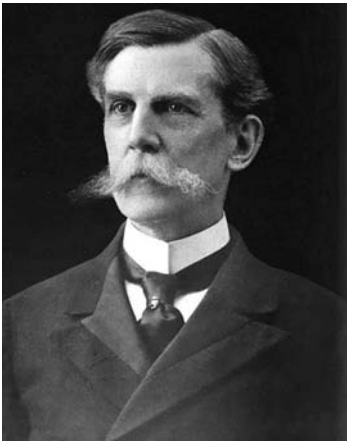
Let's say you're a guy who works with his hands. Your job is in a small factory, painting hatchets. You paint them and then place them on a rack above you to dry. You've worked there for years. One day, your employer installs a new hatchet-drying rack and you quickly notice that the new rack is unstable. If it were to collapse, you'd probably get hurt by the falling newly painted hatchets. So you warn your boss that the new shelf is dangerous and needs to be replaced.

Your boss listens attentively but tells you he's not going to fix the shelf. It's your choice, he says. You can take the risk of working there, or quit. Since you need the job, you shut up and keep working under the rickety rack.

Would you think that you had made a real choice?

This really happened. The shelf really fell, and the hatchet painter, whose name was Henry Lamson, was really hurt. He also really sued.

The Massachusetts court deciding the case ruled for the employer. The opinion was written over a hundred years ago by Oliver Wendell



Oliver Wendell Holmes, Jr.

Holmes, Jr., who would later become one of the nation's most famous Supreme Court justices. He said that Lamson made his choice to accept the risk when he chose to go back to work knowing that the shelf might collapse. The fact that he needed his job to provide for himself and his family did not make his returning to work any less of a choice. "He stayed, and took the risk," said Holmes.² Lamson made his bed, so to speak, every day when he showed up to work.

To modern readers, this old case seems just that—old. We believe employers today have a responsibility to provide safe workplaces. This responsibility is both a legal and a moral obligation, and it's enforced with lawsuits and inspections. The market also helps: the lattes at Starbucks would be less popular if they included the occasional fingertip lost in the coffee grinder. An employer who makes money by risking his employees' lives and limbs is seen as a bad actor who cannot avoid responsibility by suggesting that the employees made their own choices when they came to work in a dangerous environment.

But there's nothing wrong with Holmes's *logic*. Henry Lamson knew and understood the risk he was taking when he stood under that rack every day. He had a way to avoid it, namely quitting. It wasn't a pleasant

or easy choice, but it was a choice. And Holmes thought he should bear personal responsibility for his choice.

Do our modern sensibilities about that reasoning differ, and if so, why? Let's turn from the hatchet in the head and compare it to a baseball in the face.

In 1998, a woman named Jane Costa went with some friends to a Boston Red Sox game at Fenway Park. It was her first time attending a baseball game. Most people who go to Fenway remember it for great baseball—yes, I'm a Sox fan—and cramped, ancient seats that may or may not give you a view of the action and may or may not be covered by sticky substances with a nuclear half-life. Jane Costa will never forget her first game for a different reason. Arriving late, she had just taken her seat behind the home dugout when Red Sox batter Darren Lewis hit a foul ball directly at her. Since the ball was going more than ninety miles an hour when it left the bat, Costa had about a second to move out of the way. She didn't. The ball crushed her face, causing permanent and disfiguring injury. Costa spent many days in the hospital, running up nearly \$500,000 in medical bills.

She sued the Red Sox in a Boston court. That's like suing the Pope in the Vatican, and she received about as much sympathy. The court denied her suit, saying that she should have known the risks of watching baseball, even if she had never been to a game before.³ The court held that the Red Sox had no duty to protect her. She should have taken care of herself.

Here, too, our sense of the case depends on a notion of choice. Most people's reaction is: *Everybody knows you can get hit watching a baseball game. It even says so on the ticket.* Costa had made her choice, and she had to accept the consequences.

But there's something illogical in this. Compared to Henry Lamson's choice in going to work, Jane Costa's so-called choice was much less genuine. While Lamson had a pretty good idea of the risks he faced at work, Costa had very little understanding of the risks she faced when she entered

the ballpark. Most people know that balls can go every which way, and that some will fly into the stands. But few understand how dangerous they can be, and even fewer know that about 300 people are seriously injured each year at American baseball games.⁴ And as for the warning and waiver of liability on the back of the ticket, get real. I'm looking at an old ticket as I write this, and to call the warning "fine print" overstates the size quite a bit. I am reading it with a magnifying glass. Anyway, the last time you were at a baseball game, how many of the people sitting around you were in any condition to perform a sophisticated risk analysis? By the seventh inning, most of us at Fenway are lucky to find our way to the restrooms.

I am not saying that Costa should have won her suit. But the simple act of showing up at the game doesn't mean she understood the risk of getting hit in the face by a baseball. If she bears responsibility for her injuries, it's not because she chose to accept the risk in the same way as Henry Lamson chose to accept the risk of getting hit in the head by a hatchet.

I know of these two cases because I'm a law professor and have discussed them with students for many years. Most of them think Costa should have lost and Lamson should have won. In other words, the guy who actually knew, understood, and chose the risk of being injured should be able to recover for his injuries. The woman who knew nothing of the risk and did not choose to be subject to it should not be able to recover.

What explains these intuitions? There are a number of possibilities, including a belief that work is more important than baseball (I shudder to think), that the responsibility of an employer to one's employees is stronger than that of a baseball club to its fans, or that the costs of precautions in the hatchet factory were minimal and the costs of protecting fans in the ballpark would be too high.

What this means, then, is that even though both cases seem to depend on an examination of the nature of the choices Lamson and Costa made, the results we lean toward have little to do with choice. Or, maybe, what we mean by choice is elastic depending on the situation. If that's true, then

our usual rhetoric about choice and personal responsibility is bound to be too simplistic. It's also bound to lead us to wrong conclusions.

2.

Why does all this matter? Why should anyone care so much about the meaning of choice?

The reason is that it is fundamental to the American sensibility to praise personal autonomy and require individuals to take responsibility for their decisions. We are the cowboy culture, prideful and self-assured.⁵ We respect people's choices and hold them accountable for their decisions.

Except when we don't.

Here's the puzzle. While we laud choice and rail against those who want to avoid the effects of their decisions, we often seem to excuse people from the choices they make. Lamson is not an isolated example.

Take for example Hurricane Katrina, which devastated the Gulf Coast in August 2005. Some experts call it the worst natural disaster in the nation's history. Hardest hit were some 200,000 New Orleans residents who chose to stay in their homes in the face of a mandatory evacuation order issued the day before the storm landed. Most of those who stayed behind were poor and African American. Once the levees broke, their homes were flooded, they lost their possessions, and they were put in serious personal danger. Almost two thousand lost their lives. Those who lived sought refuge or waited for rescue in squalid conditions in the Superdome or elsewhere.

In the days following the disaster, some commentators placed blame for these horrors on the people themselves. Michael Brown, the head of the Federal Emergency Management Agency, said that the high death toll would be "attributable a lot to people who did not heed the advance warnings." Senator Rick Santorum suggested that people who had chosen to stay should be subject to criminal penalties. The conservative *Washington*

Times ran a harsh editorial, saying that “thousands of New Orleans residents . . . failed to show personal responsibility.” Other commentators went further, saying that the victims had put themselves in harm’s way through their poverty, which was their own fault. Talk radio personality Neal Boortz suggested that people around the country should be generous to the victims but not “ignore the behavior that put them in this position in the first place. Hurricane Katrina has shown all of us . . . that poverty is a behavioral disorder.” He piled on: “What we saw in New Orleans was poor people demonstrating the very behavior that made them poor in the first place.”⁶

In this view, the main blame for the horrors of Katrina should be borne by the victims themselves. They made themselves poor, and their decision not to evacuate was simply another example of the same kind of bad choices. In the days immediately following the disaster, this “blame the victim” view had some traction. According to a *Time* magazine poll in the week following the breach of the levees, 57 percent of Americans agreed that “people hit by the hurricane” bore some or a great deal of the responsibility for what went wrong with relief efforts.⁷

This narrative did not last long. The mantra of personal responsibility—mostly seized by conservatives—did not convince most people. Americans generally felt compassion and empathy for the victims in New Orleans, and the dominant story even at the time was more about the bumbling of government officials than about the choice of residents to ride out the storm.

Notice that our collective sympathy was not based on a notion that no choice had been made. Those who stayed behind were indeed making a choice, just as Henry Lamson chose to stay at his dangerous job. The Katrina victims were put in a tough position, and the alternatives were not good. But a choice it was.

Nevertheless, most Americans who watched their televisions in horror in the days after the hurricane seemed to understand the difference

between choice and personal responsibility. Or maybe they realized that for a choice to be genuine and for personal responsibility to make sense, you have to have more information and more alternatives than most New Orleans residents in fact had.

There are lots of reasons why the personal responsibility mantra failed to carry the day. For example, the evacuation order came only twenty hours before the hurricane made landfall. Because of this, as many as one in four New Orleans residents did not hear about the order before the hurricane hit.⁸ A majority of those who stayed had no way to leave, and only 20 percent had relatives or friends they could move in with if they did. Most had no financial wherewithal to rent hotel rooms—only 28 percent had usable credit cards, and only 31 percent had a bank account. A significant percentage of those who stayed behind were caring for a disabled person. And, of course, they had been assured of the integrity of the levee system for years. It's fair to say that many if not most of those who stayed to face Katrina were making a choice only in the most simplistic meaning of that term.

The interesting thing is that these facts did not have to be widely known for the victims to receive the benefit of the doubt. Most Americans seemed to recognize, in a simple but profound way, that the victims of the flood had had few real alternatives and should not be blamed for the “choices” they made. Polls taken a year after Katrina showed that Americans mostly blamed the government and government officials. Only 22 percent put primary blame on the residents.

Sometimes, we seem to excuse people from personal responsibility when they do make choices. About 16 months after Katrina, climbers on Oregon's Mount Hood were stranded by a winter storm that blew in as they tried to scale the summit. CNN streamed live video from the mountain to homes across the nation. State and federal agencies, including the military, picked up the tab for the search. Maybe the climbers had no warning of the storm, but maybe they did. They almost certainly had



Mt. Hood.

more warning of the storm than Jane Costa had of Darren Lewis's foul ball. And climbing such a mountain at any time of year, let alone in December, is a risky proposition. Nevertheless, the fact that they made a bad choice in deciding when and where to climb played no role in the media coverage. Understandably, we watched with dread instead of judgment, fearing the worst. In the end, one climber was found dead, and two others were still missing when the search was called off after two days, with another storm approaching. The news coverage was empathetic, mindful of the impacts of the tragedy on the climbers' families. The climbers themselves were adventurers, admired for their bravery and spirit.

So let me make a weird comparison. Among the most despised individuals in America are fat people. According to studies, young children are more likely to describe overweight playmates as stupid, mean, or ugly. Parents provide less financial support for overweight children pursuing education after high school than for their non-obese siblings. People say that if given a choice between marrying an obese spouse and someone else, they'd rather marry an embezzler, a drug addict, a shoplifter, or a

blind person. More parents would abort a fetus if they knew it would be destined to be obese than if they knew it was mentally retarded. One recent study revealed that someone *standing next to* an obese person is considered less attractive than when standing close to a thin person.⁹

Here in America, where more of us are obese than ever before, we can't look at fat people without cringing. More important, we can't look at fat people without projecting character flaws onto them. Being fat is a failure of decision making, a sign of poor choices.

A few years ago, a couple of New York teenagers sued McDonald's for contributing to their obesity.¹⁰ Their suit was quickly thrown out amid national ridicule. There was nothing more ridiculous, Americans agreed, than fat people suing McDonald's for their french-fry habit. It was as if people around the country said, *It's one thing for fat people to let themselves go. But it's another thing for the fatties to try to shift responsibility for their food addiction to a clown with red hair and yellow coveralls. People know what they are getting when they buy a Big Mac. They are getting cheap, fatty food that could give them a heart attack if they eat a lot of it. If they get fat, develop diabetes, or die of heart disease, they only have themselves to blame.*

But what if we learned that obesity is less a product of genuine choice than it seems? More and more studies show that people are "hard-wired" to eat by deep biological commands. Eating to excess is often a product of the kinds of foods available and how they are marketed, the cultural messages people receive about food, how much money they have, and the availability of safe places to exercise. In other words, what individuals choose to eat is very contextual. As a *New York Times* commentator said, "It's the environment, stupid."¹¹ Fast food companies are intensely aware of how contextual our food choices are, and they are brilliant at taking advantage of situations and environments—low-income neighborhoods, roadside rest stops, or airport concourses—that are conducive to selling unhealthy, fatty foods. (Why do you think there are so many Cinnabon stores in airports?)

I am not saying that people have no control over their muscles when they move a Whopper, chicken wing, or Cheez Whiz nacho from the plate to their mouths. But our decision to eat—even the decision to eat really bad food—is affected by what happens around us and inside us. Fast food companies, supermarkets, cigarette manufacturers, and beer makers know that choices can be affected, and they take advantage of it in decisions about what to put in products, how to advertise them, and where to sell them. People may have about the same level of choice about being obese as Henry Lamson did about getting hit in the head with a hatchet, as Jane Costa did about getting hit in the face with a baseball, and as New Orleans residents did about staying in their homes in the face of Katrina warnings. And fat people probably have *less* responsibility for their size than the climbers on Mount Hood had for being on the slopes of a mountain in December.

3.

So what is going on here? On the one hand, we revel in a culture of personal responsibility and choice. We hold people responsible for things that may or may not be their own doing, or that are due as much to the actions of others as to their own. On the other hand, we often let people off the hook for things that go horribly wrong because of something they did.

Maybe we need to be more consistent in applying notions of personal responsibility. Perhaps we are making a mistake when we excuse people from making bad choices—like to climb a dangerous mountain rather than stay home in the face of a coming storm. Or maybe the opposite is true—perhaps we should be more forgiving than we are, more understanding of the mistakes people make and of constraints that limit or compel their decisions.

This book is about our fixation on choice and our confused responses to it. The rhetoric of choice and personal responsibility is all around us,

yet we have little real understanding of what makes choices valid and worth respecting. Sometimes we can be unforgiving. (*Jane Costa should have known that a hit baseball could ruin her life, even if she had never been to a baseball game. The obese should eat salad and go for a run, even if McDonald's is the only place in their neighborhood they can afford to eat.*) Sometimes our judgments are much gentler. (*The people who stayed behind in New Orleans when the hurricane was coming maybe should've left. But it wasn't all their fault, and they have suffered enough. Give them a break.*)

Our ambivalent responses are not limited to these narrow situations. We face similar puzzles in all kinds of areas—from criminal law to business, from sexuality to religion. This might not be a big deal if the concept didn't mean so much. But it is a central concept—perhaps the *crucial* concept—in all of law, and also fundamental in economics, theology, political theory, marketing, literature, psychology, and philosophy.

Take business contracts, for example. Only contracts you freely enter into are considered valid. The notion of freedom of contract is seen as the chief embodiment in law of the respect for choice. But the law respects contracts only sometimes. Not only are there numerous ways to get out of contracts—such as bankruptcy or government bailouts—there are all kinds of contracts you can't enter into even if both parties want to: for instance, to take jobs that pay less than the minimum wage.

For another example, think about sex. Ever since the Supreme Court ruled in 2003 that laws criminalizing gay sex were unconstitutional, having sex with another consenting individual is a constitutional right—except when it's not. For example, that right does not exist when the other person is closely related to you, or when you're married and you choose to have sex with someone else, or when you choose to have sex with someone because they pay you. In those cases, not only is your choice not a constitutional right, it can be illegal. (Yes, adultery is still a crime in many states.)¹²

A person who has sex with someone who did not freely choose to have sex has committed rape, a heinous crime. But having sex with someone who does freely choose to have sex with you is not a crime, and it can be an extraordinary expression of love or simply a lot of fun. The law has wrestled for decades to try to define free choice in that situation, and the question of sexual consent is among the most serious in all of criminal law. A person's consent may not count if he or she is underage, unless their partner is underage as well. Consent may not count if a person is drunk, even if he or she got drunk in order to lose their inhibitions. In some jurisdictions, consent does not count if a person is under a mistaken impression of who they are with—there are cases where a twin has tricked his brother's wife into having sex with him. In other jurisdictions, shockingly, that isn't rape, presumably because it may be difficult to define how much deception it takes to vitiate consent.¹³ (Would it be rape if a guy gets a woman to come home with him from a bar after telling her he's a movie director when in fact he works at a video store?)

The way the law considers choice varies across different areas of criminal law, creating some odd possibilities. For example, if you are drunk and have sex with someone who is just as drunk as you, their drunkenness may mean that their choice to have sex will not be valid, meaning that you have committed a sexual assault. But in most states you cannot use your own drunkenness as a defense, because the law assumes you intended to commit the crime even if you're inebriated. But then, your choice to have sex may not be valid either, since you were drunk. So it's possible that the other person committed a sexual assault on *you* while you were committing one on them.

In politics, consent and choice are central but disturbingly ephemeral. In democratic societies, the idea of "consent of the governed" has won adherents since Jean-Jacques Rousseau wrote about the "social contract" in the eighteenth century. He argued that "residence constitutes consent,"

meaning that anyone who chooses to live within a jurisdiction can be considered to have agreed to whatever laws that jurisdiction puts forth. That is the theory behind electoral politics: if your candidate doesn't win you still have to obey the laws. It was also the high theory behind the old bumper sticker "America: Love It or Leave It."

One of the nation's leading conservative constitutional law scholars, Steven Calabresi, has taken a similar view. He has written that the gay rights issue should be handled by having gays move to "secular" cities, while "Americans of faith" should "form and live in communities" where they can discriminate openly. Following Rousseau, he suggests that "those who choose to live in a part of the country where their views on homosexuality are in the minority should learn to gracefully put up with a prevalence of opposing views."¹⁴

That is not the correct answer. Mere presence in a jurisdiction cannot really mean that a person agrees with everything that goes on there, and probably does not even mean that every law is justly applied to her. Your presence in a community should not mean that you've waived your right to protest what you consider a violation of your rights. If simply being in a polity means that you consent to be governed by whatever laws then exist, then "consent" has little genuine meaning. We may want to *assume* that people have freely chosen their location, because it makes the theory of governance and state legitimacy work better, but it has little to do with what people actually have in their heads. It is often impossible to see from outside a person's head any difference between free choice—*I am here because I want to be here*—and coercion—*I am here because I have no other choice*. More profoundly, it may even be difficult to figure that out from *inside* a person's head.

Of course Rousseau and Calabresi are correct to say we need a theory of choice and consent to make democracy legitimate. But we don't really know what choice looks like.

The concept of political consent is so elastic that even Osama bin Laden tried to use it to excuse his attacks on American civilians. The 9/11 attacks were justified, he said, because “the American people are the ones who choose their government by their own free will,” and they “have the ability and choice to refuse the policies of their government.”¹⁵

Choice is an issue in religion as well. Tatian the Syrian explained in A.D. 170 that “the just man [is] deservedly praised for his virtuous deeds, since in the exercise of his free choice he refrained from transgressing the will of God.” A couple of centuries later, St. Augustine wrote, “The commandments of God themselves would be of no avail to man unless he had the free choice of the will whereby by fulfilling them he could attain the promised reward.” Twentieth-century Christian thinker C. S. Lewis said, “All that are in Hell, choose it. Without that self-choice there could be no Hell.”¹⁶

In my family’s Baptist faith, one is “saved” when one affirmatively chooses the spiritual path after the “age of accountability,” which is when one can make choices for oneself. I was “born again” when I was eight. Looking back on it, I’m not sure I made that decision with any more thought or understanding than my choice of DC comics over Marvel. I certainly have different beliefs now about both religion and comics.

There are hundreds of other examples of the difficulties surrounding choice. Consent transforms an illegal police search into a legal one. A person injured in an accident can sue the person responsible, unless the victim had chosen to accept the risk. (Hence the waivers we all have to sign when we do anything from hiring a scuba instructor to joining a health club.) With “informed” consent, a doctor can perform life-saving surgery; without consent, the patient dies (unless he or she is somehow unable—rather than unwilling—to give consent, in which case consent is assumed).

So the notions of choice are everywhere, but what we mean by those words and the impact they have vary across situations. One purpose of

this book is to examine the different ways we think of choice and try to make sense of them. In the end, we will discover that we are better than it appears in figuring out when choice should count and when it should not. We actually have a more nuanced view of choice than our rhetoric about choice and personal responsibility might suggest. We are well attuned to the fact that some choices are compelled, that alternatives are limited, and that people often do not have the information needed to make good decisions. We also know—at least at some level—that our choices are often manipulated by marketing and fraud, even if we don't always know how. As it turns out, our intuitions work pretty well, much of the time. We hold people accountable for “real” choices and give them a break when the choices aren't “real,” or when their situation is more someone else's fault than their own. In the end, we are fundamentally decent and generous about choice.

This book will explore what most of us seem to understand intuitively, namely that choices are constrained, manipulated, and forced upon us. I will flesh out our intuitions and discuss the effects of biology, economics, power, and culture on people's choices. We will also discover areas where our intuition points us in the wrong direction. Obesity is one example, the Mount Hood climbers another.

This book will also look into why, if choice is so malleable and indistinct, we hear so much about it and its cousin personal responsibility. In fights about issues as diverse as health care reform, gay rights, educational policy, poverty, disaster relief, and abortion, why does so much of the debate turn on arguments about choice and personal responsibility? One answer is the rhetorical power of choice in a culture of individualism. We love to *think* we all have an abundance of choices and that we should take personal responsibility for the choices we make.

But there is a deeper reason choice is the preferred frame for so many political battles. In most cases, the rhetoric of choice gives the advantage to those in power. It is the rhetoric of the powerful. Saying that “people

should bear responsibility for the choices they make” helps the powerful and hurts the powerless more often than not. Choice is a ready-made frame with which to oppose movements fighting for social justice, civil liberties, or economic rights, because opponents can point to people’s existing behavior as representing a choice—whether to work at Walmart, to live on the street, or to live in a country where the government taps one’s phone. In facing such assertions of choice, the person fighting injustice that occurs within the status quo must argue either that people are not really making the choices they seem to be making, that the choices made do not reflect the true preferences of the actors, or that the choices should not be respected. Those are hard arguments to make. This book will help make them, pointing out that people often have much less choice than we (and sometimes they) assume.

But this book will not take this state of affairs, this lack of choice, as unchangeable. I will also ask how we make choice more real. How can we give people the tools to take personal responsibility seriously? How should the law and public policy take into account the limitations on human decision making we know exist? How can individuals and law help build choice? Perhaps ironically, once we understand and take heed of our limitations as human beings, we can use this knowledge to become better decision makers and more confident and knowledgeable choosers.