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Public Requitals: Corrective, Retributive, and Distributive Justice

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PUBLIC REQUITALS: CORRECTIVE, RETRIBUTIVE, AND DISTRIBUTIVE JUSTICE

BAILEY KUKLIN*

ABSTRACT

The currently predominant view of public requitals for criminal behavior draws on the deontic guidance provided rather sketchily by Kant's writings. He offers a broad, formal framework for the mandate to respect others and punish those who criminally violate the mandate. As ethical beings, people have the duty to avoid invading the "autonomy space" of others that is delineated by maxims designed to reasonably and fairly balance everyone's equal liberty and security interests. Once society settles on a complete and coherent set of maxims that determines the reach of one's autonomy space, it must then turn to maxims that address the requital repercussions for invasions of this space. In the private realm, our legal regime looks to corrective justice for guidance. In the public, criminal realm we turn to . . . Well, here is where a deep debate resides. Might we think of punishment as corrective justice writ large? This does not seem promising since our intuitions and traditions emphasize the blameworthiness of the criminal autonomy invader, which corrective justice downplays. Instead, should we turn to conceptions of retribution, as Kant asserts? If so, what are the parameters of retribution? While this is more promising, I believe the prominent role of blameworthiness in our judgments of apt punishment are best situated by conceptions of distributive justice. Defending and developing this position is the primary burden of this Article. After explicating the key elements of autonomy space and requitals for its invasion, including "dignity," "respect," "responsibility," "consent," "harm," "wrongful harm," and especially "blameworthiness," I turn to the process by which these elements may be integrated and implemented in a just penal regime centered on distributive justice.

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I. INTRODUCTION

The notion of autonomy is at the heart of the modern discussion of rights and duties. While consequentialist utilitarians, such as J.S. Mill, offer a basis for honoring autonomy claims, individualistic deontology dominates the current debate among commentators about the reach of the protections issuing from the obligation to respect a person's autonomy. This debate involves two important questions. First, what is the justification for a person's autonomy claims? Second, when there has been a violation of recognized claims, what is a proper requital? In prior articles, I addressed the first question,¹ as well as the second question regarding requitals for invasions of private rights, such as torts.² In this Article, I address requitals in the public, criminal context.

To arrive at the question of requitals for autonomy invasions, I will first summarize the reasoning in my prior work that led me to identify the reach of autonomy claims. This starts, of course, with Kant, the seminal deontologist.³ Kant places the right and duty to respect a person's dignity at the center of practical reasoning. According to Kant, a person, by virtue of her capacity for rationality, is an ethical being whose autonomy is entitled to respect and who, likewise, is obligated to respect the autonomy of other ethical beings.⁴ Every moral agent is entitled to the maximum amount of freedom consistent with an equal freedom for others.⁵ Because a person's exercise of her interest in freedom often is incompatible with the freedom interests of others, there must be a means of resolving these conflicts.⁶ Consequently, inconsistent exercises of liberty interests (positive freedom) and security interests (negative freedom) must be balanced by the adoption of norms or maxims of conduct.⁷

Under Kant, the balancing process that produces adopted maxims must meet the constraints of the categorical imperative. The most important forms of the categorical imperative for our purposes are, first, that maxims are to be universalized, meaning that they must apply equally to all within the class of persons covered by the maxims.⁸

¹ Bailey Kuklin, *Constructing Autonomy*, 9 N.Y.U.J.L. & LIBERTY 375 (2015) [hereinafter Kuklin, *Constructing Autonomy*].

² Bailey Kuklin, *Private Requitals*, 64 CLEV. ST. L. REV. 965 (2016) [hereinafter Kuklin, *Private Requitals*].

³ *Id.*

⁴ *Id.* at 967–68.

⁵ See generally IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (1785), reprinted in PRACTICAL PHILOSOPHY 37, 41 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1996) [hereinafter KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*].

⁶ Kuklin, *Constructing Autonomy*, *supra* note 1, at 381.

⁷ *Id.* at 390–91.

⁸ “[A]ct only in accordance with that maxim through which you can at the same time will that it become a universal law.” KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, *supra* note 5, at 73 (emphasis omitted). This mandate “can be called the Formula of Universal Law . . .” PAUL GUYER, *KANT ON FREEDOM, LAW, AND HAPPINESS* 142 (2000).

Second, moral agents are to be treated as ends in themselves and not as a means only to another's ends.⁹ As an aspect of exercising her autonomous freedom, each agent is to adopt maxims that govern her own conduct while respecting the equal autonomy interests of others.¹⁰ Since the constraints of the categorical imperative usually are seen as formal only,¹¹ within these limitations, in principle, an agent may adopt any one of an infinite number of complete and coherent sets of deontic maxims. What, then, is to be done when the proper maxims adopted by one agent are inconsistent with the proper maxims adopted by another? From a private, entirely individualized perspective, this problem is intractable.¹² Kant resolved this problem by finding a nonconsensual social contract that obligates everyone.¹³ One might argue that ignoring the consent of the governed is not very Kantian, at least in light of Kant's deep concern for personal autonomy.¹⁴ Others have resolved this problem by basing political obligation on a social contract grounded on such propositions as hypothetical or tacit consent, or notions of fairness.¹⁵ From a personal autonomy perspective, I see much hand waving in these solutions, but I am relegated to hand waving myself. The foundational disagreements between Kantian liberals and Kantian libertarians, and others, are understandable.¹⁶ Therefore, I rely on a *deus ex machina* of sorts that grants a just government the power to adopt a complete and coherent set of legal maxims, as long as each maxim satisfies the categorical imperative. Likewise, a community may establish a set of non-legal, moral norms.

⁹ "So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means." KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, *supra* note 5, at 80 (emphasis omitted). This form or formulation is referred to as "the Formula of Humanity as an End in Itself . . ." GUYER, *supra* note 8, at 142.

¹⁰ Robert Johnson & Adam Cureton, *Kant's Moral Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Feb. 23, 2004), <https://plato.stanford.edu/entries/kant-moral/>.

¹¹ See, e.g., GEORG WILHELM FRIEDRICH HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* 89–90 (T.M. Knox trans., Oxford Univ. Press 1952) (1821); JEFFRIE G. MURPHY, *KANT: THE PHILOSOPHY OF RIGHT* 40 (1970). But see, e.g., Andrews Reath, *Agency and Universal Law, in AGENCY AND AUTONOMY IN KANT'S MORAL THEORY* 196, 196 (2006); ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 383 app. (2009) [hereinafter RIPSTEIN, *FORCE AND FREEDOM*].

¹² See generally Jens Timmermann, *Kant's Puzzling Ethics of Maxims*, 8 HARV. REV. PHIL. 39, 43 (2000).

¹³ See IMMANUEL KANT, *THE METAPHYSICS OF MORALS* (1797), reprinted in *PRACTICAL PHILOSOPHY*, *supra* note 5, at 353, 451, 457–59 [hereinafter KANT, *THE METAPHYSICS OF MORALS*]; JOHN RAWLS, *Justice as Fairness, in COLLECTED PAPERS* 47, 71 n.22 (Samuel Freeman ed., 1999); RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 11, at 198–204.

¹⁴ Kuklin, *Constructing Autonomy*, *supra* note 1, at 385–86.

¹⁵ See generally DAVID GAUTHIER, *MORALS BY AGREEMENT* (1986); BRIAN SKYRMS, *EVOLUTION OF THE SOCIAL CONTRACT* (1996); Fred D'Agostino et al., *Contemporary Approaches to the Social Contract*, STAN. ENCYCLOPEDIA PHIL. (Mar. 3, 1996), <http://plato.stanford.edu/entries/contractarianism-contemporary/>.

¹⁶ See generally Jason Kuznicki, *Kantianism, in ARGUMENTS FOR LIBERTY* 87, 87–122 (Aaron Ross Powell & Grant Babcock eds., 2016).

With this shaky foundation in place, we are now ready for the business of adopting maxims. Maxims establish the extent of a person's autonomy claims.¹⁷ I refer to this ambit, as have others, by using a spatial metaphor—autonomy space. The adoption of deontic maxims delineates a person's autonomy space.¹⁸ For instance, “do not assault another person” protects a person from certain kinds of harms. Once these types of substantive, first-order maxims are adopted, the boundaries they establish may generally be adjusted by the consent of the protected party.¹⁹ In case there is a nonconsensual violation of these maxims, we must turn our attention to apt responses to the autonomy space invasion. This requires the adoption of requital, second-order maxims.²⁰ In the private realm, the standard for Kantians is to look to Aristotle's concept of corrective justice for guidance.²¹ In the public, criminal realm, we usually look to the concept of retribution, as did Kant.²²

The Kantian process of identifying autonomy space, and then protecting against invasions of it, is not simple and straightforward. A person's material autonomy space, her freedom in practice, is demarcated not only by substantive maxims, but also by the maxims that are embraced to requite invasions.²³ Hence, if for no other reason, these requital maxims must also satisfy the categorical imperative.²⁴ Corrective justice and retribution are up to this task in principle, but like the categorical imperative itself, they both have a formal quality.²⁵ In other words, each of these two concepts have many deontically justifiable conceptions.²⁶ For example, an invasion of the autonomy space delineated by an assault maxim may trigger an associated legal or moral requital maxim that, perhaps depending on the particularities of the assault, may call for general damages for harms, damages for only particular kinds or extents of harms, or simply for a sincere apology that acknowledges the invader's disregard of the invadee's protected dignity interest. An assaulter effectively has greater freedom under a requital maxim that requires an apology than one that exacts general

¹⁷ Timmermann, *supra* note 12, at 39.

¹⁸ Kuklin, *Constructing Autonomy*, *supra* note 1, at 380.

¹⁹ Some boundary markers are, most commentators would argue, immutable or inalienable, such as the disallowance of slavery contracts. Kuklin, *Constructing Autonomy*, *supra* note 1, at 394. Allowable consent does not simply serve as an excuse for autonomy invasions; instead, it readjusts the autonomy space boundary such that the consensual actions impacting on the consenter's baseline, pre-consensual autonomy space, do not constitute invasions at all. Under the Consent Principle I favor, the greater the negative effect of the consensual conduct on the consenter's baseline autonomy space, the deeper, more understanding, must be the consent. For further development of this principle, see *infra* text accompanying notes 489–93.

²⁰ Kuklin, *Public Requitals*, *supra* note 2, at 972.

²¹ *Id.* at 979.

²² Frederick Rauscher, *Kant's Social and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (July 24, 2007), <https://plato.stanford.edu/entries/kant-social-political/>.

²³ Kuklin, *Constructing Autonomy*, *supra* note 1, at 381.

²⁴ Kuklin, *Private Requitals*, *supra* note 2, at 990.

²⁵ Kuklin, *Constructing Autonomy*, *supra* note 1, at 388.

²⁶ *Id.*

damages.²⁷ The assaulter's personal resources and future options are less at risk from her invasive conduct.²⁸ Vice versa for the person assaulted.²⁹

In considering plausible maxims for adoption, we must attend to the harms, the setbacks to interest,³⁰ that go onto the scales balancing liberty and security interests. As Kantians, the central harm is to one's dignitary interest, the right to be respected and treated as a moral equal.³¹ Associated with dignitary harm are the standard types of harms recognized in legal and moral practice: physical, economic, and psychic.³² These four types of harms may be direct, immediate harms or indirect, reactive harms.³³ A direct or immediate harm is the usual, quotidian sort, as where a battery causes physical injury, medical expenses, and pain and suffering.³⁴ An indirect or reactive harm is a product of an awareness of an autonomy space invasion, as where the public responds to the knowledge of a crime spree by fright, expenditures for protective measures, and even physical illness from the psychic distress.³⁵ Reactive harms may be convoluted. A targeted invader may suffer them when, for example, she becomes aware that she is the object of an intended invasion before the invader even begins to carry out her planned incursion. As another instance, a person may silently suffer invasive abuse from her partner that begins to negatively affect her work. When she perceives that her coworkers have begun to question her abilities or work ethic, she may suffer reactive harms of all four types, which may increase her coworkers' unfavorable perceptions, etc. The kin, kith, and supporters of an invader and, for that matter, an invader, may suffer reactive harms from their perceptions of the interaction between the invader and direct invader.³⁶ Reactive harms are, I argue, a crucial, perhaps underappreciated element in a deontic realm, especially in the retributive context of criminal law.

A harm principle, such as those advanced by J.S. Mill or Joel Feinberg,³⁷ establishes limits to the acceptable constraints on liberty, and reciprocally, the protection of security.³⁸ For instance, some types of harms, deemed self-regarding

²⁷ Kuklin, *Private Requitals*, *supra* note 2, at 974.

²⁸ *Id.*

²⁹ *Id.*

³⁰ For "harm" as a setback to interest, see JOEL FEINBERG, HARM TO OTHERS 31–64 (1984) [hereinafter FEINBERG, HARM TO OTHERS].

³¹ Kuklin, *Constructing Autonomy*, *supra* note 1, at 390, 427.

³² *Id.* at 427.

³³ *See id.* at 433.

³⁴ *Id.* at 430–32.

³⁵ *Id.* at 433.

³⁶ Kuklin, *Private Requitals*, *supra* note 2, at 1010.

³⁷ *See* FEINBERG, HARM TO OTHERS, *supra* note 30, at 10–14, 26–27; JOHN STUART MILL, ON LIBERTY 134–67 (4th ed. London 1869) ("Of the Limits to the Authority of Society over the Individual").

³⁸ David Brink, *Mill's Moral and Political Philosophy*, STAN. ENCYCLOPEDIA PHIL. (Oct. 9, 2007), <https://plato.stanford.edu/entries/mill-moral-political/>.

harms (e.g., reading sexually explicit literature, according to some observers), do not present legitimate concerns for others.³⁹ Even other-regarding harms, such as those from business competition, may or may not call for restrictions.⁴⁰ Like the categorical imperative, corrective justice, and retributive justice, specific maxims must flesh out a harm principle. With this in mind, when establishing a complete and coherent set of substantive and requital maxims within deontic constraints, the notion of culpability or blameworthiness traditionally and intuitively is seen as an important factor.⁴¹ As individualistic deontologists, we are concerned with the just deserts of the invader, and perhaps the invadee as well, especially when delineating conceptions of retribution. Therefore, acceptable meanings of desert must be identified. While we may find some room for truly strict liability, it makes most deontologists uncomfortable, particularly in the criminal law realm, for its failure to weigh in the actor's blameworthiness.⁴²

The genus of blameworthiness has two species. First, "responsibility blameworthiness" harkens back to Aristotle's position that fully responsible choices and actions must be free of unavoidable ignorance and coercion.⁴³ At some point, depending on the situation, a person's choice is too impaired to fairly hold her responsible for it, or at least, fully responsible. She has not adequately chosen, or "consented to" in some sense, her own conduct. Second, "disrespect blameworthiness" accounts for Kant's insistence that one has the duty to respect the equal dignity of other rational, ethical beings.⁴⁴ Disrespect blameworthiness must be distinguished from dignitary harm. Dignitary harm is judged from the invadee's perspective, while disrespect blameworthiness is gauged from the invader's perspective.⁴⁵ An agent who beneficently paternalizes another person produces a dignitary harm by denying that person the liberty to choose for herself, even when such action produces no other harm and is prompted by love for the person. An agent who consensually assists another person to successfully diet is disrespect blameworthy when the motive for the aid, unbeknownst to the dieter, is to see her suffer during the process.

Both responsibility blameworthiness and disrespect blameworthiness may be adopted as factors in substantive maxims and associated requital maxims. For example, here are plausible high-level substantive and associated requital maxims (that need much unpacking): "[d]o not unreasonably harm another person through (responsibility) blameworthy conduct"; "[i]f one unreasonably harms another person through (responsibility) blameworthy conduct, then one is to compensate that person

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Kuklin, *Constructing Autonomy*, *supra* note 1, at 446.

⁴² Kuklin, *Private Requitals*, *supra* note 2, at 969.

⁴³ See ARISTOTLE, NICHOMACHEAN ETHICS bk. III, ch. 1 (c. 384 B.C.E.), reprinted in THE BASIC WORKS OF ARISTOTLE 935, 964–67 (Richard McKeon ed., Random House 1941).

⁴⁴ Kuklin, *Constructing Autonomy*, *supra* note 1, at 446.

⁴⁵ *Id.* at 453.

to the extent of the harm and one's (disrespect) blameworthiness.⁴⁶ In the course of working out a complete set of substantive maxims to establish autonomy space boundaries, some types of situational features are salient: intentional harm; truth-telling and promise-keeping; reliance and expectations; exploitation (advantage-taking); risk imposition; and the existence of established norms, such as statutes, customs, and mores.⁴⁷ This Article mainly focuses on the plausible retributive requital maxims for violation of substantive maxims related to the aforementioned situations and others, all of which require balancing the liberty and security interests of moral agents.

As should be evident already, I have projected a rocky road to map. Commentators have not identified a way to apply the theory of retributive punishment to an actual measure of levels of punishment.⁴⁸ The application of corrective justice has not generated as much complaint, but this lack of dissatisfaction is apparently because the concept largely has been narrowed to the single conception of returning an invader to the position she occupied prior to the invasion.⁴⁹ The invader's blameworthiness plays a minor role in gauging the private requital.⁵⁰ One may strongly argue against this position, however, for minimal negligence may ground enormous damage recoveries, or vice versa. The public realm of punishment is quite to the contrary when it comes to accounting for blameworthiness. Our legacies and feelings about punishment invoke the concept of just deserts, which puts blameworthiness on center stage.⁵¹ Once we put responsibility and disrespect blameworthiness into the limelight, and the means to accommodate these factors in measures of requital, all hope of clearly implied, mechanical applications in the private and public realms vanish. Thus, the rocky road will not reach a definitive final destination. Traveling that road will, I hope, show some of the potholes, gullies, and chasms that must be avoided or leaped.

⁴⁶ Bailey Kuklin, *The Labyrinth of Blameworthiness*, 51 U.S.F. L. REV. 173, 198–99 (2017) [hereinafter Kuklin, *The Labyrinth of Blameworthiness*].

⁴⁷ See Kuklin, *Private Requitals*, *supra* note 2, at 1020–25 (“Norms”).

⁴⁸ See Michael T. Cahill, *Retributive Justice in the Real World*, 85 WASH. U. L. REV. 815, 818–20 (2007) [hereinafter Cahill, *Retributive Justice*]. Furthermore, “a cursory historical survey [of philosophical discussions] makes it clear that although retributivism has been, and still is, a live philosophical option, its theoretical base has not been clearly articulated.” GEORGE SHER, DESERT 69 (1987) [hereinafter SHER, DESERT]. Duff believes that strict retributive accounts cannot explain “the role of hard treatment in punishment.” R.A. Duff, *Penal Communications: Recent Work in the Philosophy of Punishment*, 20 CRIME & JUST. 1, 1 (1996) [hereinafter Duff, *Penal Communications*].

⁴⁹ Kuklin, *Constructing Autonomy*, *supra* note 1, at 416.

⁵⁰ *Id.* at 439.

⁵¹ “Under a distributive principle of ‘deontological desert’ . . . , the sole criterion for punishment is the actor’s moral blameworthiness, a matter of moral philosophy. . . . The degree of an offender’s blameworthiness depends upon both the seriousness of the violation and the extent of the person’s moral accountability for it.” PAUL H. ROBINSON, DISTRIBUTIVE PRINCIPLES OF CRIMINAL LAW 11 (2008) [hereinafter ROBINSON, DISTRIBUTIVE PRINCIPLES]. “Culpability, it should be noted, affects both questions of liability (‘Should the person be punished at all?’) and questions of allocation (‘How severely should he be punished?’).” ANDREW VON HIRSCH, DOING JUSTICE 80 n.* (1976) [hereinafter VON HIRSCH, DOING JUSTICE].

II. CORRECTIVE, RETRIBUTIVE, AND DISTRIBUTIVE JUSTICE

In a deontic regime, autonomy space is specified by adopted maxims.⁵² Invasions of autonomy space are required by conceptions and applications of deontic justice. In the private sphere of tort, contract, and unjust enrichment, conceptions of corrective justice are invoked as requital standards.⁵³ In the public sphere of criminal law, conceptions of retribution are commonly invoked.⁵⁴ As Aristotle declares, conceptions of distributive justice also play a role in the public sphere.⁵⁵ The interrelationship among these three forms of justice is not settled.⁵⁶ Some commentators contend that retributive justice is simply corrective justice writ large.⁵⁷ Corrective justice is said to account for wrongful harms to specific protected individuals, while retributive justice accounts for wrongful harms to the general public, though both forms of justice are gauged in a similar manner.⁵⁸ While this view has attractive features, the usual, more

⁵² Kuklin, *Constructing Autonomy*, *supra* note 1, at 392.

⁵³ *Id.* at 381.

⁵⁴ *Id.*

⁵⁵ See ARISTOTLE, *supra* note 43, bk. V, chs. 1–3, at 1002–07. For a useful summary, see IZHAK ENGLARD, CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES 1–10 (2009).

⁵⁶ In working out the relationship among the three forms of justice, “a number of conflicting solutions have been advanced . . . : (1) retribution makes part of distributive justice; (2) it is part of corrective justice; (3) it is a third form of justice; (4) it is a distinct idea that can be applied to the basic two forms of particular justice.” ENGLARD, *supra* note 55, at 9–10. As for the difference between distributive justice and corrective justice, Sadurski finds “the distinction is not as clear in actual social life as it is in theory” WOJCIECH SADURSKI, GIVING DESERT ITS DUE 25 (1985) [hereinafter SADURSKI, GIVING DESERT ITS DUE]; see *id.* at 25–36. “Because corrective and distributive justice are mutually irreducible structures of justificatory coherence, a single legal relationship cannot coherently partake of both.” Ernest J. Weinrib, *The Jurisprudence of Legal Formalism*, 16 HARV. J.L. & PUB. POL’Y 583, 589 (1993). For elaboration, see Ernest J. Weinrib, *Punishment and Disgorgement as Contract Remedies*, 78 CHI.-KENT L. REV. 55, 84–93 (2003).

⁵⁷ See, e.g., David Wood, *Retributive and Corrective Justice*, *Criminal and Private Law*, 48 SCANDINAVIAN STUD. L. 542, 542 (2005).

⁵⁸ “[I]t is desired that a theory of punishment *concern itself with corrective justice*, as that is its principal aim. . . . [This] is meant to caution against a theory of punishment’s placing considerations other than those of corrective justice (e.g., distributive justice) at the forefront of concern in punishment.” J. ANGELO CORLETT, RESPONSIBILITY AND PUNISHMENT 22 (rev. 2d ed. 2004) [hereinafter CORLETT, RESPONSIBILITY AND PUNISHMENT]. “[A]ccording to Aquinas retribution is embedded in corrective justice: rectification of wrongful conduct must take into account the fact that injury has been caused not only to a private person, but also to the state or to the public at large through violation of their interest in individual security.” Ronen Perry, *The Third Form of Justice*, 23 CAN. J. L. & JURIS. 233, 239 (2010) [hereinafter Perry, *The Third Form of Justice*] (citing ENGLARD, *supra* note 55, at 19–20 (citing Aquinas)). Perry states, “[i]n my view, applying the notion of retributive justice cannot be deemed as vindicating an independent state interest but as an attempt to vindicate the aggregate interest of law abiding citizens.” *Id.* at 241 n.67. Perry finds substantial differences between retribution and corrective justice. See *id.* at 239–42. “[T]here is now no danger of confusion or collision between the principle of Reparative and that of Retributive Justice, as the one is manifestly concerned with the claims of the injured party, and the other with the deserts of the wrongdoer” Henry

appealing, conceptions of corrective justice fail to satisfactorily incorporate the centrality of just deserts in conceptions of retributive justice.⁵⁹ Moral luck, for instance, may crucially affect whether, and the extent to which, an invader's obligations under corrective justice correlate to her degree of blameworthiness.⁶⁰ As two examples, under (non)responsibility for moral luck, an invader's outrageously evil motivation may produce little harm, as where a delivery accident destroyed the large shipment of drugs she poisoned.⁶¹ Alternatively, her minimal wrongfulness may cause enormous harm, as where she inadvertently rammed a school bus over a cliff.⁶² For the conceptions of retribution that I embrace, blameworthiness must always be kept under the magnifying glass.⁶³ Corrective justice, in general terms, obligates an invader to restore the invadee to her position prior to the invader's conduct.⁶⁴ Retribution is to

Sidgwick, *Justice as Desert*, in WHAT DO WE DESERVE?: A READER ON JUSTICE AND DESERT 47, 52 (Louis P. Pojman & Owen McLeod eds., 1999). "[T]he problem is to explain the notion of a public wrong in a way which does not denigrate the wrong done to the individual victim . . ." Duff, *Penal Communications*, *supra* note 48, at 79. "The wrong suffered by the mugging victim is 'her' wrong: but insofar as we identify ourselves with her, as we should, as a fellow member of the community, it becomes 'our' wrong too." *Id.* I would say, we are also harmed.

While some argue that corrective justice subsumes retribution, a welfarist may turn this around. In discussing the notion of fairness,

concerned with making the injurer pay for the harm he has occasioned. . . . [Kaplow and Shavell] find it convenient to refer to such a notion of fairness as one involving punishment, whether the motivation for the notion pertains to retribution, the desire to rectify the outcome created by the injurer's action . . . or some other reason.

LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 87 (2002) (footnote omitted).

⁵⁹ "Although in my own view, corrective justice is not this focused on wrongdoing to the exclusion of culpability, it remains true that wrongdoing, and not culpability, is the main trigger for corrective justice duties." Michael S. Moore, *Prima Facie Moral Culpability*, 76 B.U. L. REV. 319, 331 (1996) [hereinafter Moore, *Prima Facie Moral Culpability*].

⁶⁰ For various types of luck, see RONALD DWORKIN, SOVEREIGN VIRTUE 73 (2000) ("option" and "brute" luck); Leo Katz, *Why the Successful Assassin Is More Wicked than the Unsuccessful One*, 88 CALIF. L. REV. 791, 798 (2000) ("character," "opportunity," "circumstantial," and "outcome" luck). "Why treat these different kinds of luck so asymmetrically? There seems to be no principled difference between them." *Id.*

⁶¹ Perry, *The Third Form of Justice*, *supra* note 58, at 240.

⁶² "[E]ven where wrongful conduct results in harm, the extent of damages under corrective justice is determined by the fortuitous amount of the victim's loss, which is usually a poor measure of the gravity of the wrong." *Id.* at 240, 240 n.64. For more on moral luck, see *infra* text accompanying notes 333–34.

⁶³ "Nowadays, the dominant tendency in criminal law theory is to derive the conditions of penal liability and of exculpation from a moral theory of inward blameworthiness for wrongdoing." ALAN BRUDNER, PUNISHMENT AND FREEDOM: A LIBERAL THEORY OF PENAL JUSTICE 17 (2009) (citing exceptions).

⁶⁴ "[T]ort law does *not* purport to provide remedies proportional to the injurer's wrong: normally, compensation is the remedy, whatever the nature of the tort or wrong. . . . [T]he tort remedy usually does not vary with the culpability of the injurer." Kenneth W. Simons, *The Crime/Tort Distinction: Legal Doctrine and Normative Perspectives*, 17 WIDENER L.J. 719, 721

punish an invader in proportion to her just deserts irrespective of the fortuitous impact of her conduct on the invadees and her obligations to them under corrective justice.⁶⁵

Some commentators argue that an interrelationship exists between corrective and distributive justice,⁶⁶ or among corrective justice, distributive justice, and retribution.⁶⁷ Some see an unbridgeable gap between corrective and retributive justice.⁶⁸ I subscribe

(2008) [hereinafter Simons, *The Crime/Tort Distinction*] (citing John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1142–43 (2007) [hereinafter Goldberg & Zipursky, *Tort Law and Moral Luck*]).

⁶⁵ There are other views. “In contrast with *culpability-based* retributivism, which premises just deserts upon the agent’s blameworthiness in bringing about a harm, *harm-based* retributivism premises just deserts (at least in part) simply upon the agent’s bringing about a harm.” Kenneth W. Simons, *Book Review: Social Meaning, Retributivism, and Homicide*, 19 LAW & PHIL. 407, 413 (2000) [hereinafter Simons, *Book Review*] (reviewing SAMUEL H. PILLSBURY, *JUDGING EVIL* (1998)).

⁶⁶ “The normative force of corrective justice is, [Coleman] argues, conditional upon whether there are other institutions in society the purpose of which is to make good victims’ losses. . . . [As in New Zealand and no-fault insurance, such schemes are] generally best understood in terms of distributive justice” Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune and Tort Law*, 16 QUINNIAC L. REV. 315, 317–18 (1996) [hereinafter Perry, *The Distributive Turn*] (citing JULES L. COLEMAN, *RISKS AND WRONGS* 401–04 (1992) [hereinafter COLEMAN, *RISKS AND WRONGS*]). Ripstein sees a chasm between corrective and distributive justice. Corrective justice “is not a distributive theory, not even a small-scale version of distributive justice between plaintiff and defendant. It is not a theory of desert or proportionality, not an attempt to approximate a normative order in which suffering is proportionate to wickedness.” Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 199 (2011) [hereinafter Ripstein, *Civil Recourse*].

⁶⁷ “Since all justice is allocative, and ‘distributive’ and ‘allocative’ are synonyms, it is hard to resist the thought that all justice is distributive.” John Gardner, *Corrective Justice, Corrected*, 12 DIRITTO & QUESTIONI PUBBLICHE 9, 13–14 (2012) [hereinafter Gardner, *Corrective Justice*]. “It is notoriously hard to pin down what is interestingly distinctive about [corrective and distributive justice].” *Id.* at 14. “Retributive justice combines features of both corrective and distributive justice.” George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 58, 57–59 (1999) [hereinafter Fletcher, *Place of Victims*]. For a discussion of commentators who have taken this position, with criticism, see Perry, *The Third Form of Justice*, *supra* note 58, at 242–45. As telegraphed by the title of his article, Perry takes the position that retribution does not fall within corrective or distributive justice. “The idea that retributive justice constitutes an independent form [of justice] has gained support in modern legal scholarship. It is assumed without explanation by many authors.” *Id.* at 246.

⁶⁸ See, e.g., Paul H. Robinson, *The Criminal-Civil Distinction and the Utility of Desert*, 76 B.U. L. REV. 201, 207 (1996); Jules Coleman & Gabriel Mendlow, *Theories of Tort Law*, STAN. ENCYCLOPEDIA PHIL. (Sept. 22, 2003), <http://plato.stanford.edu/archives/fall2010/entries/tort-theories/>. “Although there are theories of retributive justice which in many respects resemble theories of corrective justice, the most plausible versions of retributive justice separate the duty to accept punishment from any duty to annul a victim’s losses.” Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51, 72 (1991) (citing HERBERT MORRIS, *ON GUILT AND INNOCENCE* 31–58 (1976)).

In standing back to survey the arguments, one commentator sees three kinds of distinctions between corrective and retributive justice, that is, private and criminal law, based on the prohibitions involved, the remedies available, and the means of enforcement. See Aya Gruber,

to the view that retributive justice fits most comfortably within conceptions of distributive justice that place just deserts on center stage.⁶⁹ This view requires specification of the idea of just deserts.⁷⁰

Righting Victim Wrongs: Responding to Philosophical Criticisms of the Nonspecific Victim Liability Defense, 52 BUFF. L. REV. 433, 483–84 (2004). For Gruber's observations on the differences, see *id.* at 484–96. Gruber places the differences between private law and public law in this third distinction (means of enforcement). *Id.* Ripstein provides an example. "Criminal law differs from tort in three distinctive ways. First, in order to qualify as a crime, the risk of wrongful injury must be chosen, not merely taken. Second, criminals are punished. Third, the state is charged with punishment and appears as a party to a criminal proceeding." ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 245 (1999) [hereinafter RIPSTEIN, *EQUALITY*].

Some question the nature or extent of the gap in existing law. Here are some examples: "If painted without an eye to detail, the line that divides most of tort law from most of criminal law is the line between consequential wrongs and deontological wrongs." Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 271 (1996). "If this is true, . . . it challenges those who are corrective justice theorists about torts and retributive justice theorists about crimes to ask why consequential wrongs uniquely demand corrective justice while deontological wrongs uniquely demand retributive justice." *Id.* at 272. Simons takes issue with Hurd. Simons says, "I present evidence that deontological principles can explain much of tort doctrine. In particular, I suggest that negligence doctrine can have a nonconsequentialist justification, notwithstanding the cost-benefit and balancing form of analysis that courts increasingly employ in negligence cases." Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 273–74 (1996) [hereinafter Simons, *Deontology*]. For Simons's evidence, see *id.* at 276–85, and for his rejection of Hurd's thesis, see *id.* at 285–95. See generally Robert W. Drane & David J. Neal, *On Moral Justifications for the Tort/Crime Distinction*, 68 CALIF. L. REV. 398 (1980); Richard A. Epstein, Symposium, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1 (1996); Simons, *Book Review*, *supra* note 65.

⁶⁹ "Some [retributivists] regard the punishment of wrongdoers as derivative from a fundamental axiom of justice that wrongdoers deserve to suffer. Other retributivists try to connect punishment with broader issues of distributive justice, or justice in the distribution of the benefits and burdens of social life." C.L. TEN, *CRIME, GUILT, AND PUNISHMENT* 5 (1987). "The literature rarely rationalizes punishment in terms of distributive justice." Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CALIF. L. REV. 1181, 1201 (1994) (footnote omitted). "With few exceptions . . . there has been no deliberate effort to propose a principle or set of principles which apply uniformly to the retributive and distributive aspects of 'doing justice'. There has been no congruence between these two realms in modern literature, nor (I suspect) in most popular thinking." Wojciech Sadurski, *Social Justice and the Problem of Punishment*, 25 ISR. L. REV. 302, 304 (1991) [hereinafter Sadurski, *Social Justice*] (citing ALAN GEWIRTH, *REASON AND MORALITY* (1978)). For a discussion of whether retribution is properly considered an aspect of distributive justice, see Perry, *The Third Form of Justice*, *supra* note 58, at 242–45, who finds more differences than alignments. Perry discusses whether retribution is an amalgam of corrective and distributive justice. *Id.* at 245–46. But, ultimately, he subscribes to the view that retribution is a third form of justice. *Id.* at 246–47. Sadurski, "suggest[s] that there is no reason to avoid the application of a principle of distributive justice (that is, justice in the distribution of good things) to retributive justice." Wojciech Sadurski, *Distributive Justice and the Theory of Punishment*, 5 OXFORD J. LEGAL STUD. 47, 47 (1985) (noting Rawls's disagreement as well).

⁷⁰ "Among the great ethical theorists of the past, Aristotle, Butler, Price, Kant and Hegel all made considerable use of the notion of desert, yet none of them, with the possible exception

The literature identifies two broad categories of desert, one that is based on equality values and the other on liberty values.⁷¹ Examples of equality-grounded

of Price, made any real endeavor to analyse [sic] the concept.” JOHN KLEINIG, PUNISHMENT AND DESERT 50 (1973) [hereinafter KLEINIG, PUNISHMENT AND DESERT]. “By ‘punishment according to desert’ I mean punishment according to the offender’s personal blameworthiness for the past offense, which takes account not only of the seriousness of the offense but also the full range of culpability, capacity, and situational factors that we understand to affect an offender’s blameworthiness.” Paul H. Robinson, *The A.L.I.’s Proposed Distributive Principle of ‘Limiting Retributivism’: Does It Mean in Practice Anything Other than Pure Desert?*, 7 BUFF. CRIM. L. REV. 3, 5, 5 n.5 (2003) [hereinafter Robinson, *Limiting Retributivism*] (noting that “all thoughtful desert advocates that I know essentially support the description I have offered here”). Robinson finds “at least three distinct conceptions of desert to be found in the current debates, typically without distinction being made between them. The three include what might be called vengeful desert, deontological desert, and empirical desert.” Paul H. Robinson, *Competing Conceptions of Modern Desert: Vengeful, Deontological, and Empirical*, 67 CAMBRIDGE L.J. 145, 146 (2008) [hereinafter Robinson, *Competing Conceptions*]. “[T]he primary focus of vengeful desert remains the extent of the harm of the offence.” *Id.* at 147 (first citing NICOLA LACEY, STATE PUNISHMENT: POLITICAL PRINCIPLES AND COMMUNITY VALUES 17 (1994); then citing TEN, *supra* note 69, at 152). “The deontological conception of desert focuses not on the harm of the offense but on the blameworthiness of the offender, as drawn from the arguments and analyses of moral philosophy.” *Id.* at 148 (footnote omitted). “Empirical desert, like deontological desert, focuses on the blameworthiness of the offender. But in determining the principles by which punishment is to be assessed, it looks not to philosophical analyses but rather to the community’s intuitions of justice.” *Id.* at 149. While there are difficulties with all three conceptions, “it seems clear that the usefulness of the ongoing debate over desert as a distributive principle can only be enhanced by distinguishing these three conceptions of it.” *Id.* at 175. Scheid identifies three “contrasting notions of punitive desert as statements of desert principles,” none of which specifically focuses on the blameworthiness of the invader. Don E. Scheid, *Davis, Unfair Advantage Theory, and Criminal Desert*, 14 LAW & PHIL. 375, 399 n.52 (1995) [hereinafter Scheid, *Davis*] (noting that the traditional retributivist looks to the harm caused, compensation theories turn on the damages caused, and the unfair-advantage theory center on the illicitly gained advantage). “An adequate account of desert may grow rather complex.” SHELLY KAGAN, THE GEOMETRY OF DESERT 5 (2012). For some of the complexities, see *id.* at 5–12. Kagan grounds desert on a person’s virtue. *Id.* at 251.

⁷¹ See, e.g., JOEL FEINBERG, *Justice and Personal Desert*, in DOING AND DESERVING: ESSAYS IN THE THEORY OF RESPONSIBILITY 55, 55 (1970) [hereinafter FEINBERG, *Justice and Personal Desert*]; JOEL FEINBERG, SOCIAL PHILOSOPHY 107–17 (1973); CH. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 6–29 (John Petrie trans., 1963); NICHOLAS RESCHER, DISTRIBUTIVE JUSTICE 73–83 (1966); SHER, DESERT, *supra* note 48, at 6–8; Owen McLeod, *Introduction to Contemporary Interpretations of Desert*, in WHAT DO WE DESERVE?, *supra* note 58, at 61, 61–69 [hereinafter McLeod, *Introduction*]; Diana T. Meyers, *Introduction*, in ECONOMIC JUSTICE: PRIVATE RIGHTS AND PUBLIC RESPONSIBILITIES 1, 1–2 (Kenneth Kipnis & Diana T. Meyers eds., 1985); John Kleinig, *The Concept of Desert*, in WHAT DO WE DESERVE?, *supra* note 58, at 84, 88–89 [hereinafter Kleinig, *The Concept of Desert*]; Serena Olsaretti, *Introduction: Debating Desert and Justice*, in DESERT AND JUSTICE 1 (Serena Olsaretti ed., 2003); see generally SHER, DESERT, *supra* note 48; WHAT DO WE DESERVE?, *supra* note 58. “In spite of its ubiquity, or perhaps because of it, the notion of desert is not especially well understood. This isn’t surprising, since there are many difficult questions surrounding desert.” Owen McLeod, *Desert*, STAN. ENCYCLOPEDIA PHIL. (May 14, 2002), <http://plato.stanford.edu/archives/spr2009/entries/desert/>. “Even when one strives to be charitable, it is difficult to escape the conclusion that desert theory takes a widely held but imprecise intuition that wrongdoers should be punished and attempts, without much success, to

conceptions of desert include the view that each individual is to receive according to her needs, rank, legal entitlement (society's rules, e.g., statutory welfare), or "same thing" (as equals).⁷² This equality notion of desert relates to a person's state of *being*.⁷³ Under Kant, it is by virtue of having the capacity to be a rational, ethical being that one's state of being entitles one to respect.⁷⁴ Indeed, apparently because the requirements for meeting this notion of desert are so minimal, rather than saying one "deserves" the benefits of society's rules, for example, saying that one is "entitled" to them is more common.⁷⁵ Examples of liberty-grounded conceptions of desert, on the other hand, argue that each is to receive according to her merit, ability, achievement, virtue, effort, sacrifice, works, contribution, or agreements with others.⁷⁶ This liberty notion of desert relates to a person's conduct.⁷⁷ A person who *does* praiseworthy or blameworthy conduct is to be requited accordingly.⁷⁸

This Article argues that the conduct, liberty-driven conceptions of distributive justice are the conceptions that best fit into a retributive calculus.⁷⁹ While the basic

impose onto this intuition philosophical vigor." Alice G. Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 739 (2009). "We often claim that . . . punishment merely gives offenders what they deserve, but we have no coherent theory of deserts which justifies the claim." TEN, *supra* note 69, at 164.

⁷² Peter Celello, *Desert*, INTERNET ENCYCLOPEDIA PHIL., <http://www.iep.utm.edu/desert/> (last visited Nov. 7, 2017).

⁷³ *Id.*

⁷⁴ Kuklin, *Constructing Autonomy*, *supra* note 1, at 383–84.

⁷⁵ See McLeod, *Introduction*, *supra* note 71, at 67–68; Owen McLeod, *Desert and Institutions*, in WHAT DO WE DESERVE?, *supra* note 58, at 186, 186; Kleinig, *The Concept of Desert*, *supra* note 71, at 88–89. Rawls, for example, writes that "what we can say is that, in the traditional phrase, a just scheme gives each person his due: that is, it allots to each what he is entitled to as defined by the scheme itself." JOHN RAWLS, A THEORY OF JUSTICE 275–76 (rev. ed. 1999) [hereinafter RAWLS, A THEORY OF JUSTICE]. David Miller, holding that desert relates to conduct, objects to considering need or entitlement as a basis for desert. David Miller, *Deserts*, in WHAT DO WE DESERVE?, *supra* note 58, at 93.

⁷⁶ Celello, *supra* note 72.

⁷⁷ See, e.g., SHER, DESERT, *supra* note 48, at 37–52.

⁷⁸ Rawls has famously, and influentially, challenged the view that one's desert should be based on conduct, because a person does not deserve her natural endowments or superior character that facilitate the cultivation of her abilities. RAWLS, A THEORY OF JUSTICE, *supra* note 75, at 87. Hence, "most contemporary political philosophy, especially liberal political philosophy, the dominant contemporary form, has renounced or greatly undermined the notion of desert." Louis P. Pojman, *Introduction to Historical Interpretations of Desert*, in WHAT DO WE DESERVE?, *supra* note 58, at 1, 6 (footnote omitted). "The leading political philosophers of our time . . . reject or undermine the idea of justice as rewarding desert or merit as egalitarian and/or based on false consciousness." Louis P. Pojman, *Does Equality Trump Desert?*, in WHAT DO WE DESERVE?, *supra* note 58, at 283 (footnote omitted) (identifying thirteen philosophers "to name a few"). This aspect of the debate about justice will not be addressed here. Instead, I target the question of what desert-based justice, if embraced, should consider.

⁷⁹ Thus, I reject the position that retributive punishment is to be gauged by the invader's character. Character, as a state of being, would be relevant to an equality-based notion of desert. All persons with the same character deserve the same positive or negative requital. Instead, I

duty to respect others is grounded on an equality conception of desert, the reach of any breach of that duty is gauged by a liberty conception.⁸⁰ More specifically, (de)meritorious conduct has overtones of Kant's focus on the freedom interests of an ethical being.⁸¹ Adopted maxims that apply universally balance her liberty and security interests. When conduct that has been declared criminal by a properly adopted maxim disrupts this balance, the blameworthiness of that wrongful conduct provides the gauge for a just retributive requital. A wrongful criminal invasion of another's established autonomy space is disrespectful of the invadee's equal dignity.⁸² The blameworthiness of the dignitary wrong is, in its turn, gauged by the reaction of the knowing public as perceived by an objective observer representing the deontic views of society.⁸³

In light of this orientation of the three forms of justice, insofar as a person's conduct wrongfully harms another person, corrective justice requires that she

favor the position that retributive punishment is to be gauged by the invader's conduct. This is grounded on a liberty-based notion of desert. I subscribe to Brudner's view: "Not only is the character theory at odds with well-settled and defensible features of the criminal law; it is also intrinsically deficient as a theory of criminal desert." BRUDNER, *supra* note 63, at 69; *see infra* note 346.

⁸⁰ Dillon points out that our commonsense notion of personal worth has two aspects. "On the one hand, there is the intrinsic worth, which Kant called 'dignity,' that each of us has simply by virtue of being a person rather than a rock or a tree." Robin S. Dillon, *Toward a Feminist Conception of Self-Respect*, in DIGNITY, CHARACTER, AND SELF-RESPECT 290, 292 (Robin S. Dillon ed., 1995). "On the other hand, there is a kind of worth or merit we may earn through what we do and become, which individuals can have in varying degrees, and which some may lack altogether." *Id.* Darwall refers to the first of these as "recognition respect" and the second as "appraisal respect." Stephen L. Darwall, *Two Kinds of Respect*, in DIGNITY, CHARACTER, AND SELF-RESPECT, *supra*, at 181, 183–84.

⁸¹ Johnson & Cureton, *supra* note 10.

⁸² "[A]n adequately justificatory account of a system of criminal law, trials and punishments must be founded on the Kantian principle of respect for individual autonomy . . ." R.A. DUFF, TRIALS AND PUNISHMENTS 11 (1986) [hereinafter DUFF, TRIALS AND PUNISHMENTS]. "On the question of just what it is that translates an action into one of 'offense' and the actor as 'offender,' it has been argued that crimes generically are acts of *disrespect* and therefore that punishment functions as a rectification." DANIEL N. ROBINSON, PRAISE AND BLAME: MORAL REALISM AND ITS APPLICATIONS 181 (2002) [hereinafter ROBINSON, PRAISE AND BLAME].

⁸³ Cf. Kenneth S. Abraham, *Custom, Noncustomary Practice, and Negligence*, 109 COLUM. L. REV. 1784, 1820 (2009) (citing Kenneth S. Abraham, *The Trouble with Negligence*, 54 VAND. L. REV. 1187, 1195–96 (2001) ("[T]he jury is described as the conscience of the community in negligence cases."); *see generally* DUFF, TRIALS AND PUNISHMENTS, *supra* note 82, at 39–73 ("Criticism, Blame and Moral Punishment"). Relatedly, Robinson argues that the problems of gauging blameworthiness can be addressed by looking not at the philosophical analysis of deontological desert, but rather to empirical desert. Empirical desert looks "to the community's intuitions of justice. The primary source of empirical desert principles . . . is not moral philosophy but empirical research into the factors that drive people's intuitions of blameworthiness." ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 51, at 139 (footnote omitted). In gauging empirical desert, Robinson would exclude bias from "political or social context or . . . other factors, such as race or class . . ." *Id.*

compensate the invadee by, typically, restoring her to her prior, protected position.⁸⁴ Insofar as a person's conduct is criminally blameworthy, irrespective of whether restoration is implicated, her just deserts under distributive justice call for retributive punishment.⁸⁵ Praiseworthy behavior, often forgotten in these discussions, may call for rewards granted by some organ of the government.

Respect the equal dignity of all ethical, autonomous beings. Do not sacrifice autonomous agents merely for the sake of social welfare. With these underpinnings in place, collectives, such as corporations and governmental entities, do not have independent claims.⁸⁶ They are not ethical beings.⁸⁷ While we may grant the state standing to bring claims against individuals as a representative of the general public,⁸⁸

⁸⁴ "Should we understand torts as *moral* wrongs or as *legal* wrongs? For sound doctrinal reasons, tort theorists have been disinclined to cast torts as moral wrongs. For a different set of jurisprudential reasons, they have instead treated torts as legal wrongs." John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 930 (2010). Despite the authors' examples of strict-liability type torts, among other reasons, as suggested in the later discussion of social norms as a source of moral duties, I doubt that moral and legal wrongs can be neatly separated. Goldberg and Zipursky also see an intricate intertwining. See *id.* at 947–53.

⁸⁵ Alexander and Ferzan "argue[] that negative desert, the measure of just punishment, is solely a function of the culpability of the offender." Larry Alexander & Kimberly Kessler Ferzan, *Risk and Inchoate Crimes: Retribution or Prevention?*, in SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS 103, 103 (G.R. Sullivan & Ian Dennis eds., 2012) [hereinafter Alexander & Ferzan, *Risk and Inchoate Crimes*] (citing LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, *CRIME AND CULPABILITY* (2009) [hereinafter ALEXANDER & FERZAN, *CRIME AND CULPABILITY*]). Culpability, in its turn, has two factors. First, "the risks to others' legally protected interests that the actor believes his action is 'unleashing' beyond his ability to alter." *Id.* Second, "the reasons the actor perceives in favour of and against imposing the risks." *Id.* at 104. "In essence, we reduce[] all culpability assessments to that of recklessness." *Id.*

⁸⁶ Kuklin, *Constructing Autonomy*, *supra* note 1, at 375.

⁸⁷ *Id.*

⁸⁸ Rather than referring to crime as harm to the state, Murphy prefers "to think of crime as an invasion by an individual into an area of decision making and action that is properly reserved to the state as part of its necessary job that we, as its 'clients,' might think of ourselves as 'hiring' it to do." JEFFRIE G. MURPHY, *Why Have Criminal Law at All?*, in RETIBUTION RECONSIDERED 1, 10 (1992) [hereinafter MURPHY, *Why Have Criminal Law at All?*]. "[I]n the case of retributive justice the State acts as an enforcer of the duties which precede it, and which obtain irrespective of the State's existence." Sadurski, *Social Justice*, *supra* note 69, at 321. "According to some, a so-called legal relation between an individual and a collectivity, like the state or a corporation, may be reduced to multiple legal relations between that individual and all other individuals composing the collectivity." Ronen Perry, *Correlativity*, 28 LAW & PHIL. 537, 545 (2009) (citing Arthur L. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163, 165 (1919)). "Richard Swinburne, in his recommendation of retributive punishment, indicated that the state only has authority to impose punishment for criminal harm where it serves as a proxy for the individual harmed." Gerard V. Bradley, *Retribution: The Central Aim of Punishment*, 27 HARV. J. L. & PUB. POL'Y 19, 25 (2003) (citing ROBINSON, PRAISE AND BLAME, *supra* note 82, at 183). Moreover, another problem with group rights is that they "consign individuals to dependence sustained by their conformity." GEORGE KATEB, HUMAN DIGNITY 12 (2011).

"Just because the offender might deserve punishment, it does not follow—without an appropriate theory of state power—that the state should assess the degree of deserved

as, arguably, for public nuisance,⁸⁹ even a unanimously consented-to social contract cannot make the state into an ethical being with independent autonomy interests of a relevant type.⁹⁰ The state may have independent claims against other collective entities, particularly other states, but any use of the idea of autonomy in this context is based on a different understanding of the term “autonomy”—one that is not based on moral agency in a germane, deontic sense.

From this viewpoint that the state has no independent autonomy claims of a relevant sort, the question again arises as to whether there is in principle a difference between corrective justice and retribution.⁹¹ The difference, arguably, relates to the

punishment and use its power to impose it on the offender.” GEORGE P. FLETCHER, 1 *THE GRAMMAR OF CRIMINAL LAW* 153 (2007) [hereinafter FLETCHER, *GRAMMAR OF CRIMINAL LAW*] (referring to the assumption that the state is entitled to punish criminals as “one of the unfortunate banalities of criminal law in our time”).

⁸⁹ See PROSSER AND KEETON ON THE LAW OF TORTS 643 (W. Page Keeton et al. eds., 5th ed. 1984) (“No better definition of a public nuisance has been suggested than that of an act or omission ‘which obstructs or causes inconvenience or damage to the public in the exercise of rights common to all Her Majesty’s subjects.’” (quoting *R v. Price*, [1884] 12 Q.B.D. 247 (Stephen, J.))).

Duff writes of crimes that “count as ‘public’ . . . simply because they wrong or harm the public collectively or the polity as a whole,” such as treason and tax evasion, as well as a crime that is a “kind of ‘public nuisance’: ‘which is so widespread in its range or so indiscriminate in its effect that it . . . should be taken on the responsibility of the community at large.’” R.A. DUFF, *ANSWERING FOR CRIME* 140 (2007) [hereinafter DUFF, *ANSWERING FOR CRIME*] (quoting *A-G v. P.Y.A. Quarries Ltd.*, [1957] 1 All E.R. 894, 908 (Can.) (Denning, L.J.)). I see all crimes based on deontic principles as offenses to the general public, not to the state in an independent capacity. In other words, the principles behind public nuisance apply to all so-called crimes against the state. But the relevant, key principles of public nuisance are driven by convenience, not deontic demands. There is nothing in deontic principle that would disallow every person harmed by a public nuisance from standing to bring an action against the tortfeasor. We choose otherwise if for no other reason than the relative administrative costs. Thus, arguably, the state is delegated authority to sue on behalf of individual harmed parties, as in a class action. “A liberty-protecting state, in short, will always establish a preference for protecting rights through private means; it will adopt criminal prohibition only in those cases where it seems reasonable to believe that private means will be insufficient.” MURPHY, *Why Have Criminal Law at All?*, *supra* note 88, at 11. Kant has a somewhat different view of the role of the state and its officials. “Kant’s claim . . . is not that citizens actively entrust their affairs to the state, nor even that officials act for citizens considered separately. Instead, officials act for the citizens considered as a collective body.” RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 11, at 195. For more elaboration, see *id.* at 194–98.

⁹⁰ One commentator finds that Kant “assumes that states or nations are moral persons and, accordingly, fall under (his) moral rules.” Lloyd P. Gerson, *Who Owns What? Some Reflections on the Foundation of Political Philosophy*, 29 *SOC. PHIL. & POL’Y FOUND.* 81, 84 n.8 (2012) (citing IMMANUEL KANT, *TOWARD PERPETUAL PEACE* (1795), *reprinted in* *PRACTICAL PHILOSOPHY*, *supra* note 5, at 311, 318).

⁹¹ Analytically and normatively, “[i]t is notoriously difficult to give a clear and plausible account of the distinction between civil and criminal law, between ‘private’ and ‘public’ legal wrongs” Antony Duff, *Legal Punishment*, *STAN. ENCYCLOPEDIA PHIL.* (Jan. 2, 2001) [hereinafter Duff, *Legal Punishment*] (citations omitted), <http://plato.stanford.edu/archives/spr2009/entries/legal-punishment/>. “What is the essential difference between tort law and criminal law?” One important lesson of historical studies . . . is

fact that corrective justice traditionally has aimed exclusively at requiring the harms to what have been perceived as the private, direct, immediate victims of autonomy invasions; in contrast, retribution has been aimed (also) at requiring the harms to what have been perceived as collateral victims of autonomy invasions that were directed elsewhere—that is, the general public.⁹² Under existing doctrine, the private law tort requital under corrective justice calls for full compensation for the invadee's wrongful

that the question has no answer.” David Friedman, *Beyond the Tort/Crime Distinction*, 76 B.U. L. REV. 103, 108 (1996) (footnote omitted). “Contemporary philosophy of law has not yet reached consensus as to whether or not (or to what extent) the crime-tort distinction is a sound one. Thus it seems that requiring such a distinction of a theory of punishment is unreasonable.” CORLETT, RESPONSIBILITY AND PUNISHMENT, *supra* note 58, at 46. For example, Barnett’s restitutive theory of justice implies “the collapse for most purposes of the traditional distinction between crime and tort” Randy E. Barnett, *The Justice of Restitution*, 25 AM. J. JURIS. 117, 119 (1983); see Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157 (1996) [hereinafter Barnett, *Getting Even*]; Randy E. Barnett, *Restitution: A New Paradigm of Criminal Justice*, 87 ETHICS 279 (1977). For a brief look at various views, see Stephen Marks, *Utility and Community: Musings on the Tort/Crime Distinction*, 76 B.U. L. REV. 215, 218–19 (1996); cf. Matthew Dyson, *The Timing of Tortious and Criminal Actions for the Same Wrong*, 71 CAMBRIDGE L.J. 86 (2012).

⁹² Coffee invokes Roscoe Pound’s “most important objection” to the standard distinction between crimes and torts: “events that cause private injuries also cause public ones, because public injuries are usually only private injuries writ large. For example, an individual’s private interest in the enforcement of a contract can also be described as the collective, public interest in the security of transactions.” John C. Coffee, Jr., *Does “Unlawful” Mean “Criminal”?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 221 (1991) (citing 3 ROSCOE POUND, JURISPRUDENCE 23–24, 328–30 (1959)). “Historically, early English criminal law was compensatory in character. Tort and crime were not clearly distinguishable, and the making of a tariff payment of the ‘bot’ to the injured and the ‘wite’ to the King could atone even for a homicide.” *Id.* at 230 (citing 2 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF THE ENGLISH LAW 451 (2d ed. 1968)). Under the common law from 1200 to 1500, “[i]n most instances, the same wrong could be prosecuted either as a crime or as a tort. Nor was the distinction [between crime and tort] a difference between the kinds of person who could initiate the actions. Victims could initiate actions of both kinds.” David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996). For a symposium discussing the tort/crime interface, see Christopher J. Robinette, *Symposium: Crimtorts*, 17 WIDENER L.J. 705 (2008). Simons identifies salient differences between tort and criminal law. Simons, *The Crime/Tort Distinction*, *supra* note 64.

“The very idea of defining certain conduct as ‘criminal’ first arose approximately one-thousand years ago. Before that, the tort/crime distinction that today serves as the foundation of criminal law did not exist.” Ric Simmons, *Private Criminal Justice*, 42 WAKE FOREST L. REV. 911, 921 (2007). “Tort actions were quasi-criminal until the late seventeenth century. For approximately five centuries, then, tort liability exclusively addressed situations in which the defendant wrongfully (criminally) injured the plaintiff and was required to compensate the plaintiff for that wrong. These situations are paradigmatic examples of corrective justice.” Mark Geistfeld, *Economics, Moral Philosophy, and the Positive Analysis of Tort Law*, in PHILOSOPHY AND THE LAW OF TORTS 250, 253–54 (Gerald J. Postema ed., 2001) (footnote omitted). “Until the eighteenth century [victims of crimes] had to prosecute at their own expense; gradually the State took over this burden” MARTIN WRIGHT, JUSTICE FOR VICTIMS AND OFFENDERS 11 (2d ed. 1996). “Even the most serious crimes have been dealt with by civil procedures in some societies, and perpetrators required to pay damages rather than undergo punishment.” *Id.* at 19.

harms to direct victims.⁹³ In principle, when balancing liberty and security interests, we could expand our notion of who are direct victims of invasive conduct. We might grant standing to each member of the general public to bring an action for the wrongful harms she suffers from an invader's conduct, including her parallel, reactive harms produced by mere knowledge of the criminal act.⁹⁴ We choose to do otherwise, partially for consequential reasons.⁹⁵ In an Adam Smithian or Coasean world of zero information and administrative costs, we might be more open to grant standing to sue to all persons or, at least, to a wider range of harmed persons.⁹⁶ I pursue this line of thought below.⁹⁷ If every person that an invader's wrongful conduct harms could fully recover for that harm, the question of whether there is any remaining work for conceptions of retribution comes into sharper relief. There is indeed work remaining. It is to account for the invader's blameworthiness, which gets short shrift under corrective justice, at least as it is traditionally conceived.

In the private realm, we have traditionally adopted a conception of corrective justice that aims to restore the prior baseline position of the invadee.⁹⁸ We are not concerned with whether the extent of the invadee's prior resources is deserved or whether the invader's level of resources is deserved.⁹⁹ These are matters of distributive

⁹³ Bruce Chapman, *Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 409, 411 (David G. Owen ed., 1995).

⁹⁴ "But it remains controversial whether these duties [under the criminal law] are directed or not, that is, whether they correlate with claim-rights or not." Gopal Sreenivasan, *Duties and Their Direction*, 120 ETHICS 465, 473 (2010) (citations omitted).

Even a direct victim of a crime is typically not able to obtain adequate requit from the criminal for her own harms and, even more so, the harms to the public. "As far as imagining that damages for criminal activities might be recovered under the civil law, that is stuff and nonsense." CHARLES F. ABEL & FRANK H. MARSH, PUNISHMENT AND RESTITUTION 5 (1984). Along with the reality that criminals are most often judgment proof, "this approach shifts an even greater burden to the victim. He or she must now take on the state's role as prosecutor, detective, and should an award be granted, enforcer of state decrees . . ." *Id.*

⁹⁵ In terms of striking a balance between security and liberty interests, we choose to grant invaders of an individual's autonomy space the liberty to impose certain costs on collateral agents without risk of private requitals. In Coasean, private law terms, it is a cost of living in today's world that occasionally one will suffer collateral harm from wrongful conduct directed at others; it is not a cost to the actor that her conduct will produce collateral harm to the public. See R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 44 (1960).

⁹⁶ That deontological principles may consider the consequences of adopted maxims, see Kuklin, *Constructing Autonomy*, *supra* note 1, at 427–28. "Thus whereas the primary retributivist justification for both the institution of punishment and particular punishments is that the offender deserves it, the secondary retributivist justification for both the institution of punishment and particular punishments may consider aspects of social utility." CORLETT, RESPONSIBILITY AND PUNISHMENT, *supra* note 58, at 63.

⁹⁷ See *infra* text accompanying notes 171–76.

⁹⁸ Kuklin, *Private Requitals*, *supra* note 2, at 966.

⁹⁹ See ARISTOTLE, *supra* note 43, bk. V, ch. 4, at 1008.

justice.¹⁰⁰ We further ignore what the invader's restoration does to the relative balance of resources between the invader and the invadee that had existed before the invader's harmful conduct.¹⁰¹ Also neglected is whether the invader's duty to restore the invadee to her prior position disrupts the invader's relative balance of resources with the general public.¹⁰² For example, compensating a previously impecunious invadee may bankrupt a wealthy invader, as where the invadee's medical expenses and psychic harms (pain and suffering) are enormous. Largely setting aside all other considerations, attention focuses on restoring the invadee's original shielded position.¹⁰³

In the public realm of retributive punishment, attention very much shifts to the invader's blameworthiness.¹⁰⁴ This factor is not, however, entirely neglected under corrective justice. In contract law, blameworthiness plays a negligible role¹⁰⁵ to the dismay of some.¹⁰⁶ The law of restitution will take into account blameworthiness in

¹⁰⁰ *Id.*, bk. V, ch. 3, at 1007 n.4.

¹⁰¹ *Id.*, bk. V, ch. 4, at 1008.

¹⁰² *See id.*, bk. V, ch. 4, at 1008–10.

¹⁰³ *See id.*

¹⁰⁴ *See id.*

¹⁰⁵ *See, e.g.*, E. ALLAN FARNSWORTH, *CONTRACTS* 760 (4th ed. 2004) (“No matter how reprehensible the breach, damages are generally limited to those required to compensate the injured party for lost expectation . . .”). Despite supposed basic principles to the contrary, blameworthiness emerges in some contract doctrines. For example, while contract damages for mental distress is generally disallowed, some courts “have looked to the nature of the breach and allowed damages for emotional disturbance on the ground that the breach of contract was reprehensible . . .” *Id.* at 810 (citing *Lutz Farms Co. v. Asgrow Seed Co.*, 948 F.2d 638 (10th Cir. 1991)). Some courts “suggest[] that a wilful failure to perform is more likely to be regarded as material than a non-wilful breach.” JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* 683 § 108 (4th ed. 2001) (footnote omitted). The Restatement agrees. *RESTATEMENT (SECOND) OF CONTRACTS* § 241(e) cmt. f (AM. LAW INST. 1981).

¹⁰⁶ It has been proposed that, owing to differences in fairness or blameworthiness, negligent breaches should be treated differently from (some) intentional breaches. *See, e.g.*, Thomas A. Diamond, *The Tort of Bad Faith Breach of Contract: When, if at All, Should It Be Extended Beyond Insurance Transactions?*, 64 *MARQ. L. REV.* 425 (1981); Patricia H. Marschall, *Willfulness: A Crucial Factor in Choosing Remedies for Breach of Contract*, 24 *ARIZ. L. REV.* 733 (1982). Two commentators argue in support of this proposal: “in contrast to conventional law and economics wisdom—that supercompensatory damages for willful breach are justified.” Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, in *FAULT IN AMERICAN CONTRACT LAW* 174, 174 (Omri Ben-Shahar & Ariel Porat eds., 2010). “Willful breach triggers extra resentment for what underlies it—for all the other bad things that the breaching party likely did, or, more basically, for the ex ante choice he made to engage in such a pattern of behavior.” *Id.* Insofar as an invadee's resentment is a protected psychic harm, compensation for this would not be supercompensatory, and the supposition of other bad conduct is not necessary to justify the additional compensation. Relatedly, two other commentators argue for “a distinct measure of [contract] damages, vindictory damages. These, we argue, are neither compensatory nor restitutionary, neither loss-based nor gain-based: they are a rights-based remedy.” David Pearce & Roger Halson, *Damages for Breach of Contract: Compensation, Restitution and Vindication*, 28 *OXFORD J. LEGAL STUD.* 73, 73 (2008).

measuring recoveries to some degree.¹⁰⁷ In tort law, negligence is grounded on a rather attenuated form of blameworthiness.¹⁰⁸ Yet blameworthiness in producing wrongful harm may sometimes be significant in the private realm. This significance is seen, for instance, in the greater generosity toward invadees for intentional harms than for negligent harms.¹⁰⁹ Relaxing the strictures of necessary causal linkage and the types or extent of harms recoverable implements this greater generosity.¹¹⁰ At times, we bring the invader's blameworthy mental state onto the front burner, as when providing a warrant for the tort of malicious prosecution.¹¹¹ The requital maxims associated with elevated blameworthiness harms may also be more expansive.¹¹² But the degree of the invader's blameworthiness usually drops out of the requital calculation once thresholds have been reached.¹¹³ One apparent exception is the doctrine of

¹⁰⁷ See RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT §§ 50, 51 (AM. LAW INST. 2011) (distinguishing recoveries from innocent and blameworthy obligors).

¹⁰⁸ "[N]egligence is out of kilter with notions of moral blameworthiness in several significant respects . . . [including,] first, that negligence involves a type of conduct while moral blameworthiness typically affixes to states of mind" James Goudkamp, *The Spurious Relationship Between Moral Blameworthiness and Liability for Negligence*, 28 MELB. U. L. REV. 342, 349 (2004) (footnote omitted) (adding four more reasons).

¹⁰⁹ See DAN B. DOBBS, *THE LAW OF TORTS* 75–79 (2000).

¹¹⁰ See, e.g., *id.*; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 89, at 37.

¹¹¹ See, e.g., DOBBS, *supra* note 109, at 1223–25; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 89, at 882–84.

¹¹² "Being in a particular state of mind may not only be a condition of liability but may also affect the quantum of liability. For instance, liability for making a fraudulent mis-statement is more extensive than liability for making a negligent mis-statement because fraud is considered more culpable than negligence." Peter Cane, *Retribution, Proportionality, and Moral Luck in Tort Law*, in *THE LAW OF OBLIGATIONS* 141, 149 (Peter Cane & Jane Stapleton eds., 1998) [hereinafter Cane, *Retribution*]. I would put it that the fraudulent misstatement produces a protected dignitary harm greater than does a comparable negligent misstatement.

While punitive damages may be granted for torts when the invader's mental state is exacerbated, this is a quasi-criminal requital that directly relies on principles of punishment. See generally Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1 (1989) [hereinafter Kuklin, *Punishment*]. "Punitive damages do not serve the function of supplementing the criminal law. The defendant is not charged with a wrong against society, but one against the claimant" ROBERT STEVENS, *TORTS AND RIGHTS* 86 (2007). Some courts have justified punitive damages in terms of requiting dignitary harms. See Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1687 (1992) [hereinafter Hampton, *Correcting Harms*]. "Many punitive damages cases involve affront and dignitary interests, to which the criminal law pays relatively little regard." Epstein, *supra* note 68, at 16.

¹¹³ "Tort law is not interested in the defendant's culpability aside from the plaintiff's entitlement to redress." ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 155 (1995) [hereinafter WEINRIB, *THE IDEA OF PRIVATE LAW*]. See Adam J. Kolber, *Smooth and Bumpy Laws*, 102 CALIF. L. REV. 655, 673–75 (2014) [hereinafter Kolber, *Smooth and Bumpy Laws*]. "A full account of torts as wrongs should explain why damage awards are only loosely tied to wrongfulness." *Id.* at 674. For the suggestion that the mental state of the invader with respect to excuses and justifications should not be taken into account for a tort requital, but should be for

comparative negligence, which accounts for the blameworthiness of the invadee as well as the invader.¹¹⁴ Nonetheless, even under this exception, we judge the relative blameworthiness of the parties, not the absolute blameworthiness.¹¹⁵ On a blameworthiness scale of, say, 0.0 to 1.0, the invadee's recovery is the same when her blameworthiness (negligence) is 0.2 and the invader's is 0.4 as when hers is 0.5 and the invader's is 1.0.

Retribution, to the contrary of corrective justice, weighs absolute blameworthiness.¹¹⁶ Furthermore, big pockets of strict liability remain in the private law,¹¹⁷ such as products liability. Agents are sometimes held to standards that they personally are incapable of meeting, such as when the reasonable person standard for negligence is beyond the reach of subnormal or uninformed persons.¹¹⁸ In cases such as these, blameworthiness is diminished or absent, but the invadee is nonetheless returned to her prior protected position at the invader's expense.¹¹⁹ While deontologists may be uneasy and even reject at least some of these areas of the private law that ignore the invader's blameworthiness, they express discontent when blameworthiness is disregarded or discounted in the criminal realm, as in strict

a criminal one, see John Gardner, *The Mysterious Case of the Reasonable Person*, 51 U. TORONTO L.J. 273, 303–04 (2001).

¹¹⁴ See generally DOBBS, *supra* note 109, at 503–10; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 89, at 468–79.

¹¹⁵ William L. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 655 (1953).

¹¹⁶ “[A]lthough both tort and criminal law care about culpability, tort law only uses it to determine whether the defendant is liable, not how heavy that liability should be. . . . Criminal law, by contrast, uses culpability not merely to determine *whether*, but also to determine *how severely*, to punish.” LEO KATZ, *ILL-GOTTEN GAINS* 152 (1996) [hereinafter KATZ, *ILL-GOTTEN GAINS*].

¹¹⁷ “Because the idea of injury wrongly inflicted is central to corrective justice, as most of its advocates conceive it, corrective justice conceptions of tort law have tended to favor fault over strict liability.” Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 198 (2000) (footnote omitted). Justification for strict liability under existing law is mainly welfarist, including principles of cost internalization, risk avoidance, loss spreading, and deterrence. See, e.g., Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 U. MIAMI L. REV. 893, 932–33 (1990). Because strict tort liability does not require fault, Goldberg and Zipursky see it as a mutation and desire to evict it from torts. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *THE OXFORD INTRODUCTION TO U.S. LAW: TORTS* 267 (2010) [hereinafter GOLDBERG & ZIPURSKY, *TORTS*].

¹¹⁸ See Kuklin, *Private Requitals*, *supra* note 2, at 1011–20.

¹¹⁹ Existing tort and contract laws relating to strict liability still usually build foreseeability into the elements of proximate cause and damages, thus retaining a pinch of blameworthiness. See *infra* note 248.

criminal liability, absolute criminal liability,¹²⁰ or criminal liability for negligent conduct.¹²¹

Sticking as much as possible to purely deontic considerations, this Article will explore what follows when conceptions of blameworthiness are the central pillar of retribution, leaving other factors and harms to the private realm of corrective justice.¹²² In turn, the central focus of blameworthiness is on the disrespectfulness that the invader manifested through his conduct. For purposes of retribution, disrespectfulness is gauged by the reactive response of the public, suitably trimmed of non-deontic biases or perceptions, to the choice of the invader to disregard the autonomy protections afforded the wrongfully harmed persons, including the immediate victim(s) and others.¹²³ The proposition that requital stems from, and is measured by, society's reactive judgment of disrespectfulness sharply sets this view of retribution apart from that of corrective justice. Once the relevant features of this reaction are identified, we will be in a better position to consider how to apply this conception in practice. Driven by first principles and not bound by historical detritus, we may see more clearly what is at stake. Problems, unsurprisingly, still remain.

III. RETRIBUTION

Corrective justice and retribution both underpin requitals for autonomy invasions. Because retribution pulls in the wider, more attenuated autonomy claims of the general public, and elevates the importance of conceptions of just deserts, neither of which commands much weight in the private sphere of corrective justice, it involves greater difficulties.¹²⁴ Retribution is punishment, with all that entails in our common

¹²⁰ See *infra* text accompanying notes 281–285. Duff distinguishes strict liability from absolute liability: “[I]liability would be absolute if it required no proof of mens rea as to *any* aspect of the offence Liability is strict if it requires no proof of mens rea as to *an* aspect of the offence” DUFF, ANSWERING FOR CRIME, *supra* note 89, at 232 (footnote omitted) (including a taxonomy at 233–35).

¹²¹ “[N]egligence really isn’t quite a mental state It’s the *absence* of a mental state: to act negligently means not being aware of a risk of harm. But unlike strict liability, negligence at least makes some reference to a mental state—awareness—even if only *in absentia*.” MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 47 (2002) [hereinafter DUBBER, CRIMINAL LAW]. Simons “argue[s] that conscious recklessness . . . is too high a threshold of criminal liability, that culpable indifference . . . is ordinarily an appropriate threshold, and that simple negligence . . . is ordinarily too low a threshold.” Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 365 (1994) [hereinafter Simons, *Culpability and Retributive Theory*].

¹²² For example, federal criminal law requires criminals to provide “full and timely restitution as provided in law.” 18 U.S.C. § 3771(6) (2009) (Crime victims’ rights).

¹²³ Kuklin, *Private Requitals*, note 2, at 969, 981.

¹²⁴ “Retributivists claim that the point of legal punishment, and the standard that ought to govern the construction of penal institutions, practices and rules, is that the guilty must be treated in the way that they morally deserve to be.” Russ Shafer-Landau, *Retributivism and Desert*, 81 PAC. PHIL. Q. 189, 189 (2000) [hereinafter Shafer-Landau, *Retributivism and Desert*] (arguing “that there is no plausible index for measuring moral desert”). Furthermore, “retributivists need to supply us with an account of why only certain immoralities merit legal

understanding,¹²⁵ while corrective justice is not punishment, no matter how great the invader's liability.¹²⁶ Michael Moore provides a foundational understanding of the concept of retributivism: "[r]etributivism is the view that punishment is justified by the moral culpability of those who receive it. A retributivist punishes because, and only because, the offender deserves it."¹²⁷ When commentators refer to retributivism,

punishment." Russ Shafer-Landau, *The Failure of Retributivism*, 82 PHIL. STUD. 289, 289 (1996) [hereinafter Shafer-Landau, *The Failure of Retributivism*].

¹²⁵ H.L.A. Hart identifies five elements in the standard case of punishment. H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 4–5 (2d ed. 2008) [hereinafter HART, *Prolegomenon*]. Three of the elements are relevant to the discussion here: "(i) It must involve pain or other consequences normally considered unpleasant." *Id.* at 4. "(iv) It must be intentionally administered by human beings other than the offender. (v) It must be imposed and administered by an authority constituted by a legal system against which the offence is committed." *Id.* at 5.

¹²⁶ *Id.*

¹²⁷ Michael S. Moore, *The Moral Worth of Retribution*, in PUNISHMENT AND REHABILITATION 94, 94 (Jeffrie G. Murphy ed., 3d ed. 1995) [hereinafter Moore, *Moral Worth of Retribution*]. For seven leading confusions, see *id.* at 94–96. "Retributivism, so construed, joins corrective justice theories of torts, natural right theories of property, and promissory theories of contract as deontological alternatives to utilitarian justifications . . ." *Id.* at 96. "[P]unishment is justified on the grounds that wrong-doing merits punishment." John Rawls, *Two Concepts of Rules* (1955), reprinted in THE PHILOSOPHY OF PUNISHMENT 105, 107 (H.B. Acton ed., 1969) [hereinafter Rawls, *Two Concepts*]. Hart defines retribution "simply as the application of the pains of punishment to an offender who is morally guilty . . ." HART, *Prolegomenon*, *supra* note 125, at 9. "The retributive theory of punishment, speaking very generally, is a theory that seeks to justify punishment, not in terms of social utility, but in terms of this cluster of moral concepts: rights, desert, merit, moral responsibility, justice, and respect for moral autonomy." JEFFRIE G. MURPHY, *Retributivism, Moral Education, and the Liberal State*, in RETRIBUTION RECONSIDERED, *supra* note 88, at 15, 21 [hereinafter MURPHY, *Retributivism*]. "Retribution may be defined as imposing a sanction that corresponds to individual moral desert. Retributive justice . . . insists on proportionality between the severity of the sanction and the gravity of the wrong." Perry, *The Third Form of Justice*, *supra* note 58, at 235 (citations omitted). For a brief introduction to retributive theories, see Larry Alexander, *The Philosophy of Criminal Law*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 815, 816–20 (Jules Coleman & Scott Shapiro eds., 2002) [hereinafter Alexander, *Philosophy of Criminal Law*]. Cahill identifies three plausible versions (or extensions) of retributivism: the absolutist model, the threshold model, and consequentialist retributivism. Cahill, *Retributive Justice*, *supra* note 48, at 826–35. Simons briefly reviews three retributive theories (choice, character, and ideal agent). Simons, *Culpability and Retributive Theory*, *supra* note 121, at 368–70. Bedau finds in Feinberg six versions of retribution and seven retributive ideas available for the theory of punishment. Hugo Adam Bedau, *Feinberg's Liberal Theory of Punishment*, 5 BUFF. CRIM. L. REV. 103, 119–20 (2001). Cottingham identifies "no less than nine distinct approaches to punishment . . . which are or have been labelled [sic] retributive." John Cottingham, *Varieties of Retribution*, 29 PHIL. Q. 238, 238 (1979); see Russell L. Christopher, *Deterring Retributivism: The Injustice of "Just" Punishment*, 96 NW. U. L. REV. 843, 880–82 (2002) (identifying five varieties of retribution). For three mistakes in the "prevailing formulations and defenses of retributivism," see David Dolinko, *Three Mistakes of Retributivism*, 39 UCLA L. REV. 1623, 1626 (1992) [hereinafter Dolinko, *Three Mistakes*]; see also R.A. Duff, *Retrieving Retributivism*, in RETRIBUTIVISM 3, 4–5 (Mark D. White ed., 2011) [hereinafter Duff,

they often mention Kant's emphasis of it, even though some have found Kant's arguments for punishment as not entirely within many notions of retribution,¹²⁸ not entirely consistent with his general moral system,¹²⁹ not fully based on just deserts,¹³⁰ or exceedingly sketchy,¹³¹ among other complications.¹³²

Retrieving Retributivism] (distinguishing positive and negative retributivism). For my earlier, somewhat different, analysis of retribution, see Kuklin, *Punishment*, *supra* note 112, at 23–85. Kenny throws up his hands. “The retributive theory of punishment is very difficult to state accurately . . . [and] it is impossible to state it coherently . . .” ANTHONY KENNY, *FREEWILL AND RESPONSIBILITY* 69 (1978). That retribution as a general theory cannot fully answer any of the main questions about punishment, see ROBINSON, *PRAISE AND BLAME*, *supra* note 82, at 188.

¹²⁸ For example, Corlett argues that his “model of punishment . . . renders problematic the construal of Kant as a pure retributivist . . .” J. Angelo Corlett, *Making Sense of Retributivism*, 76 *PHIL.* 77, 78 (2001) [hereinafter Corlett, *Making Sense of Retributivism*]. “Nevertheless, few would hesitate to place Immanuel Kant’s account of just punishment squarely in the retributivist camp.” Sarah Holtman, *Kant, Retributivism, and Civil Respect*, in *RETRIBUTIVISM*, *supra* note 127, at 107. Kant’s “underlying idea [of punishment] is simple, even if its application is complex: whenever someone acts in a way contrary to right, others are entitled to constrain the wrongdoer’s conduct. Such constraint is not an interference with freedom; it is the hindering a hindrance to freedom.” RIPSTEIN, *FORCE AND FREEDOM*, *supra* note 11, at 27.

¹²⁹ “I do not think Kant’s retributivist convictions are supported by any arguments he suggests on behalf of them. The theory of punishment that arises naturally out of Kant’s theory of right turns out not to be retributivist.” ALLEN W. WOOD, *KANTIAN ETHICS* 206 (2008) [hereinafter WOOD, *KANTIAN ETHICS*]. “Kant’s retributivism is even in serious tension with some of his most fundamental moral doctrines.” *Id.* For Wood’s argument, see *id.* at 206–23. “Some theorists believe that retributivism and deontology go hand in hand, in the sense that one requires the other. Yet deontology as such does not require retributivism to be true.” Larry Alexander & Michael Moore, *Deontological Ethics*, *STAN. ENCYCLOPEDIA PHIL.* (Nov. 21, 2007), <http://plato.stanford.edu/archives/spr2009/entries/ethics-deontological/>.

¹³⁰ Hill argues that “although Kant does endorse standards of punishment commonly associated with retributivism, his rationale for endorsing those standards is far from the familiar retributivist thought that evildoers inherently deserve to suffer.” Thomas E. Hill, Jr., *Punishment, Conscience, and Moral Worth*, in *KANT’S METAPHYSICS OF MORALS* 233, 234 (Mark Timmons ed., 2002) [hereinafter Hill, Jr., *Punishment*]. For some main points of Kant’s theory of punishment, see *id.* at 235–37. Kant’s “principles are stern but not in the fullest sense retributive; and their avowed purpose is not to see that happiness and misery are proportionate to moral desert but rather to secure a system of fair laws that maximize liberty.” THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY* 181 (1992) [hereinafter HILL, JR., *DIGNITY*]; see Thomas E. Hill, Jr., *Kant on Wrongdoing, Desert, and Punishment*, 18 *LAW & PHIL.* 407, 409, 414 (1999) [hereinafter Hill, Jr., *Kant on Wrongdoing*].

¹³¹ “I am not even sure that Kant develops anything that deserves to be called a *theory* of punishment at all. I genuinely wonder if he has done much more than leave us with a random (and not entirely consistent) set of *remarks*—some of them admittedly suggestive—about punishment.” JEFFRIE G. MURPHY, *Does Kant Have a Theory of Punishment?*, in *RETRIBUTION RECONSIDERED*, *supra* note 88, at 31 [hereinafter MURPHY, *Does Kant Have a Theory of Punishment?*]; see Holtman, *supra* note 128, at 107 (“Kant’s central discussion of punishment occupies only a few pages . . .”).

¹³² For example, Brooks finds that Kant invokes two versions of punishment, one retributive-based and the other deterrent-based. Thom Brooks, *Corlett on Kant, Hegel, and*

Various justifications exist for the state's claim to the right to impose retributive criminal punishment.¹³³ The two most prominent justifications today are the fairness theory and expressionism.¹³⁴ Under the fairness theory, which is akin to some theories of the social contract,¹³⁵ the state responds to a criminal who has taken advantage of the benefits of the law but unfairly refused to pay the costs of it.¹³⁶ She is a free-rider. In the words of H.L.A. Hart, "when a number of persons conduct any joint enterprise according to rules and thus restrict their liberty, those who have submitted to these

Retribution, 76 PHIL. 561, 562–73 (2001). "Kant . . . had no interest in developing the political application of his retributive punishment theory, an application he believed may well take into account consequentialist considerations such as reformation." Markus Dirk Dubber, *Rediscovering Hegel's Theory of Crime and Punishment*, 92 MICH. L. REV. 1577, 1599 n.99 (1994) [hereinafter Dubber, *Rediscovering Hegel's Theory*] (reviewing MARK TUNICK, *HEGEL'S POLITICAL PHILOSOPHY: INTERPRETING THE PRACTICE OF LEGAL PUNISHMENT* (1992)). "Kant's formula of ends does not rule out deterrence, or any other principle but retribution, as a vital, perhaps even primary, justification of punishment." R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 286–87 (2002) [hereinafter Wright, *Treating Persons as Ends in Themselves*] (footnote omitted). Hill agrees. Hill, Jr., *Punishment*, *supra* note 130. "There is . . . rather too much in Kant's own version of retributive theory that should be resisted." ROBINSON, PRAISE AND BLAME, *supra* note 82, at 190.

¹³³ For a survey of the justifications for punishment, with criticism, see Duff, *Penal Communications*, *supra* note 48. Boonin discusses, but rejects, versions of retribution that are trust-based, debt-based, and revenge-based. DAVID BOONIN, *THE PROBLEM OF PUNISHMENT* 143–54 (2008); see Christopher, *supra* note 127, at 956–57 (identifying "a wide variety" of consequentialist justifications of retributive punishment); Christopher Heath Wellman, *The Rights Forfeiture Theory of Punishment*, 122 ETHICS 371, 372 (2012) (mentioning six justifications for punishment). For a trust based theory of retributive punishment, see Susan Dimock, *Retributivism and Trust*, 16 LAW & PHIL. 37 (1997).

The state's role in punishment is typically overlooked.

[A] question that is at least of equal importance [to the issue of the moral legitimacy of retributivism] has been almost totally neglected—namely, the question of whether retributivist goals, however morally admirable they may be, are *legitimate state goals*, goals that it is the state's proper business to pursue.

MURPHY, *Retributivism*, *supra* note 127, at 17 (footnote omitted); see Duff, *Legal Punishment*, *supra* note 91, at 16 (citations omitted) ("[E]ven if [the guilty] deserve to suffer, why should it be for the state to inflict that suffering on them through a system of criminal punishment?").

¹³⁴ See MURPHY, *Retributivism*, *supra* note 127, at 17.

¹³⁵ See *supra* text accompanying note 15.

¹³⁶ "[T]he fairness theory . . . perceives punishment as a way of restoring a fair balance of benefits and burdens between the criminal and law-abiding members of the society." JESPER RYBERG, *THE ETHICS OF PROPORTIONATE PUNISHMENT* 6 (2004); see Scheid, *Davis*, *supra* note 70, at 375–76 (footnote omitted) ("According to unfair-advantage theories, a criminal gains a certain unfair advantage over law-abiding citizens whenever he breaks the law."); Jeremy Waldron, *Lex Talionis*, 34 ARIZ. L. REV. 25, 50 (1992) (first citing SHER, *DESERT*, *supra* note 48, at 91; then citing SADURSKI, *GIVING DESERT ITS DUE*, *supra* note 56, at 225) (Under this view, "[a]n appropriate punishment is one that offsets this stolen advantage, and restores the original distribution.").

restrictions when required have a right to a similar submission from those who have benefited by their submission."¹³⁷ Under John Rawls's version, a person must comply with "the rules of an institution when two conditions are met: first, the institution is just (or fair) . . . and second, one has voluntarily accepted the benefits of the arrangement or taken advantage of the opportunities it offers to further one's interests."¹³⁸ Many commentators subscribe to versions of this theory,¹³⁹ while others remain critical.¹⁴⁰

Under expressionism, Feinberg writes, "punishment is a conventional device for the expression of attitudes of resentment and indignation, and of judgments of disapproval and reprobation, on the part either of the punishment authority himself or of those 'in whose name' the punishment is inflicted."¹⁴¹ Jean Hampton's famous view

¹³⁷ H.L.A. Hart, *Are There Any Natural Rights?*, in THEORIES OF RIGHTS 77, 85 (Jeremy Waldron ed., 1984).

¹³⁸ RAWLS, A THEORY OF JUSTICE, *supra* note 75, at 96. For Rawls's duty of "fair play," see RAWLS, *Justice as Fairness*, *supra* note 13, at 60.

¹³⁹ According to Shafer-Landau, unfair advantage theorists include Herbert Morris, Jeffrie Murphy, Wojciech Sadurski, George Sher, and Michael Davis. Shafer-Landau, *The Failure of Retributivism*, *supra* note 124, at 290. For a similar list, see BOONIN, *supra* note 133, at 119 (adding John Finnis, Richard Dagger, and, "at least on some interpretations," Kant and Hegel). Von Hirsch sees Kant as an unfair advantage theorist. VON HIRSCH, *supra* note 51, at 47. Jeffrie Murphy agreed with this interpretation. Jeffrie G. Murphy, *Marxism and Retribution*, 2 PHIL. & PUB. AFF. 217, 228 (1973). He has since changed his view in favor of "some version of Kant's idea of punishing . . . human evil . . ." Jeffrie G. Murphy, *Some Second Thoughts on Retributivism*, in RETIBUTIVISM, *supra* note 127, at 93, 98. For the meaning of "unfair advantage," see Sadurski, *Social Justice*, *supra* note 69, at 316 ("benefit of non-self-restraint"); Shafer-Landau, *The Failure of Retributivism*, *supra* note 124, at 293 ("extra measure of freedom gained through criminal behavior").

¹⁴⁰ See, e.g., BOONIN, *supra* note 133, at 119-43; DUFF, TRIALS AND PUNISHMENTS, *supra* note 82, at 205-17; ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 90-95 (1974) [hereinafter NOZICK, ANARCHY]; RYBERG, *supra* note 136, at 36-43; Shafer-Landau, *The Failure of Retributivism*, *supra* note 124, at 301-04. "Thus, modestly put, I do not think that proportionalism follows as easily from the fairness theory as its adherents usually proclaim." RYBERG, *supra* note 136, at 43.

¹⁴¹ JOEL FEINBERG, *The Expressive Function of Punishment*, in DOING AND DESERVING, *supra* note 71, at 95, 98 [hereinafter FEINBERG, *The Expressive Function of Punishment*]. "That the expression of the community's condemnation is an essential ingredient in legal punishment is widely acknowledged by legal writers." *Id.* Punishment "is also a symbolic way of getting back at the criminal, of expressing a kind of vindictive resentment." *Id.* at 100. "This symbolic function of punishment was given great emphasis by Kant, who, characteristically, proceeded to exaggerate its importance." *Id.* at 103. "Punishment has its two salient features—the imposition of hard treatment and the visitation of censure—in order to serve these dual purposes [of 'discourage[ing] conduct' and 'express[ing] disapproval of the conduct and its perpetrators']." ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 52 (1985) [hereinafter VON HIRSCH, PAST OR FUTURE CRIMES] (footnote omitted); see DUFF, TRIALS AND PUNISHMENTS, *supra* note 82, at 233-66 ("Expression, Penance and Reform"); Dan M. Kahan, *What Do Alternative Sanctions Mean?*, 63 U. CHI. L. REV. 591, 594-605 (1996) ("The Expressive Dimension of Punishment").

Related to expressionism are communication theories of retribution. Duff posits, "can we explain criminal punishment in retributive-communicative terms as a process of communication

of expressionism provides that an offender is punished to “vindicate the value of the victim denied by the wrongdoer’s action through the construction of an event that not only repudiates the action’s message of superiority over the victim but does so in a way that confirms them as equal by virtue of their humanity.”¹⁴² This theory has not escaped criticism.¹⁴³ One must determine how to “vindicate the value . . . denied . . .”¹⁴⁴ Doing so need not require punishment.¹⁴⁵

in which the offender, as well as the polity, is meant to be a participant?” Duff, *Retrieving Retributivism*, *supra* note 127, at 17. According to Duff, first, “[p]unishment communicates censure from the polity to the offender, with a view to persuading him to attend to that censure, to face up to the wrong he has done, and therefore also to recognize the need to mend his ways.” *Id.* “The second aspect of communicative punishment draws on an idea, prominent in recent penal theory, that punishment has to do with the kind of apology that offenders owe to their victims, and to the wider polity (whose values and relationships they have violated).” *Id.* (footnote omitted). “[P]unishment can be seen as a communicative process in which a perpetrator is, through the conveyance of an appropriate condemnatory message, held accountable for his misdeed . . .” RYBERG, *supra* note 136, at 6; see Dan Markel, *What Might Retributive Justice Be? An Argument for the Confrontational Conception of Retributivism*, in RETIBUTIVISM, *supra* note 127, at 49.

¹⁴² Hampton, *Correcting Harms*, *supra* note 112, at 1686; see Jean Hampton, *An Expressive Theory of Retribution*, in RETIBUTIVISM AND ITS CRITICS 1 (Wesley Cragg ed., 1992) [hereinafter Hampton, *An Expressive Theory of Retribution*]; Carissa Byrne Hessick, *Why Are Only Bad Acts Good Sentencing Factors?*, 88 B.U. L. REV. 1109, 1158–59 (2008).

¹⁴³ For discussion and criticism, see RYBERG, *supra* note 136, at 19–36; Duff, *Penal Communications*, *supra* note 48, at 31–56; Duff, *Legal Punishment*, *supra* note 91, at 18–21 (“Punishment as Communication”). “What these considerations highlight is the fact that not much has been done to make clear exactly how the communicative process actually takes place.” RYBERG, *supra* note 136, at 36.

“Nor is retributivism to be confused with denunciatory theories of punishment. In this latter view punishment is justified because punishment is the vehicle through which society can express a condemnation of the criminal’s behavior. This is a utilitarian theory . . . justified by the good consequences it achieves . . .” Moore, *Moral Worth of Retribution*, *supra* note 127, at 96 (citations omitted); see SADURSKI, *GIVING DESERT ITS DUE*, *supra* note 56, at 248–50.

¹⁴⁴ Joshua Kleinfeld, *Reconstructivism: The Place of Criminal Law in Ethical Life*, 129 HARV. L. REV. 1485, 1486 (2016).

¹⁴⁵ Hampton agrees. “[T]he retributive response is broader than punishment. Or to put it another way, *there are ways in which one can inflict retribution, but nonetheless not inflict punishment.*” Hampton, *An Expressive Theory of Retribution*, *supra* note 142, at 16. “So long as there are nonpunitive means of conveying society’s disapproval of an offender’s behavior, the state’s right to denounce the offender cannot generate a right to punish her.” BOONIN, *supra* note 133, at 178. We may “condemn without intending to make suffer. . . . [T]o condemn is not in itself to punish.” GEOFFREY CUPIT, *JUSTICE AS FITTINGNESS* 139–40 (1996). “Expressive views need to explain why hard treatment is the appropriate vehicle for denouncing crimes. As T.M. Scanlon has asked, why not say it with flowers, or better still with weeds?” RIPSTEIN, *EQUALITY*, *supra* note 68, at 145 (footnotes omitted) (citing T.M. Scanlon, Jr., *The Significance of Choice*, in VIII THE TANNER LECTURES ON HUMAN VALUES 149 (Sterling M. McMurrin ed., 1988)). Nozick discusses the difficulties in “showing” an offender that she was wrong. ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 370–74 (1981) (“The Message of Retribution”).

Both the fairness theory and expressionism are consistent with the idea that retribution must account for dignitary harms to immediate victims and the public.¹⁴⁶ By free-riding or flouting the law, the criminal implicitly is asserting moral superiority,¹⁴⁷ as Hampton observes above.¹⁴⁸ Similarly, expressionism aims at conveying social disapproval of the criminal's conduct that also implicitly claims moral superiority.¹⁴⁹ The state, as representative of the public, seeks requital from the criminal for her improper rejection of the moral equality of all persons.

Moral agents, in sum, are not to manifest disrespect of another's dignity by invading her realm of protected freedom.¹⁵⁰ In the private law of torts, contracts, and unjust enrichment, determining whose autonomy space has been invaded is largely, if not entirely, straightforward. Controversy under existing law arises over whether negligently causing another person a purely economic loss constitutes a tortious invasion of her autonomy space or, more generally, whether a particular class of persons suffers harms from another's conduct sufficient to be declared wrongful.¹⁵¹ Furthermore, we debate, among other things, the types and extent of harms that are reparable once there has been a recognized invasion.

¹⁴⁶ "We are all familiar with these retributivist metaphors: punishment restores the moral equilibrium of the universe, it pays back a debt, it vindicates the norms flouted by criminals, etc. . . . [W]hen pressed for literal sense [these metaphors] never cash out to what you thought they would have meant." Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 84 (1999) [hereinafter Moore, *Victims and Retribution*].

¹⁴⁷ "[I]f someone breaks the rules of a particular deal, it is not just that he has gained a particular advantage but that he has adopted an unjust superior position—infringed the rights or status of his fellows as equal negotiators and deal-makers." John Wilson, *The Purposes of Retribution*, 58 PHIL. 521, 523 (1983).

¹⁴⁸ See Jean Hampton, *A New Theory of Retribution*, in LIABILITY AND RESPONSIBILITY 377 (R.G. Frey & Christopher W. Morris eds., 1991); see also *supra* note 142. For discussion, see David Dolinko, *Some Thoughts About Retributivism*, 101 ETHICS 537 (1991), and for doubts, see CUPIT, *supra* note 145, at 145 n.9. Others advance the invader's flouting of the law as grounds for retributive punishment. See, e.g., DUFF, TRIALS AND PUNISHMENTS, *supra* note 82, at 255; Dan Markel & Chad Flanders, *Bentham on Stilts: The Bare Relevance of Subjectivity to Retributive Justice*, 98 CALIF. L. REV. 907, 932, 935–36 (2010) [hereinafter Markel & Flanders, *Bentham on Stilts*].

¹⁴⁹ This is suggestive of Ackerman's justification for neutrality in the liberal state whereby, "[n]o reason is a good reason if it requires the power holder to assert: . . . (b) that, regardless of his conception of the good, he is intrinsically superior to one or more of his fellow citizens." BRUCE ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE 11 (1980). Similarly, Dworkin advances the principle of equal concern and respect. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180–83, 272–78 (1977).

¹⁵⁰ Kaiser identifies "three dimensions of the criminal wrong": "the 'culpable interference with the legally protected freedom of action of another'"; "treating the victim solely as a means to an end"; and "culpable expression of disrespect for the victim's plan of life." Hanno F. Kaiser, *The Three Dimensions of Freedom, Crime, and Punishment*, 9 BUFF. CRIM. L. REV. 691, 694 (2006) (book review).

¹⁵¹ Herbert Bernstein, *Civil Liability for Pure Economic Loss Under American Tort Law*, 46 AM. J. COMP. L. 111 (1998).

In criminal law matters, the persons harmed by disrespectful invasions of their autonomy space are, along with the direct victim and her supporters,¹⁵² the members of the public who are put at risk of harm at the time of the criminal act or in the future.¹⁵³ Crimes are, generally, frightful to the public.¹⁵⁴ They produce insecurity.¹⁵⁵

¹⁵² See Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115, 119 n.8 (1985) (“suffering of the victim’s relatives”). One commentator “takes a first look at this neglected issue of the role that more remote harms [to the family and friends of the victim] should play in sentencing and asserts that accounting for these more remote harms would better reflect the basic tenets of harm-based retributivism” Meghan J. Ryan, *Proximate Retribution*, 48 HOUS. L. REV. 1049, 1049 (2012). She “argues that a proximate causation analysis is essential to limit the harms considered in sentencing while recognizing the full array of harms caused by criminal conduct.” *Id.* at 1049–50.

¹⁵³ See, e.g., Ryan, *supra* note 152, at 1082–85. Criminal acts “had to be ‘injurious to the public at large, in distinction from individuals; or else it must be wrong to individuals of a nature which the public takes notice of as done against itself.’” Albin Eser, *The Principle of “Harm” in the Concept of Crime: A Comparative Analysis of the Criminally Protected Legal Interests*, 4 DUQ. U. L. REV. 345, 353 (1966) (quoting JOEL P. BISHOP, 1 COMMENTARIES ON THE CRIMINAL LAW § 252 (5th ed. 1872)).

¹⁵⁴ Nozick asserts that many, but not all, crimes are frightful to the public, which justifies punishment beyond compensation to the direct victim. NOZICK, *ANARCHY*, *supra* note 140, at 65–71. Rawls imagines a father’s answer to his son’s question of why people are jailed. “‘To protect good people from bad people,’ or ‘To stop people from doing things that would make it uneasy for all of us; for otherwise we wouldn’t be able to go to bed at night and sleep in peace.’” Rawls, *Two Concepts*, *supra* note 127, at 107. “Surveys suggest that the fear of crime is widespread amongst members of many contemporary westernized societies.” Emily Gray et al., *In Search of the Fear of Crime: Using Interdisciplinary Insights to Improve the Conceptualisation and Measurement of Everyday Insecurities*, in SAGE HANDBOOK OF CRIMINOLOGICAL RESEARCH METHODS 268, 268 (David Gadd et al. eds., 2012). For an example of subscribers to the reaction (fright) theory of (some) crime, see GEORGE P. FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW* 35–36 (1998) [hereinafter FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW*]; RICHARD G. SINGER, *JUST DESERTS* 26 (1979); Lucia Zedner, *Reparation and Retribution: Are They Reconcilable?*, 57 MOD. L. REV. 228, 243–44 (1994).

Fletcher criticizes Nozick’s “notion of generalized fear [because it] proves too much and too little.” Fletcher, *Place of Victims*, *supra* note 67, at 56. Because mass torts can “trigger widespread public anxiety” and “isolated crimes such as embezzlement . . . [may] engender no public fear at all, [i]t is not so easy . . . to distinguish crimes from torts.” *Id.* at 56–57. My focus on disrespect as key for criminal requitals offers, I believe, a reasonable means to distinguish the two realms. All fear is *prima facie* harmful, but not all harmful fear is wrongful. “An alternative approach to the public nature of crime might be simply to locate the public dimension of the crime in the extrapolation of the concrete harm to the general class of victims.” *Id.* at 57. This strikes me as remaining a matter for corrective justice.

¹⁵⁵ “Whoever steals makes the property of everyone else insecure” KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 474. Regarding conspiracy and other crimes by multiple individuals, “the involvement of several people in an offence may create greater fear in victims and greater public alarm.” ANDREW ASHWORTH, *PRINCIPLES OF CRIMINAL LAW* 451 (6th ed. 2009) [hereinafter ASHWORTH, *PRINCIPLES OF CRIMINAL LAW*]. Dagger refers to the “indirect” or “secondary harm” of those who merely hear of a crime. “Indeed, someone who never even hears about a particular crime may feel its effects if it creates a climate of fear and apprehension that leads to suspicion, distrust, or hostility.” Richard Dagger, *Restitution: Pure or Punitive?*, 10 CRIM. JUST. ETHICS 29, 30 (1991). See, e.g., Ryan, *supra* note 152, at 1085.

Beyond these reactive, psychic harms, criminal behavior often induces the public at risk to respond by taking costly, protective measures.¹⁵⁶ These psychic and economic harms may also generate physical illness or increase susceptibility to such illness.¹⁵⁷ Psychic harms may ensue from dignitary harms, as where a group that a person identifies with is insulted or defamed.¹⁵⁸ While fright is a common reactive response of the public to criminal conduct,¹⁵⁹ the public also responds in many other negative, painful, destructive, psychological ways. These include fear, anxiety, insecurity, dread, terror, panic, alarm, dismay, suspicion, distrustfulness, consternation, concern, outrage, anger, ire, hostility, indignation, resentment, disgust, rage, and fury, among others.¹⁶⁰ These responses may or may not overlap with fright and one another. In

General reactive fear varies, of course, from crime to crime, to say nothing of person to person. For example, "people fear robberies more than securities frauds." Scheid, *Davis, supra* note 70, at 394.

"Might someone not argue, with Ralf Dahrendorf, that increases in sanction levels would reassure the public and reduce fear—even if they did not actually affect crime rates?" Andrew von Hirsch & Andrew Ashworth, *Not Not Just Deserts: A Response to Braithwaite and Pettit*, 12 OXFORD J. LEGAL STUD. 83, 91 (1992) (citing RALF DAHRENDORF, *LAW AND ORDER* (1985)).

¹⁵⁶ A crime, such as a neighborhood robbery, may frighten neighbors, cause them to make expenditures for security systems, decrease property values, increase insurance rates, impose opportunity costs, and even deprive unknowing strangers of economic opportunities with the neighbors because of these costs, etc. See BOONIN, *supra* note 133, at 225. "What I call the 'secondary victims response' to the harm to society . . . insists that in such cases the offender must make restitution to these people as well." *Id.* at 226. The difficulty of doing this is discussed, *id.* at 227. See Alan Wertheimer, *Victimless Crimes*, 87 ETHICS 302, 311–13 (1977) ("Crime as a Social Phenomenon").

¹⁵⁷ "Fear of crime is often seen to constitute a social problem in and of itself, reducing quality of life and public health, restricting movements, eroding social and neighbourhood bonds, and shaping the very organisation and zoning of a city." Gray et al., *supra* note 154, at 268 (citations omitted).

¹⁵⁸ See Kuklin, *Private Requitals, supra* note 2, at 983.

¹⁵⁹ "[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." Peter Strawson, *Freedom and Resentment*, in FREE WILL 59, 67 (Gary Watson ed., 1982); see JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL 6–7 (1998). "On [one] account we engage in 'blame validation': We make blame attributions spontaneously according to how strongly negative our gut reaction is then we validate our blame assessment by tuning evaluations of causation and intention accordingly." Janice Nadler, *Blaming as a Social Process: The Influence of Character and Moral Emotion on Blame*, 75 LAW & CONTEMP. PROBS. 1, 9 (2012) [hereinafter Nadler, *Blaming as a Social Process*]. "Reactive attitudes invariably concern what someone can be held to, so they invariably presuppose the authority to hold someone responsible and make demands of him." STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT 17 (2006); see *id.* at 83–85.

¹⁶⁰ Feinberg refers to the "responsive attitudes typically expressed by reward and punishment—gratitude, appreciation, approval, 'recognition,' resentment, disapproval, condemnation . . ." FEINBERG, *Justice and Personal Desert, supra* note 71, at 70. "When we blame someone, we may feel—among other things—anger, resentment, irritation, bitterness, hostility, fury, rage, outrage, disappointment, contempt, disdain, or disgust. Although these feelings differ in important ways, each is always negative . . ." GEORGE SHER, IN PRAISE OF

either event, these reactions might also provide a basis for retributive claims.¹⁶¹ They are harms. Reasonable people prefer to be secure from suffering harms. As reasonable people, they would take practical measures to avoid them, if sensible. The categorical imperative does not, in principle, prevent psychic harms from being declared wrongful harms in themselves. Some reactive psychic harms, however, will not survive the filter of the categorical imperative, such as those that stem from disrespectful attitudes toward outgroups, or indeed, oneself.¹⁶² Once identified harms clear the deontic filter, society must decide whether to declare them wrongful by means of first-order, substantive maxims.

After the issue of the obligation to conform to established norms is favorably resolved (e.g., a social contract), moral agents have a duty to abide by criminal laws that are consistent with the categorical imperative. However, concerns for respecting the autonomy of moral agents may not be the driving factor of some laws, such as animal cruelty laws.¹⁶³ Indeed, some laws may run afoul of the mandate under a harm

BLAME 94 (2006). Using Mill's harm principle, Feinberg invokes such harms to prohibit "depraved" or brutal public events. JOEL FEINBERG, *HARMLESS WRONGDOING* 126–33 (1990). Nussbaum opines that some emotions (e.g., shame, disgust) are "unreliable as guides to public practice, because of features of their specific internal structure." MARTHA C. NUSSBAUM, *HIDING FROM HUMANITY* 13 (2004).

¹⁶¹ The theorists J.F. Stephen, Adam Smith, and Edward Westermarck opined "that resentment and indignation felt by people towards wrongdoers played an essential role in law and punishment." Jarkko Savolainen, *Retribution, Self-Respect, and the Emotions*, in *RETRIBUTIVISM AND ITS CRITICS*, *supra* note 142, at 117. That resentment and indignation are reactions to dignity harms, see Michael S. Pritchard, *Human Dignity and Justice*, 82 *ETHICS* 299, 304–05 (1972). Duff refers to the idea of "retributive hatred." Duff, *Penal Communications*, *supra* note 48, at 28–31.

"[T]he moral norms—on which the legal norms of the criminal law are based—protect each of us as individuals. . . . [E]ach of us, when the norm is violated, can claim a separate wrong was done to him, even if it's the same act doing the violating." Moore, *Victims and Retribution*, *supra* note 146, at 71–72.

¹⁶² "[B]ehind our judgments of retributive justice," according to Nietzsche, is "truly a witch's brew: resentment, fear, anger, cowardice, hostility, aggression, cruelty, sadism, envy, jealousy, guilt, self-loathing, hypocrisy and self-deception—those 'reactive affects' that Nietzsche sometimes lumped under the French term *ressentiment*." Moore, *Moral Worth of Retribution*, *supra* note 127, at 106 (citation omitted). Similarly, "some utilitarians have proposed [to] 'purify[]' desires of 'imperfection.' . . . Harsanyi wants . . . to 'exclude all antisocial preferences, such as sadism, envy, resentment, and malice.'" Amartya Sen, *Well-Being, Agency and Freedom: The Dewey Lectures 1984*, 82 *J. PHIL.* 169, 191 (1985) (quoting John C. Harsanyi, *Morality and the Theory of Rational Behavior*, in *UTILITARIANISM AND BEYOND* 39, 56 (Amartya Sen & Bernard Williams eds., 1982)). "Many [emotional] responses that are deeply embedded in human life are morally questionable and unworthy of guiding public action." NUSSBAUM, *supra* note 160, at 171.

¹⁶³ Kant was against animal cruelty on the grounds that it would coarsen one's feelings and relations with others. IMMANUEL KANT, *LECTURES ON ETHICS* 239–41 (Louis Infield trans. 1930) [hereinafter KANT, *LECTURES*]; KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 564. For discussion, see MATTHEW C. ALTMAN, *Animal Suffering and Moral Character*, in *KANT AND APPLIED ETHICS* 13 (2011); Christine M. Korsgaard, *Fellow Creatures: Kantian Ethics and Our Duties to Animals*, in *25 THE TANNER LECTURES ON HUMAN VALUES* 77 (Grethe B. Peterson ed.,

principle to respect the freedom of people to make choices that are not harmful to others,¹⁶⁴ as in, for instance, truly victimless crimes.¹⁶⁵ Kant, however, insists that one must conform to the universalized laws of the state.¹⁶⁶ One has a moral duty to obey the law.¹⁶⁷ Like others, I question the political obligation said to come from social contracts that are not deeply consensual, such as Kant's.¹⁶⁸ Hence, I set aside this claim by Kant that one must meet laws regardless of whether deontic principles immediately justify them.¹⁶⁹ I address requitals that are apt for violations of maxims directly consistent with the categorical imperative and not those stemming from a general duty to obey the law.¹⁷⁰

I have mentioned two categories of persons who are subject to invasions of their autonomy space. The direct victim, such as the object of a battery, is in the first category—immediate victims. She clearly suffers wrongful harm. Often she suffers wrongful physical, economic, and psychic harms, but even when she does not suffer these harms, she suffers at least a wrongful dignitary harm. The invader has disrespected her autonomy through nonconsensual, improper touching. Other individuals close to the victim may suffer similar harms resulting from the invader's battery of the direct victim. Kin, kith, and other affiliates suffer when they empathize and sympathize with the direct victim, support her, depend on her, and so forth. Her pain is their pain. Therefore, we may adopt maxims that protect against these indirect harms in particular circumstances, thereby declaring that the autonomy space of these indirect victims encompasses this source of harm. The tort of the negligent infliction

2005); Allen W. Wood & Onora O'Neill, *Kant on Duties Regarding Nonrational Nature*, 72 PROC. ARISTOTELIAN SOC'Y 189, 211 (1998).

¹⁶⁴ Regarding a harm principle, see *supra* text accompanying note 37.

¹⁶⁵ Husak considers judging the harmfulness of the victimless crimes of most drug offenses under a "social-standard analysis." "Very roughly, a social-standard analysis would assess the magnitude of various non-victimizing offences by the degree to which they make the society a worse place to live." Douglas N. Husak, *Desert, Proportionality, and the Seriousness of Drug Offences*, in FUNDAMENTALS OF SENTENCING THEORY 187, 208 (Andrew Ashworth & Martin Wasik eds., 1998) [hereinafter Husak, *Desert*]. This may equate to harm to the general public. For difficulties and deficiencies in arguments regarding victimless crimes, see *id.* at 208–09; Wertheimer, *supra* note 156.

¹⁶⁶ See KANT, THE METAPHYSICS OF MORALS, *supra* note 13, at 461–66.

¹⁶⁷ See *id.*

¹⁶⁸ See Kuklin, *Constructing Autonomy*, *supra* note 1, at 379–80; Kuklin, *Private Requitals*, *supra* note 2, at 968 n.15.

¹⁶⁹ Kuklin, *Private Requitals*, *supra* note 2, at 966.

¹⁷⁰ As Moore points out, laws (such as coordination norms) may give rise to reasonable reliance or expectations, in which case a violation may wrongfully dash them, thereby producing a wrongful harm. But such deontic wrongfulness comes from the dashing, not directly from the law itself. MICHAEL S. MOORE, PLACING BLAME 72–73 (1997) [hereinafter MOORE, PLACING BLAME]; see *Clinkscales v. Carver*, 136 P.2d 777, 778–79 (Cal. 1943) (finding it "negligence as a matter of law to disregard [a] stop-sign" that was erected pursuant to a defective statute because "any reasonable man should know that the public naturally relies upon their observance").

of emotional distress is such a maxim.¹⁷¹ This tort is limited to close family members,¹⁷² but not because other intimate supporters do not suffer substantial indirect harms, but rather, the limit is because of administrative and other concerns with spreading the legal protection more widely.¹⁷³ When a family member is protected under this tort, she has a direct claim against the invader.¹⁷⁴ She then is seen as a direct victim herself. As the connections to the immediate victim become more diluted,¹⁷⁵ the harms to third parties typically dissipate until they are indistinguishable from strangers to the events. This is not to say that strangers suffer no harms themselves. They may pay to bar their windows from personal fright, for instance, to say nothing of their discomfort from sympathetic identification with the immediate victim. They constitute a second category of persons—the general public category. Thus, these two categories, immediate victims and the general public, are polar limits, not sharply distinguishable, to the field of those who might suffer harms from an agent's conduct.

Before turning to the general public's claims stemming from an autonomy invasion of an immediate victim, let us briefly look the possible effects of the autonomy invasion on the *invader's* kin and kith. These individuals also may suffer harms.¹⁷⁶ Psychic harm from seeing one's loved one or friend endure the distress of a civil or criminal process and outcome is easy enough to imagine. Economic and physical harms to the supporters may follow. Even dignitary harms are likely, such as when others shun a criminal's family members. We can also envision an invader's kin and kith angrily thinking, if not saying: "You jerk, what did you think your wrongful conduct would do to me? Don't you love (respect) me enough to protect me from these harms, such as the sympathetic distress and personal shame I feel?" Proper substantive maxims that protect against these types of harms, and requalit maxims that offer relief, though extremely unlikely, would not run afoul of the categorical imperative. The security interest of the invader's kin and kith may be declared to outweigh the liberty interest of the invader, especially since the invader's supposed liberty entails the wrongful invasion of an immediate victim's protected autonomy space.

¹⁷¹ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 48 (AM. LAW INST. 2012); DOBBS, *supra* note 109, §§ 308–09; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 89, § 54.

¹⁷² This tort is further cabined severely by doctrines such as the impact rule, the zone of danger rule, or a quite restrictive foreseeability rule. See, e.g., DOBBS, *supra* note 109, at 839–41; PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 89, at 362–67.

¹⁷³ One concern is not to "overpunish" the invader. See PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 89, at 366.

¹⁷⁴ DOBBS, *supra* note 109, at 841.

¹⁷⁵ An intricate web of harms may flow from an autonomy invasion. For example, while a person may not know the direct victim, she may be close to, and sympathize with, a family member of the victim who suffers from the victim's invasion.

¹⁷⁶ See, e.g., Serge F. Kovaleski, *Killers' Families Left to Confront Fear and Shame*, N.Y. TIMES, Feb. 5, 2012, at A1; Ryan, *supra* note 152, at 1085.

IV. DIGNITY AND HARM

The duty to respect the dignity of others sits at the dead center of Kant's moral system.¹⁷⁷ Breach of this duty produces a dignitary harm.¹⁷⁸ There are two direct forms of dignitary harm.¹⁷⁹ The first is insult harm.¹⁸⁰ The invader offends the invadee by conveying a disrespectful message to her.¹⁸¹ The invader communicates, explicitly or implicitly, that she is morally superior to the invadee or, equivalently, that the invadee is morally inferior.¹⁸² Even when the invader and invadee are the only parties privy to this communication, the invadee still suffers an insult harm. She has reason to feel slighted. The invader herself may be unaware of the message she is communicating, as where her facial expression or body language inadvertently conveys the idea of disrespect, which the invadee, as a reasonable person, interprets accordingly. In this case, the invader may be marginally blameworthy, if at all, for producing the insult

¹⁷⁷ "Respect (*reverentia*) is, again, something merely subjective, a feeling of a special kind, not a judgment about an object that it would be a duty to bring about or promote." KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 531. "Dignity is an expressive value demanding that people's behavior, physical and verbal, convey a certain attitude to other people, namely an attitude of respect. There are many ways in which respect can be conveyed and, correspondingly, many ways in which it can be withheld." Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CALIF. L. REV. 759, 771 (2000).

¹⁷⁸ Historically, dignitary and reputational harms have been requited by apologies, shows of respect, seeking pardons, and compensation, among other means. See JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW* 222–30 (2006). "One can see a remarkable degree of continuity in the civil law. Rights to dignity and reputation have always been protected." *Id.* at 230. The common law has been somewhat less protective. See *id.* at 233–39. Gordley opines: "[d]ignity and reputation belong to a person in much the way property belongs to him." *Id.* at 242. Practical reasons argue for limits to their legal protection, such as "the public interest in the exchange of information. But otherwise, if they are rights which in principle should not be infringed, then what matters is their infringement, not whatever mental suffering it may or may not cause." *Id.* "In the Aristotelian tradition, the rules of distributive justice constitute the structure of society. . . . If honor and reputation are rights accorded to an individual [as the late scholastics asserted], then they should be protected just as the law protects his property." *Id.* at 243.

¹⁷⁹ Jeffrie G. Murphy, *Forgiveness and Restatement*, in JEFFRIE G. MURPHY & JEAN HAMPTON, *FORGIVENESS AND MERCY* 14, 25 (1988) [hereinafter Murphy, *Forgiveness and Resentment*].

¹⁸⁰ Hampton, *An Expressive Theory of Retribution*, *supra* note 142, at 5–6.

¹⁸¹ *Id.*

¹⁸² Relying on Kant, Hampton identifies "what it is that makes an action wrong—i.e., the fact that it is an action that does not respect that person's worth." *Id.* at 5. "An immoral response to a person, whether or not it produces harm, carries with it a message, in particular, an *insulting* message. . . . [A]n immoral action is insulting in the sense that it sends a message which challenges the victim's worth." *Id.* at 6. Murphy ascribes the resentment from moral injuries not only to their tangible or sensible harms, but also to their "*messages*—symbolic communications. They are ways a wrongdoer has of saying to us, 'I count but you do not,' 'I can use you for my purposes,' or 'I am here up high and you are there down below.' Intentional wrongdoing *insults* us and attempts (sometimes successfully) to *degrade* us" Murphy, *Forgiveness and Resentment*, *supra* note 179, at 25; see Josh Bowers, *Blame by Proxy: Political Retributivism & Its Problems, a Response to Dan Markel*, 1 VA. J. CRIM. L. 135, 140 (2012).

harm. Aware that she has sent this false signal to others in the past, she may even have been careful not to do so this time, but she failed because of her quirky mannerisms. She did not intend to be disrespectful nor did she believe she was being so. She may even believe that the invadee is morally superior to her.

The second direct form of dignitary harm is defamation harm.¹⁸³ This type occurs when a third person is privy to and understands a message conveyed by the invader's words or conduct as disrespectful to the invadee.¹⁸⁴ The harm injures her reputation.¹⁸⁵ This form of dignitary harm likewise may be manifested without the awareness or intention of the invader or, for that matter, the awareness of the invadee, as she may be inattentive, incapable of understanding, comatose, or deceased.¹⁸⁶ Nevertheless, a third party gets the message. Again, the invader may not be blameworthy for evincing this message. Thus, we may say, direct dignitary harms come in two types: insultive and defamatory. We declare some of their permutations to be wrongful and subject to sanctions.

Closely associated with dignitary harms are the standard types of harms recognized in law and morals: physical, economic, and psychic.¹⁸⁷ Their close association can be seen from two perspectives. First, in balancing the liberty and security interests of moral agents, protective boundaries are drawn around these three types of harms at the point where society perceives them to be unreasonable or unacceptable and

¹⁸³ See Kuklin, *Constructing Autonomy*, *supra* note 1, at 440–41.

¹⁸⁴ “Most of us tend to care about what others (at least *some* others, some significant group whose good opinion we value) think about us—how much they think we matter. Our self-respect is *social* in at least this sense” Murphy, *Forgiveness and Resentment*, *supra* note 179, at 25. “And thus when we are treated with contempt by others it attacks us in profound and deeply threatening ways.” *Id.* “At their core, the torts of libel and slander enjoin us not to utter statements that attribute to others qualities or actions that ordinarily tend to lower them in the esteem of others.” GOLDBERG & ZIPURSKY, *TORTS*, *supra* note 117, at 310. “Both [defamation and privacy invasions] identify conduct as being wrongful and injurious for altering the way in which third parties view the victim and interact with her.” *Id.* at 307 (emphasis omitted). On the “four types of losses which the law of defamation aims at compensating,” including both the insultive and defamation interests I mention, see Eric Descheemaeker, *Protecting Reputation: Defamation and Negligence*, 29 OXFORD J. LEGAL STUD. 603, 612, 611–15 (2009).

¹⁸⁵ “The interest in reputation . . . protects a good which is both non-pecuniary and immaterial. . . . As a result, in a system whose default and main remedy for violation of a right is the award of money damages, reputation is a very difficult interest to take into account.” Descheemaeker, *supra* note 184, at 610. Kant objects to monetizing a dignitary harm, in some sense. Dignity “is exalted above any price” KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 557; *see id.* at 579; KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS*, *supra* note 5, at 84. I have suggested elsewhere a surrogate for monetizing a dignitary harm. If we look to a reasonable person’s psychic reaction to the disrespectful conduct, then we have an indirect means to put a price on, as Kant asserts, the priceless dignitary harm. *See* Kuklin, *Constructing Autonomy*, *supra* note 1, at 439–42. While this gambit is debatable, at least it accommodates the intuition that dignitary harms vary greatly in degree, and this should be taken into account when requiring the invadee.

¹⁸⁶ Kuklin, *Constructing Autonomy*, *supra* note 1, at 443.

¹⁸⁷ *Id.* at 444.

therefore adopted maxims declare the harms as wrongful.¹⁸⁸ A rational, sensible moral agent would forgo the liberty to impose these harms on others in exchange for the security from suffering them from others.¹⁸⁹ Second, from another perspective, the material freedom an agent has to choose and conduct her life depends on her resources or wherewithal.¹⁹⁰ At one extreme, where she has nothing, she can do virtually nothing. Accordingly, physical, economic, and psychic harms hinder her freedom, irrespective of her remaining resources.¹⁹¹ At some point and under certain circumstances, these harms are declared wrongful as invasions of an agent's autonomy space.¹⁹² For these reasons, a person's choice is blameworthy when she chooses to engage in conduct that wrongfully causes these three types of harms to another person.¹⁹³ It disrespects the invader's autonomy, her equal dignity as a moral agent, and her established freedom to conduct her life as she fairly chooses.¹⁹⁴ The invader deserves to suffer a just requal, private or public, for her transgression.

In identifying apt requitals for disrespectful conduct, we must be careful to avoid confusion from the multiple meanings of "respect" and related terms such as "dignity," for we may respect₁ everyone equally as moral beings, but respect₂ some persons more or less than others because of their (mis)achievements.¹⁹⁵ The first meanings of respect and related notions are based on equality-oriented conceptions of desert.¹⁹⁶ Let us identify them as respect_E or dignity_E. They are based on what one is (e.g., a rational, moral being).¹⁹⁷ The second meanings of these notions are based on liberty-oriented conceptions of desert.¹⁹⁸ They may be denominated respect_L or dignity_L. They are

¹⁸⁸ *Id.* at 387–88.

¹⁸⁹ At first glance, these three types of harms seemingly fall within the security domain. We wish to be secure from suffering them. They may, however, also be seen as falling within the liberty domain. A person may suffer one or more of these harms if she is denied a liberty, such as the right to buy a car. As for physical and psychic harms, these may also result from a person's reaction to the denial of a liberty.

¹⁹⁰ Kuklin, *Constructing Autonomy*, *supra* note 1, at 389.

¹⁹¹ *Id.* at 429.

¹⁹² *Id.*

¹⁹³ *Id.* at 446.

¹⁹⁴ This argument is suggestive of the interest theory of rights, as contrasted to the will theory. See Leif Wenar, *Rights*, STAN. ENCYCLOPEDIA PHIL. § 2.2.2 (Dec. 19, 2005), <http://plato.stanford.edu/archives/fall2010/entries/rights/>.

¹⁹⁵ See *supra* text accompanying note 80.

¹⁹⁶ Alice Ristroph, *Respect and Resistance in Punishment Theory*, 97 CALIF. L. REV. 601, 626 (2009) [hereinafter Ristroph, *Respect and Resistance*].

¹⁹⁷ FEINBERG, *Justice and Personal Desert*, *supra* note 71, at 58–59.

¹⁹⁸ *Id.* at 61.

based on what one does.¹⁹⁹ Kant's imperative to respect others is equality based.²⁰⁰ As equal moral beings, persons are entitled to respect_E. His standards for punishment are liberty-based.²⁰¹ One deserves punishment for one's blameworthy conduct.²⁰² Therefore, the argument may go this way: we respect_E an invader's responsible choice and conduct to wrongfully harm another person by granting her the respect_L she deserves by means of apt punishment.²⁰³ This resolves to a matter of distributive justice—that is, just deserts.²⁰⁴

¹⁹⁹ "If a person is deserving of some sort of treatment, he must, necessarily, be so *in virtue of* some possessed characteristic or prior activity." FEINBERG, *Justice and Personal Desert*, *supra* note 71, at 58. On the positive side of the desert ledger where compensation is in the form of social benefits, "desert is relevant to justice in distribution only where it expresses an actual burden, that is, when it involves some effort, sacrifice, work, risk, responsibility, inconvenience and so forth, when it is linked with an expenditure of energy and time." SADURSKI, *GIVING DESERT ITS DUE*, *supra* note 56, at 116. "No benefits are 'deserved' when a proposed ground of 'desert' cannot be meaningfully described as a burden, and that is precisely the case of natural abilities, talents and skills." *Id.* at 130. However, distinguishing "genetic and environmental influence and the relative role of a person's deliberate effort of self-development is probably doomed to failure because it is the dynamic interplay and mutual reinforcing of those factors that shapes the character, personality and behaviour of human beings." *Id.* at 141.

²⁰⁰ Robin S. Dillon, *Respect*, STAN. ENCYCLOPEDIA PHIL. (Sept. 10, 2003), <https://plato.stanford.edu/archives/win2016/entries/respect> [hereinafter Dillon, *Respect*].

²⁰¹ *Id.*

²⁰² See, e.g., Hampton, *Correcting Harms*, *supra* note 112, at 1667 ("Kant had *two* theories of [human] worth . . .").

²⁰³ Likewise, "Hegel insists that when I have committed a crime, punishment is my 'right,' because it is something that I myself have willed. Not only is punishment 'in itself just,' he says, but 'it is also a *right posited in the criminal himself*, in his existing will, in his action.'" ALLEN W. WOOD, *HEGEL'S ETHICAL THOUGHT* 113 (1990) (quoting *HEGEL'S PHILOSOPHY OF RIGHT*, *supra* note 11, § 100). For an introduction to Hegel's retributivism, see Dubber, *Rediscovering Hegel's Theory*, *supra* note 132. The distinction between respect_E and respect_L is responsive to Ristroph's accusation of inconsistency. "To many ears—including my own—these claims of respectful punishment ring hollow. It is difficult to see how we can simultaneously stigmatize an offender and show respect for him; stigma and respect seem fundamentally incompatible." Alice Ristroph, *Respect and Resistance*, *supra* note 196, at 627 (first citing Christopher, *supra* note 127, at 967–70; then citing Dolinko, *Three Mistakes*, *supra* note 127, at 1632–33, 1642–56). Her related points remain intact. After observing the conditions in prisons, Ristroph asks, "With respect like this, who needs insults?" *Id.* at 628. "Other retributive arguments are simply circular: they assert that responsible agents must be punished, and that failure to punish is failure to recognize the criminal as a responsible agent." *Id.* (citing Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239, 260–61 (2009)). "In fact, judgments of responsibility and agency are independent of judgments of how to respond to a responsible agent." *Id.* (footnote omitted). I argue for punishment for autonomous choices, gauging such punishment by the degree to which the invader acts disrespectfully regarding the invadee.

²⁰⁴ As to the deontic justification for the community's claim to impose punishment on invaders according to their just deserts, we are again relegated to the social contract. See *supra* text accompanying note 19. The invader "consents" to the community's authority to punish. The community as a collective declares that it has the duty to individual members of the

The distinction between equality and liberty conceptions of respect, dignity, and related notions is important in understanding the relevant dignitary harm to an invadee. The relevant harm is an equality-based conception. The dignitary harm from a murder is independent of who the invadee is. Murdering an elected president is no more of a dignitary harm to her than murdering a tyrant is to him. We may rightfully respect_L the president more, but as Kantians, we center our moral duty to respect others on dignity_E. While intuitively an appealing declaration is that the intentional murder of a person because she is president is more blameworthy, the other side of that coin is that the intentional murder of a person because he is a vicious tyrant is not very blameworthy, indeed, it may be laudable. These intuitions, however, invoke conceptions of distributive justice and of respect_L.²⁰⁵ Non-consensually requiring a person's just deserts for what she has done, that is, desert_L, is a duty for the government, not private parties.²⁰⁶ Private parties may only judge and requite a person for her desert_L if she consents, as where she enters an agreement with a school that includes fair grading or with sponsors of a fair talent or athletic contest.²⁰⁷

In gauging the degree of the invader's blameworthiness for wrongfully harming the invadee and thus for imposing an indignity on her,²⁰⁸ we rely upon the judgment of the reasonable observer,²⁰⁹ suitably freed of biases toward the invader and invadee, as well as other distortions that would fail to survive the deontic filter of the categorical

community to punish blameworthy wrongdoers as well as the right and duty to the wrongdoer herself to punish her.

²⁰⁵ "[K]illing a saint is more heinous than killing a sinner (hence the well-known defense attorney's ploy of 'putting the victim on trial')." MARTIN DALY & MARGO WILSON, *HOMICIDE* 272 (1988).

²⁰⁶ According to H.L.A. Hart, as noted above, one of the five elements in the standard case of punishment is that "[i]t must be imposed and administered by an authority constituted by a legal system against which the offence is committed." HART, *Prolegomenon*, *supra* note 125, at 4-5; *see supra* note 125.

²⁰⁷ An offended person may reasonably deem another's conduct as a substantial insult or defamation, though it falls outside a protective maxim, as where the person is not elected into a hall of fame after a judgment by an admission committee.

²⁰⁸ For difficulties with the concept and measurement of dignity, and caution about ignoring the dignity of the invader, *see* RYBERG, *supra* note 136, at 131-42.

²⁰⁹ "The only way to judge [criminal] responsibility for reckless and negligent risk-taking is to measure the actor's conduct against community expectations. The choice to disregard the risk is not per se culpable; it is culpable only if it falls short of the community standard of reasonable [law-abiding] behavior." FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW*, *supra* note 154, at 119. Wallace "postulate[s] a close connection between holding someone responsible and a central class of moral sentiments, those of resentment, indignation, and guilt. To hold someone responsible, [he] argue[s], is essentially to be subject to emotions of this class in one's dealings with the person." R. JAY WALLACE, *RESPONSIBILITY AND THE MORAL SENTIMENTS* 2 (1994). "[T]hese emotions are distinguished by their connection with expectations." *Id.*; *cf.* RESTATEMENT (SECOND) OF TORTS § 19 (AM. LAW INST. 1977) ("A bodily contact is offensive if it offends a reasonable sense of personal dignity.").

imperative.²¹⁰ The reasonable observer focuses on the invader's mental state.²¹¹ The observer's judgment of the blameworthiness of the invader's mental state is the gauge used to determine the invader's just deserts.²¹² The actual consequences of the invader's chosen conduct does not necessarily reflect her mental state with regard to the invadee at the time of her conduct. This implies that criminal attempts may be punished the same as completed crimes.²¹³ Furthermore, the objective observer ignores the psychic and other reactions experienced by the particular invadee, as well as her own self-regarding reactions (e.g., "She might do that to me"; "I feel for the invadee."). These are matters for corrective justice. In gauging the invader's just deserts, we must stick to distributive justice.

The reasonable observer's judgment of the blameworthiness of the invader's mental state may partially stem from her objective, psychic reaction to the revealed facts and circumstances. Many such facts and circumstances are evidentiary of the degree of the invader's disrespectfulness toward an invadee, whether the invadee experiences direct or indirect harm (e.g., a supporter or sympathetic observer of a directly harmed person).²¹⁴ The invader's foreseeability of the invasion and its repercussions on the invadee is of supreme relevance.²¹⁵ Among the other considerations are: the duration of the invasion, as in false imprisonment for a short or long period;²¹⁶ the foreseeable duration of the wrongful risk or invasive effects,

²¹⁰ Hurd and Moore identify Adam Smith, Rawls, Plowden, and Posner as among those who have been "helped in their ability to reach justified conclusions [about risk imposition] by asking what some epistemically idealized person would do or think." Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQ. L. 333, 358 (2002). "Holding someone to a community standard, therefore, is not necessarily a form of injustice. So long as the defendant is excused on the basis of objective, conduct-influencing factors, such as physical impediments, the standard of responsibility remains attentive to individual capacity." FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW, *supra* note 154, at 120. That it may be difficult to create an accurate filter, see KAPLOW & SHAVELL, *supra* note 58, at 425–26.

²¹¹ For example, "the coolness of a scoundrel makes him not only far more dangerous but also immediately more abominable in our eyes than we would have taken him to be without it." KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, *supra* note 5, at 50. "[T]he desire to commit a wrongful action for its own sake seems incrementally worse than intending to commit a wrongful act as a means to a generally permissible end. Killing or torturing, or disfiguring for the sheer joy of it seems paradigmatic of true evil." Moore, *Prima Facie Moral Culpability*, *supra* note 59, at 323. "Killing without a motive can usually be just as wicked as killing after detached reflection about one's goals." GEORGE FLETCHER, RETHINKING CRIMINAL LAW 254 (1978) [hereinafter FLETCHER, RETHINKING CRIMINAL LAW]; see JOEL FEINBERG, *What Is So Special About Mental Illness?*, in DOING AND DESERVING, *supra* note 71, at 272, 287.

²¹² Nadler, *Blaming as a Social Process*, *supra* note 159, at 14.

²¹³ This issue is addressed below, see *infra* text accompanying notes 330–38.

²¹⁴ ALEXANDER & FERZAN, CRIME AND CULPABILITY, *supra* note 85, at 264.

²¹⁵ *Id.*

²¹⁶ For a proposed culpability-based criminal code, Alexander and Ferzan "take into account the duration of the risk as the actor perceived it. . . . We propose that for every additional two minutes, the offense level be multiplied by the number of two-minute increments for which the risk continued." ALEXANDER & FERZAN, CRIME AND CULPABILITY, *supra* note 85, at 283.

including whether a full recovery can be anticipated;²¹⁷ the frequency of invasions, as where three false imprisonments occur either a week apart or a year apart; the continuity or intermittency of the invasion, thus distinguishing a single false imprisonment of four hours from four imprisonments of one hour each; whether the invader plans to repeat the invasion against the particular invader or others;²¹⁸ and the foreseeable resilience of the invader.²¹⁹ The reasonable observer may also factor in: the invader's known risk disposition because those who prefer risk are likely to respond to harmful risks differently from risk avoiders;²²⁰ the risk of an invader's retaliation for reporting or litigating the invasion, or willingness to settle; the invader's remorsefulness;²²¹ the reaction of the invader's cohorts, such as fellow gang members, to the invasion;²²² peak and end considerations regarding the wrongful harms;²²³ the

²¹⁷ "In our view, the anticipated duration of risk of harm also affects the actor's culpability. . . . An actor who imposes a risk for a longer period of time imposes more risk than an actor who imposes a risk for a shorter period of time." *Id.* at 243 (footnote omitted).

²¹⁸ This ties in to recidivism. *See infra* text accompanying notes 345–68.

²¹⁹ Bentham identifies some of these factors in discussing the "value of a lot of pleasure or pain." JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION ch. IV, at 38–41 (J.H. Burns & H.L.A. Hart eds., 1970) (1789) ("Value of a Lot of Pleasure or Pain, How to Be Measured").

²²⁰ The invader's foreseeable risk attitudes may require deeper analysis. For instance, she may have one attitude about putting herself at risk, as by mountain climbing, and another attitude about having others put her at risk.

²²¹ "Joel Feinberg, Herbert Morris, and the late Jean Hampton . . . have all argued that the truly repentant criminal in general deserves less punishment than the unrepentant criminal" Murphy, *Some Second Thoughts on Retributivism*, *supra* note 139, at 94. Murphy cautiously embraces this position. *Id.* at 95. In Robinson's view, "[g]enuine remorse, public acknowledgment of wrongdoing, and sincere apology can all . . . reduce an offender's blameworthiness—and, thereby, the amount of punishment deserved." Paul H. Robinson, *The Virtues of Restorative Processes, the Vices of "Restorative Justice"*, 2003 UTAH L. REV. 375, 380 (2003) [hereinafter Robinson, *Virtues of Restorative Processes*]. In the attached footnote, Robinson states, "I do not know that retributivists as a group would agree with this" *Id.* at 380 n.12. Duff is one who does. DUFF, TRIALS AND PUNISHMENTS, *supra* note 82, at 289, 289–91 ("[S]he has recognised [sic] and repented her crime, and subjected herself to the pain of remorse"). This position regarding remorse has overtones of the character theory of punishment rather than the act theory. Holtman doubts that retributivism has the wherewithal to account for remorse, as well as victim reaction and other issues. Holtman, *supra* note 128, at 125.

²²² *See* Kuklin, *The Labyrinth of Blameworthiness*, *supra* note 46, at 192–93.

²²³ "Summary assessments [of extended experiences] . . . tend to focus on only a few features . . . , [including] the intensity of the state at key instances, in particular the most intense (*peak*) and the final (*end*) moments." Dan Ariely & Ziv Carmon, *Gestalt Characteristics of Experiences: The Defining Features of Summarized Events*, 13 J. BEHAV. DECISION MAKING 191, 191 (2000); *see* Daniel Kahneman, *Evaluation by Moments: Past and Future*, in CHOICES, VALUES AND FRAMES 693, 694–702 (Daniel Kahneman & Amos Tversky eds., 2000); Daniel Kahneman, *Experience Utility and Objective Happiness: A Moment-Based Approach*, in CHOICES, VALUES AND FRAMES, *supra*, at 673, 675–77.

publicity given to the invasion;²²⁴ and whether the invasion is of a liberty or a security interest.²²⁵

The relevance of the psychic response of the reasonable observer differs from the fright theory of punishment, at least when we focus on fright and not other negative reactions. Under the fright theory, persons are concerned for the welfare of themselves and those they care for.²²⁶ The invader's mental state suggests that she is willing to put others at risk of wrongful harm.²²⁷ Under the view explored here, the relevant emotional response of the observer is that which her empathy and antipathy (or sympathy) arouses toward the invader in light of the invader's violation of substantive maxims and, perhaps, her ensuing corrective justice obligations.²²⁸ This reaction is other-regarding, not self-regarding.²²⁹ To highlight the difference between these two sources of harms, even those with enmity toward the immediate invadee and her supporters, who rejoice in their harms, may suffer fright harms from insecurity as they worry that the invader may direct her blameworthy conduct at the observer or her favorites. Contrariwise, those who are not the least bit frightened by a perceived risk from the invader's willingness to wrongfully harm others may suffer from sympathy with the immediate invadee, her affiliates, and the invader's affiliates.

In the end, there seems to be something deeply troubling about my position on how one gauges an invader's just deserts. Apparently, I have dragged someone off the Clapham Omnibus to judge our invader. The difference between my bus rider and the one Lord Devlin²³⁰ looks to for judging whether conduct is sanctionable on the grounds of immorality is that I have put our bus rider through a short course in deontic morality.²³¹ Our reasonable person's values have been purified, if you will. Still, this

²²⁴ Regarding the relevance of the stigma from a crime's publicity, see Douglas N. Husak, *Already Punishment Enough*, 18 PHIL. TOPICS 79, 79–80 (1990) [hereinafter Husak, *Already Punishment Enough*].

²²⁵ Violating a security interest may be perceived as worse than violating a comparable liberty interest under the common reaction of loss aversion that “losing hurts more than winning feels good.” See, e.g., DANIEL KAHNEMAN, THINKING, FAST AND SLOW 283–86 (2011); Daniel Kahneman & Amos Tversky, *Choices, Values, and Frames*, in CHOICES, VALUES, AND FRAMES, *supra* note 223, at 1, 3.

²²⁶ NOZICK, ANARCHY, *supra* note 140, at 66–67.

²²⁷ KLEINIG, PUNISHMENT AND DESERT, *supra* note 70, at 128.

²²⁸ *Id.* at 125.

²²⁹ “Some have suggested that the public indignation or resentment caused by an act is a proper measure of wrongfulness.” *Id.* (first citing EMILE DURKHEIM, THE DIVISION OF LABOR IN SOCIETY 90 (G. Simpson trans., 1933); then citing 2 JAMES FITZJAMES STEPHEN, A HISTORY OF THE CRIMINAL LAW OF ENGLAND 81 (1883)). Kleinig worries that public “indignation is too easily affected by considerations . . . extraneous to the determination of desert,” such as “the face of the offender.” *Id.* To avoid this, I would insist that relevant reactions survive the deontic filter. Kleinig raises other concerns about determining wrongfulness by reliance “on some simple appeal to the amount of indignation or harm caused by some act.” *Id.* at 127. Without responding to his several concerns one by one, I believe my proposals survive his caution.

²³⁰ See PATRICK DEVLIN, *Morals and the Criminal Law*, in THE ENFORCEMENT OF MORALS 1 (1965).

²³¹ See *id.*

purification seems to leave some influences to chance and the normative breezes of the day. I think this is, unfortunately, unavoidable. Conceptions of responsibility and disrespect are socially constructed.²³² Looking back to anthropology, sociology, world history, news sources, and the like demonstrates that what passes muster in one community, or at one time, may fail in another.²³³ The parameters of responsible and disrespectful conduct are not deducible from Kantian principles. They entail a double judgment. First, society must judge where to draw essentially contestable standards that balance liberty and security interests within the constraints of the categorical imperative and with an understanding of the human (mental) condition.²³⁴ For even where fuzzy lines are to be drawn in light of these considerations, reasonable people may differ. Second, agents of society must judge whether, or the extent to which, these standards or lines have been crossed.²³⁵ We ask our reasonable people, be they judges, juries, others, or some combination, to judge both aspects of individual cases because we have no useful, accurate data and algorithms to feed to ideal computers. As the Legal Realists and postmodernists have made clear, society has no hope in turning to a mechanical jurisprudence, be it legislative or judicial.²³⁶

Since this section is central to my analysis of retribution, let me summarize how I got this far. The ordinary wrongful harms suffered by invadees are to be required, if at all, by conceptions of corrective justice. Protected invadees might include the immediate invadee, her kin, kith, supporters, and onlookers. For that matter, this category might include those who suffer because of their linkage to the invader, such as the invader's family members. But this principle does not mean that all harms are required. Adopted maxims must still delineate whether a harm is requitable and, if so, the reach of permissible requitals. We may decide that some harms, such as those from crowd jostlings, are simply, in Coasean terms,²³⁷ the cost of living in the modern world, and thus are not wrongful. Once all the wrongful harms of each invadee have been allowably required, at least in principle, by private law remedies aimed at returning an invadee to her prior protected position, a residual concern centered on the

²³² Hampton, *An Expressive Theory of Retribution*, *supra* note 142, at 10.

²³³ "The type of behavior that counts as either respectful or insulting is a matter of social convention. What passes for acceptable conduct in New York will be regarded as outright rudeness in Iowa." *Id.* To give the point a communitarian grounding, "the notion of desert is at home only in the context of a community whose primary bond is a shared understanding both of the good for man and of the good of that community and where individuals identify their primary interests with reference to those goods." ALASDAIR MACINTYRE, *AFTER VIRTUE* 250 (3d ed. 2007). I would express this good mainly in terms of the security-liberty tradeoff.

²³⁴ For "essentially contestable concepts," see WILLIAM E. CONNOLLY, *THE TERMS OF POLITICAL DISCOURSE* 10–44 (3d ed. 1993); W.B. Gallie, *Essentially Contested Concepts*, 56 *PROC. ARISTOTELIAN SOC'Y* 167 (1956).

²³⁵ Cf. IMMANUEL KANT, *CRITIQUE OF PRACTICAL REASON* (1788), *reprinted in* *PRACTICAL PHILOSOPHY*, *supra* note 5, at 133, 268–69 [hereinafter KANT, *CRITIQUE OF PRACTICAL REASON*] ("[E]mployment of the faculty of judgment"). For elaboration and criticism, see Robert Hanna, *Kant's Theory of Judgment*, *STAN. ENCYCLOPEDIA PHIL.* (July 28, 2004), <http://plato.stanford.edu/entries/kant-judgment/>.

²³⁶ Frederick Schauer, *Legal Realism Untamed*, 91 *TEX. L. REV.* 749, 752–53 (2013).

²³⁷ Kuklin, *Constructing Autonomy*, *supra* note 1, at 393 n.60.

invader's conduct remains. She was disrespectful to the direct and indirect invadees by wrongfully invading their autonomy space. A criminal requital under notions of distributive justice may be an apt means to treat the invader's just deserts. This draws attention to the blameworthiness of the invader in the form of both responsibility and disrespect blameworthiness.

V. BLAMEWORTHINESS

Deontic blameworthiness has two foci. The first focus is responsibility blameworthiness, B_r , which reflects the invader's degree of responsibility for making her choice to act or refrain from acting.²³⁸ The second, disrespect blameworthiness, B_d , refers to the invader's mental state and conduct with respect to those who are put at risk by her act. In other words, the focus relates to the extent to which she violates her duty to other persons to respect their dignity.²³⁹ Despite the vagueness of the idea of blameworthiness, various key factors have been identified or advanced.²⁴⁰ Some of

²³⁸ *Id.* at 446.

²³⁹ "[T]he study of culpability is [a] poly-dimensional enterprise. Not only does it include considerations on *mens rea*, but it also involves considerations of personal responsibility." RYBERG, *supra* note 136, at 68. As Alexander analyzes it, "the two essential elements of culpable acts are the following: First, there is the defendant's subjective assessment of the risk of harm to others his act presents Second, there is the defendant's *reason for acting* in the face of the risk." Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 3 (1994) [hereinafter Alexander, *Crime and Culpability*]. In his explication, Alexander omits reference to coercive forces on the agent. *Id.* at 3–5. "Two basic elements determine an offender's degree of blameworthiness: the nature and seriousness of the harm caused or threatened by the crime and the offender's degree of culpability in committing the crime." Richard S. Frase, *Punishment Purposes*, 58 STAN. L. REV. 67, 73 (2005) (identifying several factors to culpability: intent, capacity, motives, "and, for multi-defendant crimes, the defendant's role in the offense . . .").

²⁴⁰ "Blameworthiness is not easy to define, but it would appear that a manageable approach would be to consider (1) the harm actually inflicted (or attempted) and (2) the mental state (culpability; *mens rea*) of the offender." SINGER, *supra* note 154, at 34. Fletcher's "General Framework of Retributive Punishment" recognizes various factors: "(1) the likelihood that the defendant's act will result in the violation of a protected legal interest and (2) the harm, if any, represented by this violation." George P. Fletcher, *The Recidivist Premium*, 1 CRIM. JUST. ETHICS 54, 56 (1982) [hereinafter Fletcher, *Recidivist Premium*]. Additional factors are the defendant's degree of responsibility, which has two dimensions, control and "the degree of awareness and knowledge." *Id.* at 56. Furthermore, there seem to be "two theories of desert that interweave in the analysis of just punishment," one stresses responsibility and the "other focuses on culpability" *Id.* at 56–57. "[I]f rationality [which "clearly ranges along a continuum"] is a criterion for responsibility, then responsibility, too, should in theory be a matter of degree which ranges along a continuum." Stephen J. Morse, *Diminished Capacity*, in ACTION AND VALUE IN CRIMINAL LAW 239, 249 (Stephen Shute et al. eds., 1993) [hereinafter Morse, *Diminished Capacity*]. "Responsibility or blameworthiness has two distinct dimensions and one presupposition that attaches to both. The presupposition is that any being who is held responsible must be sufficiently rational and autonomous to be a moral agent." Moore, *Prima Facie Moral Culpability*, *supra* note 59, at 319 (footnote omitted). "The first [dimension] is that one has done something morally wrong, something that violates one's moral obligations. . . . The second dimension of responsibility requires that one must have done such wrong *culpably*." *Id.*

the factors tend to decrease the invader's relative blameworthiness (e.g., unforeseeability, duress), while others tend to increase it (e.g., malice, contempt). For any one wrongful action, there may be a combination of blameworthiness elements at work that, overall, either exacerbates or moderates the blameworthiness in relation to the threshold for wrongfulness.²⁴¹

A. Responsibility Blameworthiness, B_r

As Aristotle instructs, for an agent to be responsible for her conduct,²⁴² the agent's choice must largely be free of avoidable ignorance, B_{ri}, and coercion, B_{rc}.²⁴³ The factors of ignorance and coercion may be independent of one another, as where an actor is fully aware of the risks of her conduct but is coerced to act by a gun to her head, or where the risks are entirely unknown to her while she otherwise acts freely. Ignorance may have sources that are external (e.g., fraud, misleading bargain frames) or, as uncovered by cognitive and other sciences, internal (e.g., salience distortion, cognitive dissonance).²⁴⁴ An important aspect of ignorance is the degree of foreseeability of the potential consequences of considered actions.²⁴⁵ The more foreseeable to her a risk of harm to others is, the more the agent is in a position to rationally choose (i.e., consent to, of sorts) her conduct,²⁴⁶ and thus the more that agent

²⁴¹ For additional discussion of these two blameworthiness foci, see Kuklin, *Constructing Autonomy*, *supra* note 1, at 446–57; Kuklin, *The Labyrinth of Blameworthiness*, *supra* note 46, at 175.

²⁴² “Active responsibility theories that relate a person to a harm via the properties of voluntariness, intentionality, causation, knowledge (absence of mistake), freedom (absence of compulsion), and rationality (absence of insanity, infancy) . . . are the theories long enshrined in Anglo-American criminal law.” MOORE, PLACING BLAME, *supra* note 170, at 40. “[T]hey all require some kind of action by a person before that person may be held responsible.” *Id.* (discussing “four distinct views of responsibility here” further).

²⁴³ See ARISTOTLE, *supra* note 43, bk. III, ch. 1, at 964.

Behind the voluntary act requirement of criminal law “is the idea that no one is blameworthy for his acts if his rational agency is sufficiently impaired at the time. The impairment might affect his will . . . [o]r it might affect his rationality” Alexander, *Philosophy of Criminal Law*, *supra* note 127, at 825. “It seems to be a logical rather than a normative matter that we can be morally responsible (i.e. properly held responsible) only for that over which we had or could have some control.” DUFF, ANSWERING FOR CRIME, *supra* note 89, at 58; see, e.g., CORLETT, RESPONSIBILITY AND PUNISHMENT, *supra* note 58, at 4–5; FISCHER & RAVIZZA, *supra* note 159, at 12; Peter Arenella, *Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability*, 39 UCLA L. REV. 1511, 1519 (1992); Holly Smith, *Culpable Ignorance*, 92 PHIL. REV. 543, 548–54 (1983).

²⁴⁴ Kuklin, *Constructing Autonomy*, *supra* note 1, at 399–400.

²⁴⁵ *Id.*

²⁴⁶ “Most crime has always involved some degree of conscious or unconscious risk-taking.” PAT O’MALLEY, CRIME AND RISK 53 (2010). To account for liability for omissions, Husak “submit[s] that the presence or absence of control, and not the presence or absence of choice or action, establishes the boundaries of deserved punishment and responsibility.” Douglas N. Husak, *The Relevance of the Concept of Action to the Criminal Law*, 6 CRIM. L.F. 327, 340 (1995) (book review).

is responsible for her choice and the ensuing wrongful harm to invadees.²⁴⁷ Some commentators argue that every general element of a tort accommodates foreseeability, and contract and criminal law also emphasize foreseeability.²⁴⁸ Coercion, like ignorance, also may have sources that are external (e.g., force, economic duress, necessity, barriers) and internal (e.g., addiction, irresistible impulse, starvation),²⁴⁹ as Kant notes.²⁵⁰ For example, insofar as an invader lacks resources prior to an autonomy

While the controversial doctrine of double effect may justify foreseeable harms, it generally does so by finding that persons are not being purposively harmed and circumstances allow for the harm. See *infra* text accompanying note 480.

²⁴⁷ Many fortuitous contingencies affect the direct invadee's and the public's reactive harms, including: the amount of publicity about the invasion, which may turn on the happenstance of the news cycle, other concurrent newsworthy events, the identity of the direct invadee, and so forth; the size of the public within the reasonable spheres of the risk of future wrongful risk; whether the invasion is one in a series by the invader or part of a crime wave; the socio-economic class of the invadee, and even the invader; ad infinitum. Some of these contingencies are foreseeable to some degree. When, then, are they declared wrongful? Some of the reactive harms (e.g., race-based) fail to clear the deontic filter.

A fortuity may be beneficial to an invader, as where an invasion is never made known either to the direct invadee (e.g., an undiscovered theft) or the general public (e.g., the direct invadee does not reveal it). Does the invader's foresight of these contingencies make her conduct more blameworthy? She believes she will "get away" with her invasion. Her confidence in escaping punishment would seem to increase the risk of future wrongful risks.

²⁴⁸ See, e.g., E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1204 (1970); Kimberly Kessler Ferzan, *The Unsolved Mysteries of Causation and Responsibility*, 42 RUTGERS L.J. 347, 349 (2011); Kuklin, *Private Requitals*, *supra* note 2, at 987–89; see generally Hurd & Moore, *supra* note 210, at 336; David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1290 (2009); Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247, 1248–49 (2009); Benjamin C. Zipursky, *The Many Faces of Foreseeability*, 10 KAN. J. L. & PUB. POL'Y 156, 156–57 (2000).

²⁴⁹ For example, we do not see it as disrespectful conduct when a lost mountain hiker caught in an unexpected blizzard breaks into another's cabin, consumes the food there, and leaves behind an apology on her business card. See Hampton, *Correcting Harms*, *supra* note 112, at 1686 ("[A] starving man's theft of food . . . carries no insult, and therefore should not be punished."). Even Barnett, the libertarian, would allow the hiker to break in to save herself, though she would be liable for damages. RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 170–72 (1998) [hereinafter BARNETT, *STRUCTURE OF LIBERTY*]. Owing to necessity, the Model Penal Code rejects the criminality of the conduct. See DUBBER, *CRIMINAL LAW*, *supra* note 121, at 197.

²⁵⁰ "The degree of responsibility depends on the degree of freedom. . . . The greater the obstacles to action which we must overcome, the more accountable we are for the action; the less an action results from our freedom, the less responsible we are for it." KANT, *LECTURES*, *supra* note 163, at 62–63. "If, for instance, a starving man steals something from the dining-room, the degree of his responsibility is diminished by the fact that it would have required great self-restraint for him not to do it." *Id.* at 63; see KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 382. "[T]he violence of passion, or temptation, may sometimes alleviate a crime; as theft, in case of hunger, is far more worthy of compassion, than when committed through avarice, or to supply one in luxurious excesses." 4 WILLIAM BLACKSTONE, *COMMENTARIES* *15. Taking this tack, Morse observes: "[c]ontrary to my earlier writing on this subject, I now believe

invasion seeking basic necessities,²⁵¹ and thus has reduced opportunities for, say, legitimate economic activities, the more others may believe that coercive factors influenced her conduct.²⁵²

As suggested by these observations, unavoidable ignorance and coercion may interrelate in complex ways.²⁵³ Both ignorance and coercion have scalar qualities,²⁵⁴ so we must determine at what degree the freedom from them suffices to hold an agent responsible. For purposes of retribution, once past the threshold, the reasonable observer judges the extent to which the heightened satisfaction of the requisites to responsibility also reflects the invader's greater disrespect of the persons put at risk by her conduct.²⁵⁵

A closer look at the scalar qualities of ignorance and coercion may be edifying. Under idealized standards, let us suppose that for an agent who is perfectly informed and capable of rationally processing information, $B_{ri} = 1.0$, and for an agent who is perfectly free of every form of coercion, $B_{rc} = 1.0$. Hence, B_{ri} and B_{rc} range from 0.0 to 1.0. At some point, the agent is sufficiently blameless to be considered not responsible for her harm to the invadee, at which point the harm may be considered not wrongful.²⁵⁶ For the reasonable person of existing law, both aspects of

that the law should adopt a generic partial excusing condition, 'Guilty But Partially Responsible,' based on diminished rationality [owing to coercive impairments]." Stephen J. Morse, *Rationality and Responsibility*, 74 S. CAL. L. REV. 251, 265 (2000) (footnotes omitted); see *id.* at 265–66.

²⁵¹ For a discussion of the role of enablements in a deontic regime, see Kuklin, *Constructing Autonomy*, *supra* note 1, at 404–06.

²⁵² A \$1000 theft by a rich person seems more blameworthy than such a theft by a poor person. In Boonin's view, it is wrong to assume

that if a rich offender and a middle-class offender commit identical offenses, then the amount of harm they cause is identical. This assumption is mistaken because the objective insecurity and subjective anxiety caused to others will be much greater if the offender is rich than if he is of average means.

BOONIN, *supra* note 133, at 260 (citing Stephen Wilkinson, *Restitution Without Punishment: Is It Enough to Make Criminals Pay?*, in PUNISHMENT, EXCUSES AND MORAL DEVELOPMENT 35, 50 (Henry Benedict Tam ed., 1996)).

²⁵³ See Kuklin, *Constructing Autonomy*, *supra* note 1, at 396–401. I examine these complexities in great detail in Kuklin, *The Labyrinth of Blameworthiness*, *supra* note 46, at 173.

²⁵⁴ See Kuklin, *The Labyrinth of Blameworthiness*, *supra* note 46, at 173.

²⁵⁵ "The concept of responsibility involves being *appropriately responded to* in a certain way for a certain action. . . . The same point can be made more sharply with respect to blameworthiness." Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQ. L. 97, 122 (2008) [hereinafter Zipursky, *Two Dimensions of Responsibility*]. Our negative reactive attitudes toward a person's harmful conduct are moderated by knowledge of the person's shortfalls from fully responsible choice. See Strawson, *supra* note 159, at 64–67.

²⁵⁶ "In problematic cases . . . legal responsibility is something to be *decided*, not simply *discovered*." JOEL FEINBERG, *Problematic Responsibility in Law and Morals*, in DOING AND DESERVING, *supra* note 71, at 25, 27.

responsibility blameworthiness are satisfied somewhat short of the ideal, say, $B_{ri} \geq 0.5$ and $B_{rc} \geq 0.3$. This disparity in thresholds is supposed since existing law seems to be less sympathetic to coercion than to ignorance (e.g., unforeseeability). The minimum thresholds for the two aspects of responsibility blameworthiness may vary according to the type of conduct (e.g., battery versus the intentional infliction of emotional distress), whether the shortfalls stem from internal or external sources (e.g., irresistible impulse versus economic duress), whether the claim is criminal or civil, the type of harm in issue (e.g., physical versus dignitary harm), and other similar considerations.²⁵⁷ Furthermore, an agent who is more skilled or knowledgeable than the standard reasonable person or better able to resist coercive pressures (e.g., a hardened stoic) may be found more blameworthy for a wrongful harm than an ordinary reasonable person, or may be found to have committed a harm that is wrongful because of her superior capabilities that would not be wrongful if done by the ordinary reasonable person. Because of her superior capabilities, the risk of harms may be more foreseeable and easier to avoid, perilous temptations may be easier to resist, and so forth. As we do for medical practitioners and other experts, we may hold her to a higher standard because, owing to her superior capabilities, doing so is not more personally demanding of her.²⁵⁸ A particular agent may have a complex combination of qualities that relate to responsibility blameworthiness. She may have, for example, superior knowledge, ordinary reasoning skills, and subnormal resistance to coercive pressures or temptations.

B. Disrespect Blameworthiness, B_d

Disrespect blameworthiness, B_d , centers on the degree of the invader's disrespectfulness toward an invadee at the time of the conduct in question. Under the categorical imperative, an agent must consider other persons as moral equals and must so treat them.²⁵⁹ Thus, as with responsibility blameworthiness, there are two aspects of disrespect blameworthiness: disrespectful attitude, B_{da} , and disrespectful treatment B_{dt} . In judging the first aspect of the invader's disrespectfulness, her superior attitude, the observer must gauge the invader's subjective mental state.²⁶⁰ This may require

In questioning how the law should "respond to justifiable claims for partial responsibility," Morse doubts that the law can "sensibly and even-handedly make fine judgments about morally relevant discrete, marginal differences in rationality and fear of dysphoria." Morse, *Diminished Capacity*, *supra* note 240, at 271. If such a judgment is to be made, it should be done by the jury "because it represents the community's moral judgment . . ." *Id.*

²⁵⁷ See Morse, *Diminished Capacity*, *supra* note 240, at 271.

²⁵⁸ See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 12 (AM. LAW INST. 2012); RESTATEMENT (SECOND) OF TORTS § 299A (AM. LAW INST. 1977).

²⁵⁹ See, e.g., HILL, JR., DIGNITY, *supra* note 130, at 55; ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 198 (1989); Allen Wood, *Humanity as End in Itself*, in 2 DEREK PARFIT, ON WHAT MATTERS 58, 62–63 (Samuel Scheffler ed., 2011); Kuklin, *Constructing Autonomy*, *supra* note 1, at 449–54; Dillon, *Respect*, *supra* note 200.

²⁶⁰ Kant holds that duties of respect are strict duties "classified according to the kinds of actions that would constitute violations of them: arrogance, defamation, and ridicule." WOOD, KANTIAN ETHICS, *supra* note 129, at 178 (citation omitted). While defamation and ridicule involve the failure to treat another person with respect, arrogance is a mental state that seems

complicated evaluations,²⁶¹ including the drawing of inferences from the invader's manifested conduct,²⁶² such as in the difference between recklessness and negligence.²⁶³ To what extent was the invader's conduct a product of, even motivated by, a sense of moral superiority to those put at risk by her conduct? What was her intention or her purpose?²⁶⁴ Was she indifferent to the risks to others, or did she believe other societal values outweighed the risks? Was the manifestation of disrespect a product of the invader's ignorance, inadvertence, or insensitivity?²⁶⁵ While foreseeability is an important factor in gauging responsibility blameworthiness, it also bears on disrespectfulness.²⁶⁶ The more an invader knows or has reason to know of the nature or extent of the negative impact on the invadee's autonomy space, or the harms that may well ensue, the greater the likely disrespectful mental state driving the conduct in question, *ceteris paribus*.²⁶⁷ Likewise, perhaps, in benefitting from an

independent of conduct. Loving paternalism appears independent of all three of Kant's specified forms of disrespect.

²⁶¹ As one example, suppose that an invader knows she could request, and get, a gift of a book from the invadee, but chooses to steal it from her instead. Would we say that the additional (psychic) payoff from the theft over the gift reflects heightened disrespect of the invadee? Do we consider whether the invader obtains a perceived benefit from the invasion? What if an invader rubs the invadee's nose in her harm, even if originally not a product of blameworthiness?

²⁶² Brudner defends a subjectivism that "avoids the excessive empiricism of which critics complain, incorporating as it does the standpoint of an ideal thinking Agent whose inferences from the empirical agent's choices are imputed to those choices." BRUDNER, *supra* note 63, at 59.

²⁶³ "The difference between negligence and recklessness is entirely a matter of attitude. Recklessness implies a conscious disregard of the risk; negligence requires neither awareness, nor disregard, of the risk." DUBBER, CRIMINAL LAW, *supra* note 121, at 76. Under negligence, "I should have been aware, but wasn't." *Id.* at 77.

²⁶⁴ Strawson "insist[s] on . . . the very great importance that we attach to the attitudes and intentions towards us of other human beings, and the great extent to which our personal feelings and reactions depend upon, or involve, our beliefs about these attitudes and intentions." Strawson, *supra* note 159, at 62.

²⁶⁵ "Jurisdictions should adopt aggravation doctrines [in criminal law] based on quality of contemplation or the opportunity for such." Kimberly Kessler Ferzan, *Plotting Premeditation's Demise*, 75 LAW & CONTEMP. PROBS. 83, 105 (2012) [hereinafter Ferzan, *Plotting Premeditation's Demise*] (discussing "enhanced decisionmaking"); see *id.* at 103–08.

²⁶⁶ *Id.*

²⁶⁷ "Under the risk-based paradigm . . . [c]ulpability would be a scalar function of the various harms the actor believed he was putting at risk, the degrees of risk of the various harms he believed his act was imposing, and his reason(s) for undertaking the act." Larry Alexander, *Duff on Attempts*, in CRIME, PUNISHMENT, AND RESPONSIBILITY: THE JURISPRUDENCE OF ANTONY DUFF 215, 237 (Rowan Cruft et al. eds., 2011) [hereinafter Alexander, *Duff on Attempts*]. "The magnitude of dignitary harms is also [along with the invader's (*A*) disregard of the invadee (*S*)] a function of the nature of legitimate interest on *S*'s part that *A* manifests himself as ready to abridge." PETER WESTEN, THE LOGIC OF CONSENT 149 (2004) [hereinafter WESTEN, LOGIC OF CONSENT]; see H.L.A. HART, *Intention and Punishment*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 125, at 113, 122 (opining that the difference between "direct and oblique intention" may be relevant to penalty judgments, though not conviction judgments); Adam Kolber, *The*

interchange that is disadvantageous to an invadee, the more the invader knows or has reason to know of the invadee's shortfalls from full responsibility—that is, the coercive forces on her and her relevant ignorance—the greater the disrespect blameworthiness, whether or not the invader is the source of these shortfalls (e.g., exploiting the invadee's lack of education).²⁶⁸ Knowledge of an invadee's unusual sensitivity may not affect compensation under tort law (e.g., noise nuisance), but it is relevant to judging the invader's disrespectful attitude and, for that matter, the second aspect of disrespectfulness, treatment, B_{dt}.

Knowingly denying a person's legal and moral rights to liberty or security is an obvious example of disrespectful treatment. Disrespectful treatment, however, may not correlate with disrespectful attitude, as disrespectful treatment requires an independent evaluation.²⁶⁹ For example, for paternalistic conduct driven by love for a susceptible invadee, an observer may judge that the invader was not (very) disrespectful even though she denied the invadee the freedom to choose for herself under the circumstances. By nonconsensually hiding the susceptible invadee's candy while she is on a taxing diet, for instance, the invader's disrespectful attitude may be minimal or nonexistent. Nevertheless, while the invader may have had a respectful attitude toward the invadee by considering her an equal ("I myself would prefer and benefit from this type of paternalism"), by denying her the freedom to choose whether to eat her own candy, the invader did not treat the paternalized invadee with (complete) respect.²⁷⁰ Yet, the invader was not using the paternalized person as a means only to her own ends.²⁷¹ In some overall sense, perhaps, the invader was respectful of the invadee.²⁷² As another instance, an observer may similarly view as minimally blameworthy, if at all, the invader who helps euthanize a rational, imploring invadee

Experiential Future of the Law, 60 EMORY L.J. 585, 627–31 (2011). Nonetheless, we must take into account such considerations as the doctrine of double effect. See *infra* text accompanying note 480.

²⁶⁸ See Kuklin, *Private Requitals*, *supra* note 2, at 1001–05.

²⁶⁹ *Id.*

²⁷⁰ Meyers identifies three components of respect, one subjective and two objective. "[T]hese three components can be at odds. One's respectful attitude may fail to find expression in one's conduct; one may act respectfully despite an indifferent or disrespectful attitude; one's respectful conduct may be addressed to an object unworthy of respect." Diana T. Meyers, *Self-Respect and Autonomy*, in DIGNITY, CHARACTER, AND SELF-RESPECT, *supra* note 80, at 218, 224.

²⁷¹ Respectful paternalistic behavior may be quite extreme, as where an agent imprisons an invadee against his will to save him from himself (e.g., drug addiction) or from others who have put him at risk (e.g., threat of mob hit). This conduct may be costly to the agent and without any personal benefit, as where the agent is ambivalent about the propriety of her conduct. We might conclude that beneficent paternalism is a dignitary harm (an objective insult, of sorts), but not disrespectfully blameworthy (a subjective insult) in that it was done for the purpose of, and succeeded in, advancing the net interests of the invadee. Still, however, the agent did not treat the invadee with unqualified respect since she denied him the freedom to choose for himself.

²⁷² Could we say that the respectful attitude toward the paternalized agent outweighed the disrespectful treatment that denied the agent immediate, free choice under the circumstances?

with strong grounds for her insistence. As for the malicious invader out "to get" the invadee, this is disrespect of the first order.²⁷³

As with responsibility blameworthiness, B_r , the two aspects of disrespect blameworthiness, B_{da} and B_{dt} , have scalar qualities, say, from 0.0 to 1.0.²⁷⁴ Regarding attitude, the disrespectfulness of an invader's mental state may vary greatly.²⁷⁵ Kant asserts that the evil mental state of a criminal makes him worse.²⁷⁶ Existing law recognizes a wide range of mental states as sufficient for requitals, either privately under corrective justice or publicly under retribution or distributive justice.²⁷⁷ Requitals may ensue from strict liability, inadvertence, negligence, recklessness, wantonness, intention, purposiveness, willfulness, and malice. The latter part of this list easily implies disrespect, but even strict liability may suggest a degree of disrespect under some particulars, as where substantial statistical risk to product users (e.g., of cars without available, inexpensive safety devices installed) is known or knowable to producers. Criminal law invokes conceptions of mens rea to identify degrees of blameworthy mental states.²⁷⁸ The Model Penal Code resorts to four categories: purpose, knowledge, recklessness, and negligence.²⁷⁹ Commentators debate the meaning and usefulness of these and other applied terms.²⁸⁰ A difficult deontic

²⁷³ Again, if the direct invadee or others suffer psychic and other harms from knowledge of the invader's ill-will, this is a matter for corrective justice. Protected harm, if any, is based on the invadee's reasonable reaction, generally not directly on the blameworthiness of the invader's conduct. Corrective justice usually establishes thresholds of blameworthiness, after which this element typically drops out. The doctrine of comparative negligence is an exception. See *supra* text accompanying notes 113–14.

²⁷⁴ For example, $B_d = 0.0$ in the ordinary, arms-length, fully negotiated contract, where the autonomy of both parties is fully respected during the contracting process, neither one being used as a means only to the other's ends. $B_d = 1.0$ where (bear with me) an invader tortures a baby for fun knowing that, and because, the parents, family, and others are looking on.

²⁷⁵ "The magnitude of dignitary injuries varies, depending upon the species of disregard an actor manifests." WESTEN, *LOGIC OF CONSENT*, *supra* note 267, at 149. Thus, Westen asserts that the manifested purpose or desire to harm another is a worse indignity than simply a willingness to harm, just as harm from indifference is worse than harm from inadvertence. *Id.* "Even very tiny risk-impositions can be reckless if imposed for insufficient or misanthropic reasons, just as very large risk-impositions can be nonculpable if supported by weighty reasons." Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CALIF. L. REV. 931, 934–35 (2000) [hereinafter Alexander, *Insufficient Concern*] (footnote omitted).

²⁷⁶ See KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 382.

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ See MODEL PENAL CODE § 2.02(2) (AM. LAW INST. 1962). "The states of mind found in tort law are deliberation, intention, and recklessness." Cane, *Retribution*, *supra* note 112, at 149 (providing explications). For tortious recklessness (willful or wanton conduct), see, for example, DOBBS, *supra* note 109, at 51; JOEL FEINBERG, *Sua Culpa, in DOING AND DESERVING*, *supra* note 71, at 187, 193.

²⁸⁰ "Criminal statutes have resorted to a bewildering variety of adjectives to characterize the mental states required by various offenses." LEO KATZ, *BAD ACTS AND GUILTY MINDS* 186 (1987) [hereinafter KATZ, *BAD ACTS*]. "Recently, drafters have tried to limit themselves to four basic terms: intention, knowledge, recklessness, and negligence. The meaning of these is superficially obvious. On closer inspection it becomes harder to grasp." *Id.* at 209. For a taste of the breadth and depth of

issue is whether the law should have strict liability crimes.²⁸¹ Some commentators insist not,²⁸² others find in such crimes an aspect of mens rea,²⁸³ or sufficient defendant control,²⁸⁴ and still others are satisfied with the justifiability of strict outcome responsibility.²⁸⁵

the debate, see, for example, ALEXANDER & FERZAN, CRIME AND CULPABILITY, *supra* note 85, at 23–85. “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, *Philosophy of Criminal Law*, *supra* note 127, at 828 (footnote omitted); see Alexander, *Insufficient Concern*, *supra* note 275, at 931. Despite the debate over the usefulness of delineated mental states, the studies of three researchers “show that people are able to make explicit distinctions about the states of mind of others that more or less correspond to legally relevant categories.” Pam A. Mueller et al., *When Does Knowledge Become Intent? Perceiving the Minds of Wrongdoers*, J. EMPIRICAL LEGAL STUD. 859, 859 (2012).

²⁸¹ “Whatever one might think of strict obligations of repair, punishment in the absence of fault is generally considered extremely difficult to justify. And the more severe the punishment, the more difficult is the justificatory task.” PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 109 (2002) [hereinafter CANE, RESPONSIBILITY IN LAW AND MORALITY]. Simons supports strict liability punishments, if not strict liability crimes. “Notwithstanding the demands of retributive desert, strict criminal liability is sometimes defensible when the strict liability pertains, not to whether conduct is to be criminalized at all, but to the seriousness of the actor’s crime.” Kenneth W. Simons, *Is Strict Criminal Liability in the Grading of Offences Consistent with Retributive Desert?*, 32 OXFORD J. LEGAL STUD. 445, 445 (2012) [hereinafter Simons, *Strict Criminal Liability*] (referring to “holistic culpability, attention to the degree of unjustifiability of the risk, and rough comparability in culpability.”).

²⁸² “As far back as the thirteenth century, St. Thomas Aquinas pronounced that ‘a man should never be condemned without fault of his own to an inflicitive punishment.’” Christopher, *supra* note 127, at 904–05 (citing THOMAS AQUINAS, SUMMA THEOLOGIAE II, part 2–2, quest. 108, 4th art.). “One important difference between tort and criminal law is that although a deontological account of tort can support an injurer’s genuine strict liability duty to a victim, a deontological account of criminal law does not support an injurer’s genuine strict liability duty.” Simons, *Deontology*, *supra* note 68, at 296. More generally, strict liability “may have its legal uses but seems irrational as a moral position.” THOMAS NAGEL, *Moral Luck*, in MORTAL QUESTIONS 24, 31 (1979); see generally PUNISHMENT AND RESPONSIBILITY, *supra* note 125.

²⁸³ See, e.g., HYMAN GROSS, A THEORY OF CRIMINAL JUSTICE 343, 346–47, 357–58 (1979); Richard A. Wasserstrom, *Strict Liability in the Criminal Law*, 12 STAN. L. REV. 731, 741–44 (1960); see generally DUFF, ANSWERING FOR CRIME, *supra* note 89, at 229–61; Kenneth W. Simons, *When Is Strict Criminal Liability Just?*, 87 J. CRIM. L. & CRIMINOLOGY 1075 (1997).

²⁸⁴ “I maintain that there is an interpretation of strict-liability offences possible which does not violate the retributivist principle of punishment.” SADURSKI, GIVING DESERT ITS DUE, *supra* note 56, at 241. “[E]ven in the strict-liability cases, the defendant must have had at least *some* control (minimal as it might be) over his action and some means of reducing the risk.” *Id.* at 243. “Presumably, an actor is given a fair chance to arrange her circumstances so as to avoid any call for performing the knowing, intentional acts forming the predicate for the strict liability crime in question.” R. George Wright, *The Progressive Logic of Criminal Responsibility and the Circumstances of the Most Deprived*, 43 CATH. U. L. REV. 459, 460 n.4 (1994). Likewise, regarding strict tort liability, “[h]owever difficult it may be to refrain from [such] a tort, it is virtually never practically impossible,” as by “opting out of the profession or activity” Hanoch Sheinman, *Tort Law and Corrective Justice*, 22 LAW & PHIL. 21, 56 (2003); see GROSS, *supra* note 283, at 346–47, 357–58.

²⁸⁵ Christopher argues “that retributivism justifies punishment under a standard of liability—an extreme form of absolute liability—in which not merely many, but *every*, innocent

Blameworthiness, I have observed, may play a role at two points. First, harm may require a threshold level of blameworthiness (e.g., negligence) for a particular autonomy space interference to be considered wrongful, an autonomy invasion. This relates to first-order, material maxims. Second, once a protected harm occurs, blameworthiness then may be a factor in measuring the legal response (e.g., extent of damages or penalty). This relates to second-order, requital maxims.²⁸⁶ Mens rea plays, perhaps, a role in both types of penal maxims.²⁸⁷

The harmed person's conduct, which is presumably a manifestation of her mental state, may also be relevant to the observer's calculus of the agent's disrespectfulness. Her mental state may make the agent's conduct (somewhat) justifiable, for example, as where she self-defensively reacts to the other person's threats or provocation. This takes us to justifications and its sibling, excuses.

C. Excuses and Justifications

One may analyze the defenses of excuse and justification as denials of blameworthiness under the analysis presented here.²⁸⁸ Excuses, such as duress,²⁸⁹ provocation,²⁹⁰ irresistible impulse, diminished capacity, insanity, and infancy, generally center on the negation or reduction of responsibility blameworthiness.²⁹¹ Moore's analysis of excuses exemplifies this. Examining excuses, he separates them

defendant would be convicted and punished." Christopher, *supra* note 127, at 908; see Ken Levy, *The Solution to the Problem of Outcome Luck: Why Harm Is Just as Punishable as the Wrongful Action that Causes It*, 24 LAW & PHIL. 263 (2005) (justification based on assumption of risk principles). For citations to those who accept and reject the retributive relevance of ensuing harms outside the actor's control, see *id.* at 267 n.7 ("Equal Punishment Argument"). For more on outcome responsibility and moral luck, see *infra* text accompanying notes 334–38.

²⁸⁶ That *lex talionis* does not consider blameworthiness is cause for complaint. Among other problems, *lex talionis* "suffers from the defect that it makes no allowance for the mental state of the criminal or for the circumstantial aspects of the crime. In short, it simply ignores the other major component of seriousness, namely, the criminal's culpability." RYBERG, *supra* note 136, at 68 (footnote omitted).

²⁸⁷ See, e.g., MODEL PENAL CODE § 210.6(3)–(4) (AM. LAW INST. 1962) (describing aggravating and mitigating circumstances for death penalty sentences); but see *infra* note 413.

²⁸⁸ "Think of justifications and excuses as having modes of culpability attached to their elements." DUBBER, CRIMINAL LAW, *supra* note 121, at 191; see *id.* at 249 (opining that perhaps the Code's common principle for justification and excuse is "the general, and unexplored, notion of blameworthiness"); see generally ALEXANDER & FERZAN, CRIME AND CULPABILITY, *supra* note 85, at 86–168 ("Defeaters of Culpability"). Fletcher and Moore see justification as negating wrongdoing, while excuse negates blameworthiness. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW, *supra* note 154, at 85; MOORE, PLACING BLAME, *supra* note 170, at 482–83.

²⁸⁹ For the confusions and complexities of the excuse of duress under the Model Penal Code, see DUBBER, CRIMINAL LAW, *supra* note 121, at 251–59; see generally Joshua Dressler, *Exegesis of the Law of Duress: Justifying the Excuse and Searching for Its Proper Limits*, 62 S. CAL. L. REV. 1331 (1989).

²⁹⁰ See DUBBER, CRIMINAL LAW, *supra* note 121, at 265–71. "Provocation is a partial, rather than a complete, excuse because it mitigates the actor's blameworthiness, rather than precluding it." *Id.* at 267.

²⁹¹ See, e.g., *id.* at 247–51.

into three sets: mislabeled (“called”) excuses, true excuses, and status excuses.²⁹² First, the set that are not true excuses “are simply ways of showing the absence of voluntary action . . . , intentionality . . . , or causation”²⁹³ “[T]rue excuses,” the second set, “are conditions of mistake . . . or of compulsion”²⁹⁴ Finally, Moore refers to the third set as “status excuses—infancy, insanity, perhaps involuntary intoxication.”²⁹⁵

Justifications, such as self-defense, largely spring from a denial of disrespect blameworthiness.²⁹⁶ For example, the key provision in the Model Penal Code, “Justification Generally: Choice of Evils,” begins, “[c]onduct that the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that: [it is a lesser evil and not otherwise excluded]”²⁹⁷ Conduct motivated by the necessity to protect oneself or another is not normally disrespectful of others harmed by the defensive response. As with excuses, however, creating rigid categories of justifications is questionable.²⁹⁸ Scholars have also questioned the distinctiveness of excuses versus justifications.²⁹⁹ But the bottom line for our purposes is the top line above: both excuses and justifications are denials, in one way or another, that the agent’s conduct was blameworthy.³⁰⁰

²⁹² Other commentators, on the other hand, have challenged the definitiveness of particular excuse categorizations. “The search for a unifying theory of excuses has been less productive, partly because different authors set out to rationalize different groups of defences (some including denials of capacity, others excluding them).” ASHWORTH, *PRINCIPLES OF CRIMINAL LAW*, *supra* note 155, at 235 (citing Peter Westen, *An Attitudinal Theory of Excuse*, 25 *LAW & PHIL.* 289, 300 (2006)). Wallace, for instance, analytically divides excuses “into four broad classes: inadvertence, mistake or accident; unintentional bodily movements; physical constraint; and coercion, necessity, and duress.” WALLACE, *supra* note 209, at 136 (footnote omitted).

²⁹³ MOORE, *PLACING BLAME*, *supra* note 170, at 42.

²⁹⁴ *Id.*

²⁹⁵ *Id.* (footnote omitted).

²⁹⁶ *See id.*

²⁹⁷ MODEL PENAL CODE § 3.02(1) (AM. LAW INST. 1962). “Necessity is the mother of all justifications [under the Model Penal Code]” DUBBER, *CRIMINAL LAW*, *supra* note 121, at 194.

²⁹⁸ *See supra* note 292 (noting excuses). “Yet the situations that may justify an actor in doing something otherwise criminal are so various that no set of specific justificatory defenses can describe them all—‘fact is richer than diction’, as one ordinary language philosopher once put the point.” MOORE, *PLACING BLAME*, *supra* note 170, at 675.

²⁹⁹ Duff contends that “needless confusion has been bred by attempts to fit all defences into a simple two-part schema of ‘justification’ and ‘excuse’.” DUFF, *ANSWERING FOR CRIME*, *supra* note 89, at 263–64. “With only a little legerdemain, you can turn any justification into an excuse (and vice versa).” KATZ, *BAD ACTS*, *supra* note 280, at 65 (following with examples). “All this fanciful arguing is not meant to deny that there is a tremendous difference between a justification and an excuse, one that’s a lot more profound than most others the law hangs its hat on.” *Id.* at 66.

³⁰⁰ KATZ, *BAD ACTS*, *supra* note 280, at 65–66.

D. Overall Blameworthiness

In some cases, the invader's disrespect blameworthiness cuts one way while her responsibility blameworthiness cuts the other way. More specifically, complicated differences and interconnections may exist among the four aspects of blameworthiness: B_{ri} , B_{rc} , B_{da} , and B_{dt} .³⁰¹ For instance, suppose an invader consciously acts with complete indifference to whether her conduct puts others at wrongful risk of harm, or, if she did know of the risk, she would act with malice toward potential invadees. This exacerbates her disrespect blameworthiness. At the same time, the invader is acting under partial economic coercion and is reasonably ignorant that her conduct actually will put another person at risk. This decreases her responsibility blameworthiness. These sources of blameworthiness offset one another to some degree.³⁰²

How these two components of blameworthiness are to be combined in an overall judgment of blameworthiness is not obvious.³⁰³ Suppose we measure each component on a scale of 0.0 to 1.0. Are they to be multiplied? That is, to simplify, $B = B_r \times B_d$. Or should we combine them in some other more complex manner, as by partial addition and partial multiplication depending on the particularities of the invasion? As a society, we must resolve this question in adopting detailed, retributive, requital maxims.³⁰⁴ Standing back, I think this scenario presents many reasonable possibilities that would satisfy the categorical imperative. Let us adopt one or more of them.

It is particularly troublesome to our objective observer if, after considering both the invader's responsibility and disrespect blameworthiness, she concludes that the invader is liable under private, corrective justice and adopted public sanctions much beyond her just deserts. The observer may be sympathetic to the invader who she perceives must unduly suffer for conduct that has been declared wrongful. Still, there is normally sympathy for the invadee who suffers from the invader's conduct.³⁰⁵ She did nothing to deserve her harms. Our observer prefers to see that, in the end, the invadee is not left to suffer and the invader is not made to suffer unduly. Both preferences may not be achieved at the same time.³⁰⁶ The two (relatively) innocent parties conundrum arises. Yes, the invadee should happily be returned to her *ex ante*

³⁰¹ *Id.*

³⁰² Deeper analysis would call for an explication of how the two components of blameworthiness relate to the wrongful harm of particular crimes. For example, Ryberg finds a "serious challenge which *mens rea* generates: the challenge of absolute comparison. . . . [W]hat exactly does it imply to say that a person is more culpable if a harm is caused intentionally than if it is the result of recklessness?" RYBERG, *supra* note 136, at 70.

³⁰³ "Here is what I mean by doing justice: Giving a wrongdoer punishment according to what he deserves—no more, no less—by taking account of all those factors that we, as a society, think are relevant in assessing personal blameworthiness." Robinson, *Virtues of Restorative Processes*, *supra* note 221, at 380 (footnote omitted).

³⁰⁴ "In so far as proportionalists accept that there are not one but several factors which affect the culpability of a criminal, it needs to be explained how these factors should be combined." RYBERG, *supra* note 136, at 76. Ryberg summarizes the problems of comparing and combining various aspects of culpability. *Id.* at 83–84.

³⁰⁵ See COLEMAN, RISKS AND WRONGS, *supra* note 66, at 303–28.

³⁰⁶ See *id.*

position, but one may not find quite right the fact that the invader is entirely responsible to return her to that point in light of the nature of the invader's blameworthiness and, perhaps, the extent of her civil and criminal liability to the particular invadee, other wrongfully harmed parties, and the state.³⁰⁷ Usual conceptions of corrective justice and retribution cannot resolve this quandary. Perhaps the state, dispenser of distributive justice, should provide a (partial) resolution.³⁰⁸

To further pursue this deep moral dilemma, recall that under existing legal doctrines blameworthiness plays a subordinate role in corrective justice.³⁰⁹ We may establish blameworthiness as a threshold requirement for protected harms, as in tortious negligence, but, even here the legally competent person physically or mentally incapable of completely satisfying the standard of the reasonable person may be liable for harms resulting from conduct for which she is not responsibility blameworthy in any significant material sense.³¹⁰ She is effectively strictly liable as in various explicit pockets of strict liability, such as products and enterprise liability.³¹¹ Once even a fully reasonable person is held liable for negligence, she may be responsible for harms unforeseeable to her, such as under the thin-skull rule and a conception of moral luck,³¹² in which case her responsibility for these unforeseeable harms falls short of Aristotle's requirement that responsible choices be substantially free of unavoidable ignorance.³¹³ Corrective justice here is driven by the aim to restore an invadee to her prior protected position irrespective of the invader's actual level of blameworthiness

³⁰⁷ Smith offers justifications. First, even if incapable of complying with the norm, the injurer is a beneficiary of a society which observes such a norm; second, the victim's reliance on the norm will "falter" if she cannot recover for violations; and third, "the norm will lose some of its force and value if society tolerates violations—even violations committed by subjectively incompetent individuals." Steven D. Smith, *The Critics and the 'Crisis': A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 794 (1987).

³⁰⁸ Coleman's abandoned annulment theory of corrective justice may offer some guidance. COLEMAN, RISKS AND WRONGS, *supra* note 66, at 303–28 ("The Mixed Conception of Corrective Justice"). "[T]he core principle of [Coleman's theory] was the moral demand that wrongful losses be eliminated or annulled. . . . The annulment theory did not insist, however, that the annulment of the wrongful loss was necessarily the responsibility of the agent who had brought it about." Perry, *The Distributive Turn*, *supra* note 66, at 315 (citing Jules L. Coleman, *Tort Law and the Demands for Corrective Justice*, 67 IND. L.J. 349 (1992)). For criticism of Coleman's retreat from the annulment theory, see Gardner, *Corrective Justice*, *supra* note 67. "While Coleman recognizes that corrective justice is distinct from distributive justice, he does not, unlike some other contemporary corrective justice theorists, regard the two as *completely* independent of one another." Perry, *The Distributive Turn*, *supra* note 66, at 317 (referring to COLEMAN, *supra* note 66).

³⁰⁹ See, e.g., DOBBS, *supra* note 109, at 277–81.

³¹⁰ See, e.g., *id.*; OLIVER WENDELL HOLMES, THE COMMON LAW 86–89 (Mark D. Howe ed., 1963) (1881); PROSSER AND KEETON ON THE LAW OF TORTS, *supra* note 89, at 173–85. Regarding the diminished role of blameworthiness in contract and restitution law, see *supra* text accompanying notes 105–14.

³¹¹ See *supra* text accompanying notes 105–14.

³¹² On moral luck, see *infra* text accompanying notes 333–44.

³¹³ See generally MURPHY & HAMPTON, FORGIVENESS AND MERCY, *supra* note 179.

with respect to an established objective threshold.³¹⁴ Retribution, on the other hand, as grounded on distributive justice, should arguably always keep blameworthiness on the scales.³¹⁵ Consequently, the applications of these two forms of justice in particular cases may further lead to disquieting results. The criminally responsible invader, for example, may be tortiously liable for an enormous recovery for a minor offense much beyond her relative blameworthiness, her just deserts, in which case we are tempted to declare, “that’s not fair to the invader! She has suffered enough.”³¹⁶ Choosing to reduce her punishment for this reason is not a matter of distributive justice for penal behavior. Private liability, no matter how great, is not punishment and is not gauged by the degree of just deserts. Instead, any reduction in punishment is based on other normative considerations, such as mercy.³¹⁷

VI. RISK AND HARM

The identification of most harms is straightforward, like a punch in the nose. From intentional, nonconsensual touching to the disappointment of reasonable expectations, society supports a common view as to what constitutes a harm, a setback to interests. While room for debate exists on whether particular types of conduct produce harms at all, such as the creation of certain kinds of minimal, nuisance-like externalities, the main debates center on whether or when a recognized type of harm should be declared wrongful by means of an adopted maxim. When considering harms that derive from the imposition of a risk alone, the complexities grow, especially in the context of retributive punishment.³¹⁸ In the criminal realm, for instance, particularly knotty are questions about apt requitals for the wrongful harms, if any, from the risks ensuing from inchoate crimes, such as attempts, and from the risks relating to recidivism. Therefore, attention to some of the complexities relating to whether particular risks are harms, or should be declared wrongful harms, is necessary before one can focus on acceptable requitals for such identified harms.

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ An example may be where an invader commits a minor criminal battery and, because the invadee has a “thin skull,” causes enormous, unforeseeable harm.

³¹⁷ On mercy, see *id.*; Stephen P. Garvey, *Is It Wrong to Commute Death Row? Retribution, Atonement, and Mercy*, 82 N.C. L. REV. 1319 (2004); Dan Markel, *Against Mercy*, 88 MINN. L. REV. 1421 (2004). “With regard to crimes of *subjects* against one another it is absolutely not for [the sovereign] to exercise [the right to grant clemency]; for here failure to punish . . . is the greatest wrong against his subjects.” KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 477. “But that mercy by the state can *ever* be justified is unclear to the retributivist, at least the Kantian sort of retributivist who holds that punishment is both the state’s right and perfect duty of justice to punish wrongdoers.” Corlett, *Making Sense of Retributivism*, *supra* note 128, at 106 (footnote omitted).

³¹⁸ Some commentators have recommended that harms from risks that do not come to fruition should be punished according to the severity of the risk discounted by its likelihood of maturing at the time of the conduct. See Don E. Scheid, *Constructing a Theory of Punishment, Desert, and the Distribution of Punishments*, 10 CAN. J. L. & JURISPRUDENCE 441, 487 (1997) (identifying suggestions by Paul Robinson and Douglas Husak).

Scholars have not reached a consensus on whether an imposed risk is a wrongful harm in itself, or even a harm in itself.³¹⁹ Criminal prohibitions almost always require more than the creation of a risk. In traditional terms, both *actus reus* and *mens rea* must be met.³²⁰ Thus, criminal sanctions require risk “plus.”³²¹ Once this “plus” is satisfied, attention returns to whether the risk imposition should be sanctionable—that is, whether the risk imposition is wrongful.³²² As a prelude to this discussion, I must say a few words about the temporal relationship between a risk and the types of harms that may ensue.

Risks can be analyzed as falling into three temporal categories: past, present (occurrent), and future.³²³ Different categories may give rise to different types, manners, or degrees of harms. Harms from occurrent risks exist between the time a risk is created and the time at which the risk either comes to fruition or dissipates.³²⁴ When an individual throws a shoe at another person, an immediate, occurrent risk results, from which physical and other harms may eventuate.³²⁵ Many of the harms from the occurrent risk depend on the invadee’s knowledge of it at the time, such as those that arise from her reaction to the unfolding risk.³²⁶ But at least one harm does not require the invadee’s knowledge of the risk at the time. If third persons are aware of the occurrent risk to the invadee, they may perceive it as defamatory and as expressing the invader’s disrespect, which is a dignitary harm to the invadee.³²⁷

³¹⁹ I have briefly addressed this question elsewhere. See Kuklin, *Private Requitals*, *supra* note 2, at 1005–13 (“Risk Imposition”).

³²⁰ Dubber identifies “the Model Penal Code’s complete scheme of criminal liability: A person is criminally liable if he engages in 1. conduct that a. inflicts or threatens b. substantial harm to individual or public interests 2. without justification and 3. without excuse.” DUBBER, *CRIMINAL LAW*, *supra* note 121, at 29. “The Model Penal Code defines conduct as encompassing both [*actus reus* and *mens rea*]: conduct is ‘an action or omission and its accompanying state of mind.’” *Id.* at 30 (quoting MODEL PENAL CODE § 1.13(5) (AM. LAW INST. 1962)). “The analytic schemes of the Model Penal Code and the common law are more or less interchangeable . . .” *Id.* One commentator “argue[s] that this most basic organizing distinction is not coherent.” Paul H. Robinson, *Should the Criminal Law Abandon the Actus Reus—Mens Rea Distinction?*, in *ACTION AND VALUE IN CRIMINAL LAW*, *supra* note 240, at 187, 187. For the slipperiness of *mens rea*, see Kuklin, *Punishment*, *supra* note 112, at 58–72.

³²¹ “One of the usual reasons for requiring *mens rea* in the criminal law but not in private law is . . . that the seriousness of criminal sanctions means they should be directed only at the morally most heinous conduct.” WILLIAM LUCY, *PHILOSOPHY OF PRIVATE LAW* 392 (2007) (citation omitted).

³²² Alexander and Ferzan provide an answer: “An actor who culpably imposes a risk to others’ legally protected interests should be punished for that risk-imposition whether or not any harms to those interests result from the act.” Alexander & Ferzan, *Risk and Inchoate Crimes*, *supra* note 85, at 105.

³²³ See Kuklin, *Private Requitals*, *supra* note 2, at 1011–13.

³²⁴ *Id.*

³²⁵ We may wish to play this invasion in slow motion to give the invadee time to contemplate the meaning of the approaching shoe. Otherwise, some of the harms may be retrospective only.

³²⁶ *Id.*

³²⁷ *Id.*

Similar observations can be made about harms from past and future risks. As an invadee looks back at a risk, whether or not it ripened, all four types of harms may ensue from the retrospection, such as from reactive illness, work interruption, trauma, and insult. On the other hand, retrospection may reduce an invadee's continuing reactive harms, as where she comes to understand that the invader's conduct occurred with minimal responsibility or disrespectfulness. Turning to the future, another array of the four types of harms may arise from prospection. The invadee, whether or not she was the direct object of the past wrongful conduct, may suffer physical harm (e.g., illness from feelings of insecurity³²⁸), economic harm (e.g., expenditures for protective measures), psychic harm (e.g., anxiety), and dignitary harm (e.g., ongoing insult and defamation).³²⁹ The immediate wrongful harms from future wrongful risks often dominate the justification for the claims of the general public for retributions. For inchoate crimes, harms from past and occurrent risks may be particularly prominent. For recidivism considerations, present harms from future risks take center stage.

With the temporal categories of risks in place, let us turn to the harms from inchoate crimes,³³⁰ particularly attempts.³³¹ Once sufficiently targeted by an invader, the knowledge of the invadee and third parties of an ongoing or past inchoate crime may produce physical, economic, and psychic harms, but the dignitary harm may predominate. The inchoate crime manifests disrespect of the invadee, whether or not any risk ripens. At the very least, the inchoate crime produces a wrongful dignitary

³²⁸ That burglary victims suffer ongoing worries of vulnerability and other negative emotions, see Frederick M. Lawrence, *Comment: The Limits of Domination*, 76 B.U. L. REV. 361, 368 n.33 (1996) (citing many examples in the footnotes).

³²⁹ *Id.*

³³⁰ "An inchoate crime . . . is a crime that occurs while the actor still has the ability to choose to refrain from imposing the risk." Alexander & Ferzan, *Risk and Inchoate Crimes*, *supra* note 85, at 105. See Michael T. Cahill, *Attempt by Omission*, 94 IOWA L. REV. 1207, 1123–20 (2009) [hereinafter Cahill, *Attempt by Omission*] ("What Is an 'Inchoate' Crime?"). "Inchoate offenses not only create a risk of harm, they are harms in themselves. Thus the debate surrounding inchoate offenses . . . focus[es] . . . on whether the harm from inchoate offenses is substantial enough to merit prohibition and punishment by the criminal law." Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 269 (1975). Regarding an unsuccessful attempted crime, "even when no one is made aware of the failed attempt, a would-be offender does cause wrongful harm to his intended victim. He does so by exposing his victim to a risk of harm." BOONIN, *supra* note 133, at 251 (footnote omitted). I would also say that he causes a dignitary harm, at least. Not all commentators note or agree with my dignitary harm analysis. Cf. Andrew Ashworth, *Criminal Attempts and the Role of Resulting Harm Under the Code, and in the Common Law*, 19 RUTGERS L.J. 725, 727 (1988) [hereinafter Ashworth, *Criminal Attempts*]; Cahill, *supra* 330, at 1209; Epstein, *supra* note 68, at 17; Heidi M. Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157 (1994).

³³¹ "The Model Penal Code . . . has a large number of substantive offences defined in the inchoate mode—for example, assault, false alarms, indecent exposure, forgery, deceptive business practices, self-abortion, perjury, hindering apprehension, disrupting meetings, and many bribery offences." Ashworth, *Criminal Attempts*, *supra* note 330, at 765 (footnotes omitted). While the Model Penal Code lists the four "inchoate offenses" of attempt, conspiracy, solicitation, and possession, it is the inchoate offense of attempt that is of particular interest in our context. See DUBBER, *CRIMINAL LAW*, *supra* note 121, at 141.

harm.³³² At some point, we may adopt maxims under corrective justice to grant invadees private requitals for some or all of the four types of ensuing harms, more so as the relative administrative costs diminish. We might even grant the state standing to bring suit on behalf of the harmed public, as in the public nuisance context.

The centrality of the two components of blameworthiness to the conception of retribution that I champion implies that punishment for attempts and other inchoate crimes should not turn on whether they are successful.³³³ Whether the individuals succeed in executing these crimes is often a matter of moral luck.³³⁴ In the debate over moral luck, a Kantian would likely come down on the side that believes consequences outside the reasonable foreseeability or control of an actor should not count against

³³² “[B]ecause the magnitude of dignitary harms is a function of the readiness of a person to act with *mens rea*, it does not depend upon whether *A* commits a completed crime or attempts to commit a completed crime.” WESTEN, *LOGIC OF CONSENT*, *supra* note 267, at 149. When the agent’s conduct has not yet focused on a specific invadee or an identifiable group of potential invadees, the dignitary harm to any one individual may be minimal, perhaps not wrongful with respect to that individual. Here, the state, as in public nuisance, has a role to play to protect against these diffuse harms.

³³³ “When an actor knowingly risks harm to others, she manifests her respect (or lack thereof) for others and their interests. In our view, this theory of culpability sets forth not only the necessary conditions for blameworthiness and punishment but also the sufficient conditions.” ALEXANDER & FERZAN, *CRIME AND CULPABILITY*, *supra* note 85, at 171 (disagreeing with the current law insofar as it considers resulting harm as a factor in deserved punishment). See Alexander, *Crime and Culpability*, *supra* note 239, at 3. The Model Penal Code “propos[es] that with one exception punishments for attempts should be equal to those for the completed crime attempted.” Michael S. Moore, *The Independent Moral Significance of Wrongdoing*, 5 J. CONTEMP. LEGAL ISSUES 237, 239 (1994) (citing MODEL PENAL CODE § 5.05(1) (AM. LAW INST. 1962)). “Since then many criminal law theoreticians who have addressed the issue have concurred” *Id.* (identifying twelve concurring theoreticians). A thirteenth theoretician argues, “[t]he result of one’s completed attempts—whether it turns out to be a successful crime—is out of one’s control once one has completed the attempt. [The outcome is a matter of luck.] Luck cannot affect culpability. And culpability is all that affects negative desert.” Alexander, *Philosophy of Criminal Law*, *supra* note 127, at 834. Moore “think[s] the standard educated view to be mistaken.” Moore, *supra* at 240. In Moore’s view, “culpability and wrongdoing are two independent desert-bases—and the only two, at that [E]ach is an independent determinant of how much punishment an offender deserves, given the presence of the other.” *Id.* at 237. For commentators who believe that attempts should normally be punished less than completed crimes, see, for example, ANTONY DUFF, *CRIMINAL ATTEMPTS* 350–54, 398 (1996); FLETCHER, *RETHINKING CRIMINAL LAW*, *supra* note 211, at 362, 472–81; see GROSS, *supra* note 283, at 430–34; Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 963–64 (2003). My prior view put me in this latter camp. See Kuklin, *Punishment*, *supra* note 112, at 77–79. “Desert . . . contains within itself internally contradictory values: the question whether an attempt truly deserves less punishment because it caused no harm generates the subcategories of harm-retributivism and intent-retributivism.” Marc O. DeGirolami, *The Choice of Evils and the Collisions of Theory*, in *RETRIBUTIVISM*, *supra* note 127, at 192, 201.

³³⁴ Broadly speaking, the moral luck principle “provides that whatever culpability an actor displays in act *A*—intention, knowledge, recklessness, negligence, strict liability—that actor deserves greater censure or punishment if *A* results in consequence *B* or occurs in circumstance *C* (even though whether *B* or *C* occurs is ‘fortuitous’ in the relevant sense).” Simons, *Strict Criminal Liability*, *supra* note 281, at 459. “Retributivists who support increased punishment due to moral luck have said very little about how large that increase should be” *Id.*

her in a deontic regime.³³⁵ She *is not* disrespectful to those put at risk by her conduct when she cannot reasonably control or foresee the relevant consequences of the conduct.³³⁶ Her reasons for acting cannot fairly weigh in the unforeseeable or uncontrollable.³³⁷ She *is* disrespectful to those put at substantial risk when she can reasonably control and foresee the relevant consequences of her risky conduct.³³⁸ For

³³⁵ “Kant believed that good or bad luck should influence neither our moral judgment of a person and his actions, nor his moral assessment of himself.” NAGEL, *supra* note 282, at 24. “[T]he seriousness of the crime [is] determined by the amount of harm it generally causes and the degree to which people are disposed to commit it.” FEINBERG, *The Expressive Function of Punishment*, *supra* note 141, at 118.

Justice in punishment takes a broader perspective [than the thin skull rule of tort recoveries pursuant to corrective justice]. Because crime is considered a public as well as a private wrong, victims must be understood as representatives of the public as a whole. It is not the particular victim who matters, but the typical victim of homicide, rape, or mugging.

FLETCHER, *GRAMMAR OF CRIMINAL LAW*, *supra* note 88, at 261 (footnote omitted). For considerations of moral luck in criminal law, see, for example, ASHWORTH, *PRINCIPLES OF CRIMINAL LAW*, *supra* note 155, at 77–78; CANE, *RESPONSIBILITY IN LAW AND MORALITY*, *supra* note 281, at 65–78; TONY HONORÉ, *Responsibility and Luck. The Moral Basis of Strict Liability*, in *RESPONSIBILITY AND FAULT* 14 (1999); NAGEL, *supra* note 282, at 31; Cane, *Retribution*, *supra* note 112, at 141; David Enoch & Andrei Marmor, *The Case Against Moral Luck*, 26 *LAW & PHIL.* 405, 406 (2007); Goldberg & Zipursky, *Tort Law and Moral Luck*, *supra* note 64, at 1123; Stephen J. Morse, *Reasons, Results, and Criminal Responsibility*, 2004 *U. ILL. L. REV.* 363; Norvin Richards, *Luck and Desert*, 95 *MIND* 198 (1986); Zipursky, *Two Dimensions of Responsibility*, *supra* note 255. Some commentators are not unduly troubled by moral luck. See, e.g., TONY HONORÉ, *Introduction*, in *RESPONSIBILITY AND FAULT*, *supra*, at 1, 9; Cane, *Retribution*, *supra* note 112, at 142 (“[T]aking responsibility for conduct and outcomes, even those outside our control, is essential to having a sense of ourselves as moral agents rather than mere victims of fate.”); Nicola Lacey, *Book Review* (reviewing ALEXANDER & FERZAN, *CRIME AND CULPABILITY*, *supra* note 85), 121 *ETHICS* 633, 636 (2011). Zipursky estimates “that there is substantially greater support among leading criminal theorists for the view that an asymmetry in punishment based on whether a crime is an unsuccessful attempt, as opposed to a successful attempt, is indefensible than there is for the view that a completion asymmetry is defensible.” Zipursky, *Two Dimensions of Responsibility*, *supra* note 255, at 107 (emphasis omitted) (footnote omitted).

³³⁶ Arthur Ripstein, *Philosophy of Tort Law*, in *OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY LAW*, *supra* note 127, at 656, 664.

³³⁷ “The requirement that the class of plaintiffs and type of injuries be foreseeable reflects the law’s role in articulating standards of conduct. Those standards can only guide conduct if they tell people what to do, and no standard can tell people to avoid an unforeseeable consequence.” *Id.* at 663. “The intuitive idea is straightforward: you are only answerable for, and so potentially liable for, the consequences of your acts if it makes sense to include those consequences among your deeds.” *Id.* at 664; see, e.g., DOBBS, *supra* note 109, at 277.

³³⁸ “[F]or *completed attempts* at least, attempts are essentially mental crimes, constituted by the beliefs and desires of the attempter.” Alexander, *Duff on Attempts*, *supra* note 267, at 217. In discussing attempts versus completed offenses, Fletcher notes, “[t]he culpability-centered theory focuses exclusively on the actor who has formulated a criminal intent and has started to act upon it.” FLETCHER, *BASIC CONCEPTS OF CRIMINAL LAW*, *supra* note 154, at 173. “The harm-centered conception of crime focuses on the victim. The evil of the offense lies . . . in bringing

corrective justice, on the other hand, we may be more expansive in holding an agent liable for harms to others from such risks.³³⁹ Even when the agent is minimally blameworthy, the invadee usually is even more relatively free of blameworthiness.³⁴⁰ Under current legal principles, the aim of corrective justice—to restore the invadee’s prior protected condition once the invader meets a threshold for liability—overwhelms the concern for the degree of the invader’s responsibility and disrespect blameworthiness.³⁴¹ The “two innocent persons” principle, among others, also obtrudes, as well as welfarist considerations such as cost internalization, risk avoidance, loss spreading, and moral hazard.³⁴² Proposals to account for the invader’s relative blameworthiness in measuring requitals under corrective justice generally have been rejected.³⁴³ Doctrines of comparative negligence are an exception.³⁴⁴

Let us turn to the nature of the harms from the prospect of recidivism.³⁴⁵ One can characterize these harms as stemming from a present risk of a future wrongful risk.³⁴⁶

about harm to a concrete individual.” *Id.* at 174. “[T]he basic philosophical tensions in the law of attempts have yet to find a proper resolution.” *Id.* at 181; *see generally* ALEXANDER & FERZAN, CRIME AND CULPABILITY, *supra* note 85, at 197–225 (“When Are Inchoate Crimes Culpable and Why?”).

³³⁹ NEIL MACCORMICK, *The Obligation of Reparation*, in LEGAL RIGHT AND SOCIAL DEMOCRACY 212, 214 (1982).

³⁴⁰ MacCormick struggles with the notion that a blameless invader must compensate the invadee. Though the invadee, since she did not trigger the loss, has a comparative desert claim against the invader, this is a thin, troublesome reed. *Id.* The twists from doctrines of comparative negligence complicate this statement.

³⁴¹ Kuklin, *Constructing Autonomy*, *supra* note 1, at 382–83.

³⁴² *See generally* BAILEY KUKLIN & JEFFREY W. STEMPER, FOUNDATIONS OF THE LAW 36–42 (1994) [hereinafter KUKLIN & STEMPER, FOUNDATIONS OF THE LAW].

³⁴³ *Id.*

³⁴⁴ *See supra* text accompanying note 114.

³⁴⁵ “What proportionalists who defend the importance of prior record will have to assert is that previous convictions affect either the harm or the culpability of the current crime or that it in itself constitutes a further dimension contributing to the seriousness.” RYBERG, *supra* note 136, at 77.

³⁴⁶ Punishment based on the risk of future wrongful risk is akin to, but different from, punishment for character flaws. An invader with an exceedingly evil character who, during her criminally invasive action, becomes a quadriplegic is not much of a present risk of a future wrongful risk. Some commentators assert that character should be a factor in punishment, and some even advance it as a factor in describing the underlying crime. *See* FLETCHER, GRAMMAR OF CRIMINAL LAW, *supra* note 88, at 35–37. Fletcher distinguishes three systems of criminal law: (1) “act-based criminal law,” which centers on criminal acts; (2) “attitude-based criminal law,” which “focuses exclusively on the guilt or subjective disposition of the offender, regardless of any action that he or she has performed”; and (3) “actor-based criminal law,” where “punishment is inflicted on the suspect because of the kind of person he or she is (say, a dangerous offender) . . .” *Id.* at 27–28 (footnote omitted). “The argument for a criminal law based on acts, and not on guilt or character, is ultimately one of political theory.” *Id.* at 37 (footnote omitted). “If the basis [for retributive desert] is character, and only derivatively culpable choice, then chosen acts are only evidentiary, not constitutive of desert, and choice may be sufficient, but it is not necessary, for assessing desert.” ALEXANDER & FERZAN, CRIME

When proscribed by a substantive maxim, the present risk becomes a present wrongful risk of a future wrongful risk.³⁴⁷ In other words, an agent's conduct reveals that she currently is a substantial future risk to others.³⁴⁸ She might not be a risk to others at

AND CULPABILITY, *supra* note 85, at 16 (adopting the choice basis of desert). One commentator finds the character theory of culpability in the writings of Joel Feinberg, George Fletcher, Robert Nozick, Michael Bayles, Nicola Lacey, George Vuoso, Kyron Huigens, and Victor Todoros. See Ekow N. Yankah, *Good Guys and Bad Guys: Punishing Character, Equality and the Irrelevance of Moral Character to Criminal Punishment*, 25 CARDOZO L. REV. 1019, 1034–35 (2004). For a summary of objections punishing character, see *id.* at 1037; see generally BRUDNER, *supra* note 63, at 64–70 (discussing and critiquing “the character theory”). Sendor “suggest[s] several reasons that support the law’s principle that a defendant’s bad character should not be a criterion of guilt but that a defendant’s good or bad character should be a criterion of punishment (although not the only criterion of punishment).” Benjamin B. Sendor, *The Relevance of Conduct and Character to Guilt and Punishment*, 10 NOTRE DAME J. L. ETHICS & PUB. POL’Y 99, 101 (1996) (justifying this punishment view on the grounds of the risks of recidivism). The federal rules of evidence generally proscribe evidence of bad character in criminal cases. *E.g.*, FED. R. EVID. 404. “In general, our legal system eschews the role of character in criminal liability determinations, relying instead on an act-based system of inculcation.” Janice Nadler & Mary-Hunter M. McDonnell, *Moral Character, Motive, and the Psychology of Blame*, 97 CORNELL L. REV. 255, 260 (2012) (footnote omitted). Interestingly, experimental evidence suggests that “[o]ur emotional reactions are not only a product of the act and the outcome, but also a product of inferences about the general virtuousness of the person who performed the act that caused the harm.” Nadler, *Blaming as a Social Process*, *supra* note 159, at 28; see Nadler & McDonnell, *supra*, at 256 (noting, in the article’s abstract, that “three original experiments that suggest that an actor’s bad motive and bad moral character can increase not only perceived blame and responsibility but also perceive causal influence and intentionality”).

For a character theory of damages for contract breach, see Bar-Gill & Ben-Shahar, *supra* note 106, at 174. These commentators argue for “supercompensatory damages for willful breach” “Willful breach . . . reveals information about the ‘true nature’ of the breaching party—that he is more likely than average to be a ‘nasty’ type who readily chisels and acts in dishonest ways, and may have acted in other self-serving, counterproductive ways that went undetected and unpunished.” *Id.*

³⁴⁷ See Barbara H. Fried, *The Limits of a Nonconsequentialist Approach to Torts*, 18 LEGAL THEORY 231, 239 (2012) (“[I]mposition of risk and imposition of harm are not distinct forms of conduct. They are identical conduct viewed from an *ex ante* and *ex post* perspective, respectively.”). The law often protects against the harms of *ex ante* risks alone. See *id.* at 242–44. Among the deontic explanations for this protection are: “1. Harm Includes Expected Harm; . . . 2. Risk Creation Is a Completed Harm; . . . [and,] 3. Risk Creation Violates a Different Right from the Right to Be Free from Harm.” *Id.* at 244–48.

³⁴⁸ “An offender who has shown himself capable of committing an offence is, at least in the actuarial sense, more likely to commit another one than someone who has not. ‘Nothing predicts behaviour like behaviour’, even if its predictions are often wrong.” NIGEL WALKER, WHY PUNISH? 40 (1991) (footnotes omitted). “If our concern is with future dangerousness, we do not need the outcome harm to occur in order to know that the offender is dangerous.” Finkelstein, *supra* note 333, at 988 (discussing risky conduct that does materialize). Wright cites rather alarming statistics. One study showed that fifty-four percent of robbery suspects had prior convictions, eleven percent of which having had ten or more. R. George Wright, *Criminal Law and Sentencing: What Goes with Free Will?*, 5 DREXEL L. REV. 1, 28 (2012). About forty percent of released prisoners return to prison within three years. *Id.* In the case for preventing future crimes, Barnett invokes “the principle of self-defense, which permits persons to use force

the immediate moment, however, as where she is imprisoned or temporarily disabled. Depending on the degree and nature of the future risk, a retributive requital maxim may call for immediate or enhanced punishment.³⁴⁹ Some examples will point to the complexities of this position. If a person enters an illegal gambling contract with another individual, she is subject to punishment, but this conduct implies a limited wrongful risk to others in the future.³⁵⁰ She may be a recidivist, but the harm from this risk is attenuated since the criminal conduct was (presumably fully) consensual. The situation presents no necessary disrespect of the other party insofar as she knowingly consented.³⁵¹ On the other hand, the taste for illegal gambling may be statistically

to repel a threat of harm before the harm occurs.” Barnett, *Getting Even*, *supra* note 91, at 160; see BARNETT, *STRUCTURE OF LIBERTY*, *supra* note 249, at 190. I would say that a threat of harm is or produces a harm. If the predicted threats would prove incorrect, nonetheless Barnett “claim[s] that they have communicated a message that they will violate the rights of others and have assumed the risk that others might take their communication seriously.” Barnett, *Getting Even*, *supra* note 91, at 165. Others reason similarly. “Sometimes what actors do justifies acting on predictions of what they might do in the future. This is the framework of self-defense.” Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 146 (2011) [hereinafter Ferzan, *Beyond Crime and Commitment*] (footnote omitted). “The self-defense model demonstrates that there are grounds for substantially depriving responsible agents of their liberty to prevent their future crimes.” *Id.* at 146–47. “[I]f there is a false positive as to the necessity of stopping the culpable actor, it is the actor’s fault.” *Id.* at 175 (footnote omitted). “Any forward-looking form of legal regulation that aims to prevent future harm is generally justified by every person’s right not to suffer unjustifiable harm and the lack of a right to inflict such harm.” Stephen J. Morse, *Blame and Danger: An Essay on Preventive Detention*, 76 B.U. L. REV. 113, 116 (1996) [hereinafter Morse, *Blame and Danger*].

³⁴⁹ “[A]ctions at one time that create a risk of a later harm are culpable at the time the risk is first created (for instance, when one gets unjustifiably drunk).” Ferzan, *Plotting Premeditation’s Demise*, *supra* note 265, at 102 (citing ALEXANDER & FERZAN, *CRIME AND CULPABILITY*, *supra* note 85, ch. 7). One reason that criminal risks of harm create substantial risks of future wrongful risks is that conviction rates are so low. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 461 (1997) (stating that the average rate of conviction for listed offenses is 1.5%).

Fletcher finds standard retributive justifications for recidivist enhancements wanting. Fletcher, *Recidivist Premium*, *supra* note 240, at 57–59. He turns to utilitarianism for support. “However difficult it is to justify recidivist penalties under retributive criteria, they are a common practice. . . . If they are justified at all, they must be so under the utilitarian principle that social protection justifies the longer period of confinement of those who have shown themselves to be dangerous.” FLETCHER, *GRAMMAR OF CRIMINAL LAW*, *supra* note 88, at 237. The question of whether the nature of a prior crime should be considered when gauging future risks is more difficult than the question of whether the nature of the immediate crime should be so considered. Accounting for a prior crime introduces an element of double punishment.

³⁵⁰ Complications arise if we bring in possible claims of the criminal’s dependents and supporters and perhaps some select others.

³⁵¹ But victim consent is often not enough to fend off the criminal law. Consent to a tortious act, for example, may not preclude criminal prosecution for a parallel crime. See Vera Bergelson, *Consent to Harm*, 28 PACE L. REV. 101 (2008). This position may be partially a product of paternalism. See Gerald Dworkin, *Paternalism*, 56 THE MONIST 64, 66 (1972); Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 230 (1998). Does a criminal act

linked to other future criminal behavior, as where gambling habits or addictions lead to property crimes.³⁵² Similarly, entirely noncriminal behavior may be linked to future crimes. A person who drives recklessly on her own property may be more likely to later drive recklessly on public roads.³⁵³ For that matter, a person with a genetic disposition for risky behavior may be more likely to commit future crimes.³⁵⁴ We certainly would decline to penalize some of these present risks of future risks, but not because the risks are necessarily insubstantial. It is not because others do not react to the present risks in ways that are harmful to them as, for example, by inducing them to reallocate some of their resources toward protective measures.³⁵⁵ Rather, we decline to penalize some of these risks because other considerations, such as those behind the requirements of *actus reus* and *mens rea*, predominate in our weighing of the balance between liberty and security interests.³⁵⁶ Punishment for dangerousness alone challenges these fair limitations.³⁵⁷

against a consenting victim imply an increased risk that the actor will commit a comparable act against another, nonconsenting person? Might this turn on the nature of the criminal act?

³⁵² See M. Neil Browne et al., *The Role of Ethics in Regulatory Discourse: Can Market Failure Justify the Regulation of Casino Gaming?*, 78 NEB. L. REV. 37, 71–72, 71 n.141 (1999).

³⁵³ Coleman and Ripstein mention that one may violate her duty and “cross” her own boundary but, from luck, not cross another’s boundary (i.e., not harm anyone). Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 109 (1995). Duff makes a similar observation. DUFF, *ANSWERING FOR CRIME*, *supra* note 89, at 125. A future risk or harm empirically linked to the boundary crossing is a harm.

³⁵⁴ See, e.g., J.C. Barnes et al. *Examining the Genetic Underpinnings to Moffitt’s Developmental Taxonomy: A Behavioral Genetic Analysis*, 49 CRIMINOLOGY 923 (2011); Nita Farahany & William Bernert, *Behavioral Genetics in Criminal Cases: Past, Present, and Future*, 2 GENOMICS SOC’Y & POL’Y 72, 73–75 (2006); J. Tiihonen et al., *Genetic Background of Extreme Violent Behavior*, 20 MOLECULAR PSYCHIATRY 786 (2014); see generally Symposium, *The Impact of Behavioral Genetics on the Criminal Law*, 69 LAW & CONTEMP. PROBS. 1 (2006).

³⁵⁵ As always, we must judge the reactions to make sure they survive the deontic filter. For example, suppose a recidivist Christian-American commits a robbery and an equally recidivist Muslim-American commits a like robbery. Because of the fears generated by the 9/11 attack, the general public’s perceived future risk and reactive harms may be greater in the latter case. Even though the Muslim-American could have foreseen the increased reactive harms, she is not blameworthy for them, it would seem, because they ensue from the general public’s disrespectful attitude towards her. Likewise, an invader who randomly robs someone who unforeseeably turns out to be famous, resulting in greater publicity that increases the public’s perceived future risk and reactive harms, is not blameworthy for the heightened harms.

³⁵⁶ “In general, the first principle of just punishment—equal liberty, capacity, and opportunity—justifies the general *mens rea* requirement as a predicate of criminal liability.” David A.J. Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395, 1431 (1979).

³⁵⁷ Many commentators have discussed issues relating to punishment for dangerousness. See, e.g., ROBINSON, *DISTRIBUTIVE PRINCIPLES*, *supra* note 51, at 109–33; VON HIRSCH, *DOING JUSTICE*, *supra* note 51, at 87, 126; VON HIRSCH, *PAST OR FUTURE CRIMES*, *supra* note 141. R.A. Duff, *Dangerousness and Citizenship*, in *FUNDAMENTALS OF SENTENCING THEORY*, *supra* note 165, at 141, 150–63; Ferzan, *Beyond Crime and Commitment*, *supra* note 348, at 163; Hessick, *supra* note 142, at 1158–59; Norval Morris & Marc Miller, *Predictions of Dangerousness*, 6 CRIME & JUST. 1 (1985); Morse, *Blame and Danger*, *supra* note 348, at 113; Stephen J.

Tracing out this theme that particular conduct implies various statistical future risks leads to some curious points. For example, a person who kills her spouse, though highly disrespectful, may not be much of a recidivist risk.³⁵⁸ Likewise is an embezzler of an employer's assets.³⁵⁹ Once aware of this criminal conduct, others are in a good position to protect themselves by avoiding a financial relation with the criminal invader. This is not to say that the invader is less disposed to commit a future crime than other convicted criminals, but only that the opportunity to commit a comparable future crime is diminished owing to the specifics of the past one. To the contrary, a theft of a petty amount from a stranger, though less disrespectful of that person than the spouse killing or embezzlement, may signal greater future risks to others.³⁶⁰ All four types of harms may immediately ensue. Individually, we usually have more to fear from a thief than an embezzler. Another likely factor in the chances of recidivism is the attitude of the caught or punished criminal, such as remorse or defiance.³⁶¹

The present risk of a future risk, then, is itself a harm, or produces harms.³⁶² When the future risk is proscribed by a proper substantive maxim, the ensuing harms are thus wrongful.³⁶³ The associated moral or legal requital maxims pursuant to corrective justice may, as usual, vary greatly from extensive restraints (e.g., protections from prospective spousal abuse) to minimal apologies (e.g., for careless crowd jostling). My preferred conception of retribution, however, does not turn on wrongful harms alone. My conception turns on the blameworthiness of disrespectful conduct. Greater

Schulhofer, *Two Systems of Social Protection: Comments on the Civil-Criminal Distinction, with Particular Reference to Sexually Violent Predator Laws*, 7 J. CONTEMP. L. ISSUES 69 (1996). The Model Sentencing Act of 1962, "makes available, for the first time, a plan that allows the sentence to be determined by the defendant's make-up, his potential threat in the future, and other similar factors, with a minimum of variation according to the offense." MODEL SENTENCING ACT, Introduction 1, 2 (2d ed., 1972). "There is no reason to suppose . . . that either preventive detention or a deterrence theory of punishment must at some point violate the Kantian formula of ends." Wright, *Treating Persons as Ends in Themselves*, *supra* note 132, at 290.

³⁵⁸ "[S]econd degree murders are typically intra-family killers who are highly non-recidivist, so on incapacitation grounds this class of criminals should be punished least." MOORE, *PLACING BLAME*, *supra* note 170, at 29.

³⁵⁹ See, e.g., *id.*

³⁶⁰ Similarly, "a record of lesser offenses may be as good a predictor of recidivism as a record of more serious crimes. It may, in fact, be a better predictor—since lesser crimes typically are repetitive and serious crimes have low recidivism rates." Andrew von Hirsch, *Desert and Previous Convictions in Sentencing*, 65 MINN. L. REV. 591, 621 (1981) (footnote omitted).

³⁶¹ *Id.*

³⁶² The risk of a future wrongful risk applies to the private law also—for example, a future battery, a future conversion, or a future breach of contract. This is seen in the rationale for the contract right to reasonable assurances of a future promised performance. See U.C.C. § 2-609 (AM. LAW INST. & UNIF. LAW COMM'N 1977). Relatedly, that a present risk should be compensable without the occurrence of actual injury, see Glen O. Robinson, *Probabilistic Causation and Compensation for Tortious Risk*, 14 J. LEGAL STUD. 779 (1985). "The argument for recognizing risk as a sufficient basis for liability is as strong from corrective justice norms of fairness as from norms of efficiency." *Id.* at 789.

³⁶³ Kuklin, *Private Requitals*, *supra* note 2, at 1011–20.

wrongful harms imply greater disrespect, *ceteris paribus*. This observation brings the wrongful harm in through the side door. I reserve the front door for blameworthiness, disrespect, and indignity in themselves. For ordinary crimes, we have little trouble identifying the person who is substantially disrespected—the direct invadee. For criminal attempts and some other inchoate crimes, the substantially disrespected person is the targeted invadee or range of persons substantially at risk from the invader's conduct. Under responsibility blameworthiness, the greater the foreseeable, uncoerced, wrongful harm to the invadee, the greater is the implied disrespect.³⁶⁴ Under disrespect blameworthiness, the more egregious the invader's attitude and conduct with respect to the invadee's harmed dignity interest, the greater the disrespect.³⁶⁵ Bringing considerations of recidivism to bear, the question then arises, in what sense or degree is the present risk of a future risk to others disrespectful to them?

In addressing this issue regarding recidivism, I set aside responsibility blameworthiness. The context of recidivism does not produce unusual complexities for responsibility blameworthiness as it does for disrespect blameworthiness. Let us assume that the invader is completely free of coercion and perfectly informed of the risks her conduct raises with respect to her future wrongful risks to others. With this established, the question becomes, when is this future wrongful risk disrespectful to others? Well, future wrongful risk does knowingly harm others by inducing insecurity in them and causing an array of possible reactive responses, including ones to ameliorate that insecurity.³⁶⁶ But how disrespectful is that to another individual in the community? For a committed terrorist, very disrespectful. For a serial killer, seemingly somewhat less so. For an ordinary petty criminal, usually hardly at all. If she preys only on a specific small group or community, the disrespect to each member of that community is more significant because the risk to each specific one of them is accordingly greater. At some point, we should consider granting these individuals at risk relief under corrective justice. Yet enhancing this petty criminal's retributive punishment for recidivism seems odd if it simply is because she preys on a small community rather than a large one.³⁶⁷ I am not, however, the judge of this. Instead, we turn this question over to our reasonable observer, who reflects deontic social values in judging when, and how much, criminal standards have been abridged by disrespectful conduct. In some communities, disrespectful conduct of certain types to neighbors may be sufficiently worse than the same type of conduct directed at more distant persons so as to warrant a requal or a requal enhancement.³⁶⁸

³⁶⁴ *Id.* at 969–70.

³⁶⁵ *Id.* at 970–71.

³⁶⁶ *Id.* at 1013.

³⁶⁷ In some sense, the invader's net disrespect may be mathematically independent of the size of the community preyed upon. For instance, if a recidivist will commit one crime per month, the overall, total disrespect to community members is the same whether the community has one hundred or one thousand members insofar as the degree of disrespect considers the likelihood of any one person being victimized each month. In these and related situations, when deciding whether an agent's disrespect of others warrants a prohibiting maxim or requal, is her overall disrespect somehow aggregated or averaged?

³⁶⁸ Elsewhere I refer to this moral question as the boundary problem. See Bailey Kuklin, *The Morality of Evolutionarily Self-Interested Rescues*, 40 ARIZ. ST. L.J. 453, 489–504 (2008). For

In sum, then, we allow our reasonable observer to consider community values regarding future risks if the overarching deontic duty to respect the risk-producing actor is met. Here, the questions come down to when the actor's duty to respect others, and society's duty to respect the actor, support the justifiable standard of an adopted maxim and, when such legitimate standard is violated, the nature of the allowable requital. If the manifest disrespect to others from future risks to them is minimal, we may choose to reject a legal requital in favor of a moral one (e.g., an apology), or none at all.

VII. ASPECTS OF AUTONOMY SPACE AND INVASIONS

To reconnoiter, retributive punishment under deontic conceptions is gauged by disrespectfulness. Disrespectfulness stems from either a blameworthy attitude or conduct. It is manifested by an invasion of another's autonomy space, delineated by a complete and coherent set of substantive and requital maxims that is adopted to balance a moral agent's interests in both liberty and security.³⁶⁹ An invasion produces wrongful harms of one or more of the four types of harms. As already posited, the disrespect blameworthiness of an invader's conduct is partially judged by the foreseeability to her of the consequences of her invasion and her purposiveness—factors that also relate to responsibility blameworthiness.³⁷⁰

In light of this deontic foundation, in considering apt retributive requitals for invasions, the extent of the invasion of the invadee's autonomy space seems, at first glance, an important factor. The greater the invasion's foreseeable harms or disrespectful purposiveness, the greater the blameworthiness.³⁷¹ Examining more closely the notions of autonomy space and invasions of it is useful before going further with this intuition. In gauging these, one must first determine a baseline. To do this, I begin by looking at three aspects of autonomy space: hypothetical, formal, and material. I then turn to three types of effects from the loss of security or liberty from autonomy space invasions: operative, preferred, and felt losses.

Autonomy space comes in three types or modes.³⁷² The first is hypothetical autonomy space.³⁷³ This type is the autonomy space of a person with the capabilities of the ideally rational and responsible person.³⁷⁴ Not only is she presumed to have the capabilities to make fully rational choices, but also she is presumed to have the wherewithal to implement them.³⁷⁵ She has sufficient resources to engage fully in the activities of civic and private life, and the demands or limitations of an unjust social

utilitarians, this question amounts to issues over whose wellbeing is to count and how much. For Kantians, it directs attention to the generalization-universalization distinction. How general are maxims to be?

³⁶⁹ Kuklin, *Constructing Autonomy*, *supra* note 1, at 455.

³⁷⁰ *See id.* at 455.

³⁷¹ *Id.* at 446–47.

³⁷² *See id.* at 408–14 (“Types of Autonomy Space”).

³⁷³ *Id.* at 409.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

environment (e.g., undue prejudice) do not unreasonably constrain her.³⁷⁶ This is the default gauge of wrongful harms for invasions of public, political rights.³⁷⁷ Examples of such invasions are where an agent of the state wrongfully denies a private person the democratic right to run for office, or wrongfully denies her a driver's license. This type of invasion does not include violations of every established political or legal right.³⁷⁸ Denying a person the right to exercise a nondeontic law, such as one that requires or allows injurious discrimination on the basis of race or religion, is not cause for complaint that one's hypothetical autonomy space has been invaded.

Formal autonomy space is exemplified by a person with the capabilities of the law's reasonable person.³⁷⁹ She is presumed to have normal capabilities.³⁸⁰ Her resources and social environment suffice for usual quotidian activities.³⁸¹ For wrongful harms from interactions between private parties, this is the default baseline.³⁸² As noted before, this may differ from the standard for existing legal wrongdoing, under which some types of harms (e.g., pure economic harms) are not legally protected in various circumstances.³⁸³

Material autonomy space is that of the specific agent in question based on her actual capabilities, resources, and social environment.³⁸⁴ For example, the denial of an individual's protected freedom to buy a yacht is a material autonomy invasion for a sufficiently wealthy person who attempts to do so, but only a formal autonomy invasion for a person without the necessary resources. Likewise, the wrongful denial of a person's freedom to go to a movie is a material autonomy invasion for a person planning to do so, but only a formal invasion for a person with no such plans.

³⁷⁶ *Id.*

³⁷⁷ *See id.*

³⁷⁸ *See id.* at 410.

³⁷⁹ Sugden summarizes the social choice literature on the measurement of opportunity. One main approach "measures the 'pure quantity of choice' offered by a set of options, independently of preferences." Robert Sugden, *Opportunity as a Space for Individuality: Its Value and the Impossibility of Measuring It*, 113 *ETHICS* 783, 784 (2003). The other main approach aligns with the proposal here. It "assesses the extent of opportunity offered by a set of options by considering how well it caters to the range of 'potential' preferences that is in some sense normal, reasonable, or eligible for the relevant type of person." *Id.* Opportunity matters, in one view, because "being able to choose how to live one's life is an aspect of individual well-being in its own right." *Id.* at 785. Sugden concludes, "no measure of opportunity can fully capture the scope that a person has to develop and express his or her individuality." *Id.*

³⁸⁰ Kuklin, *Constructing Autonomy*, *supra* note 1, at 411.

³⁸¹ *Id.* at 410.

³⁸² *Id.*

³⁸³ Examples of harms not legally cognizable under existing law are economic harms within the economic loss doctrine, dignitary harms for wrongful imprisonment in some jurisdictions when the imprisonment is unknown to the invadee, dignitary harms from depriving a poor person of the protected freedom to buy a yacht or disallowing a rich person from buying a yacht who neither desires or attempts to, and breach of contract causing no legal damages.

³⁸⁴ Kuklin, *Constructing Autonomy*, *supra* note 1, at 412.

As some of these examples show, autonomy invasions may have differing types of impacts on specific individual or classes of agents. For particular agents and circumstances, autonomy space varies in its functionality.³⁸⁵ Accordingly, invasions may produce various kinds or flavors of realized harms. Psychic and dignitary harms are particularly contingent. To categorize some of these salient variations, we may distinguish operative, preferred, and felt losses of security or liberty.

Operative autonomy space is the part of a person's autonomy space that is actively used.³⁸⁶ It refers to her delineated range of liberty and security that is regularly exercised or needed.³⁸⁷ For example, the psychic harm from denying a person the liberty to ski likely is less for nonskiers than for regular skiers. Even if an agent has a strong desire to ski, she may have other, greater interests or duties that induce her not to do so, thus perhaps making the psychic harm from the wrongful denial accordingly less.

Preferred autonomy space refers to the conative value that a person ascribes to a particular aspect of her sphere of liberty and security, whether for present use (operative), future use, future options, or from principle alone.³⁸⁸ Persons vary in the

³⁸⁵ If freedom is thought of as a range of choice, "what would make one range of choices larger or smaller than another?" GORDLEY, *supra* note 178, at 27 (citing WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 113, at 73, 83). Gordley rejects two potential standards: "the number of alternatives among which a person might choose, whether he wants them or not"; and "the extent to which a person can choose what he wants since, then, the scope of each person's freedom would depend on the extent of his desires." *Id.* (citing WEINRIB, *THE IDEA OF PRIVATE LAW*, *supra* note 113, at 212–13).

³⁸⁶ See MARTIN RHONHEIMER, *NATURAL LAW AND PRACTICAL REASON* 219 (Gerald Malsbary trans., 2000).

³⁸⁷ Sen agrees with Hayek "in distinguishing between (1) the *derivative* importance of freedom (dependent only on its actual use) and (2) the *intrinsic* importance of freedom (in making us free to choose something we may or may not actually choose)." AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 292 (1999). Is a reduction of options always a loss of freedom? "[Gerald] Dworkin has, in an influential article, defended the view that the question 'Is more choice better than less?' may well be answered in the negative." RYBERG, *supra* note 136, at 174 (citing Gerald Dworkin, *Is More Choice Better than Less?*, in 7 *MIDWEST STUDIES IN PHILOSOPHY* 47 (Peter A. French et al. eds., 1982)). "[The question remains] whether the mere formal burden of reduced options is what we should focus on rather than some sort of experienced burden." *Id.* Ripstein observes that "[y]our entitlement to the means that you have does not depend upon the particular purposes to which you might wish to put them," including whether you leave them unused or even that they are useless. Arthur Ripstein, *As if It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1966–67 (2007). Nonetheless, the degree of the harms ensuing from an autonomy invasion may relate to whether the entitlement is operative.

³⁸⁸ See Kuklin, *Constructing Autonomy*, *supra* note 1, at 393. Kant argues that preventing a person from exercising a free choice that is undesired is a restriction on freedom nevertheless. See Louis-Philippe Hodgson, *Kant on the Right to Freedom: A Defense*, 120 ETHICS 791, 810–12 (2010). Hayek contends that the importance of a specific freedom is unrelated to the likelihood of it being exercised. "It might even be said that the less likely the opportunity to make use of freedom to do a particular thing, the more precious it will be for society as a whole." F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 31 (1960); AMARTYA SEN, *RATIONALITY AND FREEDOM* 604 (2002) [hereinafter SEN, *RATIONALITY AND FREEDOM*] (quoting HAYEK, *supra*, at 31). Dignitary and even psychic harms, at the least, likely are produced by the restriction of such an unused freedom.

strength of their preferences for particular liberties and securities, whether or not they are within reach. The desirability of a liberty or security may range from the agent's willingness to die for the interest on principle to total indifference, or even a preference that it not exist (e.g., access to certain irresistible, fatty treats). For example, an ascetic may be indifferent to the right to the material goods of life, while a hedonist feels quite to the contrary. Personality dispositions affect the desirability of aspects of autonomy space.³⁸⁹ An aggressive, egocentric person, for instance, may strongly desire the liberty to take advantage of other people's foibles while a passive, benevolent person does not. A person may presently wish to preserve an unused liberty or security for a future exercise (e.g., in case she wins the lottery) or simply out of principle. A person also must make room for the fact that preferences change, perhaps owing to changes in relevant capabilities, resources, or opportunities.³⁹⁰

Finally, felt autonomy space looks to the extent to which an autonomy invasion actually impacts on the invadee, psychically or otherwise.³⁹¹ Usually the protection against dignitary and psychic harms can account for many of these variations.³⁹² An insult of a stoic, for example, produces the same dignitary harm as it would to anyone else, but her psychic harm is muted. Likewise are some of the harms to those who have prior damage to their nervous system. Furthermore, studies have shown that extremely harmed (and benefitted) parties typically return to their prior state of

"Whether we would prefer to have one set of opportunities rather than another is an obvious question to ask in evaluating freedom, and in this evaluation, it would seem natural to include, *inter alia*, our preferences over those options." *Id.* at 596. Sen "argues for an interpretation of effective freedom as 'a person's ability to get systematically what he *would choose* no matter who controls the levers of operation.'" Sugden, *supra* note 379, at 790 (quoting AMARTYA SEN, *INEQUALITY REEXAMINED* 65–69 (1992)); *id.* at 790 n.15 (citing additional criticism of Sen's arguments). Hobbes takes the position "that being externally hindered in the choice of a given option takes from your freedom only if you have 'a will to' do it; only if you prefer that option." Philip Pettit, *The Instability of Freedom as Noninterference: The Case of Isaiah Berlin*, 121 *ETHICS* 693, 696 (2011) (quoting Hobbes). Berlin disagrees with Hobbes: "Freedom is . . . 'the absence of obstacles to possible choices and activities.'" *Id.* at 698 (quoting ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* xxxix (1969)).

³⁸⁹ Kuklin, *Constructing Autonomy*, *supra* note 1, at 401.

³⁹⁰ "Many authors have drawn attention to the similarity between the relevance of multiple preferences related to a person's autonomy and the preference for flexibility with uncertainty of future tastes." SEN, *RATIONALITY AND FREEDOM*, *supra* note 388, at 618.

³⁹¹ One commentator sees that justice depends on the value a person places on elements of his life (e.g., a beloved pet killed by a hooligan). Wilson, *supra* note 147, at 526.

³⁹² Tadros discusses "limitations on the intrinsic value of freedom": "Firstly, the freedom to do something which Peter does not wish to do is not very valuable where Peter already has plenty of choices: there is a law of diminishing return when it comes to the intrinsic value of choice." VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 202 (2005); see Kuklin, *Constructing Autonomy*, *supra* note 1, at 414–16 ("The Declining Marginal Increase of Autonomy Space"). "Secondly, there is no support for the position that the coerced actions always lack the full value of comparable voluntary choices. The argument that freedom is intrinsically valuable in some circumstances is compatible with the claim that it is intrinsically disvaluable in others." TADROS, *supra*, at 202 (emphasis omitted). See the discussion below, *infra* note 397, about "The Tyranny of Choice." "Thirdly, the argument provides no support for the claim that the existence of entirely valueless choices is intrinsically valuable." TADROS, *supra*, at 202.

wellbeing within a few years of the causative event.³⁹³ Some invadees are quick to forgive;³⁹⁴ others hold a grudge forever. A relatively minor invasion may produce great lasting harm, while a major invasion soon fades into the invadee's past. A pickpocket, for example, may prevent the invadee from ever pursuing her educational dreams, whereas a nasty battery may leave no lasting traces.³⁹⁵

Felt autonomy space invasions become even more curious when an invasion produces not (only) harms, but psychic or other benefits to the invadee. Beneficent paternalism appreciated by the invadee may produce benefits for her that outweigh dignitary and other harms, as where an addictive personality is denied her irresistible, deleterious wants.³⁹⁶ Some persons may welcome certain painful invasions, even more so than if they had been consensual. The benefits an invadee obtains from her supporters after an invasion may more than offset the harms she suffered from it. A person who is denied her favored activity, say skiing, may come to discover that a previously ignored alternative activity gives her even greater satisfaction. For the maximizer who insists on, or cannot resist, the substantial effort to make the "very best" choice available, denying her the liberty of such a wide range of options may be psychically beneficial to her.³⁹⁷ The businessperson or industrialist who would be competitively disadvantaged if she pursues her desire to "do the right thing," as by environmental protections or consumer disclosures, may be psychically benefited by a government regulation that limits a business's liberty to do otherwise.³⁹⁸ These

³⁹³ See *infra* note 460.

³⁹⁴ Perhaps one must not be too quick to forgive. One commentator interprets Murphy as arguing, "readiness to forgive—or even refusal initially to display resentment—tends to reveal one's lack of respect, not just for oneself, but for others as well." Savolainen, *supra* note 161, at 119 (citing Jeffrie G. Murphy, *Forgiveness and Resentment*, in 7 MIDWEST STUDIES IN PHILOSOPHY, *supra* note 387, at 505). Savolainen disagrees. See *id.* at 124–25. Murphy has further developed his position that one should not be too quick to forgive. JEFFRIE G. MURPHY, GETTING EVEN (2003). "What are the values defended by resentment and threatened by hasty and uncritical forgiveness? I would suggest three: self-respect, self-defense, and respect for the moral order." *Id.* at 19.

³⁹⁵ Should we distinguish between harms that are primarily immediate (e.g., temporary physical injury) from those that are future-oriented (e.g., disruption of marriage or career plans)?

³⁹⁶ Kuklin, *Constructing Autonomy*, *supra* note 1, at 443.

³⁹⁷ See Barry Schwartz, *The Tyranny of Choice*, SCI. AM. 71 (Apr. 2004). The research made "a distinction between 'maximizers' (those who always aim to make the best possible choice) and 'satisficers' (those who aim for 'good enough,' whether or not better selections might be out there)." *Id.* at 71. "We found . . . that the greatest maximizers are the least happy with the fruits of their efforts." *Id.* at 72. "[T]he presence of an enormous variety of options can, in some circumstances, have a somewhat dazzling effect on a chooser, so that a person may actually prefer to have a small range of options." SEN, RATIONALITY AND FREEDOM, *supra* note 388, at 606. "[S]ometimes we seek 'a freedom of second order: freedom from decision.'" *Id.* (quoting W.V. QUINE, QUIDDITIES 68 (1987)). You may do your own study the next time you are in a large drugstore. See how many of the myriad toothpastes and cold remedies by a single manufacturer have the same ingredients but are differently packaged and promoted. Was it worth the effort of getting exactly the right one? And did you?

³⁹⁸ See Bailey Kuklin, *Self-Paternalism in the Marketplace*, 60 U. CIN. L. REV. 649, 657 n.16 (1992).

examples turn on benefits to the invadee, but do not simply resolve into a social welfare calculus. Restricting the range of choices of people in the marketplace, though beneficial to some maximizers, may be costly overall to consumers as a class, most of whom are, say, simply satisficers.³⁹⁹ The issue here is whether the psychic or other benefits to an invadee should ever be considered when she seeks a private requital or when retributive punishment is at stake. I leave this issue to another day.

The invader's foreseeability of the functionality of the autonomy space invaded affects our perceptions of her blameworthiness.⁴⁰⁰ It is one thing to knowingly interfere with an unused, undesired right and another if the right is understood as central to the invadee's identity. The same may be said in distinguishing knowing invasions of material, formal, or hypothetical autonomy space, the actual harms from which may vary according to the extent to which they are within the reach of the invadee.

There are, then, three aspects of autonomy space: hypothetical, formal, and material. The functionality of the particular type of autonomy space also comes in three flavors: operative, preferred, and felt. The disrespectful blameworthiness of an invasion varies according to which of these types and flavors of autonomy space the invader foreseeably or purposively invades. In gauging an apt requital for these invasions, these aspects and flavors of the invader's autonomy space may thus be found relevant.⁴⁰¹

VIII. REQUITAL GAUGES

It is time to cash out the standard of retributive punishment based upon the just deserts of an invader for her blameworthy conduct that invades the autonomy space of one or more other people. The invasion was proscribed by a substantive maxim that triggers a criminal requital maxim. The invader is responsible for her conduct that wrongfully disrespects_E an invadee.⁴⁰² Distributive justice calls for her punishment. On the one side of the scales of justice we place the amount that an objective observer quantifies the blameworthiness of the invader for her harmful conduct. To right this imbalance, we place on the other side of the scales . . . Well, this is where controversy rages.⁴⁰³ First, how does one quantify the observer's judgment of blameworthiness or,

³⁹⁹ *Id.* at 651–52.

⁴⁰⁰ See Kuklin, *Constructing Autonomy*, *supra* note 1, at 455.

⁴⁰¹ Sunstein points out how difficult it is to gauge capability losses. “First,” he asks, “[w]hat kinds of capability losses are legally cognizable? Second, how can capabilities be translated into monetary equivalents? At first glance, a notion of normal human functioning would seem to provide the baseline from which to measure capability losses . . .” Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S178 (2008) (emphasis omitted) (footnote omitted); *see id.* at S178–81 (exploring answers to the two questions beyond the first glance suggestive of some of the distinctions drawn above).

⁴⁰² To recall the meaning of the subscript, see *supra* text accompanying notes 195–202.

⁴⁰³ “[R]etributivism, which adopts a backward-looking perspective focusing on the moral duty to punish past wrongdoing, is a justificatory theory, but seemingly not a prescriptive one. It offers retribution as a justifying ideal but does not explain how legal institutions are supposed to make retribution real.” Cahill, *Retributive Justice*, *supra* note 48, at 818 (footnotes omitted); *see* LUCY, *supra* note 321, at 414. “The problem of matching crime with punishment has occupied philosophers for centuries, and any theory of punishment that offered a simple formula

for that matter, any other adopted standard of retribution? Second, how does one balance the invader's requiting punishment? Even if we can sensibly gauge the amount that the observer's pan sinks with apt disapproval, no evident way can offset this with like for like.⁴⁰⁴ There is no apparent coin of this realm. We are comparing apples to smoke.⁴⁰⁵ While Kant and others commonly advance the imposition of pain or suffering on the invader,⁴⁰⁶ this coin has several significant flaws, as will be discussed. Whether suffering is a fit response to blameworthiness may even be questioned.⁴⁰⁷ I

for determining punishments should be immediately suspect." Daniel McDermott, *The Permissibility of Punishment*, 20 LAW & PHIL. 403, 425 (2001) (footnote omitted).

⁴⁰⁴ Under retributive principles, "determining moral desert becomes a matter of correlating punishment, typically incarceration, with something that is usually very different from it [such as embezzlement or rape]. . . . The drastic differences in kind between punishment and offense should make us suspicious about moral desert's ability to do what retributivists require of it." Shafer-Landau, *The Failure of Retributivism*, *supra* note 124, at 308. Corlett proposes a "Matching Principle of Proportionate Punishment" whereby "[a]s far as humanly possible, criminals ought to be punished in ways which match the harm they caused to others." CORLETT, RESPONSIBILITY AND PUNISHMENT, *supra* note 58, at 86 (emphasis omitted). "Considerations that might vitiate against this mode of punishment would include cases of extortion, or embezzlement, and the like where treating criminals in 'tit for tat' ways seems ludicrous, if not impossible." *Id.* at 87.

⁴⁰⁵ "There is no 'natural' measure of punishment, that is to say, no rationally determinable and uniquely appropriate penalty to fit the crime." John Finnis, *Retribution: Punishment's Formative Aim*, 44 AM. J. JURIS. 91, 103 (1999) [hereinafter Finnis, *Retribution*]. "The severity of the punishment can be made proportionate to the seriousness of the crime only if degrees of seriousness can be distinguished. However, the judgement that one crime is more or less serious than a very different crime seems much like dealing with apples and oranges." Husak, *Desert*, *supra* note 165, at 189. "The difficulty posed by this problem [of incommensurables] has led many legal philosophers to despair about the prospects of applying desert theory to the real world." *Id.* at 190. "The problem of incommensurables is compounded because the seriousness of crime is a function of *two* variables . . . , 'the degree of harmfulness of the conduct, and the extent of the actor's culpability.'" *Id.* (quoting ANDREW VON HIRSCH, CENSURE AND SANCTIONS 29 (1993)). "Even Hegel himself, along with Kant the most influential retributivist, concedes retributivism's inability to determine the just punishment for any particular offense" Christopher, *supra* note 127, at 893.

⁴⁰⁶ See *supra* text accompanying notes 125–27, *infra* notes 426–32. "Retributivists, in general, reply [to utilitarians] that it is morally necessary that wrongdoers be made to suffer. Those I call *deep retributivists* held this is as a *fundamental* moral principle, which can serve to justify retributive policies of punishments." Hill, Jr., *Kant on Wrongdoing*, *supra* note 130, at 411–12 (footnote omitted). For Hill's distinctions among mixed retributive theories, derivative retributive policies, basic retributive principles, the intrinsic desert thesis, and related notions, see *id.* at 412–14. "[Retributive] punishment is essentially a matter of humbling a criminal's will—it is in this sense that punishment must make her *suffer*." DUFF, TRIALS AND PUNISHMENTS, *supra* note 82, at 196; see, e.g., JACOB ADLER, THE URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT 80 (1991) [hereinafter ADLER, URGINGS OF CONSCIENCE]; FEINBERG, *The Expressive Function of Punishment*, *supra* note 141, at 98; HART, *Prolegomenon*, *supra* note 125, at 4; KATZ, ILL-GOTTEN GAINS, *supra* note 116, at 155; VON HIRSCH, DOING JUSTICE, *supra* note 51, at 35; RYBERG, *supra* note 136, at 6, 14–19; Hampton, *An Expressive Theory of Retribution*, *supra* note 142, at 3.

⁴⁰⁷ Rather than suffering as the object of desert, "[i]t might be held that a fitting response to wrongdoing would be reproach, blame, reproof or criticism; in which case it would no longer

will examine a few other plausible coinages as well.⁴⁰⁸ None of the possibilities is fully satisfactory. There is no gold standard for our penal legal tender.⁴⁰⁹ Blind trust in the fairness of socially promised, or threatened, IOUs is inevitably somewhat necessary, unfortunately.

Compounding the difficulties with identifying the coin of the realm of retributive punishment is the commonly articulated position that a fair punishment is to be proportionate.⁴¹⁰ It is not to be one for one as in *lex talionis*, an eye for an eye.⁴¹¹ Even more certainly, it is not to be based on vengeance, which may demand more-than-one for one.⁴¹² Calculating one for one is hard enough. After determining what “proportionate punishment” means,⁴¹³ further twists and turns await if we adhere to it

be obvious that punishment would be the appropriate instrument.” RYBERG, *supra* note 136, at 16. Even if suffering is intended, punishment may not cause it in particular instances. See ADLER, *URGINGS OF CONSCIENCE*, *supra* note 406, at 80. “[A] punishee may want[] to submit to punishment [because she] believes that she can achieve reconciliation, atonement, expiation, renewed innocence, greater moral knowledge, or some other good by undergoing the punishment.” *Id.* at 91; see KLEINIG, *PUNISHMENT AND DESERT*, *supra* note 70, at 23. “But while I do not think it to be a necessary characteristic of punishments that they be *experienced* as impositions, I would insist that they be *intended* as impositions.” *Id.* at 24.

⁴⁰⁸ Shafer-Landau summarizes ten “candidates for commensurating punishment and moral desert,” including “the same kind of treatment,” “the same amount of suffering,” “the degree of responsibility . . . multiplied by [the] wrong” (Nozick), what “is necessary and sufficient for nullifying the message of inferiority” (Hampton), similar “suffering or hard treatment” (Waldron), that which “is authorized by a democratically enacted sentencing rule,” proportional treatment within “a set of proportional punishments,” “equal treatment,” “that amount of liberty that [was] unfairly gained,” and that which “is efficacious in achieving some valuable goal.” Shafer-Landau, *Retributivism and Desert*, *supra* note 124, at 208–09. I will not explore all of these candidates.

⁴⁰⁹ “[J]ustice cares about *amount*, *not method* of punishment. Thus, one could impose deserved punishment through any variety of alternative methods without undercutting justice—fine, community service, house arrest, curfew, regular reporting, diary keeping, and so on” Robinson, *Virtues of Restorative Processes*, *supra* note 221, at 386 (emphasis added). “[O]nce the punishment amount is determined, one could look to any number of non-desert purposes to determine how that fixed amount of punishment is to be imposed.” Robinson, *Limiting Retributivism*, *supra* note 70, at 11 (footnote omitted).

⁴¹⁰ See, e.g., Frase, *supra* note 239, at 73. “Some theorists, I believe, simply take this principle [of proportionate retributive punishment] as an elementary intuition.” Scheid, *Davis*, *supra* note 70, at 397 (footnoting his interpretation of Kant as among these theorists).

⁴¹¹ See RYBERG, *supra* note 136, at 68.

⁴¹² See *id.*

⁴¹³ Kant’s meaning of proportional punishment is not clear. See MURPHY, *Does Kant Have a Theory of Punishment?*, *supra* note 131, at 58. Without argument, Kant “seems to think that the claim [for proportionality] is self-evident or intuitively obvious” *Id.* at 60. In this regard, one commentator identifies two accounts of culpability, one being proportionate culpability. “This principle states that punishment must be *in accord with* or *in proportion* to culpability, and it is sometimes endorsed by courts and overwhelmingly by scholars.” Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability’s Relevance*, 75 LAW & CONTEMP. PROBS. 109, 110 (2012) (footnotes omitted). The other account is threshold culpability, the apparent favorite of courts and legislatures. “On this view, proof of mens rea is

as the standard.⁴¹⁴ Among those twists and turns are, for one, that we must consider whether there is a lower limit to a just proportion. If criminal sanctions are too low, it would seem to be disrespectful of the invadee who was wrongfully harmed by the invader. Another twist is that we must determine whether a set proportion is to apply equally to all types of harms and crimes. Rather, since my preferred conception of retribution centers on the blameworthiness of the invader, and only indirectly looks to the nature of the harms to the invadee, this second issue may morph into the question of whether a proportional punishment may vary according to the degree of blameworthiness, as in progressive or regressive taxation. For blameworthiness just beyond the threshold for retributive punishment, the proportion may be, say, 0.4, and as the blameworthiness increases, the proportion may likewise increase or decrease, though not necessarily in a linear fashion.

Let us step back for a moment to consider whether proportionate punishment should directly consider the nature and extent of the various types of wrongful harms, and even the class of the invadees or other factors, rather than simply lumping together these aspects of an invasion under a broad gauge of blameworthiness. Recall that harms are the focus for our judgment of where to strike the balance between one's liberty and security interests. The propriety of restrictions on liberty and disruptions of security are evaluated by the physical, economic, psychic, and dignitary harms they produce.⁴¹⁵ Harms, by curtailing an invadee's resources, also usually reduce her wherewithal to exercise her range of freedom established by the baseline balance struck by adopted maxims.⁴¹⁶ Blameworthiness springs from an invader's attitude and conduct in causing wrongful harms.⁴¹⁷ This suggests that greater refinement in gauging apt retributive punishment may be facilitated by looking through the blameworthiness element to the features of the wrongful harms behind it. We may decide, for instance, that wrongful physical harms are more blameworthy than equally monetized, wrongful economic harms. Or we may decide that, say, economic harms accompanied by physical harms, or face-to-face frightful confrontations, are worse than equally monetized economic harms alone. For example, a purse snatching that causes minimal or no physical harm but causes an economic loss of \$100 may be worse than an online

needed only to determine whether one is innocent or blameworthy for *some* offense. . . . [I]t plays no necessary role in setting the magnitude of a sentence nor places an upper limit on punishment." *Id.* at 111. Strict liability crimes and sentencing indifference to moral luck reflect this second view. *See id.* at 111–12, 128–29. Ryberg represents this latter account. He contends "that the proportionality principle does not constitute a plausible candidate as to how punishment should be distributed." RYBERG, *supra* note 136, at 8. Ryberg's view is based on his conclusions that the justification of the proportionality principle is morally doubtful, it has difficult theoretical problems, and, finally, "the principle faces problems once we take the step from the ideal spheres of penal theory to actual penal practice." *Id.* On what is proportionalism, *see id.* at 12–14. "[I]t is difficult to elucidate with any confidence the principles of proportionality that the most defensible retributive theory requires." Simons, *Strict Criminal Liability*, *supra* note 281, at 446 (exploring a "bottom-up analysis" of proportionality).

⁴¹⁴ *See, e.g.,* Dolinko, *Three Mistakes*, *supra* note 127, at 1636–37; Duff, *Penal Communications*, *supra* note 48, at 57–61.

⁴¹⁵ Kuklin, *Constructing Autonomy*, *supra* note 1, at 452.

⁴¹⁶ *Id.* at 382.

⁴¹⁷ *Id.* at 452.

scam that produces an economic loss of \$10,000, even when the full tort recovery under corrective justice for the snatching would be considerably less than for the \$10,000 scam. We seem to punish white-collar crime proportionally less than comparably monetized, blue-collar crime. If differences such as these are accepted, there may be a few ways of getting there. On the one hand, we could judge that committing the purse snatching is more blameworthy and disrespectful than the scam, and hence greater punishment is appropriate. More specifically, face-to-face invasions producing direct physical or psychic harms are more disrespectful, perhaps especially if weapons are involved,⁴¹⁸ than are comparable economic harms alone.⁴¹⁹

Alternatively, we could judge that both crimes are equally blameworthy but that we punish crimes involving direct confrontations proportionally more than other crimes. If we take this second route, we should come up with a justification for the distinction.⁴²⁰ I do not have one to offer. The better route, I believe, is the first one that simply declares that certain types or combinations of harms—depending on the particularities—are more blameworthy than are others, irrespective of the corrective justice monetization. The umbrella of dignitary harm could encapsulate this notion. For instance, cultural norms can hold direct, immediate physical or insulting harms to produce greater overall associated dignitary harms than do equally monetized, economic or nonconfrontational insulting harms. They are more offensive, insulting, defamatory, disrespectful, and assertive of moral superiority when holding all else equal.⁴²¹ Under this tack, the proportion in punishment could remain the same for all crimes, the gauge of blameworthiness for producing a dignitary harm incorporating any distinctions based on features of the other underlying harms.⁴²²

When considering possible distinctions based on the classifications of the invadees, lines of reasoning like the ones above may apply. When calculating the apt proportion of the punishment, we could, for example, explicitly differentiate among autonomy invasions of family members, friends, neighbors, associates, clients, strangers, and the like, and we could finely subdivide each general category. We could even adopt permutations depending on the types of harms combined with the class of

⁴¹⁸ Does use of a weapon imply the invader's assertion of greater moral superiority than do other types of crimes?

⁴¹⁹ I say "direct physical or psychic harms" to suggest another category for these harms that stem from an invadee's reaction, as where she becomes physically ill from being scammed.

⁴²⁰ Because we are focusing on retributive punishment for the wrongful harms to the direct invadee, we must set aside the fright these invasions may produce in the general public. I have pushed requitals for these types of societal reactive harms mainly into the bailiwick of corrective justice. Insofar as these reactive harms are disrespectful to third parties, retributive considerations would, in principle, arguably focus on each invadee separately.

⁴²¹ We must consider, of course, other factors, as where the holdup is from desperation while the economic crime is from greed.

⁴²² Kolber notes that "[c]ulpability seems to be a continuous variable So if the pertinent continuous input (culpability) yields a proportional continuous output (punishment severity), then retributivists who subscribe to the widely held principle of proportionality should seek laws that support this smooth relationship." Kolber, *Smooth and Bumpy Laws*, *supra* note 113, at 670–71 (footnote omitted).

invadees.⁴²³ Or, we may lump these differences into our overall judgment of blameworthiness, again under the umbrella of dignitary harm. We may declare physically harming a loved one more or less a dignitary harm as compared to, say, an equal physical harm to a neighbor.⁴²⁴ Being wrongfully harmed by an associate seems a greater insult than by a stranger.

Many hurdles hinder the commensuration of an objective observer's judgment of an invader's blameworthiness with an apt retributive punishment. In what follows, I examine some of the plausible currency.⁴²⁵ The most obvious place to turn first is to the four types of harms that are the focus when adopting maxims to balance liberty and security interests. In light of their sufficiently close affinity and the standard practice of commentators to not distinguish among them in this context, I here discuss physical, psychic, and economic harms together, leaving dignitary harm for separate attention.

Before discussing plausible requital harms, let us take a quick look at Kant's observations, which are representative of the views of many other commentators as well. Kant cashes out retributive punishment largely in terms of the invader's pain and suffering,⁴²⁶ as do others.⁴²⁷ At the same time, Kant does not dwell on the pain and suffering of the victim as the basis for retribution.⁴²⁸ Kant, and often other

⁴²³ We might go even further by declaring that the threshold for finding a harm to be wrongful varies among the harms and the class of invadees. For example, the monetized threshold for a wrongful dignitary harm may be \$0 for strangers and \$100 for family members and other permutations for the other three types of harms. Aggregation of some sort may also be embraced.

⁴²⁴ Many other permutations are possible within the confines of the universalization form of the categorical imperative. For instance, one may adopt maxims imposing greater duties to one's family than to strangers, so long as duties to strangers meet the respectfulness threshold. This is a matter of adopted generalization, not universalization.

Within any one classification, circumstances would affect our judgment of the dignitary harm. An equal economic loss wrongfully imposed on a commercial client, for example, may produce a greater dignitary harm on the client who dropped her guard because of nonbinding assurances by the invader than a client who maintained arm's distance.

⁴²⁵ "Oregon has implemented a system of punishment units. . . . One problem, however, with this approach is that it is very difficult for commissions or sentencers to reach a conclusion about exchange rates, i.e. what amount of community service is really equal to X days in prison." Karen Lutjen, *Culpability and Sentencing Under Mandatory Minimums and the Federal Sentencing Guidelines: The Punishment No Longer Fits the Criminal*, 10 NOTRE DAME J. L. ETHICS & PUB. POL'Y 389, 437 (1996) (footnote omitted). Morris and Tonry struggle with penal commensurability. NORVAL MORRIS & MICHAEL TONRY, *BETWEEN PRISON AND PROBATION: INTERMEDIATE PUNISHMENTS IN A RATIONAL SENTENCING SYSTEM* 37–108 (1990).

⁴²⁶ "[P]unishment is a physical harm" KANT, *CRITIQUE OF PRACTICAL REASON*, *supra* note 235, at 170. "[F]or Kant, punishment is a *physical harm*, properly understood. Psychological punishments or non-painful punishments are not seriously considered for most varieties of crime. . . . The criminal 'pays' for the crime she committed by experiencing a certain amount of, potentially lethal, pain." Brooks, *supra* note 132, at 565–66 (footnotes omitted).

⁴²⁷ See *supra* text accompanying notes 125–27, 406.

⁴²⁸ Corlett identifies a "Harm-Based Principle of Proportional Punishment": "Punishment is justifiably inflicted on an offender only if it 'weighs' the same for the offender on a scale of

commentators, are not clear as to whether the invader's retributive suffering is to be from one or more of the four types of harms, or some combination of them, or even from other types of harms.⁴²⁹ Some aspects of Kant's discussion of punishment do not necessarily entail painfulness. For example, he favors capital punishment, castration for rape and pederasty, and "expulsion from civil society" for bestiality, none of which are, somewhat imaginatively, necessarily painful (overall), at least in modern times.⁴³⁰ Perhaps he should be read as holding that punishment involves the deprivation of the criminal, irrespective of her suffering. Others have taken this position.⁴³¹ Kant gets to his currency for retribution by, essentially, hand waving.⁴³² He is far from alone in this

suffering as the offence 'weighs' (or would 'weigh' on such a scale if the victim is incompetent or dead) to the victim on a scale of suffering" CORLETT, RESPONSIBILITY AND PUNISHMENT, *supra* note 58, at 85 (emphasis omitted); see Mirko Bagaric & James McConvill, *Giving Content to the Principle of Proportionality: Happiness and Pain as the Universal Currency for Matching Offence Seriousness and Penalty Severity*, 69 J. CRIM. L. 50, 50 (2005).

If the pain and suffering from the invader's requital is somehow to be gauged by the pain and suffering caused the invadee, the following discussed problems with identifying the appropriate sources and forms of suffering would be further exacerbated, for now the discomfort of two (or more) persons must be independently evaluated. We might decide, say, that the invadee's psychic and dignitary harms are to be requited with the invader's suffering from physical and economic harms. Furthermore, the invasion may not induce any real suffering by the invadee, as where she is beneficently paternalized. For formulas to compare the invader's and invadee's discomforts, see Kuklin, *Punishment*, *supra* note 112, at 23–85.

⁴²⁹ See, e.g., R.A. Duff, *Alternatives to Punishment—or Alternative Punishments*, in RETIBUTIVISM AND ITS CRITICS, *supra* note 142, at 43 ("Punishment must involve the imposition of some kind of suffering, pain, restriction, or burden: but that imposition can take a variety of material forms."). "[I]t is not entirely clear whether the desert principle calls for wrongdoers to experience *punishment* or *suffering*. . . . [I]t has been noted recently that the desert-as-suffering claim seems to generate some troubling or dubious results." Michael T. Cahill, *Punishment Pluralism*, in RETIBUTIVISM, *supra* note 127, at 15, 28–29 (footnotes omitted).

⁴³⁰ See KANT, THE METAPHYSICS OF MORALS, *supra* note 13, at 474–76, 498.

⁴³¹ "The essence of punishments, as Aquinas clearly and often explains, is that they subject offenders to something *contrary to their wills*—something *contra voluntatem*. This, not pain, is of the essence." Finnis, *Retribution*, *supra* note 405, at 98 (footnote omitted). One of the elements in Rawls's definition of the institution of punishment is: "a person is said to suffer punishment whenever he is legally deprived of some of the normal rights of a citizen on the ground that he has violated a rule of law . . ." Rawls, *Two Concepts*, *supra* note 127, at 111; see, e.g., BOONIN, *supra* note 133, at 6–7 ("making her worse off in some way"); BRUDNER, *supra* note 63, at 53 ("interferences with liberty"); KLEINIG, PUNISHMENT AND DESERT, *supra* note 70, at 22–25 ("restriction of his freedom"); Richard L. Lippke, *Retribution and Incarceration*, 17 PUB. AFF. Q. 29, 34–35 (2003) ("interfere commensurately with the capabilities of offenders to live decent lives of their own choosing"); C.W.K. Mundle, *Punishment and Desert*, 4 PHIL. Q. 216, 218–19 (1954) ("frustration of a person's desires"). That violation of another's rights requires forfeiture of the same or similar rights, see MICHAEL D. BAYLES, PRINCIPLES OF LAW 287 (1987); Alan H. Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42 (1979); see generally Wellman, *supra* note 133.

⁴³² "Kant's theory . . . accounts only for the imposition of *some* kind of deprivation on the offender to offset the 'advantage' he obtained in violating others' rights. It does not explain why

leap. Furthermore, Kant does not discuss how to measure criminal violations against penal pain, suffering, or deprivations.⁴³³

A. Physical, Psychic, and Economic Harms

Cashing out retributive punishment in terms of the imposition of physical, psychic, and economic harms may seem rather straightforward. One simply gauges the extent of these harms that an invader would suffer from various forms or degrees of punishment and imposes an apt punishment accordingly. Even in principle, however, certain issues loom. Are all three of these types of harms to be summed, or only some of them, totally or partially? Should the particularities of the invasion or the requital maxim affect the answer to this last question? Even more troubling are issues relating to whether the harms are to be gauged against a hypothetical or reasonable invader or the actual invader. Before addressing these issues, let us first look at some principles relating to the possibility of cashing out punishment in terms of the fourth type of harm, dignitary harm.

B. Dignitary Harms

Since dignity is central to deontic principles, exacting punishment by the imposition of dignitary harms on an invader in proportion to the dignitary or other harms the invader imposed on the invader may seem appropriate. Even in principle, however, this retributive coin raises considerably more complex issues than do those of physical, psychic, and economic harms. To begin with, Kant cautions that even criminals have a dignity that is entitled to respect.⁴³⁴ At first blush, this principle would seem to push the possibility of dignitary harm requitals off the table. Yet we must remember that this Kantian concern for dignity and respect refers to egalitarian underpinnings. All persons by virtue of their capacity for rationality are ethical beings with a dignity_E that entitles them to respect_E. This leaves on the table the liberty conceptions of these and related concepts. While everyone's dignity_E is entitled to equal respect_E, we also respect_I individuals to the extent that they have developed their talents, contributed to society, etc. They have earned and deserve their dignity_L. Hence, we treat them with commensurate respect_L. As for those who have wrongfully

that deprivation should take the peculiar form of punishment." VON HIRSCH, *DOING JUSTICE*, *supra* note 51, at 48.

⁴³³ *Id.*

⁴³⁴ See KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 473, 580. According to Kant "moral virtue is not a prerequisite of dignity; even the grossly immoral have it." THOMAS E. HILL JR., *Social Snobbery and Human Dignity*, in *AUTONOMY AND SELF-RESPECT* 155, 169 (1991). Hence, "punishments degrading to humanity are prohibited." Hill, Jr., *Punishment*, *supra* note 130, at 236 (citing MS6:328–370). "In punishing a criminal, we must always respect humanity in the criminal's person, and this makes it wrong to inflict forms of punishment that humiliate or degrade." ALLEN W. WOOD, *KANT'S ETHICAL THOUGHT* 134 (1999) [hereinafter WOOD, *KANT'S ETHICAL THOUGHT*] (citation omitted). "[H]ow can we punish people without humiliating them? . . . What is more, the humiliating message expressed by punishment is not an unwanted side effect. It is part of the punishment itself." MICHAEL ROSEN, *DIGNITY* 74 (2012).

harmed others by blameworthy conduct, they have earned our disrespect_L for their lack of dignity_L, or alternatively, their indignity_L.⁴³⁵

It is useful to distinguish one's earning of respect_L for one's dignity_L from our recognition of that increased dignity_L. For instructive purposes, let us first look at the positive side of the dignity_L ledger at those who have earned increased respect_L. Courageous, socially beneficial conduct, for instance, entitles one to respect_L, even before society recognizes this conduct as such.⁴³⁶ How might society recognize, requite, this heightened dignity_L? Setting aside the complexities of posthumous recognition,⁴³⁷ we may turn to the opposites of physical, psychic, and economic harms, that is, rewards or benefits.⁴³⁸ As for physical benefits, the possibilities seem limited. We may grant medical care, as we do for military veterans.⁴³⁹ This care may extend to physical trainers and facilities as well as therapies and other services that increase

⁴³⁵ Hampton emphasizes the need to be respectful of the person being punished. "Hence the construction of retributive punishment is an art, which involves the satisfaction of two demands: first, that the wrongdoer be diminished; and second, that the diminishment not represent him as lower in value than the victim." Hampton, *An Expressive Theory of Retribution*, *supra* note 142, at 14.

⁴³⁶ See Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107 (2011) (suggesting the difference between dignity and the recognition thereof). "Dignity in this sense [of Waldron's] is not something one simply has, but rather is earned through hard work on the self, and is fully settled only once it has been recognized by another." Katherine Franke, *Dignifying Rights: A Comment on Jeremy Waldron's Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1177, 1178 (2011).

⁴³⁷ Because I explore the recognition of increased dignity_L for insights on how to deal with the decreased dignity_L of a criminal, posthumous acknowledgments become uninformative. Deceased invaders are not punished. Most commentators argue that persons cannot be harmed posthumously. See, e.g., Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1295 (2003); Kuklin, *Constructing Autonomy*, *supra* note 1, at 440 n.222.

⁴³⁸ Kant takes a counterintuitive position on rewards. "The *rightful* effect . . . of a meritorious deed is *reward* (*praemium*) (assuming that the reward, promised in the law, was the motive to it)" KANT, *THE METAPHYSICS OF MORALS*, *supra* note 13, at 382. Goodin contends "that notions of positive desert ought not play any important role in social policymaking." Robert Goodin, *Negating Positive Desert Claims*, in *WHAT DO WE DESERVE?*, *supra* note 58, at 234, 235. For questions about the symmetries between benefits and harms, see Seana Valentine Shiffrin, *Wrongful Life, Procreative Responsibility, and the Significance of Harm*, 5 LEGAL THEORY 117, 120–25 (1999). Fletcher calls for caution in looking at one side of the ledger for help on the other. He argues for "an asymmetry between positive and negative desert." GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 98 (1996); see *id.* at 96–99. On the other hand, Kagan writes: "At a minimum, it is not at all obvious what there is about the difference between virtue and vice that might justify asymmetrical treatment." KAGAN, *supra* note 70, at 224.

⁴³⁹ For a description of the extensive benefits granted veterans, see U.S. DEP'T OF VETERAN AFFAIRS, *FEDERAL BENEFITS FOR VETERANS, DEPENDENTS, AND SURVIVORS* (2016), https://www.va.gov/opa/publications/benefits_book/2016_Federal_Benefits_for_Veterans.pdf; U.S. DEP'T OF VETERAN AFFAIRS, *ExploreVA*, VA.GOV, <http://explore.va.gov> (last visited Feb. 15, 2017). These benefits are, of course, partially a matter of contract, not unbargained-for reward.

physical wellbeing.⁴⁴⁰ For psychic benefits, we have hero parades, medals, award ceremonies, and positive publicity. Therapies, such as massages, may be granted for their hedonistic pleasures even when not medically beneficial. Turning to economic benefits, these loom large. Financial rewards are common. Education benefits, such as under the GI bill, and mortgage subsidies fall into this category.⁴⁴¹ Free passes and reduced rates for events and institutions do too. Economic rewards come in many possible forms.

The fourth category, dignitary harm or, on the credit side of the ledger, dignitary benefits, poses interesting prospects. This category draws our attention to the liberty-security balance that, pursuant to the recognition of everyone's equal dignity_E, is struck by the adoption of deontic maxims designed to grant all persons the fullest freedom consistent with the equal freedom of others.⁴⁴² The wrongful invasion of a person's autonomy space that has been delineated by adopted maxims is a dignitary harm to the invadee irrespective of whether the invasion produces any of the other three types of harms.⁴⁴³ The invasion denies the invadee her full autonomy, her freedom to choose and act within the adopted limits of her equal liberty, and her equal security from wrongful impacts by others.⁴⁴⁴ While typically an invasion produces one or more of the other three types of harms, it may not, as where an invadee is beneficently paternalized or is unknowingly battered (e.g., kissed), such as during sleep.⁴⁴⁵ The dignitary harm remains in place.

Using invasions of the adopted liberty-security balance as the focus for determining pure dignitary harms offers aids in looking at the other side of the ledger—pure dignitary benefits. How might liberty-security benefits be granted to reward earned respect_L and heightened dignity_L? Looking first at liberty, is expanding a deserving person's liberty without, at the same time, unfairly truncating another person's security plausible? As a reward, we certainly cannot allow our heroes to batter others.⁴⁴⁶ On the other hand, we might consider allowing them priority seating at events or public transportation and the right to move to the fronts of lines. We could grant them priorities or weighted advantages for government employment or contracts, or admission to public institutions such as schools. When attending next to honorees' security interests, the possibilities seem few or questionable. Might we allow them greater fire and police protection? Free or reduced insurance, as is the case for veterans? Advantageous standards when bringing defamation claims or, for that matter, other tort or contract claims?

A difficulty with at least some of these considered tacks is that the expanded liberty or security freedoms of the rewarded beneficiaries can be seen as curtailments of the correlative liberty or security interests of those persons who experience setbacks from

⁴⁴⁰ *Id.*

⁴⁴¹ *Id.*

⁴⁴² See Kuklin, *Constructing Autonomy*, *supra* note 1, at 380.

⁴⁴³ See *id.*

⁴⁴⁴ See *id.*

⁴⁴⁵ See *id.* at 387–89.

⁴⁴⁶ More accurately, we would not redefine a wrongful battery in such a way as to truncate the security interests of others with respect to the heroes.

the granted dignitary_L benefits to others. Some of the controversies over affirmative action reflect this.⁴⁴⁷ Consider how easy moving to the front of a line in your hometown would be unless, perhaps, you are a well-recognized hero. Mine is New York City where strangers predominate. Forgettaboutit. When we turn to the other side of the ledger to the dignitary_L harms that may be imposed on blameworthy wrongdoers in recognition of their just deserts, the objections of third parties are more muted, though not silenced.⁴⁴⁸ Yes, an invader's dependents, kin, kith, associates, and supporters may suffer harms from her punishment, but these indirect harms likely would not be protected by adopted maxims when balancing overall liberty and security interests. They probably did not deserve to have a criminal in their lives, but their claims seem outweighed by the invader's claims, her affiliates' claims, and the retributive aim of punishing the invader according to her just deserts. The invader's affiliates may be harmed, but we would assert they are not wrongfully harmed. The deterrent effects of the punishment, moreover, generally protects or even expands the liberty and security interests of third parties, including the invader and her affiliates and, perhaps, partially even the invader's own affiliates, depending on the circumstances and whether they have also been the targets of the invader's hostilities.

To avoid many of these complexities, an apt means of recognizing an invader's indignity_L, of meting out her just deserts, is restricting her liberty, as by imprisonment, house arrest, probation, and protection orders. These constrain her liberty interest irrespective of whether they cause her any physical, psychic, or economic harms. Even the measure of an economic harm, such as a fine, may be determined by its effects on the invader's liberty and not directly on any sort of economic suffering. An invader's security interest may also be constrained. She may be subject to searches and surveillance and other actions that are normally treated as invasions of privacy or otherwise proscribed. Although these types of security constraints have been consequentially justified by the needs of penal institutions, they have a desert grounding as well. Punishment entails the curtailment of the punishee's liberty and security.⁴⁴⁹

C. Requisites in Principle, Requisites in Practice

There are various means to punish a criminal invader by imposing physical, psychic, or economic harms on her. Similarly, regarding dignitary harms, there are various ways to truncate an invader's freedom, to dock her liberty and security

⁴⁴⁷ See, e.g., SADURSKI, GIVING DESERT ITS DUE, *supra* note 56, at 213–20 (“‘Victims’ of Preferential Treatment”).

⁴⁴⁸ I take these up below. See *infra* text accompanying notes 483–86.

⁴⁴⁹ An offender “arrogates to himself or herself excess liberties; the scheme of equal rights is upset. In order to restore it, the person’s basic rights must be restricted in an equal but opposite way. This restriction is the punishment.” ADLER, URGINGS OF CONSCIENCE, *supra* note 406, at 121. Under Adler’s “rectification principle,” “[w]hen a person has arrogated excess basic liberties by committing an offense, that person must then forgo an equivalent body of basic liberties by way of punishment.” *Id.* at 124. By “liberties,” Adler refers to what I have been calling liberty and security. See *id.* at 125–26. I would find a place for proportion in his principle. In gauging “an equivalent body of basic liberties” while avoiding the preferences of the punishee, one can ask, “[w]hat quantity of rights would a reasonable person willingly forgo in order to gain the right to do what the offender did?” *Id.* at 137.

interests. Even in principle, however, aptly gauging the freedom curtailments is problematic.⁴⁵⁰ For one, we should consider whether a restriction is measured by the invader's hypothetical, formal, or material autonomy space. As we move from the first to the last, the curtailments tend to pinch harder.⁴⁵¹ Additionally, we should decide whether to consider the functionality of the invader's liberty and security constraints. The effects of curbs may vary from invader to invader depending on how they impact on her operative, preferred, or felt freedoms.⁴⁵² More problems still exist in practice, such as the sensitivities of the punished invader. These variables also play out when directly gauging the physical, psychic, and economic harms produced by punishment, which I address first.

In practice, similar physical and psychic harms as requitals certainly vary effectively from invader to invader. Irrespective of this, any pains or pleasure put on the scales must survive the deontic filter. As examples stemming from unacceptable disrespectfulness, an invader's additional suffering from being imprisoned by agents from a disfavored religion or sharing close quarters with such persons are kept out of the balancing pans. Past this preliminary, we must consider whether to account for the special sensitivities or insensitivities of the invader,⁴⁵³ as where the invader is happy-

⁴⁵⁰ "[T]o measure opportunity in a real-world situation . . . requires us to locate options in some conceptual space in which relations of similarity and difference can be defined. But there are many such spaces, none of which is uniquely privileged." Sugden, *supra* note 379, at 803. Kolber objects to a "liberty-deprivation calibration" gauge of punishment. Adam J. Kolber, *The Comparative Nature of Punishment*, 89 B.U. L. REV. 1565, 1598 (2009) [hereinafter Kolber, *Comparative Nature of Punishment*]. "First, it is not at all clear how we measure amounts of liberty." *Id.* (footnote omitted). "I doubt we can compare the value of liberties without surreptitiously examining experiential facts." *Id.* at 1598–99 (footnote omitted).

⁴⁵¹ In discussing the gauge of punishment, Kolber directs attention to the invader's "liberty-in-fact," "liberties-under-law," and her "idealized liberties," which track my material, formal, and hypothetical autonomy space. Kolber, *Comparative Nature of Punishment*, *supra* note 450, at 1585–94. Though doubting these conceptions of liberty profitably "identify[] the underlying disvalue of punishment, even if they did a good job, punishment severity would still have to be determined comparatively, because people differ in their baseline levels of all three notions of liberty." *Id.* at 1594 (footnote omitted). As I analyze the differences, hypothetical and formal liberties do not differ from person to person, while material liberty does. For further elaboration of his "limited subjectivist position," see *id.* at 1595–600. For much more, see Adam Kolber, *The Subjective Experience of Punishment*, 109 COLUM. L. REV. 182 (2009). This subjectivist complaint would also apply to dignity benefits (i.e., rewards).

⁴⁵² See Kolber, *Comparative Nature of Punishment*, *supra* note 450, at 1585–94.

⁴⁵³ Commentators have noted the variations in the sensitivities of prisoners. Bentham lists thirty-two "circumstances influencing sensibility." BENTHAM, *supra* note 219, at 52. Ryberg refers to this as "the sensibility challenge." RYBERG, *supra* note 136, at 102–09. "A morally plausible account of punishment severity cannot avoid counting in features the strength of which to some extent will be conditioned by the sensibility of the individual perpetrator." *Id.* at 108. "[T]he sensibility is obviously determined by various factors to which there is no simple access for the punisher and, even if some knowledge is available, the risk of calibrating punishment severity in a way which observes proportionality will indeed be a complicated task." *Id.* at 108–09. Complicated or not, "[w]hen we know about prisoners' sensitivities to punishment, we should try to take them into account at sentencing." Adam Kolber, *Unintentional Punishment*, 18 LEGAL THEORY 1, 29 (2012) [hereinafter Kolber, *Unintentional Punishment*]. On the other

go-lucky or hardened,⁴⁵⁴ or imprisonment triggers her claustrophobia or claustrophilia. The invader may be a masochist who likes punishment or prefers imprisonment because her friends are there, because it provides for necessities otherwise unobtainable,⁴⁵⁵ or because she sees punishment as a means to expiate her sins.⁴⁵⁶ Some of these factors relate to the functionality of the invader's autonomy space that her punishment curtails. The suffering one feels from confinement relates to whether it impacts on her operative, preferred, or felt freedoms.⁴⁵⁷ The couch potato, for instance, suffers less from being kept from the wild than does an outdoorsperson.⁴⁵⁸ The invader's feelings of guilt or shame affect the psychic costs of her punishment.⁴⁵⁹ Her resilience may soon or eventually diminish the discomfort of her punishment.⁴⁶⁰

hand, the relevance of the invader's sensitivities has been challenged. *See, e.g.,* David Gray, *Punishment as Suffering*, 63 VAND. L. REV. 1619 (2010) ("objectivism").

⁴⁵⁴ There may be a "'hardening to punishment' effect observed in animals, in which an escalating series of punishment, if it begins at a level that is ineffective in controlling the initial transgression, simply conditions the person to tolerate the increasing punishments, without reducing the rate of transgressions." ROBINSON, DISTRIBUTIVE PRINCIPLES, *supra* note 51, at 38.

The invader may be "the happy-go-lucky person who tends to make his peace with his surroundings . . . [rather than] the melancholic person who is miserable no matter where he is." KATZ, ILL-GOTTEN GAINS, *supra* note 116, at 155–56. Hence, Katz argues, "certain kinds of [penal] harms are to be objectively rather than subjectively judged." *Id.* at 156.

⁴⁵⁵ "[C]ounty jails often serve as places of refuge for vagrants during the winter months in cities in cold climates." Paul H. Robinson & John M. Darley, *Does Criminal Law Deter? A Behavioural Science Investigation*, 24 OXFORD J. LEGAL STUD. 173, 193 (2004) [hereinafter Robinson & Darley, *Does Criminal Law Deter?*] (footnote omitted); *see* Clarence S. Darrow, *Crime and Criminals*, 3 HUMANE REV. 209, 213 (1903). O'Henry humorously portrayed this tendency in a short story. O'Henry, *The Cop and the Anthem* (1904).

⁴⁵⁶ *See supra* note 407.

⁴⁵⁷ *See* NOZICK, ANARCHY, *supra* note 140, at 41.

⁴⁵⁸ These variations in the felt benefits of freedom are suggestive of the utility monster problem for utilitarians whereby people greatly vary in the satisfaction they obtain from consuming a unit of a particular resource. *See id.*

⁴⁵⁹ Kant took note of the additional suffering of a high-status prisoner owing to his sense of honor, vanity, and shame, as well as the impetus of the sense of honor in dueling and infanticide of illegitimate children. KANT, THE METAPHYSICS OF MORALS, *supra* note 13, at 473–74, 476–77. Kant's views of honor, however, are curious. *See* MURPHY, *Does Kant Have a Theory of Punishment?*, *supra* note 131, at 56–57. Because of feelings of guilt and anxiety, "[t]here are . . . several ways in which a criminal may suffer severely after his crime is committed but before conviction" RYBERG, *supra* note 136, at 17. Sociopaths and other egoists may have no feelings of guilt or shame.

"Although shaming penalties can be imposed by the government, shaming is essentially a nonlegal sanction. Shaming occurs when people draw attention to the undesirable traits or behaviors of another person, with the result that the target is seen as a less desirable cooperative partner." ERIC A. POSNER, LAW AND SOCIAL NORMS 89 (2000). "History reveals two problems with shaming punishments. First, these punishments are messy. . . . Second, these punishments created deviant subcommunities." *Id.* at 106; *see generally id.* at 88–111.

⁴⁶⁰ Studies of those suffering egregious injuries (e.g., paraplegia) or gaining great benefits (e.g., lottery winners) have shown that a person's level of well-being typically returns to or near

She may suffer from her reactive response to the harms her punishment causes her supporters.⁴⁶¹ Sources of suffering other than the state may impact the invader, such as a threatening vigilante committee, bad publicity before, during, or after the trial,⁴⁶² or self-triggered injuries during the course of the crime and its ensuing events.⁴⁶³ The

its ex ante level as time passes. See Philip Brickman et al., *Lottery Winners and Accident Victims: Is Happiness Relative?*, 36 J. PERS. SOC. PSYCHOL. 917 (1978). As Bagaric and McConvill note, in the context of crime, this cuts two ways. With respect to the harmed victim, “[p]eople are extremely resilient and adaptable. It follows that most criminal offences are unlikely to have a lasting significant negative impact on well-being. This suggests that so far as the principle of proportionality is concerned, it is inappropriate to impose sanctions that have long-term effects.” Bagaric & McConvill, *supra* note 428, at 73. With respect to the punished criminal, this resilience cuts the other way. Since, as research has shown, prisoners adapt to their conditions (see what follows), “a long period of detention may be necessary to inflict [] even a moderate level of pain.” *Id.* Studies have revealed a “hedonic treadmill.” “The essence of the notion is that over time, people who move to a markedly better, or markedly worse, situation that initially produces great pleasure or discomfort, will adapt to that new set of circumstances and return to seeing it as a neutral state.” ROBINSON, *DISTRIBUTIVE PRINCIPLES*, *supra* note 51, at 39; see Robinson & Darley, *Does Criminal Law Deter?*, *supra* note 455, at 187–89 (describing two kinds of prisoner adaptations). Does the hedonic adaption of the invader during imprisonment correspond to the invadee’s hedonic adaption to her harm from the crime? Kant mentions the impossibility of predicting future pleasure. KANT, *CRITIQUE OF PRACTICAL REASON*, *supra* note 235, at 186. Hence, he discounts pleasure as the goal of duties. See *id.* at 186–93. Does this argue for a similar discount for a suffering standard for punishment?

Several studies supporting this human adaptability to conditions “suggest that our society’s major means of modulating the punitive bite of punishment felt by a convicted individual, which is by manipulating the duration of the prison sentence, is not going to be as effective as what one might call the ‘naïve calculation system’ assumes.” ROBINSON, *DISTRIBUTIVE PRINCIPLES*, *supra* note 51, at 40. Referring to the “peak and end” rule in the context of deterrence, Robinson finds that recent work “suggest[s] that duration does not play anything like the major role that intuition gives it in determining punishment amount. Instead in these experiments, the amount contributed by duration to the remembered experience of pain was small.” *Id.* at 41 (footnotes omitted). “New approaches to punishment are necessary to achieve proportionality in light of the challenges posed by adaptation.” John Bronsteen et al., *Happiness and Punishment*, 76 U. CHI. L. REV. 1037, 1037 (2009).

⁴⁶¹ Should the suffering of the invader’s supporters or sympathizers be considered? For some of these harms, see Ryan, *supra* note 152, at 1085. Contrariwise, should we weigh in the satisfactions of third parties from the invader’s punishment? “The social welfare evaluation also includes the satisfaction of any tastes that individuals might have for correct punishment: For example, the gratification they experience when guilty parties are appropriately punished” KAPLOW & SHAVELL, *supra* note 58, at 292.

⁴⁶² Adverse publicity may be a state vehicle for punishment, particularly for corporations. “[A] program of adverse publicity, sometimes to be coupled with fines, . . . would take the form of a court-ordered, institutionalized form of adverse publicity of the guilty corporation the cost of which is paid by the guilty corporate-collective by order of the state.” CORLETT, *RESPONSIBILITY AND PUNISHMENT*, *supra* note 58, at 140.

⁴⁶³ Alexander poses a hypothetical in which, as a criminal “leaves the scene [of the crime], he is struck by lightning and suffers *X* amount of pain as a consequence. Should the lightning strike affect and perhaps reduce to zero the amount of punishment imposed for the crime?” Alexander, *Philosophy of Criminal Law*, *supra* note 127, at 819 (citing Douglas N. Husak, *Already Punishment Enough*, *supra* note 224, at 79). Most commentators argue that non-state

state itself may be an additional source of variable impacts on prisoners, as where incarceration conditions differ within a particular prison or its wider system.⁴⁶⁴ The stigma of punishment may have negative physical and psychic repercussions on the invader and her supporters long after the imprisonment has ended,⁴⁶⁵ these varying from person to person. In sum, the same formal punishment may have widely variable, physical and psychic impacts on affected parties.⁴⁶⁶

sources of suffering should not count as punishment. See, e.g., Husak, *Already Punishment Enough*, *supra* note 224, at 83 (referring to a “school of thought”); but see SADURSKI, *GIVING DESERT ITS DUE*, *supra* note 56, at 230–31; Shawn J. Bayern, *The Significance of Private Burdens and Lost Benefits for a Fair-Play Analysis of Punishment*, 12 NEW CRIM. L. REV. 1, 23 (2009); Husak, *Already Punishment Enough*, *supra* note 165, at 231 (making out “inconclusive” support for the proposition). “Interestingly enough, judges and juries, as the case may be, do tend to take the wrongdoer’s suffering into account in sentencing.” *Id.* at 231. “This idea, referred to as ‘*poena naturalis*’, or ‘natural punishment’, seems to reflect something deeply embedded in our moral sense.” *Id.* Defense lawyers, unsurprisingly, have argued that adverse publicity causing great humiliation to a previously respected member of the community should constitute “punishment enough.” See RYBERG, *supra* note 136, at 17.

⁴⁶⁴ Kolber argues that we need to “justify those aspects of punishment that are neither intended nor foreseen” as well as “aspects of punishment that are augmented by offenders’ baseline characteristics.” Kolber, *Comparative Nature of Punishment*, *supra* note 450, at 1602. “When we harm people knowingly, we need to have a justification for doing so. Retributivists who claim that they can ignore the full, comparative range of harms to inmates simply because those harms are unintended have failed to fully justify those punishments.” *Id.*; see Kolber, *Unintentional Punishment*, *supra* note 453. “Similarly, focusing on retribution, judges could factor in likely sexual victimization in determining ‘just deserts.’ . . . If a likely collateral consequence of imprisonment is rape, or even fear of rape, some lesser sentence may be retributively appropriate.” Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259, 1302 (2011) (footnotes omitted). This is a major problem. One observer “describes prison conditions in the United States as ‘unspeakably barbaric.’” Chad Flanders, *Retribution and Reform*, 70 MD. L. REV. 87, 95 (2010) (footnote omitted). “Our prisons in particular are theaters of appalling human degradation. Outside prisons, too, American criminal justice humiliates offenders in ways unique in the Western world . . .” James Q. Whitman, *Making Happy Punishers*, 118 HARV. L. REV. 2698, 2699 (2005) (reviewing NUSSBAUM, *supra* note 160) (footnote omitted).

⁴⁶⁵ Ryberg mentions the negative long-term effects of job loss and the difficulty of obtaining a new job after release, losing one’s spouse and other social ties, and psychological after-effects. “Moreover, a punishment may have an impact on the lives of other persons, most obviously on the close relatives of the punished.” RYBERG, *supra* note 136, at 109–10. “Prisoners are often abandoned by their spouses and friends, face difficulty finding and keeping employment, and may suffer from incurable diseases contracted during their incarceration.” Bronsteen et al., *supra* note 460, at 1038.

⁴⁶⁶ “When we recognize the comparative nature of punishment, we see that, by putting two equally blameworthy offenders in prison for equal durations, the offender with the better baseline condition is likely punished more severely than the offender with the worse baseline condition.” Kolber, *Comparative Nature of Punishment*, *supra* note 450, at 1566 (emphasis omitted). “If we insist on giving both of these offenders equal prison terms, we cannot justify doing so on the grounds of proportional punishment.” *Id.* (emphasis omitted). “We would argue that fairness requires a recognition that the same sentence may have a disproportionately severe impact on certain offenders, and that only if one adopts a principle of equal impact can this problem be minimized.” Andrew Ashworth & Elaine Player, *Sentencing, Equal Treatment, and the Impact of Sanctions*, in FUNDAMENTALS OF SENTENCING THEORY, *supra* note 165, at 251, 255. “Equality of impact is widely accepted as a strong principle of fairness in the calculation

As for economic harms, fines are one imposition that produce them. They provide a common means to punish business enterprises.⁴⁶⁷ Under the notion of the declining marginal utility of wealth,⁴⁶⁸ equal fines may have disparate impacts that hinge on the wealth of the fined invaders.⁴⁶⁹ Wealth effects aside, the preference for wealth is a variable matter of taste, as evident from the attitude manifested by religious ascetics.⁴⁷⁰ Imprisonment in itself also produces economic harms, as it precludes most gainful employment. The preclusion of gainful employment during imprisonment, or afterwards from the stigma of a criminal record, has differing economic impacts owing to the variations in the market value of the invader's skill set, experience, and other factors. In other words, her opportunity costs may differ. We can even imagine eventual economic gains from imprisonment, as where a prisoner turns away from a life of crime, obtains a valuable education in prison, or hones her commercially valuable creative talents.⁴⁷¹

Psychic harms especially, but also physical harms associated with economic harms, may vary from invader to invader. The invader's temperament and preferences affect her reactions to economic harms. Again, a crucial factor is the functionality of the invader's reduced autonomy space, that is, the amount that her economic loss impacts her operative, preferred, or felt freedoms.

of financial penalties." *Id.* at 256. "The same principle has, however, been less rigorously applied when calculating the length of custodial sentences." *Id.* Furthermore, "insofar as the conditions in prison establishments vary, over and above the minimum, there is the question of whether, and, if so, how, to take account of those variations when calculating sentence length." *Id.* at 262.

Perhaps these problems can be avoided by adjusting the purpose or meaning of retributive punishment. "It would be foolish to deny that persons experience punishment differently. However, what we deny, in the main, is that this variance in the experience of punishment is critically relevant to the shape and justification of retributive punishment within a liberal democracy." Markel & Flanders, *Bentham on Stills*, *supra* note 148, at 909. "A key point of our disagreement is the common and, for the most part, apparently unreflective conflation of *punishment* with *suffering*." *Id.* at 911 (footnote omitted). "If retributive punishment is not about matching pain for pain but rather serves as an attempt to communicate to the offender society's condemnation by means of a deprivation of an objective good such as liberty, then the idiosyncratic experience of the offender will hardly matter—if at all." *Id.* This last point turns on what is meant by "liberty."

⁴⁶⁷ "Although it has escaped almost everyone's attention, fines have long operated as the principal technique of governing crimes through risk. In most jurisdictions outside the US, fines make up about [seventy percent] of court dispositions." O'MALLEY, *supra* note 246, at 84 (citation omitted).

⁴⁶⁸ See, e.g., KUKLIN & STEMPEL, *FOUNDATIONS OF THE LAW*, *supra* note 342, at 40; RICHARD A. POSNER *ECONOMIC ANALYSIS OF LAW* 75–76 (2d ed. 1977); LUDWIG VON MISES, *HUMAN ACTION* 119–27 (3d rev. ed. 1966).

⁴⁶⁹ "Subjective factors, [Kant] grants, are sometimes relevant in assessing the severity of punishment (e.g. the rich man's indifference to a small fine)." Hill, Jr., *Kant on Wrongdoing*, *supra* note 130, at 436 (footnote omitted).

⁴⁷⁰ See *id.*

⁴⁷¹ See *infra* text accompanying note 477.

The significance of all these variations among punished invaders may be finessed altogether if we objectify the impacts of punishment,⁴⁷² as we might also consider doing with respect to the impacts of invasions on the invadees.⁴⁷³ But this calls for justification.⁴⁷⁴ Should society take into account the knowledge that equal forms and degrees of punishment have disparate impacts on invaders?

For edification, let us again turn to the positive side of the ledger—grants of benefits for those we wish to reward.⁴⁷⁵ Suppose a community has established a prize designed to reward persons in proportion to their just deserts for beneficial conduct that reflects the honorees' extraordinary beneficence and respect for fellow citizens. Over the years, a designated group of civic leaders has granted such rewards by means of free passes and services at the municipal sports and cultural institutions. For a heroic, highly risky rescue of the community from an impending disastrous flood, the leaders granted the honoree and her immediate family lifetime passes and free services at every municipal facility. For a modest rehabilitation of a local ball field, the leaders granted the honoree a one-year pass to municipal swimming pools. Now, let us assume that the leaders believe an appropriate reward for an honoree's exceptional conduct is a lifetime pass to either a municipal golf course or ice skating rink. They discover that this person is an avid golfer but indifferent to skating. It seems unimaginable that the leaders would grant her the pass to the skating rink instead of the golf course. What if the honoree is known to be indifferent to all sports and cultural activities or incapable of enjoying them? Is it incumbent on the community to come up with an alternative reward, if possible? If so, what are the standards of "if possible"? Does this turn on the size or wealth of the community? The effort and expense required to find and implement an alternative reward? Suppose the community wishes to reward two persons for the same beneficial conduct, the leaders considering as appropriate for each the grant of a lifetime pass to one of the municipal facilities. It turns out that one of the honorees is twenty years old and the other is sixty. Should the community supplement the award to the older honoree? Again, the "if possible" issue arises.⁴⁷⁶

⁴⁷² "The assessment of severity, as the assessment of the harmfulness of the offense, should be standardized: the focus should be on how unpleasant the punishment *characteristically* is. Such standardization is necessary as a limit on discretion It is also needed as a safeguard against class justice." VON HIRSCH, *DOING JUSTICE*, *supra* note 51, at 89–90. It "assures that the severity of penalties is knowable in advance." *Id.* at 80. "[T]he criminal law, with its general rules and its emphasis on foreseeable harms, is mainly equipped to deal with standard cases." Andrew von Hirsch & Nils Jareborg, *Gauging Criminal Harm: A Living-Standard Analysis*, 11 OXFORD J. LEGAL STUD. 1, 13 (1991). Nonetheless, "the living-standard analysis would explicitly allow for cultural variation." *Id.* at 14.

⁴⁷³ For example, we might base impacts, or the pain and suffering from impacts, on a reasonable person experiencing a like formal (hypothetical? material?) autonomy space reduction.

⁴⁷⁴ See *supra* note 464.

⁴⁷⁵ I use the reward side of desert as an "intuition pump," as coined by Daniel Dennett. Intuition pumps, which are subject to misuse, are "not arguments, they're stories. Instead of having a conclusion, they pump an intuition." Daniel Dennett, *Intuition Pumps*, in *THE THIRD CULTURE* 181, 182 (John Brockman ed., 1995).

⁴⁷⁶ "Often it may happen that the social costs of legal enforcement of justice based on desert are too high and then the attempt should be abandoned without, however, changing the criteria of what is desert." SADURSKI, *GIVING DESERT ITS DUE*, *supra* note 56, at 121.

On another side of the coin, suppose the civic leaders believe a lifetime pass to a municipal golf course is an apt reward for a person's conduct, but then learn that the honoree is an avid golfer who had to give up the activity because she could no longer afford the green fees. Hence, she will become ecstatic by such a reward. The honoree's psychic and other benefits, therefore, would much surpass the gauge of her just deserts for her conduct. Should the leaders then cut back on the length of the golf course pass, offer merely a discount, give her a pass to a skating rink instead, etc.? What if the heroic honoree is so wealthy that even free lifetime access to all the municipal facilities will strike her as a mere token?

In discussing the quandaries these hypotheticals raise, let me set aside some possible responses: first, that the award is meant to be merely symbolic, and hence its value to the honoree is not a controlling consideration; and second, that the award is akin to a contest in which the contestant who satisfies the rules earns a pre-established prize irrespective of its benefit. In discussing retributive just deserts, I have dismissed both of these standards and all other standards but this: the invader is to suffer punishment in proportion to her just deserts. If a proportional standard is to apply to the honorees, attention to the honorees' known conditions and dispositions when determining an appropriate reward seems important—if this consideration is reasonably possible. This last clause is a significant hooker. When is the standard of reasonability met? Substantially past this point it would seem to be an insult, and disrespectful, to grant an honoree a reward that is foreseeably inferior in the honoree's eyes to an easily granted alternative.

To return to the debit side of the just deserts ledger, let us look at some arguments that have been accepted as a means of discounting foreseeable, but unintended, harmful effects or factors. To focus this inquiry, let us assume the favored requital maxim centers on dignitary harm and is, say, to "reduce an invader's freedom in proportion to her blameworthiness." To end the conversation, we could simply declare that, under this adopted maxim, foreseeable harms beyond those that would be suffered by a reasonable person from the freedom restrictions in themselves are not wrongful. Harms, yes, wrongful harms, no. But this is too quick. First, limitations on freedom, dignitary harms, cannot be neatly separated from the other three types of harms. Imprisonment, for example, often inextricably intertwines with physical, psychic, and economic harms, and occasionally benefits,⁴⁷⁷ as well. Likewise, a requital focus on any one or more of these latter three types of harms often involves the other types of harms also. Economic or physical harm, and even psychic harm, typically restricts a person's freedom.

Second, even if we grant that a requital focus on one or more types of harm to the exclusion of other foreseeable harms meets the mandates of the categorical imperative, we must also then acknowledge that a significant range of other requital maxims, or applications thereof, would also meet Kant's standard. In adopting one or another of these acceptable maxims, we usually expect a deeper justification than, "we put all the possible maxims on a board and adopted the one hit by a thrown dart." Yes, reason alone will not lead to a single, uniquely acceptable requital maxim, but it will go some of the way even when, as here, we are struggling with moral issues bristling with

⁴⁷⁷ The punishment, for example, "could ultimately benefit the wrongdoer by healing the sickness of soul or mending the defects of character that had propelled her toward, or found expression in, her criminal deeds." David Dolinko, *Morris on Paternalism and Punishment*, 18 LAW & PHIL. 345, 348 (1999).

essentially contestable concepts. We found a comparable problem when searching for standards by which to judge an invader's just deserts. For this difficulty, we brought in our reasonable person, suitably deontically disciplined, to judge an invader's degree of blameworthiness. Similarly, we may ask our reasonable person, as a representative of the entire community, to pick an apt requital maxim for adoption or application. In doing so, we should ask her to justify her choice. As postmodernists have instructed, she cannot be expected to justify her choice beyond debate all the way down to bedrock principles,⁴⁷⁸ but our questioning should push her to consider as many relevancies as reasonably possible, including consequential and aretaic normative factors that are not inconsistent with deontic principles. At the end of the line of analysis there is a leap of faith, such as "I choose this deontic maxim simply because I think it properly balances the many divergent values I have deeply contemplated, weighted, and weighed." But the shorter the leap, the less likely are slips.⁴⁷⁹ As much as reasonably possible, our representative of the community must clear out the underbrush. She must justify as well as one can the adopted balance of the liberty and security interests of the invader and others. After all, the punished invader can claim that punishment that does not aptly account for her foreseeable requital harms does not respect her autonomy and her dignity_E, to say nothing of her dignity_L.

How, then, might we justify ignoring foreseeable harms to an invader produced by her punishment? Let us first turn to the community's penal agent and ask her to justify her conduct that foreseeably punishes the invader beyond her just deserts. The agent's situation is suggestive of moral quandaries that invoke the doctrine of double effect. The doctrine, roughly, is "that we may do what will cause a bad outcome in order to cause a good outcome if and only if (1) the good is in appropriate proportion to the bad and (2) we do not intend the bad outcome as our means to the good outcome."⁴⁸⁰

⁴⁷⁸ See generally COSTAS DOUZINAS ET AL., POSTMODERN JURISPRUDENCE 16 (1991); CHRISTOPHER NORRIS, WHAT'S WRONG WITH POSTMODERNISM 1-48 (1990); STEPHEN TOULMIN, COSMOPOLIS 5-44 (1990); Scott Fruehwald, *The Emperor Has No Clothes: Postmodern Legal Thought and Cognitive Science*, 23 GA. ST. U. L. REV. 375, 377-79 (2006).

⁴⁷⁹ See KUKLIN & STEMPEL, FOUNDATIONS OF THE LAW, *supra* note 342, at 23-24.

⁴⁸⁰ Judith Jarvis Thomson, *Self-Defense*, 20 PHIL. & PUB. AFF. 283, 292 (1991) (emphasis omitted) (criticizing the doctrine under her "Irrelevance-of-Intention-to-Permissibility Thesis" at 292-96); see, e.g., BRUDNER, *supra* note 63, at 197-205; ALAN DONEGAN, THE THEORY OF MORALITY 157-64 (1977); R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY 58-63, 74-98 (1990); F.M. KAMM, INTRICATE ETHICS 21-23, 91-189 (2007); J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 160-68 (1977); MICHAEL S. MOORE, CAUSATION AND RESPONSIBILITY 42-51 (2009); T.M. SCANLON, MORAL DIMENSIONS 1-4, 8-36 (2008); John Finnis, *Intention and Side-effects*, in LIABILITY AND RESPONSIBILITY, *supra* note 148, at 32; Joseph M. Boyle, Jr., *Toward Understanding the Principle of Double Effect*, 90 ETHICS 527 (1980) (specifying "[t]he classic modern formulation" at 528); Dolinko, *Three Mistakes*, *supra* note 127, at 1634 (referring to critics of the doctrine who claim the doctrine is mistaken, superfluous, or incoherent); Alison McIntyre, *Doing Away with Double Effect*, 111 ETHICS 219 (2001). Quinn "suggest[s] a rationale with clear Kantian echoes" that buoys "the intuitions that support [the doctrine]" within bounds. Warren S. Quinn, *Actions, Intentions, and Consequences: The Doctrine of Double Effect*, 18 PHIL. & PUB. AFF. 334, 335 (1989). "[T]he doctrine reflects a Kantian ideal of human community and interaction. Each person is to be treated, so far as possible, as existing only for purposes that he can share." *Id.* at 350 (footnote

The classic example is the wartime bombing of a munitions factory located in a residential neighborhood.⁴⁸¹ Harm to innocent bystanders because of the bombing is foreseeable. Under the doctrine, if the overall benefits toward ending the war and reducing casualties (substantially?) outweigh the harms to innocents, bombing the factory is not immoral.⁴⁸²

In scrutinizing the doctrine of double effect in the punishment context, first consider the invader's innocent supporters. The invader's punishment causing harm to the innocent supporters is foreseeable even though they did nothing to deserve it. Nevertheless, as a matter of deontic justice, we arguably do not fully recognize their claims. We are not foreseeably harming the supporters as a means to punish the invader. The invader's blameworthiness is not any less because her supporters will suffer from her punishment, her just deserts. Indeed, the invader's blameworthiness seems even worse insofar as she can foresee her supporters' ensuing harms from her conduct. But we are not unsympathetic to the supporters' pleas. In punishing the invader, we may consider their harms as a matter of mercy,⁴⁸³ or consequentialism,⁴⁸⁴ and accommodate them to some extent accordingly,⁴⁸⁵ though these are not deontic principles fundamentally. Yet a deontic consideration remains. The supporters' foreseeable harms should at least be a consideration in implementing the invader's punishment when a range of possible requitals is apt. Parallel to the reward side of the desert ledger, an adopted maxim should protect against easily avoidable, gratuitous harms. If, for example, the punisher has equal options to imprison the invader within convenient visiting reach of the supporters or at an inconvenient distance, the first option reduces the foreseeable harms to those supporters. Insisting upon the nearby prison is reasonable.⁴⁸⁶ As accounting for the supporters' harms becomes more costly for the punisher, at what point does it become unreasonable to require the accommodation? Just as we queried the strength of the demands on a community when rewarding a person for her beneficial conduct to make reasonable efforts to accommodate the honoree's preferences, so are we raising these demands in the context of punishment. The word "reasonable" does the easy work of denominating the standard. The difficult implementation of this standard involves a multitude of considerations. When balancing the various liberty and security interests, at some

omitted). "An . . . urgent basic task [for morality] is to define the forms of respect that we owe to one another, and the resulting limits that we may not presume to exceed." *Id.* at 351.

⁴⁸¹ See, e.g., Thomson, *supra* note 480, at 292–93.

⁴⁸² See *id.*

⁴⁸³ For the legitimacy of mercy to an invader in a deontic realm, see *supra* note 317. Whether mercy to an invader's supporters should reduce the invader's punishment is an even more perplexing issue.

⁴⁸⁴ The consequences of plausible maxims are considered in a deontic regime. See *supra* note 96.

⁴⁸⁵ In sentencing, the Model Penal Code would consider the "excessive hardship to [the defendant's] dependents." MODEL PENAL CODE § 7.01(2)(k) (AM. LAW INST. 1962) (quoted *infra* note 498).

⁴⁸⁶ The punisher should not choose the distant prison in order to reduce the number of visits from supporters, thus psychically harming the invader along with the supporters. This tactic uses the supporters as a means only.

point the harms to others that might occur (for example, from onerous administrative burdens or the expensive need to build more convenient prisons) may outweigh the foreseeable harms to supporters.

As applied to invaders themselves, the underlying quandaries of the doctrine of double effect take us down a path like the one for supporters' foreseeable harms. Is adopting a requital maxim that excludes consideration of one or more of the invader's four types of harms when foreseeable the proper option? If, say, we adopt a requital maxim that focuses only on dignitary harms from an invader's freedom restrictions, may we ignore the foreseeable, disparate physical, psychic, or economic harms to various invaders from application of the maxim? Let us begin this inquiry at the far end of the slope. While we began with easy cases when discussing the foreseeable disparities in effects from rewards, and the harms to an invader's supporters (i.e., a more convenient prison is equally available), let us start here at the opposite extreme. That is, assume incarceration of an invader will foreseeably produce great physical, psychic, and economic harms to her vastly beyond the norm for prisoners and her just deserts, and these harms would be extremely difficult, even practically impossible, for the punisher to avoid. The invader rightfully says, "because of my heightened sensitivities, if you imprison or otherwise punish me for my battery, it will destroy me."

Our first response to the punishee's point that normal punishment will harm her much beyond her just deserts might be, "you should have thought of that before you battered that invadee while knowing of the risk of criminal sanctions. Under these circumstances, your criminal conduct constitutes consent to the legal consequences." This rebuttal, based on the notion of hypothetical, implied, tacit, constructive, or formal consent, is often seen in moral, political, and legal argument.⁴⁸⁷ I mention this analysis above as the main way that political theorists have justified a deontic basis for the social contract underpinning a government's claim to legitimacy.⁴⁸⁸ There are real teeth in this type of consent argument. But the argument is often used to bite off more than it can swallow. One can invoke this argument to justify an unjust government or law, for example, or to justify an egregious remedy for a minor breach of contract that is buried in a nonnegotiable, complicated document. On the other hand, an orderly, efficient legal system would seem practically impossible if every defendant could deny liability by proving that she did not truly understand or explicitly consent to particular norms, laws, or contract provisions. To strike a fair balance, I have proposed a Consent Principle.⁴⁸⁹

Under the Consent Principle, the richness or depth of a person's required consent to limitations on her autonomy space is proportional to the extent to which such consent truncates her baseline freedom, that is, constitutes curtailments of her liberty and security interests.⁴⁹⁰ For instance, the consent required for a social hug is much shallower than is the consent required for sexual relations. Likewise, the consent needed to forgo a nominal legacy is weaker than that to decline a substantial estate. In

⁴⁸⁷ Mikko Wennberg, *Modeling Hypothetical Consent*, 17 J. LIBERTARIAN STUD. 17, 17 (2003).

⁴⁸⁸ See *supra* text accompanying note 15.

⁴⁸⁹ See Kuklin, *Private Requitals*, *supra* note 2, at 977–78.

⁴⁹⁰ See *id.* at 976–77.

line with Aristotle's notion of responsibility blameworthiness, full consent must be free of avoidable ignorance and coercion, but the imperfections of the human condition do not allow us to always demand full consent to hold someone responsible for their choices and conduct.⁴⁹¹ In deciding where an apt line is drawn for sufficiently finding responsibility, the Consent Principle urges consideration of the likely impact of the finding on the purported consenter.⁴⁹²

Among the impacts on a person's autonomy space, criminal punishment must surely rank among the most extensive. Hence, to counter the claim that the criminal invader "consents" to punishment that negatively impacts on her more than called for under the proportional standard of retributive just deserts, the invader's agreement under the Consent Principle must be rich and deep. Some may doubt that this is often the case. Criminals generally have but a vague notion of the potential consequences of their sanctionable conduct.⁴⁹³

Even when criminals are completely aware of all the risks they assume by illegal conduct, their "consent" to the sanctions may not be enough to justify punishment beyond their just deserts. As Kant points out, even full consent has limits.⁴⁹⁴ One cannot consent, he claims, to actions that are disrespectful to oneself, such as self-slavery, mutilation, or suicide.⁴⁹⁵ Because persons, by virtue of their rational capacity, are moral beings entitled to be treated with respect, one cannot disrespectfully treat even oneself under the categorical imperative.⁴⁹⁶ It seems that "consent" to punishment significantly beyond that which is mandated by one's just deserts is disrespectful of oneself. While this line drawing is difficult, clearly that limit is often violated in our current penal system.⁴⁹⁷ A principled deontic regime would not tolerate this.

Our second, somewhat more sympathetic, response to the sensitive punishee who claims she will be "destroyed" by imprisonment might be, "because we don't want you to suffer beyond your just deserts, we would like to avoid (most) of your harms from your special sensitivities, but doing this would require shifting substantial resources to your case which we simply cannot afford in light of the community's other pressing needs. Our only plausible accommodation would be to set you free. But we must do our duty to you by punishing you."⁴⁹⁸ We also have a duty to your invadees

⁴⁹¹ See *id.* at 977.

⁴⁹² See *id.*

⁴⁹³ See, e.g., Robinson & Darley, *Does Criminal Law Deter?*, *supra* note 455, at 175–78; *id.* at 174 ("Potential offenders commonly do not know the legal rules, either directly or indirectly, even those rules that have been explicitly formulated to produce a behavioural effect.").

⁴⁹⁴ See IMMANUEL KANT, ON THE COMMON SAYING: THAT MAY BE CORRECT IN THEORY, BUT IT IS OF NO USE IN PRACTICE (1793), *reprinted in* PRACTICAL PHILOSOPHY, *supra* note 5, at 273, 293–94 [hereinafter KANT, ON THE COMMON SAYING].

⁴⁹⁵ See *id.*; KANT, THE METAPHYSICS OF MORALS, *supra* note 13, at 431, 471–72.

⁴⁹⁶ See KANT, ON THE COMMON SAYING, *supra* note 494.

⁴⁹⁷ See generally SUSAN KUKLIN, NO CHOIRBOY: MURDER, VIOLENCE, AND TEENAGERS ON DEATH ROW (2008); BRYAN STEVENSON, JUST MERCY (2014).

⁴⁹⁸ Kant notoriously claimed that the state has the duty to punish all criminals, just short of the heavens falling, in order to show respect for the criminal and her autonomous choices (otherwise, she is being treated as an incompetent). KANT, THE METAPHYSICS OF MORALS, *supra* note 13, at 474–75. "Retributivism in other words, is truly a theory of justice such that, if it is

and those who are put at risk of your future wrongful risks to punish you.”⁴⁹⁹ Again, at the opposite extreme where, say, a prisoner’s severe temperature sensitivity could

true, we have an obligation to set up institutions so that retribution is achieved.” Moore, *Moral Worth of Retribution*, *supra* note 127, at 96; see MOORE, PLACING BLAME, *supra* note 170, at 91, 154. Moore “defend[s] the purely moral claim that the obtaining of retribution is an intrinsic good.” *Id.* at 160; see Michael S. Moore, *Responsible Choices, Desert-Based Legal Institutions, and the Challenges of Contemporary Neuroscience*, 29 SOC. PHIL. & POL’Y 233, 235 (2012) (“[A] freestanding, intrinsic good”). Brudner distinguishes legal retributivism from moral retributivism. Unlike legal retributivists, “all moral retributivists believe that the state should punish for the sake of the good inherent in punishing the morally guilty.” BRUDNER, *supra* note 63, at 20. But, “[t]o say that punishment has intrinsic value would imply that the committing of an offence has instrumental value, but surely no-one would embrace this paradox!” Mundle, *supra* note 431, at 223. The Model Penal Code is not so strict. Among the considerations to “be accorded weight in favor of withholding sentence of imprisonment” is that “the imprisonment of the defendant would entail excessive hardship to himself or his dependents.” MODEL PENAL CODE § 7.01(2)(k) (AM. LAW INST. 1962). In the private law context, however, we often do not think that we are disrespecting obligors or tortfeasors by allowing them to escape their obligations. Contract obligees and tort invadees have no duty to sue their obligors. Indeed, we often think we are honoring obligors by waiving their obligations.

From the other side of the Hohfeldian correlative—that is, the invader’s rights rather than the state’s duties—Morris argues that the fundamental, natural, inalienable, and absolute human right to be treated as a person entails the right to punishment. Herbert Morris, *Persons and Punishment*, in PUNISHMENT AND REHABILITATION, *supra* note 127, at 74, 74–75. “[T]he denial of this right implies the denial of all moral rights and duties.” *Id.* at 75. Duff agrees that “[a] sane criminal has a right to be punished,” otherwise she is disrespected. DUFF, TRIALS AND PUNISHMENTS, *supra* note 82, at 263. Feinberg questions whether a criminal has a right or entitlement to be punished. FEINBERG, *Justice and Personal Desert*, *supra* note 71, at 72 (“Of all those modes of official treatment for which a person might qualify under some institutional rules, only punishment seems resistant to the language of rights . . .”). Why shouldn’t the criminal’s right or the state’s duty be waivable by the right-holder, as are most other rights and duties? See, e.g., ADLER, URGINGS OF CONSCIENCE, *supra* note 406, at 19; SADURSKI, GIVING DESERT ITS DUE, *supra* note 56, at 245–47. The exceptions to waivable duties are those based on self-disrespect (e.g., mutilation), which, arguably, is not the case here. “[A] renounced right ceases, sooner or later, to be a right, and the criminal’s ‘right’ to be punished is well-nigh certain to be renounced.” FEINBERG, *Justice and Personal Desert*, *supra* note 71, at 73 (footnote omitted). Kant denies that a criminal has a duty to accept punishment. KANT, THE METAPHYSICS OF MORALS, *supra* note 13, at 476 (“the social contract contains no promise to let oneself be punished . . .”). While Morris and Duff argue that a person is disrespected if the state denies her the right to be punished, this does not seem to be the normal reaction in the private law context where, say, an obligee declines to accept her obligor’s contract or tort obligations.

⁴⁹⁹ If the state declines to punish, does this show disrespect of the invadees and the public put at risk of future wrongful risks? “Of course Kant regards externally wrongful (illegal) conduct as deserving punishment, and the state not only may but must use such coercion to protect people’s rightful freedom.” WOOD, KANT’S ETHICAL THOUGHT, *supra* note 434, at 134 (citation omitted). What if invadees consent to the invader’s nonpunishment? “[A] retributivist should urge punishment on all offenders who deserve it, even if no victims wanted it.” MOORE, PLACING BLAME, *supra* note 170, at 89; Moore, *Moral Worth of Retribution*, *supra* note 127, at 95. Moore objects to Fletcher’s “rights-based retributivism” whereby a victim can waive the right to demand the criminal be punished, seeing this approach as an engine of vengeance and neglectful of equal punishment concerns. Moore, *Victims and Retribution*, *supra* note 146, at 75–79. Yet since an invadee can usually consent *ex ante* to what would otherwise be an autonomy invasion, why can she not consent, in effect, *ex post*? Is it partially because the

be rectified by providing her warmer clothing, we would expect the foreseeable harm to be avoided. At what point do we cross from the “ought” to the “can’t”?⁵⁰⁰

The deontic duties of respect may help us draw lines when resource trade-offs are necessitated. Three types of parties with interests in the trade-offs are identified above: the invader (punishee), whether or not she is particularly sensitive; the invadee and those put at future wrongful risk by the invader’s possible ensuing conduct; and, other members of the community who will be denied sufficiently respectful treatment by the government if resources are reallocated to meet the invader’s claim of unjust punishment. In this latter category, we can imagine the need to take money from schools, welfare, policing, and other public institutions to treat punishees fairly according to their just deserts. This may become a deontic problem. When schools, for example, are substantially substandard, the children denied a reasonable opportunity to hone their talents are not being treated with respect_E, especially when other schools in the system are not substandard. The same can be said about some other public services. Indeed, we can imagine a sufficiently impoverished community such that virtually all its members are denied their entitlements to respect_E and dignity_E, which is due them simply by virtue of their rational nature. On top of this, they may also be denied their just deserts for their conduct, thus denying them their rights to respect_L and dignity_L.

So what is a community to do when it cannot meet all of its deontic duties because of its lack of resources?⁵⁰¹ Is it to disrespect some persons (e.g., invaders) to fully respect other persons (e.g., invadees)? Is it to (dis)respect all persons to an equal extent,⁵⁰² thus requiring everyone to share in a denial of their rights? Is this denial to be proportional? On what would such proportion be gauged? These are among the myriad of issues that remain for a community that wishes to “do the right thing” according to Kant. Let the debate among reasonable, just people continue.

invadee’s ex post consent largely leaves in place the risk of future wrongful risks by the invader to the public? For some invasions, this is highly attenuated (e.g., problematic theft of spouse’s assets). How does prosecutorial discretion relate to these concerns?

⁵⁰⁰ More generally, if conceptions of retribution stumble in principle or practice, at some point do they run afoul of the Kantian principle that “ought implies can”? See generally Robert Stern, *Does ‘Ought’ Imply ‘Can’? And Did Kant Think It Does?*, 16 UTILITAS 42 (2004). If we cannot properly retributively punish an invader, ought we give up any attempt?

⁵⁰¹ I speak here and elsewhere of a community’s deontic duties while, at the same time, I have denied that a community or a state is a moral being under the categorical imperative. Thus, a collective does not have independent deontic status. The reference to community rights and duties, then, must resolve back to the individual rights and duties of each member of the community. See *supra* note 88. This complicates the analysis. For example, impoverished or disabled members may have different duties from those not so disadvantaged. They may not be able to afford to give more for the penal system without depriving their children of a fair upbringing. Other characteristics of each community member may also go into the calculus of their duties. I leave these complications aside.

⁵⁰² That “equal” is a loaded, controversial standard, see DOUGLAS RAE, *EQUALITIES* (1981).

