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CONSTRUCTING AUTONOMY

Bailey Kuklin*

I. INTRODUCTION

This article examines the meaning and reach of autonomy. More particularly, it analyzes the means by which personal autonomy boundaries are established and, relatedly, the notion of crossing an autonomy boundary, which gives rise to an autonomy invasion. Plausible autonomy boundaries between persons are looked at mainly from an individualistic, deontic viewpoint. I take the perspective of persons making personal claims against one another, typically in light of existing legal, moral, and social norms. The autonomy claims of entities other than individuals, such as collectives (e.g., the state, corporations), are set aside because they are not natural persons with independent moral status.¹

The currently preponderant strain of legal analysis generally embraces an internal point of view. The dominant internal orientation of modern tort scholarship is especially noteworthy. Tort

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¹ See MICHAEL S. MOORE, PLACING BLAME 37 (1997); Jody S. Kraus, *Philosophy of Contract Law*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 687, 696 n. 20 (Jules Coleman & Scott Shapiro eds., 2002).

scholars who base their theories on corrective justice, such as Ernest Weinrib, Jules Coleman, and Arthur Ripstein, identify and mainly support the corrective justice principles that they see as immanent in existing tort doctrine, and typically reject inconsistent tort doctrine or principles as incoherent.² Tort scholars with an economic orientation who look to the Hand formula as signaling the central organizing principle of tort law negligence, such as Richard Posner, suggest that the formula implies that the goal of efficiency is recognized as immanent in existing tort law, and commonly dismiss inconsistent authority as counterproductive.³ Criminal law and contracts scholars, other than those with a strong law and economics commitment, do not seem to emphasize a single, identified immanent principle of their legal subjects as much as do most torts scholars.⁴ They often acknowledge the existence or acceptability of polycentric values.⁵

² Weinrib, the leader of this orientation, in focusing on “the relationship between the characteristic aspects of tort law,” adopts “an intrinsic ordering, in which each aspect contributes to the coherence of the whole.” Ernest Weinrib, *Introduction*, in TORT LAW xi, xiii (Ernest Weinrib ed., 1991). See Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQ. L. 107, 110 (2001) [hereinafter Weinrib, *Correlativity*] (embracing “justifications internal to tort law”); JULES COLEMAN, *THE PRACTICE OF PRINCIPLE* xiv-xv (2001) (criticizing economic analysis as an account of the scheme of practical inference that is reflected in the relationship among [“concepts central to tort law”]). For criticism of the corrective justice tort theorists’ view of what is immanent in tort law, see Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003). Contrary to the contention of Goldberg and Zipursky that tort law is better explained by their theory of “civil recourse” than by corrective justice, Gardner tellingly argues that they cannot properly keep corrective justice out of their tort picture. See John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U. L. REV. 43 (2011). Finally, for the claim that “the concept of corrective justice is neither capable of unifying tort law nor of demarcating it from other legal branches,” see Hanoch Sheinman, *Tort Law and Corrective Justice*, 22 LAW & PHIL. 21, 21 (2003) [hereinafter Sheinman, *Tort Law*].

³ See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 371 (1990); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). The recent Restatement (Third) of Torts takes the same approach. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 3 (Negligence) (2011).

⁴ There are exceptions. See, e.g., Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 72, 96 (Gerald J. Postema ed., 2001); Jules L. Coleman, *Mistakes, Misunderstandings and Misalignments*, 121 YALE

In contrast to this current strain of legal thought, my approach looks outside existing law to the overarching principles of individual rights however they may align with today's law. These principles stem from Immanuel Kant's categorical imperative. This inspiration from Kant reflects the predominant thinking of modern legal, moral, and political commentators. Writers as diverse as John Rawls and Robert Nozick ground their fundamental conceptions on Kant's works. In seeking a rounded understanding of personal autonomy, reliance on the lessons of existing law is of limited usefulness. There is little reason to believe that the body of private common law would reflect a coherence that is ascribed to it by some commentators. It is still largely influenced by the old writ system. This system emerged as a means to obtain the jurisdiction of the courts of the English sovereign. As some commentators have made so clear, it was not designed for, nor did it ever achieve, a comprehensive, log-

L.J. 541, 548 (2012) ("[T]ort law . . . is independent of any particular theory . . . , aim or goal.").

⁵ "Pluralist [contract] theories attempt to respond to the difficulty that unitary normative theories ["such as autonomy or efficiency"] pose by urging courts to pursue efficiency, fairness, good faith, and the protection of individual autonomy." Alan Schwartz & Robert E. Scott, *Contract Theory and the Limits of Contract Law*, 113 YALE L.J. 541, 543 (2003) (footnoting citations to "a broad discussion of this problem"). See, e.g., Friedrich Kratochwil, *The Limits of Contract*, 5 EUR. J. INT'L L. 465, 469 (1994). But see, e.g., CHARLES FRIED, *CONTRACT AS PROMISE* (1981), Randy E. Barnett, *A Consent Theory of Contracts*, 86 COLUM. L. REV. 269 (1986).

To briefly speculate, criminal law may be drawn to deterrence – a utilitarian, consequentialist principle – for various reasons. For some egregious crimes, such as murder and rape, adequate compensation is typically beyond reach. For some other crimes, such as tax, draft, or jury-duty evasion, or securities fraud, particular harmed persons may not be identifiable. For some other crimes, such as environmental degradation, harmed individuals may not be entitled, or be sufficiently incented, to bring a private claim in tort. Since these types of crimes are not adequately requitable by private parties, more can be said for attempting to deter them altogether. On the other hand, the key reasons may be criminal law's historical roots. The Sovereign was eager to avoid disruptions of her realm by securing peace among her subjects. The subjects demanded this also. As for contract law, deontic promisekeeping, reliance, and expectation maxims are surely on the surface, but so also is the reality that contracts largely involve commerce. Commerce is promoted by efficiency. This calls for explicit attention.

ical ordering of the private law.⁶ The common law is complete in the sense that every issue brought before the courts can be resolved one way or another. But in light of its quirky and historically contingent origins, it would be amazing if the substantive principles and doctrines of the common law entirely harmonized.⁷ At best, the common law would take a very long time to evolve towards and achieve harmony because of the braking constraints of the doctrine of stare decisis and the ebb and flow of the moral and political inclinations of the law's agents. Even with an overall trend towards coherence in the common law, which I do not deny, path dependence would point toward a limited orbit of likely end points short of a radical reorientation of the common law process. Akin to Pareto optimality, the common law could reach a state of completeness and coherence without satisfying any ideal body of substantive principles. One should be very doubtful about finding a fully justifiable moral "ought" in the "is" of the common law.

A somewhat comparable tale can be told about the origins and development of criminal law doctrine.⁸ Here, however, we should

⁶ See, e.g., JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW* (2006) [hereinafter GORDLEY, *FOUNDATIONS*]. Gordley makes a powerful case for the haphazard incoherence of modern private law owing to its quirky historical development. What is of central importance to rational private law development, he and others point out, is to attend to "what ultimately matters," that is, "the interests we wish to protect." *Id.* at 173. "The law did not begin with a theory [of tort law]. It has never worked one out." OLIVER W. HOLMES, JR., *THE COMMON LAW* 63 (Mark D. Howe ed., 1963) (1881). See ROBERT STEVENS, *TORTS AND RIGHTS* 299-300 (2007); Jules L. Coleman, *Legal Theory and Practice*, 83 GEO. L.J. 2579, 2604 (1995); David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665, 665-66 (1985).

⁷ To pick an example, consider the tort doctrine of defamation, much of "which makes no sense. It contains anomalies and absurdities for which no legal writer ever has had a kind word The explanation is in part one of historical accident and survival, in part one of the conflict of opposing ideas of policy" W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 771-72 (5th ed. 1984) (footnote omitted).

⁸ "It would clearly be absurd to try to explain any existing penal system, whose historical development reflects an unsystematic diversity of competing influences, in terms of some unitary set of coherent values and purposes" R. A. DUFF, *TRIALS AND PUNISHMENTS* 5 (1986). "[I]t may be that we face an irreducible conflict of val-

expect greater, though perhaps not complete, order. The body of criminal law has historically been subject to comprehensive adjustments through legislation. Subject to constitutional limitations, the legislative process allows for giant steps, backwards and forwards, and the opening of entirely new avenues, such as those needed to cope with abuses relating to the emerging forms of power being generated by the computer revolution. None of these cautions regarding the origin and growth of the law goes to reject the claim that conceptions of corrective justice and retribution are, at least partially, immanent in the private and criminal law.⁹ Bypassing the powerful arguments by legal economists and other commentators that additional principles are, and should be, immanent in the law, the problem remains that corrective justice and retribution are formal concepts only. They instruct us on limitations to what we may properly do, but they do not tell us exactly what we should do.

The central orientation of my search for the meaning of autonomy is Kantian, with needed and enlightening help from Aristotle. In considering the range of an individual's plausible deontic claims, I will identify points at which normative choices may or must be made when adopting substantive principles and, when they are violated, requital principles for the autonomy invasions. Atop a strictly formal, Kantian foundation, just law allows for a considerably broader range of acceptable doctrine and precepts than is generally acknowledged. Under this orientation, political obligation (the duty to obey the law) must be grounded on individualistic principles alone, such as consent. For instance, to the claim for requital since "you broke the law," the claimer may properly respond, "but I am not obligated to obey that particular law. I did not consent to it." Although Kant insisted that one has a moral duty to obey universalized laws, his position involves a nonconsensual so-

ues, which make irreconcilably conflicting demands on our attempts to envisage and develop more adequate legal institutions." *Id.* at 6.

⁹ "[T]ort doctrine is deontological in its structure." Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811, 1820 (2004) (footnote omitted).

cial contract imposed by the state.¹⁰ For purposes of the strongly individualistic analysis here, a nonconsensual grounding for a social contract is deemed inadequate.¹¹

Here is a roadmap of what follows. In the private sphere primarily addressed, autonomy boundaries, within which is one's autonomy space, are established by each person's adopted deontic maxims (e.g., "do not batter another person"). Under the common, formal interpretation of the categorical imperative,¹² an individual's chosen, substantive, first-order maxims may vary from person to person. Each individual's set of maxims must be complete, in that it addresses all possible conflicts with the interests of other persons, for otherwise the autonomy boundaries are not fully drawn and thereby leave gaps. Each set of maxims must also be coherent, that is, all the maxims in the set must be consistent with one another.¹³ In adopting maxims to establish autonomy boundaries, two sorts of freedoms are balanced and delineated: first, the liberty to choose and act;¹⁴ and second, the security, essentially, from being acted

¹⁰ Kant develops the "idea of the original contract" which is nonconsensual. See JOHN RAWLS, *Justice as Fairness*, in COLLECTED PAPERS 47, 71 n.22 (Samuel Freeman ed., 1999); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 198-204 (2001) [hereinafter RIPSTEIN, *FORCE AND FREEDOM*].

¹¹ While remaining a Kantian, I am not alone in departing from some of Kant's reasoning and plausible implications. "Few, if any, philosophers who work in a Kantian tradition today accept all of Kant's doctrines, and among them there is a considerable diversity in both their interpretations of Kant and their preferred ways of developing Kantian theory." THOMAS E. HILL, JR., *RESPECT, PLURALISM, AND JUSTICE* 1, 1 (2000).

¹² See, e.g., G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* 89-90 (T.M. Knox trans., 1952) (1st ed. 1821); JEFFRIE G. MURPHY, *KANT: THE PHILOSOPHY OF RIGHT* 40 (1970) [hereinafter MURPHY, *THE PHILOSOPHY OF RIGHT*] ("[T]he Categorical Imperative is itself no more a source of maxims or purposes than a judge is a source of litigation.").

¹³ In principle, every agent could choose the same set of maxims. A totalitarian regime may aim for this. So might a heavenly one.

¹⁴ "Freedom is valuable for at least two different reasons. First, more freedom gives us more *opportunity* to pursue our objectives - those things that we value Second, we may attach importance to the *process* of choice itself." AMARTYA SEN, *THE IDEA OF JUSTICE* 228 (2009) [hereinafter SEN, *IDEA OF JUSTICE*]. See AMARTYA SEN, *RATIONALITY AND FREEDOM* 10 (2002) [hereinafter SEN, *RATIONALITY*]; AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 17 (1999) [hereinafter SEN, *DEVELOPMENT AS FREEDOM*].

upon by others. Once a person's autonomy space is plotted, she may adjust its boundaries by consent, within limits (e.g., no slavery contracts), by granting another party rights and, correlatively, assuming duties. When an autonomy boundary has been impermissibly crossed, that is, there has been an autonomy invasion producing a wrongful harm (e.g., a battery), requit is available to the invader. This response requires the invocation of adopted, requit, second-order maxims. In the private law the requit standards are conceptions of corrective justice,¹⁵ while in the public (criminal) law, they are conceptions of retribution or distributive justice. For the violation of a first-order maxim against battery, for instance, an invader may seek damages under a second-order requit maxim based on corrective justice. Because independent claims of the state are here discounted, conceptions of corrective justice and retribution focus entirely on individual rights and duties.

The conceptions of corrective justice that are adopted, like the substantive maxims that initially mark autonomy boundaries, are matters of individual choice that, again, must simply meet the categorical imperative and establish a complete and coherent set of requits to cover all the possible invasions of autonomy space determined directly by substantive maxims. For example, there could be one or more remedial conceptions of corrective justice to deal with harmful ultrahazardous activities, and other ones to deal with negligence, as where distinct degrees of wrongful risk are accounted for. Furthermore, the conceptions may vary according to the differences in the ensuing harms, such as physical versus psychic harms. The combination of first- and second-order maxims establishes a person's overall autonomy space. Because these maxims are matters of personal choice, the maxims adopted by different individuals may conflict. A claimant may charge another person with invading her autonomy space by violating one of her first-order maxims. The

¹⁵ "From the perspective of corrective justice, the point of a tort action is to undo the injustice that the defendant has done to the plaintiff." Weinrib, *Correlativity*, *supra* note 2, at 108. For the role of corrective justice in contract theory, see, e.g., Peter Benson, *The Expectation and Reliance Interests in Contract Theory: A Reply to Fuller and Perdue*, 1 *ISSUES IN LEGAL SCHOLARSHIP* 1, art. 5 (2001).

claimant may properly respond that he has not adopted this particular maxim and that his conduct fully meets the full set of maxims consistent with the categorical imperative that he has personally adopted. Consequently, as a practical matter, the state cannot be entirely excluded from choosing maxims and imposing them on individuals. The state must act as an arbiter of inconsistent sets of maxims as a second-best solution to an otherwise intractable problem. Similarly, for retribution the state must be the arbiter of conflicting claims and the implementer of apt punishment. But this second-best solution is resorted to only when unavoidable, for it runs contrary to strict individualistic principles.

In unpacking common conceptions of corrective justice and retribution, there are three key notions that are often, if not always, elements: harm, wrongfulness, and blameworthiness.¹⁶ For example, "when one wrongfully harms another person by blameworthy conduct, she is to compensate that person to the extent of the wrongful harm." As in this conception of corrective justice, one or more of the key notions may relate to whether reparation is called for and, if met, affect the measure of that reparation. Furthermore, specification of the notions may vary from context to context, as where, say, a greater degree or type of blameworthiness is required to recover for purely psychic harms than for purely physical harms. Harms are, in short, of four kinds: physical, economic, psychic, and dignitary. This last kind of harm, dignitary, has not received extensive attention in existing law, though dignity is central to Kant's development of practical reason.¹⁷ It does receive much attention here. Wrongfulness, or wrongful harm, occurs when a substantive,

¹⁶ More generally, "corrective justice is itself a contested concept, loose enough to invite continual debate, valuable enough to be worth fighting over, and comprehended enough to produce some shared agreement on its content." Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and Tort Law*, 38 UCLA L. REV. 143, 146 (1990). See Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 197 (2000).

¹⁷ "In the kingdom of ends everything has either a *price* or a *dignity* . . . [W]hat . . . is raised above all price and therefore admits of no equivalent has a dignity." IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, in *PRACTICAL PHILOSOPHY* 41, 84 (Mary J. Gregor ed. & trans., 1996) (1785).

first-order maxim is violated, as, say, when an agent purposely puts another person at an unreasonable risk of harm. Blameworthiness refers to two notions. First, it refers to the extent to which an actor is responsible for the conduct in question. This responsibility turns on her relative freedom from ignorance and coercion when choosing the act or omission. The more she knows about the potential consequences of her considered conduct, the freer she is to make an unencumbered choice, the more she is responsible and blameworthy for the wrongful harms that ensue. Second, blameworthiness refers to the actor's mental state and conduct regarding the invadee. This blameworthiness is gauged by the degree of her disrespectfulness of the invadee's dignity. Fellow moral agents are entitled to equal respect. Depending on the particular adopted maxims, both forms of blameworthiness may affect the delineation of autonomy space.

Once an agent has worked out a deontically acceptable range of meanings for the three key moral notions, she is ready to consider and adopt a full set of first- and second-order maxims. This article aims to help her get to that point of being ready to work out her own autonomy boundaries. I leave it to future articles to help her further along. The bottom line, it will be seen, is that the deontic constraints on delineating autonomy boundaries are much looser than is commonly supposed. A very wide range of potential rights and duties are consistent with the claims of individualism.

II. DEONTIC FOUNDATIONS

Deontic notions of autonomy are associated with Kant's analysis of practical reason,¹⁸ which leads to his categorical imperative. The gist of Kant's reasoning, for our purposes, has two prongs: first, a person, by virtue of her rationality capabilities,¹⁹ is an ethical, au-

¹⁸ *Autonomy* is ... the ground of the dignity of human nature and of every rational nature." *Id.* at 85. See SUSAN M. SHELL, KANT AND THE LIMITS OF AUTONOMY 2 (2009) ("One could say that Kant put individual 'autonomy' on the map.').

¹⁹ See ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 199 (1999) [hereinafter WOOD, KANT'S ETHICAL THOUGHT] ("Kant rejects the traditional definition of the human being as *animal rationale*, allowing only that the human being is an *animal rationabilis* – that is, a being *capable* of acting rationally but not a being that necessarily or even

tonomous being entitled to have her dignity respected by others;²⁰ and second, a person, as an ethical being, also has the duty to respect the autonomy, the dignity, of other moral agents.²¹ Kant identified various forms of the categorical imperative, all of which he declared to be equivalent.

In contrast to the original formulation of the categorical imperative, "*Act only in accord with those maxims through which you can at the same time will that they should be a universal law*", which can be called the Formula of Universal Law, [Kant's] more "intuitive" formulations are the Formula of Humanity as an End in Itself, "*So act that you always at the same time use humanity in your own person as well as in the person of every other as an end, never merely as a means*", and the Formula of the Realm of Ends ... which requires "*that the will be able to regard itself as through its maxims at the same time*

typically exercises this capacity successfully."). See also MURPHY, THE PHILOSOPHY OF RIGHT, *supra* note 12, at 29; Thomas E. Hill, Jr., *The Kantian Conception of Autonomy*, in THE INNER CITADEL 91, 97 (John Christman ed., 1989).

²⁰ "[A] human being regarded as a person ... is [] to be valued ... as an end in itself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world." IMMANUEL KANT, THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY 353, 557 (Mary J. Gregor ed. & trans., 1996) (1797) [hereinafter KANT, THE METAPHYSICS OF MORALS]. See PAUL GUYER, KANT ON FREEDOM, LAW, AND HAPPINESS 154, 203, 239-40 (2000); THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY 10, 47-48 (1992) [hereinafter HILL, JR., DIGNITY AND PRACTICAL REASON]; THOMAS E. HILL, JR., *Social Snobbery and Human Dignity*, in AUTONOMY AND SELF-RESPECT 155, 169 (1991) [hereinafter HILL, JR., *Social Snobbery*] ("moral virtue is not a prerequisite of dignity; even the grossly immoral have it"); WOOD, KANT'S ETHICAL THOUGHT, *supra* note 19, at 121; Diana T. Meyers, *Self-Respect and Autonomy*, in DIGNITY, CHARACTER, AND SELF-RESPECT 218, 229 (Robin S. Dillon ed., 1995).

²¹ See STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT 14 (2006). See also MEIR DAN-COHEN, HARMFUL THOUGHTS 157-59 (2002) [hereinafter DAN-COHEN, HARMFUL THOUGHTS] (analyzing dignity and autonomy as independent notions).

universally legislating" for a realm of equally qualified co-legislators.²²

While, like others, I do not claim that Kant would go along with all of the positions taken in this article,²³ the notions of the right to respect, as well as the duty to respect, stem from Kantian roots.²⁴ What I grow from these roots may not be fully embraced by Kant himself.

Having met the necessary threshold of rationality capability,²⁵ a person's autonomy commands respect. Michael Sandel puts Kant's idea of autonomy as, "To be free is to be autonomous, and to be

²² GUYER, *supra* note 20, at 142 (citations omitted). For another translation with a succinct explanation, see Allen W. Wood, *General Introduction*, in IMMANUEL KANT, PRACTICAL PHILOSOPHY viii, xxiii-xxiv (Mary J. Gregor ed. & trans., 1996). That treating people as a end in themselves may be distinguished from not treating them as a mere means, see F.M. KAMM, INTRICATE ETHICS 13 (2007); MICHAEL ROSEN, DIGNITY 81-85 (2012); T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME ch. 3 (2008) [hereinafter SCANLON, MORAL DIMENSIONS] ("Means and Ends").

²³ See HILL, *supra* note 20, at 1 ("Few ethical theories, if any, have been ... as variously interpreted as Immanuel Kant's."); ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY xi (1989). "Kant makes many conflicting claims . . . [and] 'is the least exact of the great thinkers.'" 1 DEREK PARFIT, ON WHAT MATTERS xlii (2011) (quoting Norman Kemp Smith, *Kant's Method of Composing the Critique of Pure Reason*, 24 PHIL. REV. 526, 527 (1915)).

²⁴ "Kantian ethics, [as distinguished from Kant's *ethics*.] is an ethical theory formulated in the basic spirit of Kant, drawing on and acknowledging a debt to what the author of the theory takes to be his insights in moral philosophy." ALLEN W. WOOD, KANTIAN ETHICS 1 (2008) [hereinafter WOOD, KANTIAN ETHICS]. See JOHN RAWLS, *Kantian Constructivism in Moral Theory*, in COLLECTED PAPERS 303, 304-05 (Samuel Freeman ed., 1999).

²⁵ Rationality "is a normative concept that can take on various meanings according to differing moral and political judgments about how society should govern itself." Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 254 (2000) [hereinafter Morse, *Rationality*]. For guidance to the meaning of rationality, both "thick" and "thin" versions, see *id.* at 254-55 ("Rationality is of course a continuum concept . . ."). "All formal definitions [of rationality] found in the literatures of economics, philosophy, and psychology are contestable" Stephen J. Morse, *Diminished Capacity*, in ACTION AND VALUE IN CRIMINAL LAW 239, 248 (Stephen Shute et al. eds., 1993) [hereinafter Morse, *Diminished Capacity*].

autonomous is to be governed by a law I give myself.”²⁶ There are many meanings of “autonomy.”²⁷ Put most simply, to be autonomous is to be one’s own person, to be directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one’s authentic self.”²⁸

All conduct by one agent imposes limitations on other persons.²⁹ Indeed, the very existence of an agent imposes limitations on

²⁶ MICHAEL J. SANDEL, JUSTICE 214 (2009). “[T]he most basic autonomy-right is the right to decide how one is to live one’s life, in particular how to make the critical life-decisions” JOEL FEINBERG, HARM TO SELF 54 (1986) [hereinafter FEINBERG, HARM TO SELF]. See, e.g., LAWRENCE HAWORTH, AUTONOMY 1 (1986) [hereinafter HAWORTH, AUTONOMY]; CHRISTINE M. KORSGAARD, THE CONSTITUTION OF AGENCY 31, 62 (2008); JOHN RAWLS, A THEORY OF JUSTICE 222 (rev. ed. 1999) [hereinafter RAWLS, THEORY OF JUSTICE]; ANDREWS REATH, *Legislating the Moral Law*, in AGENCY AND AUTONOMY IN KANT’S MORAL THEORY 92, 96 (2006); Marina A.L. Oshana, *Personal Autonomy and Society*, 29 J. SOC. PHIL. 81, 82 (1998); James S. Taylor, *Introduction*, in PERSONAL AUTONOMY 1, 1, 4-23 (James S. Taylor ed., 2005).

²⁷ “[T]here is no uniform understanding about what autonomy is.” THOMAS E. HILL, JR., *Autonomy and Benevolent Lies*, in AUTONOMY AND SELF-RESPECT, *supra* note 20, at 25, 25. See THOMAS E. HILL, JR., *The Importance of Autonomy*, in AUTONOMY AND SELF-RESPECT, *supra* note 20, at 43, 44 (“the relations among the different senses of autonomy are staggeringly complex”); ONORA O’NEIL, BOUNDS OF JUSTICE 29 (2000); MARINA OSHANA, PERSONAL AUTONOMY IN SOCIETY 10-14, 77-88, 178 (2006) [hereinafter OSHANA, PERSONAL AUTONOMY]; Gerald Dworkin, *The Concept of Autonomy*, in THE INNER CITADEL 54, 54 (John Christman ed., 1989); Thomas May, *The Concept of Autonomy*, 31 AM. PHIL. Q. 133, 133 (1994) (“the concept remains vague at best”). For a range of meanings, see, e.g., GERALD DWORIN, THE THEORY AND PRACTICE OF AUTONOMY 5-6, 34-35, 108 (1988) [hereinafter DWORIN, THEORY AND PRACTICE]; FEINBERG, HARM TO SELF, *supra* note 26, at 27-97; JOSEPH RAZ, THE MORALITY OF FREEDOM 369-429 (1986); WOOD, KANTIAN ETHICS, *supra* note 24, at 106-22; Tom L. Beauchamp, *Autonomy and Consent*, in THE ETHICS OF CONSENT 55, 61-74 (Franklin G. Miller & Alan Wertheimer eds., 2010) [hereinafter Beauchamp, *Autonomy and Consent*]; PERSONAL AUTONOMY (James S. Taylor ed., 2005).

²⁸ John Christman, *Autonomy in Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/fall2009/entries/autonomy-moral/> (last visited Aug. 7, 2013).

²⁹ See GEORGE KATEB, HUMAN DIGNITY 100 (2011) (“Life is affecting and being affected, influencing and being influenced.”).

others if for no other reason than that two people cannot occupy the same place at the same time.³⁰ Increasing liberty for one person typically decreases security for another, and vice versa, as where an agent's freedom to swing her hand normally ends somewhere short of another person's nose.³¹ So the question is not whether there are limitations to one's autonomy space, one's freedom, but rather what the boundaries will be and how they are to be drawn.³² Liberty and security interests require tradeoffs that must be balanced.³³ Where

"Conduct" means either action or inaction, as where a person is allowed or obligated to turn over resources, or is denied the opportunity to do so. See PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 78 (2002) [hereinafter CANE, RESPONSIBILITY IN LAW].

³⁰ More generally, "[t]he interests of different persons are constantly and unavoidably in conflict . . ." JOEL FEINBERG, HARM TO OTHERS 35 (1984).

³¹ Locke emphasizes the security provided by the social contract. "The Reason why Men enter into Society is the preservation of their Property.... [They authorize laws] to limit the Power, and moderate the Dominion of every Part and Member of the society." JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT, in TWO TREATISES OF GOVERNMENT 265, 412 (Peter Laslett ed., 1988) (1690). "[T]he people ... provide for their own Safety and Security, which is the end for which they are in Society." *Id.* at 412-13. Mill gives security a central place in his moral and political principles. See JOHN STUART MILL, UTILITARIANISM, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 1, 67 (1st ed. London 1863). "Mill sees security (understood in [an] expansive way) as both a precondition and a defining feature of a civilized society." Glyn Morgan, *The Mode and Limits of John Stuart Mill's Toleration*, in TOLERATION AND ITS LIMITS 139, 151 (Melissa S. Williams & Jeremy Waldron eds., 2008). Blackstone, less expansively than Mill, defines "the absolute rights of each individual . . . to be the right of personal security, the right of personal liberty, and the right of private property . . ." 3 WILLIAM BLACKSTONE, COMMENTARIES *119 (1768). See H.L.A. HART, THE CONCEPT OF LAW 190 (1961); CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 99 (1996) [hereinafter KORSGAARD, CREATING THE KINGDOM]; René Demogue, *Analysis of Fundamental Notions*, in MODERN FRENCH LEGAL PHILOSOPHY 345, 418 (Mrs. Franklin W. Scott & Joseph P. Chamberlain trans., 1921). "Without such [personal] security society loses most of its value." Beach v. Hancock, 27 N.H. 223, 229 (1853).

³² "[T]he idea of freedom [is] an inescapably pluralist notion." SEN, RATIONALITY, *supra* note 14, at 658. See WOOD, KANTIAN ETHICS, *supra* note 24, at 123-41.

³³ "To protect certain kinds of freedom and suppress other kinds is one of the principal functions of a legal system . . ." MORRIS R. COHEN, *Freedom: Its Meaning*, in THE FAITH OF A LIBERAL 161, 163 (1946). Commentators have declared that various legal principles found in tort, contract, and criminal law are designed to fairly bal-

the line is drawn may be a matter of distributive justice.³⁴ Be that as it may, the balance in a Kantian regime must accord with the dignity principle of the categorical imperative.³⁵ When a person violates the established balance, requiting it is a matter of corrective justice or retribution. The interrelationship among these three types of justice strikes me as more intricate than this commonly ascribed division of labor. Principles of distributive justice may well mark an initial, *prima facie* tradeoff between liberty and security, but the associated conceptions of corrective and retributive justice ultimately affect that balance. For example, if an agent wrongfully hits another person, whether that wrong is requitable by imprisonment, by damages for all harms, foreseeable or not, by damages for the foreseeable physical harm only, or is fully satisfied by a formal apology,

ance liberty and security interests. See, e.g., WILLIAM LUCY, *PHILOSOPHY OF PRIVATE LAW* 407-08 (2007) (contract); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 6-7, 55 (1999) [hereinafter *EQUALITY, RESPONSIBILITY*] (tort and criminal law); Jules L. Coleman, *Second Thoughts and Other First Impressions*, in *ANALYZING LAW* 257, 304 (Brian Bix ed., 1998) (fault principle); Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, in *PHILOSOPHY AND THE LAW OF TORTS* 183, 213 n.37 (Gerald J. Postema ed., 2001) (ditto); Gerald J. Postema, *Introduction*, in *PHILOSOPHY AND THE LAW OF TORTS* 1, 6 (Gerald J. Postema ed., 2001) (negligence and strict liability); Arthur Ripstein, *Three Duties to Rescue: Moral, Civil, and Criminal*, 19 *LAW & PHIL.* 751, 761 (2000) (reasonable person standard); Arthur Ripstein, *Closing the Gap*, 9 *THEORETICAL INQ. L.* 61, 69-72 (2007) (ditto). See Anita Bernstein, *The Communities That Make Standards of Care Possible*, 77 *CHI.-KENT L. REV.* 735, 736 n.5 (2002) (citing Jules L. Coleman, John C.P. Goldberg & Benjamin C. Zipursky, Stephen G. Gilles, and Gregory C. Keating).

³⁴ See CANE, *RESPONSIBILITY IN LAW* *supra* note 29, at 79 (citing *EQUALITY, RESPONSIBILITY*, *supra* note 33); IZHAK ENGLARD, *CORRECTIVE AND DISTRIBUTIVE JUSTICE FROM ARISTOTLE TO MODERN TIMES* 198 (2009); Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 *IOWA L. REV.* 515 (1992).

³⁵ "No society fully realizes the dignity of the individual . . ." KATEB, *supra* note 29, at ix. Rawls identifies a four-step categorical imperative procedure. See JOHN RAWLS, *Themes in Kant's Moral Philosophy*, in *COLLECTED PAPERS* 497, 498-506 (Samuel Freeman ed., 1999). "This procedure helps to determine the content of the moral law as it applies to us as reasonable and rational persons endowed with conscience and moral sensibility, and affected by, but not determined by, our natural desires and inclinations." *Id.* at 498.

vitality affects our understanding of the overall balance between liberty and security.

Liberty refers to the freedom to choose particular conduct,³⁶ while security refers to the freedom from being acted upon or being obligated to engage in particular conduct.³⁷ At their most general level, liberty and security relate to the effect of powers or forces, or their absence, on a person's possible conduct choices.³⁸ Powers or forces have overlapping sources, including: nature (e.g., weather, animals, biology); resources (wherewithal, drive); institutions (constitutions, norms); and, other humans (prowess, arms, status). They may be internal (akrasia, anomie, timidity, indecisiveness, guilt, greed, obsession, impulse, phobia, addiction, kleptomania, self-deception),³⁹ or external (coercion, inhibiting social norms, black-

³⁶ After Moore identifies conceptual and normative issues regarding the notion of liberty, see MOORE, *supra* note 1, at 739-40, he "cut[s] through this Gordian knot with a simple stipulative definition that adopts the traditional, negative definition of liberty: liberty is the absence of constraint, and political liberty is the absence of coercive legal sanctions." *Id.* at 741. Rawls "bypass[es] the dispute about the meaning of liberty that has so often troubled this topic" and "assume[s] that any liberty ... has the following form: this or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so." RAWLS, *THEORY OF JUSTICE*, *supra* note 26, at 176-77. As I use these terms, "liberty is a subset of all 'freedoms.'" Peter Westen, "Freedom" and "Coercion" - *Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 591.

³⁷ "The interest in liberty requires a protected space for freedom of action, the ability to carry out one's purposes in the world. The interest in security requires that the limits be imposed on the actions of others." EQUALITY, RESPONSIBILITY, *supra* note 33, at 50.

³⁸ My use of "power" or "force" is uncommonly broad. For a definition restricted to influences by humans, see, e.g., MICHAEL J. GORR, *COERCION, FREEDOM AND EXPLOITATION* 52 (1989). "As is well known, the relation between liberty and power is ambiguous, or at least debatable." J. Roland Pennock, *Coercion: An Overview*, in *COERCION* 1, 6 (J. Roland Pennock & John W. Chapman eds., 1972).

³⁹ See ALAN DONAGAN, *CHOICE: THE ESSENTIAL ELEMENT IN HUMAN ACTION* 147-56 (1987); Laura W. Ekstrom, *Autonomy and Personal Integration*, in *PERSONAL AUTONOMY* 143, 145-46 (James S. Taylor ed., 2005); Robert Noggle, *Autonomy and the Paradox of Self-Creation*, in *PERSONAL AUTONOMY* 87, 87 (James S. Taylor ed., 2005). Ekstrom notes that "the difficult issue of settling which forces are external and which

mail, shame, weather, climate),⁴⁰ and active (weather, human actions, imminent animal threats), or passive (norms, barriers, power outages, collapsed bridges).⁴¹ While security and liberty may be limited or facilitated by various sources, the ones of primary moral interest are those ascribable to human agents.⁴²

In balancing the inevitable conflicts between liberty and security interests, all moral agents are to have the most expansive liberty possible while, at the same time, respecting the security interests of (themselves and) others.⁴³ In Kant's words, "*Freedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity."⁴⁴ The adopted balance between liberty and security produces autonomy boundaries between agents.

The conceptions of liberty and security discussed in this article have much in common with related notions of liberty and rights

are internal to the agent himself (which are 'truly his own')" has given rise to a debate among commentators. Ekstrom, *supra*, at 146.

⁴⁰ See MICHAEL D. BAYLES, *PRINCIPLES OF LAW* 9 (1987) (noting that some factors are borderline external or internal); Beauchamp, *Autonomy and Consent*, *supra* note 27, at 69 (emphasizing persuasion, coercion, and manipulation); Lawrence Haworth, *Autonomy and Utility*, in *THE INNER CITADEL* 155, 163 (John Christman ed., 1989) [hereinafter Haworth, *Autonomy and Utility*] (noting "preferences resulting from pervasive acculturation or socialization processes which are not directly manipulative in the ways of brainwashing and subliminal advertising are."). For the difficulty in identifying a criterion for autonomous preferences, see Jon Elster, *Sour Grapes - Utilitarianism and the Genesis of Wants*, in *THE INNER CITADEL* 170, 176-79 (John Christman ed., 1989).

⁴¹ As the examples reveal, the active-passive distinction may be more polar than dichotomous.

⁴² "[I]f the 'threat to B comes from nature (say, a sickness) rather than from A or any other person, than in all probability we would take that threat simply to be one of the background conditions ... rather than an intervening force" FEINBERG, *HARM TO SELF*, *supra* note 26, at 196 (reference omitted).

⁴³ See Arthur Ripstein, *Private Order and Public Justice: Kant and Rawls*, 92 VA. L. REV. 1391, 1417 (2006).

⁴⁴ KANT, *THE METAPHYSICS OF MORALS*, in *PRACTICAL PHILOSOPHY*, *supra* note 20, at 393.

categories recognized by various commentators. Isaiah Berlin championed the most famous distinction, the one between negative and positive liberty.⁴⁵ Under his analysis, negative liberty is the freedom to act without “obstacles, barriers or constraints.”⁴⁶ Negative liberty, in a nutshell, is freedom *from*.⁴⁷ Freedom from, according to Berlin, relates to external factors.⁴⁸ Positive liberty, on the other hand, is the freedom with respect to internal, psychological constraints.⁴⁹ It is the freedom *to*.⁵⁰ This distinction between Berlin’s conceptions of positive and negative liberty, while embraced by others,⁵¹ may be ambiguous,⁵² and has been strongly challenged.⁵³

⁴⁵ See ISAIAH BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

⁴⁶ Ian Carter, *Positive and Negative Liberty*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/fall2008/entries/liberty-positive-negative> (last visited Aug. 7, 2013) [hereinafter Carter, *Positive and Negative Liberty*]. “One has negative liberty to the extent that actions are available to one in this negative sense.” *Id.*

⁴⁷ “We are free in the negative sense if we are free from being arrested for speaking our minds, being attacked as we walk in the street, being forcibly prevented from meeting with others.” VIRGINIA HELD, *RIGHTS AND GOODS* 124 (1984). See SEN, *RATIONALITY*, *supra* note 14, at 508.

⁴⁸ See Carter, *Positive and Negative Liberty*, *supra* note 46.

⁴⁹ “Positive liberty is the possibility of acting – or the fact of action – in such a way as to take control of one’s life and realize one’s fundamental purposes.” *Id.* “[I]t seems to require the *presence* of something (i.e. of control, self-mastery, self-determination or self-realization).” *Id.*

⁵⁰ “[W]e are free in the positive sense when we are guided by our better, rational selves rather than by our passions, free to do what we ought to do.” HELD, *supra* note 47, at 125.

⁵¹ See, e.g., FRIEDRICH A. HAYEK, *THE CONSTITUTION OF LIBERTY* 19 (1960) [hereinafter HAYEK, *CONSTITUTION OF LIBERTY*]; John Christman, *Saving Positive Freedom*, 33 *POL. THEORY* 79 (2005); David Miller, *Constraints on Freedom*, 94 *ETHICS* 66 (1983); Marina A.L. Oshana, *Autonomy and Free Agency*, in *PERSONAL AUTONOMY* 183, 193–96 (James S. Taylor ed., 2005); Theodore L. Putterman, *Berlin’s Two Concepts of Liberty: A Reassessment and Revision*, 38 *POLITY* 416 (2006).

⁵² “[T]he distinction between ‘positive’ and ‘negative’ freedoms . . . can be interpreted in several distinct ways.” SEN, *RATIONALITY*, *supra* note 14, at 509 (footnote omitted). For various interpretations of both positive and negative freedom, see SEN, *RATIONALITY*, *supra* note 14, at 586–87.

⁵³ See, e.g., MARTHA NUSSBAUM, *CREATING CAPABILITIES* 65 (2011) [hereinafter NUSSBAUM, *CREATING CAPABILITIES*]; OSHANA, *PERSONAL AUTONOMY*, *supra* note 27,

Other commentators have identified distinctions between active and passive rights, or negative and positive rights. First, active and passive rights. "Active rights are signaled by statements of the form 'A has a right to ϕ '; while passive rights are signaled by statements of the form 'A has a right that B ϕ ' (in both of these formulas, ' ϕ ' is an active verb)."⁵⁴ Second, negative and positive rights. "The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to provision of some good or service."⁵⁵

My look at liberty and security interests begins with expansive conceptions that extend beyond the common normative realm in which entitlement claims are salient, as where one claims to have the right to be secure from assault and battery. Freedom, for instance, may further entail claims to a minimal level of resources or enablements, such as rights to welfare. As in some of the taxonomies above, liberty and security typically come in overlapping, sometimes indistinct, negative and positive varieties, as well as ac-

at 152; Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967); Eric Nelson, *Liberty: One Concept Too Many?*, 33 POL. THEORY 58 (2005); Westen, *supra* note 36, at 553. See generally Joshua Cherniss & Henry Hardy, *Isaiah Berlin*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/sum2010/entries/berlin> (last visited Aug. 7, 2013). Notice that reliance on this common model of positive and negative liberty does not fit with symmetrical notions of positive and negative security.

⁵⁴ Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/fall2010/entries/rights> (last visited Aug. 7, 2013) (citing David Lyons, *The Correlativity of Rights and Duties*, 4 NOUS 45 (1970)). "A naval captain has an active privilege-right to walk the decks and an active power-right to order that the ship set sail. A college professor has a passive claim-right that students not disrupt her lectures, and a passive immunity-right that her university not fire her for publishing unpopular views." *Id.* See Ray Jackendoff, *The Natural Logic of Morals and of Laws*, 75 BROOK. L. REV. 379, 394-95 (2002).

⁵⁵ Wenar, *supra* note 54 (citing JAN NARVESON, *THE LIBERTARIAN IDEA* (1988)). "Since both negative and positive rights are passive rights, this division cannot capture all rights." Wenar, *supra* note 54. "Whatever is the justification of ascribing rights – autonomy, need, or something else – there may be just as strong a case for ensuring that a person has adequate nutrition as for ensuring that the person not be beat up." Wenar, *supra* note 54, at 11. See KAMM, *supra* note 22, at 286; RAWLS, *A THEORY OF JUSTICE*, *supra* note 26, at 98.

tive and passive ones. The Hohfeldian correlatives capture many of the characteristics.⁵⁶

III. AUTONOMY SPACE

The term “autonomy space” metaphorically represents the idea that a moral agent has a certain realm of freedom in space and time to make choices and act upon them. Within this realm the agent can conduct her life free from interference by others.⁵⁷ As one commentator puts it, it is her “discretionary space”.⁵⁸ This space is established by a full set of universalized deontic maxims, both first- and second-order, adopted by a moral agent to balance her liberty and security interests within the parameters of the categorical imperative.⁵⁹ Once an agent’s baseline autonomy space is demarcated, she can usually adjust the boundaries by consent.⁶⁰ One can consent to a

⁵⁶ See WESLEY N. HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS* 23 (1923).

⁵⁷ “Boundaries defining personal space are necessary to constitute individuals.” GEORGE P. FLETCHER, 1 *THE GRAMMAR OF CRIMINAL LAW: FOUNDATIONS* 22 (2007) [hereinafter, FLETCHER, *THE GRAMMAR OF CRIMINAL LAW*] (footnote omitted). Included within “[t]he contours of the individual” are one’s body, “the things under one’s immediate control”, one’s own living space, and, furthermore, it also reaches “the right to act in certain ways and to control larger spaces on the basis of a social understanding of ownership.” *Id.* at 22-23. Others also use the domain, territory, and space metaphors. See FEINBERG, *HARM TO SELF*, *supra* note 26, at 52-57; LEO KATZ, *ILL-GOTTEN GAINS* 139 (1996) (citing ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* 57 (1974)).

⁵⁸ “If we think of each person as having rights to control certain features of the world, then each person has a sphere of discretionary space, that is, a domain within which she is entitled to control what happens.” Japa Pallikkathayil, *Deriving Morality from Politics: Rethinking the Formula of Humanity*, 121 *ETHICS* 116, 133 (2010).

⁵⁹ See Hanoch Dagan, *Remedies, Rights, and Properties*, (Dec. 1, 2011) (unpublished manuscript) (on file with the Tel Aviv University Journal of Tort Law).

⁶⁰ In the manner of one of the lessons of the Coase theorem, parties may negotiate over a preferred balance of their baseline, reciprocal liberty and security interests. For example, one may seek permission to touch another person in a way that is otherwise disallowed by default, and that other person may grant that permission, both parties thereby adjusting the boundaries between themselves in a way that satisfies them both. A consumer surplus, of sorts, results.

reduction of one's autonomy space (e.g., permit non-everyday contact by another), and also decline an expansion of the space (refuse a beneficial gift). Some autonomy boundaries are immutable, partially or entirely. For example, consensual slavery, mutilation, or sexual contracts may be declared out of bounds for being disrespectful of one's own status as a moral, autonomous being.⁶¹

Many interferences with, or limitations on, a person's plausible autonomy space are not found to be wrongful, and hence not subject to moral or legal restraints. Under existing norms, for example, a variety of acceptable social touchings or contacts circumscribe a person's liberty and security interests, such as an ordinary pat on the back.⁶² No applicable maxim prohibits touchings of the types in question. Though they may be harmful, they are not wrongful. On the other hand, if such contacts were proscribed by an adopted substantive maxim, and a violation therefore within the reach of a restraint maxim, such a substantive maxim would not necessarily run afoul of the categorical imperative. Just as allowing some contact need not be disrespectful, so banning all social touchings need not be disrespectful. When not wrongful, we would not say that the invasion of the autonomy space is privileged, but rather, owing to implicit consent, that there was no invasion at all.⁶³ For each society,

⁶¹ See IMMANUEL KANT, ON THE COMMON SAYING: THAT MAY BE CORRECT IN THEORY, BUT IT IS OF NO USE IN PRACTICE, in PRACTICAL PHILOSOPHY, *supra* note 20, at 273, 293-94 [hereinafter KANT, ON THE COMMON SAYING]; KANT, THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY, *supra* note 20, at 431, 471-72. But see, e.g., ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 331 (1974) (opining that "a free system will allow [a person] to sell himself into slavery").

⁶² See, e.g., JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, TORTS 205 (2010) [hereinafter GOLDBERG & ZIPURSKY, TORTS]; KEETON ET AL., *supra* note 7, at 41-42; Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 268 (1975); Sheinman, *Tort Law*, *supra* note 2, at 53.

⁶³ "The absence of ... consent is inherent in the very idea of those invasions of interests of personality which, at common law, were the subject of an action of trespass for battery, assault, or false imprisonment." RESTATEMENT (SECOND) OF TORTS § 13 cmt. d (1977). "The consent principle is general in its scope, firm in its acceptance, and central in its significance. It makes the plaintiff's right of self-determination or

where to strike this balance between liberty and security is a, if not the, central issue.

A nonwrongful limitation to an agent's possible autonomy space will be referred to as a "reduction", "decrease", "curtailment", "limitation", "restriction", "truncation", etc. Some commentators use the term "infringement", but this has overtones of "violation" or "wrongfulness".⁶⁴ To the contrary of an autonomy space reduction, there may be an "enlargement", "increase", etc., as where an agent is granted the privilege to touch another person in a manner beyond default norms. When an interference with a person's autonomy space is wrongful, and hence subject to requit, this is referred to as an autonomy, or autonomy space, invasion.

The essentially contested,⁶⁵ fuzzy concepts of liberty, security, autonomy, dignity,⁶⁶ respect,⁶⁷ etc., are mustered to point down various promising roads suggested by deontic principles. I largely decline to opine how far down the road these concepts go, or whether particular roads can be traveled as a practical matter, or even whether other normative principles may trump these pathways in a particular society's web of norms and values.⁶⁸ My primary aim is

autonomy the centerpiece of the law on intentional torts and to some extent other torts as well." DAN B. DOBBS, *THE LAW OF TORTS* 217 (2000) [hereinafter DOBBS, *LAW OF TORTS*].

⁶⁴ See, e.g., Claire Finkelstein, *Tort Law as a Comparative Institution: Reply to Perry*, 15 HARV. J.L. & PUB. POL'Y 939, 946 (1992); Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV 45, 47 (1977) (distinguishing "infringement" from "violation").

⁶⁵ See W.B. Gallie, *Essentially Contested Concepts*, 56 PROC. ARISTOTELIAN SOC'Y 167 (1955-56).

⁶⁶ See *infra* note 196.

⁶⁷ "[T]he concept of 'disrespect' is simply too elastic and vague to illuminate that range of doctrines within criminal law. It is even more clearly insufficient to illuminate doctrines across fields of law." Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 528 n.222 (1992).

⁶⁸ "[T]heories are not arguments, sound or otherwise. Theories are maps." David Schmidtz, *Nonideal Theory: What It Is and What It Needs to Be*, 121 ETHICS 772, 778 (2011). "[I]t is not only maps that are incomplete. The terrain being described (i.e., justice itself) can be incomplete as well." *Id.* at 779. "A theory of justice may give us

to identify the process behind some of the critical choices and tradeoffs that individuals and societies must address in embracing a set of norms that satisfy deontic mandates. They are constitutive of an agent's autonomy space. Whether our current social, moral, and legal norms, or those of any other society, meet Kant's marching orders is another question.

A. CONDITIONS FOR AUTONOMY SPACE

Within an agent's autonomy space, the agent is free to make choices that utilize her expanse of liberty and protect her sphere of security. Indeed, free, responsible choice is central to an agent's full usage of her realm of freedom.⁶⁹ Conversely, we respect her as a

parameters, some of which may be more or less timeless. Even so, details of evolving practices are in the hands of communities, not theories." *Id.* at 784 (footnote omitted).

⁶⁹ "[T]he term *act* implies a choice." HOLMES, *supra* note 6, at 77. "But why should liability depend on choice? Because choice, it is thought, is the defining mark of agency; it marks the point at which we engage in the world as free and responsible agents, and thus bring ourselves within the proper reach of the criminal law." R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY 154 (1990). "We need only recognize why we respect people's choices – because we respect people and their innate dignity." Robert E. Goodin, *The Political Theories of Choice and Dignity*, 18 AM. PHIL. Q. 91, 91 (1981). "Choice and autonomy in this way mutually reinforce one another: we value autonomy in part because of the freedom to choose it validates, and we value free choice in part because it contributes to our autonomy." DAN-COHEN, HARMFUL THOUGHTS, *supra* note 21, at 125. See DWORKIN, THEORY AND PRACTICE, *supra* note 27, at 18; SANFORD H. KADISH, *Excusing Crime*, in BLAME AND PUNISHMENT 81, 88 (1987) ("choice as a condition of blame"); OSHANA, PERSONAL AUTONOMY, *supra* note 27, at 133.

Not all agree that responsibility entails choice. See CANE, RESPONSIBILITY IN LAW, *supra* note 29, at 97-104; VICTOR TADROS, CRIMINAL RESPONSIBILITY 61-66 (2005) (doubting the importance of choice to autonomy and responsibility); Stephen Shute et al., *Introduction: The Logic of Criminal Law*, in ACTION AND VALUE IN CRIMINAL LAW 1, 20 (Stephen Shute et al. eds., 1993) (responsibility "depends primarily on control of conduct and self-control, not on choice"); Michael McKenna, *The Relationship Between Autonomous and Morally Responsible Agency*, in PERSONAL AUTONOMY 205 (James S. Taylor ed., 2005); T.M. Scanlon, *Ethics and Free Will: Varieties of Responsibility*, 90 B.U. L. REV. 603, 603-04 (2010) (distinguishing three varieties of responsibility: personal, moral, and substantive); Stephen A. Smith, *Contracting Under Pressure: A Theory of Duress*, 56 CAMBRIDGE L.J. 343 (1997) (distinguishing the concerns of wrongdoing,

person by holding her accountable for her responsible choices.⁷⁰ Aristotle identified the circumstances where choices and conduct should not be considered free, responsible ones: those that result from unavoidable ignorance or coercion.⁷¹ As an example of the adoption of Aristotle's viewpoint by common law courts, in the leading case establishing fault, negligence, as the standard for tort liability for unintentional conduct, *Weaver v. Ward*,⁷² the court discusses hypothetical examples of when liability is exempted.⁷³ As George Fletcher observes, "The hypotheticals of *Weaver v. Ward* cor-

autonomy, and consent); Nicole A. Vincent, *On the Relevance of Neuroscience to Criminal Responsibility*, 4 CRIM. L. & PHIL. 77, 84 (2010) (noting six conceptions of responsibility).

⁷⁰ "To hold someone responsible is to regard her as a *person* – that is to say, as a free and equal person, capable of acting both rationally and morally." KORSGAARD, CREATING THE KINGDOM, *supra* note 31, at 189.

⁷¹ "Those things, then, are thought involuntary, which take place under compulsion or owing to ignorance; and that is compulsory of which the moving principle is outside, being a principle in which nothing is contributed by the person who is acting or is feeling the passion" ARISTOTLE, NICHOMACHEAN ETHICS bk. III, ch. 1, in THE BASIC WORKS OF ARISTOTLE 935, 964 (Richard McKeon ed., 1941). See *id.* at bk. III, ch. 8, 964-67, bk. V, ch. 8, 1015-16. "Since Aristotle, moral theorists have generally agreed that the necessary attributes of moral agency fall under three categories: knowledge, reason, and control." Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1519 (1992). See FEINBERG, HARM TO SELF, *supra* note 26, at 115; JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL 12 (1998); KORSGAARD, CREATING THE KINGDOM, *supra* note 31, at 295; GEORGE SHER, WHO KNEW? 4, 143 (2009); MARK TUNICK, PRACTICES AND PROMISES 112 (1998); Michael McKenna & David Widerker, *Introduction*, in MORAL RESPONSIBILITY AND ALTERNATIVE POSSIBILITIES 1, 2 (David Widerker & Michael McKenna eds., 2003); Arthur Ripstein, *Justice and Responsibility*, 17 CAN. J.L. & JURISPRUDENCE 362, 377 (2004) [hereinafter Ripstein, *Justice and Responsibility*]; Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543, 548-54 (1983). "One might even contend that people are denied respect if they are held legally liable when they are not responsible, because they are then treated as mere instruments for the well-being of others." BAYLES, *supra* note 40, at 8.

⁷² 80 Eng. Rep. 284 (K.B. 1616).

⁷³ *Id.*

respond to the Aristotelian excusing categories of compulsion and unavoidable ignorance."⁷⁴

While the notion of ignorance is far from entirely self-evident,⁷⁵ that of coercion is blurrier still.⁷⁶ Peter Westen provides a pointer in the right direction: "A coercive constraint is anything that leaves a person worse off either than he otherwise expects to be or than he ought to be for refusing to do the proponent's bidding."⁷⁷ I would expand on this to include nonagential "bidding", such as from a storm, a threatening animal, or an irresistible impulse.⁷⁸ Like igno-

⁷⁴ George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 552 (1972).

⁷⁵ Feinberg discusses at length failures of consent from defective belief. See FEINBERG, HARM TO SELF, *supra* note 26, at 269-315.

⁷⁶ "[F]ew agree on what counts as coercion. . . . [N]o analysis has been generally accepted as convincing." O'NEIL, *supra* note 27, at 81. See FEINBERG, HARM TO SELF, *supra* note 26, at 189; MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 78-101 (1993); Scott Anderson, *Coercion*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/fall2008/entries/coercion/> (last visited Aug. 7, 2013); May, *supra* note 27, at 133; Morse, *Rationality*, *supra* note 25, at 256-66.

⁷⁷ Westen, *supra* note 36, at 589 (offering a detailed specification of "coercion"). Westen identifies "the core elements of coercion", *id.* at 559-69. See HAYEK, CONSTITUTION OF LIBERTY, *supra* note 51, 20-21; Eric Chwang, *On Coerced Promises*, in PROMISES AND AGREEMENTS 156 (Hanoach Sheinman ed., 2011); Morse, *Diminished Capacity*, *supra* note 25, at 250-52; Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 85-86 (1981); Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 126 (1981); Alan Wertheimer, *Consent to Sexual Relations*, in THE ETHICS OF CONSENT 195, 198 (Franklin G. Miller & Alan Wertheimer eds., 2010). For criminal coercion, see MODEL PENAL CODE § 212.5 (1962).

⁷⁸ Anderson points out that "coercion" can be used "with a quite broad sense." Anderson, *supra* note 76. "Coercion belongs to a family of 'power' or 'influence' concepts" Alan P. Wertheimer, *Political Coercion and Political Obligation*, in COERCION 213, 221 (J. Roland Pennock & John W. Chapman eds., 1972). For a discussion of the variations among commentators as to the sources (e.g., other people, natural obstacles) and types (e.g., physical barriers, disincentives, manipulation) of constraints that count in gauging negative freedom, see Carter, *Positive and Negative Liberty*, *supra* note 46. See Ian Carter, *The Myth of 'Merely Formal Freedom'*, 19 J. POL. PHIL. 486, 492-94 (2011) [hereinafter Carter, *The Myth*] ("normatively loaded" versus "normatively neutral" conceptions of freedom and "interpersonal" or "social" conceptions of freedom versus "freedom-as-ability"). For a taxonomy of types of coercion, see Samuel D. Cook, *Coercion and Social Change*, in COERCION 107, 116 (J. Roland Pennock & John

rance, coercion is, of course, a matter of degree.⁷⁹ Existing norms require coercive forces to pass a certain threshold, which depends on the circumstances,⁸⁰ before they excuse an agent from responsibility.

Ignorance and coercion can stem from sources that are external from the agent or internal to her, that is, arise from internal analogs to external conditions,⁸¹ or be a mixture of the two.⁸² Let me provide some examples of what I mean by internal and external ignorance and coercion. First, internal ignorance may arise from cognitive dissonance, self-deception, and the many self-generated or self-exacerbated shortfalls from accurate perceptions and knowledge uncovered in recent decades by behavioral economists and cogni-

W. Chapman eds., 1972). See generally COERCION (J. Roland Pennock & John W. Chapman eds., 1972).

⁷⁹ "One can think of voluntariness as a matter of degree." FEINBERG, HARM TO SELF, *supra* note 26, at 104. "It may not always be possible, even in principle, to say of one act that it is more voluntary or closer to being voluntary than another . . ." *Id.* at 117. See CANE, RESPONSIBILITY IN LAW, *supra* note 29, at 34.

⁸⁰ "Rather than undermining responsibility, what coercion may do is to modify the permissibility of an action or the kind of blame, if any, that it makes appropriate." SCANLON, MORAL DIMENSIONS, *supra* note 22, at 181. Gratuitous harm to another is one thing, fearful reactive harm is quite another. SCANLON, MORAL DIMENSIONS, *supra* note 22, at 181. See TUNICK, *supra* note 71, at 101-02.

⁸¹ See GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT LAW 106 (1996) [hereinafter FLETCHER, BASIC CONCEPTS] ("The internal analogue to external pressure is mental illness."); RIPSTEIN, FORCE AND FREEDOM, *supra* note 10, at 15; Michael C. Munger, *Euvoluntary or Not, Exchange Is Just*, 28 SOC. PHIL. & POL'Y 192, 195 (2011); Morse, *Diminished Capacity*, *supra* note 25, at 250-66. Morse writes that "cases of pure internal coercion, compulsion, or 'volitional' problems are extremely rare." Morse, *Diminished Capacity*, *supra* note 25, at 261. "On both theoretical and practical grounds, the law should treat internal-coercion claims with great caution." Morse, *Diminished Capacity*, *supra* note 25, at 270. The law and legal philosophers predominantly reject such claims. See Amanda C. Pustilnik, *Rethinking Unreasonableness: A Comment on Nita Farahany's "Law and Behavioral Morality"*, in EVOLUTION AND MORALITY 166, 167 (James E. Fleming & Sanford Levinson eds., 2012). For exceptions, see, e.g., Walter Sinnott-Armstrong, *A Case Study in Neuroscience and Responsibility*, in EVOLUTION AND MORALITY 194, 205-06 (James E. Fleming & Sanford Levinson eds., 2012).

⁸² See FEINBERG, HARM TO SELF, *supra* note 26, at 151-52; TUNICK, *supra* note 71, at 101-02.

tive psychologists.⁸³ Second, internal coercion results from some forms of insanity, impulse, anomie, stress,⁸⁴ akrasia, and, again, what cognitive science is revealing.⁸⁵ Third, external ignorance may be a product of fraud, deception, and the failure to collect available information. Finally, fourth, a gun to the head paradigmatically exemplifies external coercion.⁸⁶

Ignorance and coercion may be permanent (e.g., insanity, psychological enslavement [undue influence]), episodic (insanity, drunkenness, road rage, imprisonment), or transitory (economic duress, necessity, preliminary misinformation).⁸⁷ Overall, ignorance

⁸³ See generally DAN ARIELY, *PREDICTABLY IRRATIONAL* (2008); DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011); *ADVANCES IN BEHAVIORAL ECONOMICS* (Colin F. Camerer et al. eds., 2003); *CHOICES, VALUES, AND FRAMES* (Daniel Kahneman & Amos Tversky eds., 2000); *HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT* (Thomas Gilovich et al. eds., 2002); *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* (Francesco Parisi & Vernon L. Smith eds., 2005).

⁸⁴ See Hila Keren, *Consenting Under Distress*, 64 *HASTINGS L.J.* 679 (2012). "Most courts do not view stress that leads a person to accept an injurious contract, as a sufficient reason for relief from that contract." *Id.* at 683.

⁸⁵ See *supra* text accompanying note 83. "[S]elf-rule is not possible if the person's passions and impulses dictate his responses, so that he is led to do that which, had he reflected, he would have avoided doing." HAWORTH, *AUTONOMY*, *supra* note 26, at 43. Regarding voluntary choices, Trebilcock identifies "temporarily distorting states or circumstances, including: impulsiveness; fatigue; excess nervousness, agitation, or excitation; powerful passion (e.g., rage, hatred, lust, depression, mania); intoxication (alcohol and other drugs); pain; neurotic compulsiveness/obsessiveness; severe time constraint." TREBILCOCK, *supra* note 76, at 148 (punctuation and capitalization revised).

"In general, those who write about criminal law have been much more skeptical than philosophers about whether a plausible account of volitional disorders can be given." TADROS, *supra* note 69, at 340.

⁸⁶ Fischer and Ravizza mention "brainwashing, hypnosis, or direct manipulation of the brain," as well as "subliminal advertising". FISCHER & RAVIZZA, *supra* note 71, at 13, 49. "[T]he agent must control his behavior in a suitable sense, in order to be morally responsible for it." FISCHER & RAVIZZA, *supra* note 71, at 13. They briefly summarize the "suitable sense" for sufficient control. FISCHER AND RAVIZZA, *supra* note 71, at 240-41.

⁸⁷ "The voluntariness-reducing incapacities can be divided in respect to their durability into two major classes, those thought to be permanent impairments and

and coercion, both internal and external, or permanent to transitory, interrelate in complex, multiple ways. For example, a person may exploit another's known cognitive weaknesses in particular settings by creating such a setting and practicing subtle deception, as where a mediocre, overpriced product is displayed in a plush showroom by attractive, seductive salespersons.⁸⁸ Hypnotism and brainwashing also have external and internal aspects.⁸⁹

B. THE MACHINERY OF AUTONOMY SPACE

Without certain qualities needed to utilize one's autonomy space, it is a formal conception only. One who is semi-comatose is free in a very restricted sense, if at all. To be free in a real sense, a person must have, first, sufficient capabilities or personal resources,⁹⁰ which are qualities of the person. Because people vary in their capabilities, native and developed, they vary in the extent to which they can take advantage of potential autonomy space. Native capabilities include, to some extent, intelligence, athleticism, attractiveness, and some personality traits, such as risk disposition and

those deemed merely temporary, and a third overlapping category for alternating or recurring impairments." FEINBERG, *HARM TO SELF*, *supra* note 26, at 318.

⁸⁸ See Collin O'Neil, *Lying, Trust, and Gratitude*, 40 PHIL. & PUB. AFF. 301, 301 (2012) ("identif[ying] twelve distinct deceptive techniques deployed in political advertisements"). On subliminal advertising, see generally VANCE PACKARD, *THE HIDDEN PERSUADERS* (1957). For doubts about Packard's arguments, see GERALD ZALTMAN, *HOW CUSTOMERS THINK: ESSENTIAL INSIGHTS INTO THE MIND OF THE MARKET* 127 (2003); Richard A. Bauer, *The Limits of Persuasion*, 36 HARV. L. REV. 105, 106 (1958); Irina D. Manta, *Hedonic Trademarks*, 74 OHIO ST. L.J. 241, 244 (2013).

⁸⁹ Cf. TREBILCOCK, *supra* note 76, at 148 ("subliminal suggestion; post-hypnotic suggestion; 'sleep-teaching,' etc.").

⁹⁰ "Someone's personal resources are his physical and mental capacities" RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 355 (2011) [hereinafter DWORKIN, *JUSTICE FOR HEDGEHOGS*]. "I take it that an account of autonomy should capture the agentic resourcefulness people need to cope with life's vicissitudes, ordeals, and upheavals." Diana T. Meyers, *Decentralizing Autonomy: Five Faces of Selfhood*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM* 27, 27 (John Christman & Joel Anderson eds., 2005). See Thom Brooks, *Capabilities*, in *INTERNATIONAL ENCYCLOPEDIA OF ETHICS* 692 (H. LaFollette ed., 2013).

attention disorder.⁹¹ Developed capabilities, insofar as they are a product of (self) nurture rather than nature, include education, knowledge, skill, willpower, and self-discipline.⁹²

The exercise of capabilities may reflect an interrelationship among them. A brilliant person, for example, needs less willpower than others to succeed in school. Capabilities are relative, circumstantial competencies ("In the land of the blind"). The greater a person's relevant capabilities, the greater her effective, usable autonomy space, all else equal.⁹³ These variable contingencies affect an agent's material autonomy space,⁹⁴ as distinguished from the formal autonomy space possessed in principle equally by all. Autonomy in practice, then, is quantifiable by a scalar measure, a matter of more or less.⁹⁵

For a person to have full legal and deontic status, a threshold standard of minimum capabilities is typically declared as essential.

⁹¹ What are known as the Big Five personality dispositions are partially innate and heritable, the heritability according to studies given in brackets: openness [57%], conscientiousness [49%], extraversion [54%], agreeableness [42%], and neuroticism [48%]. See Thomas J. Bouchard & Matt McGue, *Genetic and Environmental Influences on Human Psychological Differences*, 54 J. NEUROBIOLOGY 4 (2003).

⁹² "[N]atural diversity may arise from any combination of ordinary genetic variations, self-caused factors, and differential luck." Thomas Pogge, *A Critique of the Capability Approach*, in MEASURING JUSTICE 17, 32 (Harry Brighouse & Ingrid Robeyns eds., 2010).

⁹³ "A person with energy, intelligence, good health, and good looks is better able to advance her conception of the good than someone who is sickly, gloomy, unintelligent, and ugly." Pogge, *supra* note 92, at 34.

⁹⁴ Similarly, Nussbaum, along with Sen, advances a conception of a functioning. "A functioning is an active realization of one or more capabilities." NUSSBAUM, *CREATING CAPABILITIES*, *supra* note 53, at 24-25.

⁹⁵ Haworth identifies various stages of autonomy: minimal autonomy, a transition stage, normal autonomy, "[a]nd finally, further growth of autonomy, beyond the norm, by which one gets more completely free from inner and outer constraints and realizes something close to unrestricted critical competence." HAWORTH, *AUTONOMY*, *supra* note 26, at 55. "[S]ome [people] are more autonomous than others." *Id.* at 83. For more on the scalar qualities of autonomy, see, e.g., RICHARD LINDLEY, *AUTONOMY* 51, 69 (1986).

Beyond this, she usually has no increased rights or duties.⁹⁶ There are exceptions to this, as under existing tort law where a person who holds herself out as an expert thereby assumes heightened duties.⁹⁷ Children and mental incompetents do not fit neatly into this paradigm, but must, of course, be accommodated.⁹⁸ Yet, despite the threshold capabilities standard of law and deontology, the effect of one's capabilities on her material autonomy space seems continuously additive. As evident when we consider realistically the vastly different opportunities of the klutzes and the demigods, the greater one's capabilities, the greater one's effective, usable freedoms.

External resources are needed to employ one's formal autonomy space.⁹⁹ Wealth, opportunity, and privilege, for example, facilitate the exercise of liberty.¹⁰⁰ Similarly, outside resources may expand a person's security, as when some touchings are normally

⁹⁶ See *supra* text accompanying note 25.

⁹⁷ See, e.g., RESTATEMENT (SECOND) OF TORTS § 299A cmt. d (1977). Even if a person with superior skills does not hold herself out as such, should she be held to a higher standard? See James Goudkamp, *The Spurious Relationship Between Blameworthiness and Liability for Negligence*, 28 MELB. U.L. REV. 343, 344, 351-55 (2004) ("moral censure"). For interesting questions about adjusting standards of care on the basis of individual skill levels, see Bernstein, *supra* note 33, at 748-50.

⁹⁸ "It is my judgment that the greatest challenge facing a dignity-based theory of human rights is . . . : what accounts for the human dignity, and hence the human rights, of those human beings who are not capable of functioning as persons?" Nicholas Wolterstorff, Book Review, 122 ETHICS 602, 607 (2012).

⁹⁹ "Roughly speaking, formal freedom is said to be achieved through the rule of law and the safeguarding of people's rights of property and contract; by contrast, substantive or effective or real freedom is said to exist only when people possess the material means necessary to realize their plans." Carter, *The Myth*, *supra* note 78, at 486 (footnote omitted). See RAWLS, *THEORY OF JUSTICE*, *supra* note 26, at 179; WOJCIECH SADURSKI, *GIVING DESERT ITS DUE* 265 (1985); R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1431 (1995) [hereinafter, Wright, *Consenting Adults*].

¹⁰⁰ "[T]he seven conditions for autonomy are epistemic competence, rationality, procedural independence, self-respect, control, access to a range of relevant options, and substantive independence." OSHANA, *PERSONAL AUTONOMY*, *supra* note 27, at 87 (emphasis omitted). For a prior, shorter list, see Marina A.L. Oshana, *Personal Autonomy and Society*, 29 J. SOC. PHIL. 81, 93-94 (1998).

within social norms, but the concomitants of wealth or status deter or proscribe them. As a practical matter, external resources, like capabilities, would seem to be continuously additive. The more a person's outside resources, the larger her material autonomy space, in general.

To be a truly, materially autonomous person requires a certain level of external resources.¹⁰¹ A homeless person without any resources is autonomous in a weak sense only.¹⁰² These requisite resources have been called "enablements", "primary goods", or "functionings", among other labels.¹⁰³ External resource enablements necessary to truly exercise one's autonomy space vary according to a person's capabilities (e.g., intelligence, strength, health) and environment (war, high crime area, agricultural community,

¹⁰¹ "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders." *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970). "Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." *Id.* at 265. See ALAN BRUDNER, PUNISHMENT AND FREEDOM xvii (2009); ONORA O'NEIL, BOUNDS OF JUSTICE 134 (2000); SEN, RATIONALITY, *supra* note 14, at 10.

¹⁰² "Let them eat cake." "A homeless person sleeping under a bridge may have chosen, in some sense, to do so; but we would not necessarily consider his choice to be a free one." SANDEL, *supra* note 26, at 81.

¹⁰³ Rawls, on the one hand, and Sen and Nussbaum on the other, have most famously directed attention to this issue. "Social primary goods are, according to Rawls, those goods that anyone would want regardless of whatever else they wanted. They are means, or resources (broadly conceived)" Ingrid Robeyns & Harry Brighouse, *Introduction: Social Primary Goods and Capabilities as Metrics of Justice*, in MEASURING JUSTICE 1, 1 (Harry Brighouse & Ingrid Robeyns eds., 2010) (citing JOHN RAWLS, JUSTICE AS FAIRNESS: A RESTATEMENT 58-61 (2001)). "The other approach, developed most prominently by Amartya Sen, and more recently also by Martha Nussbaum, is known as the capability approach. Instead of looking at people's holdings of, or prospects for holding, external goods, we look at what kinds of functionings they are able to achieve." *Id.* at 2. See, e.g., SEN, DEVELOPMENT AS FREEDOM, *supra* note 14, at 73-74; SEN, THE IDEA OF JUSTICE, *supra* note 14, at 231-35, 253-68. For an argument that the differences between these two approaches is overstated, see Pogge, *supra* note 92, at 17. These general metrics have also been referred to as "capabilities", but I reserve this term for personal resources that do not have external origins, such as athleticism and judgment.

climate, capitalism).¹⁰⁴ For example, a hilly community with many steps and few sidewalks would significantly limit the material autonomy space of the physically challenged, but have little impact on athletic, vigorous persons.

While Kant does not find in his principles a right to enablements or, more particularly, welfare,¹⁰⁵ he has been read as calling for such a right.¹⁰⁶ Even John Locke, a mainstay of libertarian philosophers, can be read as a champion of some enablements.¹⁰⁷ Friedrich Hayek, another mainstay, is explicit about it.¹⁰⁸ Among modern commentators, enablements or related metrics of one sort or another are advanced by John Rawls,¹⁰⁹ Joel Feinberg,¹¹⁰ Ronald

¹⁰⁴ See, e.g., SEN, *THE IDEA OF JUSTICE*, *supra* note 14, at 254-57; MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY: DISGUST, SHAME, AND THE LAW* 344-45 (2004) (referring to inner and outer aspects of capabilities).

¹⁰⁵ Under Kant, "[t]he poor are supported not because they hold a right but because they are the beneficiaries of a duty. The sovereign takes over from the people the duty to support the poor that is an incident of everyone's obligatory entrance into a civil condition." Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 818 (2003) [hereinafter Weinrib, *Property and Poverty*]. See RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 10, at 25-26, 267-99.

¹⁰⁶ See MURPHY, *THE PHILOSOPHY OF RIGHT*, *supra* note 12, at 124-25; ONORA O'NEILL, *BOUNDS OF JUSTICE* 140 (2000); RUTH J. SAMPLE, *EXPLOITATION* 57 (2003); WOOD, *KANTIAN ETHICS*, *supra* note 24, at 193-205.

¹⁰⁷ Hausman, unlike some others, "take[s] Locke to be concerned with the whole gamut of threats to life, property, and freedom.... [I]f individuals cannot protect themselves and government action is not itself a greater threat than the problem it aims to tackle, then government should act." Daniel M. Hausman, *A Lockean Argument for Universal Access to Health Care*, 28 SOC. PHIL. & POL'Y 166, 173 (Summer 2011). "The Lockean is concerned with the protection of property broadly conceived and with freedom in the sense of independence and self-determination." *Id.* at 186.

¹⁰⁸ Hayek argues that a state guarantee of a minimum of sustenance need not "endanger[] general freedom", nor need a state protection against "those common hazards or life against which ... few individuals can make adequate provision ... as in the case of sickness and accident [T]he case for the state's helping to organize a comprehensive system of social insurance is very strong" FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 120-21 (1944) (quoted in Elizabeth Anderson, *How Should Egalitarians Cope with Market Risks*, 9 THEORETICAL INQ. 239, 258 (2009) (including other cites to Hayek)).

¹⁰⁹ In the revised edition of his seminal treatise, Rawls writes, "Primary goods are now characterized as what persons need in their status as free and equal citizens,

Dworkin,¹¹¹ Amartya Sen,¹¹² Martha Nussbaum,¹¹³ Joseph Raz,¹¹⁴ and many others.¹¹⁵

Environment, both natural and social, is a third factor impacting autonomy space. The environment provides a setting for an agent's exercise of freedom. It affects the manner and degree to which an agent's capabilities and resources allow her the liberty to choose and act. It impacts her security. With respect to the natural environment, the capabilities and external resources facilitating liberty and security are different on the savanna than in the arctic or desert. These include such things as toleration of heat or cold, athleticism, and natural immunity or resistance to an endemic, debili-

and as normally and fully cooperating members of society over a complete life." RAWLS, *THEORY OF JUSTICE*, *supra* note 26, at xiii. "[T]he principle [of redress] holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions." *Id.* at 86. See JOHN RAWLS, *Social Utility and Primary Goods*, in *COLLECTED PAPERS* 359, 370 (Samuel Freeman ed., 1999).

¹¹⁰ See FEINBERG, *HARM TO OTHERS*, *supra* note 30, at 37-38, 206-07.

¹¹¹ "[I]mpersonal resources, consist in [a person's] wealth, measured as abstractly as possible.... We must aim, as a first approximation, to make members of our political community equal in those material resources." DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 90, at 355.

¹¹² See, e.g., SEN, *THE IDEA OF JUSTICE*, *supra* note 14, at 231-35, 254-57, 296-309.

¹¹³ See, e.g., NUSSBAUM, *CREATING CAPABILITIES*, *supra* note 53 (discussing capabilities at 20-28 and listing "ten Central Capabilities" at 33-34); MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000) (listing basic capabilities at 78-80); Martha C. Nussbaum, *Capabilities and Human Rights*, 66 *FORDHAM L. REV.* 273 (1997).

¹¹⁴ Raz advances the Basic-Capacities Principle that "requires us to promote conditions in which people have the basic capacities for pursuit of goals and relationships of sufficient range to make for a rewarding and fulfilling life." JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* 16-17 (rev. ed. 1994). See *id.* at 3-28.

¹¹⁵ See, e.g., JAMES GRIFFIN, *WELL-BEING* (1986); SADURSKI, *GIVING DESERT ITS DUE*, *supra* note 99 at 158-83; Elizabeth Anderson, *What Is the Point of Equality*, 109 *ETHICS* 287 (1999); Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 *MCGILL L.J.* 91, 128 (1995); Wright, *Consenting Adults*, *supra* note 99, at 1427.

Enablements may spring from principles of distributive justice. See *EQUALITY, RESPONSIBILITY*, *supra* note 33, at 266-67; Weinrib, *Poverty and Property*, *supra* note 105, at 796; Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 *AM. J. JURIS.* 143, 165-66 (2002).

tating disease.¹¹⁶ The social environment is also crucial.¹¹⁷ The capabilities and external resources facilitating liberty and security are different in a poor, oppressive, totalitarian plutocracy than in a prosperous, capitalistic, liberal democracy. The liberty furthered by a particular income or skill set depends on the costs of goods, the (economic) usefulness of the skills, the number of others with similar or better skills, etc. Particular social environmental autonomy space constraints may not be deontologically justifiable, or consistent with other, basic, accepted norms. For example, a maxim generally disallowing the liberty to engage in fair competition is hardly plausible,¹¹⁸ as is the case for proscribing accidental bumps into others in crowded public spaces. On the other hand, deontically unacceptable would be disrespectful discrimination, such as sexism and racism, or the imposition of nonconsensual duties due entirely to involuntary group membership, such as that of caste or national origin. When provision is feasible,¹¹⁹ the absence or denial of some standard protections and enablements, such as policing or adequate schools, seems unjustifiable.

¹¹⁶ The stock example is the resistance to malaria provided by the gene causing sickle-cells, which is disadvantageous overall outside malarial zones. On a personal note, during my Peace Corps tour in Nepal in the 60's, I was stationed in the Terai, the flat, fertile, Gangetic plain bordering India, living along a rather unsophisticated tribe that was said to have a natural resistance or tolerance of malaria. A few years before I arrived, a USAID program had greatly reduced the threat of malaria with DDT spraying. During my stay I was told that the local tribe was being increasingly exploited by the savvier "hill Nepalis" and Indians who were now freer to "invade" without the deadly mosquito to keep them at bay.

¹¹⁷ "[O]ne has to be lucky in the match of one's talents with socially available forms of activity." BARBARA HERMAN, *MORAL LITERACY* 269 (2007). See T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 292 (2000).

¹¹⁸ "That inevitable kind of harm to others is, as the old Roman lawyers put it, *damnum sine injuria*. It is part of our personal responsibility – it is what makes our separate responsibilities personal – that we accept the inevitability and permissibility of competition harm." DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 90, at 288.

¹¹⁹ Feasibility is important. As Rawls notes, "most such principles [of justice] are only as a *prima facie* principle, one that is to be weighed in the balance with others." RAWLS, *THEORY OF JUSTICE*, *supra* note 26, at 86.

Ultimately, capabilities, external resources, and the environment interrelate, perhaps synergistically, in creating and delineating one's actual, material autonomy space. In light of the spatial metaphor of autonomy space, it might be modeled in this way. Autonomy space can be visualized as a multidimensional, ameba-shaped form with chunks cut from the edges, representing external limitations, and holes or gaps on the inside, representing internal limitations.¹²⁰

C. TYPES OF AUTONOMY SPACE

Theory must ultimately accommodate practical realities.¹²¹ For this topic they include the many different sorts of environmental circumstances that humans face, and the wide range of their capabilities and external resources with which they have to face them. Consequently, autonomy space is not truly the same for everyone even if they are subject to an identical set of deontic maxims. In the last section above, this divergence suggests that the duty to respect others may imply or support a redistributive maxim aimed at assuring everyone a certain minimum expanse of autonomy space.¹²² Otherwise, do they truly have freedom? In this section I further develop some of the observations by discussing three ways of looking at, or three types of, autonomy space: hypothetical, formal, and material.¹²³ These types of autonomy space become particularly rele-

¹²⁰ Pushing this metaphor further, the internal and external autonomy limitations may not be complete gaps or holes, but rather thinned areas within the "substance" of autonomy. For example, "irresistible impulse" would be represented by an internal gap, whereas "hard-to-resist impulse" thins the autonomy space at that place, i.e., the agent has some power to overcome the impulse but not unhindered freedom. As the impulse becomes easier to resist, until it dissipates altogether, the autonomy "substance" thickens in that metaphorical area.

¹²¹ Kant was aware of this. See KANT, ON THE COMMON SAYING, *supra* note 61, at 273.

¹²² A welfare maxim may be seen as creating a positive right. See *supra* note 54.

¹²³ Compare Brudner's trichotomy of formal agency, real autonomy, and community belonging. See BRUDNER, PUNISHMENT AND FREEDOM, *supra* note 101, at 5-6.

vant in establishing requitals for invasions. Which autonomy space is to be protected?

Hypothetical autonomy space suggests an ideal.¹²⁴ A person must have extensive physical and mental capabilities to meet this standard. For guidance, we may look to the ideal rational person sometimes central to particular moral,¹²⁵ political,¹²⁶ or economic theory.¹²⁷ As for this person's external resources, while not a Bill Gates or a Warren Buffett, she has enough of them to engage fully in the activities of public and private life, whatever her sensible desires.¹²⁸

The natural and social environment supporting hypothetical autonomy space cannot be specified in detail. Eden is not required.

¹²⁴ "[W]e can distinguish between 'basic' autonomy – a certain level of self-government necessary to secure one's status as a moral agent or political subject – and 'ideal' autonomy – the level or kind of self-direction that serves as a regulative idea" John Christman & Joel Anderson, *Introduction*, in *AUTONOMY AND THE CHALLENGES TO LIBERALISM* 1, 2 (John Christman & Joel Anderson eds., 2005).

¹²⁵ Parfit, as usual, offers an interesting analysis of rationality. See PARFIT, ON WHAT MATTERS, *supra* note 23, at 111-29.

¹²⁶ Rawls invokes the standard concept of rationality, less envy, "familiar in social theory." RAWLS, *THEORY OF JUSTICE*, *supra* note 26, at 124 (footnote omitted). With a "coherent set of preferences between the options open to him," the rational person "ranks these options according to how well they further his purposes; he follows the plan which will satisfy more of his desires rather than less, and which has the greater chance of being successfully executed." *Id.* See generally KEN BINMORE, *RATIONAL DECISIONS* (2009); ROBERT NOZICK, *THE NATURE OF RATIONALITY* (1993); *RATIONAL CHOICE* (Jon Elster ed., 1986); *RATIONAL DECISION* (Carl J. Friedrich ed., 1964).

¹²⁷ "[T]he concept of rationality must be interpreted as far as possible in the narrow sense, standard in economic theory, of taking the most effective means to given ends." RAWLS, *THEORY OF JUSTICE*, *supra* note 26, at 12 (modifying this sense for his own purposes). See, e.g., I.M.D. LITTLE, *A CRITIQUE OF WELFARE ECONOMICS* ch. II (2d ed. 1957). See generally *RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY* (Robin M. Hogarth & Melvin W. Reder eds., 1987); *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* (Francesco Parisi & Vernon L. Smith eds., 2005).

¹²⁸ Cf. *supra* note 103 (discussing social primary goods and capabilities or functionings).

Human characteristics must be kept in mind.¹²⁹ For those of us habituated to temperate climates, it is hard to imagine longing for a severe desert or frozen wasteland, but many people do quite well in such places and may feel disoriented elsewhere. Still, I do not think that we should take the biota, climate, geography, and other native features of a person's surroundings as a given. An ideal place to exercise one's autonomy would not require undue time and effort to satisfy basic needs. Beyond meeting basic needs, the environment must allow for additional time and resources for easily preserving one's security and utilizing one's liberty to engage in preferred endeavors.¹³⁰ Perhaps you found such a place during a vacation – a short one, most likely, that ended before the bug or rainy season. What is the social environment of your Shangri-La? We cannot take as benchmarks the actual norms of one's familial, community, religious, political, and economic institutions.¹³¹ For one, some such norms may not be deontically justifiable, as in a sexist society. Even if a society springs from a strong social contract, one in which the members deeply consent to its terms, we must still reject any of the norms that violate the categorical imperative, as where, according to Kant, consensual mutilation or slavery is declared acceptable.¹³²

Formal autonomy space is a default standard within a society that substantially satisfies the requirements of the categorical imperative. Each person is presumed to meet, and usually held to, a

¹²⁹ See HART, *THE CONCEPT OF LAW*, *supra* note 31, at 190 (discussing the contingency of law and morality on human vulnerability).

¹³⁰ One's preferences are, of course, partially informed by the environment in which one is raised. As this again shows, it is not possible to break up this puzzle of autonomy into totally independent pieces.

¹³¹ For Rawls, the parties in the original position behind the veil of ignorance "do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve." RAWLS, *THEORY OF JUSTICE*, *supra* note 26, at 118.

¹³² See *supra* note 61.

minimum standard of capabilities.¹³³ In the common law, this is said to be those of the reasonable person. Her relevant characteristics are: "Normal intelligence; normal perception, memory, and at least a minimum of standard knowledge"¹³⁴ This existing standard may not suffice for our purposes insofar as it incorporates characteristics that do not align with deontic mandates. When, for instance, a reasonable person is said to have "knowledge" that certain classes of persons have particular inferior skills (e.g., sexism, racism), we must exclude as disrespectful these characteristics from our understanding of formal autonomy space.¹³⁵ The external resources assumed by formal autonomy space, like that of the law's reasonable person, are enough for a person to engage in normal quotidian activities and meet her usual moral and legal duties.¹³⁶ Her resources are not so limited that she feels compelled to engage

¹³³ In other words, a person is presumed to have the skill set needed to reasonably exercise her rights and meet her duties, such as in avoiding negligence and satisfying familial and other obligations. The usual exceptions for children and mental incompetents apply in the law and under deontic principles. "The elements of character of a normal moral agent will not be the same across times and places, but the feature of fit is constant: hers is the character that is at home in her social world." HERMAN, MORAL LITERACY, *supra* note 117, at 305 n.8.

¹³⁴ DOBBS, LAW OF TORTS, *supra* note 63, at 280 (format revised and footnotes omitted). See RESTATEMENT (SECOND) OF TORTS § 283 (1977); KEETON ET AL., *supra* note 7, at 173-93. Dobbs also adds characteristics not applicable to formal autonomy space, but suggestive of material autonomy: "all the additional intelligence, skill, or knowledge actually possessed by the individual actor; and the physical attributes of the actor [her]self." *Id.* For doubts as to the usefulness of the reasonable person standard in the context of copyright, see Irina D. Manta, *Reasonable Copyright*, 53 B.C. L. REV. 1303 (2012), and for doubts as to the tort standard as "an empirically observed practice or perception," see Alan D. Miller & Ronen Perry, *The Reasonable Person*, 87 N.Y.U. L. REV. 323, 323 (2012).

¹³⁵ "Actually there are two kinds of 'objective' standards sometimes used by courts: appeal to the judgments or characteristics of *most* people or the *average* person, on the one hand, and appeal to an ideal *reasonable* person, on the other." FEINBERG, HARM TO SELF, *supra* note 26, at 210.

¹³⁶ For example, the reasonable person is presumed to have the resources needed to meet the ordinary standard of care. See *Denver & Rio Grande R.R. v. Peterson*, 69 P. 578 (Colo. 1902) (Otherwise, "if [the defendant] were extremely poor, the care required might be such as practically to amount to nothing").

in high-risk activities or consent to severe contracts. She possesses sufficient enablements. Yet she may fall short of the resources needed to do all that she would sensibly wish, such as to fully engage in civic life by running for public office.

The natural and social environment framing formal autonomy space, like the requisites of capabilities and external resources, allow a person to engage in normal daily life. Social prejudice, for one, is not unduly disabling, nor are the demands of a rigid religious ethos unduly constricting. Under the existing common and criminal laws, formal autonomy space, perhaps with some nondeontic elements, is usually the default standard.

Material autonomy space acknowledges the characteristics and circumstances of the particular agent in question. One's actual capabilities, such as intelligence and willpower, whether above or below average, are the given. Circumstances may determine the extent to which a person's actual capabilities suffice to exercise her liberty or protect her security.¹³⁷ For instance, ectomorphic geniuses may be disadvantaged in a strict, violent, subsistence society, while

¹³⁷ For instance, in exercising her liberty, a child may be able to truly consent to some choices (e.g., fruit for dessert, not pie), but not others (e.g., employment contract). John Kleinig, *The Nature of Consent*, in *THE ETHICS OF CONSENT* 3, 13 (Franklin G. Miller & Alan Wertheimer eds., 2010). See FEINBERG, *HARM TO SELF*, *supra* note 26, at 116 (observing that some voluntary choices can be made by animals, small children, and mentally disabled patients). The minimally competent person, though *de jure* autonomous, "may rule himself badly, unwisely, only partially. He may in fact have relatively little personal autonomy in the sense of *de facto* condition" *Id.* at 30. Feinberg diagrams "[d]e facto and de jure senses of autonomy, liberty, and freedom," *id.* at 65 (diagram 19-1). Along these lines, Kolber identifies "liberty-in-fact" that "focuses on our ability to take certain actions without interference with others." Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1587 (2009) (footnote omitted). "[P]eople differ dramatically in the amount of liberty that they have in their baseline conditions because people differ in the amount that others in fact interfere with their available action." *Id.* Kolber distinguishes this view of liberty from "liberties-under-law" which is suggestive of what I identify as formal autonomy space. See *id.* at 1589. He further identifies "idealized liberties" that "are those that we ought to have under some set of idealized circumstances." *Id.* at 1593. This seems to map onto my notion of hypothetical autonomy space.

mesomorphic dullards thrive. Likewise for external resources, one's actual resources are taken as the given. A person may have the hypothetical or formal autonomy space (liberty) to buy a yacht, but not the economic wherewithal. For the same reason, she may have a duty of care (e.g., to support her children) that cannot be met, or leaves her in desperate straits. Finally, the particular agent's actual natural and social environment, normative and otherwise, frames her material autonomy space.

In sum, material autonomy space refers to the realizable power of a person to exercise and protect her hypothetical or formal autonomy space. Hence, the material autonomy space of a wealthy, talented, unencumbered person surpasses that of her formal autonomy space. It may approach, even exceed, that of her hypothetical autonomy space. For those at the other end of spectrum, their material autonomy space may be minuscule, ultimately, a dot.

As the discussion of these three types of autonomy space reveals, it is difficult to sharply distinguish one from another. The discussion also shows that a person's capabilities, external resources, and environment interrelate in complex ways. These complications may especially hang over plausible requital maxims. For example, if a person is wrongfully denied the right to purchase a yacht, should a requital account for the reality that she did not have the material autonomy space, the resources, to purchase it anyway? The common law of negligence aims to return an invadee to her *ex ante* position.¹³⁸ This position is based on her actual, material condition, not her formal autonomy space. This benefits an invadee with unusual, unforeseeable vulnerabilities, but it disadvantages the invader who is held responsible for costly consequences that she could not foresee.¹³⁹ Negligence requital maxims that base the remedial standard on formal autonomy space may protect the invad-

¹³⁸ See, e.g., DOBBS, *LAW OF TORTS*, *supra* note 63, at 1047.

¹³⁹ See discussion *infra* Part VI.A. (Responsibility Blameworthiness).

er reasonably ignorant of the invader's unusual vulnerabilities from the consequences of her choices and actions that were not fully responsible. She is liable for the harms that a "reasonable person" would have suffered, but not the more extensive harms that the actual invader suffered. But then the compensated invader is left short of her *ex ante* position. And if recovery is based on the "reasonable person" invader when the actual invader was harmed less than what was foreseeable, the invader must "overcompensate" the invader. Which standard is fairer, more just? Do either or both of them meet the minimal, formal requirements of the categorical imperative? What about other possible requitals? As a final example, when determining an apt retributive punishment for a criminal act, should an agent's formal or material autonomy space be proportionately truncated? For the severely penurious criminal, prison may offer more benefits to her than does the outside world. For the rich and famous, even a moment in prison may be devastating. Should this be relevant?

D. THE DECLINING MARGINAL INCREASE OF AUTONOMY SPACE

Parallel to the economic notion of wealth, there seems to be a declining marginal increase of autonomy space with expansions of capabilities and resources, and relaxations of environmental constraints. Facilitated liberty and security expand at a decreasing marginal rate. If one has a small material autonomy space, a particular invasion (say, a loss of \$1000) has a greater effect than when one has a larger autonomy space.¹⁴⁰ But this is a generalization only, as in counterexamples in which being slightly better than others can lead to enormous gains.¹⁴¹

¹⁴⁰ See Kolber, *The Comparative Nature of Punishment*, *supra* note 137, at 1599 n.88.

¹⁴¹ See generally ROBERT H. FRANK & PHILIP J. COOK, *THE WINNER-TAKE-ALL SOCIETY* (1995).

The economic notion of the declining marginal utility of wealth may largely get to the same place as the idea of marginal changes in autonomy space.¹⁴² Insofar as economists posit that everything can be priced, then wealth suggests autonomy space. Progressive taxation may be supported, then, by the declining marginal increase of autonomy space as well as of the declining utility of wealth. But wealth may not equate to the liberty and security freedoms within autonomy space. In an environment in which wealth per se is not valued or is actually disvalued (e.g., a religious community renouncing materialism), changes in wealth would diverge from changes in autonomy space. Similarly, for a person without access to markets, such as an isolated prisoner or recluse, wealth may be useless as a practical matter.

The concept of the declining marginal increase of autonomy space implies that the material autonomy space loss to an invader may differ from a like gain to the invader. The rich invader may lose less autonomy space from a \$100 theft than the poor invader gains by it. Requitals for autonomy space invasions also present this asymmetrical phenomenon. After compensation for a tort, such as a battery, the defendant's autonomy space may shrink more or less than the plaintiff's autonomy space then enlarges. Cognitive scientists find that autonomy space losses are felt more than equal gains.¹⁴³ Even after a simple wealth transfer between two equally

¹⁴² See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 75-76 (2d ed. 1977). Cf. LEO KATZ, *BAD ACTS AND GUILTY MINDS* 254 (1987) (applying "the principle of diminishing marginal returns" to the damages from a series of misrepresentations); Robert H. Frank, *The Frame of Reference as a Public Good*, 107 *ECON. J.* 1832, 1832 (1997) ("Does consuming more goods make people happier? For a broad spectrum of goods, available evidence suggests that beyond some point the answer is essentially no.").

¹⁴³ See, e.g., JONAH LEHRER, *HOW WE DECIDE* 70-81 (2009); Daniel Kahneman, Jack L. Knetsch & Richard H. Thaler, *Experimental Tests of the Endowment Effect and the Coase Theorem*, in *ADVANCES IN BEHAVIORAL ECONOMICS* 55, 56-57, 72 (Colin F. Camerer et al. eds., 2003); Cass R. Sunstein, *Introduction*, in *BEHAVIOR LAW AND ECONOMICS* 1, 5-6 (C.R. Sunstein ed., 2000); Daniel Kahneman & Amos Tversky, *Con-*

situated parties (i.e., equal material autonomy spaces), there is an asymmetry in the effects since one suffers a loss while the other obtains a gain. Typically, the loss has a greater felt impact.¹⁴⁴ A bottom line is that pure wealth-transfer-type requitals for autonomy space invasions, and other types of requitals as well, if designed to rebalance or equalize the invader's compensatory obligation or punishment and the invadee's harms, may not restore their relative or absolute autonomy spaces. Much depends on the prior baselines of the two parties, among other things.

IV. AUTONOMY SPACE BOUNDARIES

Rights and duties are a reflection of an agent's autonomy space, or vice versa. Within the boundaries of her space, the agent has rights against potential invaders. Outside her boundaries, she has duties not to invade the autonomy spaces of other agents. This section further examines where and how these boundaries are erected. It begins by looking at traditional boundary baselines and then turns to the individualized deontic process of delineating boundary markers.

A. TRADITIONAL BASELINES

A harm principle is the classic boundary marker demarcating baseline autonomy space. The best-known harm principle is J.S. Mill's: self-regarding harm falls within the range of personal freedoms and, hence, is not subject to governmental intervention, while other-regarding harm may be subject to regulation.¹⁴⁵

flict Resolution: A Cognitive Perspective, in CHOICES, VALUES, AND FRAMES 473, 481-86 (Daniel Kahneman & Amos Tversky eds., 2000).

¹⁴⁴ This may also be the case at an initial invasion. If, say, an invader steals \$100, the invadee feels it as a loss while the invader feels it as a gain.

¹⁴⁵ See JOHN STUART MILL, ON LIBERTY, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT, *supra* note 31, at 81, 176-200. As a utilitarian, Mill based his harm principle on the argument that the liberty it allows will increase

For self-regarding harm, the claim in deontic terms is that because such harm does not wrongfully harm another person, there is no violation of any duty to others.¹⁴⁶ Harming oneself is not disrespectful of others. Self-regarding harm may be self-disrespectful and therefore violate a duty to oneself, as in certain suicides,¹⁴⁷ but it does not, by itself, violate a duty to other persons. In these circumstances others must defer to the agent's choice.

Other-regarding harm may or may not be wrongful.¹⁴⁸ Under existing law, harms from fair competition and "pure accident", for example, are not remediable, rightfully so in the view of most.¹⁴⁹

overall social utility. See *id.* Feinberg specifies a harm principle: "It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values." FEINBERG, HARM TO OTHERS, *supra* note 30, at 26. For nine "commonly proposed liberty-limiting principles", see *id.* at 10-14, 26-27. Sadurski sees Rawls's deep principle of the "priority of the right over the good" as "merely a restatement of the [Millian] 'harm principle'." Wojciech Sadurski, *Social Justice and the Problem of Punishment*, 25 ISR. L. REV. 302, 328 (1991) (referring to JOHN RAWLS, A THEORY OF JUSTICE 393 (rev. ed. 1999)). "There is significant controversy within the philosophical literature both as to how to understand the Harm Principle (What is to count as a harm? Do offensive actions count as harms under this standard?), and as to the merits of that principle." Brian H. Bix, *Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried*, 45 SUFFOLK U. L. REV. 719, 725 (2012) (footnote omitted). For the applicability of the harm principle to contract law, and surrounding controversies, see *id.* at 725-33.

¹⁴⁶ That self-regarding harm may merge into other-regarding harm, see RONALD DWORIN, TAKING RIGHTS SERIOUSLY 263 (1978); Morgan, *The Mode and Limits of John Stuart Mill's Toleration*, *supra* note 31, at 147-50.

¹⁴⁷ Kant insists that the categorical imperative requires one to be respectful of one's own self as well as others. This disallows, in his view, slavery contracts, self-mutilation, and, perhaps, certain consensual sexual conduct, among other things. See *supra* note 61.

¹⁴⁸ "[T]he harm principle sets but a threshold of legitimacy for the use of state power. It sets a necessary condition, not one that is necessary and sufficient." Dori Kimel, *Fault and Harm in Breach of Contract*, in FAULT IN AMERICAN CONTRACT LAW 271, 282 (Omri Ben-Shahar & Ariel Porat eds., 2010).

¹⁴⁹ Utilitarian economists favoring strict enterprise liability may disagree with respect to "pure accident". Certainly they would not disagree about fair competition. That a deontological libertarian may have difficulty justifying the harms from fair

Psychic harms pose some of the most difficult issues for boundary marking. While some conduct may psychically harm others because, say, they are upset from simply being aware of it (e.g., particular private sexual activities), such “knowledge” harm need not be deontically wrongful. The agent usually is not disrespecting the objectors. She is not using them as a means only.¹⁵⁰ She is not interfering with their liberty or truncating their rightful security. Though one generally has a security interest in avoiding psychic harms from the conduct of others, this must be carefully circumscribed, for otherwise, near the bottom of this slippery slope, are claims such as, “Your legitimate, earned success has aroused painful envy in me and therefor has wrongfully harmed me.” A proscriptive maxim on these grounds would strike a balance between liberty and security that unduly favors psychic security. Nonetheless, adopting a proper balance is quite difficult.¹⁵¹ The central deontic pillar of respect for the dignity of moral persons helps to point a way out of this complexity.¹⁵² Psychic harm of others is wrongful if it arises from con-

economic competition, see Jonathan Wolff, *Libertarianism, Utility, and Economic Competition*, 92 VA. L. REV. 1605 (2006).

¹⁵⁰ “In general, using another as a mere means is thought to belong in the same family as the concepts of ‘manipulation, dehumanization, exploitation, and disrespect.’ [It] may also be understood in the negative – as failing to respect another’s inviolability, rationality, or moral status.” Russell L. Christopher, *Detering Retributivism: The Injustice of “Just” Punishment*, 96 NW. U. L. REV. 843, 927 (2002) (footnotes omitted). “In addition to using another as a tool or commodity, using another without their consent is another common conception of using someone as a mere means.” *Id.* at 928 (footnote omitted). For various viewpoints, see *id.* at 927-30. Parfit analyzes the “Mere Means Principle”, and finds it defective. See PARFIT, ON WHAT MATTERS, *supra* note 23, at 212-32.

¹⁵¹ “The harm principle is designed to draw the boundaries of criminal liability ... [but] the resulting boundary is vague, elastic, and porous.” Meir Dan-Cohen, *Thinking Criminal Law*, 28 CARDOZO L. REV. 2419, 2421 (2007). For summaries of suggested considerations when drawing boundary lines, see FEINBERG, HARM TO OTHERS, *supra* note 30, at 214-17, 243-45.

¹⁵² Because of “a growing disaffection with the harm principle [such as its expansiveness] and the challenge of multiculturalism,” Dan-Cohen advances a “dignity principle”. DAN-COHN, HARMFUL THOUGHTS, *supra* note 21 at 152-53. Similarly,

duct primarily disrespectful of them, but not otherwise, even if said to be self-disrespectful. Under this line drawing, private sexual conduct between consenting adults is not disrespectful of others if engaged in for personal reasons, but is disrespectful if motivated by the desire to noisily upset knowing neighbors.¹⁵³ This may be generalized to public events. If public conduct is engaged in, say, to express pride in one's characteristics or values (e.g., gay pride) or to assert one's liberty claims (e.g., civil rights), then it is not disrespectful of others. If the conduct is primarily aimed at vexing others, it is disrespectful.¹⁵⁴

B. BOUNDARY MARKERS

Other-regarding wrongful harms are established by deontic maxims. An agent, by adopting a maxim, demarcates an autonomy

"Michael Köhler has argued that the entire criminal law should be understood as a response to a violation of the victim's freedom." FLETCHER, *THE GRAMMAR OF CRIMINAL LAW*, *supra* note 57, at 41 (footnote omitted).

¹⁵³ Compare Kant's requirement that duty is to be done for duty's sake, and if done for mixed motives, that the duty motive predominate. See, e.g., KORSGAARD, *CREATING THE KINGDOM*, *supra* note 31, at 55-67; PARFIT, *ON WHAT MATTERS*, *supra* note 23, at 169-79; WOOD, *KANTIAN ETHICS*, *supra* note 24, at 24-42. Compare also the standard in common law nuisance law whereby a fence built for the landowner's reasonable use is not a nuisance, but a similar spite fence is. See DOBBS, *LAW OF TORTS*, *supra* note 63, at 1329; KEETON ET AL., *supra* note 7, at 624 n.65.

¹⁵⁴ Since motive or purpose for the offensive conduct is central to the line drawn, this differs from Feinberg's Offense Principle: "It is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted." FEINBERG, *HARM TO OTHERS*, *supra* note 30, at 26. "There is one kind of offended state that can probably never satisfy this requirement [of proscription], namely the shock of disappointment occasioned by the bare knowledge that other persons are doing, or may be doing, immoral things in private with legal impunity." *Id.* at 50. For criticism of Feinberg's line drawing, see, e.g., FLETCHER, *THE GRAMMAR OF CRIMINAL LAW*, *supra* note 57, at 185; Larry Alexander, *The Philosophy of Criminal Law*, in *OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 815, 858-64 (Jules Coleman & Scott Shapiro eds., 2002); Larry Alexander, *Harm, Offense, and Morality*, 7 *CAN. J.L. & JURISPRUDENCE* 199 (1994); David W. Shoemaker, "Dirty Words" and the *Offense Principle*, 19 *LAW & PHIL.* 545 (2000).

space boundary between herself and others. Subject to later boundary adjustments through consent, crossing this marker constitutes, as the agent sees it, a wrongful harm. If another person crosses the marker, he wrongfully harms the agent. If the agent crosses her own adopted marker, she wrongfully harms another person. Whether this other person perceives his harm from the agent as wrongful depends on whether he has adopted a comparable maxim. The harm may be wrongful from the actor's perspective but nonwrongful from the other's perspective, and vice versa. For example, one person may adopt a battery maxim that disallows non-consensual touchings of items physically connected to a person (e.g., a worn hat), while another person may adopt a battery maxim that also disallows touchings of closely associated items (e.g., a car in which a person is riding).¹⁵⁵ This signals practical trouble in the individualistic world supposed here. Some of these potential conflicts may be ameliorated by higher order maxims, as where an agent adopts a maxim to follow respectful social norms. But sooner or later the complexities of an individualized deontic realm must be confronted.

In principle, a person cannot rationally adopt a set of maxims that create inconsistent boundary markers. *Prima facie* or *pro tanto* rights and duties may conflict,¹⁵⁶ but individual maxims explicitly or implicitly include "except when ..." or "unless ..." clauses and

¹⁵⁵ See DOBBS, *LAW OF TORTS*, *supra* note 63, at 61-62 ("extended personality"); KEETON ET AL., *supra* note 7, at 39-40.

¹⁵⁶ That Kant did not work out well the problem of conflicting moral norms, see SULLIVAN, *IMMANUEL KANT'S MORAL THEORY*, *supra* note 23, at 73-74. When apparent obligations conflict, Kant would have the agent rely on her judgment to resolve the problem by adopting a responsive maxim. See Mark D. White, *Pro Tanto Retributivism: Judgment and the Balance of Principles in Criminal Justice*, in *RETRIBUTIVISM* 129, 135-37 (Mark D. White ed., 2011) (comparing this approach to those of W.D. Ross and Ronald Dworkin). On the "pro tanto view of promissory obligation," see Hanoch Sheinman, *Introduction: Promises and Agreements*, in *PROMISES AND AGREEMENTS* 3, 17-19 (Hanoch Sheinman ed., 2011).

other provisos that coherently weave together the set of maxims.¹⁵⁷ For example, an agent who disappoints another's aroused expectations ("I promise to meet you at 1:00, on the dot.") in order to effect an easy rescue would not be violating her apparent maxims against such disappointment if her promisekeeping, reliance, or expectation maxims (implicitly) include the proviso, "except when necessary to make an easy rescue."¹⁵⁸

There are many exception provisos in broad or general maxims. One must not equate generalization with the universalization demanded by the categorical imperative.¹⁵⁹ A universalized maxim may apply to a restricted range of persons (e.g., spouses), or a narrow range of circumstances (e.g., ballooning).¹⁶⁰ There may be an

¹⁵⁷ "A rule that ends with the word 'unless ...' is still a rule." H.L.A. HART, *CONCEPT OF LAW* 136 (1961). "Hart claimed that the unless-clause cannot be exhaustively stated: no matter how many exceptions are given to a rule, one can always imagine further exceptions that have not been captured." Richard Holton, *The Exception Proves the Rule*, 18 J. POL. PHIL. 369, 375 (2010). For an argument that exceptions to rules, i.e., subrules, effectively converts rules into rules of thumb, see Allen Habib, *Promises*, The Stanford Encyclopedia of Philosophy, available at <http://plato.stanford.edu/archives/win2008/entries/promises/> (last visited Aug. 7, 2013).

¹⁵⁸ "Immanuel Kant argued that failing to rescue others violated the categorical imperative." George P. Fletcher, *The Fall and Rise of Criminal Theory*, 1 BUFF. CRIM. L. REV. 275, 291 (1998) (citing IMMANUEL KANT, *GROUNDWORK TO THE METAPHYSICS OF MORALS* 17-22 (Herbert J. Paton trans., 1962)). This is not to say that there is a *legal* duty to rescue. See *id.* at 293.

¹⁵⁹ Parfit finds flaws in Kant's universalization principle. See PARFIT, *ON WHAT MATTERS*, *supra* note 23, at 275-419. Indeed, in his two-volume tome, Parfit finds flaws in virtually all of Kant's principles, though he tweaks them to make them, in his view, plausible and useful. In particular, see PARFIT, *ON WHAT MATTERS*, *supra* note 23, at 652-718.

¹⁶⁰ See, e.g., PARFIT, *ON WHAT MATTERS*, *supra* note 23, at 315. "Principles of action – practical principles – refer to *types of action* . . . [P]ractical principles usually specify the *domain of agents* for whom they are to be regarded as relevant." ONORA O'NEIL, *BOUNDS OF JUSTICE* 51 (2000). In terms of equal treatment, "[w]hat we actually mean when we speak of equality in a certain legal system is that we accept the choice of particular properties as relevant to differentiated treatment." SADURSKI, *GIVING DESERT ITS DUE*, *supra* note 99, at 82. "[N]o objective and non-controversial standard of 'relevance' can be found." *Id.* (footnote omitted). "The reasonableness of the choice

enormous number of exceptions to broad maxims as the seemingly infinite nuances of possible circumstances and interweavings among maxims play out.¹⁶¹ While Kant has been incorrectly accused of being an absolutist about unqualifiable rules,¹⁶² nonetheless, most people would create exceptions to broad maxims, as in the rescue example above. Indeed, a person who passed up an easy rescue in order to keep a nonessential promise would probably be considered a moral monster.¹⁶³ If an agent chooses a set of maxims that fails to account for potential conflicts, the set is irrational in the sense of not being complete and coherent.¹⁶⁴ To remedy this, an agent might

of certain criteria for classification of people by legal rules rests upon value judgments" *Id.* at 83. Nonetheless, an overarching principle of equality demands "equal respect for all human beings and equal concern for them, irrespective of their qualities and characteristics." *Id.* at 96.

¹⁶¹ "How many valid moral principles are there, then? An indefinite number, I would say." SCANLON, *WHAT WE OWE*, *supra* note 117, at 201.

¹⁶² "The notion that Kantian ethics is committed to strict exceptionless rules because it regards moral principles as categorical imperatives is based on the crudest misunderstanding. A categorical imperative . . . is far from implying that the obligatoriness of particular moral rules or duties is unconditional." WOOD, *KANTIAN ETHICS*, *supra* note 22, at 63. Under Kant, reasons for exceptions cannot "always be formulated in precise rules, telling us in general terms precisely when to make exceptions. Judgment in Kant's view is a talent that may be developed through experience but cannot be formulated in any set of rules." *Id.* On the other hand, Hill maintains, "unconditional prohibitions . . . do not follow from Kant's basic moral theory, despite what he himself thought" THOMAS E. HILL, JR., *Introduction*, in *RESPECT, PLURALISM, AND JUSTICE* 1, 3 (2000).

¹⁶³ In discussing the failure of a person to easily rescue a child at dire risk, one court observed, "If he does not, he may, perhaps, justly be styled a ruthless savage and a moral monster; but he is not liable in damages for the child's injury, or indictable under the statute for its death." *Buch v. Amory Mfg. Co.*, 44 A. 809, 810 (N.H. 1897). "Saying 'I promise to . . . ' normally binds one to do the thing promised, but it does not bind unconditionally or absolutely [I]t does not bind one to do the thing promised whatever the cost to oneself and others." Thomas Scanlon, *Promises and Practices*, 19 *PHIL. & PUB. AFF.* 119, 214 (1990).

¹⁶⁴ "A collision of duties and obligations is inconceivable." KANT, *THE METAPHYSICS OF MORALS*, *supra* note 20, at 379. There may be slippery slopes if one insists on narrow maxims to account for potential conflicts with other maxims. "If . . . we concentrate upon the details of each case and allow maxims to be quite specific, then it seems we can will as universal law the maxim of virtually any act that we are willing

adopt higher levels of meta-maxims to deal with incompleteness or *prima facie* conflicts within her set of explicit, lower-level maxims.¹⁶⁵

to do." HILL, JR., DIGNITY AND PRACTICAL REASON, *supra* note 20, at 62. Well, not quite. We cannot will a maxim disrespectful of others. This is limitation enough. In addressing the problem of "adjust[ing] our ethical categories and principles reciprocally until we get whatever result we want," Korsgaard observes, "Of course there are dangers of this kind, but it is not clear that we have any option but to face them, and to try to be intellectually honest." KORSGAARD, CREATING THE KINGDOM, *supra* note 31, at 357-58. "Our discussion will be adequate if it has as much clearness as the subject-matter admits of" ARISTOTLE, NICHOMACHEAN ETHICS bk. I, ch. 3, in THE BASIC WORKS OF ARISTOTLE 935, 936 (Richard McKeon ed., 1941). The idea of specifying a complete and coherent set of rights "all the way down" has been referred to as "specificationism". Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/fall2010/entries/rights> (last visited Aug. 7, 2013) (citing Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209 (1995) ("[E]ach right is defined by an elaborate set of qualifications that specify when it does and when it does not apply: a set of qualifications that define the right's 'space.'")). Objections to specificationism are: fully specified rights are unknowable; they are conclusory; and, they cannot explain the "residue" of a "defeated" right, as where a starving person may have a right to steal food, but still has a duty to, say, apologize for it. See Wenar, *supra*. For the last objection, we could say that there is no such right to steal, but that the requital maxim for a violation requires, under the circumstances, only an apology. Specificationism supports "Kant's bold proclamation that 'a conflict of duties is inconceivable.'" Larry Alexander & Michael Moore, *Deontological Ethics*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/spr2009/entries/ethics-deontological/> (last visited Aug. 7, 2013) (citation to Kant omitted). "[R]easons for believing it are difficult to produce." *Id.*

¹⁶⁵ "[A] subject may have, in a rule he prescribes to himself, two grounds of obligation When two such grounds conflict with each other, practical philosophy says . . . that the stronger ground of obligation prevails" KANT, THE METAPHYSICS OF MORALS, *supra* note 20, at 379. See Russ Shafer-Landau, *Specifying Absolute Rights*, 37 ARIZ. L. REV. 209, 212-13 (1995). This suggests Dworkin's controversial "right answer" thesis. See RONALD DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985). Chapman, discussing Frederick Schauer's and Ronald Dworkin's similar views, writes, "the idea is that the rule, properly and completely articulated as a rule, must contain all the various 'unless' clauses that are relevant to the application of the rule." Bruce Chapman, *Law Games: Defeasible Rules and Revisable Rationality*, 17 LAW & PHIL. 443, 449 (1998) (footnote omitted). Without full specification prior to application, Schauer argues, "there is essentially no rule." *Id.* (footnote omitted). On the other hand, Hill observes, "the kingdom of ends ideal, like any rule-generating procedure, must face the possibility that, in practice, it will produce moral dilemma, gaps, and disagree-

In the real world, an agent rarely if ever expressly adopts maxims. Instead, she reveals or manifests chosen maxims and their nuances by her conduct over time, if consistent, in response to newly faced moral dilemmas. Maxims are adopted and refined piecemeal. If asked, she may not know beforehand the details of her own maxims.¹⁶⁶ It may require the kiln of difficult dilemmas to harden her considered or spontaneous choices. This is, in some ways, like the common law at work. Consequently, when a person claims that an agent has violated her own maxim and has therefore wrongfully harmed him, and the agent denies that any of her maxims encompass his claim, the claimant's response might be, "But your prior conduct in response to a morally indistinguishable situation revealed that you have adopted a maxim that would protect me from your action."¹⁶⁷ How likely is it that the claimant will be able to as-

ments." THOMAS E. HILL, JR., *A Kantian Perspective on Moral Rules*, in RESPECT, PLURALISM, AND JUSTICE 33, 52 (2000). "Given how limited and imprecisely specified the commitments of Kantian legislators are, it seems obvious that some questions about moral rules will not be determinately resolvable." *Id.* "For practical Kantians, then, *apparent* dilemmas pose tasks for further moral thinking rather than a reason to abandon the framework or simply to marvel at the tragic absurdity of life." *Id.* at 53. Relatedly, Munzer advances this approach: "Morality may be composed of different types of basic units – for instance, specific 'rules' that apply pretty rigidly to actions they cover, together with broad 'principles' that exert less definitive force where they apply." Stephen R. Munzer, *Persons and Consequences: Observations on Fried's Right and Wrong*, 77 MICH. L. REV. 421, 427 (1970) (citing Marcus G. Singer, *Moral Rules and Principles*, in ESSAYS IN MORAL PHILOSOPHY 160 (A.I. Melden ed., 1958)). This is suggestive of R.M. Hare's "two levels of moral thinking – intuitive and critical Critical thinking resolves conflicts [in intuitive principles] and in general tries to select the best set of intuitive principles." Stephen R. Munzer, *Intuition and Security in Moral Philosophy*, 82 MICH. L. REV. 740, 740 (1984) (reviewing R.M. HARE, *MORAL THINKING: ITS LEVELS, METHOD, AND POINT* (1981)).

¹⁶⁶ While if pressed, an agent could normally state and justify the maxim under which she is acting, "Kant does not claim that a rational agent either always does or always must have an explicit maxim consciously in mind while acting." SULLIVAN, IMMANUEL KANT'S MORAL THEORY, *supra* note 23, at 28.

¹⁶⁷ "The most important of these factors which show that in acting we have applied a rule is that if our behaviour is challenged we are disposed to justify it by reference to the rule" HART, THE CONCEPT OF LAW, *supra* note 31, at 136. Evidence

sert this? To confront this practical reality, we must invoke the state or other authoritative sources to arbitrate many of these problems in specifying a full set of enforceable maxims.¹⁶⁸

Once the parameters of an agent's autonomy space are specified by her first-order, substantive maxims, requitals for wrongful incursions into her or another's parallel space fall within conceptions of corrective justice and retribution. An agent must choose second-order, requital maxims as well as first-order ones. Requital maxims must also satisfy the rationality standard of completeness and coherence, separately and in combination with the first-order maxims. When an agent's own first- and second-order maxims call for her requital, the agent has a deontic duty to meet the obligation. It is disrespectful for an agent to invade another's autonomy space that is established by the agent's own first-order maxim, and then decline to adopt a responsive requital maxim or comply with it once adopted.¹⁶⁹

V. HARM

Our moral agent is ready to establish the boundaries of her autonomy space and, owing to the universalization mandate of the categorical imperative, the boundaries of everyone else's autonomy space, as she sees fit. She needs at this point to adopt a full set of substantive and requital maxims that balance her interests in liberty

that we accept the rule "may be manifested not only in our past and subsequent general acknowledgements of it and conformity to it, but in our criticism of our own and others' deviation from it." *Id.*

¹⁶⁸ "This mediation between freedom and security means that every actor must accept a measure of external constraint, not precisely specified *ex ante*, on her movements." Bernstein, *supra* note 33, at 737.

¹⁶⁹ See Jody Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1627-30 (2009) ("second-order moral responsibility"). Since promissory obligations stem from autonomous choice, "the remedial moral duties, if any, that attach to the violation of those obligations should also be subject to the will of the individuals who create the obligations." *Id.* at 1629-30 (footnote omitted). Are there requital maxims for violation of requital maxims? Third-order and higher maxims?

and security. For this task she must develop a sense of the harms caused by other persons that she would choose to be protected from and, reciprocally, that she would disallow herself from inflicting on others. The harms must survive the filter of the categorical imperative, of course. Offense at a touching simply because it was by a member of a disfavored, innate outgroup will not make it through this filter. That would be disrespectful.

The most prominent definition of "harm" is by Joel Feinberg. A "harm", in one sense, is a "setback to interests."¹⁷⁰ But there is "harm" and there is "harm",¹⁷¹ and there is "harm" and there is "wrongful harm".¹⁷² For purposes of identifying relevant harms,¹⁷³

¹⁷⁰ "Feinberg expounds harm in three senses: (i) harm as damage, (ii) harm as a setback to interests, and (iii) harm as wrongdoing. Harm as used in the harm principle is an amalgamation of sense two and three." Dennis J. Baker, *The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation*, 33 AUSTL. J. LEGAL PHIL. 66, 74 (2008) [hereinafter Baker, *The Harm Principle vs Kantian Criteria*] (footnote omitted). For Feinberg's own explication, see FEINBERG, HARM TO OTHERS, *supra* note 30, at 31-36, 105-06. "The word 'harm' is used . . . to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause." RESTATEMENT (SECOND) OF TORTS § 7(2) (1977).

¹⁷¹ Kleinig writes that "harm remains 'the most underdeveloped concept in our criminal law.'" John Kleinig, *Crime and the Concept of Harm*, 15 AM. PHIL. Q. 27, 27 (1978) (footnote omitted). "[E]ven the most cursory reflection shows that harm is conceptually foggy, susceptible to fictional applications, and subject to ideologizing." *Id.* (footnote omitted). See NEIL MACCORMICK, LEGAL RIGHT AND SOCIAL DEMOCRACY 29 (1982). "[T]he question is . . . not what 'harm' really means, but what reasons of principle there are for preferring one conception to another . . . [W]hich conception answers more adequately to the purposes for which the concept is deployed." JEREMY WALDRON, LIBERAL RIGHTS 119-20 (1993) (quoted in Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 DENV. U.L. REV. 889, 893 n.12 (1997)). Waldron suggests, in our context, that we need to distinguish "harm" from "wrongful harm". The real conceptual problem, I believe, is not harm in itself, but rather wrongful harm. For some of the controversies, see, e.g., Stephen Perry, *Harm, History, and Counterfactuals*, 40 SAN DIEGO L. REV. 1283 (2003); John C.P. Goldberg, *Rethinking Injury and Proximate Cause*, 40 SAN DIEGO L. REV. 1315 (2003).

¹⁷² In specifying "[t]he sense of 'harm' as that term is used in the harm principle," Feinberg writes, "only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense." FEINBERG, HARM TO OTHERS, *supra* note 30, at 36. See Baker, *The Harm Principle vs Kantian Criteria*, *supra* note 170, at 74.

let us begin with Kant. He places the duty to respect another's dignity as the key principle of practical reason.¹⁷⁴ Violation of this duty, then, produces a dignitary harm. This type of harm draws a good deal of attention in what follows.¹⁷⁵ In law and morals there are also other recognized harms: those stemming from physiology, psychology, and economics. Along these lines, Feinberg identifies the harm within his harm principle as a setback to a welfare and associated interests.¹⁷⁶ A welfare interest, at first blush, appears to spring from consequentialist, utilitarian, or communitarian moral reasoning, not deontic principles.¹⁷⁷ Practical reason, however, is quite open to, indeed involves, consequential considerations in adopting possible maxims,¹⁷⁸ so long as they do not run afoul of the categorical im-

¹⁷³ "There is no distinctly legal typology of harms." MOORE, *supra* note 1, at 391 (1997).

¹⁷⁴ See *supra* note 17; see also *supra* text accompanying notes 20-21. "Kant's use of dignity (or *Würde*) is complicated." Jeremy Waldron, *Dignity, Rank, and Rights*, in 29 THE TANNER LECTURES ON HUMAN VALUES 207, 219 (Suzan Young ed., 2011). See *id.* at 218-21.

¹⁷⁵ "Respect for human dignity . . . hovers over our laws like a guardian angel." Denise G. Réaume, *Indignities: Making a Place for Dignity in Modern Legal Thought*, 28 QUEENS L.J. 61, 62 (2002).

¹⁷⁶ "The trichotomy of interests delineated in [Feinberg's] harm principle includes welfare interests and those security and accumulative interests that cushion our welfare interests." Baker, *The Harm Principle vs Kantian Criteria*, *supra* note 170, at 74-75. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1662 (1992). Brudner neglects Feinberg's "accumulative interests" in criticizing his harm principle as inadequate to explain the criminal law, pointing out that a protected dignitary interest (as I would call it) is necessary to do the explanatory work. See Alan Brudner, *Agency and Welfare in the Penal Law*, in ACTION AND VALUE IN CRIMINAL LAW 21, 21-24 (Stephen Shute et al. eds., 1993) (later emphasizing the centrality of "respect for agency", "freedom", or "liberty").

¹⁷⁷ But see *supra* text accompanying notes 101-15 (enablements or primary goods).

¹⁷⁸ "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy." RAWLS, *THEORY OF JUSTICE*, *supra* note 26, at 26. "Nonconsequentialism does not deny that consequences can be a factor in determining the rightness of an act." KAMM, *INTRICATE ETHICS*, *supra* note 22, at 11. See JACOB ADLER, *THE URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT* 13 (1991); DWORKIN, *A MATTER OF PRINCIPLE*, *supra* note 165, at 411 n.10; MURPHY, *THE PHILOSOPHY OF RIGHT*, *supra* note

perative.¹⁷⁹ In considering the adoption of a possible maxim, an agent contemplates the potential results of universalizing it,¹⁸⁰ for she will be subject to both the benefits and the burdens of the maxim. The foreseeable effects may or may not have moral overtones, or may have normative sources other than deontology, as where efficiency or community values are given weight and weighed.¹⁸¹ Consequences aside, there is nothing inherently disrespectful about adopting proper maxims that disallow or require the standard types

12, at 31 n.20; PARFIT, ON WHAT MATTERS, *supra* note 23, at 275; SEN, RATIONALITY, *supra* note 14, at 639; Elizabeth Anderson, *Practical Reason and Incommensurable Goods*, in INCOMMENSURABILITY, INCOMPARABILITY, AND PRACTICAL REASON 90, 92 (Ruth Chang ed., 1997). But, "[e]specially to be avoided is the idea that Kant's doctrine provides at best only the general, or formal, elements for a utilitarian or indeed for any other moral conception." RAWLS, THEORY OF JUSTICE, *supra* note 26, at 221 n.29.

¹⁷⁹ As Nozick puts it, the categorical imperative is merely a side constraint on plausible maxims that does not exclude other considerations, normative or otherwise. See NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 61, at 28-33.

¹⁸⁰ Kant, for example, discusses the consequences of rejecting a promisekeeping maxim. See KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, *supra* note 17, at 74 (To universalize a law that one may intentionally break a promise when needy "would make the promise and the end one might have in itself impossible, since no one would believe what was promised him but would laugh at all such expressions as vain pretenses."). "[O]n the best reading of the categorical imperative test, the maxim of an action which is tested by it includes both the act done and the end for the sake of which that act is done." CHRISTINE M. KORSGAARD, SELF-CONSTITUTION 10 (2009). See SULLIVAN, IMMANUEL KANT'S MORAL THEORY, *supra* note 23, at 63.

¹⁸¹ "In considering . . . reasons, mulling them over, one arrives at a view of which reasons are more important, which ones have more weight." ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 294 (1981). Marmor supports Nozick's point: "The balancing of interests and costs . . . essential for the determination of the existence of each and every right is not necessarily a utilitarian one Cost-benefit analysis is not necessarily a quantitative matter; the intrinsic values and relative importance of the interests in question matter too." Andrei Marmor, *On the Limits of Rights*, 16 LAW & PHIL. 1, 13 (1997). Marmor suggests a second step, that of weighing in addition to weighting. Suppose a community weights the value of efficiency as greater than that of social solidarity, say, by two-to-one. In confronting a particular tradeoff choice, however, the community evaluator sees that the efficiency gains are minor in comparison to the substantial solidarity losses. In this case, though efficiency is weightier, the evaluator may decide to reject that protective choice because it is overall outweighed by the solidarity setback.

of legally recognized harms. Indeed, it is quite to the contrary. We may even adopt different monetized thresholds for each type of harm before declaring it wrongful.¹⁸² From a functional viewpoint, reflecting on the importance, even necessity, of protection against the standard types of recognized harms provides a more direct way to see them as under the deontic umbrella. Physical, economic, and psychic harms are disablements. They truncate the autonomy, reduce the freedom, of a harmed agent by destroying, hindering, or diverting her resources.¹⁸³ A physically injured, psychologically distressed, or economically taxed person has fewer real, material options to choose among.

A. TYPES OF HARMS

While potential benefits are crucial to the balancing involved in the choice to adopt a particular maxim, it is the costs, or harms, that receive most of the attention of commentators with a deontic orientation. I will follow suit. In this section I discuss the three general types of harms that the law prominently recognizes – physical, economic, and psychic – though I parse them somewhat differently.¹⁸⁴ Then I discuss at greater length a fourth type of harm, identified above, which the law recognizes in a more muted or interstitial

¹⁸² In monetized terms, for example, we might declare that the threshold remediality for physical harm is \$0, economic harm is \$100, psychic harm is \$200, and dignitary harm is \$0.

¹⁸³ "Someone who commits a tort against me robs me of the control I have over some of the resources otherwise at my disposal When you negligently injure me, you interfere with my autonomy in the sense of the control I have over resources at my disposal." Coleman, *Mistakes, Misunderstandings, and Misalignments*, *supra* note 4, at 554. See John Gardner, *On the General Part of the Criminal Law*, in *PHILOSOPHY AND THE CRIMINAL LAW* 205, 243 (Anthony Duff ed., 1998).

¹⁸⁴ For the ALI's division of noneconomic losses ("pain and suffering") into four main categories, see 2 *AMERICAN LAW INSTITUTE, REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY* 199-200 (1991).

manner – dignitary.¹⁸⁵ We are, after all, constructing autonomy from a Kantian perspective.

Physical harm, as I use the term, is harm to a person's body.¹⁸⁶ It does not include harm to property.¹⁸⁷ Harm to property would fall

¹⁸⁵ "[H]arm, as defined in this Section, is the detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person, or in physical things, and also the detriment resulting to him from acts or conditions which impair his physical, emotional, or aesthetic well-being, his pecuniary advantage, his intangible rights, his reputation, or his other legally recognized interests."

RESTATEMENT (SECOND) OF TORTS § 7 cmt. b (1977). Is dignitary harm to be found in the penumbra of this definition, perhaps in his "emotional . . . well-being" or "his intangible rights, his reputation, or his other legally recognized interests"? Apparently, it is the former. "One who has a cause of action for a tort may be entitled to recover as an element of damages for that form of mental distress known as humiliation, that is, a feeling of degradation or inferiority or a feeling that other people will regard him with aversion or dislike." RESTATEMENT (SECOND) OF TORTS § 905 cmt. d (1977). See *id.* cmt. g (granting damages for intentionally caused "loss of freedom" "for harm to feelings that result because of his inability to move freely wherever he desires"). Hence, it appears that courts and commentators may bury the independent notion of dignitary harm under the rubric of mental distress. See CANE, RESPONSIBILITY IN LAW, *supra* note 29, at 214-15; Peter Cane, *Retribution, Proportionality, and Moral Luck in Tort Law*, in THE LAW OF OBLIGATIONS 141, 147 (Peter Cane & Jane Stapleton eds., 1998). According to "the Mishnah (the foundation principles of the Talmud): 'A man who injures another becomes liable to him – on five counts: for damages, for pain, for healing, for loss of time, and for indignity.'" CHARLES F. ABEL & FRANK H. MARSH, PUNISHMENT AND RESTITUTION 109 (1984) (footnoting "Bava Kama 5:4"). See TALMUD BAVLI (Babylonian Talmud) ch. 8, Mishna 1, at 83b. "Ulpian famously stated, in respect of the Roman law of *iniuria*, that the wrong could protect either *corpus* (physical integrity), *fama* (good name, reputation, fame, renown) or *dignitas* (dignity, worth, status, standing)." Eric Descheemaeker, *Defamation Outside Reputation: Proposals for the Reform of English Law*, 18 TORT L. REV. 133, 135 (2010) (footnote omitted). Prosser and Keeton ascribe the reluctance to protect against "insult and indignity" mainly to the impropriety of protecting against "every trivial indignity" and the epistemic difficulties regarding the extent of the harm. See KEETON ET AL., *supra* note 7, at 59. See generally Leslie M. Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169 (2011); Jeremy Waldron, *How Law Protects Dignity*, 71 CAMBRIDGE L.J. 200 (2012).

¹⁸⁶ "Every personal injury action . . . rests on an unspoken assumption that each person owns his own body." Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 50 (1979) (footnote omitted). "Bodily

within my broad notion of economic harm.¹⁸⁸ Economic harm refers to financial loss.¹⁸⁹ While harm to property is commonly distinguished from harm to other economic interests (e.g., trespass versus breach of contract), I generally run these together, partially because I favor an expansive view of property interests. Nothing essential to my discussion turns on this distinction. Reshuffling these types of economic and other harms would leave my central analysis in place. Moreover, maxims may explicitly subdivide the various harms, as where requital maxims grant relief for some types of economic harm (e.g., medical expenses), but not others (e.g., opportunity costs of litigation).

Psychic harm includes “virtually any form of conscious suffering, both emotional and physical.”¹⁹⁰ Psychic harms, then, have two

harm is any impairment of the physical condition of the body, including illness or physical pain.” RESTATEMENT (SECOND) OF TORTS § 905 cmt. b (1977). Because purely physical pain is hard, if not impossible, to distinguish from emotional pain, I push physical pain into the category of psychic harm.

¹⁸⁷ Physical harm has been defined more broadly. “The words ‘physical harm’ are used . . . to denote the physical impairment of the human body, or of land or chattels.” RESTATEMENT (SECOND) OF TORTS § 7(3) (1977).

¹⁸⁸ Interestingly, harm to property, such as a theft, may be detrimental to the invader and beneficial to the invadee. For example, an invader may steal a “white elephant”, say, a pet that unexpectedly gives her no pleasure, while the invadee experiences physical, economic, and psychic gains (“At last I’m free of that nipping pest.”). A burdensome heirloom may provide another example.

¹⁸⁹ The Insurance Information Institute supplied this definition of “economic loss”: “Total financial loss resulting from the death or disability of a wage earner, or from the destruction of property. Includes the loss of earnings, medical expenses, funeral expenses, the cost of restoring or replacing property, and legal expenses. It does not include noneconomic losses, such as pain caused by an injury.” *Economic Loss*, INS. INFO. INST., available at <http://www.compuquotes.com/insurance-definition-economic-loss.html> (last visited Mar. 31, 2015). A new Restatement takes another slant, excluding harm to property. “For purposes of this Restatement, ‘economic loss’ is pecuniary damage not arising from injury to the plaintiff’s person or from physical harm to the plaintiff’s property.” RESTATEMENT (THIRD) TORTS: LIABILITY FOR ECONOMIC HARM § 2 (Tentative Draft No. 1, 2012).

¹⁹⁰ DOBBS, *LAW OF TORTS*, *supra* note 63, at 1050 (footnotes omitted) (identifying “[t]he pain for which [tort] recovery is allowed . . .”). For elaboration, see *id.* at 1051-53. The Restatement (Second) of Torts, in detailing compensatory damages for non-

sources: first, pain and suffering that stem from physical harm;¹⁹¹ and second, mental or emotional harm, whatever its origin.¹⁹² These two centers of psychic harms significantly interrelate.¹⁹³ Psychic harms beyond physical pain and suffering include insecurity, fear,

pecuniary harm, specifically identifies humiliation, fear and anxiety, and feelings from loss of freedom. See RESTATEMENT (SECOND) OF TORTS § 905 cmts. d, e, g (1977). Existing law is not generous in protecting against psychic harm. See KEETON ET AL., *supra* note 7, at 54-60, 359-60 ("mental distress" and "mental disturbance"); John C.P. Goldberg, *Rights and Wrongs*, 97 MICH. L. REV. 1828, 1845 (1999).

¹⁹¹ Ripstein gives short shrift to pain and suffering as a harm to an enablement of the invadee: Unlike compensatory damages, "damages [for pain and suffering] do not restore or correct anything . . . Your happiness, considered as such, is not among the means you use to set and pursue your purposes, even if, for example, your mental health could be described as something you use in that way." Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1984 (2007).

¹⁹² For example, "hedonic damages", going beyond "traditional pain and suffering or mental anguish damages, . . . compensate for limitations 'on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocation.'" Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745, 748 (2007) (quoting *Boan v. Blackwell*, 541 S.E.2d 242, 244 (S.C. 2001)). "Disability damages" are distinguishable since they "are not based on the effect of disability on life's enjoyment . . ." *Id.* at 751. "Research on attitudes toward promise and contract indicates that there is a special psychological harm in breaching a contract, a harm that is conceptually separate from the financial or actual losses of the promisee." Tess Wilkinson-Ryan, *Fault in Contracts: A Psychological Approach*, in *FAULT IN AMERICAN CONTRACT LAW* 289, 290 (Omri Ben-Shahar & Ariel Porat eds., 2010). A breach of contract may feel like a betrayal. "People seem to respond more negatively, and more punitively, to harms caused by a trusted agent than identical harms not caused by a trusted agent." *Id.* at 291 (citing Cass R. Sunstein, *Moral Heuristics*, 28 BEHAV. & BRAIN SCI. 531 (2005) ("betrayal heuristic")). "The[] psychological effects [of burglary in a dwelling] are well documented: [two researchers] found that about a quarter of victims 'are, temporarily at least, badly shaken by the experience', and that a small minority of victims suffer longer-lasting effects." ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 386 (6th ed. 2009) (footnote omitted).

¹⁹³ Though perhaps obscure, "[t]he basic distinction [from pain and suffering] is that hedonic damages cover not affirmative distress or suffering but foregone gains, as when people are unable to engage in valued activities, such as athletics." Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S159 (2007) (footnote omitted). For hedonic damages, "it is extremely difficult to translate the relevant interest into monetary equivalents." *Id.* at S160.

fright, terror, panic, shock, sadness, dread, anger, outrage, offense, and many other undesirable mental states.¹⁹⁴ These may arise from, among other things, risks directed at specific individuals with their knowledge, such as assault, the intentional infliction of emotional distress, and criminal attempts. Another important origin of psychic harms is from general, undirected, or immediately unperceived risks created by others, as by reckless practices, inchoate crimes, and recidivism. Psychic harms have many causes. To be relevant here, they must survive the deontic filter. Again, harms from disrespectful emotional reactions do not count.

Dignitary harm arises from a setback to a person's interest and right to be respected as an autonomous, ethical being, of priceless moral worth equal to that of other ethical beings.¹⁹⁵ There is no consensus about the meanings of dignity and respect.¹⁹⁶ As analyzed

¹⁹⁴ See RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1977).

¹⁹⁵ See KANT, *THE METAPHYSICS OF MORALS*, *supra* note 20, at 557, 579.

¹⁹⁶ "There does not seem to be any canonical definition of 'dignity' in the law." Waldron, *Dignity, Rank, and Rights*, *supra* note 174, at 211. For Waldron's identification of the immanent aspects of legal rights reflecting dignity, see *id.* at 236-50. See NUSSBAUM, *CREATING CAPABILITIES*, *supra* note 53, at 29 [dignity]; Robin S. Dillon, *Respect*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/fall2010/entries/respect/> (last visited Aug. 7, 2013) [respect and self-respect]; Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 66, 67 (2011) [dignity]; Wright, *Consenting Adults*, *supra* note 99, at 1398 [dignity]. One commentator "identifies three concepts of dignity used by constitutional courts and demonstrates how these concepts are fundamentally different" Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 183 (2011). For a summary, see *id.* at 187-89 ("inherent worth", "living in a certain way", "recognition and respect"). Rosen similarly identifies these three meanings of dignity. See ROSEN, *supra* note 22, at 54 ("status", "inherent value", "behavior, character, or bearing"). "The concept of dignity has become debased by flabby overuse in political rhetoric But we need the idea, and the cognate idea of self-respect, if we are to make much sense of our situation and our ambitions." DWORKIN, *JUSTICE FOR HEDGEHOGS*, *supra* note 90, at 13. For Waldron's "controversial" account of dignity as a "status-concept", see Waldron, *How Law Protects Dignity*, *supra* note 185, at 201; Waldron, *Dignity, Rank, and Rights*, *supra* note 174. For reference to scholars and jurists who find the concept of dignity to be too vague to be useful, see ROSEN, *supra*, at 1-8; Henry, *The Jurisprudence of Dignity*, *supra* note 185, at 174-75. Henry, identify-

here, a dignitary harm stems from the objective manifestation of another person's disregard, dismissal, insult, disparagement, defamation, contempt,¹⁹⁷ ridicule, spite, malice,¹⁹⁸ or other forms of disrespect.¹⁹⁹ In other words, explicit or implicit denial of a person's equal moral worth produces a dignitary harm.²⁰⁰ Disrespect implies a claim of moral superiority contrary to Kant's egalitarianism

ing five overlapping conceptions of dignity, finds to the contrary of the doubters. See Henry, *The Jurisprudence of Dignity*, *supra* note 185, at 177. Rao suggests that "dignity", "a relatively new legal term", will become less nebulous as the law works out its meaning, as it has with "liberty" and "equality". Rao, *supra*, at 190. For analyses of dignity, see Denise G. Réaume, *Discrimination and Dignity*, 63 LA. L. REV. 645, 672-94 (2003) ("Defining Dignity"); Doron Shultziner & Itai Rabinovici, *Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Psychological Approach*, 18 PSYCHOL., PUB POL'Y, & L. 105 (2012).

"Dignity in the Kantian sense is something that persons possess as such and therefore regardless of how they are treated by others: treating a person with pity or contempt or ridicule does not remove her dignity in this Kantian sense" Ian Carter, *Respect and the Basis of Equality*, 121 ETHICS 538, 554 (2011). "[T]he role that dignity plays in Kant's ethical thinking is not straight-forward (or, unfortunately, easy to explain)." ROSEN, *supra*, at 19. For explanation, see *id.* at 19-31. See generally Aurel Kolnai, *Dignity*, 51 PHIL. 251 (1976).

¹⁹⁷ For the unbearableness of contempt, see Jon Elster, *Justice, Truth, Peace*, in TRANSITIONAL JUSTICE 78, 83 (Melissa S. Williams et al. eds., 2012) (quoting Voltaire, Adam Smith, and John Adams).

¹⁹⁸ "[M]alice might be better characterized as the intentional violation of dignity." Réaume, *Indignities*, *supra* note 175, at 79.

¹⁹⁹ As regarding mental states relevant to responsibility, "practical judgments ... rest on an interpretation of what the agent said and did - viewed against a background of 'relevant' circumstances - as manifesting or not manifesting the mental state in question." CANE, RESPONSIBILITY IN LAW, *supra* note 29, at 47 (footnote to commentators with a similar approach omitted). See *id.* at 47-48.

²⁰⁰ "Most criminal acts [requiring *mens rea*] inflict dignitary harms . . . Dignitary harms are the indignities that an actor *A* inflicts upon *S* by manifesting that he has so little regard for *S* that he is ready to abridge *S*'s legitimate interests in order to aggrandize himself." PETER WESTEN, THE LOGIC OF CONSENT 149 (2004) (the omitted footnote excluding public crimes, such as tax evasion and bribery). Hampton analyzes what I call "dignitary harm" somewhat differently. "[S]ome [wrongful] moral actions violate [applicable moral] standards in a particular way insofar as they are also an affront to the victim's value or dignity. I call such an affront a moral injury." Hampton, *Correcting Harms Versus Righting Wrongs*, *supra* note 176, at 1666. See Hampton, *Correcting Harms Versus Righting Wrongs*, *supra* note 176, at 1679. "A moral injury is not the same as a wrongful loss or harm." *Id.* at 1666.

among moral agents.²⁰¹ The understood meaning of a person's conduct in this regard, that is, the degree of disrespectfulness, is culturally situated.²⁰² A pat on the back may be acceptable in some circumstances or societies, but not others. Even if the disrespectful person does not *treat* the other person with disrespect, in that disesteem is not manifested by any impinging action, her disrespectful attitude still constitutes a violation of the categorical imperative.²⁰³ When such disrespect is manifested, it engenders a dignitary harm.²⁰⁴

²⁰¹ As Ackerman puts his principle of neutrality (without invoking Kant): "No reason is a good reason if it requires the power holder to assert . . . that . . . he is intrinsically superior to one or more of his fellow citizens." BRUCE A. ACKERMAN, *SOCIAL JUSTICE IN THE LIBERAL STATE* 11 (1980). Dworkin emphasizes the justice principle of equal concern and respect. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180-83, 272-78 (1977).

²⁰² "[A] person is morally injured when she is the target of behavior whose meaning, appropriately understood by members of the cultural community in which the behavior occurs, represents her value as less than the value she should be accorded." Hampton, *Correcting Harms Versus Righting Wrongs*, *supra* note 176 at 1670. "What counts as humiliating or degrading treatment varies drastically from culture to culture . . ." ROSEN, *supra* note 22, at 127. See John Finnis, *Natural Law: The Classical Tradition*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 45 (Jules Coleman & Scott Shapiro eds., 2002); Filimon Peonidis, *Freedom of Expression, Autonomy, and Defamation*, 17 *LAW & PHIL.* 1, 5 (1998).

²⁰³ "The attitudes of respect, then, have cognitive dimensions (beliefs, acknowledgments, judgments, deliberations, commitments), affective dimensions (emotions, feelings, ways of experiencing things), and conative dimensions (motivations, dispositions to act and forbear from acting); some forms also have valuational dimensions." Robin S. Dillon, *Respect*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/fall2010/entries/respect/> (last visited Aug. 7, 2013). "The attitude is typically regarded as central to respect . . ." *Id.* "Negative" respect entails "doing nothing to impair or destroy [persons'] capacity for autonomy," as by interference with their autonomous decisions and morally acceptable pursuits, coercion, deception, or paternalism. *Id.* "Positive" respect involves "protecting them from threats to their autonomy (which may require intervention when someone's current decisions seem to put their own autonomy at risk) and by promoting autonomy and the conditions for it," as by teaching individuals to be independent and responsible. *Id.*

²⁰⁴ Kant . . . stress[es] the moral importance of attitude and gesture aside from their consequences. Mockery is opposed, whether or not it is effective for the pur-

Under my conception of dignitary harm, all deontic wrongs cause harm. At the very least, such a wrong creates a dignitary harm, even if there is no accompanying physical, economic, or psychic harm.²⁰⁵ A prominent form of dignitary harm is the denial of an invadee's established claims from deontic maxims.²⁰⁶ The failure to invite someone to join a secular club because of her race or religion occasions a dignitary harm even if she suffers no other type of harm. Though existing law seems to keep dignitary harms largely in the backrooms, if not closets, several torts and crimes acknowledge them.²⁰⁷ Among those that do to some extent are as-

pose of reform or deterrent, because it reflects a disrespectful attitude toward the humanity of others." HILL, JR., *DIGNITY AND PRACTICAL REASON*, *supra* note 20, at 55. Hill's Kantian account treats snobbery as a wrongful attitude in itself. See HILL, JR., *Social Snobbery*, *supra* note 20, at 156-57. "Respect . . . signifies an emotional attitude we owe persons as well as just and courteous conduct displaying that attitude." SULLIVAN, *IMMANUEL KANT'S MORAL THEORY*, *supra* note 23, at 198.

²⁰⁵ "The harm in question [in some intentional torts] need not be experiential; it may be dignitary." Sheinman, *Tort Law*, *supra* note 2, at 32 (footnote omitted). See Daniel McDermott, *The Permissibility of Punishment*, 20 *LAW & PHIL.* 403, 411-30 (2001). Ripstein apparently does not see all dignitary invasions as harms. "It is also possible to wrong someone . . . without doing that person any harm. If I [nonconsensually invade your body or property without any damage], I draw you into my purposes and wrong you, even if, as it turns out, you never learn of my action" RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 10, at 22. See ASHWORTH, *PRINCIPLES OF CRIMINAL LAW*, *supra* note 192, at 29 (discussing the absence of harm from the rape of an unconscious, unknowing, unaffected victim). To the contrary of Ripstein and Ashworth, I would say that you have suffered a dignitary harm from me. For my own purposes, I have used you as a means only. Ripstein notes, "Kant understands wrongdoing as the interference with freedom, not with the setting back of interests." RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 10, at 68. But as Ripstein also notes, freedom requires a tradeoff, a balancing, of one's interests in liberty and security. See *supra* note 32. I have invaded your security interest, set back your interest if you will, in being free of disrespect.

²⁰⁶ Even consent, of some degree, may not preclude dignitary harm. "[C]onsensual sex, when it is unwanted and unwelcome, often carries harms to the personhood, autonomy, integrity, and identity of the person who consents to it" Robin West, *Sex, Law, and Consent*, in *THE ETHICS OF CONSENT* 221, 224 (Franklin G. Miller & Alan Wertheimer eds., 2010).

²⁰⁷ Speaking generally of "dignitary harm without physical harm", Dobbs reports, "When the trespassory tort causes no physical harm, the traditional tort rule is that

sault,²⁰⁸ offensive battery,²⁰⁹ false imprisonment,²¹⁰ defamation,²¹¹ and, apparently, the intentional infliction of emotional distress.²¹²

the plaintiff can nevertheless recover substantial as distinct from nominal damages. The idea is loosely linked to the idea of mental distress, but no actual proof of mental distress is required." DOBBS, LAW OF TORTS, *supra* note 63, at 79. The invasion "is regarded as a harm in itself". *Id.* Courts and commentators often fail to distinguish psychic and dignitary harms. Typically there is no urgency for them to do so since the two harms are usually intertwined.

²⁰⁸ Blackstone, in describing assault, refers to "assault, *insultus*". 3 WILLIAM BLACKSTONE, COMMENTARIES *120 (1768). The torts restatement distinguishes "apprehension" from "tangible and material harm", indicating that dignitary, not only psychic, harm is protected by assault liability. See RESTATEMENT (SECOND) OF TORTS § 21 cmt. c (1977) ("It is not necessary that [the proscribed act] should directly or indirectly cause any tangible and material harm to the other."). In discussing "dignitary harm without physical harm," Dobbs writes that mental distress is not required to recover substantial damages. "The invasion ... is regarded as a harm in itself and subject to an award of damages. [If mental distress is also present,] even without physical harm, [the plaintiff] is entitled to recover for that emotional distress as a separate element of damages." DOBBS, LAW OF TORTS, *supra* note 63, at 79. But Prosser and Keeton suggest a somewhat different view. "This action [of assault], which developed very early as a form of trespass, is the first recognition of a mental, as distinct from a physical, injury." KEETON ET AL., *supra* note 7, at 43 (footnote omitted).

²⁰⁹ See RESTATEMENT (SECOND) OF TORTS § 18 cmt. d (1977) ("The actor's liability is based upon his intentional invasion of the other's dignitary interest in the inviolability of his person and the affront to the other's dignity involved therein."); DOBBS, LAW OF TORTS, *supra* note 63, at 55 (For battery, "an offensive touching is one that infringes a reasonable sense of personal dignity."); RICHARD A. EPSTEIN, TORTS 16 (1999) ("The law of offensive battery is directed to words or actions by defendant designed to insult or offend plaintiff without putting her at risk of bodily harm.").

²¹⁰ See RESTATEMENT (SECOND) OF TORTS § 35 cmt. h (1977) ("The mere dignitary interest in feeling free to choose one's own location and, therefore, in freedom from the realization that one's will to choose one's location is subordinated to the will of another is ... [not a] perfectly protected interest, such as that in bodily security"); DOBBS, LAW OF TORTS, *supra* note 63, at 80. In *Whittaker v. Sandford*, 85 A. 399, 402-03 (Me. 1912), a falsely imprisoned woman, not closely confined, was given reduced damages because "[t]he case lacks the elements of humiliation and disgrace that frequently attend false imprisonment. She was respectfully treated as a guest in every way, except that she was restrained from quitting the yacht for good and all."

²¹¹ See RESTATEMENT (SECOND) OF TORTS § 559 (1977): ("A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him."). Speaking of defamation, Prosser and Keeton observe, "Since some of the interests served by way of protecting a good reputation are of a peace-of-mind and

Trespass to real property may cause only a dignitary harm allowing for nominal damages, such as when stepping on another's concrete driveway results in no other type of harm.²¹³ A breach of contract that causes no economic harm may also be seen as causing a dignitary harm only.²¹⁴ Sometimes dignitary harms are noticed by the law, but not protected by remedies, as in certain slights.²¹⁵ The crim-

dignitary nature rather than economic in character, such losses are not readily measurable in monetary terms." KEETON ET AL., *supra* note 7, at 843.

²¹² For epistemic and other reasons, courts are wary of granting relief for emotional distress alone, but if the behavior is outrageous enough, relief will be granted. See RESTATEMENT (SECOND) OF TORTS § 46 (1977). When wariness is overcome, beneath the recovery for emotional distress is seen, arguably, a protected dignitary interest. In discussing this tort, Dobbs offers a glimpse. "On the personal rather than the economic level, insult, affront, indignity, trivial annoyance, or the like, are likewise excluded from the outrage category (although perhaps still sufficient in some common carrier cases)." DOBBS, LAW OF TORTS, *supra* note 63, at 826 (footnote omitted). Réaume "argues that dignity, as a legally protected interest, is the appropriate basis for development of this area of the law [dealing with the concept of emotional tranquility], and that the next logical step is to replace the [Canadian] tort of intentional infliction of nervous shock with a dignity-based tort." Réaume, *Indignities*, *supra* note 175, at 61.

²¹³ See GORDLEY, FOUNDATIONS, *supra* note 6 ("A plaintiff whose dignity was offended might also recover for trespass to land, even if the defendant had not harmed his property, provided the defendant had entered it."); LUCY, *supra* note 33, at 207 (including trespass to person also). "[In the context of trespass and battery,] the idea that your means are subject to your choice carries with it the entitlement to exclude all others from subjecting those means to their purposes, even in the trivial sense of touching you without your permission." Ripstein, *As If It Had Never Happened*, *supra* note 191, at 1970. See Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 169-70 (2011).

²¹⁴ "It might be thought that an action for breach of contract cannot succeed without pecuniary loss. The English courts have been grappling with this issue for some time." LUCY, *supra* note 33, at 207 n.3 (including case citations).

²¹⁵ "There is virtually unanimous agreement that such ordinary defendants [beyond common carriers, innkeepers, etc.] are not liable for mere insult, indignity, annoyance, or even threats, where the case is lacking in other circumstances of aggravation." KEETON ET AL., *supra* note 7, at 59. "Our manners, and with them our law, have not yet progressed to the point where we are able to afford a remedy in the form of tort damages for all intended mental disturbance." *Id.* These quotes show the interrelationship between psychic and dignitary harm. The thrust of the observation

inal defense of provocation may be partially based on the idea that the provoker had inflicted a dignitary harm on the provoked actor by effectively disrespecting or demeaning her.²¹⁶

The extent of a dignitary harm is gauged, I would argue, from the perspective of the disrespected person. Her understanding of the other person's pertinent opinion of her, and her reactive response to it, arise from the invader's objective manifestation of a disrespectful mental state.²¹⁷ The invader may even be unaware of the disrespectfulness she manifests.²¹⁸ This would not affect the invadee's reaction to the conduct unless, it seems, the invadee is aware of the invader's ignorance. There is a role, however, for the invader's subjective disrespectfulness, irrespective of how it is manifested, but not right here. The invader's subjective mental state is a factor in gauging her relative disrespect blameworthiness, to be addressed shortly.²¹⁹

is that, though there may be a dignitary harm in these circumstances, such harm is not wrongful under existing law.

²¹⁶ "The paradigm case of provocation in murder involves a degree of fault on the victim's part, such as where the victim assaults, torments, or goads the offender and thereby precipitates their killing." Martin Wasik, *Crime Seriousness and the Offender-Victim Relationship in Sentencing*, in *FUNDAMENTALS OF SENTENCING THEORY* 103, 118 (Andrew Ashworth & Martin Wasik eds., 1998) (footnote omitted). See A.J. Ashworth, *The Doctrine of Provocation*, 35 *CAMBRIDGE L.J.* 292, 307 (1976). But cf. *RESTATEMENT (SECOND) OF TORTS* § 69 cmt. a (1977) ("Mere provocation by words or conduct, no matter how insulting, does not destroy the privilege of self-defense, even though a reasonable man should realize that the provocation will probably induce the attack.").

²¹⁷ "[T]he participant reactive attitudes are essentially natural human reactions to the good or ill will or indifference of others towards us, as displayed in their attitudes and actions." P.F. Strawson, *Freedom and Resentment*, in *FREE WILL AND REACTIVE ATTITUDES* 19, 25 (Michael McKenna & Paul Russell eds., 2008).

²¹⁸ "It is not material to the notion of guilt, that the offender have himself been fully conscious of the wickedness of what he did." DAVID HUME, *COMMENTARIES ON THE LAW OF SCOTLAND RESPECTING CRIMES* (1819) (quoted in VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 221 (2005)).

²¹⁹ See discussion *infra* at Part VI.B.

Dignitary harms can occur without any male fides by the invader, as where she innocently trespasses. Under the common law, physical, economic, and psychic harms are gauged by the impact of an invasion on the invadee, irrespective of the extent of such harms intended by the invader, and often loosely tied, if at all, to the harms foreseeable by the actor.²²⁰ Similarly, dignitary harm is measured from the invadee's perspective. Dignitary harms depend on the invadee's perception of the actor's mental state, such as when words that could be seen as insulting are instead perceived as meant to be humorous. This understanding may also, naturally, affect the invadee's psychic and other harms. As a practical matter, to say nothing of fairness, one would probably base the appraisal of dignitary harm on the standard of a reasonable person in the position of the invadee who is aware of the actor's manifested disrespect.²²¹

The objective manifestation of disrespect may obtain whether or not the disrespected person is actually aware of it.²²² Insult, which

²²⁰ I question the fairness of this, *supra* at Part III.C.

²²¹ If the actual person feels disrespect when a reasonable person in her position would not, we could say that the actual person suffers a dignitary harm, but not a wrongful dignitary harm.

²²² See Hampton, *Correcting Harms Versus Righting Wrongs*, *supra* note 176, at 1671. Lack of awareness of the dignitary harm may come from ignorance or because of an invadee "whose sense of self-worth is so low that she is unable to recognize the . . . wrong." Hampton, *Correcting Harms Versus Righting Wrongs*, *supra* note 176, at 1671. Feinberg, among others, asserts that one can be harmed posthumously. See FEINBERG, HARM TO OTHERS, *supra* note 30, at 79-95. For interesting discussion of Feinberg's analysis with criticism and tangential support, see BRIAN ANGELO LEE, MORAL OBLIGATIONS TO PAST GENERATIONS (1999) (unpublished Ph.D. dissertation, Princeton University) (on file with author). Contrary to Feinberg's intuition, Adler finds, "It is a widely shared intuition that posthumous events do not harm the deceased person . . ." Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1295 (2003) (questioning whether death is a harm to the decedent, concluding it is a welfare setback). Whether, in general, there are "duties to the dead" is controversial. That the dead cannot have Hohfeldian rights, see Ronen Perry, *Correlativity*, 28 LAW & PHIL. 537, 547 (2009). Under one deontic view, "even if we are murdered, that action cannot lower us in value (as if we re-

requires knowledge by the disrespected person sooner or later, is distinguishable from defamation, which does not.²²³ But defamation does require knowledge of the disrespectfulness by third parties.²²⁴ Defamation harms depend on the understanding of third persons of the invader's mental state, such as whether her conduct is meant to sting or to humor.²²⁵ Similarly, the sufferer's perception of the understanding by third persons of the potentially defamatory conduct may produce or exacerbate a dignitary harm, to say nothing of her reactive psychic and other harms. In general, dignitary harms, like other harms, are socially framed.²²⁶ Conduct seen as insulting in one community or one context may not be in others.²²⁷ A person may perceive a dignitary harm, but social norms declare it not wrongful, as in a case in which a person is insulted or feels defamed by an ordinary hug from a casual acquaintance.

The time at which a dignitary harm is gauged may affect its measure. The invadee's reasonable perception of her dignitary

mained behind in the corpse), but only extinguish that which *was* valuable." Hampton, *supra*, at 1673.

²²³ While it may not be harmful to the dead person herself, "defamation of the dead . . . can be harmful to those who are alive, perhaps because it is disturbing to hear a loved one defamed, or because it creates insecurity to the living to know they might be defamed after death." Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 376 (2000).

²²⁴ See RESTATEMENT (SECOND) OF TORTS §§ 558, 577 (1977). One commentator "would like to extend this legal definition [of defamation] to include statements that tend to insult, hurt, provoke, humiliate and ridicule individuals, even if they are not communicated to a third party." Peonidis, *Freedom of Expression, Autonomy, and Defamation*, *supra* note 202, at 5.

²²⁵ One "meaning of an action is determined by the reactions of others (or by the ways it would be reasonable for them to react) Meaning in this broader sense is . . . a matter of what others reasonably or unreasonably take [the agent's] reasons to be." SCANLON, *MORAL DIMENSIONS*, *supra* note 22, at 53.

²²⁶ "Dignity is socially constructed, which means that it is a product of social practices and conventions . . ." Réaume, *Indignities*, *supra* note 175, at 87.

²²⁷ Scanlon observes that it would be "demeaning" to have one's parents pick one's spouse "in societies in which arranged marriages are not the norm," but not in ones in which arranged marriages are common. SCANLON, *WHAT WE OWE*, *supra* note 117, at 253.

harm may vary during the course of an extended interaction with her invader. An invasion may occur at one point and the ultimate requital and resolution of the invasion may occur at later trial or even many years after that. For example, at the time of a dignitary invasion the invadee may perceive it as malicious, after evidence is produced at trial she may perceive it as reckless, and years later as she comes to understand the actor's position differently, she may perceive it as negligent or minimally blameworthy. Or, the perception of the dignitary harm may go from minimal to egregious, or back and forth, over time. Interactions with family and supporters, media coverage, demonstrations, fund-raising efforts, and parole hearings are among the multitude of contingencies that may influence perceptions. Similarly, insofar as the invadee's perception of her dignitary harm is affected by her understanding of the actor's responsibility for his invasive conduct, varying perceptions of his responsibility alter the perceived dignitary harm. "He tried to get me" causes greater dignitary (and psychic) harm than "He should have known better," or "He couldn't help himself." The question, then, is whether or how these varying perceptions should bear up on the gauge of a dignitary harm.²²⁸ Does the gauge account for the fact that the invadee's reasonable perceptions of it may linger long after the invasion and vary in intensity? Or is the gauge fixed at one point in time, say, at the time of the invasion or shortly thereafter? Just as recoveries under the common law for the other three types of harms account for future effects, such as continuing disabilities and medical expenses, should this be the case for dignitary harm?

²²⁸ The positive and negative reactions of onlookers to the conduct of the invadee may also vary with the ebb and flow of the interactions between the invadee and the invader, as where she is first seen as a wimp and later as gutsy. See Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1, 30 (1989).

To emphasize the point, dignitary harms are independent of other types of harms.²²⁹ For instance, when beneficent paternalism motivates a person to deny a friend the freedom to make a particular choice, such as by hiding a dieter's sweets without her consent, the paternalized person suffers a dignitary harm even if there is no physical, economic, or psychic harm.²³⁰ To the contrary, she may admittedly be benefitted.²³¹ For another example, suppose a person declines to apply for a club membership because its members are disrespectful of her race or religion. She suffers a dignitary harm whether or not she would suffer other types of harms, including psychic ones ("Who would want to associate with such bigots?"). Other examples of the possibility of dignitary harms in the absence of psychic harms include cases where the invadee is permanently

²²⁹ "Harm to dignity is more a matter of the social meaning of particular behaviour than a matter of the specific emotional or physical impact on the victim." Réaume, *Indignities*, *supra* note 175, at 86-87 (footnote omitted). "Wrongs against reputation involve using a person's reputation in a way that he or she has not authorized . . . [N]o showing of either fault or harm is required, and . . . , in the absence of harm, general damages are assessed." Ripstein, *Civil Recourse*, *supra* note 213, at 169 n.21. Contrary to Ripstein, I would say there is a harm – a dignitary harm. See GOLDBERG & ZIPURSKY, *TORTS*, *supra* note 62, at 313.

²³⁰ "Of all the tyrannies[,] a tyranny sincerely exercised for the good of its victims may be the most oppressive . . . Their very kindness stings with intolerable insult." JOHN KLEINIG, *PUNISHMENT AND DESERT* 103 (1973) (quoting C.S. Lewis, *The Humanitarian Theory of Punishment*, 6 *RES JUDICATAE* 225 (1952-54)). "[R]espect for a person's autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him." FEINBERG, *HARM TO SELF*, *supra* note 26, at 68 (emphasis omitted). See RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 10, at 43-44; Tom L. Beauchamp, *Who Deserves Autonomy, and Whose Autonomy Deserves Respect*, in *PERSONAL AUTONOMY* 310, 311-12 (James S. Taylor ed., 2005). At some point, however, "[o]n the view that only rational, fully informed selves are autonomous, it follows that the most fierce and uncompromising interferences with a person's value judgments, desire formation, or thought patterns are not interferences with autonomy at all if those values, desires, or thoughts are irrational ones." John Christman, *Introduction*, in *THE INNER CITADEL* 3, 12 (John Christman ed., 1989).

²³¹ See BRUDNER, *PUNISHMENT AND FREEDOM*, *supra* note 101, at 31.

comatose,²³² is a consummate stoic, or where she appreciates ex post the actor's beneficent, loving paternalism.²³³

A dignitary harm may interrelate with or trigger physical, economic, and psychic harms. Nausea or a heart attack, for example, may follow from disrespectful conduct. As the perceived painfulness and rate of recovery from physical trauma may turn on whether the comparable trauma is from child birth, a battle injury, or a car accident, so it may turn on the sufferer's perception of the invader's mental state.²³⁴ Economic harm may link to dignitary harm, such as opportunity costs and expenditures from attempts to avoid future insult, all the more so as the insult is perceived as malevolent. Psychic harm typically flows from dignitary harm.²³⁵ Can we not recall our own experiences of insult as further examples?²³⁶ Finally, the

²³² Cf. DOBBS, *LAW OF TORTS*, *supra* note 63, at 1052 (discussing recovery of a comatose person for loss of enjoyment of life).

²³³ "[L]ove arguably does need respect, lest love be paternalistic or otherwise invasive" Marcia W. Baron, *Love and Respect in the Doctrine of Virtue*, in KANT'S METAPHYSICS OF MORALS 391, 400 (Mark Timmons ed., 2002) (qualifying footnote omitted). See WOOD, *KANTIAN ETHICS*, *supra* note 24, at 179 ("we must be careful to love others in a way that maintains respect for them").

²³⁴ "Different prior experience, emotions and expectations are only several factors proven to be important in modulation of pain." Koraljka M. Stanke & Dragutin Ivanec, *Social Context of Pain Perception: The Role of Other People's Presence and Physical Distance*, 17 REV. PSYCHOL. 69, 69 (2010) (references omitted). "Pain experience . . . is shaped by expectations and beliefs, attentional focus, and social context." Marieke Jepma & Tor D. Wager, *Multiple Potential Mechanisms for Context Effects on Pain*, PAIN (2013), http://wagerlab.colorado.edu/files/papers/Jepma_Wager_Pain.pdf.

²³⁵ "If it is proper to feel *indignation* when I see third parties morally wronged, must it not be equally proper to feel *resentment* when I experience the moral wrong done to myself?" Jeffrie G. Murphy, *Forgiveness and Resentment*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 14, 18 (1988). "Interestingly enough, a hasty readiness to forgive – or even a refusal to display resentment initially – may reveal a lack of respect, not just for oneself, but for others as well." *Id.*

²³⁶ In the leading case establishing a tort for the intentional infliction of emotional distress, the plaintiff, in response to a "practical joke", suffered "a violent shock to her nervous system, producing vomiting and other more serious and permanent physical consequences at one time threatening her reason, and entailing weeks of suffering and incapacity to her as well as expense to her husband for medical attendance." *Wilkinson v. Downton*, [1897] 2 Q.B. 57, 58.

invadee's autonomy, liberty, may be effectively constricted owing to her reluctance to interact with third persons who were swayed by a wrongful, defamatory message.²³⁷

How does one gauge or value dignitary harm? At best, with great difficulty. At worst, it is not possible. As Kant proclaims, dignity "is exalted above any price"²³⁸ If this is the case, perhaps we must be satisfied simply by symbolically acknowledging that the invadee has suffered a wrongful dignitary harm. Nominal damages of 6¢ or \$1 dollar would do this. Yet this seems intuitively unsatisfactory. After an egregious act of disrespect, the aggressor gets off with such a minimal, symbolic requital, indeed, no more than is due for a marginal dignitary harm! Or, more to the point, from the invadee's perspective the law may appear indifferent to the extent to which the invader manifests wrongful disrespect of her. That is insulting! Perhaps this complication can be partially addressed by turning to psychic harm as a surrogate. If dignitary harm is gauged by a reasonable person's psychic reaction to an antagonist's known disrespectful conduct towards the invadee, then we have a plausible means to monetize the dignitary harm. Should the actual sufferer's psychic harm be even greater, additional recovery may be proper. While this standard is still difficult to apply, at least we have affirmed that not all disrespectful conduct is the same. As they do for other knotty questions, let a jury of peers, after judicial guidance, take on the task of putting numbers to the dignitary harm.²³⁹

²³⁷ See Peonidis, *Freedom of Expression, Autonomy, and Defamation*, *supra* note 202, at 10-13.

²³⁸ KANT, *THE METAPHYSICS OF MORALS*, *supra* note 20, at 557. See *id.* at 579; KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, *supra* note 17, at 84.

²³⁹ See generally Mark P. Gergen, *The Jury's Role in Deciding Normative Issues in the American Common Law*, 68 *FORDHAM L. REV.* 407 (1999). "The civil jury's virtues are said to include ... keeping the law in touch with popular values" *Id.* at 435-36 (footnote omitted).

VI. BLAMEWORTHINESS (CULPABILITY)

Blameworthiness, which may be an element in a substantive, first-order maxim, or an associated requital, second-order maxim, has two foci. First, there is responsibility blameworthiness, B_r , which relates to the extent of the agent's responsibility for making her choice to act or refrain from acting.²⁴⁰ Second, there is disrespect blameworthiness, B_d , which examines the degree of the agent's disrespectfulness regarding those who are put at wrongful risk of harm by her chosen conduct. These two foci provide the gauge of the actor's overall blameworthiness as measured against a baseline standard established by the particular maxim in question.²⁴¹ She may be more or less blameworthy than the standard established by the maxim.²⁴²

A. RESPONSIBILITY BLAMEWORTHINESS

The first aspect of blameworthiness, responsibility blameworthiness, B_r , springs from Aristotle. He identifies fully responsible conduct as following choices free from avoidable ignorance and

²⁴⁰ "One of the strongest and most persistent themes in the philosophical literature dealing with responsibility is that responsibility requires culpability (or 'blameworthiness')." CANE, RESPONSIBILITY IN LAW, *supra* note 29, at 65. See R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 128 (1994).

²⁴¹ "Unfortunately, no adequate theory to measure degrees of culpability has yet been proposed." Douglas N. Husak & Craig A. Callender, *Willful Ignorance, Knowledge, and the "Equal Culpability" Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 54 (citing Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW & PHIL. 193 (1993)). Compare Fletcher's "General Framework of Retributive Punishment", in George P. Fletcher, *The Recidivist Premium*, 1(2) CRIM. JUST. ETHICS 54, 56-57 (1982).

²⁴² Finkelstein doubts the weight of blameworthiness in the existing law. Because some morally blameworthy conduct is neither tortious nor criminal, and some liability is strict, she concludes, "In both tort and criminal law, then, blameworthiness is of questionable importance for determining liability." Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 964 (2003).

coercion.²⁴³ Thus, responsibility blameworthiness has two prongs: ignorance, B_{ri} ; and coercion, B_{rc} . Insofar as an agent's choice is not fully autonomous in this sense, her responsibility, her blameworthiness, is reduced until, at some threshold point, she is excused altogether.²⁴⁴ On the other hand, against the threshold standard for responsible choice, the agent may be in a position to make a choice with a greater freedom from ignorance and coercion. She has, say, an unusually deep knowledge and understanding of possible consequences of her contemplated conduct. Potential ensuing harmful consequences to others are foreseeable to her that would not be foreseeable to ordinary actors. This agent is also uncommonly free of coercive influences on her choice. She expects, for instance, to obtain no significant benefits from her anticipated conduct beyond those achievable by a known option that would not put others at wrongful risk. For this invader, a choice to engage in the wrongfully risky conduct makes her more than ordinarily blameworthy for harmful consequences.

Under the existing law of negligence, the degree of an agent's responsibility for her chosen conduct necessary to trigger liability is based on a reasonable person standard. If a reasonable person in

²⁴³ See ARISTOTLE, NICHOMACHEAN ETHICS bk. III, ch. 1, in THE BASIC WORKS OF ARISTOTLE 935, 964-67 (Richard McKeon ed., 1941). For a brief description of current theories of responsibility ("moral accountability"), see Ripstein, *Justice and Responsibility*, *supra* note 71, at 361-62.

²⁴⁴ That autonomy is a matter of degree, see, e.g., HERMAN, MORAL LITERACY, *supra* note 117, at 127; Tom L. Beauchamp, *Autonomy and Consent*, *supra* note 27, 70-71; Haworth, *Autonomy and Utility*, *supra* note 40, at 159.

In the criminal context, excuses are often said to be denials of blameworthiness. See, e.g., FLETCHER, BASIC CONCEPTS, *supra* note 81, at 85. Alexander and Ferzan argue that both justifications and excuses are denials of blameworthiness. See LARRY ALEXANDER & KIMBERLY K. FERZAN, CRIME AND CULPABILITY 88-91 (2009). The Model Penal Code may agree. See MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 249 (2002). In the civil law context, H.L.A. Hart identifies "invalidating" conditions rather than the parallel "excusing" conditions in the criminal law. See H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY 28, 34 (1968). I ignore these permutations in my general category of responsibility blameworthiness.

her position would feel strongly compelled to choose her conduct, or would choose the conduct despite her information shortfalls, then, generally, she is not responsible for the harmful consequences that follow.²⁴⁵ As freedom from coercion and ignorance increases, a point is reached at which the reasonable person would forgo the conduct in question to avoid putting others at unreasonable risk. At this point, requital for ensuing harms is allowable. The conduct is not excused. Beyond this point, as the agent becomes increasingly free of coercion and ignorance as to possible consequences, she becomes more responsible, more blameworthy, for choosing the unreasonable conduct nonetheless. The threshold for responsibility may vary from tort to tort, or crime to crime.²⁴⁶ Trespass to realty, for example, requires minimal knowledge by the invader,²⁴⁷ while malicious prosecution requires much more.²⁴⁸ Even though liability for breach of contract under existing law is often said to be strict,²⁴⁹ blameworthiness does play a role here also.²⁵⁰ Current private law

²⁴⁵ Many qualifications to this sweeping generalization are omitted. Ripstein provides guidance. "I defend what I will call a reciprocity conception of responsibility, which supposes that responsibility must be understood in terms of norms governing what people are entitled to expect of each other." Ripstein, *Justice and Responsibility*, *supra* note 71, at 361. See FLETCHER, BASIC CONCEPTS, *supra* note 81, at 108. The reasonable person standard establishes what people are entitled to expect.

²⁴⁶ "It is misleading to speak of 'legal responsibility' – as though it were a unitary thing. It is not.... Even if we confine ourselves to criminal law, there is no single conception." KLEINIG, PUNISHMENT AND DESERT, *supra* note 230, at 106.

²⁴⁷ As in other ordinary intentional torts, the "intent" requirement for trespass is rather weak, falling well short of "motive". See KEETON ET AL., *supra* note 7, at § 8 (5th ed. 1984); DOBBS, LAW OF TORTS, *supra* note 63, at § 24.

²⁴⁸ See KEETON ET AL., *supra* note 7, at 882-84; DOBBS, LAW OF TORTS, *supra* note 63, at § 433.

²⁴⁹ See, e.g., E. ALLAN FARNSWORTH, CONTRACTS § 8.8 (4th ed. 2004); RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981).

²⁵⁰ "It is often asserted that contract law is based on strict liability, not fault. This assertion is incorrect. As this chapter demonstrates, fault is a basic building block of contract law, and pervades the field." Melvin A. Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Non-performance*, in FAULT IN AMERICAN CONTRACT LAW 82, 82 (Omri Ben-Shahar & Ariel Porat eds., 2010). See Richard A. Epstein, *The Many Faces of Fault in Contract Law: Or*

rarely takes heightened responsibility beyond the given threshold into account.²⁵¹ The criminal law is more attentive to it.²⁵²

B. DISRESPECT BLAMEWORTHINESS

Disrespect blameworthiness, B_d , relates to an agent's attitude as well as her conduct towards persons wrongfully harmed. She is to

How to Do Economics Right, Without Really Trying, in FAULT IN AMERICAN CONTRACT LAW 118, 118 (Omri Ben-Shahar & Ariel Porat eds., 2010 ("different standards of fault are appropriate in different [contract] contexts")); Tony Weir, *The Staggering March of Negligence*, in THE LAW OF OBLIGATIONS 97, 122 (Peter Cane & Jane Stapleton eds., 1998); George M. Cohen, *The Fault that Lies Within Our Contract Law*, 107 MICH. L. REV. 1445, 1445-46 (2009).

²⁵¹ Under tort doctrine, "liability is not diminished if the defendant's negligence is slight, nor is it increased if the defendant's negligence is gross." DOBBS, LAW OF TORTS, *supra* note 63, at 349 (footnote omitted). See Goudkamp, *The Spurious Relationship*, *supra* note 97, at 343; Gerald J. Postema, *Introduction*, in PHILOSOPHY AND THE LAW OF TORTS 1, 3 (Gerald J. Postema ed., 2001). Yet, Goldberg notes in discussing the foreseeability limitation to proximate cause, which "only crudely implements a notion of proportionality..., courts in particular have demonstrated sensitivity to the distorting effects of the full compensation principle by varying the scope and stringency of proximate cause doctrine in accordance with the nature of the defendant's wrongdoing." John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2042 (1997) (footnotes omitted).

²⁵² See, e.g., ASHWORTH, PRINCIPLES OF CRIMINAL LAW, *supra* note 192, at 154-55 (discussing mens rea). Perhaps the criminal law is more attentive to blameworthiness in both forms here discussed because such blameworthiness is an important factor in producing wrongful harms to the general public. The more blameworthy the criminal, the more frightening she is to the public. In principle, harms to the individual invadee are largely required by her private right of action irrespective of the actor's blameworthiness beyond any required threshold. For the general public, protection under the criminal law accounts for the harms to the public in reaction to the agent's perceived blameworthiness. For the "fright" theory of criminality, see, e.g., NOZICK, ANARCHY, STATE, AND UTOPIA, *supra* note 61, at 65-71; John Rawls, *Two Concepts of Rules*, in THE PHILOSOPHY OF PUNISHMENT 105, 107 (H.B. Acton ed., 1969).

But there are limits to the existing criminal law's focus on the invader's blameworthiness. Foreseeability is an important element of aspects of blameworthiness. See discussion *infra* Part VI.C. "[O]nce liability to punishment *simpliciter* is self-willed by agents by virtue of a chosen interference, they become liable to state coercion directed at crime control for all resulting proscribed harms no matter how remote and unforeseeable." BRUDNER, PUNISHMENT AND FREEDOM, *supra* note 101, at 56. A deontic retributivist would, I argue, object.

respect others as well as treat them with respect.²⁵³ As in responsibility blameworthiness, then, disrespect blameworthiness has two prongs, attitude, B_{da} , and treatment, B_{dt} . Regarding her attitude, the agent's subjective mental state at the time of her choice or conduct reflects whether, or the extent to which, she is disrespectful of those whose autonomies are curtailed.²⁵⁴ For example, an agent may deny another person the liberty to try out for an athletic team because she thinks that he will get hurt (benevolent paternalism), or that his personality would disrupt team chemistry (group welfare), or because his race is different from the rest of the team (racism). At the high end of disrespectful attitudes are egregious mental states, such as arrogance, disdain, malice, purpose, intention, recklessness,²⁵⁵ wantonness, and gross negligence.²⁵⁶ At the low end are less offensive mental states, such as those grounding inadvertence, minimal negligence,²⁵⁷ foreseeable double effects, non-negligent strict liability, and those associated with excuses and justifications.²⁵⁸ While a disrespectful attitude is always deontically objectionable by producing a dignitary harm at least, we may decline to adopt requital maxims for lesser forms of disrespect, as in some manifestations of be-

²⁵³ See, e.g., Allen Wood, *Humanity as End in Itself*, in 2 DEREK PARFIT, *ON WHAT MATTERS* 58, 62-63 (2011). See *supra* text accompanying notes 195-204.

²⁵⁴ "There are certainly retributivists who claim that what deserves punishment are the inner thoughts of an individual." Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 66 (1999). See DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* 96 (2008) ("motive"); SCANLON, *MORAL DIMENSIONS*, *supra* note 22, at 128 ("agent's attitudes toward others").

²⁵⁵ See CANE, *RESPONSIBILITY IN LAW*, *supra* note 29, at 80-81; DUFF, *supra* note 69, at 180.

²⁵⁶ "I believe that these three culpable mental states – purpose, knowledge, and recklessness – all exhibit the single moral failing of insufficient concern for the interests of others." Alexander, *The Philosophy of Criminal Law*, *supra* note 154, at 828-29 (footnote omitted). The Model Penal Code enlists four kinds of culpability: purpose, knowledge, recklessness, and negligence. See MODEL PENAL CODE § 2.02(2) (1962).

²⁵⁷ Alexander doubts the culpability of inadvertence and negligence. See Alexander, *The Philosophy of Criminal Law*, *supra* note 154, at 829-30.

²⁵⁸ For an interesting analysis of mental states, see Simons, *supra* note 67.

neficient paternalism. Or we may call for minimal requitals such as apologies. We may also forgo requitals for disrespectful mental states when they relate to conduct found not to be wrongful, as when an actor helps another to diet because she knows it is hellish for him.²⁵⁹ In both of these instances, the agent's disrespectful attitude diverges from her disrespectful treatment of the harmed party. In the first case, beneficent paternalism, the agent may greatly respect the invadee (the paternalism may be a product of solicitous love towards the invadee), but does not treat him with full respect because she denies him the freedom to choose for himself. In the second, dieting example, the agent has a disrespectful attitude towards the invadee, but she treats him with respect by agreeing to his request to help him diet.

Even using a person as a means only to another's ends may be done with a minimal disrespectful attitude. The conduct may be driven by the benevolent motive to greatly increase overall social welfare. The actor may deeply regret that anyone must suffer for this purpose. Furthermore, denying a person the freedom to make a particular binding choice for herself may stem from great concern for her, even causing her net liberty (e.g., resources) to expand, such as by declining to hold her for her consent to a one-sided contract.

The case for recognizing disrespect blameworthiness, both attitude and treatment, as a separate element in some substantive and requital maxims does not fit comfortably with existing law.²⁶⁰ It is

²⁵⁹ "It is, to be sure, not widely recognized that it is possible for there to be cases in which a person is blameworthy even though (she knows) she does not act wrongly." Peter A. Graham, *In Defense of Objectivism About Moral Obligation*, 121 *ETHICS* 88, 94 n.14 (2010) (with citation) (using the example of a consensual, excruciating medical procedure successfully performed with the motive not to aid the patient, but to cause her pain).

²⁶⁰ Nonetheless, "[w]e are used to distinguishing *what* a person did from *why* she did it, sometimes issuing separate moral judgements about the act and its motive [as where, for example, a person commits perjury to save a life]." Mark Timmons, *Motive and Rightness in Kant's Ethical System*, in *KANT'S METAPHYSICS OF MORALS* 255, 256

driven here by the centrality of dignity and respect in deontic practical philosophy.

When proscribed, the relative level of the disrespect may be measured against a baseline standard established by a substantive or requital maxim for particular conduct, such as the intention and conduct required for tortious battery, or the *mens rea* and *actus reus* for criminal battery. Below the threshold, no requital is available. Depending on whether blameworthiness is built into the substantive or requital maxims, we may declare that there was no wrongful harm or that there is no remedial entitlement.

Because of reactive attitudes, the degree of an invader's disrespect, if known to the person disrespected, may affect the invadee's physical, economic, psychic, and dignitary harms from wrongful conduct. A person put at wrongful risk, alarmed by the invader's purpose to do so, may limit her ventures and take measures to protect her security. Or, realizing the risk was accidental, she may feel less insecure and take no protective measures at all. The invadee will especially be likely to suffer greater dignitary or psychic harms from an invasion known to be motivated by malice or purpose than she will from a comparable invasion resulting from negligence, regret, or even love.²⁶¹

The identification and measurement of an invader's subjective mental state raise obvious epistemic problems. Unless she somehow reveals it before, during, or after her conduct, gauging a disrespectful attitude in actual practice may require resort to a reasonable

(Mark Timmons ed., 2002). My analysis would bring both "separate moral judgments" to bear in some plausible maxims.

²⁶¹ "A harm inflicted with a serious mental state sometimes inherently inflicts a greater harm to the victim. A victim of fraud often feels worse than a victim who has been negligently or non-negligently misled." Simons, *supra* note 67, at 512 (footnote omitted). "Emotional or psychic harm based on outrage at the offender's motive or mental state is quite real." *Supra*.

person standard.²⁶² A reasonable person standard may also be used for calculating dignitary harm, which is an objective standard.²⁶³ The difference is that for discerning dignitary harm we place our reasonable person in the shoes of the invadee, while for disrespect blameworthiness we place her in the shoes of the invader.

Responsibility blameworthiness, B_r (particularly the ignorance factor, B_{ri} , foreseeability), is often an important consideration in deciding whether a harm should be declared wrongful by adoption of a substantive maxim, or whether requital for a wrongful harm is apt. Disrespect blameworthiness, B_d , on the other hand, is infrequently an explicit factor in these determinations. Sometimes, though, disrespect blameworthiness is key to the issue. Torts such as malicious prosecution, defamation, and, arguably, the intentional infliction of emotional distress are hornbook examples. Aimed primarily at protecting against dignitary and certain psychic harms (e.g., insult), they implicate aspects of disrespect blameworthiness. They also show again the intertwining of types of harms and blameworthiness.

Objective dignitary harm may diverge from subjective disrespect blameworthiness. A reasonable person in an invadee's position may perceive the invader's mental state as egregious or hostile and suffer a dignitary harm accordingly when the invader's actual mental state is more benign. The actor may, for example, be just attempting a bad practical joke. Or, conversely, a reasonable person may dismiss actual hostile conduct as simply a bad practical joke. Dignitary harm may also disconnect from psychic harm.²⁶⁴ An invader's spite will not cause the invadee psychic harm when she is

²⁶² "When Kant addresses the question of judging legal guilt, he necessarily limits such judgments to considerations of a person's external behavior and that person's empirical or psychological personality and history." SULLIVAN, IMMANUEL KANT'S MORAL THEORY, *supra* note 23, at 243.

²⁶³ See *supra* note 221.

²⁶⁴ For instance, the tort of assault occurs independently of the fright or fear of the invadee. See RESTATEMENT (SECOND) OF TORTS § 24 cmt. b (1977).

kept in the dark, killed, or defamed after death.²⁶⁵ She may not learn of the invasion until sometime afterwards. Or, she may dismiss it as a minor annoyance until it hits the media or social networks.²⁶⁶ Psychic harm, but not dignitary harm, may turn on the degree of notoriety following the invasion. A harmed person's reactions stem from her perceptions of the aggressor's conduct as well as her understanding of the attention the invasion garners from others.²⁶⁷ The time at which psychic and dignitary harms are to be gauged, say, at the time of the antagonist's conduct or sometime thereafter, are among the factors that should be considered when adopting first- or second-order maxims. To boil it down, this second form of the invader's blameworthiness, disrespect blameworthiness, accounts for the level of her disrespect for the invadee as gauged by her treatment of the invadee and her subjective mental state, irrespective of how that mental state is actually perceived or felt by the sufferer or others identifying with her.

C. CONNECTIONS BETWEEN RESPONSIBILITY BLAMEWORTHINESS, B_R , AND DISRESPECT BLAMEWORTHINESS, B_D

Overall blameworthiness is a combination of its two aspects, responsibility and disrespect. Heightened responsibility blameworthiness may offset diminished disrespect blameworthiness, or vice versa. We could even come up with complicated interrelationships,

²⁶⁵ In this case, the psychic harm to kin and kith, and the public, especially when a public figure is the direct invadee, is affected. See *supra* note 223. As to whether a person can suffer a deontic harm after her death, see *supra* note 222.

²⁶⁶ For example, the hurled epithets "meat-eater", "pork-eater", or "cow-eater" from a person with a particular dietary norm may be intended to be disrespectful and cause psychic harm, but cause no such harm to a person who rejects the norm or is a stoic, happy-go-lucky, etc. But even if the conduct is not perceived by the invadee as disrespectful, it may nevertheless be disrespectful under a reasonable person standard, depending on the cultural and social circumstances. Once the event becomes known gossip fodder, the invadee's reaction may radically change.

²⁶⁷ From the invader's perspective, these ensuing contingencies are matters of moral luck. They are matters of luck for the invadee as well.

as where the two prongs of responsibility blameworthiness, ignorance (B_{ri}) and coercion (B_{rc}), and the two prongs of disrespect blameworthiness, attitude (B_{da}) and treatment (B_{dt}), are linked with one another in a four-factor matrix. A case could be made for further intricacies based on blameworthiness aspects of, say, the four types of harms and other factors.

Reduced responsibility blameworthiness, as by conduct from partial ignorance or coercion, usually implies reduced disrespect of those put at risk, and vice versa. Producing unforeseen risks is typically not disrespectful. On the other hand, responsibility blameworthiness and disrespect blameworthiness may also be largely independent. A person may be disappointed that she does not foresee any risk of harm to third persons by her choice to engage in reckless conduct, because she is eager to demonstrate her superiority and dominance of others by risky action. She is highly disrespectful but weakly responsible for the unforeseeable harms to others that ensue. A person could be coerced into an action harmful to another that she does with malicious glee, though she would not have done the act without the coercion.

Foreseeability plays a role in both aspects of blameworthiness, B_d and B_r , including both prongs of the latter: ignorance, B_{ri} , and coercion, B_{rc} . I turn first to disrespect blameworthiness, B_d . Foreseeability may be detached from a disrespectful attitude, B_{da} . Just thinking of oneself as morally superior to others, whether or not this attitude is manifested in conduct, violates Kant's mandate.²⁶⁸ Foreseeability has no role to play in this. Disrespectful treatment, B_{dt} , on the other hand, requires at least a minimal foreseeability. For example, assume an agent decides, "To test my new motorcycle, I'm going to drive with reckless abandon on this little-known backroad." By doing so the actor treats with disrespect only those at risk once she could foresee that others would be put in harm's way

²⁶⁸ See Pallikkathayil, *supra* note 53, at 131-32.

in a sufficient, probabilistic sense. Below this minimal foreseeability, as where the backroad is on her own isolated property, a person who is actually put at risk by the recklessness (an unintentional trespasser, perhaps) is not treated disrespectfully. Treating others with disrespect requires some knowledge that others are being affected. Foreseeability may imply a willingness and choice to use others as a means only. The more a wrongful harm to others is foreseeable to an agent, the more it seems, all else equal, that she is disrespectful by engaging in the conduct.²⁶⁹ The disrespect holds even when the agent rues the need to make such a choice. The doctrine of double effect, for example, controversially proposes to justify or excuse foreseeable harms, but it does so by declaring that the persons are not harmed purposely in a strong sense of "purpose", and circumstances allow for the harm as where, in a classic conundrum, one chooses to undertake the wartime bombing of a munitions factory sited in a residential neighborhood.²⁷⁰ In sum, foreseeability is an important factor in disrespectful treatment.

Turning back to the other, first aspect of blameworthiness, responsibility blameworthiness, B_r , foreseeability appears in both of its prongs, ignorance and coercion. For ignorance, B_{ri} , the role of foreseeability sits saliently on the surface. Knowledgeable, responsible choices and actions require apprehension of potential consequences. For coercion, B_{rc} , we must dig beneath the surface for sightings of foreseeability. Coercion is normally a product of external and internal forces that are independent of attenuated foreseea-

²⁶⁹ See ALEXANDER & FERZAN, CRIME AND CULPABILITY, *supra* note 244, at 63; Brudner, *Agency and Welfare in the Penal Law*, *supra* note 176, at 34.

²⁷⁰ See, e.g., THOMAS AQUINAS, SUMMA THEOLOGICA II-II, Q. 64, Art. 7; ALAN DONAGAN, THE THEORY OF MORALITY 58-62 (1977); PHILIPPA FOOT, *The Problem of Abortion and the Doctrine of Double Effect*, in VIRTUES AND VICES 19 (1978); KAMM, INTRICATE ETHICS, *supra* note 22, at 21-23; SCANLON, MORAL DIMENSIONS, *supra* note 22, at 8-36 ("The Illusory Appeal of Double Effect"); Thomas Nagel, *War and Massacre*, in INTERNATIONAL ETHICS 55, 60-61 (Charles R. Beitz et al. eds., 1985) (challenging the doctrine).

bility. There are exceptions. For instance, when an agent places herself in situations in which coercive forces may come into play, foreseeability may indirectly surface. If one foresees the risk of external forces, say, an approaching storm or criminal mob, then one's moral claims of necessity or coercion are weakened when one fails to reasonably respond to the anticipated threat.²⁷¹ If an agent foresees the risk of triggering internal forces, say, the slippery slope of alcohol consumption, her later claims of disability or internal coercion would be similarly diminished or precluded.²⁷² In conclusory terms, she assumed the risk.

Blameworthiness in its four permutations may essentially play two, sometimes intricately interconnected, roles. First, it may establish a threshold standard for applicability of a maxim (first- or second-order). Second, it may establish a gauge by which to measure the extent of the invasion or requital once the threshold has been met. The reason we must cope with at least some of the intricacies of blameworthiness is that we are deontologists. At the heart of our concerns when adopting plausible deontic maxims is our respect for the dignity of all persons.

²⁷¹ In general, a person is legally privileged to use another's property to escape necessitous situations. See, e.g., *Ploof v. Putnam*, 71 A. 188 (Vt. 1908); KEETON ET AL., *supra* note 7, at 145-48; DOBBS, LAW OF TORTS, *supra* note 63, at 248-50. Under existing tort law, an agent's negligence may not preclude her privilege of necessity. See DOBBS, LAW OF TORTS, *supra* note 63, at 248. This privilege might be grounded on consequentialist considerations. The imposed costs are ameliorated by the doctrine that necessity is a partial privilege only. The agent must pay for the harm that she causes. See, e.g., *Vincent v. Lake Erie Transp. Co.*, 124 N.W. 221 (Minn. 1910). In balancing the liberty and security interests at stake in circumstances of necessity, much can be said for a maxim that stretches the necessitous agent's liberty, even if "she knew what she was getting into." As a partial privilege, we will make her pay something to get out of it. With respect to the impecunious, necessitous agent, this would be troublesome, for she is judgment-proof. The criminal law is less generous than tort law in recognizing duress or necessity as a defense. It is unavailable when the actor recklessly or negligently places herself in duress or necessity situations. See MODEL PENAL CODE §§ 2.09(2), 3.02(2) (1962).

²⁷² See, e.g., DOBBS, LAW OF TORTS, *supra* note 63, at 284-85.

VII. CONCLUSION

Autonomy is not a pre-established condition or quality that is protected by the law and other norms. Autonomy is created, given meaning and definition, by them. Within the framework of the categorical imperative, wide latitude is allowed for delineations of autonomy space. There are many possible complete and coherent sets of maxims that fully respect the dignity of rational, ethical beings. In drawing boundary markers that separate one person's autonomy space from another's, sensible people may have divergent but defensible views about the proper balance between liberty and security interests. Both material, first-order maxims and requital, second-order maxims are involved in this balancing. The law, both private and public, as well as other norms and cultural values, have finely traced boundary markers over the millennia. We should not, however, assume that these markers are evolving towards a unique ideal. With guidance from the limits mandated by the categorical imperative, and history as an object lesson, each person in an individualistic regime is in a position to adopt maxims that conform to her own, justifiable notion of the proper reach of freedom. This grants her wide latitude. Once we find it necessary to bring the government into the process, it also has wide latitude.