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"You Should Have Known Better"

Bailey Kuklin*

I. INTRODUCTION

The common expression, "you should have known better," used in judicial opinions and everyday speech, is often employed in a context that implies either that the faulted person deserves a sanction when others would not, or that she deserves a more severe sanction than others. This may be called the "knowledge proposition." The expression is used to make various points, including the point that the antisocial or illegal consequences of a particular act are so obvious that everyone, or at least everyone in the position of the actor, should have foreseen them, and therefore the actor, though personally ignorant, is not excused from responsibility.¹ The expression is also used in the sense that the actor should have been aware that the chosen act runs contrary to her own interests.² But the more interesting uses of the expression suggest that, because the actor should have been aware of the antisocial or illegal consequences of her act, by choosing to act nevertheless, she acted reprehensibly in circumstances in which we would not blame others at all, or she acted more reprehensibly than we would judge others to have acted.³

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1. This has been referred to as a state of "voluntary ignorance." See JAMES S. FISHKIN, *TYRANNY AND LEGITIMACY: A CRITIQUE OF POLITICAL THEORIES* 47 (1979). Examples Fishkin cites are "a ship's pilot (who should have known about certain navigational obstacles) and a cook (who should have known that salt was necessary for the potatoes)." *Id.* (citing G.E.M. Anscombe, *The Two Kinds of Error in Action*, in *ETHICS* 279, 287 (Judith J. Thomson & Gerald Dworkin eds., 1968)).

2. At one point Feinberg hints at this use: "Some eccentrically imprudent behavior may not be 'voluntarily unreasonable' not because, being unreasonable it cannot be voluntary, but rather because, dangerous though it may be, it is not truly unreasonable *in relation to the actor's own interests*." JOEL FEINBERG, *HARM TO SELF* 111 (1986). In characterizing such conduct as unreasonable, one must be careful to refrain from importing one's own goals. See *id.* at 111-12.

3. Notice that the proposition can be construed to align with Holmes's accepted view that a person is liable for damages that would have been foreseen by a reasonable person, irrespective of what the actor actually foresaw. See OLIVER W. HOLMES, *THE COMMON LAW* 117 (Mark D. Howe ed., Harvard Univ. Press 1963) (1881) (arguing a person "is bound to foresee whatever a prudent and intelligent man would have foreseen, and therefore he is liable for conduct from which such a man would have foreseen that harm was liable to follow"); see also George P. Fletcher, *The Right and the Reasonable*, 98 HARV. L. REV. 949, 949 (1985) ("We cannot even begin to argue about most issues of responsibility and liability without first asking what a hypothetical reasonable person would do under the circumstances."). But see H.L.A. HART, *Diamonds and String: Holmes on the Common Law*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 278, 284 (1983) (arguing that, in the criminal context, there is little American legal support for the refusal to examine actual foresight). If we ascribe to

In this second permutation, the actor is not simply blameworthy; she is more blameworthy because she should have known better.⁴ It is these latter two uses that are examined in this Article.

An individual's perceived character, as well as the varying circumstances in which she acts, often affects social judgments of her responsibility and blameworthiness.⁵ Often, particular circumstances lead to judgments of diminished responsibility.⁶ For example, the various legal disabilities, such as infancy and mental incompetence, sometimes result in

Holmes's reasonable person not simply the knowledge and qualities of 'Everyperson, but the presumed additional knowledge and qualities of the actual actor, then not only are we basing general liability on the standard of this special reasonable person, but we are also adding heightened accountability: "But if a person in fact has knowledge, skill, or even intelligence superior to that of the ordinary person, the law will demand of that person conduct consistent with it." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 185 (5th ed. 1984). Rawls observes that "a reasonable man knows, or tries to know, his own emotional, intellectual, and moral predilections and makes a conscientious effort to take them into account in weighing the merits of any question." John Rawls, *Outline of a Decision Procedure for Ethics*, 60 PHIL. REV. 177, 179 (1951).

4. A sensational(ized) example was reported in the newspaper:

The crime drew widespread attention, not only for its callous nature, but also because [the defendant], who said he hoped to become a dentist, had no criminal record and was the promising son of hard-working, middle-class parents. But the Rockland County District Attorney . . . said today that, if anything, [the defendant's] background should be held against him. "He was privileged to receive the best that our society has to offer," [the District Attorney] said, but added that he made a "mockery" of the opportunities he received.

Julia Campbell, *Ex-Student Is Sentenced to 70 Years to Life in Fatal Carjacking in Rockland*, N.Y. TIMES, Feb. 1, 1995, at B5.

5. Goodin finds that "[t]he standard model of responsibility (championed variously by lawyers, churchmen and Kantian philosophers) is essentially a mechanism for fixing credit or, more commonly, blame for certain sorts of states of affairs. . . . People are paradigmatically held responsible for flaws in their characters and for the outcomes (especially the harms) that flow from them." Robert E. Goodin, *Apportioning Responsibilities*, 6 LAW & PHIL. 167, 167-68 (1987). On the other hand, Miller argues that "[t]o be responsible for something is to be answerable for it; it is not necessarily to be blamable." David Miller, *Reply to Oppenheim*, 95 ETHICS 310, 313 (1985). "Responsibility, one might say, opens the door to questions of praise and blame without deciding them." *Id.* The question of responsibility, then, is strongly normative, not factual. See JOEL FEINBERG, *Problematic Responsibility in Law and Morals*, in DOING AND DESERVING 25, 27 (1970) ("In problematic cases . . . legal responsibility is something to be decided, not simply discovered."). "[R]esponsibility is but a set of practices that we use to describe and understand individual and social behavior. Responsibility matters are matters that enter into our daily lives in myriad ways that cannot be reduced to simple formulas and principles." PETER A. FRENCH, RESPONSIBILITY MATTERS at ix-x (1992). "[T]he central core of the concept of responsibility is that I can be asked the question 'Why did you do it?' and be obliged to give an answer." J.R. LUCAS, RESPONSIBILITY 5 (1993). "To be responsible is to be able to make a response." FRENCH, *supra*, at 16. For the various meanings of ascribing responsibility, see JOEL FEINBERG, *Action and Responsibility*, in DOING AND DESERVING, *supra*, at 119, 130-34; Meir Dan-Cohen, *Responsibility and the Boundaries of the Self*, 105 HARV. L. REV. 959, 962-65 (1992); and Timothy D. Lytton, *Responsibility for Human Suffering: Awareness, Participation, and the Frontiers of Tort Law*, 78 CORNELL L. REV. 470, 472-83 (1993) (proposing two models of responsibility).

6. See, e.g., TED HONDERICH, PUNISHMENT: THE SUPPOSED JUSTIFICATIONS 20 (1969) ("We recognise a considerable range of conditions which may reduce a man's responsibility for a particular action.").

reduced duties of care.⁷ Also, while it is said that "ignorance of the law is no excuse," lack of legal knowledge often induces courts to excuse behavior at least partially, particularly when relatively innocent third parties are not harmed by the ignorant conduct.⁸ Various rationales and extenuating circumstances that excuse the ignorance are recognized throughout the law.⁹ But the expression examined in this Article, "you should have known better," suggests moral and legal pressure in the opposite direction: toward heightened accountability.¹⁰ It is the aim of this

7. Wolff offers an explanation. Children are less responsible because they "do not yet possess the power of reason in a developed form," while mental incompetents "are thought to lack freedom of choice." ROBERT PAUL WOLFF, IN DEFENSE OF ANARCHISM 12 (1970). "[W]e should assign a greater degree of responsibility to children, for madmen, by virtue of their lack of free will, are completely without responsibility, while children, insofar as they possess reason in a partially developed form, can be held responsible . . . to a corresponding degree." *Id.* at 12-13. Wolff fails to note that the law recognizes both cognitive and volitional mental incompetency. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 15 (1981); E. ALLAN FARNSWORTH, CONTRACTS § 4.6 (3d ed. 1999).

8. For example, the traditional rule in retreat is that one cannot claim reliance on a misrepresentation of law because every person is presumed to know the law. See KEETON ET AL., *supra* note 3, at 758-60. Reid justifies compassion for some ignorant persons: "[T]he unlearned man, who uses the best means in his power to know his duty, and acts according to his knowledge, is inculpable in the sight of God and man. He may err, but he is not guilty of immorality." Thomas Reid, *Of the First Principles of Morals*, reprinted in MORALS AND VALUES 63, 70 (Marcus G. Singer ed., Charles Scribner's Sons 1977) (1788). Fletcher captures Reid's idea in "the distinction between wrongdoing and responsibility, the wrong of violating the norm and the blameworthiness of not controlling one's actions and abstaining from the violation [though one is ignorant of the law]." George P. Fletcher, *Paradoxes in Legal Thought*, 85 COLUM. L. REV. 1263, 1271 (1985). In general, "[t]here is some support in legal usage for regarding acts done in ignorance or by mistake as less than fully voluntary." H.L.A. HART & TONY HONORE, CAUSATION IN THE LAW 138 n.40 (2d ed. 1985). The criminal law, however, is reluctant to recognize ignorance of the law as any excuse because "the criminal law represents certain moral principles, [and] to recognize ignorance or mistake of the law as a defense would contradict those values." Jerome Hall, *Ignorance and Mistake in Criminal Law*, 33 IND. L.J. 1, 20 (1957). Nevertheless, "the maxim [that ignorance of the law is no excuse], far from being an exhaustive statement of the law, is in reality a mere starting point for a complex set of conflicting standards and considerations that allow courts to avoid many of the harsh results that strict adherence to the maxim would entail." Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 646 (1984). Some of the considerations for the retreat of the traditional rule must certainly be rooted in realistic pragmatism: "Both American and foreign studies show (not surprisingly) that modern populations know abysmally little about law and legal systems." Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 YALE L.J. 1579, 1593 (1989) (footnote omitted).

9. See, e.g., FARNSWORTH, *supra* note 7, § 4.14, at 258-59; GEORGE FLETCHER, RETHINKING CRIMINAL LAW § 10, 759-875 (1978); KEETON ET AL., *supra* note 3, at 758-60.

10. Perhaps it is not direct pressure toward heightened accountability of the knowing actor that is at work, but rather relaxation of the social compunctions about holding him accountable: "Infliction of punishment is an intrinsic evil, but it is less of an evil when the person brings it on himself We are less impressed with his loss when he could and should have avoided it." Vinit Haksar, *Excuses and Voluntary Conduct*, 96 ETHICS 317, 325 (1986). Haksar relies on "a general rationale that explains why the voluntary element is important for both rewards and penalties." *Id.* at 324.

Left aside is the person who consciously "does know better" but nevertheless chooses the illegal act because of perceived higher principle. This person may also be punished more severely but for different, deterrent reasons: "A man's high motives may sometimes be a reason for not punishing him

Article to unpack this thrust of the proposition. I begin with a general explication of the relationship between knowledge and responsibility.

II. THE KNOWLEDGE PROPOSITION

Basic knowledge and information are requisites to rational choice. As apparent in a representative definition of "rational action," knowledge is said to inhere in all the elements of rationality: "Rational action . . . involves three optimizing operations: finding the best action, for given beliefs and desires; forming the best-grounded belief, for given evidence; and collecting the right amount of evidence, for given desires and prior beliefs."¹¹

Rational choice is generally a requisite to moral and legal responsibility. One representative analysis of "responsibility" reveals where rationality fits: "'[R]esponsibility' has two primary meanings, or . . . what [J. Roland Pennock] has called the core of meaning has two facets, (a) accountability and (b) the rational and moral exercise of discretionary power (or the capacity or disposition for such exercise), and that each of these notions tends to flavor the other."¹²

at all; but in other cases they may be a reason for punishing him as severely as the law allows. For the conscientious offender may be the stubbornest of all: his scruples may be far less easily overcome by threats of punishment than more selfish motives." S.I. BENN & R.S. PETERS, *THE PRINCIPLES OF POLITICAL THOUGHT* 224 (1959). Along these lines, Bentham claims that unusual temptation is ground not for mitigating the penalty but rather for increasing it to overcome the temptation. See JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 166-68 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789).

11. JON ELSTER, *SOLOMONIC JUDGMENTS* 4 (1989). Anthony Downs states it this way: "To make rational decisions, a man must know (1) what his goals are, (2) what alternative ways of reaching these goals are open to him, and (3) the probable consequences of choosing each alternative. The knowledge he requires is contextual knowledge as well as information . . ." ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 208 (1957); see also ROBERT NOZICK, *THE NATURE OF RATIONALITY* 64 (1993) ("Two themes permeate the philosophical literature. First, that rationality is a matter of reasons Second, that rationality is a matter of reliability."); DAVID A.J. RICHARDS, *A THEORY OF REASONS FOR ACTION* 15 (1971) ("[T]o say of a person that he has the concept of rationality is to say that he has certain special capacities of judgement, thought, belief, and knowledge . . ."). Downs continues: "Even choosing goals requires information, since only his ultimate goal—his picture of the ideal social state—exists independent [sic] of his knowledge of the current situation." DOWNS, *supra*, at 208. The term "rational choice," however, has various meanings. See, e.g., John Finnis, *Natural Law and Legal Reasoning*, in *NATURAL LAW THEORY* 134, 140-41 (Robert P. George ed., 1992). The word "rational" has been said to be "a chameleon among words." Donald H. Regan, *The Problem of Social Cost Revisited*, 15 J.L. & ECON. 427, 429 (1972). For an overview of rational choice theory, see Jon Elster, *Introduction*, in *RATIONAL CHOICE* 1 (Jon Elster ed., 1986). For an overview of rationality in general, see FREDERIC SCHICK, *HAVING REASONS* 37-65 (1984); and Steven Lukes, *Some Problems About Rationality*, in *RATIONALITY* 194 (Bryan R. Wilson ed., 1970).

12. J. Roland Pennock, *The Problem of Responsibility*, in *RESPONSIBILITY* 3, 13 (Carl J. Friedrich ed., 1960); see also Jules L. Coleman, *Justice and the Argument for No-Fault*, 3 SOC. THEORY & PRAC. 161, 170 (1974) ("Being at fault, morally or otherwise, has two essential ingredients.

Because knowledge is a requisite to rationality and, therefore, responsibility,¹³ the interesting aspect of the knowledge proposition "you should have known better" suggests that the accused person is charged with knowledge beyond the minimum required for moral and legal censure. The proposition is not advanced against the accused whenever responsibility is assigned to her, but it is resorted to when she denies, explicitly or implicitly, responsibility on the grounds of ignorance ("How was I to know that overloading my truck would lead to this mishap?"), or it is raised as a justification for a sanction more severe than usual ("I impose on you the maximum fine because, as an experienced, professional trucker, you should have known of the risk of this mishap from overloading."). With the knowledge proposition thus situated in common parlance, I now turn to what it implies.

These examples regarding the trucker reveal that there are two relevant uses of the knowledge proposition. The first use, which may be called the responsibility claim, asserts that the knowledgeable actor should be liable when an unknowledgeable actor should not be. Interestingly, in some respects, this reverses what Kant, Hart, Rawls and others have called the

One element in fault judgments relates to the character of the act and its relationship to the appropriate standard of conduct, while the other relates to the actor's 'state of mind.'"). Finkelstein emphasizes the first element, the moral accountability of "responsibility": "We often say someone is not 'responsible' for an occurrence, when what we mean is that, although she brought it about on purpose, she is not to *blame*." Claire O. Finkelstein, *Duress: A Philosophical Account of the Defense in Law*, 37 ARIZ. L. REV. 251, 271 (1995). Finkelstein does not, however, lose sight of the second element: "[t]he action must be something the agent did for a reason in order for the agent to be responsible for it." *Id.* at 278. Ladd emphasizes the second element, the exercise of discretionary power: "The common element in almost all, if not all, of the morally relevant senses of 'responsibility' is the stress on the 'forethought, care, intelligence, and initiative' demanded of the actor who is the subject of responsibility." John Ladd, *The Ethics of Participation*, in PARTICIPATION IN POLITICS 98, 112 (J. Roland Pennock & John W. Chapman eds., 1975) (quoting Kurt Baier, *Responsibility and Action*, reprinted in THE NATURE OF HUMAN ACTIONS 104 (Myles Brand, ed. 1970)). Connolly identifies the generally agreed upon elements by noting "that any agents capable of forming intentions, of deliberately shaping their conduct to rules, of appreciating the significance of their actions for others, and of exercising self-restraint are the sorts of agents worthy of being held responsible for conduct that fails to live up to expected standards." WILLIAM E. CONNOLLY, THE TERMS OF POLITICAL DISCOURSE 193 (3d ed. 1993).

13. Holmes writes that "the choice [to act] must be made with a chance of contemplating the consequence complained of, or else it has no bearing on responsibility for that consequence." HOLMES, *supra* note 3, at 46. Likewise, Moore states:

Whatever else the principle of responsibility might include, it should include the power or ability to appraise the moral worth of one's proposed actions. A person has such ability only if he has moral and factual knowledge of what he is doing and is able to integrate the two to perceive the moral quality of his action.

MICHAEL S. MOORE, LAW AND PSYCHIATRY 342 (1984). This general view is not new: "[I]n some cases *ignorantia facti* doth excuse, for such an ignorance many times makes the act itself morally involuntary." SIR MATTHEW HALE, PLEAS OF THE CROWN 42 (1736), quoted in HERBERT FINGARETTE & ANN FINGARETTE HASSE, MENTAL DISABILITIES AND CRIMINAL RESPONSIBILITY 47 (1979).

key principle of responsibility: "ought" implies "can."¹⁴ Behind the responsibility claim is the principle "can" implies "ought" in the sense that, insofar as one can be aware of the normative consequences of an action when others cannot, one ought to be responsible for it when others ought not.¹⁵ The second use of the knowledge proposition, which may be called the remedy claim, asserts that the knowledgeable actor should be subject to a greater sanction or liability than that of the unknowledgeable actor.

Before turning to the underlying postulates of the knowledge proposition, notice that the responsibility and remedy claims align with the doctrine of punitive damages. A choice to act when one knows or should know that another person, without consent, is put at substantial risk may be described as not simply blameworthy. At some point, it would be characterized as the deliberate and willful choice to harm another person, which smacks of malice. While such a deliberate and willful choice may not be malicious in the sense of spitefulness or viciousness, such as when, with cold indifference, the actor deliberately and willfully harms another person, still the law of most states identifies such deliberate and willful behavior as sufficiently malicious or outrageous to grant punitive damages.¹⁶ In the words of the *Restatement (Second) of Torts*, punitive damages are allowed "for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others."¹⁷ Behavior this reprehensible supports the social judgment that the quasi-criminal sanction of punitive damages is warranted. This parallels the responsibility claim. Finally, granting relief under the law of punitive damages, pursuant to their retributive, rather than deterrent purposes,

14. See William K. Frankena, *Obligation and Ability*, in *PHILOSOPHICAL ANALYSIS* 148, 157 (Max Black ed., 1950) ("[M]any moral philosophers . . . say, in one way or another, that 'ought' implies 'can.' Indeed, if there is anything on which philosophers are agreed with plain men and with each other, and goodness knows there is very little, it is Kant's dictum, '*Du kannst, denn du sollst*'"); see also MOORE, *supra* note 13, at 341 ("John Rawls, following Hart, regards ["ought" implies "can"] as the principle of responsibility from which more particular principles, such as those requiring actions, intentions, or reasons, may be derived.") (citing H.L.A. HART, *Punishment and the Elimination of Responsibility*, in *PUNISHMENT AND RESPONSIBILITY* 158, 177 (1968) and JOHN RAWLS, *A THEORY OF JUSTICE* § 38 (1971)). See generally ALAN R. WHITE, *MODAL THINKING* 147-57 (1975) (discussing the modal verbs "ought" and "can").

15. That "can" implies "ought," at least in an attenuated sense, suggests other moral, legal and economic principles, such as when the occasional duty to disclose arises because one party has material information unknown to the other party, see FARNSWORTH, *supra* note 7, § 4.11, at 246-49, or when the duty to avoid a risk is imposed on the party with the best information on how to accomplish the task most efficiently, see GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* 135-73 (1970).

16. See generally DAN B. DOBBS, *REMEDIES* § 3.9, at 205-07 (1973); KEETON ET AL., *supra* note 3, § 2, at 9-10 ("There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called willful or wanton.").

17. *RESTATEMENT (SECOND) OF TORTS* § 908 (1977).

parallels the remedy claim: the more reprehensible the conduct, the higher the granted damages.¹⁸

III. THE UNDERLYING POSTULATES

As adumbrated in the discussion of the moral justification of the responsibility and remedy claims, I contend that implicit in the knowledge proposition are four related postulates, which may be called the channel, incentive, disposition, and accountability postulates. To provide an overview of the weaving road to follow, here is a brief description of those postulates. The channel postulate is that the more one's conduct is guided along the "straight and narrow," against an antisocial or illegal act, the more one "knows better" than to act improperly. The incentive postulate is that choice is channeled by conflict with, and inducement from, one's preferences and values, as well as society's sanctions. The disposition postulate is that the more one's choice is channeled against an improper act, the more one must deliberately and willfully resist the guidance (or the greater must be the character defect) to choose it. Finally, the accountability postulate is that the more one deliberately and willfully chooses an improper act, or the more it is the product of one's cultivated character defect, the more one is blameworthy for so choosing.¹⁹ These four underlying postulates are next elaborated in turn.

18. See KEETON ET AL., *supra* note 3, § 2, at 15. For an analysis and critique of the retributive purposes of punitive damages, see Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1, 23-85 (1989).

19. For Hart's description of "four heads of classification" of the senses of the word "responsibility," see H.L.A. HART, *Postscript: Responsibility and Retribution*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 14, at 210, 211-22. Michael Moore parses Hart's analysis into six senses of retrospective responsibility, which represent an increasing scale, each sense having its own condition of ascription:

<u>Sense of "responsible":</u>	<u>Conditions of ascription:</u>
1. Causally responsible	Causation
2. Prospective responsibility	Moral or legal duty
3. Responsible-accountable	Accountable agent
4. Responsible-answerable	Action and mental state
5. Responsible-culpable	No justification or excuse
6. Responsible-labile	Justification for imposition of sanctions met

MOORE, *supra* note 13, at 51. Thus, Moore agrees that "we hold people retrospectively responsible in law or morals only if they are accountable agents who negligently or intentionally, and without justification or excuse, perform actions that cause some state of affairs they were obligated not to bring about." *Id.* at 51-52; see also DAVID A.J. RICHARDS, *THE MORAL CRITICISM OF LAW* 192-93 (1977) (parsing Hart's analysis of responsibility into four categories); Michael S. Moore, *Responsibility and the Unconscious*, 53 S. CAL. L. REV. 1563, 1583-88 (1980) (providing additional parsing of Hart's analysis); Susan Wolf, *The Legal and Moral Responsibility of Organizations*, in CRIMINAL JUSTICE 267, 275-79 (J. Roland Pennock & John W. Chapman eds., 1985) (describing three senses of "responsibility": causal, moral, and practical).

A. *The Channel Postulate*

Under the channel postulate, the more one's conduct is guided against an antisocial or illegal act, the more one "knows better" than to perform it.²⁰ As excavators of the channel, there appear to be two classes of the relevant knowledge: fact and value. First, the prospective factual consequences of the contemplated act must be, or should have been, apparent to the chooser. Second, the normativity of the act, the extent to which it is antisocial or illegal, should also be apparent.

First, the channel is excavated by a knowledge of the relevant facts. Regarding a choice involving a recondite body of knowledge, such as whether an unusual form of investment has the same special tax advantages of related investments, the novice cannot be expected to be knowledgeable and, therefore, aware of the impropriety of her tax claim. She may still be liable despite her ignorance, but she need not suffer, unlike the tax lawyer, increased sanctions on the basis that she should have known better.

The knowledge proposition also applies to more ordinary situations in which it becomes evident that "knowing better" does not simply depend on raw knowledge, because all competent persons, and perhaps most incompetent ones, generally know not to commit antisocial and illegal acts and know generally which acts fall within these categories. So "knowledge" means something beyond simply being aware of, or being able to correctly answer, an associated true or false quiz, such as whether the speed limit is reduced in foul highway conditions, whether it is day or night, whether it is blizzardy or sunny, and whether the road ahead is straight or curvy. Even the lifelong Floridian knows this information when venturing out of the state for the first time and driving into the wintery Rockies. But she does not "really know."²¹ Life-long northern mountain dwellers, on the

20. Brandt's examination of the variables that influence a person's action align mainly with the channel postulate. He finds there to be at least five variables:

(1) his beliefs (possibly partly unconscious) about the options open to him; (2) his beliefs about the situation he is in; (3) his beliefs about consequences that might occur if he takes any one of these options and how strong they are (how likely he thinks the consequences would be); (4) the vividness of his representation of these matters at the time; and (5) his desires and aversions for these consequences (taking each action as being a consequence of itself, so that an aversion just to doing something of a certain sort is included).

R.B. Brandt, *A Motivational Theory of Excuses in the Criminal Law*, in CRIMINAL JUSTICE, *supra* note 19, at 165, 173. The fifth variable is more akin to the next postulate, the incentive postulate.

21. For example, regarding the failure of a person to use a seat belt despite knowledge of the additional safety, Gerald Dworkin writes: "[A]lthough I know in some intellectual sense what the probabilities and risks are, I do not fully appreciate them in an emotionally genuine manner." Gerald Dworkin, *Paternalism*, in PHILOSOPHY, POLITICS AND SOCIETY 78, 92 (Peter Laslett & James Fishkin eds., 5th series 1979). Goodin, after quoting Dworkin, says the same of cigarette smokers. See ROBERT E. GOODIN, POLITICAL THEORY AND PUBLIC POLICY 49 (1982).

other hand, "really know" and drive accordingly. To be burdened with full moral censure for misfortunate consequences, one must "really know" in some heightened sense that surpasses mere book or everyday knowledge because we recognize that casual knowledge may not be enough to sufficiently alert the agent to the repercussions of the impending choice.²² One must have special experience or socialization that particularly highlights this knowledge and erects perceived barriers to nonresponsive choices.²³ As in the distinction between an inadvertent act causing harm and an intentional one, we find the intentional act more blameworthy, even though, both acts being voluntary, we may ascribe responsibility to the actor for either.²⁴

In making a considered, responsible choice, one must appreciate the potential consequences of the existing facts, that is, their significance.²⁵ Appreciating the consequences of a choice is not just a matter of knowing the existing facts, including the overall context of the choice, though this is a beginning. Making a choice based on anticipated consequences goes beyond a deductive process from known information. Meaningful,

22. The proposition takes into account the following observation:

[W]e are hampered by inadequate powers of reasoning and judgment. Our capacity to perceive and to remember is so limited, and the reliability and predictability of what we learn so uncertain, that we are hindered from the very outset. And our ability to reason, to take the information, such as it is, into account, and to arrive at judgments, is in itself severely limited and subject to bias from all directions.

SISSELA BOK, *SECRETS* 103-04 (1982).

23. Habits may cause the barriers to fall below the level of conscious perception, unless the habits are challenged by unusual circumstances. See ALAN GEWIRTH, *REASON AND MORALITY* 38 (1978) ("The purposes for which persons act may be habitual, results of long-standing goal-directed behavior where the goals have ceased to occupy the center of attention. . . . That they are still latently present, however, would be shown if attempts were made to interfere with the agent's attaining them.").

24. Fletcher finds inadvertent risk-taking to be "voluntary if, under the circumstances, the actor could have realized the risks implicit in his conduct." FLETCHER, *supra* note 9, § 9.2.3, at 711. "[T]he conscious and intentional actor realizes at every moment that he might desist, whereas the mistaken or inadvertent actor does not repeatedly forego the opportunity of correcting himself. This might explain why intentional wrongdoing is regarded as more culpable than negligent wrongdoing" *Id.*

25. See HOLMES, *supra* note 3, at 47 ("Ignorance of a fact and inability to foresee a consequence have the same effect of [thwarting] blameworthiness."). To generalize, Murphy and Coleman identify the normative elements of an act: "Being at fault, morally or otherwise, has two essential ingredients. One element in fault judgments relates to the character of the act and its relationship to the appropriate standard of conduct, while the other relates to the actor's 'state of mind.'" JEFFRIE G. MURPHY & JULES L. COLEMAN, *THE PHILOSOPHY OF LAW* 181-82 (1984). Personal autonomy grounds a justification for the requirement of awareness: "The prospect of responsibility for all-harm that results from an individual's action, including injuries which she did not (or could not) anticipate, restricts her autonomy insofar as it limits what she chooses to do for fear of unknown consequences." Lytton, *supra* note 5, at 476-77.

normatively loaded decisions also characteristically face risk and uncertainty.

The emerging body of literature on choice under risk and uncertainty distinguishes these two concepts in the following way: risk occurs when the probabilities of eventualities are known; uncertainty occurs when the probabilities are unknown.²⁶ Both concepts commonly enter into decisions of any complexity. For example, in deciding whether to overload a truck, one must estimate, among other things, the degree of the increased risk of an accident from having less control over the vehicle and from the reduction in its reliability, and one must incorporate many factors, such as those relating to the uncertain highway conditions, that might be met. Correctly incorporating this probabilistic incertitude is an endeavor fraught with pitfalls.²⁷ People do not do it very well.

Cognitive psychologists have found many sources for the distortions of decisionmaking under risk and uncertainty.²⁸ Some of these sources stem from framing and heuristics. Framing distortions are cognitive variations in perceptions owing to the particular circumstances.²⁹ Both

26. See R. DUNCAN LUCE & HOWARD RAIFFA, *GAMES AND DECISIONS* 13 (1957); Richard Zeckhauser, *Comments: Behavioral Versus Rational Economics: What You See Is What You Conquer?: The Contrast Between Economics and Psychology*, in *RATIONAL CHOICE: THE CONTRAST BETWEEN ECONOMICS AND PSYCHOLOGY* 251, 257 (Robin M. Hogarth & Melvin W. Reder eds., 1987) [hereinafter *RATIONAL CHOICE: THE CONTRAST*] (discussing the "distinction between risk (where probabilities are known) and uncertainty (where they are unknown)").

27. Von Magnus asserts that the factors favorable to making rational choices to engage in risky behavior include "risk takers (1) having good information about benefits, probabilities, and outcomes; (2) having established patterns of probabilistic reasoning (planning and calculation); and (3) having the ability to incorporate the conclusion of such deliberations into behavior controls." Eric Von Magnus, *Preference, Rationality, and Risk Taking*, 94 *ETHICS* 637, 642 (1984). Though these three conditions may be met only on rare occasions, "[a] fourth condition is called for: that there has been some accumulated and reflective social experience with the kind of risk taking in question and that the risk taker has had the opportunity to be influenced by it." *Id.* at 643.

28. For brief surveys of the types and causes of the errors that occur when making choices under risk and uncertainty, see GOODIN, *supra* note 21, at 139-45; and Bailey Kuklin, *The Asymmetrical Conditions of Legal Responsibility in the Marketplace*, 44 *U. MIAMI L. REV.* 893, 904-09 (1990). See generally *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* (Daniel Kahneman et al. eds., 1982) [hereinafter *JUDGMENT UNDER CERTAINTY*]; RICHARD NISBETT & LEE ROSS, *HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT* (1980); *RATIONAL CHOICE: THE CONTRAST*, *supra* note 26. In speculating about the many factors that "warp the perception of risk," one commentator "hypothesize[s] that human beings possess Darwinian algorithms for risk perception that are not logical but are nonetheless adaptive. Logic, truth, and reality only matter to humans insofar as they advance reproductive success." Peter Strahlendorf, *Traditional Legal Concepts from an Evolution-ary Perspective*, in *THE SENSE OF JUSTICE* 128, 147 (Roger D. Masters & Margaret Gruter eds., 1992).

29. See JON ELSTER, *SOUR GRAPES* 25 (1983) ("Preference change by framing occurs when the relative attractiveness of options changes when the choice situation is reframed in a way that rationally should make no difference."); Amos Tversky & Daniel Kahneman, *Judgment Under Uncertainty: Heuristics and Biases*, in *JUDGMENT UNDER UNCERTAINTY*, *supra* note 28, at 3, 8; Daniel Kahneman & Amos Tversky, *The Psychology of Preferences*, 246 *SCI. AM.* 160, 168 (1982) ("The framing of a

factual and normative judgments are affected.³⁰ For example, the estimation of the risk and uncertainty of overloading a truck, and the propriety of doing so, is influenced by whether one is being encouraged to do so by one's entreating loved one, a disdainful neighbor, a taunting street urchin, or a demanding, scar-faced stranger with a bulge in his coat pocket. Heuristics are resorted to because humans are not strong reasoners in the shadow of risk and uncertainty; we do not normally make probabilistic estimations with scientific or mathematical sophistication. "A *heuristic* is any guiding principle for transforming information to solve a problem or to form a judgment."³¹ It is well established that heuristic estimations are persistently warped in a variety of ways.³² For example, our trucker is likely to overestimate the risk of overloading her truck if she recently had an accident caused by overloading, or underestimate the risk if she has never had or seen such an accident.

transaction can alter its attractiveness by controlling the costs and benefits that are assigned to its account . . . "); Amos Tversky & Daniel Kahneman, *Rational Choice and the Framing of Decisions*, in RATIONAL CHOICE: THE CONTRAST, *supra* note 26, at 67, 73 ("Framing is controlled by the manner in which the choice problem is presented as well as by norms, habits, and expectancies of the decision maker.").

30. See BARUCH FISCHHOFF ET AL., ACCEPTABLE RISK 22-27 (1981); Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the Psychology of Choice*, in RATIONAL CHOICE, *supra* note 11, at 123, 139 ("The framing of acts and outcomes can also reflect the acceptance or rejection of responsibility for particular consequences . . ."). If "frame" is given a broad meaning, it even affects the notion of "rationality," which "gathers not only its force but also its very meaning from the social context in which it is embedded." Kenneth J. Arrow, *Rationality of Self and Others in an Economic System*, in RATIONAL CHOICE: THE CONTRAST, *supra* note 26, at 201, 201.

31. Richard E. Nisbett et al., *Improving Inductive Inference*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 28, at 445, 447.

32. See, e.g., JON ELSTER, POLITICAL PSYCHOLOGY 11-15 (1993) (examining "mechanisms that distort desires and beliefs"); NISBETT & ROSS, *supra* note 28, at 42, 114-15, 165-66, 192 (stating at page 192: "People tend to persevere in their beliefs well beyond the point at which logical and evidential considerations can sustain them."); Richard E. Nisbett et al., *Popular Induction: Information Is Not Necessarily Informative*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 28, at 101, 111-14 (discussing "[a]bstract versus concrete information"); Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY, *supra*, at 129, 135-36, 144-47 (discussing the "fundamental attribution error" and "[b]elief perseverance in the face of empirical challenges"); Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY, *supra*, at 163, 164 (noting "the judged frequency of classes is biased by the availability of their instances for construction, and retrieval"); Amos Tversky & Daniel Kahneman, *Judgments of and by Representativeness*, in JUDGMENT UNDER UNCERTAINTY, *supra*, at 84, 97-98 (noting "people evaluate the probability of events by the degree to which these events are representative of a relevant model or process"). In sum, it is the conflicting images of a human as a rational creature capable of reflective choice and of a human as "the passive plaything of causal forces that operate 'behind his back' . . . that give the social sciences their specific nature." ELSTER, *supra*, at 139.

To overcome the distortions that arise when making choices under risk and uncertainty, experience also helps.³³ By having made similar choices in the past, having learned of additional sources of information, and having had the opportunity to see whether one's original estimations of consequences proved reliable, a person is likely to learn from her experience and improve her ability to make dependable appraisals. In this sense, then, one "should have known better" because one has had substantial experience with the type of decision in question,³⁴ especially if it is complex,³⁵ and therefore has less reason to misestimate eventualities because of the normal human shortcomings when making choices under risk and uncertainty. The clearer picture of the contingencies further excavates a channel that guides the decision.

While one must first have adequate knowledge of the relevant facts, because a significant decision may have adverse consequences to others, one must secondly appreciate its normativity. Adverse consequences may be bad, in a teleological sense, or entail a wrong, in a deontological one.³⁶ The guiding principles and policies of the law include a mixture of considerations aimed at promoting both justice and social welfare. Citizens are

33. See, e.g., GOODIN, *supra* note 21, at 140 ("For the most part, people tend to act as intuitive probability assessors, relying upon experience to guide them."); see also FISCHHOFF ET AL., *supra* note 30, at 23 ("Competent technical analyses may tell us what primary, secondary, and tertiary consequences to expect, but not what these consequences really entail. To some extent we are all prisoners of our own experience, unable to imagine drastic changes in our world or health or relationships."); HOLMES, *supra* note 3, at 129 ("The tendency of a given act to cause harm under given circumstances must be determined by experience."); Paul Slovic et al., *Facts Versus Fears: Understanding Perceived Risk*, in JUDGMENT UNDER UNCERTAINTY, *supra* note 28, at 463, 464 ("When laypeople are asked to evaluate risks, they seldom have statistical evidence on hand. In most cases, they must make inferences based on what they remember hearing or observing about the risk in question."). For the economic conceptualization of experience and training, see JON ELSTER, *ULYSSES AND THE SIRENS* 147-48 (rev. ed. 1984).

34. For rare eventualities, the person may not even know better with substantial experience. See GOODIN, *supra* note 21, at 140 ("Where low-probability events are concerned, experience is a particularly unreliable teacher.").

35. Studies reveal that people are particularly weak at evaluating alternatives with dissimilar attributes. For example, consumers sometimes find that their complex choices do not satisfy their own subjective standards. "One source of the subjective nonoptimality of such decisions seems to be man's demonstrable inability to take proper account, simultaneously, of the various component attributes of the alternatives" Roger N. Shepard, *On Subjectively Optimum Selection Among Multiattribute Alternatives*, in HUMAN JUDGMENTS AND OPTIMALITY 257, 257 (Maynard W. Shelley, II & Glenn L. Bryan eds., 1964), quoted in RICHARD B. BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* 76 (1979).

36. Teleology emphasizes consequential states of being, such as good or bad conditions. An often-espoused goal is the maximization of social welfare. Deontology deemphasizes consequences and focuses on the acts themselves, considering whether they are just or unjust. A typical maxim of deontology is Spike Lee's principle, "do the right thing." While, under Kantian deontological reasoning, a wrong occurs irrespective of whether there are adverse consequences, a lawsuit, especially a civil one, almost always involves a complainant who was injured, for otherwise she does not have standing to sue.

expected to conform their behavior to such polycentric canons.³⁷ This requires, first of all, knowledge of the operative norms. But again, suitable conformance is not enabled simply by a basic knowledge of the norms. This is especially the case in a normative system as complex and dynamic as a modern one, where the pulls of teleology often encounter the pushes of deontology, where there may be tensions within each ethical orientation, and where emerging norms or weights to norms may escape the ken of those without special needs or occasions to be attentive.³⁸ Relevant experience helps to clarify the normative picture. Prior deliberation, active choice, and subsequent reflection on similar decisions hone one's sensitivities to the manifold nuances of the moral realm.

It must be emphasized that engaging in risky activities typically has normative as well as factual overtones. In discussing the difficulties in correctly evaluating facts, especially loaded ones, I mentioned the risk and uncertainty confronting a decisionmaker. But there is another, everyday sense of "risk," which encompasses both the risk and the uncertainty considered thus far, that will help to sharpen our focus on the knowledge proposition. This everyday sense of "risk" refers to an exposure to a hazard, as when risky conduct exposes a person to a potential harm or loss. Here we speak of the gravity of a risk, not simply its likelihood. In this context, both the likelihood and the nature and extent of the potential harm are part of the calculus of the riskiness of the conduct.³⁹ Knowingly or negligently exposing another person to a potential harm or loss, once past a certain threshold, may be normatively unacceptable behavior.⁴⁰ The more one is in a position to appreciate the gravity of the risk, the more one should know better than to impose the risk on another.

In making proper individual, normative decisions, socialization augments, and even substitutes for, the lessons of experience. For instance, the

37. To loosely borrow Dworkin's distinction, legal principles are basically means-regarding (deontological) and policies are ends-regarding (teleological). See RONALD DWORKIN, *The Model of Rules I*, in *TAKING RIGHTS SERIOUSLY* 14, 22-23 (1977).

38. For approaches to synthesizing deontological and teleological models of ethics, see ROBERT NOZICK, *PHILOSOPHICAL EXPLANATIONS* 494-98 (1981). On the distinction between the weight of a moral principle and weighing it, see *id.* at 474-94.

39. See JOEL FEINBERG, *HARM TO OTHERS* 191 (1984) ("The important concept for the legislator, then, is neither magnitude of harm nor probability of harm alone, but rather the compound of the two, which is called *risk*.").

40. Fletcher identifies the role of the concept of risk in our legal system as facilitating an abstract analysis of the likelihood of harm: "We can grasp the effect of conduct -- the creation of the risk -- apart from the conduct itself. And once the risk is separated from conduct, we can evaluate the risk and decide whether it is socially beneficial or harmful." FLETCHER, *supra* note 9, § 6.6.b, at 484. "This process of reification leads us to think of risks as a type of harm. We can formulate imperatives in which the concept of risk fills the place typically reserved for specified harms. 'Don't risk injury to your neighbor.'" *Id.*

trucker who considers overloading her truck may not bother with estimations of the factual risks and uncertainties if she has embraced the lesson from her caregivers, teachers, and others to "do the right thing" by obeying the rules, no matter what, or at least short of extraordinary circumstances. Or, perhaps her estimates of the perils are cautious because she was taught to be considerate of others and wary of personal dangers. If so, even if at this subconscious level, her decision is channeled.⁴¹ In sum, the experience and socialization of our trucker lead informed observers to note that, if she overloads the truck, "she should have known better."

Gross generality or even stereotyping based on socioeconomic and other classifications may lead to similar judgments by observers less informed of the particular circumstances. For instance, while a person from a privileged background "should have known better" than to make a particular immoral choice, the street urchin should not have, though perhaps the urchin still should have known well enough to pass the threshold for sanctions.⁴² Various other categories of personal characteristics may also lead to similar gross generalities, but these usually remain in the shadows of private, politically incorrect conversation rather than the spotlight of legal and political discourse.⁴³

To conclude, under the channel postulate, the more one's conduct is guided against an antisocial or illegal act, the more one "knows better" than to perform it. But we must dig deeper. What are the forces that tend to keep people within the channel, making contrary behavior more difficult? This leads to another precept, the incentive postulate.

B. The Incentive Postulate

The incentive postulate is that personal choice is channeled by conflict with, and inducement from, one's preferences and values, and society's sanctions. The stimuli to avoid conflict or yield to inducement are aroused

41. Bagehot puts it in terms of habit: "The active voluntary part of a man is very small, and if it were not economised by a sleepy kind of habit, its results would be null. . . . We should accomplish nothing, for all our energies would be frittered away in minor attempts at petty improvements." WALTER BAGEHOT, *THE ENGLISH CONSTITUTION* 9 (Garland Publ'g. Co. 1978) (2d ed. 1872), *quoted in* SIR CARLETON KEMP ALLEN, *LAW IN THE MAKING* 102 (7th ed. 1964).

42. *Cf.* FLETCHER, *supra* note 9, § 6.8.2, at 514 ("The law functions by setting a minimum threshold of accountability as a condition for attributing wrongdoing.").

43. Support for this proposition is found in the firestorm of controversy surrounding the publication of the book RICHARD J. HERRNSTEIN & CHARLES MURRAY, *THE BELL CURVE* (1994).

by the perceived payoff matrix for contemplated actions.⁴⁴ In other words, when the agent undertakes an analysis of the potential consequences, she discerns certain costs and benefits, both factually and normatively based.⁴⁵ The perceived costs of an action, such as possible punishment and shame, kindle conflict. The perceived benefits, such as possible honor and self-satisfaction, offer inducement.

Conflict and inducement have origins that may be roughly categorized as internal and external. Internal conflict and inducement are grounded in impulses that are largely products of nature and nurture.⁴⁶ Because the impulses are inherent (nature) or instilled (nurture) in the fabric of the agent's persona, they are backward-looking. They stem from existing psychological dispositions antecedent to the choice in question.⁴⁷ Even if the agent alone knows of her act and its consequences, the internal payoff is felt to some extent. Self-satisfaction and guilt, for example, need no observers, though the presence of observers may increase them. External conflict and inducement, on the other hand, are products of social sanctions. They are forward-looking in the sense that they result from the

44. Plamenatz comes at this from a different angle. In addressing what we signify by ascribing responsibility to a person, he states that we mean that the person could have acted differently and "was not beyond the reach of certain kinds of influence." John Plamenatz, *Responsibility, Blame and Punishment*, in PHILOSOPHY, POLITICS AND SOCIETY 173, 179 (Peter Laslett & W.G. Runciman eds., 3d series 1967). We mean that he was persuadable, "that, when he acted, he was amenable to influence by considerations of the kinds that men ordinarily put to themselves [or others] when they contemplate action." *Id.* Still, though "the pressure of public opinion no doubt is effective in shaping men's behaviour, . . . it is a pressure very different from that of a dagger in the small of the back." J.R. LUCAS, *THE PRINCIPLES OF POLITICS* 56 (1966). Nevertheless, through its various sanctions, the state is coercive. *See id.* at 56-62. State coercion is seen by some as qualifying, or even negating, the independence of moral agents. *See, e.g.,* NEIL MACCORMICK, *Against Moral Disestablishment*, in *LEGAL RIGHT AND SOCIAL DEMOCRACY* 18, 23 (1982).

45. A generous view of costs and benefits is called for. "[T]he considerations of 'loss' and 'gain' are general with respect to the varying criteria of different agents; they are by no means confined to balance-sheet egoists." GEWIRTH, *supra* note 23, at 57. For example, they apply to altruists, ascetics, voluptuaries and, generally, masochists. *See id.* Social norms are partly "sustained by the emotions that are triggered when they are violated: embarrassment, guilt and shame in the violator; anger and indignation in the observers." JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 113 (1989).

46. For a general discussion of the interrelationship of nature, nurture, and the law, see LAW, BIOLOGY AND CULTURE (Margaret Gruter & Paul Bohannon eds., 1983), and for a general discussion of the interrelationship of nature, nurture, and the sense of justice, see *THE SENSE OF JUSTICE*, *supra* note 28.

47. For some of the conundrums regarding responsibility that spring from the recognition of the unconscious, see MOORE, *supra* note 13, at 140-42. For a discussion of the relationship of the unconscious mind to responsibility, see MOORE, *supra* note 13, pts. III (Practical Reason and the Unconscious) & IV (Legal Persons and Psychiatric Subagents); and MOORE, *Responsibility and the Unconscious*, *supra* note 19. Moore concludes that Freud's "insight[] about the unconscious do[es] not . . . generally require one to alter radically the view of persons as free and rational beings who may be justly held responsible for their consciously intentional actions." *Id.* at 1675.

public response to the choice in question. Honor and shame,⁴⁸ for example, are not private occurrences that ensue without the mediation of society, that is, outside observers.

The distinction between internal and external conflict and inducement can be easily overdrawn. They may substantially interrelate,⁴⁹ or overlap.⁵⁰ To see such overlap or interrelation, let us look back at our trucker's decision whether to overload her truck. Assume the affirmative choice risks a criminal fine up to \$10,000. The possible loss of \$10,000 creates an external conflict concerning the decision to overload.⁵¹ But a payout of this amount of money does not have the same weight for everyone. For the parsimonious, \$10,000 may be nearly as dear as life itself. For the cavalier, it is "easy come, easy go."⁵² Along with personality differences, there are

48. The terms "shame culture" and "guilt culture" "have been used by anthropologists and classicists to distinguish between cultures in which self-esteem is based solely on conformity to external standards of conduct and those in which it is also (or instead) based on having a clear conscience." RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 277 (1981). The suggestions that guilt relates to "internal" concerns with "sin," "inner worth," etc., while shame relates to "external" concerns with "honor," "reputation," etc., and that there are "guilt cultures" and "shame cultures," may be challenged on the grounds that the terms are not so disconnected. See CLIFFORD GEERTZ, *Person, Time, and Conduct in Bali*, in *THE INTERPRETATION OF CULTURES* 360, 401 (1973). Nevertheless, "[s]hame is the feeling of disgrace and humiliation which follows upon a transgression found out; guilt is the feeling of secret badness attendant upon one not, or not yet, found out." *Id.* Or, breach of moral norms gives rise to guilt while breach of social norms gives rise to shame. See Jon Elster, *Weakness of Will and the Free-Rider Problem*, 1 *ECON. & PHIL.* 231, 246 (1985). For further challenges to the idea that guilt, unlike shame, is internalized, see ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* 136-40 (1990) (stating at page 137: "Guilt, we might say, normally involves a consciousness of having done wrong, and shame a consciousness of some personal inadequacy."); AGNES HELLER, *THE POWER OF SHAME* 2-9 (1985); RICHARDS, *supra* note 11, at 252-67; and RICHARD WOLLHEIM, *THE THREAD OF LIFE* 220 (1984) ("[I]f we are to think of shame as the prime moral sentiment of evolved morality, of morality beyond the superego, it must be conceived to be just as much an interiorized sentiment as guilt is."). See also ARISTOTLE, *ETHICA NICOMACHEA* 1128b (W.D. Ross ed., Oxford Univ. Press 1942) (asserting that shame is "more like a feeling than a state of character. It is defined, at any rate, as a kind of fear of dishonour."); HERBERT MORRIS, *Guilt and Shame*, in *ON GUILT AND INNOCENCE* 59, 60-63 (1976) (discussing differences between shame and guilt and their roles in the law); John Deigh, *Shame and Self-Esteem: A Critique*, 93 *ETHICS* 225 (1983) (discussing guilt and shame, especially the Rawlsian notion of shame).

49. For example, van den Haag expresses the connection this way: "Whether or not a crime is committed depends on external stimuli, pressures, opportunities, and threats; and, on the other hand, on internal dispositions to respond to these or to restrain oneself." ERNEST VAN DEN HAAG, *PUNISHING CRIMINALS* 66 (1975).

50. See *id.* at 68-69 (discussing how internal and external conflict and inducement overlap).

51. The potential fine creates a conflict regarding the choice to commit the illegal act and an inducement to choose not to commit it. In this sense, then, each conflict and inducement enters the yes-or-no decision payoff matrix on both sides. To truncate this accounting complication, I refer to conflict and inducement with respect to affirmative decisions only, not negative decisions, as when someone decides not to do a particular act.

52. See VAN DEN HAAG, *supra* note 49, at 66 ("Different personalities respond differently to the same external situation—that is what marks personalities as different.").

wealth effects.⁵³ The rich trucker is generally less concerned about the fine than the poor one.

Yet the origin of personality traits, such as parsimony and cavaliness, seems to have various sources, both internal and external. Perhaps nature leaves its mark with its skewing, genetic biochemistry. For example, genes might naturally dispose some to risk aversion and others to risk preference.⁵⁴ Nurture must certainly play a role in molding these personality traits by means of prior reinforcements from caregivers and others.⁵⁵ Since the reinforcements that mold traits originally come from sources external to the chooser, the distinction between internal and external conflict and inducement becomes ambiguous.⁵⁶

The backward-looking aspect of the internal motivation and the forward-looking aspect of the external help clarify the difference between them. The potential reach of internal conflict and inducement, whatever their origins, is in place and fairly fixed at the time of the decision. Conflict and inducement have helped form the chooser's existing personality, which, except in novelistic circumstances, is not about to change significantly because of the impending choice alone. In this regard, we say that a chosen act reflects the actor's character. External incentives, on the other hand, are more contingent. If the fine for overloading a truck decreases to \$100, or a person offers the trucker \$25,000 for performing the

53. The wealth effect, based on the supposition of the declining marginal utility of wealth, implies that the affluence of the evaluator affects the weight she gives to a particular dollar amount. See, e.g., LUDWIG VON MISES, *HUMAN ACTION* 119-27 (3d rev. ed. 1966).

54. See JEROME KAGAN, *GALEN'S PROPHECY: TEMPERAMENT IN HUMAN NATURE* (1994) (discussing the genetic dispositions for, among other qualities, inhibited or uninhibited temperaments).

55. Even among those who ascribe personality traits largely to nurture, there may be a place for individual will. George Mead, for example, argued:

[T]he self can only exist by virtue of a linguistic competence which internalizes the values and attitudes of others. . . . [But], [a]t any given moment individuals have the capacity to distance themselves from who they are, or who they have been made, and to reflect on these facts and perhaps even to change them.

Robert Post, *Tradition, the Self, and Substantive Due Process: A Comment on Michael Sandel*, 77 CAL. L. REV. 553, 558 (1989). Tribe insists that "personal and social choices serve not merely to implement 'given' systems of values, but also to define, and sometimes to reshape, the values—indeed the very identity—of the choosing individual or community." Laurence H. Tribe, *Technology Assessment and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617, 634 (1973) (citing Laurence H. Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66, 99 (1972)). "The decision-maker chooses not merely how to achieve his ends but what they are to be and who he is to become." *Id.* at 634-35. Is the capacity of individuals to distance themselves from who they are and choose who they are to become a product of nature or nurture?

56. Arrow asks: "[H]ow logically do we distinguish between the capacities which somehow define the person, and those which are the result of external actions of a society?" Kenneth J. Arrow, *Values and Collective Decision-Making*, in *PHILOSOPHY, POLITICS AND SOCIETY*, *supra* note 44, at 215, 220. Since vision may be equally good from either excellent eyes or glasses, "[i]s the vision more peculiarly mine in one case than in the other?" *Id.* at 220.

illegal act, the choice confronting the trucker takes on a different color, though her character is essentially unchanged.

But a potential fine creates conflicts and inducements beyond merely the dollars at stake. As a criminal sanction it triggers a host of reactions. First, the agent confronts internally the prospect of thinking of herself as an outlaw of sorts. Though truck overloading hardly gives rise to a tell-tale heart, for the first-timer or the reflective, many sentiments must accompany the anticipation of "crossing the line." Second, the agent confronts externally the prospect of being considered an outlaw by others.⁵⁷ This may also be daunting in various ways,⁵⁸ though, again, truck overloaders are rarely taunted for this by the neighborhood brats. Still, one's self- and public esteem, among other things, are affected by whether one's conduct is proper,⁵⁹ though perhaps not often enough. But obviously all the incentives are not against the choice to commit the particular criminal act, or the decision would not even be on the table. Some benefits, perhaps both internal and external, are in the offing. Ask Leopold and Loeb. For a gang member, eager for acceptance by the others, the dollars at stake from the possible fine may be the only significant disincentive.⁶⁰ In a well-considered decision, then, of even minimal complexity, there is an array of conflicts and inducements, internal and external, that must be thrown onto the scales. The more the scales tilt to one side, the more the agent "should have known better" than to opt for the higher pan.⁶¹

Some of the sources of the internal incentives, a few of which have already been mentioned, may be identified. Nurture (or socialization) certainly creates strong incentives.⁶² The social learning theorists, for

57. Van den Haag refers to the effects of stigma as internal: "This symbolic effect of punishment helps form the all important internal barriers which restrain most of us from law violations without conscious thought, let alone calculation." VAN DEN HAAG, *supra* note 49, at 63-64.

58. For an argument that societal reactions may give a person more reason to avoid illegal conduct than do official sanctions, see FRANKLIN E. ZIMRING & GORDON J. HAWKINS, *DETERRENCE* 174, 190-94 (1973).

59. See Mary O. Cameron, *Self-Perception and the Shoplifter*, in *PERCEPTION IN CRIMINOLOGY* 416, 420 (Richard L. Henshel & Robert A. Silverman eds., 1975) ("[N]either the fear of punishment nor the objective severity of the punishment in itself is the crucial point in relation to the change from criminal to law abiding behavior. Rather the threat to the person's system of values and prestige relationships is involved."); Frank Tannenbaum, *The Dramatization of Evil*, in *PERCEPTION IN CRIMINOLOGY*, *supra*, at 351, 351-52 (arguing that continued delinquent acts cause the public- and self-perception to shift from the delinquent's act being evil to the individual being evil).

60. See Cameron, *supra* note 59, at 419-20 (discussing "in-group" support).

61. This suggests one might "know better" than to fail to perform an improper act. Imagine a gang member being confronted by the other members for her refusal to go along with an illegal act: "You should know better than to cross your sisters!"

62. See, e.g., ZIMRING & HAWKINS, *supra* note 58, at 119-21. For example, "[o]ne of the better validated theories of crime and delinquency is Hirschi's . . . social bonding theory. Hirschi claims that those individuals with strong social ties (bonds) are less free to break rules than those whose ties are

example, instruct that moral upbringing is key to a person's moral practices. One's entire value system is largely formed by environmental influences.⁶³ In addition to environmental influences, education and

weak or become attenuated." Raymond Paternoster et al., *Perceived Risk and Social Control: Do Sanctions Really Deter?*, 17 LAW & SOC'Y REV. 457, 461 (1983) (citing TRAVIS HIRSCHI, CAUSES OF DELINQUENCY (1969)). "That environment plays a significant role in shaping an individual's values and behavior is beyond dispute." Richard Delgado, "Rotten Social Background": *Should the Criminal Law Recognize a Defense of Severe Environmental Deprivation?*, 3 LAW & INEQ. J. 9, 9 (1985). Irrespective, "[n]o jurisdiction in the United States or elsewhere recognizes a criminal defense based on socioeconomic deprivation *simpliciter*." *Id.* Most scholars reject the rotten social background ["RSB"] defense, mainly for practical reasons. *Id.* at 18. One scholar rejects it because the child of the ghetto "allowed himself to be shaped by his environment." *Id.* (citing Nathaniel Branden, *Free Will, Moral Responsibility and the Law*, 42 S. CAL. L. REV. 264, 278 (1974)). Delgado finds that there are many available defenses for the RSB defendant, though some cases fall between the cracks. See Delgado, *supra*, at 37-54. He proposes and justifies comprehensive defenses. See *id.* at 54-79. Away from this end of the socio-economic spectrum, Rawls argues that "[t]he assertion that a man deserves the superior character that enables him to make the effort to cultivate his abilities is . . . problematic; for his character depends in large part upon fortunate family and social circumstances for which he can claim no credit." RAWLS, *supra* note 14, at 104. For a discussion of the moral arbitrariness of the molding influences of both nature and nurture, see Wojciech Sadurski, *Natural and Social Lottery, and Concepts of the Self*, 9 LAW & PHIL. 157 (1990), and for its threat to the idea of personal responsibility, see Michele M. Moody-Adams, *Culture, Responsibility, and Affected Ignorance*, 104 ETHICS 291 (1994) (opposing the attack on responsibility because of cultural influences); Arthur Ripstein, *Equality, Luck, and Responsibility*, 23 PHIL. & PUB. AFF. 3 (1994); and Samuel Scheffler, *Responsibility, Reactive Attitudes, and Liberalism in Philosophy and Politics*, 21 PHIL. & PUB. AFF. 299 (1992).

63. See, e.g., Thomas E. Wren, *Social Learning Theory: Self-Regulation, and Morality*, 92 ETHICS 409, 409-12 (1982). The social learning theorists may cite Aristotle's discussion of the two kinds of virtue: "[I]ntellectual virtue in the main owes both its birth and its growth to teaching . . . while moral virtue comes about as a result of habit [Therefore,] none of the moral virtues arises in us by nature; for nothing that exists by nature can form a habit contrary to its nature." ARISTOTLE, *supra* note 48, at 1103a; see also CLIFFORD GEERTZ, *The Impact of the Concept of Culture on the Concept of Man*, in THE INTERPRETATION OF CULTURES, *supra* note 48, at 33, 35, 49, 50 (stating at page 50: "Our ideas, our values, our acts, even our emotions, are, like our nervous system itself, cultural products—products manufactured, indeed, out of the tendencies, capacities, and dispositions with which we were born, but manufactured nonetheless."); CLIFFORD GEERTZ, *Common Sense as a Cultural System*, in LOCAL KNOWLEDGE 73, 76 (1983) (asserting that even common sense is culturally situated); CLIFFORD GEERTZ, *Local Knowledge: Fact and Law in Comparative Perspective*, in LOCAL KNOWLEDGE, *supra*, at 163, 173 ("[L]egal facts are made not born, are socially constructed . . ."); ROM HARRÉ, PERSONAL BEING 20, 22 (1983) (discussing person as "cultural artefact," not "natural object," and perception, rationality and emotions as "cultural endowments not native achievements"); JAMES B. WHITE, HERACLES' BOW 126-27 (1985) ("We are ourselves to some degree formed by the languages that we use, for they imply criteria of selection, grounds of motivation, dispositions of mind and feeling, ways of telling the stories of our individual and collective lives, and so on, all of which become part of ourselves."); Richard E. Flathman, *Convention, Contractarianism, and Freedom*, 98 ETHICS 91, 95 (1987) (discussing the Rousseau-Wittgenstein understanding that "[t]he desires and preferences that I can form are limited by the concepts 'desire' and 'preference,' and these limits are given by beliefs and understandings that are socially established, that are mine only insofar as they are also ours"); James B. White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161, 166 (1987) ("[T]he languages we speak, and the cultural practices they at once reflect and make possible, form our minds by habituating them to certain modes of attention, certain ways of seeing and conceiving of oneself and of the world."). Hence, for a person raised in a society steeped in beliefs of witches and witchcraft, who upon displacement to a Europeanized community perceives someone to be casting a mortal spell, "even the voluntary, knowing, intentional, and even premeditated killing

experience are critical in developing the abilities to evaluate risks,⁶⁴ weigh possible consequences, and learn from one's failures and successes. ("After the discomfort from that ticket, next time I'll remember to stop at a yellow light."⁶⁵) Finally, refined judgment, whereby one is able to discern whether a contemplated act falls within a particular rule, is honed by practice and training.⁶⁶ ("On further reflection upon unpleasureable incidents of gratuitously hurting others, I have decided that white lies do not fall within the proscriptions of the truth-telling maxim, and falsely telling a person at a social event that she looks well is a white lie."⁶⁷)

of the 'witch' simply does not have the significance it otherwise would." FINGARETTE & HASSE, *supra* note 13, at 231.

64. Apparently, even the notion of risk is socially constructed and learned by experience. See Niklas Luhmann, *Familiarity, Confidence, Trust: Problems and Alternatives*, in TRUST 94, 98 (Diego Gambetta ed., 1988) ("Since 'risk' is a relatively new word, spreading from whatever sources into European languages via Italy and Spain only after the invention of the printing press, we may suppose that the possibility of making this distinction [between dangers and risks] is likewise a result of social and cultural development.").

65. This driver is obviously not from New York, nor, for that matter, from just about anywhere else I have been, except Japan.

66. According to Kant, judgment "is the ability to determine 'whether something . . . stand[s] under a given rule.' While theory can be taught, judgment is a 'natural gift,' a peculiar talent which can be practiced only." George Miller, *Introduction to IMMANUEL KANT, ON THE OLD SAW: THAT MAY BE RIGHT IN THEORY BUT IT WON'T WORK IN PRACTICE* 17 (E.B. Ashton trans., Univ. of Penn. Press 1974) (1923) (footnotes to Kant omitted); see also IMMANUEL KANT, *CRITIQUE OF PURE REASON* 98-100 (J.M.D. Meiklejohn trans., rev. ed., Willey Book Co. 1900) (1781); Lawrence Blum, *Moral Perception and Particularity*, 101 ETHICS 701 (1991) (discussing, among other related topics, the general notion of moral judgment); Joseph Boyle, *Natural Law and the Ethics of Traditions*, in NATURAL LAW THEORY, *supra* note 11, at 3, 14 (stating that under a natural law viewpoint, "a person's capacity to make sound moral judgements over the whole set of choices which arise in life will not be satisfactorily developed unless the person has acquired practical wisdom and the moral virtues."); Jon Elster, *The Market and the Forum: Three Varieties of Political Theory*, in FOUNDATIONS OF SOCIAL CHOICE THEORY 103, 109 (Jon Elster & Aanund Hylland eds., 1986) ("The notion of judgment is . . . difficult to define formally, but at least we know that there are persons who have this quality to a higher degree than others: people who are able to take account of vast and diffuse evidence that more or less clearly bears on the problem at hand, in such a way that no element is given undue importance."); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283, 332-33 (1989) ("The exercise of judgment, as Aristotle, Kant, and Wittgenstein clearly saw, cannot be fully characterized in an explicit metatheory At some point, the ability to apply rules must rest on some capacity other than mastering rules."); Gregory Leyh, *Legal Education and the Public Life*, in LEGAL HERMENEUTICS 269, 289 (Gregory Leyh ed., 1992) ("[T]he making of sound judgments—in law as in life—is . . . a matter of 'weighing up the whole' and of testing one's judgments against those of other judging persons. Sound human judgment moves back and forth between universals and particulars in a flexible and mutually informing way."); N.E. Simmonds, *Judgment and Mercy*, 13 OXFORD J. LEG. STUD. 52, 56-58 (1993) (explicating Kant's theory of judgment). For a general exposition of the notion of judgment, see HANNAH ARENDT, *BETWEEN PAST AND FUTURE* 219-22 (1961); for the need for judges, see LUCAS, *supra* note 44, at 25-26; and for a definition of competent moral judges, see Rawls, *supra* note 3, at 178-81.

67. Arendt may agree: "[J]udgment is endowed with a certain specific validity but is never universally valid. Its claims to validity can never extend further than the others in whose place the judging person has put himself for his considerations." ARENDT, *supra* note 66, at 221.

Nature (or genetic endowment) also creates strong internal incentives. To partially track the sources in nurture given above, the cognitive development theorists, rejecting the views of the social learning theorists, point to nature as the primary source of a person's moral values.⁶⁸ Kohlberg, for example, has found that, as one grows and matures, one's moral views evolve through a series of genetically programmed stages. Beginning with egoistic responses to rewards and punishments, and passing through perceptions of social values as based on convention, those reaching the highest stages come to realize that proper morality is based on Kantian principles of equality and reciprocity.⁶⁹ Also, it was posited above that risk disposition may be partly biochemical.⁷⁰ A person's given intelligence potential certainly must also be a critical component in her abilities to weigh consequences and learn from experience. ("Now if I must go 120 miles in the next three hours, traveling through various speed zones, can I get there without speeding?") Even refined judgment may be somewhat innate. As law students discover after their first round of final examinations, "some people just have the knack!"

68. Most reject the strong dichotomy. "As for the relationship between nature and nurture, or heredity and environment . . . the older dichotomy between mutually incompatible explanations of behavior has been superseded by a more sophisticated 'interactional' model Even learned behaviors depend upon evolved biological capacities, including the capacities for being 'rewarded' and 'punished' in learning situations." Peter A. Coming, *Human Nature Redivivus*, in *HUMAN NATURE IN POLITICS* 19, 27 (J. Roland Pennock & John W. Chapman eds., 1977). For examples of the "interactional" model, see JAMES Q. WILSON & RICHARD J. HERRNSTEIN, *CRIME AND HUMAN NATURE* (1985); JAMES Q. WILSON, *THE MORAL SENSE* 2 (1993) ("The argument of this book is that people have a natural moral sense, a sense that is formed out of the interaction of their innate dispositions with their earliest familial experiences."); and Alexander Rosenberg, *The Political Philosophy of Biological Endowments: Some Considerations*, 5 *SOC. PHIL. & POL'Y* 1, 4 (1987) ("Thus, some biological endowments will not be under any agent's control [hereditary traits], others will be the responsibility of those who nurture the agent [domestic traits], and still others will be the responsibility of the agent himself [acquired traits]."). Nussbaum surveys the "common ground among the major cognitive theories of emotion . . . [including] today's philosophy of psychology and cognitive psychology, the more cognitive parts of psychoanalytic thought, and the various forms of 'social construction' theory about emotion that prevail in social anthropology and also in radical social history," and finds "that emotions are taught to us by our culture from early infancy, in patterns of interaction between the child and others, prominently including parents, and later including the wider community." Martha Nussbaum, *Narrative Emotions: Beckett's Genealogy of Love*, 98 *ETHICS* 225, 234 (1988). "But," she adds parenthetically, "parents, as psychoanalytic thought too frequently forgets, already embody and teach the social conception of which they are a part." *Id.* at 234-35. See generally Symposium, *Moral Development*, 92 *ETHICS* 407 (1982) (discussing social learning and cognitive development theories).

69. See LAWRENCE KOHLBERG, *THE PSYCHOLOGY OF MORAL DEVELOPMENT* (1984). For brief summaries of Kohlberg's stages of moral development, see Susan Moller Okin, *Thinking Like a Woman*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* 145, 148-50 (Deborah L. Rhode ed., 1990); and Bill Puka, *An Interdisciplinary Treatment of Kohlberg*, 92 *ETHICS* 468, 469-71 (1982). See generally JEAN PIAGET, *THE MORAL JUDGMENT OF THE CHILD* (1948).

70. See *supra* note 54 and accompanying text.

External incentives are multitudinous. Among them are compensation, rewards, prizes, honors, respect, reverence, criminal and civil sanctions, shame, banishment, ostracism, and a host of other carrots and sticks.

The effects of conflict and inducement can now be summarized. The more a particular choice involves an overall conflict with, or inducement by, natural propensities and nurtured inculcations, the more one's choice is channeled. But if this is the case, when, if ever, might one choose to act contrary to one's channeling?

C. *The Disposition Postulate*

The disposition postulate is that the more one's choice is channeled against an antisocial or illegal act, the more one must deliberately and willfully resist the guidance (or the greater the character flaw must be) to choose it. Conversely, though not reflected in the standard use of the knowledge proposition, "you should have known better," there is a symmetry to the disposition postulate with respect to socially desirable acts: the more one's choice is channeled toward an exemplary act, the less willpower one must exert to perform it. On the contrary, the more one must deliberately and willfully resist one's channeling, the greater the character flaw must be to choose not to perform the exemplary act.

Since acts are presumptively rational,⁷¹ one expects there to be reasons for the agent to resist her channeling. The perceived benefits of the choice contrary to the channeling must overcome the disposition to conform to it.⁷²

71. Under the principle of charity, economists assume, "as a working hypothesis, the rationality of any given action, however strange and unadapted it might appear to be at first glance." ELSTER, *supra* note 33, at 154. Social scientists should too. *See id.* at 154-55. Elsewhere, Elster advances this hypothesis on the grounds of parsimony. *See ELSTER, supra* note 11, at 29 ("On grounds of parsimony, . . . we should begin by assuming nothing but rationality."). Yet this presumption may be too strong: "But why must it be assumed that rational people never do irrational things? Is it not one of the commonest things in the world for perfectly rational normal people to behave in ways which are manifestly contrary to their own interest?" P.S. Atiyah, *Executory Contracts, Expectation Damages, and the Economic Analysis of Contract*, in *ESSAYS ON CONTRACT* 150, 156 (1986). Promising is one of the ill-considered acts commonly done: "It is misleading to start with the assumption that promises are typically the actions of careful, rational, calculating individuals who pause and deliberate before deciding to say anything as to their intentions, and make up their minds whether they wish to announce these intentions in promissory form or not." P.S. ATIYAH, *PROMISES, MORALS, AND LAW* 172 (1981).

72. This conclusion smacks of tautology. The economic analysis of observed failures to exploit profitable opportunities, rather than assuming irrationality, ad hoc shifts in preferences, etc., "postulates the existence of costs, monetary or psychic, of taking advantage of these opportunities that eliminate their profitability—costs that may not be easily 'seen' by outside observers." Gary Becker, *The Economic Approach to Human Behavior*, in *RATIONAL CHOICE*, *supra* note 11, at 108, 112. Though this may appear tautological, Becker believes this economic approach, "applicable to all human behavior," yields useful results because it "provides a foundation for predicting the responses to various changes." *Id.*

The benefits could relate to both the factual and the normative aspects of the choice.

The knowledgeable person making the contrary choice may neglect aspects of her choice that are largely factual. Through laziness, indifference, carelessness, and so forth, she fails to attend to the available facts and her special knowledge, or declines to bother with an appropriate evaluation of the possible consequences that follow from the known facts.⁷³ Perhaps her attention is drawn toward other demands, which she considers more immediate or important, such as when our trucker, eager to meet a promised delivery deadline, fails to appreciate that her truck may be overloaded. To maintain that this choice is still rational, we must conclude, though the notion seems strained in places, that the agent prefers or values her laziness, indifference, or the other demands, highly enough to outweigh the conflict with her channeled tendencies. Regardless, there is still a place for the knowledge proposition in dealing with the inattentive person. By increasing the sanction against her, we will goad her in the future, and others like her, to be more attentive.⁷⁴ We will make sure that "she should have known *even better*."

Similarly, the perceived benefits of the conduct contrary to the channeling may outweigh the normative force that helped to form the agent's channeled disposition to do the proper thing. For example, a person may undertake a task that can be accomplished by conduct either that puts others at risk, or conduct, which is more personally burdensome, that does not. Even though the high value of refraining from harming others may have been implanted in the agent, she may nevertheless opt to engage in the risky conduct because she values her own convenience even higher than the risk to others. Perhaps her motivation is not conscious, but rather her self-

73. Anscombe refers to the situation in which "the ignorance is voluntary, e.g., careless; or even chosen, as when someone has the attitude: 'I don't want to know about that because I might have to think or act differently if I did.'" G.E.M. Anscombe, *Comment*, in PRACTICAL REASON 17, 20 (Stephan Körner ed., 1974).

74. Hart makes a similar point in questioning whether the threat of punishment could be effective for those "who committed their crime through inadvertent unthinking negligence" since, by definition, they failed to deliberate. H.L.A. HART, *Intention and Punishment*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 14, at 113, 133. He answers in the affirmative: "The threat of punishment is something which causes him to exert his faculties, rather than something which enters as a reason for conforming to the law when he is deliberating whether to break it or not. It is perhaps more like a goad than a guide." *Id.* at 134; *see also* H.L.A. HART, *Negligence, Mens Rea and Criminal Responsibility*, in PUNISHMENT AND RESPONSIBILITY, *supra*, at 136, 157 ("[P]unishment supplies men with an additional motive to take care before acting, to use their faculties, and to draw upon their experience." (quoting Professor Wechsler)).

control is overcome by a vague impulse.⁷⁵ Possibly, though she was brought up to the contrary, she opts, despite its risks to herself and others, for "the life of spontaneity, impulse, excitement, and risk."⁷⁶ Or, though she knows better, she may actually prefer to harm others because of personal, malicious satisfaction.⁷⁷ If reasons like these drive the agent to make the inappropriate choice, she has embraced socially undesirable normative values despite knowing better.

Very often it appears that an agent makes a choice contrary to her channeling not because she is driven to it, but because she floats past it. The following scenario seems common. At some time a person is confronted with a choice that is close to the line of what she knows better than to do. Serious reflection in light of her accepted values inclines her not to perform the particular act, but the mandate is not very insistent and short-term convenience and personal advantage are inducements to the contrary. For example, she discovers, several blocks away, that the cashier at the restaurant gave extra change. For this particular decision (whether to return the extra change to the restaurant), insignificant as it first appears, she might not bother with serious reflection. In any event, as a result of rationalization, carelessness, thoughtlessness, or caprice, the line is crossed.⁷⁸ From this point the tale becomes familiar because many such tales exist in everyday lore to caution the unwary. Eventually, for some people, choices routinely cross far over the line and invade the realm of acts known, upon neglected reflection, to be quite improper. Cognitive dissonance may make the decisions easier,⁷⁹ especially when aided by the

75. "The spectrum of culpability teaches us that culpability is not only a matter of cognitive foresight, but of self-control. The issue of self-control . . . requires subtle judgments of degree." FLETCHER, *supra* note 9, § 5.1.3, at 353. At some point, the specter of "irresistible impulse" arises. But for practical reasons, among others, I shun this specter. "It is by now a commonplace observation that it is impossible to distinguish between an irresistible impulse and one simply not resisted." Stephen J. Morse, *Psychology, Determinism, and Legal Responsibility*, in *THE LAW AS A BEHAVIORAL INSTRUMENT* 35, 76 (Gary B. Melton ed., 1986).

76. FEINBERG, *supra* note 2, at 109. On the other hand, "[s]ome people quite naturally prefer adventure and risk to tranquility and security, spontaneity to deliberation, turbulent passions to safety." *Id.* at 111. This is not irrational. *See id.*

77. The law declares motivations such as this out of bounds. *See* FINGARETTE & HASSE, *supra* note 13, at 230 ("The law expects us to compensate for such traits as quick temper, weakness of will, cruelty, greed, ambition, and hatred.")

78. Yet even here, the problem is not that the agent suffers from weakness of the will. She could easily act otherwise if she so chose. For the meaning of weakness of the will or akrasia, see, for example, Donald Davidson, *How Is Weakness of the Will Possible?*, in *MORAL CONCEPTS* 93 (Joel Feinberg ed., 1969).

79. Cognitive dissonance "is motivational rather than cognitive. The organism seems to have a need for interior tranquillity, which makes it adjust its desires to its beliefs (or vice versa) until they are relatively consonant with each other." ELSTER, *supra* note 32, at 12 (footnote omitted); *see also* WILLIAM GODWIN, *ENQUIRY CONCERNING POLITICAL JUSTICE* 82 (K. Codell Carter ed., Oxford Univ. Press 1971) (1798) ("Self-deception is of all things the most easy. Whoever ardently wishes to find

distortions of choice under risk and uncertainty. From frequent rubbing, callouses appear on the conscience.⁸⁰

Though she once knew better, at some point, when conflict vanishes from the conscious thought process related to the particular types of improper choices, it is fair to judge that the agent's character has become transformed.⁸¹ She reveals who she is by what she does.⁸² An action out of habit, then, may lead to the conclusion that the agent is less blameworthy because the act was not deliberate.⁸³ Yet, the knowledge proposition may cut the other way. Though she no longer does know any better, she still *should* have known better. At one point, before she transformed herself, she did indeed know better. We blame her more for her habitual act than

a proposition true, may be expected insensibly to veer towards the opinion that suits his inclination."); Daniel T. Gilbert & Joel Cooper, *Social Psychological Strategies of Self-Deception*, in SELF-DECEPTION AND SELF-UNDERSTANDING 75, 84 (Mike W. Martin ed., 1985) (The "theory of cognitive dissonance maintains that simultaneously held beliefs that are logically inconsistent will result in a psychological tension state—a state of cognitive dissonance—that can only be attenuated by rectifying the inconsistency."); For a brief introduction to the notion of cognitive dissonance, see ELSTER, *supra* note 11, at 20-23. In economic terms, the theory of cognitive dissonance represents three propositions: "First, persons not only have preferences over states of the world, but also over their beliefs about the state of the world. Second, persons have some control over their beliefs Third, . . . beliefs once chosen persist over time." George A. Akerlof & William T. Dickens, *The Economic Consequences of Cognitive Dissonance*, 72 AM. ECON. REV. 307, 307 (1982).

80. Furthermore, "[m]oralistic appeals to change one's conduct . . . tend to intensify the very motives that evoke self-deception." Herbert Fingarette, *Alcoholism and Self-Deception*, in SELF-DECEPTION AND SELF-UNDERSTANDING, *supra* note 79, at 52, 64.

81. See, e.g., Paternoster et al., *supra* note 62, at 467 ("Whatever the reasons for an initial involvement in criminal activity, it seems likely that such activity can subsequently weaken one's attachment to conventional others, belief in the legitimacy of social norms, commitment to conventional goals, and involvement in conventional activities.").

82. Dewey and Arendt subscribe to this assessment. "A voluntary act may . . . be defined as one which manifests character, the test of its presence being the presence of desire and deliberation" John Dewey, *The Moral Situation*, in MORALS AND VALUES, *supra* note 8, at 24, 24 (1908).

In acting and speaking, men show who they are, reveal actively their unique personal identities and thus make their appearance in the human world This disclosure of 'who' . . . somebody is—his qualities, gifts, talents, and shortcomings, which he may display or hide—is implicit in everything somebody says and does.

HANNAH ARENDT, *THE HUMAN CONDITION* 179 (1958).

83. Kant was led to this conclusion for some situations: "Habit makes an action easy until at last it becomes a necessity. Such necessity as a result of habit, because it fetters our will, diminishes our responsibility; yet the *actus* through which the habit was acquired, must be imputed to us." IMMANUEL KANT, *LECTURES ON ETHICS* 64 (Louis Infield trans., Harper Torchbooks 1963) (1924). Kant elaborates on his caveat with an infelicitous stereotype: "A man, for instance, who is brought up by gipsies until the habit of evil conduct has become a necessity, is responsible in a lesser degree Accordingly, we should be held less responsible for habits which are innate than for those which we acquire." *Id.* at 64-65. Brandt, on the other hand, begins unpacking the meaning of "x is morally blameworthy on account of z" by placing personality traits at the center: "Some trait (or set of traits) of x's character was responsible for z in the sense that some trait (set of traits) was below standard" Richard B. Brandt, *Blameworthiness and Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* 3, 16 (A.I. Melden ed., 1958) (emphasis omitted).

we blame a habitual actor who never knew any better.⁸⁴ Behavior stemming from character defects that accrue in this manner—we might call them cultivated character traits—do not seem to diminish, at least not significantly, ascriptions of responsibility and blameworthiness.⁸⁵

In sum, under the disposition postulate, the more one is channeled against improper conduct, the more one must resist this guidance, actively or passively, to choose otherwise. A deliberate and willful act is required to overcome one's formed disposition, at least until one has re-formed the disposition through persistent actions contrary to the original channeling.⁸⁶ What does it say of a person to make an illegal or antisocial choice under this scenario?

D. The Accountability Postulate

The accountability postulate is that the more one deliberately and willfully chooses an improper act,⁸⁷ or the more it is the product of one's

84. Plamenatz, in assessing a person's responsibility for an act, would ask, among other questions: "If he did not know [what he was doing or that it was wrong], to what extent was his ignorance an effect of his own past actions, when he did know what he was doing?" Plamenatz, *supra* note 44, at 180 (emphasis omitted).

85. Perhaps no character defects, cultivated or not, diminish responsibility. "Character, however, is not an accidental property of a person. As Aristotle maintained, it is the product of intentional choices that have become ingrained habits of acting." PETER A. FRENCH, RESPONSIBILITY MATTERS 116 (1992) (citing ARISTOTLE, *supra* note 48, bk. II). Do the insights of modern psychology challenge this generalization? Michael Moore wrote a lengthy book to defend the "view that we are responsible for who we are and what we do because we have the capacities rationally to will our fate in this world." MOORE, *supra* note 13, at xi. "Such a view entails ultimate metaphysical faith in our reason and its power to control our actions." *Id.* But as the title to his book intimates, he does not believe that we are beyond various influences. Yet "[t]he thesis is that if lawyers and psychiatrists would but look (in a philosophical way), they would see that nothing in the psychiatric view of persons contradicts the law's presupposition that a person is an autonomous and a rational agent." *Id.* at 2.

86. For example, persons mentioned above who act pursuant to the chosen "life of spontaneity, impulse, excitement, and risk," see *supra* note 76, though their actions are not "deliberately chosen," may "have long since 'deliberately chosen' the way of life in which deliberate choices play no important role." FEINBERG, *supra* note 2, at 109. On the other hand, if "their very life-plans are spontaneous and unexamined, their guiding policies do indeed reflect their characters in deep and important ways without being 'deliberately chosen.'" *Id.* Some commentators assert that, by making choices, one can reform one's values and attitudes, and even one's own identity. See *supra* note 55 (discussing Mead and quoting Tribe).

87. For a scrutiny of the distinctions among intention, deliberation, and purpose, see J.L. AUSTIN, *Three Ways of Spilling Ink*, in PHILOSOPHICAL PAPERS 272 (3d ed. 1979). He concludes: "I act deliberately when I . . . weighed up, in however rudimentary . . . a fashion, the pros and cons The pros and cons are not confined to moral pros and cons, nor need I decide in favour of what I think best or what has the most reasons in favour of it." *Id.* at 286; see also Joel Feinberg, *Legal Paternalism*, in PATERNALISM 3, 7 (Rolf Sartorius ed., 1983) ("Chosen actions are those that are decided upon by deliberation, and that is a process that requires time, information, a clear head, and highly developed rational faculties.").

cultivated character defect,⁸⁸ the more one is blameworthy for so choosing.⁸⁹ Conversely, regarding an exemplary act, which is outside the reach of the knowledge proposition, the less one must deliberately and willfully choose it, the less one is praiseworthy for so choosing.⁹⁰ To emphasize, in the case of the person who has rechanneled her own disposition, the accountability postulate would maintain that the more one deliberately and willfully cultivates harmful character traits, re-forms dispositions towards illegal or antisocial acts, the more one is blameworthy for choosing such conduct.

At this point, there are two plausible conclusions to be drawn from the reasoning behind the accountability postulate. These conclusions emerge more conspicuously when we examine a person who, under the circum-

88. To put it in the negative, "[a] man may be regarded as morally innocent if his actions do not result from a mental state (e.g., malice) or a character defect (e.g., negligence) which we regard as morally blameworthy." JEFFRIE G. MURPHY, *The Killing of the Innocent*, in RETRIBUTION, JUSTICE, AND THERAPY 3, 5 (1979).

89. Hobbes, when discussing guilt and punishment, finds that "[t]he Degrees of Crime are taken on divers Scales, and measured, first, by the malignity of the Source, or Cause." THOMAS HOBBS, *LEVIATHAN* 233 (Oxford Univ. Press 1909) (1651). A proposition which essentially combines the accountability and disposition postulates has been advanced by Harold Kelley. Schoeman describes Kelley's "augmentation principle": "Basically, this principle indicates that the greater the obstacles, costs, and inhibitions an agent overcomes in performing a given action, the greater the causal role and the moral attribution assigned to the agent." Ferdinand Schoeman, *Statistical Norms and Moral Attributions*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS 287, 297 (Ferdinand Schoeman ed., 1987) (citing Harold Kelley, *The Process of Causal Attribution*, 28 AM. PSYCHOLOGIST 114 (1973)). "It is assumed that people are equipped with strong inhibitions against harmful behavior; thus harmful actions are probably the result of especially powerful and profound inclinations that haunt the agent's character." *Id.* at 297-98.

The inverse of the accountability postulate has also been advanced: "If social conditioning makes a person lack the courage to choose (perhaps even to 'desire' what is denied but what would be valued if chosen), then it would be unfair to undertake the ethical assessment *assuming* that she does have that effective choice." AMARTYA SEN, *INEQUALITY REEXAMINED* 149 (1992). Similarly, Westermarck observes: "I think most people would admit that . . . a pickpocket who was kidnapped as a child by a band of pickpockets and trained to the profession should be looked upon with some indulgence." EDWARD WESTERMARCK, *ETHICAL RELATIVITY* 178 (1932). For Kant's concurrence, see *supra* note 83 and accompanying text. A comparable point has been made regarding channels etched by nature rather than nurture. See FINGARETTE & HASSE, *supra* note 13, at 200 ("If a person's mental powers are impaired in such a way as to disable him at least to some material extent from rational control of his conduct in respect to the requirements of the criminal law, the person in that respect acts with materially *lessened* criminal responsibility."); FLETCHER, *supra* note 9, § 4.2.2.

90. For an interesting case study of the rescuers of Jews from Nazi threats, see Kristen R. Monroe et al., *Altruism and the Theory of Rational Action: Rescuers of Jews in Nazi Europe*, 101 ETHICS 103 (1990). As to the rescuers' motivations, the interviewers found "no evidence of a need to atone for past wrongs, no evidence of either goods or participation altruism, no clusters of altruists, no expectation of reward, and no cost/benefit calculus." *Id.* at 115. "Rescuers apparently made little or no conscious decision when they rescued Jews." *Id.* at 121. But the behavior triggering rewards is not symmetrical to the behavior triggering liability. As Fletcher suggests, rewards are granted for supererogatory acts, which must be chosen by the actor. Liability, on the other hand, may be imposed for inadvertence. See FLETCHER, *supra* note 9, § 9.2.3, at 710 (considering liability for criminal punishment).

stances, falls outside the core of the knowledge proposition, the person who we must strain to declare "she should have known better." When grossly ignorant, we may judge that she did not have sufficient reason to know better to be considered blameworthy at all. Or, when she is somewhat more knowledgeable, we may judge that she did have sufficient reason to know better and is therefore culpable, but she does not have sufficient reason to deserve the maximum sanction. In light of these two judgments, the accountability postulate leads to two theses applicable to the person who does have substantial knowledge. Along one path is the following assertion, which will be called the threshold thesis: "Because you should have known better, you acted reprehensibly (that is, in a blameworthy manner) in circumstances in which we would not blame the less knowledgeable." Along the other path is the assertion, which will be called the magnitude thesis: "Because you should have known better, you acted *more* reprehensibly than would be our judgment of the less knowledgeable."

In addition to these two theses stemming from the accountability postulate, we also have the two claims discussed above stemming from the knowledge proposition: the responsibility claim ("Because you should have known better, you should be liable.") and the remedy claim ("Because you should have known better, you should be liable for more."). Joining these two theses with the two claims generates four combinations.

In specifying the first two combinations, notice how these two theses of the accountability postulate tend to track the two claims of the knowledge proposition. Putting together the threshold thesis and the responsibility claim amounts to this: "Because you should have known better, you acted reprehensibly in circumstances in which we would not blame the less knowledgeable, and therefore you should be liable when the less knowledgeable would not be." This will be called the extended responsibility claim. Putting together the magnitude thesis and the remedy claim: "Because you should have known better, you acted more reprehensibly than would be our judgment of the less knowledgeable, and therefore you should be liable for more." This will be called the extended remedy claim.⁹¹

91. Nozick runs together the two claims in his framework for retribution: "The punishment deserved depends on the magnitude H of the wrongness of the act, and the person's degree of responsibility r for the act, and is equal in magnitude to their product, $r \times H$. The degree of responsibility r varies between one (full responsibility) and zero (no responsibility)" NOZICK, *supra* note 38, at 363. While the implicit baseline for his model suggests that a person's responsibility may be diminished, the baseline for the knowledge proposition suggests that it may be enhanced beyond the usual. Perhaps Nozick would account for this in determining "the wrongness of the act." *Id.* at 386.

The last two combinations of the two theses and claims are seemingly less commonly encountered in the everyday world. First, the magnitude thesis and the responsibility claim: "Because you should have known better, you acted more reprehensibly than would be our judgment of the less knowledgeable, and therefore you should be liable." We can imagine situations in which this assertion may well be invoked. When, for example, the law in question establishes a particular minimum level of blameworthiness as a requisite to liability, this assertion would support the point that this particular agent surpassed the minimum in circumstances in which the unknowledgeable would not have. The mental element in common law fraud, generally elevated above the blameworthiness triggering the contract remedy for misrepresentation,⁹² provides a possible instance. Second, the threshold thesis and the remedy claim: "Because you should have known better, you acted reprehensibly in circumstances in which we would not blame the less knowledgeable, and therefore you should be liable for more." Again, we can imagine the invocation of this assertion. For example, under strict liability blameworthiness is not relevant to whether the actor is liable, so this assertion may be advanced to argue for a more generous measure of damages, perhaps even punitive damages. Because I believe the additional analysis of these two combinations of theses and claims will not significantly contribute to the discussion that follows, and the additional complexity may well bring confusion, they will not be pursued in the text.

To reconnoiter, the analysis of the knowledge proposition has led most prominently, and somewhat tortuously, to the extended responsibility claim and the extended remedy claim.⁹³ Implicit in the analysis are normative intuitions. In the next section, I explicate and justify some of these intuitions.

IV. THE MORAL JUSTIFICATIONS

There are three prominent Western, secular moral traditions in the legal literature: the idea of corrective justice, originally derived from Aristotle's work; the deontological centrality of duties, first systematically developed in Kant's writings; and the teleological concern for good consequences,

92. See RESTATEMENT (SECOND) OF CONTRACTS § 159 cmt. a (1981) ("[A]n assertion need not be fraudulent to be a misrepresentation. Thus a statement intended to be truthful may be a misrepresentation because of ignorance or carelessness . . ."); KEETON ET AL., *supra* note 3, at 748-49 (explaining that, while strict tortious responsibility for misrepresentations is found in some instances, it is usually in the context of contractual relationships).

93. See *supra* pp. 28-30.

best known from Bentham's advancement of utilitarianism. While corrective justice is deontological in its emphasis on proper actions (that is, it is means-regarding), rather than the teleological emphasis on good consequences (ends-regarding), I will examine the knowledge proposition separately through the lenses of corrective justice and Kantian deontology because of their historically distinct development and independent influence. But first, to situate the three traditions, I will provide a sketch of moral theory.

Under one representative interpretation of the version of corrective justice first explored by Aristotle, the standard of liability is quite straightforward. A person who harms another through blameworthy conduct should compensate the other person commensurate with the blameworthiness.⁹⁴ Kantian deontology is not as direct.⁹⁵ It begins with his

94. See ARISTOTLE, *supra* note 48, at 1131b-1132b. This version of corrective justice equates with retributive justice. See Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 2), 2 LAW & PHIL. 5, 9 (1983) [hereinafter Coleman, *Moral Theories Part II*] ("On the retributive model, recovery and liability depend on the injurer being morally at fault for the victim's damages."). Or, perhaps, it equates with one version of retributive justice. See *infra* note 141. For other interpretations of Aristotle's principle, see Jules L. Coleman, *Corrective Justice and Property Rights*, 11 SOC. PHIL. & POL'Y 124, 127-35 (1994) (stating at page 127: "According to corrective justice, individuals have a duty to repair the wrongful losses for which they are responsible. Thus, any conception of corrective justice requires conceptions of *loss*, *wrongfulness*, and *responsibility*."); (stating at page 131: "Culpability is not a condition of corrective justice; responsibility is, however."); and Christopher McMahon, *The Paradox of Deontology*, 20 PHIL. & PUB. AFF. 350, 359-62 (1991) (examining Aristotelian rectificatory justice). Under the common law tort system, in which the tortfeasor must compensate the injured party to the extent of the injury irrespective of the degree of the tortfeasor's fault or blameworthiness, the two conceptions of justice differ. See Coleman, *Moral Theories Part II*, *supra*, at 9. ("That requirement [of moral fault] of the retributive view means it cannot account for the principle of fault liability in torts which, though it requires fault, does not require moral fault as a basis of liability."). Here, "[r]etributive justice and corrective justice cannot be squared because corrective justice requires compensation from persons that exactly equals the amount of harm they have caused; and this requirement will frequently cause suffering either more than or less than retributively deserved, either absolutely or comparatively." Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1, 4 (1987). Some commentators have expansive views of retribution that, like common law tort principles, take into account the consequences of the improper act. See, e.g., Hugo A. Bedau, *Classification-Based Sentencing: Some Conceptual and Ethical Problems*, in CRIMINAL JUSTICE, *supra* note 19, at 89, 102 (arguing that retributive criminal penalties "must be based on two basic retributive principles: (1) the severity of the punishment must be proportional to the gravity of the offense, and (2) the gravity of the offense must be a function of fault in the offender and harm caused the victim."); Jeffrey H. Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115, 119 (1985) ("Retributivism . . . is the doctrine that the offender should be *paid back* with suffering he deserves because of the evil he has done, and the *lex talionis* [version of retributivism] asserts that injury equivalent to that he imposed is what the offender deserves."). See generally Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 1), 1 LAW & PHIL. 371, 372-76 (1982) (considering arguments that tort law "is best understood as rooted in principles of corrective justice."). Although corrective justice derives from Aristotle, the use of it to advance notions of responsibility in tort law comes from George Fletcher in 1972. See Alan Strudler, *Mass Torts and Moral Principles*, 11 LAW & PHIL. 297, 301 (1992) (citing George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972)). While corrective justice is usually invoked today for principles of tort

categorical imperative in its various forms. His universalization principle emerges from the first form under which a chosen act should satisfy a maxim that applies to everyone without exception, including the agent.⁹⁶ Under the second form of the categorical imperative, one is to treat all people, worthy of respect as rational and therefore ethical beings, as ends in themselves and not as means only to one's own ends. With these two forms as the main guiding lights, an agent is to derive maxims of conduct by means of rational consistency.⁹⁷ As examples, two primary maxims that would emerge from Kantian reasoning relate to promise-keeping and truth-telling. A person must always keep promises and tell the truth.

To complete the brief framework of moral theory, utilitarianism, which stems from Bentham, is essentially consequentialist in its emphasis on seeking good states of affairs in contradistinction to the deontological focus

liability. Aristotle also meant it to cover contract and restitution principles. See Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 458 (1992). See generally Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 191-201 (1981) (discussing and criticizing the corrective justice theories of tort law of various commentators); Symposium: *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 IOWA L. REV. 403 (1992) (providing discussion of historical and modern theories of corrective justice).

95. For a brief introduction to Kantian deontology, see BAILEY KUKLIN & JEFFREY W. STEMPEL, FOUNDATIONS OF THE LAW 9-12 (1994). Michael Moore points out that in corrective justice, like Kantianism, "moral desert plays the crucial justificatory role: tort sanctions are justified whenever the plaintiff does not deserve to suffer the harm uncompensated and the defendant by his or her conduct has created an unjust situation that merits corrective action." Michael S. Moore, *The Moral Worth of Retribution*, in RESPONSIBILITY, CHARACTER, AND THE EMOTIONS, *supra* note 89, at 179, 182.

96. See generally J.L. MACKIE, ETHICS: INVENTING RIGHT AND WRONG 83-102 (1977).

97. The mandate of deontological justice may be generalized this way: "To each according to X, from each according to Y." The X is broadly characterized as "desert." Of the six or more conceptions of personal desert found in recent analyses of justice, three commonly championed ones, "to each according to his or her virtue," "to each according to his or her effort," and "to each according to his or her contribution," relate to blameworthiness in the sense discussed. See Diana T. Meyers, *Introduction*, in ECONOMIC JUSTICE 1, 1 (Kenneth Kipnis & Diana T. Meyers eds., 1985). Each criterion has its pros and cons. See *id.* at 1-2. For more on the conceptions of desert, see CH. PERELMAN, THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT 6-11, 56 (1963); NICHOLAS RESCHER, DISTRIBUTIVE JUSTICE 73-83 (1966); and N. Scott Arnold, *Why Profits Are Deserved*, 97 ETHICS 387, 389-94 (1987). For challenges to the application of notions of desert, see HENRY SIDGWICK, THE METHODS OF ETHICS 283-90 (Dover Publications 1966) (7th ed. 1907); and Robert Young, *Egalitarianism and Personal Desert*, 102 ETHICS 319, 320 (1992). For the inadequacy of the notion of desert, see LUCAS, *supra* note 5, at 260-61; GEORGE SHER, DESERT (1987); and J.L.A. Garcia, *Two Concepts of Desert*, 5 LAW & PHIL. 219, 220 (1986). Sher points out in conclusion that desert is not the sole basis of community justice determinations: "[H]ow well a society promotes what is deserved is not the *only* thing that determines its justice. Also required, at a minimum, is that it treat its citizens equitably, safeguard their basic rights (whatever those ultimately are), and provide an adequate range of opportunity for all." SHER, *supra*, at 210.

on proper conduct.⁹⁸ For Bentham, the good is happiness.⁹⁹ Bentham's version of the utilitarian mandate is often acclaimed: one is to seek the most happiness for the most people.¹⁰⁰ Now, we move to the two extended uses of the knowledge proposition.

A. *The Extended Responsibility Claim*

Under the extended responsibility claim, the knowledge proposition argues for finding liability in circumstances when it would otherwise not be due: "Because you should have known better, you acted reprehensibly (that is, in a blameworthy manner) in circumstances in which we would not blame the less knowledgeable, and therefore you should be liable when the less knowledgeable should not be." Corrective justice, Kantianism and utilitarianism support this.¹⁰¹

First, corrective justice, in its modern legal incarnations, generally justifies the extended responsibility claim. Tort and criminal liability usually turn on fault or blameworthiness.¹⁰² Exceptions include the areas of the law encompassed by strict liability, in which blameworthiness is irrelevant.¹⁰³ Liability for breach of contract is essentially strict.¹⁰⁴

98. For a modern criticism and reconstruction of utilitarianism, see UTILITARIANISM AND BEYOND (Amartya Sen & Bernard Williams eds., 1982).

99. See BENTHAM, *supra* note 10, at 11-13. Other conceptions of the Good include pleasure, vir-tue, knowledge, love, and preference satisfaction. See, e.g., W.D. ROSS, THE RIGHT AND THE GOOD 140-41 (1930). See generally RICHARD B. BRANDT, ETHICAL THEORY 332-52 (1959) (discussing knowledge, love, the desire to be remembered after death, and character traits, inter alia, as intrinsically valuable).

100. See BENTHAM, *supra* note 10, at 11-13.

101. Parallel moral arguments can be raised against the plaintiff who is denied recovery on the ground that she assumed the risk because she should have known better. Curiously there are situations in which one will not be denied recovery despite having "known better," as when a woman seeks equitable distribution following the divorce from a person she should have known was an unreliable, philandering, ne'er-do-well. Other policies dominate here.

102. See HOLMES, *supra* note 3, at 116-29 (arguing that, in general, the law of torts determines liability by blameworthiness.); KEETON ET AL., *supra* note 3, at 21-23. Although legal fault and moral blameworthiness or fault diverge, see *id.* at 22, there is still moral justification for the notion of legal fault, see NEIL MACCORMICK, *The Obligation of Reparation*, in LEGAL RIGHTS AND SOCIAL DEMOCRACY 212, 221-27 (1982).

103. See, e.g., H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 14, at 1, 20 ("[S]trict liability is generally viewed with great odium and admitted as an exception to the general rule, with the sense that an important principle has been sacrificed to secure a higher measure of conformity and conviction of offenders."); KEETON ET AL., *supra* note 3, at 22-23; LUCAS, *supra* note 44, at 240 (noting that, in defending strict liability, "always we feel that Justice is being sacrificed, and often . . . to an unwarranted extent."). For the "classic" justifications for strict liability, see William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114-24 (1960). One commentator finds that the law's recent "infatuation" with strict liability reflects its immaturity, but that now "fault's true position at the center of tort law is becoming clearer by the day." David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 704

Similarly, Epstein's take on corrective justice imposes a strict tort standard.¹⁰⁵ But Aristotle's version of corrective justice and most modern tort versions are consistent with the extended responsibility claim. As noted, under corrective justice the key to liability is blameworthiness. Because the knowledgeable person is blameworthy in circumstances in which unknowledgeable persons would not be, this person who should have known better should be liable when the others should not be.¹⁰⁶

Aristotle suggests that a person is liable for at least some of the ensuing harm however slight the blameworthiness. To put the basic idea in modern economic terms, in tort law, under the "Hand formula", a blameworthy act essentially is one that is inefficient, that is, one in which the burden on the actor in taking adequate precautions is less than the gravity of the risk to third parties.¹⁰⁷ If the agent should have known that her conduct was inefficient—even though others less knowledgeable would not have known—then she should be liable irrespective of whether the others should be liable. But Aristotle would probably not embrace the economic analysis of blameworthiness,¹⁰⁸ though he may well get to the same conclusions via a different route. Aristotle was a deontologist concerned with proper behavior, not a teleologist centralizing good consequences. The economic

(1992). On the other hand, there is more overlap between negligence and strict liability than is generally acknowledged. See J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1683-84 (1990) (reviewing JOHN M. ELLIS, *AGAINST DECONSTRUCTION* (1989)). See generally Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976) (discussing whether the strict liability standard is unjust); Ernest J. Weinrib, *Liberty, Community, and Corrective Justice*, in *LIABILITY AND RESPONSIBILITY* 290, 304-14 (R.G. Frey & Christopher W. Morris eds., 1991) (analyzing the impact of strict liability on individual liberty).

104. See RESTATEMENT (SECOND) OF CONTRACTS § 346(1) (1981) ("The injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged."); FARNSWORTH, *supra* note 7, § 12.8, at 784; JOHN E. MURRAY, JR., *MURRAY ON CONTRACTS* 673 (3d ed. 1990).

105. See RICHARD A. EPSTEIN, *A THEORY OF STRICT LIABILITY: TOWARD A REFORMULATION OF TORT LAW* (1980) (positing reform of tort law from its present location of liability in defendants' fault to a system of strict liability).

106. To put it succinctly, "[f]ault implies choice which in turn implies foreseeability." Banks McDowell, *Foreseeability in Contract and Tort: The Problems of Responsibility and Remoteness*, 36 CASE W. RES. L. REV. 286, 324 (1986).

107. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947). In this case, Learned Hand found the standard of negligence to turn on whether the probability of the risk of a consequential harm (P) times "the gravity of the resulting injury" (L) is greater than "the burden of adequate precautions" (B). *Id.* at 173. Hence negligence (or contributory negligence) occurs when $B < PL$.

108. But see Posner, *supra* note 94, at 188 ("[T]he article argues that the Aristotelian concept [of corrective justice] is compatible with, and indeed required by, the economic theory of tort and, incidentally, contract and criminal law.").

analysis of law largely springs from utilitarian reasoning.¹⁰⁹ To Aristotle, proper behavior is that which follows the dictates of moral virtue. Moral virtue, to him, is the rational control of desires, which requires the following of the mean.¹¹⁰ It is a character trait necessary for individuals to flourish.¹¹¹ To leap directly to the conclusion, since argument seems

109. See FRANK H. KNIGHT, *Some Notes on the Economic Interpretation of History*, in FREEDOM AND REFORM 246, 251 at n.4 (1947) ("[U]tilitarianism and pragmatism virtually reduce all ethics to economics."); RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 357 (1972) ("Bentham's utilitarianism, in its aspect as a positive theory of human behavior, is another name for economic theory."). But see Jules L. Coleman, *The Economic Analysis of Law*, in ETHICS, ECONOMICS, AND THE LAW 83 (J. Roland Pennock & John W. Chapman eds., 1982) (challenging the connection between economics and utilitarianism); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) ("The important question is whether utilitarianism and economics are really the same thing. I believe they are not . . ."). But the economic analysis of law could also be constructed on deontological reasoning. If, for example, all members of society agreed to the adoption of the economic analysis of law, then, because of the unanimous consent, Kant's respect for personal autonomy and the maxim of promise-keeping would justify its use. Because there is no such actual contract, a social contract theorist might construct a hypothetical one that supports the economic analysis of law. See, e.g., POSNER, *supra* note 48, at 92-99. Cf. Richard A. Posner, *Epstein's Tort Theory: A Critique*, 8 J. LEGAL STUD. 457, 460 (1979) (justifying a duty to rescue by a hypothetical contract). But the meaningfulness of hypothetical consent in this context has been challenged. See, e.g., Daniel Brudney, *Hypothetical Consent and Moral Force*, 10 LAW & PHIL. 235 (1991) (arguing that hypothetical consent has no moral force); Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 545-48 (1980) (arguing that hypothetical consent does not work); Jules L. Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 STAN. L. REV. 1105, 1123-27 (1982) (arguing that hypothetical consent is not economically efficient); Ronald Dworkin, *Why Efficiency?* A Response to Professors Calabresi and Posner, 8 HOFSTRA L. REV. 563, 574-79 (1980) (arguing that Posner's idea of counterfactual consent is really no consent at all but simply permits Posner to achieve the results he wants); Mark Sagoff, *Values and Preferences*, 96 ETHICS 301, 306-07 (1986) ("The difficulty with hypothetical consent arguments of this sort is that there are so many of them."); Ernest J. Weinrib, *Utilitarianism, Economics, and Legal Theory*, 30 U. TORONTO L.J. 307, 318-25 (1980) (discussing hypothetical markets). Finally, normative economic theory can be justified on deontological, libertarian principles of expanding individual liberty by deferring to the private choices driving the invisible hand. See Robin P. Malloy, *Equating Human Rights and Property Rights—The Need for Moral Judgment in an Economic Analysis of Law and Social Policy*, 47 OHIO ST. L.J. 163, 164 (1986) (placing Adam Smith, Friedrich Hayek, and Milton Friedman among those who favor the free market for the sake of individual liberty).

110. Aristotle states: "Virtue, then, is a state of character concerned with choice, lying in a mean [between two vices], i.e., the mean relative to us, this being determined by a rational principle, and by that principle by which the man of practical wisdom would determine it." ARISTOTLE, *supra* note 48, at 1106b-1107a. Virtue, according to Pindar, like a vine, is a product of both nature and nurture: It "must be of good stock if it is to grow well. And even if it has a good heritage, it needs fostering weather . . . as well as the care of concerned and intelligent keepers, for its continued health and full perfection." MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS* 1 (1986).

111. See PHILIPPA FOOT, *Virtues and Vices*, in VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 1 (1978) (discussing the characteristics of virtues); STEPHEN R. MUNZER, *A THEORY OF PROPERTY* 121-25 (1990) (stating at page 121: "A virtue is a more or less abiding character trait that disposes a person to think or act in ways that are generally beneficial both for the person having the trait and for others, and that either enhances some positive feature or corrects or modifies some shortcoming of human beings."); Rosalind Hursthouse, *Virtue Theory and Abortion*, 20 PHIL. & PUB. AFF. 223, 225-33 (1991) (stating at page 226: "A virtue is a character trait a human being needs

unnecessary, it is not virtuous to knowingly put others at substantial risk, especially when the burden of precaution is less than the gravity of the risk (in which case, the behavior is inefficient!¹¹²).

Once we divorce corrective justice from Aristotle's grounding of it in the advancement of virtue, as has been done in modern times, the need arises to reconceptualize why "knowing better" makes chosen acts more blameworthy. Certainly the proposition is intuitively resonant that, the more one knows better, the more one is blameworthy for nonetheless choosing harmful or risky conduct contrary to one's better knowledge.¹¹³ If, indeed, this does reflect society's intuitions, this is enough, according to Durkheim, to explain society's instincts to punish the behavior.¹¹⁴ Perhaps the proposition is a moral primitive.¹¹⁵ Even Kant, who, we might

to flourish or live well."'). For a list of the Aristotelian virtues that correspond to the major spheres of experience, including courage, moderation, justice, generosity, and truthfulness, see Martha Nussbaum, *Non-Relative Virtues: An Aristotelian Approach*, in *THE QUALITY OF LIFE* 242, 246 (Martha Nussbaum & Amartya Sen eds., 1993). In recent times, several philosophers have championed "virtue ethics." See, e.g., Ruth Anna Putnam, *Reciprocity and Virtue Ethics*, 98 *ETHICS* 379, 379 (1988). "Moderate proponents of virtue ethics proposed it on the grounds that without attention to the virtues we cannot do justice to the complexity of our moral lives." *Id.* at 380.

112. This is the reasoning that leads Posner to conclude that the Aristotelian theory of corrective justice "is not only compatible with, but required by, the economic theory of law." Posner, *supra* note 94, at 201. But to get to this conclusion, Posner must expand Aristotle's conception of "wrongful" conduct. See *id.* at 201-06. While Weinrib, among others, is critical of Posner's analysis, he advances a justification of the Hand formula under a Kantian interpretation of corrective justice. See Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 *LAW & PHIL.* 37, 44-45, 53-54 (1983). In sum, "[t]he balancing of the risk against the measures needed to eliminate or avoid the risk stands at the junction of the paradigmatically deontological elements of rationality in a hypothetical situation and equality as between actor and victim." *Id.* at 53 (footnote omitted).

113. Gross asserts this bald principle when developing the dimension of culpability that measures the dangerousness of conduct: "Culpability is affected by what the actor knows (or should know) about the likelihood of harm on a particular occasion." HYMAN GROSS, *A THEORY OF CRIMINAL JUSTICE* 80 (1979). Thus, "if the actor knew (or should have known) when he acted that there was a greater likelihood of harm than normal expectations would indicate, according to the same principle, the culpability of his conduct is greater." *Id.*

114. Hart explains Durkheim's view. According to Durkheim, "punishment is 'a passionate reaction of graduated intensity' to offences against the collective conscience." H.L.A. HART, *Social Solidarity and the Enforcement of Morality*, in *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY*, *supra* note 3, at 248, 255 (quoting EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 96 (George Simpson trans., The Free Press 1933) (1926)). Therefore, as Hart understands Durkheim, punishment is "a symbolic expression of the outraged common morality." HART, *supra*, at 255. To put it in terms of "responsibility," Plamenatz first observes that "th[is] term is used loosely." Plamenatz, *supra* note 44, at 187. The term is used so loosely that some suggest "that the difference between actions for which we do, and actions for which we do not, hold one another responsible are to be looked for, not in our situations and mental conditions when we act, but in our customary reactions to behaviour." *Id.* "The sceptics who say this no doubt exaggerate, but just how much I do not know." *Id.*

115. Under intuitionism, a moral primitive is a claim that "is a primitive and unanalyzed proposition which is morally ultimate. Every ethical theory necessarily involves at least one such primitive (e.g., 'happiness is good,' 'freedom is to be respected,' etc.)" JEFFRIE G. MURPHY, *Three Mistakes About Retributivism*, in *RETRIBUTION, JUSTICE, AND THERAPY*, *supra* note 88, at 77, 77.

suppose, ties the censure of blameworthiness to the categorical imperative, or directly to reason, instead denounces the proposition virtually as a given.¹¹⁶ In the end as in the beginning, everyone knows that acts done despite "knowing better" are worse. Period. No footnote needed.

Second, Kantian reasoning also supports the extended responsibility claim. Because virtually all conduct creates at least attenuated risks to others, acting with this general awareness is not using the others as a means *only* to one's own ends. Everyone shares these reciprocal risks and rationally accepts them as a cost of living in a dynamic world.¹¹⁷ What real choice do we have? Against an agent who is reasonably ignorant of the potential of her act to put another at substantial risk, it is hard to claim that she is using the other as a means only to her own end. Her ignorance may prevent awareness that another person is being "used" at all. To choose

116. In lecturing on "degrees of responsibility," Kant expresses his thesis in terms of freedom, which I have skirted in order to avoid the quagmire awaiting those who argue in terms of freewill and determinism. Cf. THOMAS NAGEL, *THE VIEW FROM NOWHERE* 112 (1986) ("I change my mind about the problem of free will every time I think about it, and therefore cannot offer any view with even moderate confidence; but my present opinion is that nothing that might be a solution has yet been described."); Dan-Cohen, *supra* note 5, at 960 ("Concessions to determinism are as inevitable as they are perilous: they are steps down a slope that, despite enormous philosophical effort, remains a slippery one."); Schoeman, *supra* note 89, at 302 ("Philosophers, and social theorists in general, have yet to come up with a general account of what kinds of interferences with an individual undermine moral accountability."). Nevertheless, the knowledge proposition is implicit in some of Kant's thoughts. He begins by declaring that "[t]he degree of responsibility depends on the degree of freedom. Freedom involves capacity to act, and in addition, cognizance of the impulsive ground and objective character of the action." KANT, *supra* note 83, at 62. He soon thereafter asserts: "The greater the obstacles to action which we must overcome, the more accountable we are for the action . . ." *Id.* at 62-63. Less there be any doubt, he restates the idea: "The more I have to force myself to do an action, the more obstacles I have to overcome in doing it, and the more wilfully I do it, the more it is to be accounted to me . . ." *Id.* at 63. Conversely, "the greater the fight a man puts up against his natural inclinations the more it is to be imputed to him for merit." *Id.* The same is said about overcoming external forces. See *id.* This is a matter of merit and demerit. See *id.*; see also JOEL FEINBERG, *Causing Voluntary Actions, in DOING AND DESERVING*, *supra* note 5, at 152, 171 ("When the trigger-pull [for an action] is easy, . . . then the major part of the explanation of that action will necessarily involve the agent's own complicated self; and the more the triggering diminishes in explanatory significance, the less reluctant we are to regard the act as voluntary.") This is not the only place Kant makes such bald assertions. In giving content to the formal principles of practical reason, one of Kant's questionable attempts, according to Wolff, "is simply to assert without argument that there are two objective or 'obligatory' ends, namely the happiness of others and my own perfection." ROBERT PAUL WOLFF, *UNDERSTANDING RAWLS* 111 (1977). Speaking of freewill and determinism, for interesting observations about the debate that relate to the theme of this article, see MOORE, *supra* note 13, chs. 9-10 (examining the question whether the recognition of the unconscious leads to the conclusion that agents are more responsible or less responsible and coming to a negative conclusion); and JEFFRIE G. MURPHY, *Moral Death: A Kantian Essay on Psychopathy*, in *RETRIBUTION, JUSTICE, AND THERAPY*, *supra* note 88, at 128, 132 (asserting, under one compatibilist view of determinism, that "a responsible man is not one whose behavior was uncaused but, rather, one whose behavior was caused by normal or typical causes of behavior (desires, volitions, beliefs, etc.) and not by abnormal or atypical causes (epileptic seizures, blows on the head, etc.)").

117. This analysis draws on Fletcher's theory of tort liability based on nonreciprocal risks. See Fletcher, *supra* note 94, at 543-56.

rationally to conform to a universalized maxim requires sufficient knowledge for one to judge whether one's conduct threatens to violate the maxim. But to act when one knows or should know that one's conduct puts another person at substantial risk, smacks, in the absence of that person's consent, of a violation of the categorical imperative. This is particularly the case when, under the Hand formula, the burden on the actor of adequate precautions is less than the gravity of the risk to third parties. The agent avoids inconvenience to herself when she has reason to know that her act will impose probabilistically greater inconvenience or harm on others. If everyone did this, it seems that most, if not all, rational conceptions of an orderly society would be thwarted. The actor pursues a personal goal in a manner that uses others only as a means.

Finally, utilitarianism buttresses the extended responsibility claim. Under this moral viewpoint, a person's choices are to be aimed at maximizing utility. Conduct that leads to antisocial or illegal consequences presumably does not maximize utility. After all, for the utilitarian, it is incumbent on society to establish standards of antisocial and illegal conduct based on the mandate to maximize utility. Therefore, virtually by tautology, once such standards are properly established, an antisocial or illegal act runs afoul of the utilitarian precept.¹¹⁸ To a utilitarian, the very notion of conduct subject to "blame" means that one has acted in a manner that fails to abide by the precept.

Under utilitarianism, it is better to avert conduct that fails to maximize utility, whether or not the actor is aware of the potential utility loss. This increases overall welfare, but one can hardly be expected to choose to act properly if one is unaware of the possible adverse consequences. To accommodate this brute fact, some utilitarians espouse an expected, rather than an actual, utility standard. One is to maximize expected utility.¹¹⁹ The

118. I write "virtually by tautology" in recognition of some of the famous hypotheticals that have been mustered against utilitarian reasoning. One is about the sheriff who turns over to a lynch mob a prisoner known to her to be innocent in order to prevent a destructive riot. See Judith Lichtenberg, *The Right, the All Right, and the Good*, 92 YALE L.J. 544, 546 (1983) (reviewing SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM: A PHILOSOPHICAL INVESTIGATION OF THE CONSIDERATIONS UNDERLYING RIVAL MORAL CONCEPTIONS* (1982)). While the sheriff's conduct is illegal, it may indeed satisfy the utilitarian mandate by avoiding greater disutility from the riot. So much the worse for utilitarianism, according to the deontologists, and so much the worse for always equating antisocial or illegal acts with antiutilitarian conduct.

119. See BRANDT, *supra* note 99, at 381-84; Frederic Schick, *Under Which Descriptions?*, in *UTILITARIANISM AND BEYOND*, *supra* note 98, at 251, 251-52. But see ROSS, *supra* note 99, at 43 (explaining that utilitarianism "says what is right is certain acts, not certain acts motivated in a certain way; and it says that acts are never right by their own nature but by virtue of the goodness of their actual results."). Because of the difference between actual and expected consequences, G.E. Moore draws the distinction between what is right and wrong, based on actual consequences, and what is morally praiseworthy or blameworthy, based on expected consequences. See G.E. MOORE, *ETHICS* 80-

extended responsibility claim clearly fits the expected utility standard. The reason an actor should have known better, and therefore be liable, is that she should have expected her conduct to fail to maximize utility. Yet, the extended responsibility claim also fits the more exacting utilitarian standard based on avoiding adverse consequences regardless of whether they are expected. Conduct that one knows or should know will lead to adverse consequences is likely to be more harmful, or harmful more often, than conduct about which the actual consequences are unknown.¹²⁰ Even beyond this, the parties' awareness that an actor knowingly threatens them with risky behavior is, in itself, harmful to them (that is, psychologically disruptive) irrespective of whether the adverse consequences actually eventuate.¹²¹

Related to the principle of criminal and civil deterrence is the idea, first espoused by Calabresi, that the imposition of the duty to avoid risks on the person in the best position to do so will also increase overall social welfare by reducing waste.¹²² The knowledgeable actor is more likely to be in a better position than other parties to appreciate the risks, do a cost-benefit analysis of them, and avoid them more cheaply or bribe another party to do so.¹²³ In light of the principle of risk avoidance, the knowledgeable actor should have known better than to proceed in the face of the risks known to her.

In sum, the utilitarian, like the Aristotelian and deontologist, has much to say in favor of the extended responsibility claim. We will see if they have as much to say in favor of the extended remedy claim.

83 (Oxford Univ. Press 1965) (1912).

120. Hume, who has been read as being essentially a utilitarian, suggests this analysis. "Men are less blam'd for such evil actions, as they perform hastily and unpremeditatedly, than for such as proceed from thought and deliberation. For what reason? . . . because a hasty temper, tho' a constant cause in the mind, operates only by intervals, and infects not the whole character." DAVID HUME, A TREATISE OF HUMAN NATURE 412 (L.A. Selby-Bigge ed., Oxford Univ. Press 1888) (1739 & 1740). Notice that Hume links the relationship between blameworthiness and deliberation to the character of the actor rather than the act.

121. See FLETCHER, *supra* note 9, § 6.6.6, at 484. Cf. Eric Ashby, *The Search for an Environmental Ethic*, in 1 THE TANNER LECTURES ON HUMAN VALUES 1, 18 (Sterling M. McMurrin ed., 1980) (stating that "people will accept a voluntary risk considerably greater than an involuntary risk").

122. Calabresi's more complete statement of the principle is: "A pure market approach to primary accident cost avoidance would require allocation of accident costs to those acts or activities (or combinations of them) which could avoid the accident costs most cheaply." CALABRESI, *supra* note 15, at 135.

123. See *id.* at 135-40.

B. *The Extended Remedy Claim*

Under the extended remedy claim, the knowledge proposition argues for a more severe sanction than should be imposed on the unknowledgeable actor: "Because you should have known better, you acted more reprehensibly (that is, in a more blameworthy manner) than would be our judgment of the less knowledgeable, and therefore you should be liable for more." Again, corrective justice, Kantianism and utilitarianism generally support this.

First, Aristotle's vision of corrective justice warrants the extended remedy claim. Recall that, under Aristotle's version, a person who harms another through blameworthy conduct should compensate the other person commensurate with the blameworthiness.¹²⁴ The extended responsibility claim, discussed above, addresses the left side of the equation: an actor should compensate another person when her blameworthy conduct harms him.¹²⁵ The extended remedy claim addresses the right side of the equation: the measure of the required compensation is the degree of the blameworthiness. In this context, completing the equation is quite straightforward. Because knowingly putting another at risk is more blameworthy than acting from relative ignorance, the remedy according to Aristotle should be increased to reflect the greater fall from virtue.¹²⁶ Similarly, harmful conduct when an actor is in a position to know she is putting another at risk is more blameworthy than harmful conduct when she is not in such a position.¹²⁷

The modern versions of corrective justice generally manifested in common law tort principles diverge from Aristotle's. Whereas Aristotle would have the actor, in both criminal and tort suits, compensate the harmed person in proportion to the ascribed *blameworthiness*,¹²⁸ current tort law generally declares that, once the actor surpasses the established threshold of fault (roughly "blameworthiness"), the actor is to compensate the harmed person to the full extent of her *harm*.¹²⁹ It therefore seems that, once recovery is allowed, the knowledge proposition is not invocable pursuant to the extended remedy claim to justify an increase in the harmed person's recovery because it is superfluous.

124. See *supra* note 94 and accompanying text.

125. See *supra* Part IV.A.

126. See *supra* note 94 and accompanying text.

127. See *supra* notes 102-12 and accompanying text.

128. See *supra* notes 102-12 and accompanying text.

129. See DAN B. DOBBS, THE LAW OF TORTS § 377 (2000).

But there is another line of authority more akin to Aristotle's view of corrective justice that sheds light on this issue. The rule that the negligent actor is liable to the harmed person for the full extent of her harm is what Hart and Honoré call the "narrow view" of the role of foreseeability in the law of negligence: "The narrow view . . . is that the foreseeability of harm is relevant to whether the defendant was negligent but not to the extent of his responsibility once negligence is shown."¹³⁰ Opposed to this is the wider view that also considers foreseeability at a second stage of the inquiry. Under this alternative view, "the foreseeability of harm is relevant also to the extent of a negligent defendant's responsibility."¹³¹ Taking this at face value, it ties neatly to the extended remedy claim. Insofar as an agent foresees or should foresee the consequences of a contemplated action, she should be liable for the consequent harm.¹³² An unusual consequence will not cut off the liability of the agent who should have

130. HART & HONORÉ, *supra* note 8, at 255. Compare the doctrine of the plaintiff with the "eggshell skull," whereby a tortfeasor must take her victim as she finds him. See KEETON ET AL., *supra* note 3, at 290 ("[A] defendant who is negligent must take existing circumstances as they are, and may be liable for consequences brought about by the defendant's acts, even though they were not reasonably to be anticipated.").

131. HART & HONORÉ, *supra* note 8, at 255. Hart and Honoré cite for this view, along with some commentators, *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng'g Co. (The Wagon Mound No. 1)*, [1961] App. Cas. 388 (P.C. Aust.) (appeal taken from Australia). See generally Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 438-44 (1987) (discussing whether a defendant can be held liable for unforeseeable consequences or to unforeseeable plaintiffs).

132. Coleman questioned whether corrective justice always calls for compensation by the actor to the injured party. Because the actor does not "gain" from many torts, for example, automobile accidents, Coleman stated that first or third party insurance coverage would satisfy the compensation requirement. See MURPHY & COLEMAN, *supra* note 25, at 187-88. But "[a] no-fault allocation of losses owing to intentional torts involving gain would not nullify the wrongdoer's gain and would be objectionable on those grounds." *Id.* at 188. Yet generally, Coleman asserted, corrective justice itself does not require compensation from the wrongdoer to the injured party. See Coleman, *Moral Theories Part II*, *supra* note 94, at 11-14 (discussing the grounds and modes of rectification). Weinrib criticizes Coleman's (and others') analysis by observing that corrective justice, as Aristotle conceived it, requires a correlation between the victim's injury and the wrongdoer's obligation, as well as a necessary relation between the parties; that is, the wrongdoer must actually compensate the victim. See Weinrib, *supra* note 131, at 438-44; see also Stephen R. Perry, *Comment on Coleman: Corrective Justice*, 67 IND. L.J. 381 (1992) (concluding that Coleman's theory is essentially based on distributive justice, not corrective justice); Jeremy Waldron, *Criticizing the Economic Analysis of Law*, 99 YALE L.J. 1441, 1450-54 (1990) (reviewing JULES L. COLEMAN, *MARKETS, MORALS, AND THE LAW* (1988)) (criticizing Coleman's dissociation in corrective justice of victim's injury and wrongdoer's obligation). At first Coleman rejected Weinrib's argument, see Jules L. Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451 (1987), but he has largely come to concede the points of Weinrib and Perry, see Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427, 433-34 (1992), though not enough to fully satisfy Weinrib, see Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445 (1992).

known better than to doubt the reasonable possibility of a linkage from act to harm.¹³³

In the same way, contract law supports the extended remedy claim. While the liability itself for breach of contract is inconsistent with the extended responsibility claim because contract liability is generally strict, the allowable remedy for breach turns on the foreseeability of the harm by the breacher at the time of contracting.¹³⁴ Like the wider view of foreseeability in the law of negligence, if the breacher should have foreseen the unusual harm to the aggrieved party, she should compensate the aggrieved party for it.¹³⁵

Second, Kantianism justifies the extended remedy claim. At first blush, this claim may seem to fit uncomfortably within the categorical imperative. Kant, an absolutist, promotes duties as either/or propositions. Either one has a particular duty or one does not. There are no degrees of duties. Instead there is, in principle, a complete, coherent network of exact duties that all must always perform without exception.¹³⁶ The extended remedy claim suggests degrees.¹³⁷ The more one is blameworthy, the more one must compensate harmed persons.

This initial analysis fails to distinguish properly the extended responsibility claim from the extended remedy claim. As is evident in the discussion above, duties are absolute under the responsibility claim: Do not knowingly, or with reason to know, engage in antisocial or illegal

133. Hart and Honoré discuss the wide view of foreseeability primarily in terms of a limitation on liability: "The wider view of the place of foreseeability in the law of negligence may be formulated thus: a defendant is responsible for *and only for* such harm as he could reasonably have foreseen and prevented." HART & HONORÉ, *supra* note 8, at 255 (emphasis added). But they recognize that it is an extension as well as a limitation on liability: "[T]he extending doctrine is that [the defendant] is liable for foreseeable harm of which his act is a necessary condition even if, on common-sense causal principles, he did not cause it." *Id.* at 256. This extension supports, like Aristotle's version of corrective justice, the extended liability of the knowledgeable actor.

134. See FARNSWORTH, *supra* note 7, § 12.14, at 821-29; MURRAY, *supra* note 104, § 120, at 683-95. The leading case is, of course, *Hadley v. Baxendale*, 9 Ex. 341, 156 Eng. Rep. 145 (1854).

135. See, e.g., McDowell, *supra* note 106, at 323-24 (discussing the role of foreseeability in both contract and tort law).

Whether the principles of contract damages are sufficiently supported by the notion of corrective justice has been questioned. See, e.g., MURPHY & COLEMAN, *supra* note 25, at 192-93; Anthony T. Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472 (1980).

136. See, e.g., NUSSBAUM, *supra* note 110, at 31-32; R.M. Hare, *Moral Conflicts*, in 1 THE TANNER LECTURES ON HUMAN VALUES, *supra* note 121, at 169, 179-80. For the difficulties in determining the network of rights, see Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, in 1 THE TANNER LECTURES ON HUMAN VALUES, *supra* note 121, at 221, 227-34.

137. Plamenatz concludes that since, at the time of a choice, people are affected in various degrees by the manifold influences on decisionmaking, "[i]t therefore makes sense to speak of degrees of responsibility, and of diminished responsibility." Plamenatz, *supra* note 44, at 179.

conduct.¹³⁸ The duty is not greater because the act is grossly improper.¹³⁹ Yet, once this general maxim is criminally violated, Kant would decree punishment commensurate with the blameworthiness of the violation—what the criminal deserves—as determined by the standard of retribution.¹⁴⁰ Trespass is one thing, but murder is quite something else. Kant holds to this difference whether the remedy sought is criminal or civil. Under Kant's view of civil liability, as in one interpretation of Aristotle's version of corrective justice, the wrongdoer should compensate the injured person to the extent of the blameworthiness.¹⁴¹

Bare retribution, however, calls for sanctions in a class of instances that are nonremediable under the common law. When the actor's conduct is

138. See *supra* Part IV.A.

139. See *id.*

140. See IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 99-107 (John Ladd trans., Bobbs-Merrill Co., 1965) (1797). Kant's guiding standards for punishment are "his renowned principle of respect for persons and his insistence that only the 'Law of retribution' (*jus talionis*) could determine the morally appropriate kind and degree of punishment." M. Margaret Falls, *Retribution, Reciprocity, and Respect for Persons*, 6 LAW & PHIL. 25, 25 (1987). Kant does not champion retribution as a "moral primitive," see *supra* note 115 (defining what is meant by "moral primitive"), but "[h]e left it to later philosophers to identify the exact logical and moral connections between respecting persons and returning suffering for suffering," Falls, *supra*, at 25. Murphy and others see Kant's retribution as "based on his general view that political obligation is to be analyzed, quasi-contractually, in terms of reciprocity." JEFFRIE G. MURPHY, *Marxism and Retribution, in RETRIBUTION, JUSTICE, AND THERAPY*, *supra* note 88, at 93, 100. But see Falls, *supra* (criticizing the theory of reciprocity and advancing the "moral accountability theory"). See generally JEFFRIE G. MURPHY, *Kant's Theory of Criminal Punishment, in RETRIBUTION, JUSTICE, AND THERAPY*, *supra*, at 88; B. Sharon Byrd, *Kant's Theory of Punishment: Deterrence in Its Threat, Retribution in Its Execution*, 8 LAW & PHIL. 151 (1989) (arguing that deterrence is also a facet of Kant's theory of punishment); Don E. Scheid, *Kant's Retributivism*, 93 ETHICS 262 (1983) (arguing that Kant is not a "thoroughgoing retributivist"). One relevant criticism of Kantian retribution is that the retributive conception of "desert" remains unclear. See Jean Hampton, *The Moral Education Theory of Punishment*, 13 PHIL. & PUB. AFF. 208, 235-36 (1984). While few modern commentators agree with Kant (and Hegel) that retribution "nullifies" the offense, retribution or punishment is often promoted today as an authoritative expression of moral condemnation. See JOEL FEINBERG, *The Expressive Function of Punishment, in DOING AND DESERVING*, *supra* note 5, at 95-98; HART, *supra* note 19, at 230-37; RICHARDS, *supra* note 19, at 236 (referring to Bishop Butler's "thesis known as 'punishment as the expression of public morality'"). But see Michael Davis, *Punishment as Language: Misleading Analogy for Desert Theorists*, 10 LAW & PHIL. 311 (1991) (arguing that the expressive theory contributes nothing worthwhile to traditional retributivism); Moore, *supra* note 95, at 181 (asserting that denunciatory theories of punishment are utilitarian, not retributive). Nozick sees retributive punishment as "(re)connecting" the wrongdoer with correct values. See NOZICK, *supra* note 38, at 374.

141. See Weinrib, *supra* note 131, at 449 ("Kant's integrative interpretation of doing and suffering under the concept of right itself has ancient roots, because it translated into the terms of his metaphysics of morals Aristotle's pathbreaking elucidation of corrective justice."). One commentator observes that there are three versions of retributive theory: an eye for an eye irrespective of intention (the simplest); a tooth for a tooth for acts done intentionally or in character (Hume's and Adam Smith's); and punishment to reciprocate for moral wickedness (the sophisticated, modern, and liberal version). See Haksar, *supra* note 10, at 318. Haksar assigns Kant to this third version. See *id.* For an argument that retribution is insufficient to justify the moral duty of reparation, see MACCORMICK, *supra* note 102, at 214-17.

blameworthy, but no one is injured, the actor will be free of liability however great her blameworthiness. For example, the scam operator who passes off gold-plated bars as solid gold will not be liable to the deceived purchasers when it turns out that the underlying metal is the more valuable platinum. Attempted wrongdoing that fails is usually subject to no civil sanction (or reduced criminal sanction) though the blameworthiness is not diminished because the attempt fails.¹⁴² In these circumstances, the extended remedy claim diverges from the retributive theory of civil liability because liability, extended or not, depends on an injury, whereas retributive blameworthiness does not.

Furthermore, the essence of the retributive theory of punishment is that a morally objectionable offense should be reciprocated by the imposition of "pain or loss corresponding with the moral gravity of [the] offense."¹⁴³ The usual sense of "moral gravity" ties to blameworthiness or reprehensibility, which take into account all the circumstances of the particular action that reflect the character of the act or the actor.¹⁴⁴ We say, akin to the notion of corrective justice,¹⁴⁵ that the actor deserves punishment commensurate with the blameworthiness.¹⁴⁶

142. See MURPHY & COLEMAN, *supra* note 25, at 183.

143. Richard B. Brandt, *The Conditions of Criminal Responsibility*, in RESPONSIBILITY, *supra* note 12, at 106, 106; see also NOZICK, *supra* note 38, at 363-97; Bedau, *supra* note 94, at 102 (referring to "two basic retributive principles: (1) the severity of the punishment must be proportional to the gravity of the offense, and (2) the gravity of the offense must be a function of fault in the offender and harm caused the victim."); Moore, *supra* note 95, at 179-82 (defining and clarifying "retributivism"); John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3, 4-5 (1955) (stating that, under the retributive view of punishment, "[i]t is morally fitting that a person who does wrong should suffer in proportion to his wrongdoing. . . . [T]he severity of the appropriate punishment depends on the depravity of his act"). Feinberg points out that there are many distinct theories of "retributivism." He discusses the theories "that hold that a certain degree of pain or deprivation is *deserved* by, or matches, fits, or suits, a certain magnitude of evil, quite apart from consequences. The emphasis is on fitness or proportion" JOEL FEINBERG, *Sua Culpa*, in DOING AND DESERVING, *supra* note 5, at 187, 216 n.20. For Feinberg's examination of a retributive theory of torts, see *id.* at 217-21.

144. See Brandt, *supra* note 143, at 107.

145. See ANTHONY KENNY, *FREEWILL AND RESPONSIBILITY* 70 (1978) ("The theory of retributive justice is an attempt to give an account of the justice of a just punishment in terms of commutative justice.").

146. See, e.g., GROSS, *supra* note 113, at 414, 438; (stating at page 414: "Once the primitive idea of a harm for a harm is abandoned, the best measure of punishment seems to be the blameworthiness of the conduct that is the basis of liability."). This proposition apparently aligns with sentencing practices:

[T]he choice of sentence among alternatives available is influenced by (1) whether or not the background and history of the offender reveal a pattern of criminality, and (2) whether the facts surrounding the commission of the offence suggest a high level of culpability or moral blameworthiness on the part of the offender.

John Hogarth, *Magistrates' World Views and Sentencing Behaviour*, in PERCEPTION IN CRIMINOLOGY, *supra* note 59, at 310, 315-16. While the first factor is consistent with the aim to punish for the character of the actor, rather than the act, it is also consistent with deterrence principles.

At this point, as suggested above, the commentators divide on whether retribution is to relate to the character of the actor or the character of the act. In the context of the knowledge proposition, we might say that the actor is more reprehensible because she should have known better than to behave as she did, or we might say that the act was more reprehensible because the actor should have known better than to have performed it, and therefore, under either characterization, in accordance with the extended remedy claim, she should be liable for more. While the modern view favors punishment for acts, not personal character,¹⁴⁷ I will try to avoid this issue since I believe the knowledge proposition stands essentially the same irrespective of which way it is resolved. But, as is evident in prior discussion, I have not avoided the controversy altogether. When I pondered the person who through rationalization, carelessness, thoughtlessness, or caprice ultimately re-forms her character in such a way as to make blame-worthy choices easier,¹⁴⁸ I seemingly centralized character, not acts. But even after this scenario, we can still conclude that the person should have known better than to perform the particular act if we assume the period of "knowing better" reaches back to the time before she had re-formed her

147. Bayles reports that the view that punishment is aimed at individual acts, not character, is derived from Kantian retributivism. See Michael D. Bayles, *Character, Purpose, and Criminal Responsibility*, 1 LAW & PHIL. 5, 6-7 (1982). But at one point Kant states that punishment is to be based on a person's "inner viciousness," which smacks of moral character. See KANT, *supra* note 140, at 102-04. The tradition that punishment is aimed at character stems from Hume. See Bayles, *supra*, at 7; *supra* note 120 (quoting Hume). For the modern position, see, for example, GROSS, *supra* note 113, at 452 ("[I]t is not part of the proper administration of criminal justice to make judgments about who is truly a bad person and who is really not so bad."). Justice Scalia finds the Constitution to be Humean: "Our cases proudly announce that the Constitution effectively prohibits the States from excluding from the sentencing decision *any* aspect of a defendant's character or record, or *any* circumstance surrounding the crime: that the defendant had a poor and deprived childhood, or that he had a rich and spoiled childhood" *Walton v. Arizona*, 497 U.S. 639, 663 (1990) (Scalia, J., concurring), quoted in Martha C. Nussbaum, *Equity and Mercy*, 22 PHIL. & PUB. AFF. 83, 87 n.10 (1993). Among the objections to determining whether a person deserves punishment because of personal character is that such punishment "depends on perceiving the kind of character he or she has," and that it unrealistically "assume[s], with Aristotle, that people choose to develop the kind of character they have." FLETCHER, *supra* note 9, § 10.3.2, at 805 (citation omitted). Limiting the legal inquiry to the blameworthiness of particular acts "restricts the range of relevant information, but . . . secures the individual against a free-ranging inquiry of the state into his moral worth." *Id.* at 801. On the other hand, Parfit posits that, for example, the ninety-year-old winner of the Nobel Peace Prize may not deserve punishment after confessing to injuring a policeman in a drunken brawl at the age of twenty: "Just as someone's deserts correspond to the degree of his complicity with some criminal, so his deserts now, for some past crime, correspond to the degree of psychological connectedness between himself now and himself when committing that crime." DEREK PARFIT, *REASONS AND PERSONS* 326 (1984); see also ROSS, *supra* note 99, at 58-59 (asserting that retributive punishment in proportion to moral badness "should take account of the whole character of the persons involved," among other things). For Aristotle's distinction between the moral assessment of character and the praise or blame of individual acts, see Finkelstein, *supra* note 12, at 278-79.

148. See *supra* notes 73-85 and accompanying text.

character. She might not have known better when she chose to act, but she should have known better based on her original channeling.¹⁴⁹

Similarly, when the extraordinary remedy of punitive damages is sought, the knowledge proposition again serves as a warrant for an increased recovery pursuant to the extended remedy claim. Because the main function of punitive damages is to exact punishment,¹⁵⁰ the knowledge proposition plays a role in assessing this private remedy comparable to its role in setting the level of a criminal sanction. The factfinder's judgment of the degree of blameworthiness relevant to a retributive measure of extraordinary damages weighs what the defendant should have known. It seems, then, that the extended remedy claim holds under Kant in both the criminal and the civil contexts.

Both the extended responsibility and the extended remedy claims may be supported by different reasoning under a modern approach to Kantian morality, such as the one advanced by Rawls.¹⁵¹ Both claims would arguably be adopted as maxims by contracting parties in the original position behind Rawls's veil of ignorance.¹⁵² As I have been arguing, both claims advance efficiency, promote social welfare, and satisfy notions of justice. By seeking their (hypothetical) unanimous consent to the claims, each person is recognized as an autonomous, ethical being, thereby satisfying Kantian mandates under the categorical imperative.¹⁵³

The original contracting parties would, upon reflection, take into account the inherent difficulties and human weaknesses in decisionmaking revealed by modern study. As discussed above,¹⁵⁴ making choices, especially under risk and uncertainty, is fraught with challenges even for the most assiduous. At many points in the process of decisionmaking and

149. See *supra* notes 83-89 and accompanying text.

150. See KEETON ET AL., *supra* note 3, at 9. See generally Kuklin, *supra* note 18.

151. For some of the Kantian features of Rawls's theory (and others), see Bernard Williams, *Persons, Character and Morality*, in *THE IDENTITIES OF PERSONS* 197, 197-98 (Amelie Oksenberg Rorty ed., 1976).

152. To prevent the founders of a just society from embracing political principles favorable to their own particular personal interests, Rawls places them in the original position behind a veil of ignorance that filters out knowledge of their place in society, class, social status, personal abilities, preferences, temperament, and so forth. See RAWLS, *supra* note 14, § 24.

153. Because consent to the claims is hypothetical, not actual, some commentators reject its Kantian grounding. See, e.g., Dworkin, *supra* note 109, at 574-79; Onora O'Neill, *Between Consenting Adults*, 14 *PHIL. & PUB. AFF.* 252, 257 (1985) ("If treating others as persons requires only hypothetical rational consent, we may . . . find ourselves overriding the actual dissent of others, coercing them in the name of higher and more rational selves who would consent to what is proposed."); David Schmidtz, *Justifying the State*, 101 *ETHICS* 89, 97 (1990) ("[H]ypothetical consent cannot constitute justification; to suppose hypothetical consent is to presuppose justification. Hypothetical consent proceeds from teleological justification rather than to it.").

154. See *supra* notes 26-33 and accompanying text.

implementation, a range of complications arises, from the metaphysical and epistemological to those springing from human shortcomings, such as the warpings of cognitive dissonance and our tendency to rationalize. Without further rehearsing the many difficulties that muddy the judgment of whether a particular act violates the categorical imperative or, for that matter, increases utility, it seems that the original parties could account for the difficulties by adopting a maxim with a sliding scale. The clearer it is, or should be, to the actor that her choice comprises a violation of society's mandates, the more blameworthy it is. For various reasons, mainly administrative, a minimum threshold on the sliding scale may be adopted as a trigger for standard liability.¹⁵⁵ But somewhere beyond the threshold, the liability increases to reflect the supposedly greater certainty of the actor that her chosen conduct is unacceptable. Thus, the sliding scale combines the extended responsibility and remedy claims.

Finally, utilitarianism offers grounds for the extended remedy claim. At first glance, it appears that a utilitarian would not back an increased remedy. It seems that the damages are simply a wealth transfer from one party to another that leaves overall utility unchanged, regardless of whether the amount is increased because of the actor's heightened blameworthiness. But society understandably opts to impose standard liability in order to assure people that their endeavors will not be frustrated by the improper behavior of others, thereby encouraging socially beneficial conduct that the additional risk of loss would deter. Yet, once a harmed party is fully compensated, what is to be gained by allowing her additional compensation for the defendant's exacerbated malfeasance?

One answer, perhaps answer enough, comes from the recognition of the administrative costs of the legal system. Despite the administrative costs, society benefits overall from the deterrence of improper behavior. Because it is difficult at the margins for an actor to determine whether the contemplated conduct crosses the line, society, in order to avoid overly cautious behavior,¹⁵⁶ will not penalize her beyond the amount necessary to compensate the injured party and will itself absorb much of the administrative costs. But once the actor knows or has reason to know that she is

155. Once a threshold is adopted, as mentioned in passing above, the knowledge proposition leads to a possible combination of the magnitude thesis and the responsibility claim: "Because you should have known better, you acted more reprehensibly than would be our judgment of the less knowledgeable, and therefore you should be liable [when the less knowledgeable would not be liable]." See *supra* notes 91-93 and accompanying text.

156. For an argument that the uncertainty about whether particular conduct would cross the line leads to cautious, inefficient behavior, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 543-44 (4th ed. 1992); and Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 33-57, 63-71 (1982).

beyond the line, there is no reason to be generous to this person who has thrown caution to the wind while, at the same time, putting others at risk. Indeed, at this point, for the sake of deterring others (general deterrence), it is more beneficial to make the point that reckless behavior will be met by the extended remedy claim. Punitive damages would certainly accomplish such deterrence. When the act is criminal, enhanced criminal sanctions would deter socially undesirable conduct too.

The deterrence of the actor who contemplates an improper act despite knowing better (special deterrence) may also call for an extended remedy. As Posner observes regarding premeditation, "[t]he criminal who premeditates is more likely to succeed in his criminal aim (and thus do more harm) than the impulsive criminal, and the premeditator is also harder to apprehend and punish and therefore less likely to be punished. On both counts effective deterrence requires a heavier punishment if he is caught."¹⁵⁷ Similarly, the premeditator who should know better may be more likely to succeed and harder to apprehend and punish than other premeditators.¹⁵⁸ This reasoning also applies to the deterrence of improper conduct of a noncriminal nature.

Another utilitarian answer refers back to the prior observation that a person's awareness that the actor improperly threatens her with risky behavior is, in itself, harmful to her. Security being such a valued condition,¹⁵⁹ it is psychically harmful to be knowingly put at risk, even if the risk

157. RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 175 (1990).

158. Looking to the relationship between bare mens rea and deterrence, Kenny makes this point: "The connection between the deterrent purpose of punishment and the necessity of mens rea if a crime is to be imputed is made via the concept of practical reasoning: the attachment of penal sanction to legislation is precisely an attempt to affect the practical reasoning of citizens." KENNY, *supra* note 145, at 79-80. Kenny goes on to apply this analysis to the greater punishment given to reckless killers than to inadvertent ones. Reckless acts, he finds, are more dangerous than negligent ones: "[A]ctions which, for all one knows, may be dangerous are less dangerous than actions which one positively knows to be a risk to life. Hence the more severe threat of punishment is held out to the citizen contemplating the more dangerous action." *Id.* at 89. He would further apply this analysis to distinguish intentional killers from reckless ones: "[A]ctions done with the intention of causing death are in general more dangerous than those merely foreseen as likely to cause death." *Id.* Presumably, the next step would be to find acts done despite knowing better to be more dangerous than acts done simply intentionally. Heightened penalties for the more dangerous acts enhance deterrence: "[I]t is surely not a mere accident that the gradations of severity in punishment which a comparatively recondite application of the theory of deterrence suggests should correspond in such large measure with the intuitions of moral common sense about the comparative wickedness of frames of mind." *Id.* at 92.

159. One French legal philosopher elevates security to the supreme value protected by the law. See Rene Demogue, *Analysis of Fundamental Notions*, in *MODERN FRENCH LEGAL PHILOSOPHY* 345, 418-45 (Mrs. Franklin W. Scott & Joseph P. Chamberlain trans., 1916) (stating at page 418 "We touch here the most important of the desiderata of social and legal life, its central motor, the need for security."). John Stuart Mill "declares that the primary Object of moral rights is security, 'the most vital of all interests,' 'the most indispensable of all necessities, after physical nutriment,' 'the very

does not eventuate.¹⁶⁰ In support of the remedy claim, full compensation for this harm requires enhanced damages commensurate with the blameworthiness of the conduct.

Overall, corrective justice, Kantian deontology, and utilitarian teleology generally endorse both the extended responsibility and the extended remedy claims derived from the knowledge proposition. The knowledge proposition finds support not only in blind intuition, but also in the enlightening structures of moral theory.

V. CONCLUSION

The use of the knowledge proposition, "you should have known better," as implied by its common appearance in appropriate circumstances in exchanges ranging from everyday conversation to judicial opinions, evidently strikes a resonant chord with our deep intuitions. Since the proposition uniformly appears as a bald assertion, its justification normally remains at the level of bare intuition, as if it is self-evident. The aim of this Article has been to unpack the meaning of the proposition and to see whether justification for it is to be found in reason.

Various underlying postulates were uncovered along the analytical trail: the channel postulate, the incentive postulate, the disposition postulate, and the accountability postulate. Byways were also discovered that eventually lead to the extended responsibility claim and the extended remedy claim, among others. After traveling the more promising paths, normative warrants for them were considered. Corrective justice, Kantian deontology, and utilitarian teleology were all found to be generally supportive. In the end, it seems that our deep intuitions embrace the knowledge proposition because it is consistent with our developed moral theories. Or perhaps it is the other way around.

groundwork of our existence.'" Alan Gewirth, *Can Utilitarianism Justify Any Moral Rights?*, in *ETHICS, ECONOMICS, AND THE LAW*, *supra* note 109, at 158, 174-75 (citing JOHN STUART MILL, *UTILITARIANISM* 81 (10th ed., Longmans, Green, and Co. 1888) (1863)).

160. See *supra* note 119 and accompanying text.