Constructing Autonomy: A Kantian Framework

Bailey H. Kuklin, Brooklyn Law School
I. Introduction

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

The currently preponderant strain of legal analysis generally embraces an internal point of view. The dominant internal orientation of modern tort scholarship is especially noteworthy. Tort scholars who base their theories on corrective justice, such as Ernest Weinrib, Jules Coleman, and Arthur Ripstein, identify and mainly support the corrective justice principles that they see as immanent in existing tort doctrine, and typically reject inconsistent tort doctrine or principles as incoherent.2 Tort scholars with an economic orientation who look to the Hand formula as **

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2 Weinrib, the leader of this orientation, in focusing on “the relationship between the characteristic aspects of tort law,” adopts “an intrinsic ordering, in which each aspect contributes to the coherence of the whole …. [T]ort law is to be understood non-instrumentally as an intrinsic ordering in which the doing and suffering of harm constitutes a normative unit.” Ernest Weinrib, Introduction, in TORT LAW (Ernest Weinrib ed., 1991). Weinrib embraces “the juridical conception of corrective justice. The conception is juridical in the sense that it reflects, though at an abstract level, the justifications internal to tort law, treating them as normative in their own terms rather than as the disguised surrogates for extrinsically justifiable social goals.” Ernest J. Weinrib, Correlativity, Personality, and the Emerging Consensus on Corrective Justice, 2 THEORETICAL INQ. L. 107, 110 (2001). Coleman looks to tort law, “itself a scheme of practical reason,” and finds “the concepts that are prominent in this practice – wrong, harm, responsibility, and repair among
signaling the central organizing principle of tort law negligence, such as Richard Posner, suggest that the formula implies that the goal of efficiency is recognized as immanent in existing tort law, and commonly dismiss inconsistent authority as counterproductive.3 Criminal law and contracts scholars, other than those with a strong law and economics commitment, do not seem to emphasize a single, identified immanent principle of their legal subjects as much as do most torts scholars.4 They often acknowledge the existence or acceptability of polycentric values.5

them. These are the concepts that organize our tort practice. What the principle of corrective justice does, I maintain, is to make transparent their relationships to one another and to the inference of liability.” Jules Coleman, The Practice of Principle xiv-xv (2001). “[E]conomic analysis fails both as a reductive account of the content of the concepts central to tort law, and as an account of the scheme of practical inference that is reflected in the relationship among them.” Id. at xv. “In spite of the descriptive focus of much writing on corrective justice, it appears that those theorists who claim that corrective justice best explains tort law also believe that corrective justice is normatively compelling.” Louis Kaplow & Steven Shavell, Fairness Versus Welfare 92 (2002) (footnoting support). For criticism of the corrective justice tort theorists’ view of what is immanent in tort law, see Benjamin C. Zipursky, Civil Recourse, Not Corrective Justice, 91 GEO. L.J. 695 (2003). Contrary to the contention of Goldberg and Zipursky that tort law is better explained by their theory of “civil recourse” than by corrective justice, Gardner tellingly argues that they cannot properly keep corrective justice out of their tort picture. See John Gardner, Torts and Other Wrongs, yy (2011) [ms 23-25]. For the dangers of an immanent critique,” see Barbara H. Fried, The Limits of a Nonconsequentialist Approach to Torts, 18 LEGAL THEORY 231, yy-yy (2012) [ms 6-9]. Finally, for the claim that “the concept of corrective justice is neither capable of unifying tort law nor of demarcating it from other legal branches,” see Hanoch Shoshan, Tort Law and Corrective Justice, 22 LAW & PHIL. 21, 21 (2003).


4 For exceptions, see, e.g., Stephen R. Perry, Responsibility for Outcomes, Risk, and the Law of Torts, in Philosophy and the Law of Torts 72, 96 (Gerald J. Postema ed., 2001) (“[T]ort law is a morally complex practice that weaves together many different normative strands.”); Jules L. Coleman, Mistakes, Misunderstandings and Misalignments, xx YALE L.J. yy, yy (2012) [ms 5] (“[T]ort law has its own standard of alignment that is independent of efficiency. Indeed it is independent of any particular theory of tort law or of any particular aim or goal of tort law. It is a standard of alignment intrinsic to tort law itself.”).

5 “Pluralist [contract] theories attempt to respond to the difficulty that unitary normative theories [“such as autonomy or efficiency”] pose by urging courts to pursue efficiency, fairness, good faith, and the protection of individual autonomy.” Alan Schwartz & Robert E. Scott, Contract Theory and the Limits of Contract Law, 113 YALE L.J. 541, 543 (2003) (footnoting citations to “a broad discussion of this problem”). See, e.g., Friedrich Kratochwil, The Limits of Contract, 5 EUR. J. INT’L L. 465, 469 (1994) (“[T]he institution of contract combines two related yet distinguishable ideals that suggest different bases for the obligatoriness of contractual obligations,” i.e., autonomy and reciprocity.). But see, e.g., Charles Fried, Contract As Promise (1981);
In contrast to this current strain of legal thought, my approach looks outside existing law to the theoretical constraints of Kant’s categorical imperative however they may align with today’s law. In seeking a rounded understanding of personal autonomy, reliance on the lessons of existing law is of limited usefulness. There is little reason to believe that the body of private common law would reflect a coherence that is ascribed to it by some commentators. It is still largely influenced by the old writ system. This system emerged as a means to obtain the jurisdiction of the courts of the English sovereign. As some commentators have made so clear, it was not designed for, nor did it ever achieve, a comprehensive, logical ordering of the private law. The common law is complete in the sense that every issue brought before the courts can be resolved one way or another. But in light of its quirky and historically contingent origins, it would


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

6 See, e.g., James Gordley, Foundations of Private Law (2006). Gordley makes a powerful case for the haphazard incoherence of modern private law owing to its quirky historical development. What is of central importance to rational private law development, he and others point out, is to attend to “what ultimately matters,” that is, “the interests we wish to protect.” Id. at 173. In the context of tort, “we should explain our rules in terms of these interests. That goal is not furthered by a list of torts whose boundaries pay so little regard to which interests are being protected.” Id. For examples of this haphazardness in tort law, see id. at 173-80. “The law did not begin with a theory [of tort law]. It has never worked one out.” Oliver W. Holmes, Jr., The Common Law 63 (Mark D. Howe ed., 1963) (1881). “The importance, and even existence, of particular interests is often controversial, and the common law has sometimes been indifferent to what now seems significant interests and concerned about insignificant ones.” Jules L. Coleman, Legal Theory and Practice, 83 Geo. L.J. 2579, 2604 (1995). “Tort law has always been an incomplete social mechanism for dealing with injuries.” David G. Owen, Deterrence and Desert in Tort: A Comment, 73 Calif. L. Rev. 665, 665 (1985). “Tort law thus has developed as a system of principles for redressing certain types of harm caused by certain types of behavior by certain types of injurers to certain types of victims – a ‘system’ incomplete at best.” Id. at 665-66 (footnotes omitted). Though not “widely appreciated”, that the tort law has a “lack of unity”, see Robert Stevens, Torts and Rights 299-300 (2007).
be amazing if the substantive principles and doctrines of the common law entirely harmonized.\textsuperscript{7} At best, the common law would take a very long time to evolve towards and achieve harmony because of the braking constraints of the doctrine of stare decisis and the ebb and flow of the moral and political inclinations of the law’s agents. Even with an overall trend towards coherence in the common law, which I do not deny, path dependence would point toward a limited orbit of likely end points short of a radical reorientation of the common law process. Akin to Pareto optimality, the common law could reach a state of completeness and coherence without satisfying any ideal body of substantive principles. One should be very doubtful about finding a fully justifiable moral “ought” in the “is” of the common law. A somewhat comparable tale can be told about the origins and development of criminal law doctrine.\textsuperscript{8} Here, however, we should expect greater, though perhaps not complete, order. The body of criminal law has historically been subject to comprehensive adjustments through legislation. Subject to constitutional limitations, the legislative process allows for giant steps, backwards and forwards, and the opening of entirely new avenues, such as those needed to cope with abuses relating to the emerging forms of power being generated by the computer revolution. None of these cautions regarding the origin and growth of the law goes to reject the claim that Aristotelian and Kantian conceptions of corrective justice and retribution are, at least partially, immanent in the private and criminal law.\textsuperscript{9} Bypassing the powerful arguments by legal economists and other commentators that additional principles are, and should be, immanent in the law, the problem remains that corrective justice and retribution are formal concepts only. They instruct us on limitations to what we may properly do, but they do not tell us exactly what we should do.

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

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

\textsuperscript{8} “It would clearly be absurd to try to explain any existing penal system, whose historical development reflects an unsystematic diversity of competing influences, in terms of some unitary set of coherent values and purposes ….” R. A. DUFF, TRIALS AND PUNISHMENTS 5 (1986). “[I]t may be that we face an irreducible conflict of values, which make irreconcilably conflicting demands on our attempts to envisage and develop more adequate legal institutions.” \textit{Id}. at 6.

tion involves a nonconsensual social contract imposed by the state.\(^\text{10}\) For purposes of the strongly individualistic analysis here, a nonconsensual grounding for a social contract is deemed inadequate.\(^\text{11}\)

Here is a roadmap of what follows. In the private sphere primarily addressed, autonomy boundaries, within which is one’s autonomy space, are established by each person’s adopted deontic maxims (e.g., “do not batter another person”). Under the common, formal interpretation of Kant’s categorical imperative,\(^\text{12}\) an individual’s chosen, substantive, first-order maxims may vary from person to person. Each individual’s set of maxims must be complete, in that it addresses all possible conflicts with the interests of other persons, for otherwise the autonomy boundaries are not fully drawn and thereby leave gaps. Each set of maxims must also be coherent, that is, all the maxims in the set must be consistent with one another.\(^\text{13}\) In adopting maxims to establish autonomy boundaries, two sorts of freedoms are balanced and delineated: first, the liberty to choose and act;\(^\text{14}\) and second, the security, essentially, from being acted upon by others. Once a person’s autonomy space is plotted, she may adjust its boundaries by consent, within limits (e.g., no slavery contracts), by granting another party rights and, correlatively, assuming duties. When an autonomy boundary has been impermissibly crossed, that is, there has been an autonomy invasion producing a wrongful harm (e.g., a battery), requital is available to the invadee. This response requires the invocation of adopted, requital, second-order maxims. In the private law the requital

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\(^\text{10}\) Kant develops the “idea of the original contract” which is nonconsensual. See ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 198-204 (2001). “Kant was not far wrong when he interpreted the original contract merely as an ‘idea of Reason’; yet he still thought of it as a general criterion of right and as providing a general theory of political obligation.” JOHN RAWLSD, Justice as Fairness, in COLLECTED PAPERS 47, 71 n.22 (Samuel Freeman ed., 1999). But cf. IMMANUEL KANT, THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY 353, 457 (Mary J. Gregor ed. & trans., 1996) (1797) (“[O]nly the concurring and united will of all, insofar as each decides the same thing for all and all for each, and so only the general united will of the people, can be legislative.”).

\(^\text{11}\) “Few, if any, philosophers who work in a Kantian tradition today accept all of Kant’s doctrines, and among them there is a considerable diversity in both their interpretations of Kant and their preferred ways of developing Kantian theory.” THOMAS E. HILL, JR., Introduction, in RESPECT, PLURALISM, AND JUSTICE 1, 1 (2000).

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

\(^\text{13}\) In principle, every agent could choose the same set of maxims. A totalitarian regime may aim for this. So might a heavenly one.

\(^\text{14}\) “Freedom is valuable for at least two different reasons. First, more freedom gives us more opportunity to pursue our objectives – those things that we value…. Second, we may attach importance to the process of choice itself.” AMARTYA SEN, THE IDEA OF JUSTICE 228 (2009). See AMARTYA SEN, RATIONALITY AND FREEDOM 10 (2002); AMARTYA SEN, DEVELOPMENT AS FREEDOM 17 (1999).
standards are conceptions of corrective justice, while in the public (criminal) law, they are con-
ceptions of retribution. For the violation of a first-order maxim against battery, for instance, an
in invadee may seek damages under a second-order requital maxim based on corrective justice. Be-
because independent claims of the state are here discounted, conceptions of corrective justice and
retribution focus entirely on individual rights and duties.

The conceptions of corrective justice that are adopted, like the substantive maxims that
initially mark autonomy boundaries, are matters of individual choice that, again, must simply
meet the categorical imperative and establish a complete and coherent set of requitals to cover all
the possible invasions of autonomy space determined directly by substantive maxims. For exam-
ple, there could be one or more remedial conceptions of corrective justice to deal with harmful
ultrahazardous activities, and other ones to deal with negligence, as where distinct degrees of risk
are accounted for. Furthermore, the conceptions may vary according to the differences in the en-
suing harms, such as physical versus psychic harms. The combination of first- and second-order
maxims establishes a person’s overall autonomy space. Because these maxims are matters of
personal choice, the maxims adopted by different individuals may conflict. A claimant may
charge another person with invading her autonomy space by violating one of her first-order max-
ims. The claimant may properly respond that he has not adopted this particular maxim and that
his conduct fully meets the full set of maxims consistent with the categorical imperative that he
has adopted. Consequently, as a practical matter, the state cannot be entirely excluded from
choosing maxims and imposing them on individuals. The state must act as an arbiter of inco-
sistent sets of maxims as a second-best solution to an otherwise intractable problem. Similarly,
for retribution the state must be the arbiter of conflicting claims and the implementer of apt pun-
ishment. But this second-best solution is resorted to only when unavoidable, for it runs contrary
to strict individualistic principles.

In unpacking common conceptions of corrective justice and retribution, there are three
key notions that are often, if not always, elements: harm, wrongfulness, and blameworthiness.
For example, “when one wrongfully harms another person by blameworthy conduct, she is to
compensate that person to the extent of the wrongful harm.” As in this conception of corrective
justice, one or more of the key notions may relate to whether requital is called for and, if met,
affect the measure of that requital. Furthermore, specification of the notions may vary from con-
text to context, as where, say, a greater degree or type of blameworthiness is required to recover

15 “From the perspective of corrective justice, the point of a tort action is to undo the injustice
that the defendant has done to the plaintiff.” Ernest J. Weinrib, *Correlativity, Personality, and
the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQ. L. 107, 108 (2001). For the
role of corrective justice in contract theory, see, e.g., Peter Benson, *The Expectation and Reli-
ance Interests in Contract Theory: A Reply to Fuller and Perdue*, 2001 ISSUES LEGAL SCHOLAR-
SHIP art. 5.

16 “[C]orrective justice is itself a contested concept, loose enough to invite continual debate, val-
uable enough to be worth fighting over, and comprehended enough to produce some shared
agreement on its content.” Christopher H. Schroeder, *Corrective Justice, Liability for Risks, and
Tort Law*, 38 UCLA L. REV. 143, 146 (1990). “There is, for better or for worse, no single agreed-
upon account of corrective justice.” Gregory C. Keating, *Distributive and Corrective Justice in
for purely psychic harms than for purely physical harms. Harms are, in short, of four kinds: physical, economic, psychic, and dignitary. This last kind of harm, dignitary, has not received extensive attention in existing law, though dignity is central to Kant’s development of practical reason. It does receive much attention here. Wrongfulness, or wrongful harm, occurs when a substantive, first-order maxim is violated, as, say, when an agent purposely puts another person at an unreasonable risk of harm. Blameworthiness refers to two notions. First, it refers to the extent to which an actor is responsible for the conduct in question. This responsibility turns on her relative freedom from ignorance and coercion when choosing the act or omission. Second, blameworthiness refers to the actor’s mental state and conduct regarding the invadee. This blameworthiness is gauged by the degree of her disrespectfulness of the invadee’s dignity. Depending on the particular adopted maxims, both forms of blameworthiness may affect the delineation of autonomy space.

Once an agent has worked out a deontically acceptable range of meanings for the three key moral notions, she is ready to consider and adopt a full set of first- and second-order maxims. This article aims to help her get to that point of being ready to work out her own autonomy boundaries. I leave it to future articles to help her further along.

II. Kantian Foundations

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

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


19 “Kant rejects the traditional definition of the human being as animal rationale, allowing only that the human being is an animal rationabilis – that is, a being capable of acting rationally but not a being that necessarily or even typically exercises this capacity successfully.” ALLEN W. WOOD, KANT’S ETHICAL THOUGHT 199 (1999). “Kant … does not hold that there really are fully rational beings and that their plans for men provide a definition of what is and what is not morally good.” JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 29 (1970). “[The] closest analogue [to Kant’s fully rational being] is to be found … in the notions of the ‘economic man’ employed, for example, in consent and decision theory.” Id. “I contend that Kant viewed autonomy as a property of (the wills of) virtually all adult, sane human beings, not as a special feature of the most perfectly rational or morally conscientious persons.” Thomas E. Hill, Jr., The Kantian Conception of Autonomy, in THE INNER CITADEL 91, 97 (John Christman ed., 1989). Contra Kant’s assumption, “[t]here is no empirically based reason to suppose that people are equally capable of setting ends rationally or are equally capable of acting for the sake of duty … or even
entitled to have her dignity respected by others;\(^{20}\) and second, a person, as an ethical being, also has the duty to respect the autonomy, the dignity, of other moral agents.\(^{21}\) Kant identified various forms of the categorical imperative, all of which he declared to be equivalent.

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

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that they are equally capable of trying to do so.” Ian Carter, *Respect and the Basis of Equality*, 121 ETHICS 538, 544 (2011). For discussion of this problem, see id. at 544-46.

\(^{20}\)”[A] human being regarded as a person … is [] to be valued … as an end in itself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world.” IMMANUEL KANT, THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY 353, 557 (Mary J. Gregor ed. & trans., 1996) (1797). “Kant’s claim is that there is an unparalleled dignity in elevating ourselves above the mere laws of nature by the free exercise of rational agency ….” PAUL GUYER, KANT ON FREEDOM, LAW, AND HAPPINESS 154 (2000). See id. at 203, 239-40. “Whoever warrants respect does so in virtue of his or her dignity as an agent or, in other words, in virtue of capacities to choose reflectively and to cultivate desirable dispositions to choose as opposed to natural endowments.” Diana T. Meyers, SELF-RESPECT AND AUTONOMY, in DIGNITY, CHARACTER, AND SELF-RESPECT 218, 229 (Robin S. Dillon ed., 1995) (footnote omitted). “Kant attributes human dignity to virtually all sane adult human beings because of their ‘autonomy’ of will. This implies at least a minimum capacity and disposition to acknowledge rational and moral principles. Significantly, however, moral virtue is not a prerequisite of dignity; even the grossly immoral have it.” THOMAS E. HILL, JR., SOCIAL SNOBBERY AND HUMAN DIGNITY, in AUTONOMY AND SELF-RESPECT 155, 169 (1991). See THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY 47-48 (1992). “Even trade-offs between the dignity of one person and the dignity of many are forbidden ….” THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY 10 (1992). “The one option not open to Kant is to allow gradations of human dignity or differences in rank among members of the realm of ends.” ALLEN W. WOOD, KANT’S ETHICAL THOUGHT 121 (1999).

“‘Autonomy,’ ‘respect for autonomy,’ and ‘rights of autonomy’ are different notions. ‘Respect for autonomy’ and ‘rights of autonomy’ are moral notions, but ‘autonomy’ and ‘autonomous person’ are not obviously moral notions. Indeed, they seem more metaphysical than moral.” Tom L. Beauchamp, *Who Deserves Autonomy, and Whose Autonomy Deserves Respect*, in PERSONAL AUTONOMY 310, 310 (James S. Taylor ed., 2005). My Kantian construction of autonomy by means of accepted maxims brings moral considerations to the notion of “autonomy”. But I certainly agree with Beauchamp that “theories of autonomy should only be constrained by the principle of respect for autonomy, not wholly determined by it.” Id.

\(^{21}\)”Dignity is not just a set of requirements with respect to persons; it is also the authority persons have to require compliance with these requirements by holding one another accountable for doing so.” STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT 14 (2006). Dan-Cohen analyzes dignity and autonomy as independent notions. See MEIR DAN-COHEN, HARMFUL THoughts 157-59 (2002).
the Formula of the Realm of Ends … which requires “that the will be able to regard itself as through its maxims at the same time universally legislating” for a realm of equally qualified colegislators.\textsuperscript{22}

While, like others, I do not claim that Kant would go along with all of the positions taken in this article,\textsuperscript{23} the notions of the right to respect,\textsuperscript{24} as well as the duty to respect, stem from Kantian roots.\textsuperscript{25} What I grow from these roots may not be fully embraced by Kant himself.

\textsuperscript{22} Paul Guyer, Kant on Freedom, Law, and Happiness 142 (2000) (citations omitted). For another translation with a succinct explanation, see Allen W. Wood, General Introduction, in Immanuel Kant, Practical Philosophy viii, xxiii-xxiv (Mary J. Gregor ed. & trans., 1996). Hill doubts that the universalization principle “can function adequately as [a] guide[] to moral decision making” and sees as “[m]ore promising … Kant’s principle that humanity in each person must always be treated as an end in itself, never simply as a means,” that is, “the dignity principle”. Thomas E. Hill, Jr., Dignity and Practical Reason in Kant’s Moral Theory 201, 203 (1992). That treating people as a end in themselves may be distinguished from not treating them as a mere means, see F.M. Kamm, Intricate Ethics 13 (2007); Michael Rosen, Dignity 81-85 (2012); T.M. Scanlon, Moral Dimensions: Permissibility, Meaning, Blame ch. 3 (2008) (“Means and Ends”).

While some forms of the categorical imperative, and other arguments by Kant, are suggestive of the Golden Rule, Kant specifically distinguished them and found the Golden Rule wanting. See Immanuel Kant, Groundwork of the Metaphysics of Morals, in Practical Philosophy 41, 80 n.* (Mary J. Gregor ed. & trans., 1996) (1785). Under Kant, “[w]hat is wrong with the Golden Rule (in both its positive and negative versions) is that as stated it allows our natural inclinations and the special circumstances to play an improper role in our deliberations.” John Rawls, Lectures on the History of Moral Philosophy 199 (Barbara Herman ed., 2000). Parfit thinks that Kant was wrong to be so dismissive of the Golden Rule. See 1 Derek Parfit, On What Matters 321-30 (2011).

\textsuperscript{23} “Few ethical theories, if any, have been … as variously interpreted as Immanuel Kant’s.” Thomas E. Hill, Jr., Dignity and Practical Reason in Kant’s Moral Theory i (1992). “[E]ven today there is no firm consensus about many of the most important parts of Kant’s theory – such as the nature and the role of Categorical Imperative – much less about the structure of his entire practical theory.” Roger J. Sullivan, Immanuel Kant’s Moral Theory xi (1989). “Kant makes many conflicting claims … [and] ‘is the least exact of the great thinkers.’” 1 Derek Parfit, On What Matters xlii (2011) (quoting Norman Kemp Smith, Kant’s Method of Composing the Critique of Pure Reason, 24 Phil. Rev. 526, 527 (1915)). Despite the lack of clarity and the possibility of multiple interpretations, “the importance of Kant’s ‘formula of ends’ in modern moral philosophy is impossible to deny.” R. George Wright, Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle, 36 U. Rich. L. Rev. 271, 271 (2002) (footnote omitted).

\textsuperscript{24} A right to respect does not encompass claims grounded on other moral theories alone, as where Mill argues, on utilitarian grounds, that a strong regime of recognized rights will advance overall social welfare. See John Stuart Mill, On Liberty, in Utilitarianism, Liberty, and Representative Government 81, 176-200 (1st ed. London 1869).

\textsuperscript{25} “Kantian ethics, [as distinguished from Kant’s ethics,] is an ethical theory formulated in the basic spirit of Kant, drawing on and acknowledging a debt to what the author of the theory takes
Having met the necessary threshold of rationality capability, a person’s autonomy commands respect. Michael Sandel puts Kant’s idea of autonomy as, “To be free is to be autonomous, and to be autonomous is to be governed by a law I give myself.” There are many meanings of “autonomy.” “Put most simply, to be autonomous is to be one’s own person, to be his insights in moral philosophy.”

Rationality “is a normative concept that can take on various meanings according to differing moral and political judgments about how society should govern itself. Accepting rationality as the defining criterion therefore does not entail a commitment to any particular view of what rationality requires.” Stephen J. Morse, Rationality and Responsibility, 74 S. CAL. L. REV. 251, 254 (2000). For guidance to the meaning of rationality, both “thick” and “thin” versions, see id. at 254-55. “Rationality is of course a continuum concept …. “Id. at 255. “All formal definitions [of rationality] found in the literatures of economics, philosophy, and psychology are contestable …. “Stephen J. Morse, Diminished Capacity, in ACTION AND VALUE IN CRIMINAL LAW 239, 248 (Stephen Shute et al. eds., 1993).

“In some contexts, saying a person is autonomous is a way of attributing to him the personal characteristic of being in charge of his life…. In other contexts, ‘autonomy’ is used normatively … [as a claim that one] has a right (to autonomy) that the interferer has violated.” Lawrence Haworth, Autonomy 1 (1986). Haworth champions “autonomism, ‘the view that personal autonomy is a fundamental value that conditions such other values as freedom and satisfaction, so that the latter depend for whatever value they have on the presence of the former.” Id. at 7.

Michael J. Sandel, Justice 214 (2009). “According to the Kantian conception, to be rational just is to be autonomous. That is: to be governed by reason, and to govern yourself, are one and the same thing.” Christine M. Korsgaard, The Constitution of Agency 31 (2008). See id. at 62. “[T]he most basic autonomy-right is the right to decide how one is to live one’s life, in particular how to make the critical life-decisions ….” Joel Feinberg, Harm to Self 54 (1986). “Kant held, I believe, that a person is acting autonomously when the principles of his action are chosen by him as the most adequate possible expression of his nature as a free and equal rational being.” John Rawls, A Theory of Justice 222 (rev. ed. 1999). “[A]n autonomous person is in control of her choices, her actions, and her will.” Marina A.L. Oshana, Personal Autonomy and Society, 29 J. SOC. PHILOS. 81, 82 (1998) (footnote omitted). “When maxims are viewed as ‘self-imposed rules’, all rational choice may be thought to involve some kind of self-legislation.” Andrews Reath, Legislating the Moral Law, in Agency and Autonomy in Kant’s Moral Theory 92, 96 (2006) (footnote omitted).

“Unfortunately, though autonomy has been an increasingly popular concept in recent years, there is no uniform understanding about what autonomy is.” Thomas E. Hill, Jr., Autonomy and Benevolent Lies, in AUTONOMY AND SELF-RESPECT 25, 25 (1991). “ ‘Autonomy,’ like many philosophers’ favorite words, is not the name of one single thing; it means quite different things to different people. None of these ideas is simple, and the relations among the different senses of autonomy are staggeringly complex.” Thomas E. Hill, Jr., The Importance of Autonomy, in AU-
directed by considerations, desires, conditions, and characteristics that are not simply imposed externally upon one, but are part of what can somehow be considered one’s authentic self.”


John Christman, Autonomy in Moral and Political Philosophy, The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/fall2009/entries/autonomy-moral/ (last visited Aug. 7, 2013). “Authenticity is standardly taken to be a function of the structure of a person’s cognitive states, conative states, or values, and, more recently, of the attitude of acceptance a person adopts toward the genesis of these cognitive states, conative states, or values.” Marina A.L. Oshana, Autonomy and Self-Identity, in AUTOMONY AND THE CHALLENGES TO LIBERALISM 77, 86 (John Christman & Joel Anderson eds., 2005). See JOEL FEINBERG, HARM TO SELF 36 (1986) (“The autonomous person is not only he whose tastes and opinions are authentically his own; he is also one whose moral convictions and principles (if he has any) are genuinely his own, rooted in his own character, and not merely inherited.”); ANDREWS REATH, Autonomy of the Will, in AGENCY AND AUTOMONY IN KANT’S MORAL THEORY 121, 153 (2006) (“Autonomy ... is a necessary condition of freedom. It is in virtue of possessing autonomy that a rational will
All conduct by one agent imposes limitations on other persons.31 Indeed, the very existence of an agent imposes limitations on others if for no other reason than that two people cannot occupy the same place at the same time.32 Increasing liberty for one person typically decreases security for another, and vice versa, as where an agent’s freedom to swing her hand normally has a causal capacity that satisfies the concept of freedom.”); SUSAN M. SHELL, KANT AND THE LIMITS OF AUTONOMY 1 (2009) (“Autonomy, so understood, is both a quality that a self must minimally possess to be a self at all and one that all (adult) selves are presumed to insist on or deserve.”); Sarah Buss, Personal Autonomy, The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/spr2009/entries/personal-autonomy (last visited Aug. 7, 2013) (“To be autonomous is to be a law to oneself; autonomous agents are self-governing agents.”); Sarah Buss, Autonomous Action: Self-Determination in the Passive Mode, 122 ETHICS 647, 647 (2012) (“In order to be a self-governing agent, a person much govern the process by means of which she acquires the intention to act as she does.”); Gerald Dworkin, The Concept of Autonomy, in THE INNER CITADEL 54, 61 (John Christman ed., 1989) (“A person is autonomous if he identifies with his desires, goals, and values, and such identification is not itself influenced in ways which make the process of identification in some way alien to the individual.”). See generally ALLEN W. WOOD, KANTIAN ETHICS 106-22 (2008); AUTONOMY AND THE CHALLENGES TO LIBERALISM 101 (John Christman & Joel Anderson eds., 2005); John Christman, Autonomy in Moral and Political Philosophy, The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/fall2009/entries/autonomy-moral/ (last visited Aug. 7, 2013). “Autonomy is a second-order capacity to reflect critically upon one’s first-order preferences and desires, and the ability either to identify with these or to change them in light of higher-order preferences and values.” GERALD DWORIN, THE THEORY AND PRACTICE OF AUTONOMY 108 (1988). “Liberty, power, and privacy are not equivalent to autonomy but they may be necessary conditions for individuals to develop their own aims and interests, and to make their values effective in the living of their lives.” Id. On second- and higher-order desires, see generally Harry G. Frankfurt, Freedom of the Will and the Concept of a Person, in THE INNER CITADEL 63 (John Christman ed., 1989).

“Kant’s idea of ‘autonomy,’ like that of ‘freedom,’ is far more precise and restricted than the present-day notion. For Kant, the term ‘autonomy’ denotes our ability and responsibility to know what morality requires of us and our determination not to act immorally.” ROGER J. SULLIVAN, IMMANUEL KANT’S MORAL THEORY 47 (1989). “For Kant, then, the road to autonomy is through that self-imposed discipline or self-mastery necessary to adopt rules by which we transcend individuality in favor of universality.” Id.


By “conduct” is meant either action or inaction, as where a person is allowed or obligated to turn over resources, or is denied the opportunity to do so. See PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 78 (2002).

32 More generally, “[t]he interests of different persons are constantly and unavoidably in conflict ….” JOEL FEINBERG, HARM TO OTHERS 35 (1984).
ends somewhere short of another person’s nose.\textsuperscript{33} So the question is not whether there are limitations to one’s autonomy space, one’s freedom, but rather what the boundaries will be and how they are to be drawn.\textsuperscript{34} Liberty and security interests require tradeoffs that must be balanced.\textsuperscript{35}

\textsuperscript{33} “Security in not merely one good thing among others, but to put it in Kantian language, a condition of the goodness of anything else . . . .” \textsc{Christine M. Korsgaard}, \textit{Creating the Kingdom of Ends} 99 (1996). Locke emphasizes the security provided by the social contract. “The Reason why Men enter into Society is the preservation of their Property . . . [They authorize laws] to limit the Power, and moderate the Dominion of every Part and Member of the society.” \textsc{John Locke}, \textit{The Second Treatise of Government}, in \textit{Two Treatises of Government} 265, 412 (Peter Laslett ed., 1988) (1690). “[T]he people . . . provide for their own Safety and Security, which is the end for which they are in Society.” \textit{Id}. at 412-13. Mill gives security a central place in his moral and political principles. \textit{See} \textsc{John Stuart Mill}, \textit{Utilitarianism}, in \textit{Utilitarianism, Liberty, and Representative Government} 1, 67 (1st ed. London 1863). “Mill sees security (understood in [an] expansive way) as both a precondition and a defining feature of a civilized society.” \textsc{Glyn Morgan}, \textit{The Mode and Limits of John Stuart Mill’s Toleration, in Toleration and Its Limits} 139, 151 (Melissa S. Williams & Jeremy Waldron eds., 2008). Blackstone, less expansively than Mill, defines “the absolute rights of each individual . . . to be the right of personal security, the right of personal liberty, and the right of private property . . . .” \textsc{3 William Blackstone}, \textit{Commentaries} 119 (1768). \textit{See} \textsc{René Demouge}, \textit{Analysis of Fundamental Notions, in Modern French Legal Philosophy} 345, 418 (Mrs. Franklin W. Scott & Joseph P. Chamberlain trans., 1921) (“the most important of the desiderata of social and legal life, its central motor, the need for security”). “Without such [personal] security society loses most of its value.” \textsc{Beach v. Hancock}, 27 N.H. 223, 229 (1853). Finally, \textsc{H.L.A. Hart}, discussing human vulnerability, observes, “The common requirements of law and morality consist for the most part not of active services to be rendered but of forbearances, which are usually formulated in negative form as prohibitions.” \textsc{H.L.A. Hart}, \textit{The Concept of Law} 190 (1961).

\textsuperscript{34} “In the end, Kant’s greatest insight regarding the problem of freedom may be that it is insoluble and a source of permanent torment to philosophy – all the more so because a commitment to freedom of the will is basic to ethics . . . .” \textsc{Allen W. Wood}, \textit{Kantian Ethics} 124 (2008). \textit{See id}. at 123-41. “[T]he idea of freedom [is] an inescapably pluralist notion.” \textsc{Amartya Sen}, \textit{Rationality and Freedom} 658 (2002).

\textsuperscript{35} “To protect certain kinds of freedom and suppress other kinds is one of the principal functions of a legal system . . . .” \textsc{Morris R. Cohen}, \textit{Freedom: Its Meaning, in The Faith of a Liberal} 161, 163 (1946). The fault principle “seeks . . . to divide the risks [between persons] fairly, by characterizing the interests generally and reflecting on the importance of both liberty and security interests to a person’s capacity to live a meaningful and valuable life within liberal institutions.” \textsc{Jules L. Coleman}, \textit{Second Thoughts and Other First Impressions, in Analyzing Law} 257, 304 (Brian Bix ed., 1998). \textit{See} \textsc{Jules L. Coleman}, \textit{Legal Theory and Practice}, 83 Geo. L.J. 2579, 2600-01 (1995). “Liberty, like property, is largely a formal category whose content must be determined by legislation.” \textsc{Claire Finkelstein}, \textit{Positivism and the Notion of an Offense}, 88 Cal. L. Rev. 335, 360 (2000). “Both tort law and criminal law raise issues of justice, because both set the limits of acceptable behavior in contexts in which some balance needs to be struck between one person’s liberty and another’s security.” \textsc{Arthur Ripstein}, \textit{Equality, Responsibility, and the Law} 6 (1999). “[S]pecific liberty interests and security interests are protected, based on a conception of their importance to leading an autonomous life. Thus, risks are distrib-
Where the line is drawn may be a matter of distributive justice.\textsuperscript{36} Be that as it may, the balance in a Kantian regime must accord with the dignity principle of the categorical imperative.\textsuperscript{37} When a person violates the established balance, requiring it is a matter of corrective justice or retribution.
The interrelationship among these three types of justice strikes me as more intricate than this commonly ascribed division of labor. Principles of distributive justice may well mark an initial, prima facie tradeoff between liberty and security, but the associated conceptions of corrective and retributive justice ultimately affect that balance. For example, if an agent wrongfully hits another person, whether that wrong is requital by imprisonment, by damages for all harms, foreseeable or not, by damages for the foreseeable physical harm only, or is fully satisfied by a formal apology, vitally affects our understanding of the overall balance between liberty and security.

Liberty refers to the freedom to choose particular conduct, while security refers to the freedom from being acted upon or being obligated to engage in particular conduct. At their most general level, liberty and security relate to the effect of powers or forces, or their absence, on a person’s possible conduct choices. Powers or forces have overlapping sources, including:

38 “The nature of … a general right [to liberty] is elusive [to philosophers] for two sorts of reasons. The first is conceptual: it is not clear that there is one coherent conception of liberty. It seems to many that the word, ‘liberty’, is both ambiguous and vague.” MICHAEL S. MOORE, PLACING BLAME 739 (1997) (identifying the ambiguity and vagueness). “The second reason for the elusiveness of any general right to liberty is normative: even if some one thing is specified by ‘liberty’ with enough precision to be worth talking about, it is not clear that there is anything intelligibly good about liberty as such.” Id. at 740 (using the example of the liberty to be a murderer). “I shall cut through this Gordian knot with a simple stipulative definition that adopts the traditional, negative definition of liberty: liberty is the absence of constraint, and political liberty is the absence of coercive legal sanctions.” Id. at 741.

Rawls “bypass[es] the dispute about the meaning of liberty that has so often troubled this topic” and “assume[s] that any liberty … has the following form: this or that person (or persons) is free (or not free) from this or that constraint (or set of constraints) to do (or not to do) so and so.” JOHN RAWLS, A THEORY OF JUSTICE 176-77 (rev. ed. 1999). As I use these terms, “‘liberty is a subset of all ‘freedoms.’” Peter Westen, “Freedom” and “Coercion” – Virtue Words and Vice Words, 1985 DUKE L.J. 541, 591.

39 “Note that Aristotle mentioned security as one of the three chief goods with which corrective and distributive justice are concerned.” Matthew Kramer, Of Aristotle and Ice Cream Cones: Reflections on Jules Coleman’s Theory of Corrective Justice, in ANALYZING LAW 163, 166 n.5 (Brian Bix ed., 1998) (citing ARISTOTLE, NICOMACHEAN ETHICS 1130b3). “The interest in liberty requires a protected space for freedom of action, the ability to carry out one’s purposes in the world. The interest in security requires that the limits be imposed on the actions of others.” ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 50 (1999).

The underlying idea has been referred to as positive and negative autonomy. “We violate a person’s negative autonomy when we intervene without her consent. We fail to respect a person’s positive autonomy when we do not allow her to trigger an intervention to which she consents.” Franklin G. Miller & Alan Wertheimer, Preface to a Theory of Consent Transactions: Beyond Valid Consent, in THE ETHICS OF CONSENT 79, 84 (Franklin G. Miller & Alan Wertheimer eds., 2010). See Alan Wertheimer, Consent to Sexual Relations, in THE ETHICS OF CONSENT 195, 196 (Franklin G. Miller & Alan Wertheimer eds., 2010).

40 My use of “power” or “force” is uncommonly broad. For a narrower definition, see, e.g., MICHAEL J. GORR, COERCION, FREEDOM AND EXPLOITATION 52 (1989) (“Following the practice of a
nature (e.g., weather, animals, biology); resources (wherewithal, drive); institutions (constitu-
tions, norms); and, other humans (prowess, arms, status). They may be internal (akrasia, anomie,
timidity, indecisiveness, guilt, greed, obsession, impulse, self-deception), or external (coercion,
inhibiting social norms, blackmail, shame, weather, climate), and active (weather, human ac-
tions, imminent animal threats), or passive (norms, barriers, power outages, collapsed bridges). While security and liberty may be limited or facilitated by various sources, the ones of primary moral interest are those ascribable to human agents.

number of social scientists, I shall use the term ‘power’ to designate acts by which an agent inten-
tionally influences the behavior of other persons.”). “As is well known, the relation between liberty and power is ambiguous, or at least debatable.” J. Roland Pennock, Coercion: An Over-

41 “Aristotle himself distinguishes two kinds of incontinence, weakness (astheneia) and impetu-
osity (propeteia).” Alan Donagan, Choice: The Essential Element in Human Action 147 (1987). See id. at 147-56. “Apparent examples of internal forces that may threaten to usurp control from its rightful locus include addictions, obsessive-compulsive disorder, pathological gambling, kleptomania, and strong phobias.” Robert Noggle, Autonomy and the Paradox of Self-
Creation, in Personal Autonomy 87, 87 (James S. Taylor ed., 2005). Ekstrom refers to “var-
ious compulsive disorders”. See Laura W. Ekstrom, Autonomy and Personal Integration, in Per-
sonal Autonomy 143, 145-46 (James S. Taylor ed., 2005). She then notes that “the difficult issue of settling which forces are external and which are internal to the agent himself (which are ‘truly his own’)” has given rise to a debate among commentators. Id. at 146.

42 “Limits [to freedom] can be roughly classified as external or internal. External limits are con-
ditions outside the person, such as threat of punishment or physical constraint…. Internal limits prevent one making a rational choice. Thus, mental illness or intoxication can prevent one making rational choices.” Michael D. Bayles, Principles of Law 9 (1987) (further noting that some factors are borderline). One of the “conditions of autonomous action is that a person be free of controls exerted by external sources or by internal states that rob the person of self-
directedness…. The category of influence includes acts of love, threats, education, lies, manipu-
lative suggestions, and emotional appeals ….” Tom L. Beauchamp, Autonomy and Consent, in The Ethics of Consent 55, 69 (Franklin G. Miller & Alan Wertheimer eds., 2010) (emphasiz-
ing persuasion, coercion, and manipulation). Along with brainwashing, “[t]here are three other sorts of nonautonomous preferences …: (1) anomic preferences, (2) preferences which are ‘in-
ner-impelled,’ and (3) preferences resulting from pervasive acculturation or socialization pro-
cesses which are not directly manipulable in the ways of brainwashing and subliminal advertis-

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

44 “[I]f the ‘threat to B comes from nature (say, a sickness) rather than from A or any other per-
son, than in all probability we would take that threat simply to be one of the background condi-
tions … rather than an intervening force ….” Joel Feinberg, Harm to Self 196 (1986) (refer-
ence omitted).
In balancing the inevitable conflicts between liberty and security interests, all moral agents are to have the most expansive liberty possible while, at the same time, respecting the security interests of (themselves and) others. In Kant’s words, “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every man by virtue of his humanity.” The adopted balance between liberty and security produces autonomy boundaries between agents.

The conceptions of liberty and security discussed in this article have much in common with related notions of liberty and rights categories recognized by various commentators. Isaiah Berlin championed the most famous distinction, the one between negative and positive liberty.

Under his analysis, negative liberty is the freedom to act without “obstacles, barriers or constraints.” Negative liberty, in a nutshell, is freedom from. Freedom from, according to Berlin, relates to external factors. Positive liberty, on the other hand, is the freedom with respect to internal, psychological constraints. It is the freedom to. This distinction between Berlin’s con-

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45 “On Kant’s understanding, … [t]he only rights that we can have are those that are consistent with others having the same rights in a system of equal freedom through equal rights.” Arthur Ripstein, Private Order and Public Justice: Kant and Rawls, 92 VA. L. REV. 1391, 1417 (2006).
47 Coleman apparently has a somewhat different view of the boundaries. “Crossing my own boundary does not entail that I thereby cross yours.” Jules L. Coleman, Legal Theory and Practice, 83 GEO. L.J. 2579, 2600 (1995). I would say that I do not cross my boundary until I cross into someone else’s territory, i.e., autonomy space.
50 “We are free in the negative sense if we are free from being arrested for speaking our minds, being attacked as we walk in the street, being forcibly prevented from meeting with others.” VIRGINIA HELD, RIGHTS AND GOODS 124 (1984). “Freedom as immunity can be seen as a ‘negative’ idea – the absence of encroaching activities. It relates closely to what has been called ‘negative freedom.’” AMARTYA SEN, RATIONALITY AND FREEDOM 508 (2002).
51 In Berlin’s view, it “seems to be a mere absence of something (i.e. of obstacles, barriers, constraints or interference from others).” Ian Carter, Positive and Negative Liberty, The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/fall2008/entries/liberty-positive-negative (last visited Aug. 7, 2013).
52 “Positive liberty is the possibility of acting – or the fact of action – in such a way as to take control of one’s life and realize one’s fundamental purposes.” Ian Carter, Positive and Negative Liberty, The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/fall2008/entries/liberty-positive-negative (last visited Aug. 7, 2013). “[I]t seems to require the presence of something (i.e. of control, self-mastery, self-determination or self-realization).” Id.
ceptions of positive and negative liberty, while embraced by others,\textsuperscript{54} may be ambiguous,\textsuperscript{55} and has been strongly challenged.\textsuperscript{56}

Other commentators have identified distinctions between active and passive rights, or negative and positive rights. First, active and passive rights. “Active rights are signaled by statements of the form ‘A has a right to φ’; while passive rights are signaled by statements of the form

\textsuperscript{53} “[W]e are free in the positive sense when we are guided by our better, rational selves rather than by our passions, free to do what we ought to do.” \textsc{Virginia Held, Rights and Goods} 125 (1984).

\textsuperscript{54} See, e.g., \textsc{Friedrich A. Hayek, The Constitution of Liberty} 19 (1960); \textsc{J. Christman, Saving Positive Freedom}, 33 \textsc{Pol. Theory} 79 (2005); \textsc{David Miller, Constraints on Freedom}, 94 \textsc{Ethics} 66 (1983); \textsc{Marina A.L. Oshana, Autonomy and Free Agency, in Personal Autonomy} 183, 193-96 (James S. Taylor ed., 2005); \textsc{Theodore L. Putterman, Berlin’s Two Concepts of Liberty: A Reassessment and Revision}, 38 \textsc{Polity} 416 (2006). \textsc{Kant was nearby before Berlin. “In the ‘negative’ sense [of practical freedom], a will is practically free if it acts independently of external causes determining how it acts; in the ‘positive’ sense, it is practically free if it has the power to determine itself in accordance with its own law.” \textsc{Allen W. Wood, Kant’s Ethical Thought} 172 (1999). See \textsc{Thomas E. Hill, Jr., Dignity and Practical Reason in Kant’s Moral Theory} 34-35 (1992).

\textsuperscript{55} “[T]he distinction between ‘positive’ and ‘negative’ freedoms … can be interpreted in several distinct ways.” \textsc{Amartya Sen, Rationality and Freedom} 509 (2002) (footnote omitted). For various interpretations of both positive and negative freedom, see \textit{id.} at 586-87.

\textsuperscript{56} For a powerful challenge to this distinction, partially supported by the distinction I later discuss of formal versus material liberty, see \textsc{Gerald C. MacCallum, Jr., Negative and Positive Freedom}, 76 \textsc{Phil. Rev.} 312 (1967). \textsc{MacCallum argues “that every freedom is both a freedom from and a freedom to – freedom from some particular constraint or constraints to do or to be some particular thing. The difference between negative and positive freedom is … between different specifications of the constraints …. “} \textsc{Peter Westen, “Freedom” and “Coercion” – Virtue Words and Vice Words}, 1985 \textsc{Duke L.J.} 541, 553. \textsc{Nussbaum agrees. “The very idea of ‘negative liberty’ … is an incoherent idea: all liberties are positive, meaning liberties \textit{to do} or \textit{to be} something; and all require the inhibition of interference by others.” \textsc{Martha Nussbaum, Creating Capabilities: The Human Development Approach} 65 (2011). \textsc{MacCallum’s analysis allows for distinctions among constraints stemming from inanimate, purposeful, manmade, natural, intentional, and nonintentional sources. See Westen, supra, at 554. For criticism of MacCallum’s approach, see \textsc{Michael J. Gorr, Coercion, Freedom and Exploitation} 79-81 (1989). See \textsc{Marina Oshana, Personal Autonomy in Society} 152 (2006) (“the line between [positive and negative freedom] is not always clear”); \textsc{Eric Nelson, Liberty: One Concept Too Many?}, 33 \textsc{Pol. Theory} 58 (2005) (challenging the distinction). \textsc{But see John Christman, Saving Positive Freedom}, 33 \textsc{Pol. Theory} 79 (2005) (countering Nelson’s challenge). See generally \textsc{Joshua Cherniss & Henry Hardy, Isaiah Berlin}, The Stanford Encyclopedia of Philosophy, at \texttt{http://plato.stanford.edu/archives/sum2010/entries/berlin} (last visited Aug. 7, 2013).

Notice that reliance on this common model of positive and negative liberty does not fit with symmetrical notions of positive and negative security.
‘A has a right that B ϕ’ (in both of these formulas, ‘ϕ’ is an active verb).” 57 Second, negative and positive rights. “The holder of a negative right is entitled to non-interference, while the holder of a positive right is entitled to provision of some good or service.” 58

My look at liberty and security interests begins with expansive conceptions that extend beyond the common normative realm in which entitlement claims are salient, as where one claims to have the right to be secure from assault and battery. Freedom, for instance, may further entail claims to a minimal level of resources or enablements, such as rights to welfare. As in some of the taxonomies above, liberty and security typically come in overlapping, sometimes indistinct, negative and positive varieties, as well as active and passive ones. The Hohfeldian correlatives capture many of the characteristics. 59

III. Autonomy Space

The term “autonomy space” metaphorically represents the idea that a moral agent has a certain realm of freedom in space and time to make choices and act upon them. Within this realm the agent can conduct her life free from interference by others. 60 As one commentator puts it, it is

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

58 Leif Wenar, Rights, The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/fall2010/entries/rights (last visited Aug. 7, 2013) (citing JAN NARVÉSON, THE LIBERTARIAN IDEA (1988)). “Since both negative and positive rights are passive rights, this division cannot capture all rights.” Id. “Whatever is the justification of ascribing rights – autonomy, need, or something else – there may be just as strong a case for ensuring that a person has adequate nutrition as for ensuring that the person not be beat up.” Id. at 11. Kamm observes that, insofar as it possible to divide rights into negative and positive ones, they “may protect the same [or different] interests. The negative rights have correlative duties of non-interference and the positive rights have duties of provision…. A positive right may derive from a violation of a negative or a positive right…. Alternatively, a positive right may be a ‘pure’ positive right ….” F.M. KAMM, INTRICATE ETHICS 286 (2007) (footnote and examples omitted). Regarding the correlative of rights, duties, Rawls observes, “The distinction between positive and negative duties is intuitively clear in many cases, but gives way. I shall not put any stress upon it.” JOHN RAWLS, A THEORY OF JUSTICE 98 (rev. ed. 1999).

59 See WESLEY N. HOHFIELD, SOME FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING, in FUNDAMENTAL LEGAL CONCEPTIONS 23 (1923).

60 “Boundaries defining personal space are necessary to constitute individuals.” GEORGE P. FLETCHER, 1 THE GRAMMAR OF CRIMINAL LAW: FOUNDATIONS 22 (2007) (footnote omitted). Included within “[t]he contours of the individual” are one’s body, “the things under one’s immediate control”, one’s own living space, and, furthermore, it also reaches “the right to act in certain

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her “discretionary space”.61 This space is established by a full set of universalized deontic maxims, both first- and second-order, adopted by a moral agent to balance her liberty and security interests within the parameters of the categorical imperative.62 Once an agent’s baseline autonomy space is demarcated, she can usually adjust the boundaries by consent.63 One can consent to a reduction of one’s autonomy space (e.g., permit non-everyday contact by another), and also decline an expansion of the space (refuse a beneficial gift). Some autonomy boundaries are immutable, partially or entirely. For example, consensual slavery, mutilation, or sexual contracts may be declared out of bounds for being disrespectful of one’s own status as a moral, autonomous being.64

Many interferences with, or limitations on, a person’s plausible autonomy space are not found to be wrongful, and hence not subject to moral or legal requitals. Under existing norms, for example, a variety of acceptable social touchings or contacts circumscribe a person’s liberty and security interests, such as an ordinary pat on the back.65 No applicable maxim prohibits ways and to control larger spaces on the basis of a social understanding of ownership.” Id. at 22-23. Feinberg also uses the domain, territory and space metaphors. See JOEL FEINBERG, HARM TO SELF 52-57 (1986). “[B]oundary crossings … of that line surrounding each individual – Nozick calls it a hyperplane – which harbors his possessions, entitlements, and rights.” LEO KATZ, ILL-GOTTEN GAINS 139 (1996) (citing ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 57 1974)).

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

62 “Because the remedies provided by private law to the plaintiff invoke such a [coercive] power against the defendant, they must be justified along with the rights which they protect or vindicate.” Hanoch Dagan, Remedies, Rights, and Properties, xx J. TORT L. yy, yy (2011) [ms 6].

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

64 See IMMANUEL KANT, ON THE COMMON SAYING: THAT MAY BE CORRECT IN THEORY, BUT IT IS OF NO USE IN PRACTICE, in PRACTICAL PHILOSOPHY 273, 293-94 (Mary J. Gregor ed. & trans., 1996); IMMANUEL KANT, THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY 353, 431, 471-72 (Mary J. Gregor ed. & trans., 1996) (1797). But see, e.g., ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 331 (1974) (opining that “a free system will allow [a person] to sell himself into slavery”).

65 See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 41-42 (5th ed. 1984). Goldberg and Zipursky, for instance, describe the rule of the famous battery case, Vosburg v. Putney, 50 N.W. 403 (Wis. 1891): “Vosburg sets as a condition of battery liability proof that the plaintiff suffered a harmful or offensive contact because the defendant acted with the intent to cause a kind of type of contact that is typically harmful or deemed offensive under prevailing social norms ….” JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, TORTS 205 (2010) (emphasis omitted). “Consider the common law of negligence. Here as elsewhere, the common law is designed to reflect current social practices and norms.” Hanoch Sheinman, Tort Law and
touchings of the types in question. Though they may be harmful, they are not wrongful. On the other hand, if such contacts were proscribed by an adopted substantive maxim, and a violation therefore within the reach of a requital maxim, such a substantive maxim would not necessarily run afoul of the categorical imperative. Just as allowing some contact need not be disrespectful, so banning all social touchings need not be disrespectful. When not wrongful, we would not say that the invasion of the autonomy space is privileged, but rather, owing to implicit consent, that there was no invasion at all. For each society, where to strike this balance between liberty and security is a, if not the, central issue.

A nonwrongful limitation to an agent’s possible autonomy space will be referred to as a “reduction”, “decrease”, “curtailment”, “limitation”, “restriction”, “truncation”, etc. Some commentators use the term “infringement”, but this has overtones of “violation” or “wrongfulness”.

To the contrary of an autonomy space reduction, there may be an “enlargement”, “increase”, etc., as where an agent is granted the privilege to touch another person in a manner beyond default norms. When an interference with a person’s autonomy space is wrongful, and hence subject to requital, this is referred to as an autonomy or autonomy space invasion.

The essentially contested, fuzzy concepts of liberty, security, autonomy, dignity, respect, etc., are mustered to point down various roads suggested by deontic principles. Though the absence of … consent is inherent in the very idea of those invasions of interests of personality which, at common law, were the subject of an action of trespass for battery, assault, or false imprisonment.” Restatement (Second) of Torts § 13 cmt. d (1977). “The consent principle is general in its scope, firm in its acceptance, and central in its significance. It makes the plaintiff’s right of self-determination or autonomy the centerpiece of the law on intentional torts and to some extent other torts as well.” Dan B. Dobbs, The Law of Torts 217 (2000).


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

Though we cannot create a model code only from the fuzzy concepts of “disrespect”, “dignity”, “autonomy”, etc., they can direct us towards promising avenues to pursue.
ly decline to opine how far down the road these concepts go, or whether particular roads can be traveled as a practical matter, or even whether other normative principles may trump these pathways in a particular society’s web of norms and values. My primary aim is to identify the process behind some of the critical choices and tradeoffs that individuals and societies must address in embracing a set of norms that satisfy Kantian mandates. They are constitutive of an agent’s autonomy space. Whether our current social, moral, and legal norms, or those of any other society, meet Kant’s marching orders is another question.

A. Conditions for Autonomy Space

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

72 “[T]heories are not arguments, sound or otherwise. Theories are maps.” David Schmidtz, Non-ideal Theory: What It Is and What It Needs to Be, 121 ETHICS 772, 778 (2011). “[I]t is not only maps that are incomplete. The terrain being described (i.e., justice itself) can be incomplete as well.” Id. at 779. “A theory of justice may give us parameters, some of which may be more or less timeless. Even so, details of evolving practices are in the hands of communities, not theories.” Id. at 784 (footnote omitted).

73 Gerald Dworkin views liberty (freedom) “as the ability of a person to do what he wishes and to have significant options that are not closed or made less eligible by the actions of other agents or the workings of social institutions.” GERALD DWORIN, THE THEORY AND PRACTICE OF AUTONOMY 105 (1988) (declaring the prisoner unknowingly in a cell with a defective lock as not having her liberty limited, though having her autonomy limited). See Gregory Klass, Promise Etc., 45 SUFFOLK U. L. REV. 695, 703 (2012) (“Pure promises are important to autonomy theories because the reason for the obligation resides first and foremost in the promisor’s choice ….”).

74 “[T]he condition of being a chooser (where one’s choices are not defined by the threats of another) is not just contingently linked to being an autonomous person, but must be the standard case from which exceptions are seen as precisely that – exceptions.” GERALD DWORIN, THE THEORY AND PRACTICE OF AUTONOMY 18 (1988). “[T]he term act implies a choice.” OLIVER W. HOLMES, JR., THE COMMON LAW 77 (Mark D. Howe ed., 1963) (1881). While Holmes advances the general principle that harms must lie where they fall, “losses can be shifted from plaintiff to defendant only if (1) the defendant chooses to act, and (2) the chosen act creates a foreseeable danger to the plaintiff. Choice and foreseeability are essential to the fault standard because they lay the basis for moral censure of the defendant ….” Catharine P. Wells, Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication, 88 MICH. L. REV. 2348, 2355 (1990) (citing OLIVER W. HOLMES, JR., THE COMMON LAW 74-75 (Mark D. Howe ed., 1963) (1881)). “In the moral sense, ‘fault’ means wrongful conduct or moral failing such that the party had ‘the power of avoiding the evil complained of’ and failed to do so.” Wells, id. at 2356 (citing OLIVER W. HOLMES, JR., THE COMMON LAW 77 (Mark D. Howe ed., 1963) (1881)). Wells, objecting that the fault theory largely equivocates on two meanings of “fault”, develops “a broader conception of corrective justice. The central element of this conception is fairness rather than fault.” Id. at 2359.

“But why should liability depend on choice? Because choice, it is thought, is the defining mark of agency; it marks the point at which we engage in the world as free and responsible
ing her accountable for her responsible choices.\textsuperscript{75} Aristotle identified the circumstances where choices and conduct should not be considered free, responsible ones: those that result from ignorance or coercion.\textsuperscript{76} As an example of the adoption of Aristotle’s viewpoint by common law agents, and thus bring ourselves within the proper reach of the criminal law.” R.A. Duff, INTENTION, AGENCY AND CRIMINAL LIABILITY 154 (1990). “We need only recognize why we respect people’s choices – because we respect people and their innate dignity.” Robert E. Goodin, The Political Theories of Choice and Dignity, 18 AM. PHIL. Q. 91, 91 (1981). “Choice and autonomy in this way mutually reinforce one another: we value autonomy in part because of the freedom to choose it validates, and we value free choice in part because it contributes to our autonomy.” Meir Dan-Cohen, HARMFUL THOUGHTS 125 (2002). “[P]art of what makes autonomy valuable is that it lends significance to choice.” Marina Oshana, PERSONAL AUTONOMY IN SOCIETY 133 (2006). Kadish refers to “the principle that requires choice as a condition of blame – the person must have chosen to do the action and had the capacity to have chosen otherwise.” Sanford H. Kadish, Excusing Crime, in BLAME AND PUNISHMENT 81, 88 (1987). For a challenge to the view that autonomous agency is necessary for morally responsible agency, see Michael McKenna, The Relationship Between Autonomous and Morally Responsible Agency, in PERSONAL AUTONOMY 205 (James S. Taylor ed., 2005). “[C]hoice … is thought to be most closely bound up with virtue and to discriminate characters better than actions do.” Aristotle, Nichomachean Ethics bk. III, ch. 1, in The Basic Works of Aristotle 935, 967 (Richard McKeon ed., 1941). “[C]hoice involves a rational principle and thought.” Id. at 969.

Not all agree that responsibility entails choice. “Choices entail alternatives, but basic criminal responsibility is largely unaffected by the presence or absence of alternatives. Nor is moral responsibility much different. It depends primarily on control of conduct and self-control, not on choice.” Stephen Shute et al., Introduction: The Logic of Criminal Law, in ACTION AND VALUE IN CRIMINAL LAW 1, 20 (Stephen Shute et al. eds., 1993). See Peter Cane, RESPONSIBILITY IN LAW AND MORALITY 97-104 (2002); Victor Tadros, CRIMINAL RESPONSIBILITY 61-66 (2005) (doubting the importance of choice to autonomy and responsibility); Stephen A. Smith, Contracting Under Pressure: A Theory of Duress, 56 CAMBRIDGE L.J. 343 (1997) (distinguishing the concerns of wrongdoing, autonomy, and consent); T.M. Scanlon, Ethics and Free Will: Varieties of Responsibility, 90 B.U. L. REV. 603, 603-04 (2010) (distinguishing three varieties of responsibility: personal, moral, and substantive); Nicole A. Vincent, On the Relevance of Neuroscience to Criminal Responsibility, 4 CRIM. L. & PHIL. 77, 84 (2010) (“In law, responsibility is not a single concept, but it is rather a syndrome of at least six concepts which are related to one another by a common word and by a number of justificatory relationships that are often expressed in legal discourse and practice ….”).

We may be leaving Kant behind with these empirical theories of the requisites for responsible choice. “[B]ecause Kant’s approach is committed to regard free will as something falling entirely outside the realm of nature or experience, it necessarily precludes the possibility of any empirical investigation of the natural conditions of moral responsibility ….” Allen W. Wood, Kant’s Ethical Thought 179 (1999).

\textsuperscript{75} “To hold someone responsible is to regard her as a person – that is to say, as a free and equal person, capable of acting both rationally and morally.” Christine M. Korsgaard, Creating the Kingdom of Ends 189 (1996).

\textsuperscript{76} “Those things, then, are thought involuntary, which take place under compulsion or owing to ignorance; and that is compulsory of which the moving principle is outside, being a principle in.
which nothing is contributed by the person who is acting or is feeling the passion ….” ARISTOTLE, NICHOMACHEAN ETHICS bk. III, ch. 1, in THE BASIC WORKS OF ARISTOTLE 935, 964 (Richard McKeon ed., 1941). See id. at bk. V, ch. 8, 1015-16. Aristotle discusses some of the difficulties with the concept, id. at bk. III, ch. 8, 964-67. Notice that the quote of Aristotle leaves no room for internal coercion, though he later provides slack for acts proceeding from anger or rage. See id. at bk. V, ch. 8, 1016. “Since Aristotle, moral theorists have generally agreed that the necessary attributes of moral agency fall under three categories: knowledge, reason, and control.” Peter Arenella, Convicting the Morally Blameless: Reassessing the Relationship Between Legal and Moral Accountability, 39 UCLA L. REV. 1511, 1519 (1992). “At least two conditions suggest themselves [for morally responsible agency], an epistemic and a freedom condition.” Michael McKenna & David Widerker, Introduction, in MORAL RESPONSIBILITY AND ALTERNATIVE POSSIBILITIES 1, 2 (David Widerker & Michael McKenna eds., 2003) (footnote omitted). Under the epistemic condition, an agent “must have had some understanding of (or at least she must have been able to understand) the moral significance of her behavior.” Id. Under the freedom condition, “an agent must, in some way, have been in control of what she did ….” Id. “According to Kant, you treat someone as a mere means whenever you treat him in a way to which he could not possible consent. Kant’s criterion most obviously rules out actions which depend upon force, coercion, or deception for their nature ….” CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 295 (1996) (footnote omitted). “When I am coerced or deceived into agreeing to do something, holding me to my promise does not respect my autonomy.” MARK TUNICK, PRACTICES AND PROMISES 112 (1998). “One might even contend that people are denied respect if they are held legally liable when they are not responsible, because they are then treated as mere instruments for the well-being of others.” MICHAEL D. BAYLES, PRINCIPLES OF LAW 8 (1987). “These [Aristotelian] conditions are ‘negative’ in the sense that they indicate two ways in which an agent can fail to be morally responsible: ignorance and force.” JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL 12 (1998). Regarding the ignorance condition, “a person’s blameworthiness in acting as she did is a function of how things seemed to her at the time of her action.” John Gardner, Crime: in Proportion and in Perspective, in FUNDAMENTALS OF SENTENCING THEORY 31, 42 (Andrew Ashworth & Martin Wasik eds., 1998) (footnote omitted). “A choice which entails a concealed consequence is as to that consequence no choice.” OLIVER W. HOLMES, JR., THE COMMON LAW 76 (Mark D. Howe ed., 1963) (1881).

Feinberg diagrams “[t]he model of a perfectly voluntary choice,” the topic headings being: “the chooser is ‘competent’; he does not choose under coercion or duress; he does not choose because of more subtle manipulation; he does not choose because of ignorance or mistaken belief; he does not choose in circumstances that are temporarily distorting.” JOEL FEINBERG, HARM TO SELF 115 (1986) (format adjusted). “Foreseeability is relevant to the possibility of norms, because no norm can require a person to take account of something unforeseeable.” Arthur Ripstein, Justice and Responsibility, 17 CAN. J. L. & JURISPRUDENCE 362, 377 (2004). Yet we must hold the agent for her avoidable ignorance. “[W]e assume that it is in [people’s] power not to be ignorant, since they have the power of taking care.” ARISTOTLE, NICHOMACHEAN ETHICS bk. III, ch. 5, in THE BASIC WORKS OF ARISTOTLE 935, 972 (Richard McKeon ed., 1941). 77 80 Eng. Rep. 284 (K.B. 1616).
is exempted. As George Fletcher observes, “The hypotheticals of Weaver v. Ward correspond to the Aristotelian excusing categories of compulsion and unavoidable ignorance.”

While the notion of ignorance is far from entirely self-evident, that of coercion is blurrier still. Peter Westen provides a pointer in the right direction: “A coercive constraint is anything that leaves a person worse off either than he otherwise expects to be or than he ought to be for refusing to do the proponent’s bidding.” I would expand on this to include nonagential

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78 Id.

In a recent book, Sher emphasizes the element of ignorance. “[A]n agent’s responsibility extends only as far as his awareness of what he is doing. He is responsible only for those acts he consciously chooses to perform, only for those omissions he consciously chooses to allow, and only for those outcomes he consciously chooses to bring about.” George Sher, Who Knew? 4 (2009). For Sher’s “full reconstruction of responsibility’s epistemic condition,” see id. at 143.

80 Feinberg discusses at length failures of consent from defective belief. See Joel Feinberg, Harm to Self 269-315 (1986).


82 Peter Westen, “Freedom” and “Coercion” – Virtue Words and Vice Words, 1985 Duke L.J. 541, 589 (offering a detailed specification of “coercion”). Westen identifies “the core elements
“bidding”, such as from a storm, a threatening animal, or an irresistible impulse.\textsuperscript{83} Like ignorance, coercion is, of course, a matter of degree.\textsuperscript{84} Existing norms require coercive forces to pass


\textsuperscript{84} Kant seemingly recognizes this. “Even Kant’s limited remarks about degrees of demerit indicate that the fewer the ‘natural obstacles’ to conforming to the law, the greater the demerit in violating it. A rich man’s lesser temptations to petty theft, for example, make him worse for com-
a certain threshold, which depends on the circumstances, before they excuse an agent from responsibility.

Ignorance and coercion can stem from sources that are external from the agent or internal to her, that is, arise from internal analogs to external conditions, or be a mixture of the two.


“Nor does it follow the fact that the law is concerned only with minimum standards of acceptable behaviour that responsibility in law cannot be a matter of degree…. In criminal law, for instance, the offences of murder and manslaughter represent different degrees of responsibility for homicide.” PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 34 (2002) (footnote omitted) (providing further examples). “One can think of voluntariness as a matter of degree.” JOEL FEINBERG, HARM TO SELF 104 (1986). “It may not always be possible, even in principle, to say of one act that it is more voluntary or closer to being voluntary than another ….” Id. at 117.

“Rather than undermining responsibility, what coercion may do is to modify the permissibility of an action or the kind of blame, if any, that it makes appropriate.” T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 181 (2008). Gratuitous harm to another is one thing, fearful reactive harm is quite another. Id.

“I take the most reasonable position to be that whether the promisor has this obligation [to fulfill coerced promises] depends on the extent of coercion used to extract the promise.” MARK TUNICK, PRACTICES AND PROMISES 101-02 (1998). “Many promises are made under some pressure. [But there are differences among the kinds and sources of the pressure.] We need to determine when the pressure used in extracting a promise is legitimate and when it is unduly coercive.” Id. at 102.

“The internal analogue to external pressure is mental illness.” GEORGE P. FLETCHER, BASIC CONCEPTS OF LEGAL THOUGHT 106 (1996). “[A]utonomy can be compromised by natural or self-inflicted factors no less than by the deeds of others ….” ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 15 (2001) (noting that “Kantian independence can only be compromised by the deeds of others”). Munger refers to ideas of internal and external coercion. First, external coercion, as “in the sense of being forced to exchange by threat (“If you don’t trade, I will shoot you!”),” and second, internal coercion, which “is coercion in the alternative sense of being harmed by failing to exchange (“If I don’t trade, I will starve!””).” Michael C. Munger, Euvoluntary or Not, Exchange Is Just, 28 SOC. PHIL. & POL’Y 192, 195 (2011). Murphy similarly identifies two forms of duress: “Duress1, being unfairly placed in a situation where one’s only choice is to do what is demanded or to avoid doing what is demanded by paying a price that is, morally too high; Duress2, being unfairly placed in a situation of great psychological pressure ….” Jeffrie G. Murphy, Consent, Coercion, and Hard Choices, 67 VA. L. REV. 79, 87 (1981). See Stephen J. Morse, Diminished Capacity, in ACTION AND VALUE IN CRIMINAL LAW 239, 250-66 (Stephen Shute et al. eds., 1993) (discussing internal coercion). “[C]ases of pure internal coercion, compulsion, or ‘volitional’ problems are extremely rare.” Id. at 261. Morse is skeptical that “pure [internal] coercion cases exist that require excuse.” Id. at 265. Many such supposed cases are matters of irrationality. “On both theoretical and practical grounds, the law should treat internal-coercion claims with great caution.” Id. at 270.

See MARK TUNICK, PRACTICES AND PROMISES 101-02 (1998). Feinberg diagrams “types of compulsion” as purely internal (“Neurotic compulsions, obsessions, inhibitions, and incapaci-
Regarding coercion, Kant distinguishes external freedom from internal freedom. Let me provide some examples of what I mean by internal and external ignorance and coercion. First, internal ignorance may arise from cognitive dissonance, self-deception, and the many self-generated or self-exacerbated shortfalls from accurate perceptions and knowledge uncovered in recent decades by behavioral economists and cognitive psychologists. Second, internal coercion results from some forms of insanity, impulse, anomie, stress, akrasia, and, again, what cognitive science is revealing. Third, external ignorance may be a product of fraud, deception, and the fail-

89 See Immanuel Kant, GROUNDWORK OF THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY 41, 82-90 (Mary J. Gregor ed. & trans., 1996) (1785). “[A] rational agent’s internal freedom consists in her ability to determine her will independently of alien influences [e.g., resist tempting, offered cake]; her external freedom consists in her ability to set and pursue ends for herself without being subject to the choices of others.” Louis-Philippe Hodgson, Kant on the Right to Freedom: A Defense, 120 ETHICS 791, 793 (2010). “In Kant’s vocabulary, ‘heteronomy’ has roughly the same meaning as ‘inner-impelled.’” Lawrence Haworth, Autonomy 157 (1986). See Allen W. Wood, Kant’s Ethical Thought 119 (1999) (“Humanity thus also presupposes a kind of freedom, namely the ability to resist the immediate coercion of desires and impulses. Kant calls this the ‘negative’ concept of freedom.”). For Kant’s struggles with internal-external freedom limitations, see Allen W. Wood, Kantian Ethics 123-41 (2008).

Compare Kant’s distinction between law and ethics based on contrasting incentives. “The incentives for law are ‘external’ rather than intrinsic .... The incentives in ethics are ‘internal’ in a double sense: they arise from the practical reason of the agent, and they track the rationale for the moral precept itself.” Nelson Potter, Duties to Oneself, Motivational Internalism, and Self-Deception in Kant’s Ethics, in Kant’s Metaphysics of Morals 371, 373 (Mark Timmons ed., 2002).

90 See generally Dan Ariely, Predictably Irrational (2008); Daniel Kahneman, Thinking, Fast and Slow (2011); Advances in Behavioral Economics (Colin F. Camerer et al. eds., 2003); Choices, Values, and Frames (Daniel Kahneman & Amos Tversky eds., 2000); Heuristics and Biases: The Psychology of Intuitive Judgment (Thomas Gilovich et al. eds., 2002); The Law and Economics of Irrational Behavior (Francesco Parisi & Vernon L. Smith eds., 2005).

91 See Hila Keren, Consenting Under Distress, xx (2012). “Most courts do not view stress that leads a person to accept an injurious contract, as a sufficient reason for relief from that contract.” Id. at yy [ms 5].

92 See supra note yy [Ariely, Kahneman]. “[S]elf-rule is not possible if the person’s passions and impulses dictate his responses, so that he is led to do that which, had he reflected, he would have avoided doing.” Lawrence Haworth, Autonomy 43 (1986). Regarding voluntary choices, Trebilcock identifies “temporarily distorting states or circumstances, including: impulsiveness; fatigue; excess nervousness, agitation, or excitation; powerful passion (e.g., rage, hatred, lust,
Ignorance and coercion may be permanent (e.g., insanity, psychological enslavement [undue influence]), episodic (insanity, drunkenness, road rage, imprisonment), or transitory (economic duress, necessity, preliminary misinformation). Overall, ignorance and coercion, both internal and external, or permanent to transitory, interrelate in complex, multiple ways. For example, a person may exploit another’s known cognitive weaknesses in particular settings by creating such a setting and practicing subtle deception, as where a mediocre, overpriced product is displayed in a plush showroom by attractive, seductive salespersons. Hypnotism and brainwashing also have external and internal aspects.

depression, mania; intoxication (alcohol and other drugs); pain; neurotic compulsiveness/obsessiveness; severe time constraint.” MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 148 (1993) (punctuation and capitalization revised).

Even preferences can be coercive, of sorts, as where a person has “‘preferences that increase the difficulty for the individual of delaying gratification’” or “who ‘[finds] work extremely aversive’”. George Sher, Real-World Luck Egalitarianism, 27 SOC. PHIL. & POL’Y 218, 226-27 (Winter 2010) (quoting Richard Arneson, Equal Opportunity for Welfare Defended and Recanted, 7 J. POL. PHIL. 488, 489 (1999)). Contrariwise, the person “with a ‘zest for hard work’”. Id. at 227 (with citation). The risk of seeing these internal drives as coercive is that “[i]t will be self-undermining if it commits us to exporting so many of an agent’s features that there is no self left to be responsible for anything.” Id. at 227.

“In general, those who write about criminal law have been much more skeptical than philosophers about whether a plausible account of volitional disorders can be given.” VICTOR TADROS, CRIMINAL RESPONSIBILITY 340 (2005).

Fischer and Ravizza mention “brainwashing, hypnosis, or direct manipulation of the brain,” as well as “subliminal advertising”. JOHN MARTIN FISCHER & MARK RAVIZZA, RESPONSIBILITY AND CONTROL 13, 49 (1998). They refer to this second, “control condition” of moral responsibility as pertaining to “affective, volitional, and executive features.” Id. at 13. “[T]he agent must control his behavior in a suitable sense, in order to be morally responsible for it.” Id. They briefly summarize the “suitable sense” for sufficient control, id. at 240-41.

“The voluntariness-reducing incapacities can be divided in respect to their durability into two major classes, those thought to be permanent impairments and those deemed merely temporary, and a third overlapping category for alternating or recurring impairments.” JOEL FEINBERG, HARM TO SELF 318 (1986).

“Deception can be achieved by a wide variety of methods. In the most recent primary election season, observers identified twelve distinct deceptive techniques deployed in political advertisements ….” Collin O’Neil, Lying, Trust, and Gratitude, 40 PHIL. & PUB. AFF. 301, 301 (2012). On subliminal advertising, see generally VANCE PACKARD, THE HIDDEN PERSUADERS (1957). For doubts about Packard’s arguments, see GERALD ZALTMAN, HOW CUSTOMERS THINK: ESSENTIAL INSIGHTS INTO THE MIND OF THE MARKET 127 (2003); Richard A. Bauer, The Limits of Persuasion, 36 HARV. L. REV. 105, 106 (1958). Manta partially defangs the issue of influential advertising practices in the context of trademark infringement by “show[ing] that experiencing a good for its ‘inherent’ qualities is elusive and that our perceptions are necessarily subject to outside influences that our brain incorporates into the experience of products.” Irina D. Manta, He-
B. The Machinery of Autonomy Space

Without certain qualities needed to utilize one’s autonomy space, it is a formal conception only. One who is semi-comatose is free in a very restricted sense, if at all. To be free in a real sense, a person must have, first, sufficient capabilities or personal resources, which are qualities of the person. Because people vary in their capabilities, native and developed, they vary in the extent to which they can take advantage of potential autonomy space. Native capabilities include, to some extent, intelligence, athleticism, attractiveness, and some personality traits, such as risk disposition and attention disorder. Developed capabilities, insofar as they are a product of (self) nurture rather than nature, include education, knowledge, skill, willpower, and self-discipline.

The exercise of capabilities may reflect an interrelationship among them. A brilliant person, for example, needs less willpower than others to succeed in school. Capabilities are relative, circumstantial competencies (“In the land of the blind …”). The greater a person’s relevant capabilities, the greater her effective, usable autonomy space, all else equal. These variable conditions...
tingencies affect an agent’s material autonomy space,\textsuperscript{101} as distinguished from the formal autonomy space possessed in principle equally by all. Autonomy in practice, then, is quantifiable by a scalar measure, a matter of more or less.\textsuperscript{102}

For a person to have full legal and deontic status, a threshold standard of minimum capabilities is typically declared as essential. Beyond this, she usually has no increased rights or duties.\textsuperscript{103} There are exceptions to this, as under existing tort law where a person who holds herself out as an expert thereby assumes heightened duties.\textsuperscript{104} Children and mental incompetents do not fit neatly into this paradigm, but must, of course, be accommodated.\textsuperscript{105} Yet, despite the threshold capabilities standard of law and deontology, the effect of one’s capabilities on her material autonomy space seems continuously additive. As evident when we consider realistically the vastly different opportunities of the klutzes and the demigods, the greater one’s capabilities, the greater one’s effective, usable freedoms.

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\textsuperscript{101} Similarly, Nussbaum, along with Sen, advances a conception of a functioning. “A functioning is an active realization of one or more capabilities.” \textsc{Martha Nussbaum, Creating Capabilities: The Human Development Approach} 24-25 (2011).

\textsuperscript{102} Haworth identifies various stages of autonomy: minimal autonomy, a transition stage, normal autonomy, “[a]nd finally, further growth of autonomy, beyond the norm, by which one gets more completely free from inner and outer constraints and realizes something close to unrestricted critical competence.” \textsc{Lawrence Haworth, Autonomy} 55 (1986). “[S]ome [people] are more autonomous than others.” \textit{Id.} at 83. For more on the scalar qualities of autonomy, see, \textit{e.g.}, \textsc{Richard Lindley, Autonomy} 51, 69 (1986).

\textsuperscript{103} \textit{See supra} note yy. On the other hand, Kant has been read as requiring moral agents capable of consent to be fully rational and autonomous. \textit{See} David Johnson, \textit{A History of Consent in Western Thought}, in \textsc{The Ethics of Consent} 25, 47-48 (Franklin G. Miller & Alan Wertheimer eds., 2010).

\textsuperscript{104} \textit{See, e.g.}, \textsc{Restatement (Second) of Torts} § 299A cmt. d (1977). Even if a person with superior skills does not hold herself out as such, should she be held to a higher standard? Goudkamp suggests such a person would be subject to moral censure when she “was capable of performing at a much higher level [than the reasonable person] but failed to do so and, as a consequence of that failure, the plaintiff sustained injury.” \textsc{James Goudkamp, The Spurious Relationship Between Blameworthiness and Liability for Negligence}, 28 \textsc{MELB. U.L. Rev.} 343, 355 (2004) (footnote omitted). For interesting questions about adjusting standards of care on the basis of individual skill levels, see Anita Bernstein, \textit{The Communities That Make Standards of Care Possible}, 77 \textsc{Chi.-Kent L. Rev.} 735, 748-50 (2002).

\textsuperscript{105} Kant addresses some of these issues. \textit{See} \textsc{Immanuel Kant, The Metaphysics of Morals, in Practical Philosophy} 353, 429-30, 495-96 (Mary J. Gregor ed. & trans., 1996) (1797) (duty of parents to offspring). “It is my judgment that the greatest challenge facing a dignity-based theory of human rights is …: what accounts for the human dignity, and hence the human rights, of those human beings who are not capable of functioning as persons?” \textsc{Nicholas Wolterstorff, Book Review, 122 Ethics} 602, 607 (2012).
External resources are needed to employ one’s formal autonomy space. Wealth, opportunity, and privilege, for example, facilitate the exercise of liberty. Similarly, outside resources may expand a person’s security, as when some touchings are normally within social norms, but the concomitants of wealth or status deter or proscribe them. As a practical matter, external resources, like capabilities, would seem to be continuously additive. The more a person’s outside resources, the larger her material autonomy space, in general.

To be a truly, materially autonomous person requires a certain level of external resources. A homeless person without any resources is autonomous in a weak sense only.

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106 “[C]rucial to autonomy … is a sufficient degree of control over one’s life. In particular, autonomy requires a sufficient range and value of knowable and practically available options.” R. George Wright, Consentng Adults: The Problem of Enhancing Human Dignity Non-Coercively, 75 B.U. L. REV. 1397, 1431 (1995) (footnotes omitted). “Roughly speaking, formal freedom is said to be achieved through the rule of law and the safeguarding of people’s rights of property and contract; by contrast, substantive or effective or real freedom is said to exist only when people possess the material means necessary to realize their plans.” Ian Carter, The Myth of ‘Merely Formal Freedom’, 19 J. POL. PHILO. 486, 486 (2011) (footnote omitted).

107 “Autonomy calls for agential power in the form of psychological freedom – mastery of one’s will – as well as power and authority within certain fundamental social roles and arrangements.” Marina Oshana, Personal Autonomy in Society 4 (2006). “[T]he seven conditions for autonomy are epistemic competence, rationality, procedural independence, self-respect, control, access to a range of relevant options, and substantive independence.” Id. at 87 (emphasis omitted). For a prior, shorter list, see Marina A.L. Oshana, Personal Autonomy and Society, 29 J. SOC. PHILO. 81, 93-94 (1998).

108 “My central contention will be that the law of torts protects each person’s means against other persons, so that each person is secure in the means that he or she has.” Arthur Ripstein, As If It Had Never Happened, 48 WM. & MARY L. REV. 1957, 1966 (2007).

109 “The inability to take advantage of one’s rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty…. [B]ut rather I shall think of these things as affecting the worth of liberty ….” John Rawls, A Theory of Justice 179 (rev. ed. 1999). “The worth of freedom lies in the ability to exercise it and, since freedom is worthy, its existence is determined by the ability to exercise it.” Wojciech Sadurski, Giving Desert Its Due 265 (1985).

110 “From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders.” Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970). “Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.” Id. at 265. “Without minimal standards of subsistence, agency itself fails, and so the point of liberty of action and hence even of liberty rights is gone.” Onora O’Neill, Bounds of Justice 134 (2000).

“Freedom can be valued for the substantive opportunity it gives to the pursuit of our objectives and goals. In assessing opportunities, attention has to be paid to the actual ability of a person to achieve those things that she has reason to value.” Amartya Sen, Rationality and Freedom 10 (2002). Brudner identifies “agency goods” as “[t]he things necessary to real autonomy.” Alan Brudner, Punishment and Freedom xvii (2009). Sen identifies “types of instru-
These requisite resources have been called “enablements”, “primary goods”, or “functionings”, among other labels.\textsuperscript{112} External resource enablements necessary to truly exercise one’s autonomy space vary according to a person’s capabilities (e.g., intelligence, strength, health) and environment (war, high crime area, agricultural community, climate, capitalism).\textsuperscript{113} For example, a hilly community with many steps and few sidewalks would significantly limit the material autonomy space of the physically challenged, but have little impact on athletic, vigorous persons.

\textsuperscript{111} “Let them eat cake.” “[F]or those with limited alternatives, the free market is not all that free. Consider an extreme case: A homeless person sleeping under a bridge may have chosen, in some sense, to do so; but we would not necessarily consider his choice to be a free one.” Michael J. Sandel, Justice 81 (2009). On the other hand, “[a]s Lord Denning notoriously said (in a case concerning homeless squatters), ‘If homelessness were once admitted as a defence to trespass, no-one’s house could be safe. Necessity would open a door which no man could shut…. The plea would be an excuse for all sorts of wrongdoing.’” Anthony Duff, Principle and Contradiction in the Criminal Law, in Philosophy and the Criminal Law 156, 185-86 (Anthony Duff ed., 1998) (citing London Borough of Southwark v. Williams, [1971] 2 All E.R. 175, 179).

\textsuperscript{112} Rawls, on the one hand, and Sen and Nussbaum on the other, have most famously directed attention to this issue. “Social primary goods are, according to Rawls, those goods that anyone would want regardless of whatever else they wanted. They are means, or resources (broadly conceived) …. ” Ingrid Robeyns & Harry Brighouse, Introduction: Social Primary Goods and Capabilities as Metrics of Justice, in Measuring Justice 1, 1 (Harry Brighouse & Ingrid Robeyns eds., 2010) (citing John Rawls, Justice as Fairness: A Restatement 58-61 (2001)). “The other approach, developed most prominently by Amartya Sen, and more recently also by Martha Nussbaum, is known as the capability approach. Instead of looking a people’s holdings of, or prospects for holding, external goods, we look at what kinds of functionings they are able to achieve.” Id. at 2. In Sen’s words, “‘What matters to people is that they are able to achieve actual functionings, that is the actual living that people manage to achieve.’” Id. (citing Amartya Sen, Development as Freedom 74 (1999)). See, e.g., Amartya Sen, The Idea of Justice 231-35, 253-68 (2009). Sen brings Adam Smith, among others, into his camp with Martha Nussbaum. See Amartya Sen, Development as Freedom 73-74 (1999). That the differences between these two approaches is overstated, see Thomas Pogge, A Critique of the Capability Approach, in Measuring Justice 17 (Harry Brighouse & Ingrid Robeyns eds., 2010). These general metrics have also been referred to as “capabilities”, but I reserve this term for personal resources that do not have external origins, such as athleticism and judgment. Brooks distinguishes capabilities from functionings. See Thom Brooks, Capabilities, in International Encyclopedia of Ethics xx, yy (H. LaFollette ed., 20yy) [ms 2].

While Kant does not find in his principles a right to enablements or, more particularly, welfare, he has been read as calling for such a right. Even John Locke, a mainstay of libertarian philosophers, can be read as a champion of some enablements. Friedrich Hayek, another mainstay, is explicit about it. Among modern commentators, enablements or related metrics of one sort or another are advanced by John Rawls, Joel Feinberg, Ronald Dworkin, Joseph Raz, Amartya Sen, Martha Nussbaum, and many others.

114 Under Kant, “[t]he poor are supported not because they hold a right but because they are the beneficiaries of a duty. The sovereign takes over from the people the duty to support the poor that is an incident of everyone’s obligatory entrance into a civil condition.” Ernest J. Weinrib, Poverty and Property in Kant’s System of Rights, 78 NOTRE DAME L. REV. 795, 818 (2003). Kant’s “requirement that the state support those who are unable to support themselves follows from the need for the people to be able to share a united will, as a precondition of their giving themselves laws together.” ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT’S LEGAL AND POLITICAL PHILOSOPHY 25 (2001). Under Kant, “[t]he only way in which the [property] right to exclude can be made the object of the general will is to guarantee public support for those unable to support themselves.” Id. at 26. See generally id. at 267-99 (Chapter 9: Public Right III: Redistribution and Equality of Opportunity).

115 Although Kant asserts that the state has a duty to provide welfare to the needy, Murphy questions whether “this view is consistent with his general theory,” but argues that the state duty to help others in distress “may rest on the innate right of freedom in each person. Certain kinds of social and economic disadvantages inhibit, in quite a literal sense, the freedom of those who are disadvantaged.” JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 124-25 (1970). Wood is among those who argue that Kant’s “theory of right allows for welfare and redistributive activities of the state and even provides a cogent rationale for them.” ALLEN W. WOOD, KANTIAN ETHICS 194 (2008) (footnote omitted). See id. at 193-205. O’Neill agrees. See ONORA O’NEILL, BOUNDS OF JUSTICE 140 (2000). Sample puts the idea in terms of disrespect, one form of which is: “we can fail to respect a person by neglecting what is necessary for that person’s well-being or flourishing.” RUTH J. SAMPLE, EXPLOITATION 57 (2003).

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

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

118 In the revised edition of his seminal treatise, Rawls writes, “Primary goods are now characterized as what persons need in their status as free and equal citizens, and as normally and fully cooperating members of society over a complete life.” JOHN RAWLS, A THEORY OF JUSTICE xiii
(rev. ed. 1999). “[T]he principle [of redress] holds that in order to treat all persons equally, to provide genuine equality of opportunity, society must give more attention to those with fewer native assets and to those born into the less favorable social positions.” Id. at 86. “No one deserves his greater natural capacity nor merits a more favorable starting place in society.” Id. at 87. “[P]rimary goods are social background conditions and all-purpose means generally necessary for forming and rationally pursuing a conception of the good. The principles of justice are to ensure to all citizens the equal protection of and access to these conditions ....” JOHN RAWLS, Social Utility and Primary Goods, in COLLECTED PAPERS 359, 370 (Samuel Freeman ed., 1999). “Rawls insists that the basic structure must not magnify the effects of natural inequalities, not that it must eliminate them.” Arthur Ripstein, Private Order and Public Justice: Kant and Rawls, 92 VA. L. REV. 1391, 1437 (2006) (footnote omitted).

119 “Welfare interests”, according to Feinberg, “are the interests that persons need satisfied in order to have any significant capacity to choose and order their way of living…. When these interests are destroyed or threatened, the person is foreclosed from almost any tolerable mode of life he might wish to pursue.” ANDREW VON HIRSCH, PAST OR FUTURE CRIMES 67-68 (1985) (citing JOEL FEINBERG, HARM TO OTHERS 37-38 (1984)). “Up to a certain point, both physical integrity and property constitute welfare interests. That point, Feinberg suggest, is defined by a tolerable minimum of these two generic interests.” Id. at 68 (citing FEINBERG, supra, at 206-07). “Feinberg’s next category is what he calls ‘a security interest, cushioning a welfare interest.’ Beyond the bare minimum of health and economic well-being required to make any meaningful choices, a person needs a certain additional safety margin.” Id. at 69 (citing FEINBERG, supra, at 207).

120 “[I]mpersonal resources, consist in [a person’s] wealth, measured as abstractly as possible…. We must aim, as a first approximation, to make members of our political community equal in those material resources.” RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 355 (2011).

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


123 See, e.g., MARTHA NUSBAUM, Creating Capabilities: The Human Development Approach (2011) (discussing capabilities at 20-28 and listing “ten Central Capabilities” at 33-34); MARTHA NUSBAUM, Women and Human Development: The Capabilities Approach (2000) (listing basic capabilities at 78-80); Martha C. Nussbaum, Capabilities and Human Rights, 66 FORDHAM L. REV. 273 (1997). This approach championed by Nussbaum “begins with a very simple question: What are people actually able to do and to be?” NUSBAUM, Creating Capabilities, supra, at x. “I have produced an explicit account of the most central capabilities that should be the goal of public policy. The list is continually being revised and adjusted, in accordance with my methodological commitment to cross-cultural deliberation and criticism [as well as practicalities].” Nussbaum, supra, 66 FORDHAM L. REV. at 277. For criticism of Nussbaum’s view, see Thom Brooks, A New Problem with the Capabilities Approach, yy HARV. REV. PHILOS. yy (20yy) (including Nussbaum’s statement that her view of capabilities is ongoing).

124 “Egalitarians insist on a higher floor than Hayek’s subsistence level, due to the material prerequisites of social equality. Equality requires the personal independence of adults, which requires property…. People also need a level of income sufficient to secure dignity in appearance [which relates to the society’s general consumption level].” Elizabeth Anderson, How Should
Environment, both natural and social, is a third factor impacting autonomy space. The environment provides a setting for an agent’s exercise of freedom. It affects the manner and degree to which an agent’s capabilities and resources allow her the liberty to choose and act. It impacts her security. With respect to the natural environment, the capabilities and external resources facilitating liberty and security are different on the savanna than in the arctic or desert. These include such things as toleration of heat or cold, athleticism, and natural immunity or resistance to disease. Such characteristics are a misfortune that we all have responsibility to rectify. Jules Coleman and Arthur Ripstein, *Mischief and Misfortune*, 41 McGill L.J. 91, 128 (1995). For further versions, see, *e.g.*, James Griffin, *Well-Being* (1986); Wojciech Sadurski, *Giving Desert Its Due* 105, 158-83 (1985); Elizabeth Anderson, *What Is the Point of Equality*, 109 Ethics 287 (1999). Waldron observes that dignity means that a person “has the wherewithal to demand that her agency and her presence among us as human being be take seriously and accommodated in the lives of others”). Jeremy Waldron, *How Law Protects Dignity*, 71 Cambridge L.J. 200, yy (2012) [ms 2-3]. Rao contends that this notion of dignity “mistakenly conflates inherent dignity and the conditions for achieving a particular type of dignified life.” Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 Notre Dame L. Rev. 183, 206 (2011).

Enablers may spring from principles of distributive justice. *See Arthur Ripstein, Equality, Responsibility, and the Law* 266-67 (1999) (“[P]ursuant to distributive justice, [t]hose misfortunes that preclude a person having meaningful choices about his or her life – such misfortunes as physical disabilities, illness, or extreme poverty – need to be held in common if people are to properly be held responsible for their choices.”); Richard W. Wright, *Justice and Reasonable Care in Negligence Law*, 47 Am. J. Juris. 143, 165-66 (2002); Ernest J. Weinrib, *Poverty and Property in Kant’s System of Rights*, 78 Notre Dame L. Rev. 795, 796 (2003) (“Whether the state should satisfy the basic needs of its citizens is a standard issue of distributive justice.”).

125 “[N]o matter how well we develop our talents and skills, actually achieving our goals in this life often depends on what Kant calls ‘nature and its beneficence’ – external circumstances that ‘by and large are not under man’s control’”. Roger J. Sullivan, *Immanuel Kant’s Moral Theory* 36 (1989) (citation omitted).
sistance to an endemic, debilitating disease. The social environment is also crucial. The capabilities and external resources facilitating liberty and security are different in a poor, oppressive, totalitarian plutocracy than in a prosperous, capitalistic, liberal democracy. The liberty furthered by a particular income or skill set depends on the costs of goods, the (economic) usefulness of the skills, the number of others with similar or better skills, etc. Particular social environmental autonomy space constraints may not be deontologically justifiable, or consistent with other, basic, accepted norms. For example, a maxim generally disallowing the liberty to engage in fair competition is hardly plausible, as is the case for proscribing accidental bumps into others in crowded public spaces. On the other hand, deontically unacceptable would be disrespectful discrimination, such as sexism and racism, or the imposition of nonconsensual duties due entirely to involuntary group membership, such as that of caste or national origin. When provision is feasible, the absence or denial of some standard protections and enablements, such as policing or adequate schools, seems unjustifiable.

Ultimately, capabilities, external resources, and the environment interrelate, perhaps synergistically, in creating and delineating one’s actual, material autonomy space. In light of the spatial metaphor of autonomy space, it might be modeled in this way. Autonomy space can be

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

127 “[O]ne has to be lucky in the match of one’s talents with socially available forms of activity.” BARBARA HERMAN, MORAL LITERACY 269 (2007).

Social environment also affects one’s nurtured abilities. Scanlon writes that if a person is unemployable because of horrible childhood nurture that renders him “both undisciplined and unreliable …, it would not be permissible to deny him welfare support on the ground that his unemployability is due to actions for which he is responsible.” T.M. SCANLON, WHAT WE OWE TO EACH OTHER 292 (2000).

128 “That inevitable kind of harm to others is, as the old Roman lawyers put it, damnum sine injuria. It is part of our personal responsibility – it is what makes our separate responsibilities personal – that we accept the inevitability and permissibility of competition harm.” RONALD DWORFIN, JUSTICE FOR HEDGEHOGS 288 (2011). I speak here of fair competition. “I tentatively conclude that FRE [the categorical imperative Formula of the Realm of Ends] is violated by the kinds of competitive behavior to which most wealthy, honored, and successful people devote most of their lives.” ALLEN W. WOOD, KANT’S ETHICAL THOUGHT 170 (1999).

129 Feasibility is important. As Rawls notes, “most principles [of justice] are only as a prima facie principle, one that is to be weighed in the balance with others.” JOHN RAWLS, A THEORY OF JUSTICE 86 (rev. ed. 1999).
visualized as a multidimensional, ameba-shaped form with chunks cut from the edges, representing external limitations, and holes or gaps on the inside, representing internal limitations.\footnote{Pushing this metaphor further, the internal and external autonomy limitations may not be complete gaps or holes, but rather thinned areas within the “substance” of autonomy. For example, “irresistible impulse” would be represented by an internal gap, whereas “hard-to-resist impulse” thins the autonomy space at that place, i.e., the agent has some power to overcome the impulse but not unhindered freedom. As the impulse becomes easier to resist, until it dissipates altogether, the autonomy “substance” thickens in that metaphorical area.}

C. Types of Autonomy Space

Theory must ultimately accommodate practical realities.\footnote{Kant was aware of this. See IMMANUEL KANT, ON THE COMMON SAYING: THAT MAY BE CORRECT IN THEORY, BUT IT IS OF NO USE IN PRACTICE, in PRACTICAL PHILOSOPHY 273 (Mary J. Gregor ed. & trans., 1996) (1793).} For this topic they include the many different sorts of environmental circumstances that humans face, and the wide range of their capabilities and external resources with which they have to face them. Consequently, autonomy space is not truly the same for everyone even if they are subject to an identical set of deontic maxims. In the last section above, this divergence suggests that the duty to respect others may imply or support a redistributive maxim aimed at assuring everyone a certain minimum expanse of autonomy space.\footnote{A welfare maxim may be seen as creating a positive right. See supra note yy [Wenar].} Otherwise, do they truly have freedom? In this section I further develop some of the observations by discussing three ways of looking at, or three types of, autonomy space: hypothetical, formal, and material.\footnote{Compare Brudner’s trichotomy of formal agency, real autonomy, and community belonging. See ALAN BRUDNER, PUNISHMENT AND FREEDOM 5-6 (2009).} These types of autonomy space become particularly relevant in establishing requitals for invasions. Which autonomy space is to be protected?

Hypothetical autonomy space suggests an ideal.\footnote{“[W]e can distinguish between ‘basic’ autonomy – a certain level of self-government necessary to secure one’s status as a moral agent of political subject – and ‘ideal’ autonomy – the level or kind of self-direction that serves as a regulative idea ….” John Christman & Joel Anderson, Introduction, in AUTONOMY AND THE CHALLENGES TO LIBERALISM 1, 2 (John Christman & Joel Anderson eds., 2005).} A person must have extensive physical and mental capabilities to meet this standard. For guidance, we may look to the ideal rational person sometimes central to particular moral,\footnote{Kant acknowledges that humans fall short of ideal rationality. “Rather he merely employs the concept of the fully rational being to explain, in a rather powerful manner, exactly what is the nature of his divergence from empiricism [e.g., utilitarianism] in ethics.” JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 29 (1970). Parfit, as usual, offers an interesting analysis of rationality. See 1 DEREK PARFIT, ON WHAT MATTERS 111-29 (2011).} political,\footnote{Rawls invokes the standard concept of rationality, less envy, “familiar in social theory.” JOHN RAWLS, A THEORY OF JUSTICE 124 (rev. ed. 1999) (footnote omitted). With a “coherent set of preferences between the options open to him,” the rational person “ranks these options according to how well they further his purposes; he follows the plan which will satisfy more of his desires} or economic theory.\footnote{As for this}
person’s external resources, while not a Gates or a Buffett, she has enough of them to engage fully in the activities of public and private life, whatever her sensible desires.\textsuperscript{138}

The natural and social environment supporting hypothetical autonomy space cannot be specified in detail. Eden is not required. Human characteristics must be kept in mind.\textsuperscript{139} For those of us habituated to temperate climates, it is hard to imagine longing for a severe desert or frozen wasteland, but many people do quite well in such places and may feel disoriented elsewhere. Still, I do not think that we should take the biota, climate, geography, and other native features of a person’s surroundings as a given. An ideal place to exercise one’s autonomy would not require undue time and effort to satisfy basic needs. Beyond meeting basic needs, the environment must allow for additional time and resources for easily preserving one’s security and utilizing one’s liberty to engage in preferred endeavors.\textsuperscript{140} Perhaps you found such a place during a vacation – a short one, most likely, that ended before the bug or rainy season. What is the social environment of your Shangri-La? We cannot take as benchmarks the actual norms of one’s familial, community, religious, political, and economic institutions.\textsuperscript{141} For one, some such norms may not be deontically justifiable, as in a sexist society. Even if a society springs from a strong social contract, one in which the members deeply consent to its terms, we must still reject any of

\begin{itemize}
\item \textsuperscript{138} Cf. supra note yy (Rawls’s conception of primary goods).
\item \textsuperscript{139} See H.L.A. Hart, THE CONCEPT OF LAW 190 (1961) (discussing the contingency of law and morality on human vulnerability).
\item \textsuperscript{140} One’s preferences are, of course, partially informed by the environment in which one is raised. As this again shows, it is not possible to break up this puzzle of autonomy into totally independent pieces.
\item \textsuperscript{141} For Rawls, the parties in the original position behind the veil of ignorance “do not know the particular circumstances of their own society. That is, they do not know its economic or political situation, or the level of civilization and culture it has been able to achieve.” JOHN RAWLS, A THEORY OF JUSTICE 118 (rev. ed. 1999).
\end{itemize}
the norms that violate the categorical imperative, as where, according to Kant, consensual mutilation or slavery is declared acceptable.\textsuperscript{142}

Formal autonomy space is a default standard within a society that substantially satisfies the requirements of the categorical imperative. Each person is presumed to meet, and usually held to, a minimum standard of capabilities.\textsuperscript{143} In the common law, this is said to be those of the reasonable person. Her relevant characteristics are: “Normal intelligence; normal perception, memory, and at least a minimum of standard knowledge ….”\textsuperscript{144} This existing standard may not suffice for our purposes insofar as it incorporates characteristics that do not align with deontic mandates. When, for instance, a reasonable person is said to have “knowledge” that certain classes of persons have particular inferior skills (e.g., sexism, racism), we must exclude as disrespectful these characteristics from our understanding of formal autonomy space.\textsuperscript{145} The external resources assumed by formal autonomy space, like that of the law’s reasonable person, are enough for a person to engage in normal quotidian activities and meet her usual moral and legal duties.\textsuperscript{146} Her resources are not so limited that she feels compelled to engage in high-risk activities or consent to severe contracts. She possesses sufficient enablements. Yet she may fall short

\textsuperscript{142} See supra note yy.

\textsuperscript{143} In other words, a person is presumed to have the skill set needed to reasonably exercise her rights and meet her duties, such as in avoiding negligence and satisfying familial and other obligations. The usual exceptions for children and mental incompetents apply in the law and under deontic principles. “The elements of character of a normal moral agent will not be the same across times and places, but the feature of fit is constant: hers is the character that is at home in her social world.” \textsc{Barbara Herman}, Moral Literacy 305 n.8 (2007).

\textsuperscript{144} \textsc{Dan B. Dobbs}, The Law of Torts 280 (2000) (format revised and footnotes omitted). See Restatement (Second) of Torts § 283 (1977); W. \textsc{Page Keeton et al.}, \textsc{Prosser and Keeton on the Law of Torts} 173-93 (5th ed. 1984). Dobbs also adds characteristics not applicable to formal autonomy space, but suggestive of material autonomy: “all the additional intelligence, skill, or knowledge actually possessed by the individual actor; and the physical attributes of the actor [her]self.” \textit{Id}. For doubts as to the usefulness of the reasonable person standard in the context of copyright, see \textsc{Irina D. Manta}, Reasonable Copyright, 53 B.C. L. Rev. 1303 (2012), and for doubts as to the tort standard as “an empirically observed practice or perception,” see \textsc{Alan D. Miller & Ronen Perry}, The Reasonable Person, 87 N.Y.U. L. Rev. 323, 323 (2012).

\textsuperscript{145} “Actually there are two kinds of ‘objective’ standards sometimes used by courts: appeal to the judgments or characteristics of \textit{most} people or the \textit{average} person, on the one hand, and appeal to an ideal \textit{reasonable} person, on the other.” \textsc{Joel Feinberg}, Harm to Self 210 (1986). “[W]hen \textsc{B}’s choice is other-regarding, and the interests of various third parties, or the public in general, may be affected, then the laws may judge the voluntariness of \textsc{B}’s action by rather more demanding standards.” \textit{Id}

\textsuperscript{146} For example, the reasonable person is presumed to have the resources needed to meet the ordinary standard of care. \textsc{See Denver & Rio Grande R.R. v. Peterson}, 69 P. 578 (Colo. 1902) (Otherwise, “if [the defendant] were extremely poor, the care required might be such as practically to amount to nothing ….”).
of the resources needed to do all that she would sensibly wish, such as to fully engage in civic life by running for public office.\textsuperscript{147}

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

Material autonomy space acknowledges the characteristics and circumstances of the particular agent in question. One’s actual capabilities, such as intelligence and willpower, whether above or below average, are the given. Circumstances may determine the extent to which a person’s actual capabilities suffice to exercise her liberty or protect her security.\textsuperscript{148} For instance, ectomorphic geniuses may be disadvantaged in a strict, violent, subsistence society, while mesomorphic dullards thrive. Likewise for external resources, one’s actual resources are taken as the given. A person may have the hypothetical or formal autonomy space (liberty) to buy a yacht, but not the economic wherewithal. For the same reason, she may have a duty of care (e.g., to support her children) that cannot be met, or leaves her in desperate straits. Finally, the particular agent’s actual natural and social environment, normative and otherwise, frames her material autonomy space.

In sum, material autonomy space refers to the realizable power of a person to exercise and protect her hypothetical or formal autonomy space. Hence, the material autonomy space of a wealthy, talented, unencumbered person surpasses that of her formal autonomy space. It may ap-

\textsuperscript{147} For doubts about the value of political liberty for most people, see Jason Brennan, \textit{Political Liberty: Who Needs It?}, 29(1) SOC. PHIL. & POL’Y 1 (Winter 2012) (distinguishing political liberties from civil liberties).

\textsuperscript{148} For example, in exercising her liberty, a child may be able to truly consent to some choices (e.g., fruit for dessert, not pie), but not others (e.g., employment contract). John Kleinig, \textit{The Nature of Consent, in THE ETHICS OF CONSENT} 3, 13 (Franklin G. Miller & Alan Wertheimer eds., 2010). \textit{See JOEL FEINBERG, HARM TO SELF} 116 (1986) (observing that some voluntary choices can be made by animals, small children, and retarded patients). The minimally competent person, though \textit{de jure} autonomous, “may rule himself badly, unwisely, only partially. He may in fact have relatively little personal autonomy in the sense of \textit{de facto} condition ….” \textit{Id.} at 30. Feinberg diagrams “[\textit{d}e \textit{f}acto and \textit{d}e \textit{j}ure] senses of autonomy, liberty, and freedom,” \textit{id.} at 65 (diagram 19-1). Along these lines, Kolber identifies “liberty-in-fact” that “focuses on our ability to take certain actions without interference with others.” Adam J. Kolber, \textit{The Comparative Nature of Punishment}, 89 B.U. L. REV. 1565, 1587 (2009) (footnote omitted). “[P]eople differ dramatically in the amount of liberty that they have in their baseline conditions because people differ in the amount that others in fact interfere with their available action.” \textit{Id.} Kolber distinguishes this view of liberty from “liberties-under-law” which is suggestive of what I identify as formal autonomy space. \textit{See id.} at 1589. He further identifies “idealized liberties” that “are those that we ought to have under some set of idealized circumstances.” \textit{Id.} at 1593. This seems to map onto my notion of hypothetical autonomy space.
As the discussion of these three types of autonomy space reveals, it is difficult to sharply distinguish one from another. The discussion also shows that a person’s capabilities, external resources, and environment interrelate in complex ways. These complications may especially hang over plausible requital maxims. For example, if a person is wrongfully denied the right to purchase a yacht, should a requital account for the reality that she did not have the material autonomy space, the resources, to purchase it anyway? The common law of negligence aims to return an invadee to her ex ante position. This position is based on her actual, material condition, not her formal autonomy space. This benefits an invadee with unusual, unforeseeable vulnerabilities, but it disadvantages the invader who is held responsible for costly consequences that she could not foresee. Negligence requital maxims that base the remedial standard on formal autonomy space may protect the invader reasonably ignorant of the invadee’s unusual vulnerabilities from the consequences of her choices and actions that were not fully responsible. She is liable for the harms that a “reasonable person” would have suffered, but not the more extensive harms that the actual invadee suffered. But then the compensated invadee is left short of her ex ante position. And if recovery is based on the “reasonable person” invadee when the actual invadee was harmed less than what was foreseeable, the invader must “overcompensate” the invadee. Which standard is fairer, more just? Do either or both of them meet the minimal, formal requirements of the categorical imperative? What about other possible requitals? As a final example, when determining an apt retributive punishment for a criminal act, should an agent’s formal or material autonomy space be proportionately truncated? For the severely penurious criminal, prison may offer more benefits to her than does the outside world. For the rich and famous, even a moment in prison may be devastating. Should this be relevant?

D. The Declining Marginal Increase of Autonomy Space

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

The economic notion of the declining marginal utility of wealth may largely get to the same place as the idea of marginal changes in autonomy space. Insofar as economists posit

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150 See infra note yy (discussion of the “thin skull” rule).


153 See, e.g., RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 75-76 (2d ed. 1977). “What makes the law of complicity necessary in the example I gave is the principle of diminishing marginal returns, familiar from economics: the last misrepresentation adds less to damages than the
that everything can be priced, then wealth suggests autonomy space. Progressive taxation may be supported, then, by the declining marginal increase of autonomy space as well as of the declining utility of wealth. But wealth may not equate to the liberty and security freedoms within autonomy space. In an environment in which wealth per se is not valued or is actually disvalued (e.g., a religious community renouncing materialism), changes in wealth would diverge from changes in autonomy space. Similarly, for a person without access to markets, such as an isolated prisoner or recluse, wealth may be useless as a practical matter.

The concept of the declining marginal increase of autonomy space implies that the material autonomy space loss to an invadee may differ from a like gain to the invader. The rich invadee may lose less autonomy space from a $100 theft than the poor invader gains by it. Requitals for autonomy space invasions also present this asymmetrical phenomenon. After compensation for a tort, such as a battery, the defendant’s autonomy space may shrink more or less than the plaintiff’s autonomy space then enlarges. Cognitive scientists find that autonomy space losses are felt more than equal gains.\textsuperscript{154} Even after a simple wealth transfer between two equally situated parties (i.e., equal material autonomy spaces), there is an asymmetry in the effects since one suffers a loss while the other obtains a gain. Typically, the loss has a greater felt impact.\textsuperscript{155} A bottom line is that pure wealth-transfer-type requitals for autonomy space invasions, and other types of requitals as well, if designed to rebalance or equalize the invader’s compensation or punishment and the invadee’s harms, may not restore their relative or absolute autonomy spaces. Much depends on the prior baselines of the two parties, among other things.

IV. Autonomy Space Boundaries

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

A. Traditional Baselines

next-to-last misrepresentation, which adds less than the next-to-next-to-last misrepresentation, which adds less than the first misrepresentation.” LEO KATZ, BAD ACTS AND GUILTY MINDS 254 (1987). Cf. Robert H. Frank, The Frame of Reference as a Public Good, 107 ECON. J. 1832, 1832 (1997) (“Does consuming more goods make people happier? For a broad spectrum of goods, available evidence suggests that beyond some point the answer is essentially no.”).


\textsuperscript{155} This may also be the case at an initial invasion. If, say, an invader steals $100, the invadee feels it as a loss while the invader feels it as a gain.
A harm principle is the classic boundary marker demarcating baseline autonomy space. The best-known harm principle is J.S. Mill’s: self-regarding harm falls within the range of personal freedoms and, hence, is not subject to governmental intervention, while other-regarding harm may be subject to regulation.\textsuperscript{156}

For self-regarding harm, the claim in deontic terms is that because such harm does not wrongfully harm another person, there is no violation of any duty to others.\textsuperscript{157} Harming oneself is not disrespectful of others. Self-regarding harm may be self-disrespectful and therefore violate a duty to oneself, as in certain suicides,\textsuperscript{158} but it does not, by itself, violate a duty to other persons. In these circumstances others must defer to the agent’s choice.

Other-regarding harm may or may not be wrongful.\textsuperscript{159} Under existing law, harms from fair competition and “pure accident”, for example, are not remediable, rightfully so in the view

\textsuperscript{156} See John Stuart Mill, On Liberty, in Utilitarianism, Liberty, and Representative Government 81, 176-200 (1st ed. London 1869). As a utilitarian, Mill based his harm principle on the argument that the liberty it allows will increase overall social utility. See id. Nonetheless, Mill “suggests that it is an insult to the dignity of persons to try to save them against their will, to save them from themselves by means of state coercion.” George Kateb, Human Dignity 102-03 (2011) (without citation). Feinberg specifies a harm principle: “It is always a good reason in support of penal legislation that it would be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is no other means that is equally effective at no greater cost to other values.” Joel Feinberg, Harm to Others 26 (1988). For nine “commonly proposed liberty-limiting principles”, see id. at 10-14, 26-27. Sadurski sees Rawls’s deep principle of the “priority of the right over the good” as “merely a re-statement of the [Millian] ‘harm principle’. ” Wojciech Sadurski, Social Justice and the Problem of Punishment, 25 Isr. L. Rev. 302, 328 (1991) (referring to John Rawls, A Theory of Justice 393 (rev. ed. 1999)). “There is significant controversy within the philosophical literature both as to how to understand the Harm Principle (What is to count as a harm? Do offensive actions count as harms under this standard?), and as to the merits of that principle.” Brian H. Bix, Theories of Contract Law and Enforcing Promissory Morality: Comments on Charles Fried, 45 Suffolk U. L. Rev. 719, 725 (2012) (footnote omitted). For the applicability of the harm principle to contract law, and surrounding controversies, see id. at 725-33.

\textsuperscript{157} That self-regarding harm may merge into other-regarding harm, see Ronald Dworkin, Taking Rights Seriously 263 (1978); Glyn Morgan, The Mode and Limits of John Stuart Mill’s Toleration, in Toleration and Its Limits 139, 147-50 (Melissa S. Williams & Jeremy Waldron eds., 2008).

\textsuperscript{158} Kant insists that the categorical imperative requires one to be respectful of one’s own self as well as others. This disallows, in his view, slavery contracts, self-mutilation, and, perhaps, certain consensual sexual conduct, among other things. See supra note yy.

\textsuperscript{159} “[T]he harm principle sets but a threshold of legitimacy for the use of state power. It sets a necessary condition, not one that is necessary and sufficient.” Dori Kimel, Fault and Harm in Breach of Contract, in Fault in American Contract Law 271, 282 (Omri Ben-Shahar & Ariel Porat eds., 2010). “Mill seems to have been largely oblivious to the unavoidably moralized nature of the harm principle, assuming that relatively mechanistic application of it was possible.” Michael J. Trebilcock, The Limits of Freedom of Contract 61 (1993) (footnote omitted).
of most. Psychic harms pose some of the most difficult issues for boundary marking. While some conduct may psychically harm others because, say, they are upset from simply being aware of it (e.g., particular private sexual activities), such “knowledge” harm need not be deontically wrongful. The agent usually is not disrespecting the objectors. She is not using them as a means only. She is not interfering with their liberty or truncating their rightful security. Though one generally has a security interest in avoiding psychic harms from the conduct of others, this must be carefully circumscribed, for otherwise, near the bottom of this slippery slope, are claims such as, “Your legitimate, earned success has aroused painful envy in me and therefore has wrongfully harmed me.” A proscriptive maxim on these grounds would strike a balance between liberty and security that unduly favors psychic security. Nonetheless, adopting a proper balance is quite difficult. The central deontic pillar of respect for the dignity of moral persons helps to point a way out of this complexity. Psychic harm of others is wrongful if it arises from conduct primarily disrespectful of them, but not otherwise, even if said to be self-disrespectful. Under this line drawing, private sexual conduct between consenting adults is not disrespectful of others if engaged in for personal reasons, but is disrespectful if motivated by the desire to noisily upset knowing neighbors. This may be generalized to public events. If public conduct is engaged in,  

160 Utilitarian economists favoring strict enterprise liability may disagree with respect to “pure accident”. Certainly they would not disagree about fair competition. That a deontological libertarian may have difficulty justifying the harms from fair economic competition, see Jonathan Wolff, Libertarianism, Utility, and Economic Competition, 92 VA. L. REV. 1605 (2006).  
161 “In general, using another as a mere means is thought to belong in the same family as the concepts of ‘manipulation, dehumanization, exploitation, and disrespect.’ [It] may also be understood in the negative – as failing to respect another’s inviolability, rationality, or moral status.” Russell L. Christopher, Deterring Retributivism: The Injustice of “Just” Punishment, 96 NW. U.L. REV. 843, 927 (2002) (footnotes omitted). “In addition to using another as a tool or commodity, using another without their consent is another common conception of using someone as a mere means.” Id. at 928 (footnote omitted). For various viewpoints, see id. at 927-30. Parfit analyzes the “Mere Means Principle”, and finds it defective. See 1 DEREK PARFIT, ON WHAT MATTERS 212-32 (2011). But, Christopher argues, relying on words from Robert Nozick, “not only is it permissible to use offenders as a means, but the principles of retributivism might affirmatively require it [pursuant to “retributive matching desert”].” Id. at 933 (citing ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 372 (1981)). At this point, I am left behind.  
162 “The harm principle is designed to draw the boundaries of criminal liability … [but] the resulting boundary is vague, elastic, and porous.” Meir Dan-Cohen, Thinking Criminal Law, 28 CARDOZO L. REV. 2419, 2421 (2007). For summaries of Feinberg’s suggested considerations when drawing boundary lines, see JOEL FEINBERG, HARM TO OTHERS 214-17, 243-45 (1984).  
163 Because of “a growing disaffection with the harm principle [such as its expansiveness] and the challenge of multiculturalism,” Dan-Cohen advances a “dignity principle”. MEIR DAN-COHEN, HARMFUL THOUGHTS 150, 152-53 (2002). Similarly, “Michael Köhler has argued that the entire criminal law should be understood as a response to a violation of the victim’s freedom.” GEORGE P. FLETCHER, 1 THE GRAMMAR OF CRIMINAL LAW: FOUNDATIONS 41 (2007) (footnote omitted).  
164 Compare Kant’s requirement that duty is to be done for duty’s sake, and if done for mixed motives, that the duty motive predominate. See, e.g., CHRISTINE M. KORSGAARD, CREATING THE KINGDOM OF ENDS 55-67 (1996); 2 DEREK PARFIT, ON WHAT MATTERS 169-79 (2011); ALLEN
say, to express pride in one’s characteristics or values (e.g., gay pride) or to assert one’s liberty claims (e.g., civil rights), then it is not disrespectful of others. If the conduct is primarily aimed at vexing others, it is disrespectful.165

B. Boundary Markers

Other-regarding wrongful harms are established by deontic maxims. An agent, by adopting a maxim, demarcates an autonomy space boundary between herself and others. Subject to later boundary adjustments through consent, crossing this marker constitutes, as the agent sees it, a wrongful harm. If another person crosses the marker, he wrongfully harms the agent. If the agent crosses her own adopted marker, she wrongfully harms another person. Whether this other person perceives his harm from the agent as wrongful depends on whether he has adopted a comparable maxim. The harm may be wrongful from the actor’s perspective but nonwrongful from the other’s perspective, and vice versa. For example, one person may adopt a battery maxim that disallows nonconsensual touchings of items physically connected to a person (e.g., a worn hat), while another person may adopt a battery maxim that also disallows touchings of closely associated items (e.g., a car in which a person is riding).166 This signals practical trouble in the individualistic world supposed here. Some of these potential conflicts may be ameliorated by higher order maxims, as where an agent adopts a maxim to follow respectful social norms. But sooner or later the complexities of an individualized deontic realm must be confronted.

W. WOOD, KANTIAN ETHICS 24-42 (2008). Compare also the standard in common law nuisance law whereby a fence built for the landowner’s reasonable use is not a nuisance, but a similar spite fence is. See DAN B. DOBBS, THE LAW OF TORTS 1329 (2000); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 624 n.65 (5th ed. 1984).

165 Since motive or purpose for the offensive conduct is central to the line drawn, this differs from Feinberg’s Offense Principle: “It is always a good reason in support of a proposed criminal prohibition that it is necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted.” JOEL FEINBERG, HARM TO OTHERS 26 (1984). “The distinction between hurtful and offended states is to some degree arbitrary, based as it is on somewhat obscure analogies, and lumping together, as it does, quite disparate conditions under common labels, in some instances with considerable linguistic strain.” Id. at 46-47. “There is one kind of offended state that can probably never satisfy this requirement [of proscription], namely the shock of disappointment occasioned by the bare knowledge that other persons are doing, or may be doing, immoral things in private with legal impunity.” Id. at 50. For criticism of Feinberg’s line drawing, see, e.g., GEORGE P. FLETCHER, I THE GRAMMAR OF CRIMINAL LAW: FOUNDATIONS 185 (2007); Larry Alexander, The Philosophy of Criminal Law, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 815, 858-64 (Jules Coleman & Scott Shapiro eds., 2002); Larry Alexander, Harm, Offense, and Morality, 7 CAN. J.L. & JURISPRUDENCE 199 (1994); David W. Shoemaker, “Dirty Words” and the Offense Principle, 19 LAW & PHIL. 545 (2000).

In principle, a person cannot rationally adopt a set of maxims that create inconsistent boundary markers. Prima facie or pro tanto rights and duties may conflict, but individual maxims explicitly or implicitly include “except when ...” or “unless …” clauses and other provisos that coherently weave together the set of maxims. For example, an agent who disappoints another’s aroused expectations (“I promise to meet you at 1:00, on the dot.”) in order to effect an easy rescue would not be violating her apparent maxims against such disappointment if her promisekeeping, reliance, or expectation maxims (implicitly) include the proviso, “except when necessary to make an easy rescue.”

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

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

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

170 Parfit finds flaws in Kant’s universalization principle. See 1 DEREK PARFIT, ON WHAT MATTERS 275-419 (2011). Indeed, in his two-volume tome, Parfit finds flaws in virtually all of Kant’s principles, though he tweaks them to make them, in his view, plausible and useful. In particular, see 2 DEREK PARFIT, ON WHAT MATTERS 652-718 (2011).

171 See, e.g., 1 DEREK PARFIT, ON WHAT MATTERS 315 (2011). “Principles of action – practical principles – refer to types of action… [P]ractical principles usually specify the domain of agents for whom they are to be regarded as relevant.” ONORA O’NEIL, BOUNDS OF JUSTICE 51 (2000). In terms of equal treatment, “[w]hat we actually mean when we speak of equality in a certain legal system is that we accept the choice of particular properties as relevant to differentiated treatment.” WOJCIECH SADURSKI, GIVING DESERT ITS DUE 82 (1985). “[N]o objective and non-controversial standard of ‘relevance’ can be found.” Id. (footnote omitted). “The reasonableness of the choice of certain criteria for classification of people by legal rules rests upon value judgments …” Id. at 83. Nonetheless, an overarching principle of equality demands “equal respect
ims, as the seemingly infinite nuances of possible circumstances and interweavings among maxims play out. While Kant has been incorrectly accused of being an absolutist about unqualifiable rules, nonetheless, most people would create exceptions to broad maxims, as in the rescue example above. Indeed, a person who passed up an easy rescue in order to keep a nonessential promise would probably be considered a moral monster. If an agent chooses a set of maxims that fails to account for potential conflicts, the set is irrational in the sense of not being complete and coherent. To remedy this, an agent might adopt higher levels of meta-maxims to deal with incompleteness or prima facie conflicts within her set of explicit, lower-level maxims.

for all human beings and equal concern for them, irrespective of their qualities and characteristics.” Id. at 96.

172 “How many valid moral principles are there, then? An indefinite number, I would say.” T.M. Scanlon, What We Owe to Each Other 201 (2000).

173 “The notion that Kantian ethics is committed to strict exceptionless rules because it regards moral principles as categorical imperatives is based on the crudest misunderstanding. A categorical imperative … is far from implying that the obligatoriness of particular moral rules or duties is unconditional.” Allen W. Wood, Kantian Ethics 63 (2008). Under Kant, reasons for exceptions cannot “always be formulated in precise rules, telling us in general terms precisely when to make exceptions. Judgment in Kant’s view is a talent that may be developed through experience but cannot be formulated in any set of rules.” Id. Cf. Onora Ó Neill, Bounds of Justice 53 (2000) (“Fears that principles, and especially rules, must regiment those who live by them are misplaced ….”). On the other hand, Hill refers to “the common criticism that Kant was mistaken to hold that substantive principles such as ‘Do not lie’ and ‘Uphold the law of the land’ are absolutely binding in all circumstances. Such unconditional prohibitions, I maintain, do not follow from Kant’s basic moral theory, despite what he himself thought ….” Thomas E. Hill, Jr., Introduction, in Respect, Pluralism, and Justice 1, 3 (2000).

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

175 “A collision of duties and obligations is inconceivable.” Immanuel Kant, The Metaphysics of Morals, in Practical Philosophy 353, 379 (Mary J. Gregor ed. & trans., 1996) (1797). There may be slippery slopes if one insists on narrow maxims to account for potential conflicts with other maxims. “If … we concentrate upon the details of each case and allow maxims to be quite specific, then it seems we can will as universal law the maxim of virtually any act that we are willing to do.” Thomas E. Hill, Jr., Dignity and Practical Reason in Kant’s Moral Theory 62 (1992). Well, not quite. We cannot will a maxim disrespectful of others. This is limitation enough. In addressing the problem of “adjust[ing] our ethical categories and principles reciprocally until we get whatever result we want,” Korsgaard observes, “Of course there are dangers of this kind, but it is not clear that we have any option but to face them, and to try to be intellectually honest.” Christine M. Korsgaard, Creating the Kingdom of Ends 357-58 (1996). “Our discussion will be adequate if it has as much clearness as the subject-matter admits of ….” Aristotle, Nichomachean Ethics bk. I, ch. 3, in The Basic Works of Aristotle

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935, 936 (Richard McKeon ed., 1941). The idea of specifying a complete and coherent set of rights “all the way down” has been referred to as “specificationism”. Leif Wenar, Rights, The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/fall2010/entries/rights (last visited Aug. 7, 2013) (citing Russ Shafer-Landau, Specifying Absolute Rights, 37 ARIZ. L. REV. 209 (1995) (“each right is defined by an elaborate set of qualifications that specify when it does and when it does not apply; a set of qualifications that define the right’s ‘space.’”)). Objections to specificationism are: fully specified rights are unknowable; they are conclusory; and, they cannot explain the “residue” of a “defeated” right, as where a starving person may have a right to steal food, but still has a duty to, say, apologize for it. See Wenar, supra. For the last objection, we could say that there is no such right to steal, but that the requital objection requires, under the circumstances, only an apology. Specificationism supports “Kant’s bold proclamation that ‘a conflict of duties is inconceivable.’” Larry Alexander & Michael Moore, Deontological Ethics The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/spr2009/entries/ethics-deontological/ (last visited Aug. 7, 2013) (citation to Kant omitted). “[R]easons for believing it are difficult to produce.” Id. 176 “[A] subject may have, in a rule he prescribes to himself, two grounds of obligation …. When two such grounds conflict with each other, practical philosophy says, … that the stronger ground of obligation prevails …. ” IMMANUEL KANT, THE METAPHYSICS OF MORALS, IN PRACTICAL PHILOSOPHY 353, 379 (Mary J. Gregor ed. & trans., 1996) (1797). See Russ Shafer-Landau, Specifying Absolute Rights, 37 ARIZ. L. REV. 209, 212-13 (1995). This suggests Dworkin’s controversial “right answer” thesis. See RONALD DWORKIN, A MATTER OF PRINCIPLE 119-45 (1985). Chapman, discussing Frederick Schauer’s and Ronald Dworkin’s similar views, writes, “the idea is that the rule, properly and completely articulated as a rule, must contain all the various ‘unless’ clauses that are relevant to the application of the rule.” Bruce Chapman, Law Games: Defeasible Rules and Revisable Rationality, 17 LAW & PHILO. 443, 449 (1998) (footnote omitted). Without full specification prior to application, Schauer argues, “there is essentially no rule.” Id. (footnote omitted). On the other hand, Hill observes, “the kingdom of ends ideal, like any rule-generating procedure, must face the possibility that, in practice, it will produce moral dilemma, gaps, and disagreements.” THOMAS E. HILL, JR., A KANTIAN PERSPECTIVE ON MORAL RULES, IN RESPECT, PLURALISM, AND JUSTICE 33, 52 (2000). “Given how limited and imprecisely specified the commitments of Kantian legislators are, it seems obvious that some questions about moral rules will not be determinately resolvable.” Id. “For practical Kantians, then, apparent dilemmas pose tasks for further moral thinking rather than a reason to abandon the framework or simply to marvel at the tragic absurdity of life.” Id. at 53. Relatedly, Munzer advances this approach: “Morality may be composed of different types of basic units – for instance, specific ‘rules’ that apply pretty rigidly to actions they cover, together with broad ‘principles’ that exert less definitive force where they apply.” Stephen R. Munzer, Persons and Consequences: Observations on Fried’s Right and Wrong, 77 MICH. L. REV. 421, 427 (1970) (citing Marcus G. Singer, Moral Rules and Principles, in ESSAYS IN MORAL PHILOSOPHY 160 (A.I. Melden ed., 1958)). This is suggestive of R.M. Hare’s “two levels of moral thinking – intuitive and critical…. Critical thinking resolves conflicts [in intuitive principles] and in general tries to select the best set of intuitive principles.” Stephen R. Munzer, Intuition and Security in Moral Philosophy, 82 MICH. L. REV. 740, 740 (1984) (reviewing R.M. HARE, MORAL THINKING: ITS LEVELS, METHOD, AND POINT (1981)).
In the real world, an agent rarely if ever expressly adopts maxims. Instead, she reveals or manifests chosen maxims and their nuances by her conduct over time, if consistent, in response to newly faced moral dilemmas. Maxims are adopted and refined piecemeal. If asked, she may not know beforehand the details of her own maxims. It may require the kiln of difficult dilemmas to harden her considered or spontaneous choices. This is, in some ways, like the common law at work. Consequently, when a person claims that an agent has violated her own maxim and has therefore wrongfully harmed him, and the agent denies that any of her maxims encompass his claim, the claimant’s response might be, “But your prior conduct in response to a morally indistinguishable situation revealed that you have adopted a maxim that would protect me from your action.” How likely is it that the claimant will be able to assert this? To confront this practical reality, we must invoke the state or other authoritative sources to arbitrate many of these problems in specifying a full set of enforceable maxims.

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

V. Harm

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177 While if pressed, an agent could normally state and justify the maxim under which she is acting, “Kant does not claim that a rational agent either always does or always must have an explicit maxim consciously in mind while acting.” Roger J. Sullivan, Immanuel Kant’s Moral Theory 28 (1989).

178 “The most important of these factors which show that in acting we have applied a rule is that if our behaviour is challenged we are disposed to justify it by reference to the rule …” H.L.A. Hart, The Concept of Law 136 (1961). Evidence that we accept the rule “may be manifested not only in our past and subsequent general acknowledgements of it and conformity to it, but in our criticism of our own and others’ deviation from it.” Id.

179 “This mediation between freedom and security means that every actor must accept a measure of external constraint, not precisely specified ex ante, on her movements.” Anita Bernstein, The Communities That Make Standards of Care Possible, 77 Chi.-Kent L. Rev. 735, 737 (2002).

180 See Jody Kraus, The Correspondence of Contract and Promise, 109 Colum. L. Rev. 1603, 1627-30 (2009) (“second-order moral responsibility”). Since promissory obligations stem from autonomous choice, “the remedial moral duties, if any, that attach to the violation of those obligations should also be subject to the will of the individuals who create the obligations.” Id. at 1629-30 (footnote omitted). Are there requital maxims for violation of requital maxims? Third-order and higher maxims?
Our moral agent is ready to establish the boundaries of her autonomy space and, owing to the universalization mandate of the categorical imperative, the boundaries of everyone else’s autonomy space, as she sees fit. She needs at this point to adopt a full set of substantive and re quir-tal maxims that balance her interests in liberty and security. For this task she must develop a sense of the harms caused by other persons that she would choose to be protected from and, reciprocally, that she would disallow herself from inflicting on others. The harms must survive the filter of the categorical imperative, of course. Offense at a touching simply because it was by a member of a disfavored, innate outgroup will not make it through this filter.\(^\text{181}\) That would be disrespectful.

The most prominent definition of “harm” is by Joel Feinberg. A “harm”, in one sense, is a “setback to interests.”\(^\text{182}\) But there is “harm” and there is “harm”,\(^\text{183}\) and there is “harm” and there is “wrongful harm”.\(^\text{184}\) For purposes of identifying relevant harms,\(^\text{185}\) let us begin with

\(^{181}\) That discerning “‘bad’ pleasure or desires, for example, those related to sadism,” may be problematic, see Amartya Sen, Rights and Agency, 11 Phil. & Pub. Aff. 3, 13 n.17 (1982).

\(^{182}\) “Feinberg expounds harm in three senses: (i) harm as damage, (ii) harm as a setback to interests, and (iii) harm as wrongdoing. Harm as used in the harm principle is an amalgamation of sense two and three.” Dennis J. Baker, The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation, 33 Austl. J. Legal Phil. 66, 74 (2008) (footnote omitted). For Feinberg’s own explication, see Joel Feinberg, Harm to Others 31-36, 105-06 (1984). Gerald Dworkin examines “Feinberg’s views about harms and points out some problems and puzzles in his theory.” Gerald Dworkin, Harm and the Volenti Principle, 29(1) Soc. Phil. & Pol’y 309, 311 (Winter 2012). “The word ‘harm’ is used … to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause.” Restatement (Second) of Torts § 7(2) (1977).

\(^{183}\) John Kleinig writes that “harm remains ‘the most underdeveloped concept in our criminal law.’”\(^\text{9}\) Even the most cursory reflection shows that harm is conceptually foggy, susceptible to fictional applications, and subject to ideologizing,” Id. (footnote omitted). “[H]arm’ is itself a morally loaded (and essentially contested) concept …” Neil MacCormick, Legal Right and Social Democracy 29 (1982) (footnote omitted). “[T]he question is … not what ‘harm’ really means, but what reasons of principle there are for preferring one conception to another … [W]hich conception answers more adequately to the purposes for which the concept is deployed.” Jeremy Waldron, Liberal Rights 119-20 (1993) (quoted in Alan Wertheimer, Remarks on Coercion and Exploitation, 74 Deny. U.L. Rev. 889, 893 n.12 (1997)). Waldron suggests, in our context, that we need to distinguish “harm” from “wrongful harm”. The real conceptual problem, I believe, is not harm in itself, but rather wrongful harm. For some of the controversies, see, e.g., Stephen Perry, Harm, History, and Counterfactuals, 40 San Diego L. Rev. 1283 (2003); John C.P. Goldberg, Rethinking Injury and Proximate Cause, 40 San Diego L. Rev. 1315 (2003).

\(^{184}\) In specifying “[t]he sense of ‘harm’ as that term is used in the harm principle,” Feinberg writes, “only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense.” Joel Feinberg, Harm to Others 36 (1984). See Dennis J. Baker, The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation, 33 Austl. J. Legal Phil. 66, 74 (2008). Gerald Dworkin looks at the complexities somewhat differently from my view: “So, one can be injured but not harmed (no wrong).
Kant. He places the duty to respect another’s dignity as the key principle of practical reason. Violation of this duty, then, produces a dignitary harm. This type of harm draws a good deal of attention in what follows. In law and morals there are also other recognized harms: those stemming from physiology, psychology, and economics. Along these lines, Feinberg identifies the harm within his harm principle as a setback to a welfare and associated interests. A welfare interest, at first blush, appears to spring from consequentialist, utilitarian, or communitarian moral reasoning, not deontic principles. Practical reason, however, is quite open to, indeed involves, consequential considerations in adopting possible maxims, so long as they do not run


“The trichotomy of interests delineated in [Feinberg’s] harm principle includes welfare interests and those security and accumulative interests that cushion our welfare interests.” Dennis J. Baker, *The Harm Principle vs Kantian Criteria for Ensuring Fair, Principled and Just Criminalisation*, 33 AUSTL. J. LEGAL PHIL. 66, 74-75 (2008). Brudner neglects Feinberg’s “accumulative interests” in criticizing his harm principle as inadequate to explain the criminal law, pointing out that a protected dignitary interest (as I would call it) is necessary to do the explanatory work. See Alan Brudner, *Agency and Welfare in the Penal Law, in ACTION AND VALUE IN CRIMINAL LAW* 21, 21-24 (Stephen Shute et al. eds., 1993) (later emphasizing the centrality of “respect for agency”, “freedom”, or “liberty”). Hampton equates “loss” and “harm”, and defines them: “A harm or loss is a disruption of or interference in a person’s well-being, including damage to that person’s body, psychological state, capacities to function, life plans, or resources over which we take this person to have an entitlement.” Jean Hampton, *Correcting Harms Versus Righting Wrongs: The Goal of Retribution*, 39 UCLA L. REV. 1659, 1662 (1992).

But see discussion supra notes yy-yy (enablements).

“All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would simply be irrational, crazy.” JOHN RAWLS, A THEORY OF JUSTICE 26 (rev. ed. 1999). “It is important to realize … that Kant is not saying that the value of ends is irrelevant in determining duty, only that their value is not a function of the degree to which they are desired.” JEFFRIE G. MURPHY, KANT: THE PHILOSOPHY OF RIGHT 31 n.20 (1970). “Nonconsequentialism does not deny that consequences can be a factor in determining the rightness of an act.” F.M. KAMM, INTRICATE ETHICS 11 (2007). “Kant … is often taken to be the quintessentially anti-consequentialist deontologist. The rules that he champions as ‘categorical imperatives’ may not have been championed on grounds of consequences, but then Kant also proceeds to show how wonderful the consequences of such rules can actually tend to be.” AMARTYA SEN, RATIONALITY AND FREEDOM 639 (2002). “[I]n justifying a practice, we must look to the categories of the Right and the Good, and we must be satisfied that it violates no principles of right, and that it
afoul of the categorical imperative.\textsuperscript{191} In considering the adoption of a possible maxim, an agent contemplates the potential results of universalizing it,\textsuperscript{192} for she will be subject to both the benefits and the burdens of the maxim.\textsuperscript{193} The foreseeable effects may or may not have moral overtones, or may have normative sources other than deontology, as where efficiency or community values are given weight and weighed.\textsuperscript{194} Consequences aside, there is nothing inherently disre-

accomplishes some Good.”  JACOB ADLER, THE URGINGS OF CONSCIENCE: A THEORY OF PUNISHMENT 13 (1991) (referring to JOEL FEINBERG, HARM TO OTHERS 6 (1984)).  See RONALD DWORKIN, A MATTER OF PRINCIPLE 411 n.10 (1985).  By “maxims”, “Kant usually means our policies and their underlying aims.” 1 DEREK PARFIT, ON WHAT MATTERS 275 (2011).  The consequentialist considerations in choosing which maxims to adopt make some room for welfarism, as Kaplow and Shavell note in the context of corrective justice: “[P]ractically any substantive principle … could be embedded in corrective justice.  Because the corrective justice literature neither specifies nor defends alternative normative visions, it does not contain arguments that might challenge our case for relying solely on welfare economics for legal policy analysis.”  LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 95 (2002) (footnotes omitted).  Once deontic limitations are brought to bear, welfare economics will not do all the work.  “Especially to be avoided is the idea that Kant’s doctrine provides at best only the general, or formal, elements for a utilitarian or indeed for any other moral conception.”  RAWLS, supra, at 221 n.29.

\textsuperscript{191} As Nozick puts it, the categorical imperative is merely a side constraint on plausible maxims that does not exclude other considerations, normative or otherwise.  See ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 28-33 (1974).  Dworkin expresses a similar idea in terms of rights as trumps.  See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY xi (1977) (“Individual rights are political trumps held by individuals.”); Ronald Dworkin, Rights as Trumps, in THEORIES OF RIGHTS 153, yy (Jeremy Waldron ed. 1984).

\textsuperscript{192} Kant, for example, discusses the consequences of rejecting a promisekeeping maxim.  See IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY 41, 74 (Mary J. Gregor ed. & trans., 1996) (1785) (To universalize a law that one may intentionally break a promise when needy “would make the promise and the end one might have in itself impossible, since no one would believe what was promised him but would laugh at all such expressions as vain pretenses.”).  “To make a rational choice means that a person has decided that something is worth pursuing as an end (or ‘object’ or ‘matter’)…. Moreover, our adoption of a material maxim always indicates that we have an interest in the end of that action.”  ROGER J. SULLIVAN, IMMANUEL KANT’S MORAL THEORY 63 (1989).  “[O]n the best reading of the categorical imperative test, the maxim of an action which is tested by it includes both the act done and the end for the sake of which that act is done.”  CHRISTINE M. KORSGAARD, SELF-CONSTITUTION 10 (2009).

\textsuperscript{193} “[R]ights, according to the interest theory, should be seen as inherently limited. The reason is basically this: acknowledging the right of A to x typically involves the imposition of duties on others [and, for deontic maxims, oneself]. Being under a duty is a burden ….”  Andrei Marmor, On the Limits of Rights, 16 LAW & PHIL. 1, 10 (1997).

\textsuperscript{194} “In considering … reasons, mulling them over, one arrives at a view of which reasons are more important, which ones have more weight.”  ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 294 (1981).  Marmor supports Nozick’s point: “The balancing of interests and costs … essential for the determination of the existence of each and every right is not necessarily a utilitarian one…. Cost-benefit analysis is not necessarily a quantitative matter; the intrinsic values and
skeptical about adopting proper maxims that disallow or requite the standard types of legally recognized harms. Indeed, it is quite to the contrary. We may even adopt different monetized thresholds for each type of harm before declaring it wrongful.\(^{195}\) From a functional viewpoint, reflecting on the importance, even necessity, of protection against the standard types of recognized harms provides a more direct way to see them as under the deontic umbrella. Physical, economic, and psychic harms are disablements. They truncate the autonomy, reduce the freedom, of a harmed agent by destroying, hindering, or diverting her resources.\(^{196}\) A physically injured, psychologically distressed, or economically taxed person has fewer real, material options to choose among.

A. Types of Harms

While potential benefits are crucial to the balancing involved in the choice to adopt a particular maxim, it is the costs, or harms, that receive most of the attention of commentators with a deontic orientation. I will follow suit. In this section I discuss the three general types of harms that the law prominently recognizes – physical, economic, and psychic – though I parse them somewhat differently.\(^{197}\) Then I discuss at greater length a fourth type of harm, identified above, which the law recognizes in a more muted or interstitial manner – dignitary.\(^{198}\)

We are, after all, constructing autonomy from a Kantian perspective.

relative importance of the interests in question matter too.” Andrei Marmor, *On the Limits of Rights*, 16 *Law & Phil.* 1, 13 (1997). Marmor suggests a second step, that of weighing in addition to weighting. Suppose a community weights the value of efficiency as greater than that of social solidarity, say, by two-to-one. In confronting a particular tradeoff choice, however, the community evaluator sees that the efficiency gains are minor in comparison to the substantial solidarity losses. In this case, though efficiency is weightier, the evaluator may decide to reject that protective choice because it is overall outweighed by the solidarity setback.

\(^{195}\) In monetized terms, for example, we might declare that the threshold remediability for physical harm is $0, economic harm is $100, psychic harm is $200, and dignitary harm is $0.

\(^{196}\) “Someone who commits a tort against me robs me of the control I have over some of the resources otherwise at my disposal…. When you negligenty injure me, you interfere with my autonomy in the sense of the control I have over resources at my disposal.” Jules L. Coleman, *Mistakes, Misunderstandings and Misalignments*, xx *Yale L. J.* yy, yy (2012) [ms 9]. “[A] harm, in the sense required by the liberal harm principle, … is an attenuation of capacity or opportunity for action, reducing the range of alternative actions and activities that are available to the person who is harmed.” John Gardner, *On the General Part of the Criminal Law, in Philosophy and the Criminal Law* 205, 243 (Anthony Duff ed., 1998).

\(^{197}\) For the ALI’s division of noneconomic losses (“pain and suffering”) into four main categories, see 2 *American Law Institute, Reporter’s Study, Enterprise Responsibility for Personal Injury* 199-200 (1991).

\(^{198}\) “[H]arm, as defined in this Section, is the detriment or loss to a person which occurs by virtue of, or as a result of, some alteration or change in his person, or in physical things, and also the detriment resulting to him from acts or conditions which impair his physical, emotional, or aesthetic well-being, his pecuniary advantage, his intangible rights, his reputation, or his other legally recognized interests.”
Physical harm, as I use the term, is harm to a person’s body. It does not include harm to property. Harm to property would fall within my broad notion of economic harm.

199 "Every personal injury action … rests on an unspoken assumption that each person owns his own body." Richard A. Epstein, Nuisance Law: Corrective Justice and Its Utilitarian Constraints, 8 J. LEGAL STUD. 49, 50 (1979) (footnote omitted). “Bodily harm is any impairment of the physical condition of the body, including illness or physical pain.” RESTATEMENT (SECOND) OF TORTS § 905 cmt. b (1977). Because purely physical pain is hard, if not impossible, to distinguish from emotional pain, I push physical pain into the category of psychic harm.

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

201 Interestingly, harm to property, such as a theft, may be detrimental to the invader and beneficial to the invadee. For example, an invader may steal a “white elephant”, say, a pet that unex-
nomic harm refers to financial loss. While harm to property is commonly distinguished from harm to other economic interests (e.g., trespass versus breach of contract), I generally run these together, partially because I favor an expansive view of property interests. Nothing essential to my discussion turns on this distinction. Reshuffling these types of economic and other harms would leave my central analysis in place. Moreover, maxims may explicitly subdivide the various harms, as where requital maxims grant relief for some types of economic harm (e.g., medical expenses), but not others (e.g., opportunity costs of litigation).

Psychic harm includes “virtually any form of conscious suffering, both emotional and physical.” Psychic harms, then, have two sources: first, pain and suffering that stem from physical harm; and second, mental or emotional harm, whatever its origin. These two expectedly gives her no pleasure, while the invadee experiences physical, economic, and psychic gains (“At last I’m free of that nipping pest.”). A burdensome heirloom may provide another example.

The Insurance Information Institute supplied this definition of “economic loss”: “Total financial loss resulting from the death or disability of a wage earner, or from the destruction of property. Includes the loss of earnings, medical expenses, funeral expenses, the cost of restoring or replacing property, and legal expenses. It does not include noneconomic losses, such as pain caused by an injury.” [http://www.compuquotes.com/insurance-definition-economic-loss.html](http://www.compuquotes.com/insurance-definition-economic-loss.html) (last visited Sept. 6, 2011). A new Restatement takes another slant, excluding harm to property. “For purposes of this Restatement, ‘economic loss’ is pecuniary damage not arising from injury to the plaintiff’s person or from physical harm to the plaintiff’s property.” RESTATEMENT (THIRD) TORTS: LIABILITY FOR ECONOMIC HARM § 2 (Tentative Draft No. 1, 2012).

DAN B. DOBBS, THE LAW OF TORTS 1050 (2000) (footnotes omitted) (identifying “[t]he pain for which [tort] recovery is allowed …”). For elaboration, see id. at 1051-53. The Restatement (Second) of Torts, in detailing compensatory damages for nonpecuniary harm, specifically identifies humiliation, fear and anxiety, and feelings from loss of freedom. See RESTATEMENT (SECOND) OF TORTS § 905 cmts. d, e, g (1977). Existing law is not generous in protecting against psychic harm. See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 54-60, 359-60 (5th ed. 1984) (“mental distress” and “mental disturbance”). Goldberg notes that, contrary to apparent Rawlsian (i.e., Kantian) principles, while “emotional well-being is a plausible candidate for being the sort of important human interest that law ought to protect, yet the law generally permits us to take substantial liberties with others’ peace of mind.” John C.P. Goldberg, Rights and Wrongs, 97 MICH. L. REV. 1828, 1845 (1999) (reviewing ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW (1999)).

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

For example, “hedonic damages”, going beyond “traditional pain and suffering or mental anguish damages, … compensate for limitations ‘on the injured person’s ability to participate in and derive pleasure from the normal activities of daily life, or for the individual’s inability to
ters of psychic harms significantly interrelate.\textsuperscript{206} Psychic harms beyond physical pain and suffering include insecurity, fear, fright, terror, panic, shock, sadness, dread, anger, outrage, offense, and many other undesirable mental states.\textsuperscript{207} These may arise from, among other things, risks directed at specific individuals with their knowledge, such as assault, the intentional infliction of emotional distress, and criminal attempts. Another important origin of psychic harms is from general, undirected, or immediately unperceived risks created by others, as by reckless practices, inchoate crimes, and recidivism. Psychic harms have many causes. To be relevant here, they must survive the deontic filter. Again, harms from disrespectful emotional reactions do not count.

Dignitary harm arises from a setback to a person’s interest and right to be respected as an autonomous, ethical being, of priceless moral worth equal to that of other ethical beings.\textsuperscript{208} There is no consensus about the meanings of dignity and respect.\textsuperscript{209} As analyzed here, a dignitary harm pursue his talents, recreational interests, hobbies, or avocation.” Samuel R. Bagenstos & Margo Schlanger, Hedonic Damages, Hedonic Adaptation, and Disability, 60 VAND. L. REV. 745, 748 (2007) (quoting a case). “Disability damages” are distinguishable since they “are not based on the effect of disability on life’s enjoyment ….” Id. at 751. “Research on attitudes toward promise and contract indicates that there is a special psychological harm in breaching a contract, a harm that is conceptually separate from the financial or actual losses of the promisee.” Tess Wilkinson-Ryan, Fault in Contracts: A Psychological Approach, in FAULT IN AMERICAN CONTRACT LAW 289, 290 (Omri Ben-Shahar & Ariel Porat eds., 2010). “[W]hen parties interact under an assumption of mutual trust, they may be particularly disappointed by a breach, insofar as the breach feels like a betrayal.” Id. at 291. “People seem to respond more negatively, and more punitively, to harms caused by a trusted agent than identical harms not caused by a trusted agent.” Id. at 291 (citing Cass R. Sunstein, Moral Heuristics, 28 BEHAV. & BRAIN SCI. 531 (2005) (“betrayal heuristic”). “The[\textsuperscript{2]} psychological effects [of burglary in a dwelling] are well documented: [two researchers] found that about a quarter of victims ‘are, temporarily at least, badly shaken by the experience’, and that a small minority of victims suffer longer-lasting effects.” Andrew Ashworth, PRINCIPLES OF CRIMINAL LAW 386 (6th ed. 2009) (footnote omitted).

\textsuperscript{206} Though perhaps obscure, “[t]he basic distinction [from pain and suffering] is that hedonic damages cover not affirmative distress or suffering but foregone gains, as when people are unable to engage in valued activities, such as athletics.” Cass R. Sunstein, Illusory Losses, xx, yy (2007) [ms 4] (footnote omitted). For hedonic damages, “it is extremely difficult to translate the relevant interest into monetary equivalents.” Id.

\textsuperscript{207} “Emotional distress passes under various names, such as mental suffering, mental anguish, mental or nervous shock, or the like. It includes all highly unpleasant mental reactions, such as fright, horror, grief, shame, humiliation, embarrassment, anger, chagrin, disappointment, worry, and nausea.” RESTATEMENT (SECOND) OF TORTS § 46 cmt. j (1977).

\textsuperscript{208} See IMMANUEL KANT, THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY 353, 557, 579 (Mary J. Gregor ed. & trans., 1996) (1797).

\textsuperscript{209} “There does not seem to be any canonical definition of ‘dignity’ in the law.” Jeremy Waldron, Dignity, Rank, and Rights, in 29 THE TANNER LECTURES ON HUMAN VALUES 207, 211 (Suzan Young ed., 2011). For Waldron’s identification of the immanent aspects of legal rights reflecting dignity, see id. at 236-50. “[T]here is no settled agreement in either everyday thinking or philosophical discussion about such issues as how to understand the concepts [of respect and self-

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stems from the objective manifestation of another person’s disregard, dismissal, insult, dispar-

[...]

respect], ... and what the scope is of any moral requirements regarding respect and self-respect.” Robin S. Dillon, Respect, The Stanford Encyclopedia of Philosophy, at http://plato.stanford.edu/archives/fall2010/entries/respect/ (last visited Aug. 7, 2013). “[T]he content of human dignity is something about which thoughtful people disagree.” R. George Wright, Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively, 75 B.U. L. REV. 1397, 1398 (1995). Nussbaum agrees. See MARTHA NUSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 29 (2011) (“Dignity is an intuitive notion that is by no means utterly clear.”). “Dignity is ‘admittedly [an] ethereal concept’ which ‘can mean many things’ and therefore suffers from an inherent vagueness at its core. In fact, ‘[s]ince human dignity is a capacious concept, it is difficult to determine precisely what it means outside the context of a factual setting.’” Rex D. Glensy, The Right to Dignity, 43 COLUM. HUM. RTS. L. REV. 66, 67 (2011) (footnotes omitted). One commentator “identifies three concepts of dignity used by constitutional courts and demonstrates how these concepts are fundamentally different ….” Neomi Rao, Three Concepts of Dignity in Constitutional Law, 86 NOTRE DAME L. REV. 183, 183 (2011). For a summary, see id. at 187-89 (“inherent worth”, “living in a certain way”, “recognition and respect”). Rosen similarly identifies these three meanings of dignity. See MICHAEL ROSEN, DIGNITY 54 (2012) (“status”, “inherent value”, “behavior, character, or bearing”). “The concept of dignity has become debased by flabby overuse in political rhetoric …. But we need the idea, and the cognate idea of self-respect, if we are to make much sense of our situation and our ambitions.” RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 13 (2011). For Waldron’s “controversial” account of dignity as a “status-concept”, see Jeremy Waldron, How Law Protects Dignity, 71 CAMBRIDGE L.J. 200, yy (2012) [ms 2-3]; Jeremy Waldron, Dignity, Rank, and Rights, supra. For reference to scholars and jurists who find the concept of dignity to be too vague to be useful, see ROSEN, supra, at 1-8; Leslie M. Henry, The Jurisprudence of Dignity, 160 U. PA. L. REV. yy, yy (2011) [ms 6-7]. Leslie, identifying five overlapping conceptions of dignity, finds to the contrary of the doubters. See id. at yy [ms 9]. Rao suggests that “dignity”, “a relatively new legal term”, will become less nebulous as the law works out its meaning, as it has with “liberty” and “equality”. Rao, supra, at 190. Two commentators offer a “psychological approach to human dignity [that] can bring logic and consistency back into its meaning and usages.” Doron Shultziner & Itai Rabinovici, Human Dignity, Self-Worth and Humiliation: A Comparative Legal-Psychological Approach, 18 PSYCHOL., PUB POL’Y, & L. yy, yy (2012) [ms 2]. A “thin (or minimal) meaning of human dignity violations ... rests on a shared characteristic of humiliation: diminishing and lowering a person physically, psychologically, symbolically, publicly, individually or collectively.” Id. at yy [ms 11]. “Dignity violations thus involve two aspects: the psychological sense of injured self-worth that may or may not exist in the person who was subjected to the relevant act, and the purpose behind the act that may or may not have been to humiliate and injure self-worth.” Id. at yy [ms 14]. See Denise G. Réaume, Discrimination and Dignity, 63 L.A. L. REV. 645, 672-94 (2003) (“Defining Dignity”).

“Dignity in the Kantian sense is something that persons possess as such and therefore regardless of how they are treated by others: treating a person with pity or contempt or ridicule does not remove her dignity in this Kantian sense ....” Ian Carter, Respect and the Basis of Equality, 121 ETHICS 538, 554 (2011). “[T]he role that dignity plays in Kant’s ethical thinking is not straight-forward (or, unfortunately, easy to explain).” ROSEN, supra, at 19. For explanation, see id. at 19-31. See generally Aurel Kolnai, Dignity, 51 PHIL. 251 (1976).
agement, defamation, contempt, ridicule, spite, malice, or other forms of disrespect. In other words, explicit or implicit denial of a person’s equal moral worth produces a dignitary harm. Disrespect implies a claim of moral superiority contrary to Kant’s egalitarianism among moral agents. The understood meaning of a person’s conduct in this regard, that is, the degree of disrespectfulness, is culturally situated. A pat on the back may be acceptable in some cir-

210 Unlike the false reports within “slander”, “defamation” entails “the willful spreading of true reports about [people] that may bring them into disrepute. Kant condemns this because he thinks we take malicious pleasure in defaming others in order to advance our interests or flatter our self-conceit.” ALLEN W. WOOD, KANTIAN ETHICS 178 (2008).

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

212 “[M]alice might be better characterized as the intentional violation of dignity.” Denise G. Ré-aume, Indignities: Making a Place for Dignity in Modern Legal Thought, 28 QUEENS L.J. 61, 79 (2002).

213 As with respect to mental states relevant to responsibility, “practical judgments … rest on an interpretation of what the agent said and did – viewed against a background of ‘relevant’ circumstances – as manifesting or not manifesting the mental state in question.” PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 47 (2002) (footnote to commentators with a similar approach omitted). See id. at 47-48.

214 “Most criminal acts [requiring mens rea] inflict dignitary harms …. Dignitary harms are the indignities that an actor A inflicts upon S by manifesting that he has so little regard for S that he is ready to abridge S’s legitimate interests in order to aggrandize himself.” PETER WESTEN, THE LOGIC OF CONSENT 149 (2004) (the omitted footnote excluding public crimes, such as tax evasion and bribery). Hampton analyzes what I call “dignitary harm” somewhat differently. “[S]ome [wrongful] moral actions violate [applicable moral] standards in a particular way insofar as they are also an affront to the victim’s value or dignity. I call such an affront a moral injury.” Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. REV. 1659, 1666 (1992). See id. at 1679. “A moral injury is not the same as a wrongful loss or harm.” Id. at 1666.

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

216 “[A] person is morally injured when she is the target of behavior whose meaning, appropriately understood by members of the cultural community in which the behavior occurs, represents her value as less than the value she should be accorded.” Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. REV. 1659, 1670 (1992). “What counts as humiliating or degrading treatment varies drastically from culture to culture …” MICHAEL ROSEN, DIGNITY 127 (2012). See Filimon Peonidis, Freedom of Expression, Autonomy, and Defamation, 17 LAW & PHILOSOPHY 1, 5 (1998). Finnis writes more generally of community standards as the gauge of harm: “Tort law’s distinctive project of compensation is clearly dependent upon a prior set of judgments about what forms of interaction between persons are acceptable within a given community.” John Finnis, Natural Law: The Classical Tradition, in OXFORD
cumstances or societies, but not others. Even if the disrespectful person does not treat the other person with disrespect, in that disesteem is not manifested by any impinging action, her disrespectful attitude still constitutes a violation of the categorical imperative. When such disrespect is manifested, it engenders a dignitary harm.

Under my conception of dignitary harm, all deontic wrongs cause harm. At the very least, a wrong creates a dignitary harm, even if there is no accompanying physical, economic, or psychic harm. A prominent form of dignitary harm is the denial of an invitee’s established claims

HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 1, 45 (Jules Coleman & Scott Shapiro eds., 2002). “[T]o some extent, a community should and does form its judgments of acceptability in the context of tort claims.” Id.

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

“...Kant … stress[es] the moral importance of attitude and gesture aside from their consequences. Mockery is opposed, whether or not it is effective for the purpose of reform or deterrent, because it reflects a disrespectful attitude toward the humanity of others.” THOMAS E. HILL, JR., DIGNITY AND PRACTICAL REASON IN KANT’S MORAL THEORY 55 (1992). Although Kant writes that the duty of respect is negative only – the duty to refrain from disrespectful conduct – “[i]t seems to [Baron] quite clear that duties of respect for others are not strictly negative.” Marcia W. Baron, Love and Respect in the Doctrine of Virtue, in KANT’S METAPHYSICS OF MORALS 391, 400 (Mark Timmons ed., 2002). Hill’s Kantian account treats snobbery as a wrong in itself. See THOMAS E. HILL, JR., SOCIAL SNOBBERY AND HUMAN DIGNITY, in AUTONOMY AND SELF-RESPECT 155, 156-57 (1991). While “...contemporary ethics is mostly focused upon right and wrong action ..., questions about snobbery belong to the ethics of attitudes.” Id. at 156. “Respect … signifies an emotional attitude we owe persons as well as just and courteous conduct displaying that attitude.” ROGER J. SULLIVAN, IMMANUEL KANT’S MORAL THEORY 198 (1989).

“The harm in question [in some intentional torts] need not be experiential; it may be dignitary.” Hanoch Sheinman, Tort Law and Corrective Justice, 22 LAW & PHIL. 21, 32 (2003) (footnote omitted). Smith refers to a “sense of injustice” that seems to relate to dignitary harm. He “assert[s] that tort law is primarily concerned with the sense of injustice. This is because tort law’s function is to resolve disputes, and a plaintiff’s sense of having been wronged is what generates a dispute.” Steven D. Smith, The Critics and the “Crisis”: A Reassessment of Current Conceptions of Tort Law, 72 CORNELL L. REV. 765, 787 (1987) (footnote omitted). “...Thus, when Barry violates Arthur’s right and takes X from him, Arthur has suffered two losses. First, he has lost X; second, he has not received the treatment due to him as a right-holder.” Daniel McDer-
from deontic maxims. The failure to invite someone to join a secular club because of her race or religion occasions a dignitary harm even if she suffers no other type of harm. Though existing law seems to keep dignitary harms largely in the backrooms, if not closets, several torts and crimes acknowledge them. Among those that do to some extent are assault, offensive bat-

mott, *The Permissibility of Punishment*, 20 Law & Phil. 403, 411 (2001). “This second debt is typically, and perhaps understandably, overlooked in discussions of wrongdoing and punishment.” *Id.* McDermott contends that it is this second debt that justifies punishment. *See id.* at 413-30. Ripstein apparently does not see this second, dignitary debt, as a harm. “It is also possible to wrong someone … without doing that person any harm. If I [nonconsensually invade your body or property without any damage], I draw you into my purposes and wrong you, even if, as it turns out, you never learn of my action ….” *Arthur Ripstein, Force and Freedom: Kant’s Legal and Political Philosophy* 22 (2009). *See Andrew Ashworth, Principles of Criminal Law* 29 (6th ed. 2009) (discussing the absence of harm from rape of an unconscious, unknowing, unaffected victim). To the contrary of Ripstein and Ashworth, I would say that you have suffered a dignitary harm from me. For my own purposes, I have used you as a means only. Ripstein notes, “Kant understands wrongdoing as the interference with freedom, not with the setting back of interests.” *Id.* at 68. But as Ripstein also notes, freedom requires a tradeoff, a balancing, of one’s interests in liberty and security. *See supra* note yy. I have invaded your security interest, set back your interest if you will, in being free of disrespect.

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

Dignitary harm does not fall within the reach of Feinberg’s harm principle. Instead, in dealing with coercive paternalism to prevent self-regarding harm (e.g., consensual sadomasochism), Feinberg embraces “‘a liberal departure (though a small one) from the wholly unsupplemented harm principle’, to permit the criminalisation of such ‘infringements of an actor’s autonomy’.” R.A. Duff, *Answering for Crime* 129 (2007) (quoting Joel Feinberg, *Harm to Others* 78 (1984)). By way of explanation, “infringements of autonomy do not fit the Feinbergian model of harm: they are not independently identifiable effects of autonomy-infringing actions; nor is their wrongful impact on the victim a matter of their long term effects on her life.” Duff, *supra* at 129. “Nor is this simply a ‘small’ departure from the Harm Principle. There might be relatively few criminalisable actions that infringe autonomy without causing harm, but actions that are covered by the Harm Principle will also often, perhaps typically, infringe autonomy ….” *Id.* at 129-30. Again, I would have it that disrespect is an independent harm, a dignitary harm, that may fall within the ambit of a harm principle. But whether it is a wrongful harm depends on whether it violates an adopted deontic maxim. A mild practical joke or kidding may bruise one’s ego, but not merit proscription.

221 Speaking generally of “dignitary harm without physical harm”, Dobbs reports, “When the trespassory tort causes no physical harm, the traditional tort rule is that the plaintiff can nevertheless recover substantial as distinct from nominal damages. The idea is loosely linked to the idea of mental distress, but no actual proof of mental distress is required.” Dan B. Dobbs, *The Law of Torts* 79 (2000). The invasion “is regarded as a harm in itself”. *Id.* Courts and commentators often fail to distinguish psychic and dignitary harms. Typically there is no urgency for them to do so since the two harms are usually intertwined.

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battery,\textsuperscript{223} false imprisonment,\textsuperscript{224} defamation,\textsuperscript{225} and, apparently, the intentional infliction of emotional distress.\textsuperscript{226} Trespass to real property may cause only a dignitary harm allowing for nominal

\textsuperscript{222} Blackstone, in describing assault, refers to “assault, \textit{insultus}”. 3 \textsc{William Blackstone, Commentaries} 120 (1768). The torts restatement distinguishes “apprehension” from “tangible and material harm”, indicating that dignitary, not only psychic, harm is protected by assault liability. \textit{See} Restatement (Second) of Torts \S\ 21 cmt. c (1977) (“It is not necessary that [the proscribed act] should directly or indirectly cause any tangible and material harm to the other.”). In discussing “dignitary harm without physical harm,” Dobbs writes that mental distress is not required to recover substantial damages. “The invasion ... is regarded as a harm in itself and subject to an award of damages. [If mental distress is also present,] even without physical harm, [the plaintiff] is entitled to recover for that emotional distress as a separate element of damages.” Dan B. Dobbs, The Law of Torts 79 (2000). But Prosser and Keeton suggest a somewhat different view. “This action [of assault], which developed very early as a form of trespass, is the first recognition of a mental, as distinct from a physical, injury.” W. Page Keeton et al., Prosser and Keeton on the Law of Torts 43 (5th ed. 1984) (footnote omitted).\textsuperscript{223} \textit{See} Restatement (Second) of Torts \S\ 18 cmt. d (1977) (“The actor’s liability is based upon his intentional invasion of the other’s dignitary interest in the inviolability of his person and the affront to the other’s dignity involved therein.”); Dan B. Dobbs, The Law of Torts 55 (2000) (For battery, “an offensive touching is one that infringes a reasonable sense of personal dignity.”); Richard A. Epstein, Torts 16 (1999) (“The law of offensive battery is directed to words or actions by defendant designed to insult or offend plaintiff without putting her at risk of bodily harm.”).\textsuperscript{224} \textit{See} Restatement (Second) of Torts \S\ 35 cmt. h (1977) (“The mere dignitary interest in feeling free to choose one’s own location and, therefore, in freedom from the realization that one’s will to choose one’s location is subordinated to the will of another is ... [not a] perfectly protected interest, such as that in bodily security ...”). Dan B. Dobbs, The Law of Torts 80 (2000). In Whittaker v. Sandford, 85 A. 399, 402-03 (Me. 1912), a falsely imprisoned woman, not closely confined, was given reduced damages because “[t]he case lacks the elements of humiliation and disgrace that frequently attend false imprisonment. She was respectfully treated as a guest in every way, except that she was restrained from quitting the yacht for good and all.”\textsuperscript{225} \textit{See} Restatement (Second) of Torts \S\ 559 (1977) (“A communication is defamatory if it tends so to harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.”). Speaking of defamation, Prosser and Keeton observe, “Since some of the interests served by way of protecting a good reputation are of a peace-of-mind and dignitary nature rather than economic in character, such losses are not readily measurable in monetary terms.” W. Page Keeton et al., Prosser and Keeton on the Law of Torts 843 (5th ed. 1984).\textsuperscript{226} For epistemic and other reasons, courts are wary of granting relief for emotional distress alone, but if the behavior is outrageous enough, relief will be granted. \textit{See} Restatement (Second) of Torts \S\ 46 (1977). Beneath the recovery for emotional distress is seen, arguably, a protected dignitary interest when wariness is overcome. In discussing this tort, Dobbs offers a glimpse. “On the personal rather than the economic level, insult, affront, indignity, trivial annoyance, or the like, are likewise excluded from the outrage category (although perhaps still sufficient in some common carrier cases).” Dan B. Dobbs, The Law of Torts 826 (2000) (footnote omitted). Réaume “argues that dignity, as a legally protected interest, is the appropriate basis for
damages, such as when stepping on another’s concrete driveway results in no other type of harm.\textsuperscript{227} A breach of contract that causes no economic harm may also be seen as causing a dignitary harm only.\textsuperscript{228} Sometimes dignitary harms are noticed by the law, but not protected by remedies, as in certain slights.\textsuperscript{229} The criminal defense of provocation may be partially based on the idea that the provoker had inflicted a dignitary harm on the provoked actor by effectively disrespecting or demeaning her.\textsuperscript{230}

\begin{footnotesize}
\textsuperscript{227} See JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 171 (2006) (“A plaintiff whose dignity was offended might also recover for trespass to land, even if the defendant had not harmed his property, provided the defendant had entered it.”); WILLIAM LUCY, PHILOSOPHY OF PRIVATE LAW 207 (2007) (including trespass to person also). “[In the context of trespass and battery,] the idea that your means are subject to your choice carries with it the entitlement to exclude all others from subjecting those means to their purposes, even in the trivial sense of touching you without your permission.” Arthur Ripstein, As If It Had Never Happened, 48 WM. & MARY L. REV. 1957, 1970 (2007). See Arthur Ripstein, Civil Recourse and Separation of Wrongs and Remedies, 39 FLA. ST. U. L. REV. 163, 169-70 (2011).

If an otherwise harmless trespass is done with objectively manifested spite, this increases the dignitary harm and, if done with subjective spite, this increases the invader’s blameworthiness, as discussed below.

\textsuperscript{228} “It might be thought that an action for breach of contract cannot succeed without pecuniary loss. The English courts have been grappling with this issue for some time.” WILLIAM LUCY, PHILOSOPHY OF PRIVATE LAW 207 n.3 (2007) (including case citations).

\textsuperscript{229} “There is virtually unanimous agreement that such ordinary defendants [beyond common carriers, innkeepers, etc.] are not liable for mere insult, indignity, annoyance, or even threats, where the case is lacking in other circumstances of aggravation.” WILLIAM PROSSER ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 59 (5th ed. 1984). “Our manners, and with them our law, have not yet progressed to the point where we are able to afford a remedy in the form of tort damages for all intended mental disturbance.” Id. These quotes show the interrelationship between psychic and dignitary harm. The thrust of the observation is that, though there may be a dignitary harm in these circumstances, such harm is not wrongful under existing law.

\textsuperscript{230} “The paradigm case of provocation in murder involves a degree of fault on the victim’s part, such as where the victim assaults, torments, or goads the offender and thereby precipitates their killing.” Martin Wasik, Crime Seriousness and the Offender-Victim Relationship in Sentencing, in FUNDAMENTALS OF SENTENCING THEORY 103, 118 (Andrew Ashworth & Martin Wasik eds., 1998) (footnote omitted). “[T]he claim implicit in partial justification [under the doctrine of provocation] is that an individual is to some extent morally justified in making a punitive return against someone who intentionally causes him serious offence ….” A.J. Ashworth, The Doctrine
\end{footnotesize}
The extent of a dignitary harm is gauged, I would argue, from the perspective of the disrespected person. Her understanding of the other person’s pertinent opinion of her, and her reactive response to it, arise from the invader’s objective manifestation of a disrespectful mental state.231 The invader may even be unaware of the disrespectfulness she manifests.232 This would not affect the invadee’s reaction to the conduct unless, it seems, the invadee is aware of the invader’s ignorance. There is a role, however, for the invader’s subjective disrespectfulness, irrespective of how it is manifested, but not right here. The invader’s subjective mental state is a factor in gauging her relative disrespect blameworthiness, to be addressed shortly.233

Dignitary harms can occur without any male fides by the invader, as where she innocently trespasses. Under the common law, physical, economic, and psychic harms are gauged by the impact of an invasion on the invadee, irrespective of the extent of such harms intended by the invader, and often loosely tied, if at all, to the harms foreseeable by the actor.234 Similarly, dignitary harm is measured from the invadee’s perspective. Dignitary harms depend on the invadee’s understanding of the actor’s mental state, such as when words that could be seen as insulting are instead perceived as meant to be humorous.235 This understanding may also, naturally, affect the invadee’s psychic and other harms. As a practical matter, to say nothing of fairness, one would probably base the appraisal of dignitary harm on the standard of a reasonable person in the position of the invadee who is aware of the actor’s manifested disrespect.236

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231 “[T]he participant reactive attitudes are essentially natural human reactions to the good or ill will or indifference of others towards us, as displayed in their attitudes and actions.” P.F. Strawson, Freedom and Resentment, in Free Will and Reactive Attitudes 19, 25 (Michael McKenna & Paul Russell eds., 2008). For a brief summary of Strawson’s view of moral responsibility, see John Martin Fischer & Mark Ravizza, Responsibility and Control 6-7 (1998).

232 “It is not material to the notion of guilt, that the offender have himself been fully conscious of the wickedness of what he did.” David Hume, Commentaries on the Law of Scotland Respecting Crimes (1819) (quoted in Victor Tadros, Criminal Responsibility 221 (2005)).

233 See discussion infra at yy.

234 I question the fairness of this, supra at yy [formal-material autonomy space invasions].

235 “Kant distinguishes friendly banter involving exposing another’s faults (which is morally innocent) from cases in which such remarks are delivered in order to deprive the person of respect.” Mark Timmons, Motive and Rightness in Kant’s Ethical System, in Kant’s Metaphysics of Morals 255, 285 (Mark Timmons ed., 2002).

236 If the actual person feels disrespect when a reasonable person in her position would not, we could say that the actual person suffers a dignitary harm, but not a wrongful dignitary harm. This disparity may be a matter of degree.
The objective manifestation of disrespect may obtain whether or not the disrespected person is actually aware of it. Insult, which requires knowledge by the disrespected person sooner or later, is distinguishable from defamation, which does not. But defamation does require knowledge of the disrespectfulness by third parties. Defamation harms depend on the understanding of third persons of the invader’s mental state, such as whether her conduct is meant to sting or to humor. Similarly, the sufferer’s perception of the understanding by third persons of the potentially defamatory conduct may produce or exacerbate a dignitary harm, to say nothing of her reactive psychic and other harms. In general, dignitary harms, like other harms, are socially framed. Conduct seen as insulting in one community or one context may not be in others.

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237 See Jean Hampton, Correcting Harms Versus Righting Wrongs: The Goal of Retribution, 39 UCLA L. Rev. 1659, 1671 (1992). Lack of awareness of the dignitary harm may come from ignorance or because of an invadee “whose sense of self-worth is so low that she is unable to recognize the . . . wrong.” Id. Feinberg, among others, asserts that one can be harmed posthumously. See JOEL FEINBERG, HARM TO OTHERS 79-95 (1984). For interesting discussion of Feinberg’s analysis with criticism and tangential support, see Brian Angelo Lee, Moral Obligations to Past Generations (1999) (unpublished Ph.D. dissertation, Princeton University) (on file with author). Contrary to Feinberg’s intuition, Adler finds, “It is a widely shared intuition that posthumous events do not harm the deceased person . . . .” Matthew D. Adler, Risk, Death and Harm: The Normative Foundations of Risk Regulation, 87 MINN. L. REV. 1293, 1295 (2003) (questioning whether death is a harm to the decedent, concluding it is a welfare setback). Whether, in general, there are “duties to the dead” is controversial. That the dead cannot have Hohfeldian rights, see Ronen Perry, Correlativity, 28 LAW & PHIL. 537, yy (2009) [ms 10]. Under one Kantian view, “even if we are murdered, that action cannot lower us in value (as if we remained behind in the corpse), but only extinguish that which was valuable.” Hampton, supra, at 1673.

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

239 See RESTATEMENT (SECOND) OF TORTS §§ 558, 577 (1977). “Ridicule, as Kant defines it, differs from defamation in that acts of the former sort are aimed at exposing others to laughter while the latter are aimed at exposing others to criticism.” Mark Timmons, Motive and Rightness in Kant’s Ethical System, in KANT’S METAPHYSICS OF MORALS 255, 285 (Mark Timmons ed., 2002). One commentator “would like to extend this legal definition [of defamation] to include statements that tend to insult, hurt, provoke, humiliate and ridicule individuals, even if they are not communicated to a third party.” Fillimon Peonidis, Freedom of Expression, Autonomy, and Defamation, 17 LAW & PHIL. 1, 5 (1998).

240 One “meaning of an action is determined by the reactions of others (or by the ways it would be reasonable for them to react) . . . . Meaning in this broader sense is . . . a matter of what others reasonably or unreasonably take [the agent’s] reasons to be.” T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 53 (2008).

241 “Dignity is socially constructed, which means that it is a product of social practices and conventions . . . .” Denise G. Réaume, Indigities: Making a Place for Dignity in Modern Legal Thought, 28 QUEENS L.J. 61, 87 (2002).
A person may perceive a dignitary harm, but social norms declare it not wrongful, as in a case in which a person is insulted or feels defamed by an ordinary hug from a casual acquaintance.

The time at which a dignitary harm is gauged may affect its measure. The invadee’s reasonable perception of her dignitary harm may vary during the course of an extended interaction with her invader. An invasion may occur at one point and the ultimate requital and resolution of the invasion may occur at later trial or even many years after that. For example, at the time of a dignitary invasion the invadee may perceive it as malicious, after evidence is produced at trial she may perceive it as reckless, and years later as she comes to understand the actor’s position differently, she may perceive it as negligent or minimally blameworthy. Or, the perception of the dignitary harm may go from minimal to egregious, or back and forth, over time. Interactions with family and supporters, media coverage, demonstrations, fund-raising efforts, and parole hearings are among the multitude of contingencies that may influence perceptions. Similarly, insofar as the invadee’s perception of her dignitary harm is affected by her understanding of the actor’s responsibility for his invasive conduct, varying perceptions of his responsibility alter the perceived dignitary harm. “He tried to get me” causes greater dignitary (and psychic) harm than “He should have known better,” or “He couldn’t help himself.” The question, then, is whether or how these varying perceptions should bear upon the gauge of a dignitary harm. 243 Does the gauge account for the fact that the invadee’s reasonable perceptions of it may linger long after the invasion and vary in intensity? Or is the gauge fixed at one point in time, say, at the time of the invasion or shortly thereafter? Just as recoveries under the common law for the other three types of harms account for future effects, such as continuing disabilities and medical expenses, should this be the case for dignitary harm?

To emphasize the point, dignitary harms are independent of other types of harms. 244 For instance, when beneficent paternalism motivates a person to deny a friend the freedom to make a particular choice, such as by hiding a dieter’s sweets without her consent, the paternalized person

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242 Scanlon observes that it would be “demeaning” to have one’s parents pick one’s spouse “in societies in which arranged marriages are not the norm,” but not in ones in which arranged marriages are common. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 253 (2000).

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

244 “Harm to dignity is more a matter of the social meaning of particular behaviour than a matter of the specific emotional or physical impact on the victim.” Denise G. Réaume, Indignities: Making a Place for Dignity in Modern Legal Thought, 28 QUEENS L.J. 61, 86-87 (2002) (footnote omitted). “[E]ven though a libel plaintiff who offered proof of economic loss could recover special damages for such loss, a libel plaintiff was not required to offer proof of economic loss, nor indeed proof of any harm other than the interference with reputation itself.” JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, TORTS 313 (2010). “Wrongs against reputation involve using a person’s reputation in a way that he or she has not authorized.... [N]o showing of either fault or harm is required, and ..., in the absence of harm, general damages are assessed.” Arthur Ripstein, Civil Recourse and Separation of Wrongs and Remedies, 39 FLA. ST. U. L. REV. 163, 169 n.21 (2011).
suffers a dignitary harm even if there is no physical, economic, or psychic harm.\footnote{245}{“Of all the tyrannies a tyranny sincerely exercised for the good of its victims may be the most oppressive… Their very kindness stings with intolerable insult.” \textsc{John Kleinig}, \textit{Punishment and Desert} 103 (1973) (quoting C.S. Lewis, \textit{The Humanitarian Theory of Punishment}, 6 \textit{Res Judicatae} 225 (1952-54)). “[R]espect for a person’s autonomy is respect for his unfettered voluntary choice as the sole rightful determinant of his actions except where the interests of others need protection from him.” \textsc{Joel Feinberg}, \textit{Harm to Self} 68 (1986) (emphasis omitted). “Respect involves acknowledging decision-making rights and enabling persons to act, whereas disrespect involves attitudes and actions that ignore, insult, or demean others’ rights of autonomy.” \textsc{Tom L. Beauchamp}, \textit{Who Deserves Autonomy, and Whose Autonomy Deserves Respect, in Personal Autonomy} 310, 311-12 (James S. Taylor ed., 2005). \textsc{Ripstein} refers to beneficent paternalism (along with other conduct) as usurping a person’s powers. \textit{See} \textsc{Arthur Ripstein}, \textit{Force and Freedom: Kant’s Legal and Political Philosophy} 43-44 (2001). At some point, however, “[o]n the view that only rational, fully informed selves are autonomous, it follows that the most fierce and uncompromising interferences with a person’s value judgments, desire formation, or thought patterns are not interfERENCEs with autonomy at all if those values, desires, or thoughts are irrational ones.” \textsc{John Christman}, \textit{Introduction, in The Inner Citadel} 3, 12 (John Christman ed., 1989).} To the contrary, she may admittedly be benefitted.\footnote{246}{“The formal agency model treats as a wrong any action that manifests disrespect for the capacity to choose ends even if the action inflicts no setback to the victim’s ends and even if it actually furthers them.” \textsc{Alan Brudner}, \textit{Punishment and Freedom} 31 (2009).} For another example, suppose a person declines to apply for a club membership because its members are disrespectful of her race or religion. She suffers a dignitary harm whether or not she would suffer other types of harms, including psychic ones (“Who would want to associate with such bigots?”). Other examples of the possibility of dignitary harms in the absence of psychic harms include cases where the invadee is permanently comatose,\footnote{247}{\textsc{Dobbs} discusses the authority on whether a comatose invadee can recover for the loss of enjoyment of life. “If loss of enjoyment is merely an aspect of suffering, she cannot recover for lost enjoyment. If it is an independent element of damages, she can.” \textsc{Dan B. Dobbs}, \textit{The Law of Torts} 1052 (2000). Since traditionally this item of recovery was an element of pain and suffering, most authority still denies recovery. \textit{See} \textit{id}.} is a consummate stoic, or where she appreciates ex post the actor’s beneficent, loving paternalism.\footnote{248}{“[L]ove arguably does need respect, lest love be paternalistic or otherwise invasive ….” \textsc{Marcia W. Baron}, \textit{Love and Respect in the Doctrine of Virtue, in Kant’s Metaphysics of Morals} 391, 400 (Mark Timmons ed., 2002) (qualifying footnote omitted). “Kant … insists that we must be careful to love others in a way that maintains respect for them, as by making them feel that they have honored us by receiving our beneficence.” \textsc{Allen W. Wood}, \textit{Kantian Ethics} 179 (2008) (reference omitted).} 

A dignitary harm may interrelate with or trigger physical, economic, and psychic harms. Nausea or a heart attack, for example, may follow from disrespectful conduct. As the perceived painfulness and rate of recovery from physical trauma may turn on whether the comparable trauma is from child birth, a battle injury, or a car accident, so it may turn on the sufferer’s per-
ception of the invader’s mental state. Economic harm may link to dignitary harm, such as opportunity costs and expenditures from attempts to avoid future insult, all the more so as the insult is perceived as malevolent. Psychic harm typically flows from dignitary harm. Can we not recall our own experiences of insult as further examples? Finally, the invader’s autonomy, liberty, may be effectively constricted owing to her reluctance to interact with persons who were swayed by a wrongful, defamatory message.

How does one gauge or value dignitary harm? At best, with great difficulty. At worst, it is not possible. As Kant proclaims, dignity “is exalted above any price ….” If this is the case, perhaps we must be satisfied simply by symbolically acknowledging that the invader has suffered a wrongful dignitary harm. Nominal damages of 6¢ or $1 dollar would do this. Yet this seems intuitively unsatisfactory. After an egregious act of disrespect, the aggressor gets off with such a minimal, symbolic requital, indeed, no more than is due for a marginal dignitary harm! Or, more to the point, from the invader’s perspective the law may appear indifferent to the extent to which the invader manifests wrongful disrespect of her. That is insulting! Perhaps this compli-


250 “If it is proper to feel indignation when I see third parties morally wronged, must it not be equally proper to feel resentment when I experience the moral wrong done to myself?” Jeffrie G. Murphy, Forgiveness and Resentment, in JEFFRIE G. MURPHY & JEAN HAMPTON, FORGIVENESS AND MERCY 14, 18 (1988). Under Margaret Walker’s account, “resentment is not merely another name for generalized anger or other negative affective reactions but rather describes a specific type of anger, one that attributes responsibility for the defeat or the threat of defeat of normative expectations.” Pablo De Greif, Theorizing Transitional Justice, in TRANSITIONAL JUSTICE 31, 49 (Melissa S. Williams et al. eds., 2012) (with citations). “Interestingly enough, a hasty readiness to forgive – or even a refusal to display resentment initially – may reveal a lack of respect, not just for oneself, but for others as well.” Murphy, supra.

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

252 A defamed “person might realize that she can no longer perform the actions she used to, that her options are unjustifiably limited or that her autonomy is severely impaired because of these [false] assertions.” Filimon Peonidis, Freedom of Expression, Autonomy, and Defamation, 17 LAW & PHIL. 1, 10 (1998). See id. at 11-13.

cation can be partially addressed by turning to psychic harm as a surrogate. If dignitary harm is gauged by a reasonable person’s psychic reaction to an antagonist’s known disrespectful conduct towards the invadee, then we have a plausible means to monetize the dignitary harm. Should the actual sufferer’s psychic harm be even greater, additional recovery may be proper. While this standard is still difficult to apply, at least we have affirmed that not all disrespectful conduct is the same. As they do for other knotty questions, let a jury of peers, after judicial guidance, take on the task of putting numbers to the dignitary harm.

VI. Blameworthiness (Culpability)

Blameworthiness, which may be an element in a substantive, first-order maxim, or an associated requital, second-order maxim, has two foci. First, there is responsibility blameworthiness, $B_r$, which relates to the extent of the agent’s responsibility for making her choice to act or refrain from acting. Second, there is disrespect blameworthiness, $B_d$, which examines the degree of the agent’s disrespectfulness regarding those who are put at wrongful risk of harm by her chosen conduct. These two foci provide the gauge of the actor’s overall blameworthiness as

254 “It is remarkable that in Kant’s view, considerations of public law, such as the efficiency of the administration of justice, may change the substance of private law.” IZHAK ENGLARD, CORRECTIVE AND DISTRIBUTIVE JUSTICE FROM ARISTOTLE TO MODERN TIMES 181 (2009) (footnote omitted that provides examples, including: “Thus, Kant bases the principle, that a promise to give a donation can be enforced against the promisor, upon the ground that otherwise judicial adjudication would be rendered infinitely difficult, or even impossible ….”).  
255 See generally Mark P. Gergen, The Jury’s Role in Deciding Normative Issues in the American Common Law, 68 FORDHAM L. REV. 407 (1999). “The civil jury’s virtues are said to include … keeping the law in touch with popular values ….” Id. at 435-36 (footnote omitted).  
256 “One of the strongest and most persistent themes in the philosophical literature dealing with responsibility is that responsibility requires culpability (or ‘blameworthiness’).” PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 65 (2002). “[T]he degree of our moral fault is determined essentially by the quality of the choices on which we act, regardless of whether we succeed in achieving the ends fixed by these volitional states.” R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 128 (1994).
measured against a baseline standard established by the particular maxim in question.\textsuperscript{257} She may be more or less blameworthy than the standard established by the maxim.\textsuperscript{258}

A. Responsibility Blameworthiness

The first aspect of blameworthiness, responsibility blameworthiness, $B_r$, springs from Aristotle. He identifies fully responsible conduct as following choices free from ignorance and coercion.\textsuperscript{259} Thus, responsibility blameworthiness has two prongs: ignorance, $B_{ri}$; and coercion, $B_{rc}$. Insofar as an agent’s choice is not fully autonomous in this sense, her responsibility, her blameworthiness, is reduced, until, at some threshold point, she is excused altogether.\textsuperscript{260} On the other hand, against the threshold standard for responsible choice, the agent may be in a position to make a choice with a greater freedom from ignorance and coercion. She has, say, an unusually deep knowledge and understanding of possible consequences of her contemplated conduct. Po-

\textsuperscript{257} “Unfortunately, no adequate theory to measure degrees of culpability has yet been proposed.”

\textsuperscript{258} Finkelstein doubts the weight of blameworthiness in the law. Because some morally blameworthy conduct is neither tortious nor criminal, and some liability is strict, she concludes, “In both tort and criminal law, then, blameworthiness is of questionable importance for determining liability.” Claire Finkelstein, Is Risk a Harm?, 151 U. PA. L. REV. 963, 964 (2003).


\textsuperscript{260} That autonomy is a matter of degree, see, e.g., BARBARA HERMAN, MORAL LITERACY 127 (2007); Tom L. Beauchamp, Autonomy and Consent, in THE ETHICS OF CONSENT 55, 70-71 (Franklin G. Miller & Alan Wertheimer eds., 2010); Lawrence Haworth, Autonomy and Utility, in THE INNER CITADEL 155, 159 (John Christman ed., 1989).


70 / Constructing Autonomy
tential ensuing harmful consequences to others are foreseeable to her that would not be foreseeable to ordinary actors.\textsuperscript{261} This agent is also uncommonly free of coercive influences on her choice. She expects, for instance, to obtain no significant benefits from her anticipated conduct beyond those achievable by a known option that would not put others at wrongful risk. For this invader, a choice to engage in the wrongfully risky conduct makes her more than ordinarily blameworthy for harmful consequences.

Under the existing law of negligence, the degree of an agent’s responsibility for her chosen conduct necessary to trigger liability is based on a reasonable person standard. If a reasonable person in her position would feel strongly compelled to choose her conduct, or would choose the conduct despite her information shortfalls, then, generally, she is not responsible for the harmful consequences that follow.\textsuperscript{262} As freedom from coercion and ignorance increases, a point is reached at which the reasonable person would forgo the conduct in question to avoid putting others at unreasonable risk.\textsuperscript{263} At this point, requital for ensuing harms is allowable. The conduct is not excused. Beyond this point, as the agent becomes increasingly free of coercion and ignorance as to possible consequences, she becomes more responsible, more blameworthy, for choosing the unreasonable conduct nonetheless. The threshold for responsibility may vary from tort to tort, or crime to crime.\textsuperscript{264} Trespass to realty, for example, requires minimal knowledge by the invader,\textsuperscript{265} while malicious prosecution requires much more.\textsuperscript{266} Even though liability for breach of contract under existing law is often said to be strict,\textsuperscript{267} blameworthiness does play a role here

\textsuperscript{261} “Should we not rather, and more simply, say that a person intends something if she \textit{either} desires it \textit{or} foresees it as a morally certain consequence of her action?” R.A. Duff, \textsc{Intention, Agency and Criminal Liability} 25 (1990). For twists owing to willful ignorance, as distinguished from culpable ignorance, see Douglas N. Husak & Craig A. Callender, \textsc{Wilful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality}, 1994 Wis. L. Rev. 29.

\textsuperscript{262} Many qualifications to this sweeping generalization are omitted. Ripstein provides guidance. “I defend what I will call a reciprocity conception of responsibility, which supposes that responsibility must be understood in terms of norms governing what people are entitled to expect of each other.” Arthur Ripstein, \textsc{Justice and Responsibility}, 17 Can. J.L. \& Jurisprudence 361, 361 (2004). The reasonable person standard establishes what people are entitled to expect.

\textsuperscript{263} “The problem always is what we can fairly expect of each other in resisting pressure and in paying attention to signals implicit in the circumstances under which we act.” George P. Fletcher, \textsc{Basic Concepts of Legal Thought} 108 (1996).

\textsuperscript{264} “It is misleading to speak of ‘legal responsibility’ – as though it were a unitary thing. It is not…. Even if we confine ourselves to criminal law, there is no single conception.” John Klenig, \textsc{Punishment and Desert} 106 (1973).

\textsuperscript{265} As in other ordinary intentional torts, the “intent” requirement for trespass is rather weak, falling well short of “motive”. \textit{See} W. Page Keeton et al., \textsc{Prosser and Keeton on the Law of Torts} § 8 (5th ed. 1984); Dan B. Dobbs, \textsc{The Law of Torts} § 24 (2000).

\textsuperscript{266} \textit{See} W. Page Keeton et al., \textsc{Prosser and Keeton on the Law of Torts} 882-84 (5th ed. 1984); Dan B. Dobbs, \textsc{The Law of Torts} § 433 (2000).

\textsuperscript{267} \textit{See}, e.g., E. Allan Farnsworth, \textsc{Contracts} § 8.8 (4th ed. 2004); \textsc{Restatement (Second) of Contracts} § 235 (1981).
also. Current private law rarely takes heightened responsibility beyond the given threshold into account. The criminal law is more attentive to it.

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268 “It is often asserted that contract law is based on strict liability, not fault. This assertion is incorrect. As this chapter demonstrates, fault is a basic building block of contract law, and pervades the field.” Melvin A. Eisenberg, The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance, in FAULT IN AMERICAN CONTRACT LAW 82, 82 (Omri Ben-Shahar & Ariel Porat eds., 2010). “Modern law often assumes that a uniform cost-benefit formula is the proper way to determine fault in ordinary contract disputes. This chapter disputes that vision by defending the view that different standards of fault are appropriate in different contexts.” Richard A. Epstein, The Many Faces of Fault in Contract Law: Or How to Do Economics Right, Without Really Trying, in FAULT IN AMERICAN CONTRACT LAW 118, 118 (Omri Ben-Shahar & Ariel Porat eds., 2010). “Accordingly, fault is frequently relevant to the question of contractual liability. Is it becoming more relevant? Lord Devlin has observed that ‘in every branch of the law we are getting away from the idea that absolute liability is the ideal.’” Tony Weir, The Staggering March of Negligence, in THE LAW OF OBLIGATION 97, 122 (Peter Cane & Jane Stapleton eds., 1998) (quoting Lord Devlin, The Treatment of Breach of Contract, 1966 CAMBRIDGE L.J. 192, 202). “Scholars and courts typically describe and defend American contract law as a system of strict liability, or liability without fault. I disagree with that position.” George M. Cohen, The Fault that Lies Within Our Contract Law, 107 MICH. L. REV. yy, yy (2009) [ms 1].

269 “Tort law appears to be utterly indifferent to the culpability of the injurer. A momentary lapse of care by one agent can result in liability for massive losses, while other agents, equally guilty of such lapses, or guilty of much greater lapses, escape liability entirely.” Gerald J. Postema, Introduction, in PHILOSOPHY AND THE LAW OF TORTS 1, 3 (Gerald J. Postema ed., 2001) (reference omitted). There are “many important instances where the tort of negligence is insensitive to considerations of moral blameworthiness.” James Goudkamp, The Spurious Relationship Between Blameworthiness and Liability for Negligence, 28 MELB. U.L. REV. 343, 343 (2004). Under tort doctrine, “liability is not diminished if the defendant’s negligence is slight, nor is it increased if the defendant’s negligence is gross.” DAN B. DOBBS, THE LAW OF TORTS 349 (2000) (footnote omitted). This is consistent with the conclusion that dignitary harm garners little direct protection in tort law. Yet, Goldberg notes in discussing the foreseeability limitation to proximate cause, which “only crudely implements a notion of proportionality…, courts in particular have demonstrated sensitivity to the distorting effects of the full compensation principle by varying the scope and stringency of proximate cause doctrine in accordance with the nature of the defendant’s wrongdoing.” John C.P. Goldberg, Misconduct, Misfortune, and Just Compensation: Weinstein on Torts, 97 COLUM. L. REV. 2034, 2042 (1997) (footnotes omitted).

270 Based on autonomy principles, “[t]he essence of the principle of mens rea is that criminal liability should be imposed only on persons who are sufficiently aware of what they are doing, and of the consequences it may have, that they can fairly be said to have chosen the behaviour and its consequences.” ANDREW ASHWORTH, PRINCIPLES OF CRIMINAL LAW 154-55 (6th ed. 2009). That mens rea is a fuzzy notion, see Bailey Kuklin, Punishment: The Civil Perspective of Punitive Damages, 37 CLEV. ST. L. REV. 1, 60 n.179 (1989). Blackstone identifies it as a “vitious will”. 4 WILLIAM BLACKSTONE, COMMENTATORS *21.

Perhaps the criminal law is more attentive to blameworthiness in both forms here discussed because such blameworthiness is an important factor in producing wrongful harms to the
B. Disrespect Blameworthiness

Disrespect blameworthiness, B_d, relates to an agent’s attitude as well as her conduct towards persons wrongfully harmed. She is to respect others as well as treat them with respect.271 As in responsibility blameworthiness, disrespect blameworthiness has two prongs, attitude, B_d_a, and treatment, B_d_t. Regarding her attitude, the agent’s subjective mental state at the time of her choice or conduct reflects whether, or the extent to which, she is disrespectful of those whose autonomies are curtailed.272 For example, an agent may deny another person the liberty to try out for an athletic team because she thinks that he will get hurt (benevolent paternalism), or that his personality would disrupt team chemistry (group welfare), or because his race is different from the rest of the team (racism). At the high end of disrespectful attitudes are egregious mental states, such as arrogance, disdain, malice, purpose, intention, recklessness,273 wantonness, and
general public. The more blameworthy the criminal, the more frightening she is to the public. Harms to the individual invitee are largely requited by her private right of action irrespective of the actor’s blameworthiness beyond any required threshold. For the general public, protection under the criminal law accounts for the harms to the public in reaction to the agent’s perceived blameworthiness. For the “fright” theory of criminality, see, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 65-71 (1974); John Rawls, Two Concepts of Rules, in THE PHILOSOPHY OF PUNISHMENT 105, 107 (H.B. Acton ed., 1969).

But there are limits to the existing criminal law’s focus on the invader’s blameworthiness. Foreseeability is an important element of aspects of blameworthiness. See infra note yy. “[O]nce liability to punishment simpliciter is self-willed by agents by virtue of a chosen interference, they become liable to state coercion directed at crime control for all resulting proscribed harms no matter how remote and unforeseeable.” ALAN BRUDNER, PUNISHMENT AND FREEDOM 56 (2009). A deontic retributivist would, I argue, object.

271 See, e.g., Allen Wood, Humanity as End in Itself, in 2 DEREK PARFIT, ON WHAT MATTERS 58, 62-63 (2011). See supra notes yy-yy [Dillon, Hill].

272 “There are certainly retributivists who claim that what deserves punishment are the inner thoughts of an individual.” Michael Moore, Victims and Retribution: A Reply to Professor Fletcher, 3 BUFF. CRIM. L. REV. 65, 66 (1999). “Briefly put, my proposal is this: to claim that a person is blameworthy for an action is to claim that the action shows something about the agent’s attitudes toward others that impairs the relations that others can have with him or her.” T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 128 (2008) (distinguishing blameworthiness and blame). Boonin seems to take a more expansive view of this focus of blameworthiness: “whether or not a person deserves to suffer is ultimately a function of whether she acts from a good or bad motive rather than whether her acts are objectively right or wrong.” DAVID BOONIN, THE PROBLEM OF PUNISHMENT 96 (2008).

In the context of capital punishment, Kant declares that “the strict law of retribution” requires a sentence “pronounced on every criminal in proportion to his inner wickedness .....” IMMANUEL KANT, THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY 353, 474 (Mary J. Gregor ed. & trans., 1996) (1797). More generally, “the state of mind of the subject, whether he committed the deed in a state of agitation or with cool deliberation, makes a difference in imputation, which has results.” Id. at 382.

273 “Criminal recklessness should be defined ‘subjectively’ (though not as orthodox subjectivists define it), in terms of the practical indifference to the interests of others which an agent’s actions display ....” R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY 180 (1990). “There is, of
gross negligence. At the low end are less offensive mental states, such as those grounding inadvertence, minimal negligence, foreseeable double effects, non-negligent strict liability, and those associated with excuses and justifications. While a disrespectful attitude is always deontically objectionable by producing a dignitary harm at least, we may decline to adopt requital maxims for lesser forms of disrespect, as in beneficent paternalism. Or we may call for minimal requitals such as apologies. We may also forgo requitals for disrespectful mental states when they relate to conduct found not to be wrongful, as when an actor helps another to diet because she knows it is hellish for him. In both of these examples, the agent’s disrespectful attitude diverges from her disrespectful treatment of the harmed party. In the first case, beneficent paternalism, the agent may greatly respect the invadee (the paternalism may be a product of solicitous love towards the invadee), but does not treat him with full respect because she denies him the freedom to choose for himself. In the second, dieting example, the agent has a disrespectful attitude towards the invadee, but she treats him with respect by agreeing to his request to help him diet.

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

In referring to the idea of disrespect blameworthiness, Kant asserts that deontic duties are strict duties “classified according to the kinds of actions that would constitute violations of them:

course an ‘objective’ element in recklessness; for we judge the agent’s conduct in the light of an ‘objective’ standard of reasonableness.” Id. See Peter Cane, Responsibility in Law and Morality 80-81 (2002).


275 “Negligence is defined by failure to advert to a substantial and unjustifiable risk, which means that the actor could be adverting to anything else…. [T]he negligent actor is, I believe, not culpable for failing to advert and does not deserve punishment for his negligence.” Larry Alexander, The Philosophy of Criminal Law, in Oxford Handbook of Jurisprudence and Philosophy of Law 815, 829-30 (Jules Coleman & Scott Shapiro eds., 2002) (footnotes omitted) (providing reasons).


277 “It is, to be sure, not widely recognized that it is possible for there to be cases in which a person is blameworthy even though (she knows) she does not act wrongly.” Peter A. Graham, In Defense of Objectivism About Moral Obligation, 121 Ethics 88, 94 n.14 (2010) (with citation) (using the example of a consensual, excruciating medical procedure successfully performed with the motive not to aid the patient, but to cause her pain).
arrogance, defamation, and ridicule.278 These manifestations of disrespectful attitudes or treatments appear more flagrant than the disrespect shown by simply interfering intentionally or purposely with a person’s protected security. Using a person as a means only may be done with the benevolent motive to increase social welfare. And it may be done with deep regret that anyone must suffer for this purpose. Denying a person the freedom to make a particular binding choice for herself may stem from great concern for her, even causing her net liberty (e.g., resources) to expand, such as by declining to hold her for her consent to a one-sided contract.279

Kant’s three classifications of the duties of respect may be interpreted as, in essence, “duties not to pose as morally superior to others by expressing that another agent and/or her ends have lesser value.”280 In other words, simple disrespect of another person without any relevant action is in itself a violation of the categorical imperative.281 The case for recognizing disrespect blameworthiness, both attitude and treatment, as a separate element in some substantive and reQUITAL maxims does not fit comfortably with existing law.282 It is driven by the centrality of respect in Kant’s practical philosophy.

Because of reactive attitudes, the degree of an invader’s disrespect, if known to the person disrespected, may affect the invadee’s physical, economic, psychic, and dignitary harms from wrongful conduct.283 A person put at wrongful risk, alarmed by the invader’s purpose to do so, may limit her ventures and take measures to protect her security. Or, realizing the risk was accidental, she may feel less insecure and take no protective measures at all. The invadee will especially be likely to suffer greater dignitary or psychic harms from an invasion known to be

278 ALLEN W. WOOD, KANTIAN ETHICS 178 (2008).
279 Even Milton Friedman, that paragon of Chicago-school, invisible-hand economics, finds room for paternalism: “There is no avoiding the need for some measure of paternalism.” MILTON FRIEDMAN, CAPITALISM AND FREEDOM 34 (1962) (quoted in MICHAEL J. TREBILCOCK, THE LIMITS OF FREEDOM OF CONTRACT 163 (1993)).
280 Japa Pallikkathayil, Deriving Morality from Politics: Rethinking the Formula of Humanity, 121 ETHICS 116, 131-32 (2010). Pallikkathayil’s article addresses the question of Kant’s place for “the familiar duties against force, theft, coercion, deception, and promise breaking.” Id. at 132.
281 See supra note yy.
282 Nonetheless, “[w]e are used to distinguishing what a person did from why she did it, sometimes issuing separate moral judgements about the act and its motive [as where, for example, a person commits perjury to save a life].” Mark Timmons, Motive and Rightness in Kant’s Ethical System, in KANT’S METAPHYSICS OF MORALS 255, 256 (Mark Timmons ed., 2002). My analysis brings both “separate moral judgements” to bear in some plausible maxims.
283 “A harm inflicted with a serious mental state sometimes inherently inflicts a greater harm to the victim. A victim of fraud often feels worse than a victim who has been negligently or non-negligently misled.” Kenneth W. Simons, Rethinking Mental States, 72 B.U. L. REV. 463, 512 (1992) (footnote omitted). “Emotional or psychic harm based on outrage at the offender’s motive or mental state is quite real.” Id.
motivated by malice or purpose than she will from a comparable invasion resulting from negligence, inadvertence, regret, or even love.\textsuperscript{284}

The identification and measurement of an invader’s subjective mental state raise obvious epistemic problems.\textsuperscript{285} Unless she somehow reveals it before, during, or after her conduct, gauging a disrespectful attitude in actual practice may require resort to a reasonable person standard. A reasonable person standard may also be used for calculating dignitary harm, which is an objective standard.\textsuperscript{286} The difference is that for discerning dignitary harm we place our reasonable person in the shoes of the invadee, while for disrespect blameworthiness we place her in the shoes of the invader.

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

Objective dignitary harm may diverge from subjective disrespect blameworthiness. A reasonable person in an invader’s position may perceive the invader’s mental state as egregious or hostile and suffer a dignitary harm accordingly when the invader’s actual mental state is more benign. The actor may, for example, be just attempting a bad practical joke. Or, conversely, a reasonable person may dismiss actual hostile conduct as simply a bad practical joke. Dignitary harm may also disconnect from psychic harm.\textsuperscript{287} An invader’s spite will not cause the invadee psychic harm when she is kept in the dark, killed, or defamed after death.\textsuperscript{288} She may not learn of the invasion until sometime afterwards. Or, she may dismiss it as a minor annoyance until it hits

\begin{footnotesize}
\textsuperscript{284} “A proper deontological approach [to tortious risks], the one that the criminal law makes one attuned to, would distinguish amongst [the “[d]ifferent ways of creating a risk of a certain size or of a certain sort”]. Leo Katz, \textit{A Look at Tort Law with Criminal Law Blinders}, 76 B.U. L. REV. 307, 311 (1996).
\textsuperscript{285} “When Kant addresses the question of judging legal guilt, he necessarily limits such judgments to considerations of a person’s external behavior and that person’s empirical or psychological personality and history.” \textsc{Roger J. Sullivan, Immanuel Kant’s Moral Theory} 243 (1989) (quoting Kant).
\textsuperscript{286} \textit{See infra} note yy.
\textsuperscript{287} For instance, the tort of assault occurs independently of the fright or fear of the invadee. \textit{See Restatement (Second) of Torts} § 24 cmt. b (1977).
\textsuperscript{288} In this case, the psychic harm to kin and kith, and the public, especially when a public figure is the direct invadee, is affected. \textit{See supra} note yy [Finkelstein]. As to whether a person can suffer a deontic harm after her death, see \textit{supra} note yy [Adler, Perry].
\end{footnotesize}
the media or social networks. Psychic harm, but not dignitary harm, may turn on the degree of notoriety following the invasion. A harmed person’s reactions stem from her perceptions of the aggressor’s conduct as well as her understanding of the attention the invasion garners from others. The time at which psychic and dignitary harms are to be gauged, say, at the time of the antagonist’s conduct or sometime thereafter, are among the factors that should be considered when adopting first- or second-order maxims. To boil it down, this second form of the invader’s blameworthiness, disrespect blameworthiness, accounts for the level of her disrespect for the invadee as gauged by her treatment of the invadee and her subjective mental state, irrespective of how that mental state is perceived or felt by the sufferer or others identifying with her.

C. Connections Between Responsibility Blameworthiness, B_r, and Disrespect Blameworthiness, B_d

Overall blameworthiness is a combination of its two aspects, responsibility and disrespect. Heightened responsibility blameworthiness may offset diminished disrespect blameworthiness, or vice versa. We could even come up with complicated interrelationships, as where the two prongs of responsibility blameworthiness, ignorance (B_{ri}) and coercion (B_{rc}), and the two prongs of disrespect blameworthiness, attitude (B_{da}) and treatment (B_{dt}), are linked with one another in a four-factor matrix. A case could be made for further intricacies based on blameworthiness aspects of, say, the four types of harms and other factors.

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

Foreseeability plays a role in both aspects of blameworthiness, B_d and B_r, including both prongs of the latter: ignorance, B_{ri}, and coercion, B_{rc}. I turn first to disrespect blameworthiness, B_d. Foreseeability may be detached from a disrespectful attitude, B_{da}. Just thinking of oneself as morally superior to others, whether or not this attitude is manifested in conduct, violates Kant’s mandate. Foreseeability has no role to play in this. Disrespectful treatment, B_{dt}, on the other hand, requires at least a minimal foreseeability. For example, assume an agent decides, “To test

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

290 From the invader’s perspective, these ensuing contingencies are matters of moral luck. They are matters of luck for the invadee as well.
my new motorcycle, I’m going to drive with reckless abandon on this little-known backroad.” By doing so the actor treats with disrespect only those at risk once she could foresee that others would be put in harm’s way in a sufficient, probabilistic sense. Below this minimal foreseeability, as where the backroad is on her own isolated property, a person who is actually put at risk by the recklessness (an unintentional trespasser, perhaps) is not treated disrespectfully. Treating others with disrespect requires some knowledge that others are being affected. Foreseeability may imply a willingness and choice to use others as a means only. The more a wrongful harm to others is foreseeable to an agent, the more it seems, all else equal, that she is disrespectful by engaging in the conduct.291 The disrespect holds even when the agent rues the need to make such a choice. The doctrine of double effect, for example, controversially proposes to justify or excuse foreseeable harms, but it does so by declaring that the persons are not harmed purposely in a strong sense of “purpose”, and circumstances allow for the harm as where, in a classic conundrum, one chooses to undertake the wartime bombing of a munitions factory sited in a residential neighborhood.292 In sum, foreseeability is an important factor in disrespectful treatment.

Turning back to the other, first aspect of blameworthiness, responsibility blameworthiness, B₁, foreseeability appears in both of its prongs, ignorance and coercion. For ignorance, B₁, the role of foreseeability sits saliently on the surface. Knowledgeable, responsible choices and actions require apprehension of potential consequences. For coercion, B₁C, we must dig beneath the surface for sightings of foreseeability. Coercion is normally a product of external and internal forces that are independent of attenuated foreseeability. There are exceptions. For instance, when an agent places herself in situations in which coercive forces may come into play, foreseeability may indirectly surface. If one foresees the risk of external forces, say, an approaching storm or criminal mob, then one’s moral claims of necessity or coercion are weakened when one fails to reasonably respond to the anticipated threat.293 If an agent foresees the risk of triggering internal

291 “[A]n unwitting imposition of excessive risk … is not deserving of criminal punishment in the rigorous sense of desert understood within the agency paradigm, for it implies no denial of an obligation to respect liberty ….” Alan Brudner, Agency and Welfare in the Penal Law, in ACTION AND VALUE IN CRIMINAL LAW 21, 34 (Stephen Shute et al. eds., 1993). “[W]e believe the focus of the culpability judgment is the actor’s actual beliefs about the effects of his acts – and not the reasonableness or unreasonableness of those beliefs.” LARRY ALEXANDER & KIMBERLY K. FERZAN, CRIME AND CULPABILITY 63 (2009). Bandes objects, concerned that this “reward[s] heedless and clueless behavior.” Susan A. Bandes, Is it Immoral to Punish the Heedless and Clueless? A Comment on Alexander, Ferzan and Morse: Crime and Culpability, 29 LAW & PHIL. 433, 434 (2010).


293 In general, a person is legally privileged to use another’s property to escape necessitous situations. See, e.g., Plow v. Putnam, 71 A. 188 (Vt. 1908); W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 145-48 (5th ed. 1984); DAN B. DOBBS, THE LAW OF TORTS 248-50 (2000). Under existing tort law, an agent’s negligence may not preclude her privilege of ne-
forces, say, the slippery slope of alcohol consumption, her later claims of disability or internal coercion would be similarly diminished or precluded. In conclusory terms, she assumed the risk.

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

VII. Conclusion

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

cessity. See DOBBS, supra, at 248. This privilege might be grounded on consequentialist considerations. The imposed costs are ameliorated by the doctrine that necessity is a partial privilege only. The agent must pay for the harm that she causes. See, e.g., Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910). In balancing the liberty and security interests at stake in circumstances of necessity, much can be said for a maxim that stretches the necessitous agent’s liberty, even if “she knew what she was getting into.” As a partial privilege, we will make her pay something to get out of it. With respect to the impecunious, necessitous agent, this would be troublesome, for she is judgment-proof. In the criminal context, “[i]f we deny the blameworthy defendant the necessity defense, that could also produce some very undesirable behavior.” LEO KATZ, BAD ACTS AND GUILTY MINDS 43 (1987) (providing an example). Katz distinguishes necessity, which is a justification, from coercion, which is an excuse. See id. at 65. The criminal law is less generous than tort law in recognizing duress or necessity as a defense. It is unavailable when the actor recklessly or negligently places himself in duress or necessity situations. See MODEL PENAL CODE §§ 2.09(2), 3.02(2) (1962).