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Private Requitals

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PRIVATE REQUITALS

BAILEY KUKLIN*

ABSTRACT

Previously, I examined the establishment of a person’s substantive rights and, correlatively, duties. But this was only the first step. This Article addresses the second step: the means for recognizing requital rights violations, including their articulation, adoption, and implementation. Taking a deontic, individualistic perspective on rights, this Article aims to delineate and protect one’s personal freedom, one’s autonomy. To do so, this Article, using a formal understanding of the categorical imperative, will examine whether an agent’s chosen maxims are deontically acceptable. The maxims need to be both first-order, substantive ones that establish autonomy boundary baselines, and second-order, requital ones that address violations of the baselines. Important elements in perhaps all maxims, both first- and second-order, are the notions of harm, wrongfulness, and blameworthiness. Once an agent’s substantive and requital maxims are properly in place and honored, she is truly in a position to be an autonomous person.

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INTRODUCTION

“You can’t do that to me. I’ll sue! I’ve got my rights!” Versions of this plea, demand, threat, commonly begin the myriad of disputes that end up in litigation. Implicit in this complaint are a series of questions that must be resolved before the accuser can obtain relief, including: What are a person’s rights? How are they established? What remedies are available for rights violations? How are these correctives instituted?

In a prior article, I addressed the first two of these questions regarding the establishment of a person’s substantive rights and, correlatively, duties.¹ Taking a deontic, individualistic perspective on rights, I detailed the process by which an agent adopts a scheme of substantive rights and duties for herself and, under the universalization mandate of Kant’s categorical imperative, for everyone else. But this was only the first step. The scheme is not fully in place until the means for recognizing requitals for rights violations is also articulated, adopted, and implemented. Picking up some pieces of this process mentioned in the prior article, aspects of this second step are the primary focus of this Article.

The continued quest in this Article for the delineation and protection of one’s realm of freedom, one’s autonomy, begins with a brief examination of the meanings of autonomy. To judge whether an agent’s chosen maxims are deontically acceptable, I invoke as the standard a formal understanding of the categorical imperative, as do most other commentators. Under this understanding, the requisites of acceptable maxims are broadly framed; it is up to each agent to adopt material principles that fit within this framework. The maxims need to be both first-order, substantive ones that establish autonomy boundary baselines, and second-order, requital ones that address violations of the baselines. With a few exceptions an agent’s consent allows for the adjustment of her established baselines. In drawing these boundaries the agent aims to balance her liberty and security interests. Important elements in perhaps all maxims, both first- and second-order, are the notions of harm, wrongfulness, and blameworthiness. For requitals in private law, corrective justice is the standard gauge. For public, criminal law, it is retribution. Much of this Article constitutes a survey of the range of plausible maxims for consideration by an agent. Since substantive and requital maxims are typically deeply intertwined, as a matter of expediency I sometimes dwell upon the substantive maxims rather than their requital complements. The substantive ones tend to spark more controversy. Among the normative topics examined are intentional harmful conduct, truth telling and promise keeping, reliance and expectations, exploitation, risk imposition, and existing social norms. Once an agent’s substantive and requital maxims are properly in place and honored, she is truly in a position to be an autonomous person.

I. AUTONOMY

In a deontic regime, personal autonomy is of paramount moment. An autonomous person is, in a nutshell, one who is self-governed.² Metaphorically, she controls an autonomy space in which she is free to act without interference from others. Personal autonomy, however, is not a pre-existing condition protected by

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

² See, e.g., MICHAEL J. SANDEL, *JUSTICE* 214 (2009); Kuklin, *supra* note 1, at 385-86.

legal and moral norms. To the contrary, legal and moral norms are what establish the parameters of personal autonomy by consensually circumscribing a moral agent's realm of freedom. This freedom entails a balancing of two interrelated interests: the liberty to choose one's conduct without interference from others; and, the security from interference by other people's choices or conduct.³ These two interests are often in tension. The expansion of one person's liberty curtails other people's security, and vice versa.⁴

We can distinguish different types or degrees of autonomy space. At one end of the spectrum is hypothetical autonomy space.⁵ This approaches an ideal in which an agent has all the necessary resources, external and internal, to engage in whatever acceptable conduct she chooses.⁶ Somewhat more limited, except for the occasional Midas or demigod, is formal autonomy space.⁷ An agent's freedom here is limited in principle only by the established legal and moral norms, though in practice her resources may prevent her from exercising various avenues within this space, as where a person is financially unable to purchase a desired yacht. At the far end of the spectrum, possibly, is material autonomy space.⁸ An agent's actual resources circumscribe this. An impecunious, homeless person, for example, has a material autonomy space that is very constricted in practice. These three notions of autonomy space offer different perspectives of an agent's freedom. In addressing an agent's claims to autonomy and establishing her proper requitals for autonomy invasions, these perspectives become relevant. For example, does respect for another's autonomy require the provision of a minimal level of resources (e.g., welfare) to ensure that an agent's material autonomy space suffices for her to engage in a substantial range of quotidian activities? Is the discriminatory refusal to sell a yacht to another person because of her ethnicity a remediable autonomy invasion if she did not have the resources to make the purchase in any case? Is retributive punishment to account for the fact that the autonomy space of a Midas is materially constricted to a much greater degree by a particular jail sentence than is the case of an equal sentence for an impoverished agent?

In working out the proper reach of an agent's autonomy space, Kant's categorical imperative grounds today's dominant mechanism for gauging a proper balance between liberty and security.⁹ This imperative declares that each person, by virtue of her rational capacity, is an ethical being of priceless value whose dignity is entitled

³ Kuklin, *supra* note 1, at 380-81.

⁴ *Id.* at 386-87. When we are nearby, the greater my liberty to swing my fist as I please, the less is your security from being assaulted or battered.

⁵ *Id.* at 409.

⁶ *Id.* at 409-10.

⁷ *Id.* at 410-11.

⁸ *Id.* at 412-13.

⁹ See IMMANUEL KANT, *THE METAPHYSICS OF MORALS in PRACTICAL PHILOSOPHY* 353, 393 (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1999) (1797) [hereinafter KANT, *METAPHYSICS OF MORALS*] (“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.”).

to respect by others.¹⁰ As a moral agent, one has the right to be respected by others and the duty to respect other moral agents.¹¹ A formal, strongly individualistic understanding of this declaration, which I embrace here, implies that each person has the freedom to choose her own maxims of conduct to balance her perceived interests in liberty and security. Under one form of the categorical imperative, each maxim must be universalizable.¹² It must apply equally to both the maxim adopter and to everyone else. Otherwise, a lack of allotted equality implies an improper lack of respect. Yet universalization must be distinguished from generalization. A universalized maxim may apply to a restrict range of persons (e.g., family or coworkers) or situations (e.g., snowboarding), or it may apply very generally (e.g., charity).¹³

As a matter of logic and functionality, an agent's chosen maxims must constitute a complete and coherent set that resolves any potential conflicts among them. Because each person's set of individual maxims may be inconsistent with those of others, as a practical matter there must be a means to resolve these differences and coordinate behavior. Yet, from an individualistic perspective, one should be bound to maxims only of one's own choosing.¹⁴ Kant, astutely, did not push his individualistic foundation this far. He invoked a nonconsensual social contract as a synchronizing device.¹⁵ Modern Kantians, including John Rawls, tend to rely upon a social contract founded on a weak or fictional form of consent, such as tacit or hypothetical agreement, or on concepts such as fairness.¹⁶ This central, controversial issue I leave to others.¹⁷ For purposes of this Article, I accept that a properly deontic state and community are the arbiters of norms. They should, of course, embrace my guidance.

With the above preliminaries in mind, a rational, autonomous agent is in a position to consider the adoption of maxims. She must first attend to those that demarcate substantive rights and duties. These focus on the underlying balance between basic liberty and security interests. She must also attend to requital maxims

¹⁰ “[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.” *Id.* at 186.

¹¹ Kuklin, *supra* note 1, at 383-84.

¹² *Id.* at 390.

¹³ *See id.* at 421-23; *infra* note 132.

¹⁴ For further elaboration of this basic framework, see Kuklin, *supra* note 1, at 383-93.

¹⁵ *See* KANT, METAPHYSICS OF MORALS, *supra* note 9, at 451, 457-59; ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 198-204 (2001); JOHN RAWLS, *Justice as Fairness*, in COLLECTED PAPERS 47, 71 n.22 (Samuel Freeman ed., 1999) (Kant “interpreted the original contract merely as an ‘Idea of Reason’”).

¹⁶ *See generally* BRIAN SKYRMS, EVOLUTION OF THE SOCIAL CONTRACT (1996); Fred D'Agostino et al., *Contemporary Approaches to the Social Contract*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/contractarianism-contemporary/> (last visited May 8, 2016).

¹⁷ I duck this issue as one of the most intractable in all of political theory. None of the current theories to resolve it are fully satisfactory, in my view, in an individualistic, deontic realm.

that respond to violations of the substantive maxims. The consequences of violations must be established to fully flesh out one's autonomy space, one's range of freedom.

In adopting substantive maxims, an agent will naturally consider harms that conduct may engender. For if conduct does not produce any harms, there is no apparent reason to challenge the agent's liberty to engage in it. When harms do ensue, the security interests of those impacted come to bear. But some harms are typically not seen as wrongful. For example, in capitalistic societies the harms that ensue from fair business practices are not considered unjust, nor are those that arise from the common, inevitable bumps into others on crowded sidewalks. Though harms, these are not legally cognizable injuries. Theoreticians often embrace a "harm principle" to distinguish sanctionable harms from others.¹⁸ Physical, psychic, and economic harms are the three standard types that receive extensive protection under current law.¹⁹ A fourth type of harm, which often flies below the radar of existing legal and moral norms, is dignitary harm. In my view, to the contrary, dignitary harm should get pride of place in the deontic realm we are exploring.²⁰ Priceless individual dignity is the bedrock of the categorical imperative. Disrespect of that dignity is a paramount instance of an autonomy invasion.²¹

For the establishment of requital maxims, a sophisticated modern agent is likely to turn to Aristotle and Kant. In the context of private law, Aristotle's concept of corrective justice holds sway.²² In public, criminal law, retribution, championed by Kant, predominates.²³ Both of these concepts will be discussed below.

As suggested by the basic deontic principles already introduced, several key, sometimes nebulous, essentially contested concepts are likely to require meticulous delineation, including: dignity, respect, autonomy, liberty, security, and harm. Another similarly contestable concept, blameworthiness, is central to most current discussions of fair responsibility. This concept is of particular concern in this Article. Short of absolute or strict liability, if such are acceptable, blameworthiness is connected to most, if not all, legal and moral principles of interest.²⁴

Blameworthiness in a deontic regime has, as I see it, two important aspects, each with two prongs. First, as Aristotle advances, there is "responsibility blameworthiness."²⁵ An agent is not responsible for her choices and conduct insofar as they are a product of ignorance or coercion.²⁶ Such a choice or conduct is not a fully free one. It is not fair to hold one liable for unavoidably unforeseeable or forced

¹⁸ See, e.g., JOEL FEINBERG, HARM TO OTHERS 10-14, 26-27 (1988); JOHN STUART MILL, *On Liberty*, in UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT 81, 176-200 (1869); Kuklin, *supra* note 1, at 416-19.

¹⁹ See generally Kuklin, *supra* note 1, at 429-45.

²⁰ *Id.*

²¹ *Id.*

²² *Id.* at 381.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.* at 446-47.

²⁶ See ARISTOTLE, ETHICA NICOMACHEA, in THE BASIC WORKS OF ARISTOTLE 935, 964, 1015-16 (Richard McKeon ed., 1941).

outcomes.²⁷ Both prongs, ignorance and coercion, may be a product of sources or forces that are internal or external to the agent, or a combination of the two. For instance, internal ignorance may stem from cognitive dissonance or self-deception, while internal coercion may come from insanity, impulse, or akrasia. External ignorance may ensue from fraud or deception, while external coercion may result from physical constraint or economic pressure.

Second, as manifest in Kant's categorical imperative, there is "disrespect blameworthiness."²⁸ The two prongs of this form of blameworthiness are, first, a disrespectful attitude towards another agent (e.g., a personal sense of moral superiority) and, second, a disrespectful treatment of another agent.²⁹ The denial of another's rights, for example, may be a product of the actor's belief that the other person is inferior (e.g., racial or religious discrimination). Indeed, the disrespectful

²⁷ Some commentators, unpersuaded by this argument, adopt a principle of "outcome responsibility." This is a form of strict liability. "The idea that those who expose others to risks are responsible for the outcomes they cause has considerable appeal. Kant says that those who do wrong 'play a game of chance with the agency of others.'" ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 65 (1999); see also ANDREWS REATH, *Agency and the Imputation of Consequences in Kant's Ethics*, in *AGENCY AND AUTONOMY IN KANT'S MORAL THEORY* 250 (2006). For advocates of strict outcome responsibility, see, for example, Peter Cane, *Retribution, Proportionality, and Moral Luck in Tort Law*, in *THE LAW OF OBLIGATION* 141 (Peter Cane & Jane Stapleton eds., 1998); TONY HONORE, *Responsibility and Luck: The Moral Basis of Strict Liability*, in *RESPONSIBILITY AND FAULT* 14 (1999). "A variety of principles, including non-reciprocity of risk or benefit, protection of legitimate expectations, or a Kantian requirement of internalizing externalities, can justify liability for non-faulty conduct." Kenneth W. Simons, *Jules Coleman and Corrective Justice in Tort Law: A Critique and Reformulation*, 15 *HARV. J.L. & PUB. POL'Y* 849, 862 (1992) (footnotes omitted). Responsible agency, under Aristotle, requires sufficient freedom from ignorance and coercion, which the strict liability of outcome responsibility may not. Honore contends that, "outcome allocation is crucial to our identity as persons . . ." HONORE, *supra*, at 27. But, to say nothing of coercion, the idea that a person's identity turns on holding her accountable for "unavoidable accidents" from choices made in ignorance of risks (unforeseeability) seems weak, counterintuitive. For strong criticism of standard outcome responsibility, see, for example, JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW* 199 (2006); Stephen Perry, *Loss, Agency, and Responsibility for Outcomes: Three Conceptions of Corrective Justice*, in *TORT THEORY* 24 (Ken Cooper-Stephenson & Elaine Gibson eds., 1993); Stephen R. Perry, *Responsibility for Outcomes, Risk, and the Law of Torts*, in *PHILOSOPHY AND THE LAW OF TORTS* 72 (Gerald J. Postema ed., 2001) [hereinafter, Perry, *Responsibility for Outcomes*]; Christopher H. Schroeder, *Causation, Compensation, and Moral Responsibility*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 347 (David G. Owen ed., 1995); Allan Beaver, *Corrective Justice and Personal Responsibility in Tort*, 28 *OXFORD J. LEGAL STUD.* 475, 484-91 (2008). "In strict liability, the protection of the plaintiff's right cuts off the defendant's moral power to actualize his or her purposive capacity, so that the vindication of the plaintiff's agency comes at the price of denying the defendant's." ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 182-83 (1995). "[T]he theoretical case for basing tort liability on the causation of harm without fault is inconsistent with the equality and correlativity of corrective justice and with the concept of agency that underlies Kantian right." *Id.* at 203.

²⁸ Kuklin, *supra* note 1, at 449-50.

²⁹ See, e.g., THOMAS E. HILL, JR., *DIGNITY AND PRACTICAL REASON IN KANT'S MORAL THEORY* 55 (1992); Allen Wood, *Humanity as End in Itself*, in 2 DEREK PARFIT, *ON WHAT MATTERS* 58, 62-63 (2011); Kuklin, *supra* note 1, at 449-54; Robin S. Dillon, *Respect*, *STAN. ENCYCLOPEDIA PHIL.*, <http://plato.stanford.edu/entries/respect> (last visited May 8, 2016).

attitude alone, even without conduct manifesting it, suffices to abridge the mandate to be respectful of others.³⁰ On the other hand, an agent may have the utmost regard for another person, but still treat her disrespectfully by denying her a particular right. For instance, one might paternalize a stout loved one by nonconsensually hiding her sweets to keep her from temptation.

The mapping of an agent's autonomy space through the adoption of legal and moral maxims, both substantive and requital, entails the establishment of rights and duties. Before turning our attention to the establishment of maxims, particularly the requital ones of primary interest in this Article, it will be useful to consider the nature of rights and duties.

II. RIGHTS AND DUTIES

Rights and duties may be negative or positive. Negative rights generally relate to the protection of the right-holder's security.³¹ Positive rights generally relate to the liberty of the right-holder to choose and act.³² In the following section, rights and duties that satisfy the categorical imperative are referred to as deontic ones. The deontic rights and duties considered here, like the non-deontic ones (e.g., utility rights), are treated as Hohfeldian correlatives.³³ In this section, I briefly discuss rights and duties from two overlapping perspectives: deontic and consensual.

A. Deontic Rights and Duties

The source of relevant deontic rights and duties is the maxims within the categorical imperative embraced by a moral agent.³⁴ An agent embraces a maxim when she chooses, adopts, acts on, or explicitly consents to it. Under the formal interpretation of the categorical imperative accepted by most commentators,³⁵ there

³⁰ Dillon, *supra* note 29.

³¹ See Gregory C. Keating, *A Social Contract Conception of the Tort Law of Accidents*, in *PHILOSOPHY AND THE LAW OF TORTS*, *supra* note 27, at 22-23.

³² For brief summaries of other, associated notions of positive and negative liberty and rights, and active and passive ones, see Kuklin *supra* note 1, at 390-92.

³³ See WESLEY N. HOHFELD, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, in *FUNDAMENTAL LEGAL CONCEPTIONS* 23 (1923). While Hohfeld distinguishes claim-right/duty, liberty (privilege)/no-right, power/liability, and immunity/disability, unless relevant, I will lump these together as rights and duties. Kant did not see deontic rights and duties as Hohfeldian correlatives. For other differences as well between Hohfeld and Kant, see Nikolai Lazarev, *Hohfeld's Analysis of Rights: An Essential Approach to a Conceptual and Practical Understanding of the Nature of Rights*, 12 *MURDOCH UNIV. ELECT. J. L.* (2005), <http://www.austlii.edu.au/au/journals/MurUEJL/2005/9.html>. For general doubts about the correlativity, see, for example, David Lyons, *The Correlativity of Rights and Duties*, 4 *NOÛS* 45, 45 (1970).

³⁴ For a discussion of Kant's notion of duties, see generally ALLEN W. WOOD, *KANTIAN ETHICS* 158-81 (2008).

³⁵ Some commentators disagree. "In response to the traditional Hegelian objection that ["the universal law version of the Categorical Imperative"] is purely formal and empty of content, a number of theorists sympathetic to Kant have ably made the case that [some forms of the Categorical Imperative have] important and substantive moral implications." ANDREWS REATH, *Agency and Universal Law*, in *AGENCY AND AUTONOMY IN KANT'S MORAL THEORY*, *supra* note 27, at 196, 196 (citing ONORA O'NEILL, *CONSTRUCTIONS OF REASON* (1989);

is no particular maxim that every agent must adopt.³⁶ Unlike Kant's perfect (narrow) obligations from adopted maxims, Kant's imperfect (wide) obligations do not themselves create claims by identifiable individuals.³⁷ These imperfect obligations include duties of virtue, such as the duty of general beneficence and self-development.³⁸ No one can claim a right to another person's duty of virtue. The duty of virtue, then, does not by itself create a Hohfeldian right. An agent, in recognition of an imperfect duty, may make a commitment to another person. A promise to make a charitable contribution is an example. Once this occurs, the agent's consent may create a correlative right in that other person, as from a maxim of promise keeping, unlike the imperfect duty by itself.

Adopted maxims relate to facets of an agent's moral realm.³⁹ Initially there are substantive, first-order maxims, such as, "do not batter another person." Then there are second-order, requital maxims that stem from conceptions of corrective justice or retribution, such as, "one must compensate wrongfully harmed persons to the extent of the harm." These second-order maxims are invoked after there is a violation of first-order maxims.⁴⁰ Together, first- and second-order maxims demarcate a person's

BARBARA HERMAN, *THE PRACTICE OF MORAL JUDGMENT* 6–7, 10 (1993); CHRISTINE KORSGAARD, *CREATING THE KINGDOM OF ENDS* (1996); JOHN RAWLS, *Kant, Lecture II, in LECTURES ON THE HISTORY OF MORAL PHILOSOPHY* (2000)); *see also, e.g.*, RIPSTEIN, *supra* note 15, at 383; Arthur Ripstein, *Closing the Gap, in 9 THEORETICAL INQ. L.* 61, 86 (2007) ("there are some things, such as murder, that the state must define as crimes").

³⁶ *See, e.g.*, THOMAS E. HILL, JR., *Pains and Projects: Justifying to Oneself, in AUTONOMY AND SELF-RESPECT* 173, 178 (1991). "At any given moment there may be and usually are an indefinite number of permissible maxims [that are within the Categorical Imperative] on which we may act." ROGER J. SULLIVAN, *IMMANUEL KANT'S MORAL THEORY* 51 (1989).

³⁷ *See generally* IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS, in PRACTICAL PHILOSOPHY* (Mary J. Gregor ed. & trans., Cambridge Univ. Press 1999) (1785) [hereinafter KANT, *GROUNDWORK*].

³⁸ *See, e.g., id.* at 41, 53-54, 74-75; KANT, *METAPHYSICS OF MORALS, supra* note 9, at 512-40, 572.

³⁹ Hurd "distinguish[es] at least five deontological positions (some possessing several variations) concerning the objects of categorical imperatives, and hence five possible positions concerning the nature of deontological wrongdoing. Put succinctly, the categorical imperatives of deontology may prohibit certain (1) motivations, (2) deliberations, (3) intentions, (4) tryings, or (5) actions." Heidi Hurd, *What in the World Is Wrong?*, 5 J. CONTEMP. LEGAL ISSUES 157, 163 (1994) (footnote omitted). Kant is often said to adopt the first position. *See id.* at 165.

⁴⁰ Corrective justice "holds that in the event certain conditions attend the breach [of duties towards others], a second order duty of repair exists. Whereas the underlying duties of care establish in part normative relations between the parties, the breach of such a duty creates a different but related normative relationship." Jules Coleman & Gabriel Mendlow, *Theories of Tort Law*, STAN. ENCYCLOPEDIA PHIL. 26, <http://plato.stanford.edu/archives/sum2008/entries/tort-theories> (last visited May 8, 2016); *see also* ARISTOTLE, *supra* note 26, at 1007-10; IZHAK ENGLARD, *CORRECTIVE AND DISTRIBUTIVE JUSTICE: FROM ARISTOTLE TO MODERN TIMES* 185 (2009). Pursuant to Kant, "a publicly assured enforceable right to compensation can guarantee that your right will be effective, even if I violate it, because the object of the right will once again be subject to your choice." RIPSTEIN, *supra* note 15, at 166.

autonomy space.⁴¹ In other words, one's autonomy space is determined not only by her liberty and security freedom as delineated by substantive maxims, but also by the cognizable remedial claims for violations of the substantive maxims.⁴² To twist a Roman law maxim, "without a remedy, there is no right,"⁴³ or, correlatively, a duty.

Under the view that the categorical imperative is a formal concept, a moral agent must adopt a complete and coherent set of deontic maxims, both first- and second-order, that satisfies the wide constraints of the categorical imperative.⁴⁴ When an agent adopts maxims, she may violate one of her substantive maxims in a way that falls within the reach of one of her requital maxims.⁴⁵ If this occurs, a harmed party (claimant) can claim that the agent (claimee) has violated her remediable duty to the claimant. She has, by her own lights, wrongfully harmed him and owes him a requital. Third parties may also be harmed, but not wrongfully harmed if they fall outside the reach of any substantive or requital maxim adopted by the agent. For example, unrelated observers of a battery are usually not entitled to bring a claim against the tortfeasor though they may suffer psychic and other harms from her conduct.

There are, in principle, an infinite number of complete and coherent sets of moral maxims consistent with the categorical imperative.⁴⁶ This enormously complicates the standing of a person to claim a violation of her right under a claimee's maxims. For instance, if a person argues that his reasonable expectations, foreseeably aroused by the claimee's conduct, have been harmfully dashed, the claimee may deny that

⁴¹ John Austin refers to this distinction in terms of "primary" or "principal" and "secondary" or "sanctioning" rights. See JOHN AUSTIN, LECTURES ON JURISPRUDENCE lecture xlv (5th ed. 1885). "A wrong is the infringement of a primary right which generates a secondary right, commonly but not always a liability to pay compensation." ROBERT STEVENS, TORTS AND RIGHTS 287 (2007) (internal citation omitted). Other labels have been used. See, e.g., Kenneth Campbell, *Legal Rights*, STAN. ENCYCLOPEDIA PHIL. 11-12, <http://plato.stanford.edu/entries/legal-rights> (last visited May 8, 2016) ("primary" and "remedial" rights); Hanoch Sheinman, *Tort Law and Corrective Justice*, 22 LAW & PHIL. 21, 28, 30 (2003) ("proscriptive and remedial duties", or primary and secondary duties). For a discussion of first- and second-order tort duties, see JULES COLEMAN, THE PRACTICE OF PRINCIPLE 31-35 (2001). "Retributivism is not a theory of criminality; it is a theory about what ought to be, or of what may legitimately be done by the state in those cases where a criminal misdeed has been committed." *Id.* at 33. "It presupposes an account of criminality, or at least of list of what the crimes are." *Id.*

⁴² "Remedies . . . participate in the constitution of the rights they help enforce Thus, the choice of different remedies, as well as the possibility of incorporating qualifications, limitations, and even obligations, allows private law to accommodate qualitative (and normatively attractive) distinctions between different types of rights." Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT L. 1, 1 (2011). Regarding "the connection between rights and remedies [in the context of contracts,] . . . the scope and limits of the remedy affect the essential nature of the right." Brian H. Bix, *Contract Rights and Remedies, and the Divergence Between Law and Morality*, 21 RATIO JURIS. 194, 200 (2008).

⁴³ The maxim, "ubi jus, ibi remedium," translates, "Where there is a right, there is a remedy." BLACK'S LAW DICTIONARY 1691 (4th ed. 1951). "It is said that the rule of primitive law was the reverse: Where there is a remedy, there is a right." *Id.*

⁴⁴ Kuklin, *supra* note 1, at 381.

⁴⁵ *Id.* at 381-82.

⁴⁶ *Id.* at 458.

she has adopted a relevant substantive maxim, or assert that the claimant's aroused expectations do not fall within the ambit of what the claimee meant in her adopted, relevant maxim by "reasonable" or "foreseeable,"⁴⁷ or that even if the claimant's expectations fall within the reach of her maxim, that her associated requital maxim does not include damages (e.g., apology only required) or cover the type of alleged harm (e.g., psychic).⁴⁸ To get over this hurdle, the claimant may assert that the claimee's prior statements or conduct have manifested the adoption of maxims supporting his claim, but this may often require an unrealistically detailed knowledge of the claimee's history. Even with this detailed knowledge, sufficiently specifying the maxim so manifested offers notorious problems.⁴⁹ The circumstances, moreover, may be unusual enough that the claimee was never before in a situation in which her choice of a relevant maxim was needed.⁵⁰ Or perhaps two or more broad, adopted maxims point to inconsistent conclusions requiring the claimee to refine one or more of them to coherently accommodate the case at hand, some possible refinements being protective of the claimant and others not.

Some maxims may be hard or virtually impossible to opt out of under the categorical imperative. Malicious, unprovoked homicide always seems over the line.⁵¹ Yet there is enough discretion about plausible maxims for it to be difficult for a claimant to make out an individualized claim in many cases of alleged wrongful harms.⁵² That reasonable people can rationally adopt different sets of moral maxims

⁴⁷ "Any principle can be enacted or embodied or instituted in many different ways, among which agents have to decide." Onora O'Neill, *Instituting Principles: Between Duty and Action*, in KANT'S METAPHYSICS OF MORALS 331 (Mark Timmons ed., 2002). "One must look to accounts of judgement for a view of the way in which the gap between principle and particular act, or pattern of action, is to be bridged." *Id.* at 332.

⁴⁸ "[A]lthough others also can create rights through their unilateral will, no one can be sure of how others interpret the extent of their respective rights or of whether they are willing to abide by the rights of others." Ernest J. Weinrib, *Poverty and Property in Kant's System of Rights*, 78 NOTRE DAME L. REV. 795, 807 (2003). "[E]ach person is the judge of his or her own entitlements, doing what seems right and good in his or her own eyes." *Id.* at 808 (citing KANT, METAPHYSICS OF MORALS, *supra* note 9, at 455-56).

⁴⁹ "Now there are notorious difficulties in identifying the maxim of a particular action . . ." R. A. DUFF, TRIALS AND PUNISHMENTS 201 (1986) (citation omitted). "A pattern of behavior can never fully determine the content of a rule, because any pattern of behavior is consistent with an indefinite number of different rules, each of which 'covers' past behavior, yet each of which would result in different future behavior." COLEMAN, *supra* note 41, at 80. "The problem stems from the notorious difficulty of specifying the maxim of an action The problem is that it is difficult to find any way of characterizing the proper description of the maxim to be tested without relying upon one's antecedent sense of how the test should come out." THOMAS E. HILL, JR., *A Kantian Perspective on Moral Rules*, in RESPECT, PLURALISM, AND JUSTICE 33, 40 (2000); see THOMAS E. HILL, JR., *A Kantian Perspective on Political Violence*, in RESPECT, PLURALISM, AND JUSTICE, 200, 211-13 (2000). For an approach to coming up with a set of maxims, see *id.* at 213-17.

⁵⁰ As Kant suggests, "a requirement to enact a plurality of maxims may be stymied not only by the indeterminacy of the maxims, but by agents' uncertainty about their own maxims?" O'Neill, *supra* note 47, at 338 n.13.

⁵¹ See *supra* note 35.

⁵² This is especially true when, as discussed below, *infra* note 120, the maxim claimed to be violated includes "except when" provisos, for these are particularly variable.

led Rawls in *Political Liberalism* to moderate some of his contentions previously made in *A Theory of Justice*.⁵³ Within our existing political realm, these complications are solved by the state declaring which maxims control,⁵⁴ often irrespective of a contrary individual choice.⁵⁵ This state solution remains in the background as much as possible. Required deference to state solutions depends on a theory of political obligation beyond the reach of this Article.⁵⁶

⁵³ “Now the serious problem is this. A modern democratic society is characterized not simply by a pluralism of comprehensive religious, philosophical, and moral doctrines but by a pluralism of incompatible yet reasonable comprehensive doctrines. No one of these doctrines is affirmed by citizens generally.” JOHN RAWLS, *POLITICAL LIBERALISM* xvi (1993).

⁵⁴ “In treating the parties as equals, corrective justice precludes either of them from unilaterally determining the legal consequences of their relationship. Corrective justice thereby requires that disputes be authoritatively resolvable by a third party [I]n our culture, [it is] the judiciary” WEINRIB, *supra* note 27, at 218. “An objective valuation of interests can be morally justified on the ground that it treats both parties to the lawsuit equally, whereas a subjective standard would let the injurer set the terms of the relationship unilaterally.” Mark Geistfeld, *Economics, Moral Philosophy, and the Positive Analysis of Tort Law*, in *PHILOSOPHY AND THE LAW OF TORTS*, *supra* note 27, at 250, 260. An agent who establishes the autonomy space boundary between her and others by adopting maxims does, in one sense, treat the others as equals. She is consenting to the duties to others that she is imposing on the others to her. If disputes over the boundary are turned over to a judge, the judge is in the same position as were the private parties. She is imposing duties on others, though again, she is accepting the duties for herself. If the disputants both agree to the judge’s authority, then their consent solves the equality issue between them. But under the common law, the judge’s ruling at the appellate level is generally binding on others within the jurisdiction. The equality issue arises for them. They have not consented to the judge’s ruling unless we find them bound to a consensual social contract. At this point in the inquiry, many commentators, as I see it, simply wave their hands or offer consent arguments for the social contract that I find unpersuasive in many situations. See *supra* notes 16-17 and discussion therein. Kant found a nonconsensual social contract. See *supra* note 15. His rather bald assertion looks like hand waving to me. On this issue, I wave my hands also.

⁵⁵ Under Kant, “the state provides duly authorized institutions of adjudication and enforcement. These replace the exercise of private judgment about controversial claims with the authoritative judgments of courts that determine the scope of each person’s entitlements according to what is laid down as right.” Weinrib, *supra* note 48, at 808-09 (Kant citations omitted). “The civil condition is the product of a social contract, which is conceived not as an historical occurrence, but as an idea ‘in terms of which alone we can think of the legitimacy of a state.’” *Id.* at 809 (Kant citations omitted); see also JEFFRIE G. MURPHY, *KANT: THE PHILOSOPHY OF RIGHT* 36 (1970). “The juridical state is a necessary public coercive institution for individual agents who, coexisting in limited space, each unavoidably raise legitimate freedom claims against one another, yet who, given their innate equality, lack legitimate enforcement authority over one another.” Katrin Flikschuh, *Kant’s Sovereignty Dilemma: A Contemporary Analysis*, 18 *J. POL. PHIL.* 469, 478 (2010). For the need and origin of the state in Kant’s view, see SULLIVAN, *supra* note 36, at 233-45. See also LARRY ALEXANDER & KIMBERLY K. FERZAN, *CRIME AND CULPABILITY* 295-96 (2009) (“rules resolve[] problems of coordination, expertise, and efficiency”); Japa Pallikkathayil, *Deriving Morality from Politics: Rethinking the Formula of Humanity*, 121 *ETHICS* 116 (2010) (discussing the role of the state as arbiter of deontic maxims).

⁵⁶ “Contemporary political theory has not been kind to the view that citizens are obligated to obey the law just because it is the law, even when they live in relatively just regimes.” MICHAEL S. MOORE, *PLACING BLAME* 72 (1997) (citations omitted). “My own view is that the passage of a law prohibiting certain conduct adds nothing to our antecedent moral obligations with respect to that conduct” *Id.* “My starting point is the assumption that there is no

B. Consensual Rights and Duties (Obligations)

Consent is central to the moral theory embraced in this Article.⁵⁷ Beyond the consent required for the adoption of deontic maxims, an agent by virtue of her consent may assume a particular duty to another person or forgo a particular right. Consent to assume a duty or forgo a right adjusts the boundaries of one's baseline autonomy space.⁵⁸ For example, consent to a specific touching may reduce one's otherwise protected realm of security.

Consent can establish or adjust boundaries having no prior legal or moral standing. If a person joins a group, for instance, knowing that its rules require her to bow down to its high muckamuck, then it is wrongful, even disrespectful, for her to violate the rule, whereas it would not be without the consensual membership.⁵⁹ Just as consent is technically not a defense of privilege to intentional torts, but rather is

general obligation to obey the law, not even a prima facie obligation and not even in a just society.” Joseph Raz, *Authority and Consent*, 67 VA. L. REV. 103, 103 (1981); see JOSEPH RAZ, *ETHICS IN THE PUBLIC DOMAIN* (rev. ed. 1994); A. JOHN SIMMONS, *MORAL PRINCIPLES AND POLITICAL OBLIGATIONS* (1981); Gerhard Overland, *The Right to Do Wrong*, 26 LAW & PHIL. 377, 382-83 (2007) (citing M.B.E. Smith, *Is There a Prima Facie Obligation to Obey the Law?*, 82 YALE L.J. 950 (1973)). See generally Leslie Green, *Law and Obligations*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 514 (Jules Coleman & Scott Shapiro eds., 2002); Richard Dagger & David Lefkowitz, *Political Obligation*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/political-obligation> (last visited May 8, 2016). “Although the lines that separate one theory from another are not always distinct, philosophical justifications of political obligation nowadays usually take the form of arguments from consent, gratitude, fair play, membership, or natural duty.” *Id.* at 24.

⁵⁷ Some commentators distinguish moral duties, which arise irrespective of consent, from obligations, which require consent. See, e.g., Jody Kraus, *The Correspondence of Contract and Promise*, 109 COLUM. L. REV. 1603, 1614-15 (2009). “[S]pecial duties are duties that we have only in respect of those particular people to whom we stand in a certain significant sort of relation or with whom we have had certain significant sorts of interaction.” Overland, *supra* note 56, at 385 (citing SAMUEL SCHEFFLER, *BOUNDARIES AND ALLEGIANCES* 49 (2001)). “Many people do believe, as I do not, that their racial, ethnic, religious, and linguistic connections bestow associational rights and obligations.” RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* 324 (2011).

⁵⁸ For limits to consent, such as to slavery or self-mutilation, see Kuklin, *supra* note 1, at 394. Existing criminal law is cautious about consent as a justification. “[T]he consent defense in American criminal law, and in the Model Code, is not really a general defense.” MARKUS D. DUBBER, *CRIMINAL LAW: MODEL PENAL CODE* 242 (2002). “The reason generally cited for limiting, or even rejecting, consent as a justification is that the criminal law, unlike torts, is about ‘public wrongs,’ not ‘private wrongs’” *Id.* at 243. Since my Kantian analysis rejects wrongs to the public that are not wrongs to individual moral persons, I would grant more room for consent in criminal law—until it becomes self-disrespectful, as in slavery contracts.

⁵⁹ “[A] person who wishes to be restricted in various ways, whether by the discipline of the monastery, regimentation of the army, or even by coercion, is not, on that account alone, less autonomous.” GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 18 (1988). Sheinman observes that the membership remains voluntary even though the joiner “does not even know what these rules are before becoming a member.” Hanoch Sheinman, *Contractual Liability and Voluntary Undertakings*, 20 OXFORD J. LEGAL STUD. 205, 209 (2000). The formal consent suffices.

the basis of a claim that, because of the consent, there was no relevant duty to begin with,⁶⁰ so allowable consent to an adjustment of a baseline autonomy space affects a later assertion that the consentor's autonomy space was invaded. Because of the consent, there is no wrongful harm.⁶¹ Consent not only factors into conceptions of wrongful harm, but it also factors into those of blameworthiness. When properly consented to, one is not blameworthy for harming another person.

Consent may be divided into three, overlapping types: hypothetical, formal, and material.⁶² Hypothetical consent is exemplified by a social contract presumed of citizens and others whereby certain rights and duties are established.⁶³ Whereas Kant did not recognize a social contract based on hypothetical consent,⁶⁴ various Kantians, such as Rawls, have done so.⁶⁵ Second, formal consent occurs when a person manifests consent by choosing to assume duties or forgo rights under conditions of partial ignorance or coercion.⁶⁶ For example, a person who enters an enforceable contract formally consents to unread terms and legal contract rules that one knows or has reason to know. Third, material consent, at its polar limit, involves an ideally rational choice of a fully autonomous person.⁶⁷ Such consent is completely free of ignorance and coercion.⁶⁸

In light of deontic principles and these three types of consent, I favor a Consent Principle. This Principle declares that the degree or depth of the consent necessary to adjust an agent's baseline autonomy space turns on the extent to which the adjustment impacts the agent's autonomy space.⁶⁹ The greater the reduction of the agent's autonomy space, the deeper, freer from ignorance and coercion, her consent must be.⁷⁰ For example, consent to sexual relations must be stronger, more informed, and freer from coercion, than consent to a kiss and, even less demanding, consent to

⁶⁰ See, e.g., W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 112 (5th ed. 1984) (Consent "is not, strictly speaking, a privilege, or even a defense, but goes to negative the existence of any tort in the first instance.").

⁶¹ "Once the victim consents [to a harm or an act risking a harm], there is no [legal] interest to protect; the victim has in effect conveyed his right to legal protection from the actor, at least for some duration." ALEXANDER & FERZAN, *supra* note 55, at 276; see also THOMAS NAGEL, THE VIEW FROM NOWHERE 182 (1986); STEVENS, *supra* note 41, at 17 ("[T]he waiver of the primary [first-order] right means that there is no right to violate, and consequently no wrong.").

⁶² These are not to be confused with hypothetical, formal, and material autonomy space. See Kuklin, *supra* note 1, at 408-14 ("Types of Autonomy Space").

⁶³ *Id.*

⁶⁴ For a brief account of why Kant resorted to an imaginary contract, not a consensual one, see SANDEL, *supra* note 2, at 142.

⁶⁵ See, e.g., JOHN RAWLS, A THEORY OF JUSTICE (rev. ed. 1999).

⁶⁶ These two elements invoke Aristotle's requisites for responsible conduct, discussed *supra* at notes 26-27.

⁶⁷ Kuklin, *supra* note 1, at 446-47.

⁶⁸ *Id.*

⁶⁹ *Id.* at 394 n.63.

⁷⁰ *Id.* at 395-99.

a hug. Likewise, declining a valuable gift requires deeper consent than forgoing a nominal one. Consent, of sorts, is also requisite to the adoption of maxims, which give rise to rights and duties.⁷¹ This consent similarly falls within the Consent Principle. For instance, adoption of a maxim necessitating arduous rescues of strangers requires richer consent than one demanding the expression of gratitude for being rescued.

III. REQUITALS FOR AUTONOMY INVASIONS

Requitals apply second-order maxims to rectify violations of adopted first-order, substantive maxims. Together, these satisfy requirements of justice. A general form of justice is: “To each according to X, from each according to Y.”⁷² X and Y are commonly called “desert,” though some notions of X and Y stretch the ordinary meaning of this label.⁷³

There are various conceptions of X, that is, of what one should receive. Corrective justice provides some of the conceptions.⁷⁴ For example, two conceptions of corrective justice (one of them encompassing the bracketed term) are: “To each according to wrongful harm [from blameworthiness].”⁷⁵ Some of these conceptions

⁷¹ In the context of maxims, terms more descriptive than “consent” may be “adoption,” “sanction,” “acceptance,” or “approval.”

⁷² The commentators generally focus on the X, “to,” side of the equation. *See, e.g.*, CH. PERELMAN, *THE IDEA OF JUSTICE AND THE PROBLEM OF ARGUMENT* 6-29 (1963); Diana T. Meyers, *Introduction*, in *ECONOMIC JUSTICE: PRIVATE RIGHTS AND PUBLIC RESPONSIBILITIES* 1-2 (Kenneth Kipnis & Diana T. Meyers eds., 1985); Serena Olsaretti, *Introduction: Debating Desert and Justice*, in *DESERT AND JUSTICE* 1 (Serena Olsaretti ed., 2003).

⁷³ In Feinberg’s classic exposition, desert judgments have the form: “‘S deserves X in virtue of F,’ where S is a person, X a mode of treatment, and F some fact about S” JOEL FEINBERG, *Justice and Personal Desert*, in *DOING AND DESERVING* 55, 61 (1970).

⁷⁴ “The test of adequacy [for principles of formalism] is satisfied when the justification for a doctrine conforms to the structure of corrective justice. More than one doctrine concerning a given point may satisfy this test.” WEINRIB, *supra* note 27, at 228 (citation omitted).

⁷⁵ As is the case elsewhere, I bracket certain terms to indicate various conceptions of the maxim under consideration. Here there are two identified conceptions of X, one that does not require blameworthiness and the other that does. Another of numerous possibilities for the brackets involves the nature of the ensuing harms. For example, a particular requital maxim may allow recoveries for physical and psychic harms, but not [purely] economic ones.

Goldberg suggests that the second conception of corrective justice, which accounts for the blameworthiness of the invader, is the only acceptable one. After discussing the injustice of the “thin skull” rule, he concludes, “In short, to the extent that tort law is driven by considerations of corrective justice, damages for intentional and negligent torts arguably should be determined not by the full compensation principle, but by an independent inquiry into the nature and gravity of the defendant’s wrongdoing.” John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2041 (1997) [hereinafter Goldberg, *Misconduct*] (citation omitted). Goldberg finds that the shift from fair compensation for tortious invasions, which accounts for the invader’s blameworthiness, and full compensation, which does not, took place in the mid-nineteenth century. *See* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006). “Blameworthiness of conduct and protected interests are the two types of props which, when combined, will make up the ‘grid’ of tort law.” Eric Descheemaeker, *Protecting Reputation: Defamation and Negligence*, 29 OXFORD J.

are discussed below. Other conceptions of X are grounded in distributive justice. As Aristotle would have it, distributive justice “is manifested in distributions of honour or money or the other things that fall to be divided among those who have a share in the constitution”⁷⁶ Today, matters of distributive justice are seen as including the distributive effects of norms, legal and otherwise. Retribution, under the view I embrace,⁷⁷ falls within distributive justice.⁷⁸ Other moral systems, such as utilitarianism and perhaps virtue ethics, advance other conceptions of X.⁷⁹

Commentators have also championed various conceptions of Y, what a person is to give, in the general formula for justice. Under corrective justice and, perhaps, retribution, two conceptions of Y are: “From each according to the extent of the caused [wrongful] harm.” For distributive justice, two conceptions, arguably grounding retribution, are: “From each according to [in proportion to] (negative) desert.” Another two are: “From each according to wealth [societal benefits].”⁸⁰ Other moral foundations, such as utilitarianism, ground comparable conceptions of Y.⁸¹

Corrective justice is the chief deontic principle for privately requiring autonomy invasions. Ernest Weinrib, for example, is a leader among those who examine

LEGAL STUD. 603, 603 (2009). Finkelstein disagrees. See Claire Finkelstein, *The Irrelevance of the Intended to Prima Facie Culpability: Comment on Moore*, 76 B.U. L. REV. 335, 335 (1996). Unlike criminal law, she sees tort law, “at least at present,” as social welfarist, having “nothing to do with culpability.” *Id.* at 345.

⁷⁶ ARISTOTLE, *supra* note 26, at 1005-06.

⁷⁷ While both corrective justice and retribution are key concepts in delineating autonomy space, this Article emphasizes corrective justice more than retribution because this latter concept gets most of the attention in my working paper entitled “Public Requitals: Corrective Justice, Retribution, and Distributive Justice.”

⁷⁸ See, e.g., C.L. TEN, CRIME, GUILT, AND PUNISHMENT 5 (1987); Wojciech Sadurski, *Distributive Justice and the Theory of Punishment*, 5 OXFORD J. LEGAL STUD. 47, 47 (1985).

⁷⁹ Under Bentham’s hedonistic version of utilitarianism, the X would be something like this: “To each according to the extent that overall happiness is promoted.” See generally JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (J.H. Burns & H.L.A. Hart eds., 1970) (1789).

“Virtue ethics . . . may, initially, be identified as the [major approach to normative ethics] that emphasizes the virtues, or moral character, in contrast to the approach which emphasizes duties or rules (deontology) or that which emphasizes the consequences of actions (consequentialism).” Rosalind Hursthouse, *Virtue Ethics*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/fall2013/entries/ethics-virtue/> (last visited May 8, 2016). Plato, a founder of virtue ethics, identifies justice or fairness as one of the primary virtues. See 4 PLATO, PROTAGORAS 123, 162-65 (Benjamin Jowett, trans., n.d.). Aristotle, another champion of virtue ethics, similarly specified justice as one of “[t]he forms of Virtue.” See ARISTOTLE, RHETORIC, in THE BASIC WORKS OF ARISTOTLE, *supra* note 26, at 1317, 1354.

⁸⁰ The wealth gauge is known as “deep pocket” in tort law or horizontal equity in taxation law. See, e.g., Stephen R. Perry, *Tort Law*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 64, 76-77 (Dennis Patterson ed., 2d ed. 2010); David Elkins, *Horizontal Equity as a Principle of Tax Theory*, 24 YALE L. & POL’Y REV. 43 (2006).

⁸¹ For utilitarianism, one conception is: “From each insofar as it increases overall social utility.”

private law and see Kant and corrective justice as immanent in it.⁸² But the meaning or definition of corrective justice is not settled.⁸³ A variety of plausible conceptions are considered below.⁸⁴

Although the conceptions of corrective justice discussed here not exhaustive, there are two key elements in most notions of X involved: wrongful harm and blameworthiness.⁸⁵ The same is true of conceptions of retribution.⁸⁶ Wrongness and

⁸² Outlining “the morality latent in the structure of tort law,” Weinrib observes that it was “first formulated in Aristotle’s discussion of corrective justice and elaborated by Kant” Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 403 (1989). See generally WEINRIB, *supra* note 27. “Private law makes corrective justice and Kantian right explicit by actualizing them in doctrines, concepts, and institutions that coherently fit together.” *Id.* at 20. “For Kant, as for Aristotle, corrective justice is the justificatory structure that pertains to the immediate interaction of doer and sufferer.” *Id.* at 84. For scrutiny, criticism, and defense of Weinrib’s views, see, for example, Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 535-47 (1992); Martin Stone, *On the Idea of Private Law*, 9 CAN. J. L. & JURIS. 235, 254, 274-77 (1996); Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2374-75 (1990).

⁸³ “[D]efinitions of corrective justice differ widely” Simons, *supra* note 27, at 871 (distinguishing corrective justice from retributive and distributive justice). For a general discussion of corrective justice, see Coleman & Mendlow, *supra* note 40, at 20-33. Walt identifies at least four different possible purposes for corrective justice. See Steven Walt, *Eliminating Corrective Justice*, 92 VA. L. REV. 1311, 1321 (2006). Two of them relate to the distribution of shares. “A third purpose is simply to remedy a wrongful harm. A fourth possibility might operate in tort law. Here, the duty of repair arises upon the violation of legal entitlements, whether or not the entitlements are morally legitimate.” *Id.* “Depending on the particular purpose identified, the duty of repair may be one of either corrective or distributive justice.” *Id.*

“Th[e] rectification [function of corrective justice] operates correlatively on both parties. The central feature of a system of liability is that any liability of a particular defendant is simultaneously a liability to a particular plaintiff.” ERNEST J. WEINRIB, CORRECTIVE JUSTICE 16 (2012).

To leave those costs [“from the actualization of a {inappropriate} risk”] where they fall would be to allow one person to set the terms of their interactions with others unilaterally, for it would be to allow injurers to pursue their ends at the expense of others. Alternatively, to hold them in common would be unjust in a different way, for it would be to allow one person to demand extra resources from the state so as to spare him the costs of looking out for the security of others. Thus, the law of private damages is required in order to guarantee a regime of equal freedom.

Arthur Ripstein, *Three Duties to Rescue: Moral, Civil, and Criminal*, 19 L. & PHIL. 751, 762 (2000).

⁸⁴ I plan to add to these plausible conceptions and take up the issue of proper requitals, *i.e.*, the Y in the formula of justice, in my future Article “Public Requitals: Corrective Justice, Retribution, and Distributive Justice.”

⁸⁵ In each of these conceptions of corrective justice, harm plays a central role, but Ripstein identifies torts that are not harm-based: “[A] fault element is a familiar feature of harm-based torts, but never a feature of trespass-based torts. (Confusion about this leads some to suppose that ‘intentional’ names a culpable mental state, more serious than negligence.) . . . Harm-based torts occur when separate persons pursue their separate purposes.” Arthur Ripstein, *Tort Law in a Liberal State*, 1 J. TORT L. 3, 16 (2007). “Trespass-based torts have no fault element. Each person has a protected liberty interest in using his or her means in ways

blameworthiness are distinct notions.⁸⁷ Wrongful harm, established by the violation of a first-order, substantive maxim designed to proscribe certain types or sources of harms, is identified above; whereas harm from negligence may be proscribed when harm from an “inevitable accident” is not. Justifications for harmful conduct are often said to be denials of wrongness.⁸⁸ An agent’s blameworthiness, or culpability,⁸⁹ I contend, largely relates to the disrespectfulness towards an invadee reflected in the agent’s conduct (action or inaction).⁹⁰ Maxims may include blameworthiness as a threshold standard (e.g., negligence) or as a factor that increases or decreases the invader’s obligatory requital (e.g., some intentional torts, retribution), as seen in what follows.

“When one wrongfully harms another person by blameworthy conduct, she is to compensate that person [the state] to the extent of the [wrongful] harm.” “The state” is bracketed for use of the formula for criminal punishment, in which case the state is in some way “compensated” by fine or otherwise.⁹¹ In the criminal context, perhaps another word, such as “repay,” “restore,” or “restitute,” captures more of the idea,

that generally do not interfere with the ability of others to do the same, but nobody has a protected liberty interest in using means that belong to another.” *Id.* at 18. I would argue that Ripstein’s trespass-based torts do have a fault element, weak at times, and are harmful to the invadee. They are wrongful dignitary harms. Referring to the first quote, one might also find that one of the trespassed landowner’s purposes is to exclude trespassers.

⁸⁶ “[There] is the deeply entrenched notion that the measure [of retributive punishment] should not be, or not only be, the subjective wickedness of the offender but the amount of harm done.” H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 234 (1968). Moore discusses the need for a moral theory to justify “when someone *deserves* to be punished On the moral theory I think to be most plausible, moral desert is built on two moral properties, wrongdoing and culpability.” Michael S. Moore, *Responsible Choices, Desert-Based Legal Institutions, and the Challenges of Contemporary Neuroscience*, 29 SOC. PHIL. & POL’Y 233, 234 (Winter 2012) (footnote omitted).

⁸⁷ “[W]rongness and blame can come apart. The blameworthiness of an action depends, in ways that wrongness generally does not, on the reasons for which a person acted and the conditions under which he or she did so.” T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 124 (2008). “[A]ny adequate statement of the necessary or sufficient conditions for being blameworthy will have to make essential reference to acts that are wrong. At least to this extent, I take the concept of wrongness to be prior to that of blameworthiness.” GEORGE SHER, IN PRAISE OF BLAME 9 n.7 (2006) (noting that Gibbard “reverses this ordering” in ALLAN GIBBARD, WISE FEELINGS, APT CHOICES 40-45 (1990)). The reactions to blame include anger and other negative feelings, hostile behavior, reproach, and, for self-blame, apology. *Id.* at 94-95. For Sher’s formulation of blameworthiness, see *id.* at 132-33.

⁸⁸ See, e.g., GEORGE P. FLETCHER, BASIC CONCEPTS OF CRIMINAL LAW 85 (1998).

⁸⁹ While “blameworthiness” and “culpability” have been distinguished, see, for example, Kenneth W. Simons, *Culpability and Retributive Theory: The Problem of Criminal Negligence*, 5 J. CONTEMP. LEGAL ISSUES 365, 367 (1994). For my purposes a distinction is not important, so I discuss them together.

⁹⁰ See Bailey Kuklin, *The Labyrinth of Blameworthiness*, 51 U.S.F. L. REV. (forthcoming 2016).

⁹¹ The state, not being a moral person, cannot be “compensated” in the way that moral persons can be.

though still imperfectly. If we think of the state not as an independent, collective entity, but rather as a representative for requiring harms to individual citizens, the terms become more satisfactory.

“When one wrongfully harms another person by blameworthy conduct, she is to compensate that person [the state] to the extent of the [wrongful] harm and blameworthiness.” In these versions, blameworthiness comes in twice, first, as a threshold standard to determine whether the wrongful harm is compensable or deserving of retribution, and second, as a factor in the measure of the requal.

“When one wrongfully harms another person, she is to compensate that person to the extent of the [wrongful] harm.” This, under one interpretation, is strict liability.⁹² Under Richard Epstein’s conception, “you did it, you pay.”⁹³ Strict liability still requires the harm to be wrongful. Some harms are not requaltable, such as most stemming from inaction or under the doctrine, “live and let live.”⁹⁴ This version of corrective justice is often associated with libertarianism.⁹⁵

⁹² “Four varieties of strict legal liability can be distinguished, which I will call passive strict liability, right-based strict liability, activity-based strict liability and outcome-based strict liability.” PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* 82 (2002); see *id.* at 82-84. One may wish to adopt different maxims for each of the four varieties.

⁹³ By “you did it,” Epstein means, paradigmatically, wrongful harms from force, fright, compulsion, and creation of dangerous conditions. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 160-89 (1973). Some commentators ask, why these paradigms and not others? See Jules L. Coleman, *Legal Theory and Practice*, 83 GEO. L.J. 2579, 2598 (1995) [hereinafter Coleman, *Legal Theory*]; Jules Coleman & Arthur Ripstein, *Mischief and Misfortune*, 41 MCGILL L.J. 91, 106-07 (1995); Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J.L. & JURIS. 147 (1988) [hereinafter Perry, *Impossibility*]. For further criticism, see, for example, MOORE, *supra* note 56, at 357-58, 361; Stephen R. Perry, *The Distributive Turn: Mischief, Misfortune and Tort Theory*, in *ANALYZING LAW* 141, 148 (Brian Bix ed., 1998); Coleman, *Legal Theory*, *supra*, at 2614-17; Izhak England, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 55-63 (1980).

⁹⁴ See, e.g., *Bamford v. Turnley*, 122 Eng. Rep. 27, 32-33 (1862); Richard Epstein, *Transaction Costs and Property Rights: Or Do Good Fences Make Good Neighbors?*, 1 ENVTL. L. & PROP. RTS. PRAC. GROUP NEWSL., no. 2, May 1997, <http://www.fed-soc.org/publications/detail/transaction-costs-and-property-rights-or-do-good-fences-make-good-neighbors>. “Some level of risk is simply the price of freedom to act, and that level of risk is the background level Because these risks are the price of ordinary activity, we are all better off bearing them than attempting to reduce them.” Keating, *supra* note 31, at 45.

⁹⁵ See Coleman & Ripstein, *supra* note 93, at 91. Notice a certain irony in the libertarian adoption of this conception: the various understandings of wrongful harms and corrective justice identified here produce differing tradeoffs between the protection of a person’s liberty and security interests. By embracing a strict liability standard for particular impacts, this version of corrective justice favors security over liberty. Perhaps these libertarians should be relabeled “securitarians.” Locke, for example, seemingly falls within this camp. See JOHN LOCKE, *The Second Treatise of Government*, in *TWO TREATISES OF GOVERNMENT* 265, 412-13 (Peter Laslett ed., 1988) (1690) (“Men enter into Society . . . [and authorize laws] to limit the Power, and moderate the Dominion of every Part and Member of the society [T]he people . . . provide for their own Safety and Security, which is the end for which they are in Society.”). For similar emphasis of security over liberty, see, for example, 3 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* *119 (1768); JOHN STUART MILL, *Utilitarianism*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 1, 67 (J.M. Dent & Sons 1910) (1st ed. London 1863); see also Kuklin, *supra* note 1, at 387 n.31.

In the conceptions of corrective justice displayed above, harms are lumped together, but justifiable conceptions may vary according to the particular types of harms in question. Here are some examples.

“When one physically, economically, or psychically harms another person wrongfully by blameworthy conduct, she is to compensate that person to the extent of the harm [and blameworthiness].” This would exclude dignitary harm from ordinary tort recoveries but, as stated, would allow recovery for pure economic loss alone. To elaborate on the bracketed permutation of this maxim to identify further examples, the extent of the recovery for psychic harm could depend on the degree of the blameworthiness (disrespect). For instance, for ordinary negligence the invadee may recover for the foreseeable psychic harm of a reasonable person, while for intentional conduct, the invadee may recover for the foreseeable psychic harm of the actual invadee when greater than that of the reasonable person, and for purposive or malicious conduct, all the psychic harm is remediable, foreseeable or not.⁹⁶

“When one wrongfully harms another person’s dignity, she is to compensate that person to the extent of the harm and her blameworthiness.” This suggests that pure dignitary harm recoveries take into account the reduced or increased blameworthiness of the invader, unlike ordinary tort damages for other types of harms. An unforeseeable trespass to realty, for instance, as where one reasonably believes the property is her own, allows for nominal damages, while knowing trespass allows for more damages even in the absence of other harms.

“When one wrongfully, economically harms another person by exacerbated [purposive, knowledgeable, reckless, intentional] blameworthy conduct, she is to compensate that person to the extent of the harm.” Like the pure economic loss doctrine in torts,⁹⁷ this conception would allow for such recoveries when the actor’s

⁹⁶ One view is “that those who intentionally cause harm should be liable for more remote consequences than those who negligently cause harm. This seems to be the position today in the law of torts.” GEORGE FLETCHER, *RETHINKING CRIMINAL LAW* 370 (1978). This view has been advanced for contract damages as well. See Note, *The Inadequacy of Hadley v. Baxendale as a Rule for Determining Legal Cause*, 26 U. PITT. L. REV. 795, 802 (1965).

The subjective nature of psychic harm is troublesome. “Many are wary of giving highly idiosyncratic victims’ preferences too much weight, mainly because they worry about abuse. Others think it’s just plain arbitrary to ignore the victim’s feelings.” Leo Katz, *A Look at Tort Law with Criminal Law Blinders*, 76 B.U. L. REV. 307, 315 (1996). For criminal law matters, Katz favors “the objective view of injuries.” *Id.* Monetary compensation for psychic harms may be, in principle, problematic. “[I]ntangible losses and monetary damages are simply incommensurable. The real difficulty with damage awards for intangible loss is that they purport to be compensatory when in reality they are not.” Steven D. Smith, *The Critics and the “Crisis”: A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 770 (1987) (citations omitted). “The impossibility of precisely quantifying intangible injuries does not mean that awards for such injuries are necessarily illegitimate. Instead, the dispute resolution conception of tort remedies suggests that damage awards express societal recognition of the gravity of the plaintiff’s injury.” *Id.* at 788.

⁹⁷ See, e.g., DAN B. DOBBS, *THE LAW OF TORTS* 1115 (2000) (“Broadly speaking, the plaintiff who claims a stand-alone commercial or economic tort must usually (but not invariably) prove intent rather than negligence.”); RICHARD A. EPSTEIN, *TORTS* 606 (1999) (“The general legal position today denies recovery to P for pure economic loss as a result of D’s negligence.”). There has been a major controversy in tort law over “the extent to which the law should exclude protection for pure economic loss.” GORDLEY, *supra* note 27, at 217. See generally *id.* at 263-84 (“Liability in Tort for Pure Economic Loss”). Gordley discusses

blameworthiness (disrespect) is heightened beyond ordinary negligence, but not otherwise. In these cases, there likely are substantial dignitary harms as well as economic ones.

Beyond these identified permutations, different conceptions of corrective justice, or different wrongful harms subject to retributions, may use different standards of causation, both cause in fact and proximate cause. The element of cause in fact for psychic harm may be based on, say, a “but for” standard, while for physical harm, “substantial factor.”⁹⁸

In general, there is a wide range of conceptions of corrective justice and retribution that may be adopted by an individual or the state on behalf of individuals to coordinate their behavior.⁹⁹ So long as a second-order, retributive maxim satisfies the categorical imperative,¹⁰⁰ whether or not to adopt it is a matter of preference and

the difficulty with implementing an economic loss doctrine as a rationale for limiting it. *See id.* at 280-84. Ripstein justifies the existing economic loss doctrine on the grounds “that, although the possibility of my losing something on which I have come to rely could be the basis of a norm of conduct, it would place too great a burden on your liberty to be asked to take account of such things.” Arthur Ripstein, *Philosophy of Tort Law*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 56, at 656, 683 [hereinafter Ripstein, *Philosophy*]. This seems conclusory. Is it too great a burden to take account of the foreseeable economic consequences of your negligent conduct? Is it less of a burden on the person whose security interest is truncated by such negligent conduct? Risk avoidance and other policy considerations also obtain. Ripstein asserts that an appropriate balance cannot be struck. *See id.* at 685; Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1977 (2007) (after noting the floodgates argument, making the conclusory point, “There is no liability in negligence for pure economic loss because the plaintiff has no proprietary right to the economic interest that was injured.”). One commentator, puzzled that pure economic loss is non-recoverable, notes that “courts have of late made a number of exceptions to the economic loss rule and it is harder than it once was to say what exactly the rule is.” Henry E. Smith, *Modularity and Morality in the Law of Torts*, 4 J. TORT L. 5, 26 (2011) (citation omitted). *See generally* Gennady A. Gorel, Note, *The Economic Loss Doctrine: Arguing for the Intermediate Rule and Taming the Tort-Eating Monster*, 37 RUTGERS L.J. 517 (2006).

⁹⁸ For causation in fact, see generally DOBBS, *supra* note 97, at 405-18; PROSSER & KEETON, *supra* note 60, at 263-72.

⁹⁹ “[L]aw promises coordination in any enterprise it undertakes, whether that is substantive justice or the maximization of well-being [P]rincipled consistency is normatively indispensable in the forcible pursuit of substantive justice.” Jeremy Waldron, *Does Law Promise Justice?*, 17 GA. ST. U. L. REV. 759, 787 (2001). Turning the choice of the version of corrective justice over to individuals “mak[es] each person’s security depend on the particular priorities of his or her injurer. Those difficulties would be doubled because each person’s liberty would depend on the particular sensibilities of his or her potential victims.” Coleman & Ripstein, *supra* note 93, at 109. In the context of negligence and elsewhere, existing law solves this indeterminacy problem by looking to the reasonable person standard, custom, and convention. *See id.* at 112. But still, the individual can ask, “why should I be held to such a standard. I did not consent to it.” Thus the beast of political obligation once again raises its formidable head. Yet, because the law must hone sometimes nebulous general moral principles, “[t]he effect of legal determinations of moral principle is often to make them obligatory as part of morality, quite apart from any general presumption there may be in favour of a moral duty to obey the law.” TONY HONORE, *Introduction*, in RESPONSIBILITY AND FAULT, *supra* note 27, at 1, 8.

¹⁰⁰ “Kant’s insight is that just as primary rights to freedom must be subject to reciprocal limits, so too must secondary rights to enforcement.” Arthur Ripstein, *Private Order and*

judgment reflecting, among other things, relative weights or valuations given to the various aspects of liberty, security, wrongness, and blameworthiness.¹⁰¹ As seen in the proffered examples, an agent may adopt many, diverse conceptions of corrective justice,¹⁰² to say nothing of retribution, each one depending on the substantive maxim in issue and the particularities of the circumstances. She may choose one conception for intentional harms, another for negligent harms, another for abnormally dangerous activities, others depending on the types of harms, and so forth.

IV. COMMON AUTONOMY SPACE BOUNDARY MARKERS

There is an interrelationship between first- and second-order maxims; that is, between substantive maxims directly establishing autonomy space boundaries and applicable maxims that specify requitals for particular autonomy space incursions. For example, suppose one adopts a first-order maxim that declares, “do not harm another person.” This is inordinately demanding, implicitly proscribing an ordinary, inadvertent bumping into another person in a crowd, or economic loss to another from fair business practices, or even psychic harm to another from envy of the agent’s legitimate success. Then, as a requital for this substantive maxim pursuant to corrective justice, assume one adopts a second-order maxim that states, “when one {wrongfully} harms another person by blameworthy conduct, she is to compensate that person to the extent of the {wrongful} harm.”¹⁰³ The strictness of the substantive maxim is thus ameliorated by this associated conception of corrective justice. Requital under it requires the harm to ensue from blameworthy conduct, which, presumably, would not reach the implicit, quotidian harms mentioned. Inadvertent bumping in a crowd is not disrespectful, not blameworthy. Significant harm from such contact is not foreseeable, not blameworthy. In identifying an agent’s baseline autonomy space, both the relevant substantive maxims and associated requital maxims must be integrated.

First-order, substantive maxims must cohere with associated second-order, requital maxims. Consider these first- and second-order maxims: “Do not purposely produce an unreasonable risk of harming another person”; “when one wrongfully harms another person by blameworthy conduct, she is to compensate that person to the extent of the wrongful harm.” In this substantive maxim, the implications of “purposely produce an unreasonable risk” have overtones of disrespect blameworthiness. If one purposely intends to produce such a risk, one tacitly disrespects the dignity of the person put at risk. One is dismissive. One chooses, or is willing to use the person, as a means only. In light of this interpretation, the second-

Public Justice: Kant and Rawls, 92 VA. L. REV. 1391, 1418 (2006). “[E]nforcement must be done in a way that is consistent with freedom in accordance with universal laws.” *Id.*

¹⁰¹ Coleman and Ripstein refer to “substantive judgements about why various activities matter to us and about the ways in which they do.” Coleman & Ripstein, *supra* note 93, at 109.

¹⁰² “[W]hile corrective justice may morally require that individual agents (and perhaps even the state) do something about the wrongs they do to others, it need not specify precisely what should be done.” WILLIAM LUCY, *PHILOSOPHY OF PRIVATE LAW* 414 (2007).

¹⁰³ Under the given substantive maxim, all harms are wrongful, thus the curly bracketing of “wrongful.”

order maxim, “when one wrongfully harms another person by blameworthy conduct . . .” does not fit neatly with the given first-order maxim. The wrongful harm (“purposely produc[ing] an unreasonable risk”) already implies blameworthiness. The requital maxim when combined with substantive maxim comes down to, “when one is blameworthy in causing a harm to another person by blameworthy conduct . . .”¹⁰⁴

One may resolve this type of overlap between the first- and second-order maxims by modifying one or both of them. One plausible way is: “Do not purposely produce an unreasonable risk of harming another person,” or “when one wrongfully harms another person [deleted: “by blameworthy conduct”], she is to compensate that person to the extent of the wrongful harm.” Another plausible way is: “Do not [deleted: “purposely”] produce an unreasonable risk of harming another person,” or “when one wrongfully harms another person by blameworthy conduct, she is to compensate that person to the extent of the wrongful harm.”

Yet something can be said for accommodating potential overlaps in the thrust of substantive maxims and associated requital maxims. In addressing particular harms in distinct circumstances, overlaps may be difficult to avoid without tortuously explicit maxims. Overlaps may also provide flexibility for the application of maxims to questionable conduct impossible or impractical to fully anticipate or specify beforehand. Consider these changes to the substantive maxim above. Instead of, “purposely produce an unreasonable risk . . .,” the weaker mental state “intentionally produce an unreasonable risk . . .,” or, weaker still, “foreseeably produce an unreasonable risk . . .,” may still connote disrespect and responsibility blameworthiness, to some extent, depending on the circumstances.¹⁰⁵ Degrees of

¹⁰⁴ The other prong of blameworthiness, responsibility (lack of ignorance and coercion), remains in place.

¹⁰⁵ Regarding “intention,” Prosser notes that, for intentional torts today, “it is a *state of mind* . . . about *consequences* of an act (or omission) and not about the act itself.” PROSSER & KEETON, *supra* note 60, at 34. Under this, intentionally stepping onto property which one reasonably but mistakenly believes is one’s own is still a trespass, though the blameworthiness, both disrespect and responsibility, may be minimal. Nonetheless, we still may wish to symbolically protect the dignitary interest of such a harmed party, as by granting nominal damages for trespass to realty causing no economic damage. Dignitary harms turn on objective manifestations of disrespect as well as subjective mental states. Impermissibly stepping on another’s property may manifest disrespect of her and her property claims, depending on the situation and relevant social norms. Agents are on notice of the strictness of trespass doctrine. They thus can foresee in a weak sense their potential liability for their conduct. *See infra* note 106. Fletcher would partially protect the “innocent” trespasser. After noting that the excuse of unavoidable ignorance does not defeat some intentional torts, such as trespass to land, he argues that when the plaintiff seeks damages, and is not simply testing the title to the land, the excuses of “compulsion and unavoidable ignorance . . . transcend doctrinal barriers and apply in all cases of nonreciprocal risk-taking.” George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 556 (1972).

Regarding “foreseeability,” it also may not imply disrespectfulness in any substantial or significant sense, as where statistical lives are foreseeably put at risk in a large construction project. Especially this is true when those at risk knowingly consent to assuming it. According to Aquinas, if not before, “[t]here is a distinction between what we intend and what we *foresee*.” MOORE, *supra* note 56, at 690-91 (referring to the doctrine of double effect). “Responsibility for one’s actions’ side-effects – foreseen or foreseeable – is morally and humanly different in kind from responsibility for what one intends, and therefore ought to be regarded as a distinct kind of basis for tortious liability.” John Finnis, *Natural Law: The*

disrespect are suggested by these maxims. To come at this point from a different direction, when an agent's conduct is described in these ways: (1) "she put him at an unreasonable risk . . .," (2) "she foreseeably put him at an unreasonable risk . . .," (3) "she intentionally put him at an unreasonable risk," or finally, (4) "she purposely put him at unreasonable risk," we think, without knowing more, that the agent's blameworthiness increases with each revised description. The meanings of each of these key terms, "unreasonable," "foreseeable," "intention," and "purpose," have much penumbra around the cores.¹⁰⁶ Overlaps in terminology and meanings of the first- and second-order maxims may be resolved in practice by applying different penumbral connotations of the terms, one for the substantive maxim and another for the requal maxim. This disappoints our preference to provide unambiguous notice to agents of the reach of the maxims they must satisfy,¹⁰⁷ yet we have come to live with this problem daily. We often establish legal standards ("act reasonably") rather than rules ("do not do x, y, or z"). At times, flexibility is deemed more important than high predictability.

One pronounced reason for overlaps between substantive and requal maxims is that both maxims typically include the notion of foreseeability either implicitly or explicitly. Under existing tort law, the substantive negligence maxim (in a nutshell, "act reasonably") implies foreseeability, and the requal maxim, corrective justice, usually does too.¹⁰⁸ Foreseeability is often, if not always, an aspect of all four or five elements of negligence: duty, breach, causation (cause in fact and proximate cause), and damages.¹⁰⁹ Observing that, "[f]oreseeability is undoubtedly a muddle in the law

Classical Tradition, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 56, at 1, 46. But the Restatement (Second) of Torts suggests that those who act with knowledge are equally responsible as those who act with intent. See RESTATEMENT (SECOND) OF TORTS § 8A (1965).

¹⁰⁶ For example, Moore sees the "conceptual problem with foreseeability" as stemming from "the ambiguity in what is meant by 'foreseeable' . . . , the obvious vagueness of the term . . . , [and, more seriously,] 'the multiple description problem.'" MOORE, *supra* note 56, at 363-64. For the latter problem, see *infra* note 189. "I thus conclude that the criminal and tort law conceptions of proximate causation in terms of foreseeability are completely indeterminate in all cases." MOORE, *supra* note 56, at 395. But, Moore explains, this is not the case "as that concept is used as part of what is meant by negligence . . ." *Id.* at 398.

¹⁰⁷ "The values served by the virtue of predictability are liberty (because more accurate planning is possible) and fairness (because surprise is reduced)." MOORE, *supra* note 56, at 11. There are limits to the acceptable shortfall in predictability. To provide adequate notice, under the legality principle "no one can be criminally punished if the crime of which he is guilty has not been enacted by statute . . ." Larry Alexander, *The Philosophy of Criminal Law*, in OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 56, at 815, 823. See generally FLETCHER, *supra* note 96, at 206-14 ("Justice versus Legality").

¹⁰⁸ See generally David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277 (2009). To slide down the slippery slope, "all persons understand, at some level, that consequences outside the realm of their expectations sometimes do occur, and so at some level of abstract understanding they 'foresee' the possibility of such unexpected results." *Id.* at 1288.

¹⁰⁹ "Among the five elements of which negligence is comprised [separating out proximate cause and cause in fact], most scholars agree that foreseeability is implicated in three: duty, breach, and proximate cause." Owen, *id.* at 1290 (footnoting the role of foreseeability in the remaining two, factual causation and damages). In contracts, foreseeability plays a strong role.

of negligence,”¹¹⁰ Benjamin Zipursky, after examining the role of foreseeability in duty, breach, and proximate cause, concludes, “foreseeability does not play a single role within negligence law, but a complex variety of connected roles.”¹¹¹ In principle, one could avoid the overlap of foreseeability by narrowly specifying, based on its particular contextual role, its meaning and confining each use to one or the other of the first- and second-order maxims, or to a single element of a maxim.¹¹² But it would often significantly undercut our established norms to unduly restrict the important role of foreseeability. Nonetheless, legal doctrines challenging the ubiquity of foreseeability requirements include the “thin skull” doctrine,¹¹³

All recoverable contract damages must be reasonably foreseeable to the breacher at the time of entering into the contract. *See, e.g.*, *Hadley v. Baxendale*, 156 Eng. Rep. 145 (1854); RESTATEMENT (SECOND) OF CONTRACTS § 351 (1981). “Although the [contract foreseeability] requirement neither demands absolute clairvoyance nor admits of vague premonition, it leaves considerable latitude between these extremes.” E. Allan Farnsworth, *Legal Remedies for Breach of Contract*, 70 COLUM. L. REV. 1145, 1204 (1970).

Criminal law need not be left out of this examination of foreseeability. By way of prelude, criminal liability also requires both cause in fact and proximate cause. *See* DUBBER, *supra* note 58, at 128-29. In the criminal law, “[p]roximate causation, typically formulated as either a question of foreseeability or harm within the risk, limits the reach of causation in fact.” Kimberly Kessler Ferzan, *The Unsolved Mysteries of Causation and Responsibility*, 42 RUTGERS L.J. 347, 349 (2011). “Much has been written either asserting or denying that the conceptions of proximate causation used in torts and criminal law are the same.” MOORE, *supra* note 56, at 363 n.1 (referring to the role of foreseeability in the tests of proximate causation).

¹¹⁰ Benjamin C. Zipursky, *The Many Faces of Foreseeability*, 10 KAN. J.L. & PUB. POL’Y 156, 156 (2000). The same can be said of proximate cause in general. *See* Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQUIRY L. 333, 336 (2002) (“It is well known that the tests for proximate causation in Anglo-American tort law and criminal law are elusive, multiple, and often conflicting in their implications for cases.”). Under the view that the tests of proximate cause “ask the wrong question . . . [,] the central problem the proximate cause tests address is the problem of lack of fit between what defendant intended, foresaw, or risked, on the one hand, and what defendant caused in fact, on the other.” *Id.* at 336-37. “The issue, on this view, has nothing to do with causation but, rather, with culpability.” *Id.* at 337. “A defendant is culpable for an unjustified harm if he positively intended to cause the harm, knew that it would happen, was consciously aware of a risk that it would happen, or should have been consciously aware of a risk that it would happen.” *Id.* at 385.

¹¹¹ Zipursky, *supra* note 110, at 158; *see also* Benjamin C. Zipursky, *Foreseeability in Breach, Duty, and Proximate Cause*, 44 WAKE FOREST L. REV. 1247 (2009) [hereinafter Zipursky, *Foreseeability in Breach*]. “Foreseeability is the great paradox of tort: one of its most vital moral tethers, yet irretrievably its most elusive.” Owen, *supra* note 108, at 1277. “[W]hile foreseeability may be the fundamental moral glue of tort, it provides so little decisional guidance that scholars often revile it for being vague, vacuous, and indeterminate . . .” *Id.* at 1278.

¹¹² In negligence, for instance, the main liability limiting function of foreseeability can be (largely) satisfied through any one of its elements. For example, compare *Overseas Tankship (U.K.) Ltd. v. Morts Dock & Eng’g Co. (The Wagon Mound No. 1)*, [1961] A.C. 388 (P.C.) (appeal taken from N.S.W.) (U.K.), with *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

¹¹³ *See, e.g.*, DOBBS, *supra* note 97, at 464-65; PROSSER & KEETON, *supra* note 60, at 296. A case can be made that the “thin skull” doctrine is contrary to deontic justice, embraced for

probabilistic causation (lost chance),¹¹⁴ market share liability,¹¹⁵ and strict products liability.¹¹⁶

Notice that the elements of negligence as usually understood imply both first- and second-order maxims. Putting the negligence standard this way, “[w]hen one wrongfully harms another person by blameworthy conduct, one is to compensate her to the extent of the harm,” the duty element points to a substantive, first-order maxim (“[d]o not wrongfully harm another person”). This does not point unambiguously, because “wrongful harm” needs further specification. “An unreasonable risk of harm” commonly specifies a “wrongful harm” in the negligence context. The negligence standard can then be elaborated this way: “When one imposes an unreasonable risk of harm on another person by blameworthy conduct, one is to compensate her to the extent of the harm.” Under this articulation, the implicit breach, causation, and damages elements point to a particular requital, second-order maxim.¹¹⁷

In sum, depending on the first-order maxims directly marking autonomy space boundaries, conceptions of corrective justice as implemented in second-order, requital maxims may be substantial, if indirect, determinants of these boundaries as well. How much of the work in establishing boundary markers is done by each of the associated maxims is a matter of convenience, values, and judgment. A parallel case can be made in the context of retributive punishment for criminal conduct.

other reasons, such as risk avoidance, loss spreading, “two innocents” doctrine, cost internalization, etc. “The gap between full compensation and just compensation appears most clearly in negligence law’s embrace of the ‘thin skull’ rule.” Goldberg, *Misconduct*, *supra* note 75, at 97 (footnote omitted). See John C.P. Goldberg & Benjamin C. Zipursky, *Seeing Tort Law from the Internal Point of View: Holmes and Hart on Legal Duties*, 75 *FORDHAM L. REV.* 1563, 1581 (2006). Ripstein objects. “[T]he eggshell plaintiff . . . recovers because she has been wronged; the extent of the injury determines the extent of the wrong, and so, too, of the remedy.” Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 *FLA. ST. U. L. REV.* 163, 196 (2011). Wronged, yes, but the extent of the wrong (injury), I would have it, is up for grabs. Within a plausible range, it is for the law to determine, with justification. Moreover, the “thin skull” doctrine is supportable deontically by a requital maxim that if one can foresee some harm of a particular type, then one is liable for unforeseeable, more extensive harm of that type. While the foreseeability is attenuated, there is some degree of foreseeability. At times one may formally consent to liability for unforeseeable harms. If one chooses to engage in conduct about which one has reason to know are obligatory maxims proscribing unforeseeable harms, one has consented in some measure to liability for unforeseeable harms. See *infra* note 189. In the end, “[t]he examples just enumerated [e.g., “the thin-skull rule”] suggest, and many commentators on the subject have come to accept, that the legal concept of proximate causation is not a single moral principle but rather a grab bag of differing normative considerations.” Perry, *Responsibility for Outcomes*, *supra* note 27, at 96.

¹¹⁴ See DOBBS, *supra* note 97, at 430-32; PROSSER & KEETON, *supra* note 60, at 272.

¹¹⁵ See DOBBS, *supra* note 97, at 436-38; PROSSER & KEETON, *supra* note 60, at 271-72, 713-14; Perry, *Responsibility for Outcomes*, *supra* note 27, at 96 (adding respondeat superior to the list).

¹¹⁶ See DOBBS, *supra* note 97, at 972-77; PROSSER & KEETON, *supra* note 60, at 690-94.

¹¹⁷ The causation element can also be seen as an aspect of the first-order, substantive maxim. Whether one has harmed another person entails the question of causation.

A. First-Order, Substantive Maxims

Thus far, I have emphasized the role of second-order, requital maxims in the effective, indirect construction of an agent's autonomy space. This section examines a panoply of primarily first-order, substantive maxims that directly delineate boundaries. In the jurisprudential literature over the years, this consumes most of the ink. In any case, the interconnections and overlaps between substantive and complementary requital maxims blur their distinction. When considering plausible maxims for adoption, I stress the centrality of the balance between liberty and security interests while meeting the constraints of the categorical imperative. Judging the balance in conflicting interests highlights two or three ideas: (1) the liberty to make choices to engage in conduct (action or inaction); (2) the security from impacts by the actions of others; and; (3) concomitantly, the freedom from being used as a means only to another's ends. The third idea encompasses the freedom from various forms of disrespect by others. While this dignitary "freedom from" may be seen as a facet of one's general security interest, it is discussed separately because of its prominence as a trail signpost in the following discussion.

In the proceeding parts, I consider situations in which the liberty and security interests of people may conflict. I then identify and discuss some plausible maxims designed to demarcate relevant autonomy space boundaries, keeping in mind the demands of mutual respect.

1. Intentional, Harmful Conduct

The categorical imperative suggests that intentional acts foreseeably causing harm to another person are, *prima facie*, wrongful.¹¹⁸ They seem disrespectful. They seem invasive of a reasonable person's security or liberty interests.¹¹⁹ This favors adoption of the maxim, "do not intentionally harm another person." But this general maxim needs significant refinement in light of the complexities of human interactions, for there are many accepted exceptions, as where one intentionally makes another person suffer by means of a fair athletic contest. In addition, broad *prima facie* maxims often conflict in certain circumstances. There are, ultimately, numerous exceptions needed to virtually all general maxims, that is, "except when" or "unless" provisos.¹²⁰

There is a multitude of plausible deontic maxims relating to intentional acts and omissions, and also a multitude of justifiable judgments about how to resolve conflicts among *prima facie* maxims. The prominent ones, however, have been sufficiently explored in existing tort, contract, restitution, and criminal law. They are, therefore, passed over in light of this Article's aims here. The core of intentional torts, contract breaches, unjust enrichment,¹²¹ and criminal acts generally fit easily within the constraints of the categorical imperative.¹²²

¹¹⁸ Again, one must be careful not to conflate foreseeability and intention. See *supra* note 104.

¹¹⁹ For the normative relationship between intention and harm, see generally R.A. Duff, *Intentions Legal and Philosophical*, 9 OXFORD J. LEGAL STUD. 76 (1989).

¹²⁰ As noted above, see *supra* note 13, a maxim may be universal without being extensive. For a discussion of the deontic difference between universalization and generalization, see Kuklin, *supra* note 1, at 421-23.

¹²¹ "The law of unjust enrichment, [contrary to tort and contract law,] concerns itself with reversing certain kinds of non-wrongful transactions on the ground that their *non-reversal*

But we must not grant too much deontic inevitability to the existing law regarding intentional conduct. As an example, here is the standard of the *Restatement (Second) of Torts* for Outrageous Conduct Causing Severe Emotional Distress:

One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.¹²³

We may begin by asking, why does recovery for psychic harm apparently subsume recovery for dignitary harm? Why must the intentional or reckless conduct be severe?¹²⁴ Does the balance here unduly favor the liberty of the actor over the security of the victim?¹²⁵ While the common law of torts may generally be quite mature, it still has much room to grow (and contract): “The Institute expresses no opinion as to whether there may not be other circumstances under which the actor may be subject to liability for the intentional or reckless infliction of emotional distress.”¹²⁶

Below I explore some of the more interesting and controversial situations in which conflicts among the interests of interacting agents may arise. Some of these involve intentional conduct. I sample tenable, deontic maxims that might be adopted to resolve the conflicts. This discussion is very general and, at places, quite speculative.

2. Truth Telling and Promise Keeping

Truth telling and promise keeping are separate concepts, but have enough in common to be taken together for the purposes of this Article.¹²⁷ These concepts

would be wrongful.” John Gardner, *Corrective Justice, Corrected*, 12 DIRITTO & QUESTIONI PUBBLICHE 9, 32 (2012); see John Gardner, *Torts and Other Wrongs*, 39 FLA. ST. U. L. REV. 43, 46 (2011).

¹²² Most fundamental doctrines of battery, trespass, intentional infliction of emotional distress, defamation, contract breach, arson, larceny, etc., are easily enough deontically justifiable.

¹²³ RESTATEMENT (SECOND) OF TORTS § 46 (1977).

¹²⁴ “Because of the fear of fictitious or trivial claims, distrust of the proof offered, and the difficulty of setting up any satisfactory boundaries to liability, the law has been slow to afford independent protection to the interest in freedom from emotional distress standing alone.” RESTATEMENT (SECOND) OF TORTS § 46, cmt. b (1977). Fair enough, but many other torts are also subject to these concerns, especially those where psychic harm is likely.

¹²⁵ The Institute thinks not: “The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities There must still be freedom to express an unflattering opinion, and some safety valve must be left through which irascible tempers may blow off relatively harmless steam.” *Id.* § 46, cmt. d. There is an enormous gap between “trivialities” or “harmless steam” and “extreme and outrageous conduct.”

¹²⁶ *Id.* § 46 (Caveat).

¹²⁷ “A liar and a promise-breaker each *use* another person. In both speech and promising there is an invitation to the other to trust, to make himself vulnerable; the liar and the promise-

might be interrelated.¹²⁸ Kant made much of maxims relating to these two concepts,¹²⁹ some of it fundamental to his exposition of practical reason.¹³⁰ His

breaker then abuse that trust.” CHARLES FRIED, *CONTRACT AS PROMISE* 16 (1982). “If the truth presumption is essential to the well-functioning of rational agents, by-passing it, even for a good end, would seem to involve the kind of insult to persons’ status as rational agents that morality prohibits.” Barbara Herman, *A Mismatch of Methods*, in 2 DEREK PARFIT, *ON WHAT MATTERS*, *supra* note 29, at 83, 107. One may put cheating in a nearby, intersecting camp. “[C]heating is related to, and differs from, other morally wrongful acts, such as stealing, promise-breaking, deceiving, disobedience, and disloyalty.” Stuart P. Green, *Cheating*, 23 *LAW & PHIL.* 137, 137 (2004).

¹²⁸ “G. J. Warnock in *Object of Morality* argues that the wrong of breaking a promise is the wrong of not telling the truth. Why ought I to keep my promise? ‘I ought to do it just because I said I would.’” MARK TUNICK, *PRACTICES AND PRINCIPLES* 62 n.40 (1998) (citing G. J. WARNOCK, *THE OBJECT OF MORALITY* 101 (1971), and identifying critics, including Sidgwick and Atiyah).

¹²⁹ See KANT, *GROUNDWORK*, *supra* note 37, at 74, 80 (promise keeping). “[S]everal philosophers ground promising in the value of autonomy.” Hanoch Sheinman, *Introduction: Promises and Agreements*, in *PROMISES AND AGREEMENTS* 3, 22 (Hanoch Sheinman ed., 2011) (citing Raz, Shiffrin, Robins, and Searle). As for truth telling, “[i]f a declaration made to me is knowingly false, my freedom is wrongfully restricted.” WOOD, *supra* note 34, at 243. “If someone is defrauded in a contract, it is not only this person whose right is violated but the entire system of contract right, which is structured around the truthfulness of the declarations involved in contracts.” *Id.* But Kant, to Parfit’s chagrin, condemns deceit because “any liar ‘violates the dignity of humanity in his own person’” 1 DEREK PARFIT, *ON WHAT MATTERS* 234 (2011) (quoting Kant). “According to [Kant’s] Formula of Humanity, coercion and deception are the most fundamental forms of wrongdoing to others – the roots of all evil. Coercion and deception violate the conditions of possible assent” KORSGAARD, *supra* note 35, at 140. “Physical coercion treats someone’s person as a tool; lying treats someone’s reason as a tool. This is why Kant finds it so horrifying; it is a direct violation of autonomy.” *Id.* at 141; see *id.* at 347-48. “An act of fraud has among its wrong-making features that it deprives a person of the information he needs to make a rational business decision, and that it contributes to general uncertainty and therefore enhances transaction costs in the business life of the community.” Jeremy Waldron, *Lex Talionis*, 34 *ARIZ. L. REV.* 25, 44 (1992). At one place, Kant points in a different direction: “*Embezzlement . . . and fraud . . .*, when committed in such a way that the other could detect it, are private crimes. On the other hand, counterfeiting . . . , theft and robbery, and the like are public crimes, because they endanger the commonwealth and not just an individual person.” KANT, *METAPHYSICS OF MORALS*, *supra* note 9, at 372-73. But as Wood and Waldron point out above, third parties are also harmed by embezzlement or fraud.

¹³⁰ “Kant’s example of a perfect duty to others concerns a promise you might consider making but have no intention of keeping in order to get needed money.” Robert Johnson, *Kant’s Moral Philosophy*, *STAN. ENCYCLOPEDIA PHIL.* 17, <http://plato.stanford.edu/entries/kant-moral/> (last visited May 8, 2016) (explaining why a promise-breaking maxim is not workable).

Kant does not ground contract on promise-keeping. “For Kant, a contract is not understood as a narrow special case of the more general moral obligation of promise keeping, but as a specifically legal institution through which parties vary their respective rights and obligations.” RIPSTEIN, *supra* note 15, at 20-21 (citations omitted). For issues over Kant’s claim for promise-keeping, and the relationship of promise-keeping to contract, see B. Sharon Byrd & Joachim Hruschka, *Kant on “Why Must I Keep My Promise?”*, 81 *CHI.-KENT L. REV.* 47, 48-53, 71-74 (2006).

assertions are occasionally notorious.¹³¹ He is commonly thought to have been an absolutist about both.¹³² But this leaves a wrong impression,¹³³ though his views are, at times, rather tricky.¹³⁴ When an unqualified truth telling or promise keeping maxim has been adopted, Kant insists that it must always be satisfied.¹³⁵ But these types of maxims may be properly qualified without violating the categorical imperative. Qualifications reduce the generality of maxims without inevitably undermining their universality. Kant made room for such constrained maxims.¹³⁶ As

¹³¹ Kant's most notorious example of required truth telling was in response to a hypothetical in which a killer demands to be told by a knowing person where the intended victim is. The truth must be told! See IMMANUEL KANT, *On a Supposed Right to Lie from Philanthropy*, in PRACTICAL PHILOSOPHY, *supra* note 9, at 605, 611-15. This is hard to cabin. The person even seems to be coerced into speaking the truth. For damage control of this example, see KORSGAARD, *supra* note 35, at 133-58 ("The right to lie: Kant on dealing with evil"); RIPSTEIN, *supra* note 15, at 51 n.29; SULLIVAN, *supra* note 36, at 173-77.

¹³² See, e.g., Larry Alexander & Emily Sherwin, *Deception in Morality and Law*, 22 LAW & PHIL. 393, 396-97 (2003) (lying).

¹³³ "But [unlike "the supreme principle of morality,"] a secondary moral rule or principle, whose bindingness on us, when it applies, is categorical, may admit of conditions. For instance, in the principle that we should keep our promises, there may be implied conditions that would release us from a promise . . ." WOOD, *supra* note 34, at 422.

¹³⁴ "The right to communicate your thoughts to others is just a special case of the right to use your powers as you see fit. Kant remarks that this extends even to deliberate falsehoods, because it is up to others to decide whether to believe what they are told." RIPSTEIN, *supra* note 15, at 51. Leaving it to others to decide whether to believe what they are told when the speaker knows she is telling a lie strikes me as disrespectful. For a discussion that Kant could rationalize what seems to be promise-breaking, see SUSAN M. SHELL, KANT AND THE LIMITS OF AUTONOMY 249 (2009).

¹³⁵ Regarding "Kant's conclusion in the case of the argument about false promising, . . . coercion and deception obviously violate [the categorical imperative Formula of Humanity] because they achieve their end precisely by frustrating or circumventing another person's rational agency and thereby treat the rational nature of the person with obvious disrespect." ALLEN W. WOOD, KANT'S ETHICAL THOUGHT 153 (1999).

Kant's primary example of promise-keeping is where the promisor, at the time of making the promise, has the entirely self-interested intention, as she perceives it, not to perform. This is promissory fraud, a simultaneous violation of both truth telling (implicitly, "I intend to perform") and promise-keeping. Is the combination multiply worse? What if the promisor did have the intention to perform, but circumstances later changed making performance very different from what she expected, indeed, required her to sacrifice other *prima facie* duties, such as support of her family?

What if a false assertion is not due to the asserter's blameworthiness? She had, for instance, the reasonable, but mistaken belief, in the veracity of the assertion—even all authorities at the time believed the assertion was truthful. Should the truth telling maxim include a qualification, such that falsehoods are proscribed only if they are "knowing" or "intentional"? What about "reckless" or "negligent" falsehoods?

¹³⁶ Kant accepted common courtesies and prudent reserve in expressing one's opinions. See SULLIVAN, *supra* note 36, at 171-73. "This, then, is what Kant's view about lying comes down to: We may *never* state outright that we *will* tell the truth when we have no intention of doing so." *Id.* at 173.

Kant's "catastrophe" limitation suggests qualifications to otherwise apparently absolute maxims. See WOOD, *supra* note 34, at 240-55 (pointing out that Kant's requirement

a general proposition, a reasonable agent would adopt nearly all, truth telling and promise keeping maxims with explicit or implicit exceptions.¹³⁷ Each of the following maxims, though universalized, differs in the degree or direction of its generality.

Setting aside negligent failures to tell the truth,¹³⁸ consider these plausible truth telling maxims.¹³⁹ First, to accommodate “white” lies: “Tell the truth except when it

of truth telling is not as strict as thought and allows for lies in emergencies). “The right of autonomy of individuals is also commonly understood to be qualified by a *proviso* that interference is not required to avert a major disaster or to prevent the violation of other, more stringent rights.” THOMAS E. HILL, JR., *Autonomy and Benevolent Lies*, in *AUTONOMY AND SELF-RESPECT*, *supra* note 36, at 25, 34.

Kant also made exceptions for capital punishment for murder, as where nearly the entire citizenry are accomplices (e.g., a rebellion), maternal infanticide, and soldier dueling. See KANT, *METAPHYSICS OF MORALS*, *supra* note 9, at 475-77.

¹³⁷ In the context of truth telling, see, for example, Herman, *supra* note 127, at 106-15. Particularly censurable are deceptive responses “when (a) the response is a direct lie rather than a merely evasive, misleading, or deceptively ambiguous response, (b) the person deceived trusts the deceiver and was encouraged to do so, and (c) the lie concerns the life of the deceived rather than matters only remotely touching him.” HILL, *supra* note 136, at 41.

¹³⁸ See, e.g., RESTATEMENT (SECOND) OF TORTS § 552 (1977) (“Information Negligently Supplied for the Guidance of Others”). “Deception generally . . . need not be intentional or voluntary, as lying must.” Jonathan E. Adler, *Lying, Deceiving, or Falsely Implicating*, 94 J. PHIL. 435, 435 (1997). Even though I give you false information, “I can avoid branding a liar by offering an excuse which denies the ‘mental element’ in lying: that I believed the information to be true and did not intend to deceive you.” R.A. DUFF, *INTENTION, AGENCY AND CRIMINAL LIABILITY* 8 (1990). “There is no universally accepted definition of lying to others.” James Edwin Mahon, *The Definition of Lying and Deception*, STAN. ENCYCLOPEDIA PHIL. 2, <http://plato.stanford.edu/entries/lying-definition> (last visited May 8, 2016) (citations omitted). A “commonly accepted definition . . . is the following: ‘I take a lie to be an assertion, the content of which the speaker believes to be false, which is made with the intention to deceive the hearer with respect to that content.’” *Id.* (citing BERNARD WILLIAMS, *TRUTH AND TRUTHFULNESS* 96 (2002)). For objections to the definition, see *id.* at 10-12.

¹³⁹ Alexander and Sherwin discuss the meaning and wrong of “lie,” see Alexander & Sherwin, *supra* note 132, at 395-99, as well as the broader concept of “deception,” see *id.* at 400-04. “Leading arguments hold either that lying is wrong in itself or that lying results in harm that is grave enough to support a near-absolute prohibition.” *Id.* at 395 (footnote omitted). “Law prohibits deception in very broad terms.” *Id.* at 404 (citation omitted). For the limitations of the law’s prohibitions of deception, see *id.* at 406-15. Overall, the law does not “correspond to moral theories that emphasize the effect of deception on the victim’s autonomy.” *Id.* at 432. “There is some controversy as to the relative wrongness of various forms of deception. We can distinguish between a statement (lie) that is technically false and intended to deceive, a statement that is literally true but is intended to deceive, and a failure to disclose relevant information.” Alan Wertheimer, *Consent to Sexual Relations*, in *THE ETHICS OF CONSENT* 195, 204 (Franklin G. Miller & Alan Wertheimer eds., 2010) (finding the moral differences often exaggerated). Like Wertheimer, “I will [largely] set this issue aside.” *Id.* Katz points to “examples in which the manner in which the lie causes the loss quite obviously is morally relevant.” Katz, *supra* note 96, at 314; see also *id.* at 314-15. One commentator mentions “the common moral judgment that lying is in a way worse than other forms of deception: the lie is a ‘special affront.’” Collin O’Neil, *Lying, Trust, and Gratitude*, 40 PHIL. & PUB. AFF. 301, 302 (2012). Owens, on the other hand, finds it “doubtful whether being given a false belief, even a false belief about matter that interests you, is in itself a harm.”

will be gratuitously hurtful.” For social norms relating to niceties, such as “you look great” or “your dinner party was scrumptious,” there is typically no expectation of sincere, literal truth under the circumstances and no real harm from the falsity, instead there are some benefits. In delineating maxims, consequences must be weighed. Social norms do not demand or expect truth telling in these situations.¹⁴⁰ Quite the contrary. People are trying not to be disrespectful to the listener or subject of these “white” lies. Surely it would be thought gratuitously disrespectful to hurt the listener by a truthful, uncomplimentary statement in many social situations. Other societies may perceive it differently. If we change the circumstances somewhat, even in our society unvarnished truth is demanded, as where the dinner host is relying on the evaluation of the food served for purposes of opening a restaurant. Well, even in this situation people might want some varnish so long as the indirection or innuendo in expressing the truth gently is understood by the host. Manners still count.

Two other plausible qualifications to truth telling maxims will show how these complications can be addressed. First, “tell the truth except when the other party has no rightful claim to expect or demand it from you.”¹⁴¹ This handles Kant’s infamous hypothetical of a killer demanding to be told where his targeted victim is,¹⁴² perhaps by creating uncertainty with the penumbral term “rightful.” Second, “tell the truth except when it [immediately] puts third parties at [unreasonable, great] risk.” These maxims deal with situations in which evildoers, such as terrorists, cyber criminals, or the killer in Kant’s hypothetical, would foreseeably and wrongfully exploit facts relating to security issues, if known. The word “third” in this second maxim could be bracketed to address situations where, say, a person demands to know where her gun is located so that she can retrieve it to commit suicide.¹⁴³

David Owens, *The Problem with Promising*, in PROMISES AND AGREEMENTS, *supra* note 129, at 58, 61.

¹⁴⁰ “Intentional deception is a constituent of many acceptable forms of everyday social life, such as tact, politeness, excuses, reticence, avoidance, or evasion, which are ways to protect privacy, promote social harmony, and encourage interest.” Adler, *supra* note 138, at 435 (citation omitted). Kant would go along with this. *See supra* note 135 and accompanying text. “In contexts in which people usually say false things – for example, when telling stories that are jokes – we are not deceived. If a story that is a joke and is false counts as a lie we can say that a lie in this case in [sic] not wrong” KORSGAARD, *supra* note 35, at 136. “Socially appropriate lying is not merely tolerated, it is mandatory. The child who fails to master the skill pays the heavy price of disapproval, punishment, and social ostracism.” DAVID L. SMITH, *WHY WE LIE* 18 (2004).

¹⁴¹ Other commentators have advanced this “right to truth” idea. *See Mahon, supra* note 138, at 17-20.

¹⁴² *See supra* note 130.

¹⁴³ “[M]ost of us think that there are some cases in which benevolent lies are permissible.” KORSGAARD, *supra* note 35, at 348. But Korsgaard asserts that justification of benevolent lies “must . . . appeal to the lack of autonomy of the person lied to,” which requires “some criteria for determining who is autonomous. But here we run into a difficulty. Autonomy in the ordinary sense appears to be a matter of degree.” *Id.* at 350.

All of the qualifications within these three plausible maxims may fit with the “special justification” limitations in Scanlon’s “principle forbidding lying”: “One may not, in the absence of special justification, act with the intention of leading someone to form a false belief about some matter, or with the aim of confirming a false belief he or she already holds.” T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 318 (2000). Scanlon’s principle “forbids

Turning to promise-keeping maxims, consider these.¹⁴⁴ First, “keep promises except when other prima facie moral duties are weightier under the circumstances.” This applies when, for example, an agent who is rushing to keep a promised appointment on time comes upon a person in dire need of a time-consuming rescue. Another example is where a gratuitous promise to grant future resources to another person, if kept, would prevent the promisor from substantially meeting her familial duties. As stated, however, this broad maxim qualifier (“weightier under the circumstances”) seems too open-ended. More detailed explication is required to sharpen autonomy boundaries and guide conduct. The qualification is expressed as a standard, whereas refined rules may be better. In practice, this broad standard might serve as a meta-maxim to be honed by more specific “except when” provisos as moral dilemmas are anticipated or arise. This could get very complex.

“Keep promises except when the performance [, unforeseeably at the time of the promise,] will be [unreasonably, extremely] harmful to the promisee or others.” Akin to the prior suicide example, these qualifications would excuse a promissory commitment to temporarily keep a gun for the promisee when she asks for its return while in an agitated or depressed state, having threatened to kill herself or others with it. These general, standard-laden, qualified maxims remain subsumed by the meta-maxim above.

When transgressing a general truth-telling or promise-keeping maxim, the violator may not be using another person as means only to her own ends.¹⁴⁵ She may not be curtailing another person’s overall security or liberty. Beneficent paternalism and “white” lies are both examples. They are aimed at boosting another person’s net welfare.¹⁴⁶ Nevertheless, some such violations may be disrespectful of the other

more than lying, since one can act with the aim of leading another to form a false belief without saying anything that one believes to be false.” *Id.* See generally HILL, *supra* note 136, at 25.

¹⁴⁴ “Moral philosophers disagree not only as to the grounds and scope of promissory duties, but also as to just what a promise is.” Gregory Klass, *Promise Etc.*, 45 SUFFOLK U. L. REV. 695, 699 (2012) (distinguishing between narrow and broad conceptions). “A promise in [Klass’s preferred] narrow sense is the expression of an intent to undertake a moral obligation by the very communication of that intent.” *Id.* “It is this narrow sense of ‘promise’ that makes promising the paradigm of a normative power, and which makes promises so important for autonomy theories.” *Id.* at 700. Not all promises and promise-related assertions are the same. Ayres and Klass identify “three categories of promissory representations” (positive, opaque, and blank) and three “representations relative to some fixed probability” (definite-probability, fully warranting, and semi-warranting). IAN AYERS & GREGORY KLASS, *INSINCERE PROMISES* 44-45 (2005). “Promise something that you intend not to do is not just a tort, subject to punitive damages, but can also be a crime.” *Id.* at 170 (“theft by deception”, “obtaining money or property by means of false or fraudulent . . . promises”). The “history of criminal seduction . . . does demonstrate that the law has been willing to impose punitive sanctions for promises that would not be enforceable through an action in contract.” *Id.* at 193.

¹⁴⁵ By “another person” I am referring to the third parties as well as the recipient of the communication. Lies work because most people tell the truth. Therefore, “it is not just the person to whom you lie that you treat as a means, but all of those who tell the truth [Relying on their truth telling] is explicitly treating their rational nature as a mere means: indeed it is making a tool of other people’s good wills.” KORSGAARD, *supra* note 35, at 127.

¹⁴⁶ Lahav gives examples of when promissory obligations should be released and then advances a general principle: “Where the promisee’s consent to breach is implied but not

person's dignity.¹⁴⁷ Promise-breaking motivated by beneficent paternalism denies the paternalized person the liberty to choose for herself, and the security from being treated as less than a fully rational, ethical being.¹⁴⁸ While the promise-breaker may consider the promisee a moral equal, she does not treat her respectfully. A "white" lie may signal the view that the listener cannot bear up under the weight of the bald truth. Social niceties are one thing, but even "white" lies aimed at psychic benefits may be contextually demeaning.

Qualified truth-telling and promise-keeping maxims effectively expand the liberty of the asserter or promisor at the cost, oftentimes, of reducing the security of another person. Sometimes, though, the security of the other person may also be expanded in some sense, as where permissible "white" lies increase one's security from gratuitous psychic harm. This trajectory of analysis suggests a slippery slope reasoning with the strong prospect of total paternalism at the bottom. In balancing liberty and security interests, it is critical to keep the importance of respect in sight at all times.

3. Reliance and Expectations

Disappointment of a person's reliance or expectations commonly produces harms.¹⁴⁹ Reliance and expectation damages for contract breach are exemplary.

express, the promisee's autonomy is nevertheless respected because two conditions are satisfied: (1) the promisee would have consent to the breach, and (2) the breach was motivated by the promisee's interests." Gil Lahav, *A Principle of Justified Promise-Breaking and Its Application to Contract Law*, 57 N.Y.U. ANN. SURV. AM. L. 163, 169 (2000). "I suggest here that breach may often be seen as moral, once one appreciates that contracts are incompletely detailed agreements and that breach may be committed in problematic contingencies that were not explicitly addressed by the governing contracts." Steven Shavell, *Why Breach of Contract May not Be Immoral Given the Incompleteness of Contracts*, 107 MICH. L. REV. 1569, 1569 (2009); see Steven Shavell, *Is Breach of Contract Immoral?*, 56 EMORY L.J. 439 (2006).

¹⁴⁷ "But lying also, perhaps less obviously, trespasses autonomy where a lie is told in order to foster autonomy, especially if the desire effect is achieved. That its offensive character may be blunted does not alter the autonomy-robbing function of the lie." MARINA OSHANA, *PERSONAL AUTONOMY IN SOCIETY* 111 (2006) (referring to paternalistic intervention). Nonetheless, "I believe a case can be made that strong paternalistic intervention is sometimes needed to preserve the autonomy that is threatened by a competent and deserving person's self-regarding conduct, even where the target of the paternalistic gesture has not behaved in ways that clearly permit infringements of autonomy." *Id.* at 115. For justification, see *id.* at 115-17. Relatedly, Schwartzman argues that insincere political arguments are contrary to "to the values of mutual respect and political legitimacy." Micah Schwartzman, *The Sincerity of Public Reason*, 19 J. POL. PHIL. 375, 398 (2011).

¹⁴⁸ "[A]utonomy is the good which paternalism fails to respect." Marina A.L. Oshana, *Personal Autonomy and Society*, 29 J. SOC. PHIL. 81, 82 (1998).

¹⁴⁹ "Few hurts which human beings can sustain are greater, and none wound more, than when that on which they habitually and with full assurance relied, fails them in the hour of need; . . . none excite more resentment, either in the person suffering, or in a sympathizing spectator." MILL, *Utilitarianism*, *supra* note 95, at 75.

While Corbin puts the protection of reasonable expectations at the center of contract law, see 1 ARTHUR CORBIN, *CORBIN ON CONTRACTS* § 1.1, at 2 (Joseph M. Perillo rev. ed. 1993) ("The Main Purpose of Contract Law Is the Realization of Reasonable Expectations Induced by Promises"), Owen would center it in tort law as well. "As in contract law, one naturally focuses initially on the expectations of victims in security from harm." David G.

These are typically to rectify wrongful economic harms. In addition, tort law provides examples where frustrating reliance can produce wrongful physical, economic, and psychic harms. For example, where a person reasonably relies on a railroad to continue providing a crossing guard,¹⁵⁰ or on the government to operate a lighthouse non-negligently.¹⁵¹ Dignitary harms may also ensue in these circumstances. A person may reasonably be insulted by a transparently weak excuse for breaking a non-promissory commitment (“I would have come to your house for the weekly card game, but I forgot to get money.”). When, then, should the disappointment of reliance or expectations be declared wrongful harms by means of deontic maxims?

Reliance or expectations need not be linked to truth-telling or promise-keeping maxims.¹⁵² For example, suppose a person relies on another person’s statement, “I plan to make a substantial investment in this new company.” While truthful when asserted, the speaker later changes her mind before or after the time the listener relies on the statement by investing in the new company herself.¹⁵³ Reliance or expectations maxims, on the other hand, may provide the foundation for truth-telling or promise-keeping maxims.¹⁵⁴ Ronald Dworkin champions this view:

Owen, *Expectations in Tort*, 43 ARIZ. ST. L.J. 1287, 1289 (2011). Noting that reasonable expectations also drive property law, Owen observes, “[e]xpectations might preliminarily be viewed as twin pillars of tort, then, because we robustly count the expectations of both actors and victims alike.” *Id.* at 1289-90 (citation omitted). Pound also puts the protection of reasonable expectations at the center of the law. *See* ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 188-89 (1922); ROSCOE POUND, JUSTICE ACCORDING TO LAW 3, 5-6, 17, 28-31 (1951).

¹⁵⁰ *See* Erie R.R. Co. v. Stewart, 40 F.2d 855 (6th Cir. 1930).

¹⁵¹ *See* Indian Towing v. United States, 350 U.S. 61 (1955). *See generally* RESTATEMENT (THIRD) TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 42 (2011).

¹⁵² *See* AYERS & KLASS, *supra* note 144, at 203.

¹⁵³ Dworkin argues that even if the statement is true when asserted, if it later becomes false (e.g., by cancelling a commitment to attend a conference) one harms another person whose expectations were aroused by being told of the commitment, whether or not she relied on it, and has the responsibility not to do so. *See* DWORKIN, *supra* note 57, at 305-08. Scanlon embraces the “principle of Loss Prevention”:

If one has intentionally or negligently led someone to expect that one is going to follow a certain course of action, X, and one has good reason to believe that that person will suffer significant loss as a result of this expectation if one does not follow X, then one must take reasonable steps to prevent that loss.

SCANLON, *supra* note 143, at 300-01. For challenges to Scanlon’s position, see JOHN DEIGH, EMOTIONS, VALUES, AND THE LAW 184-95 (2008). *Cf.* Stephen A. Smith, *Performance, Punishment and the Nature of Contractual Obligation*, 60 MOD. L. REV. 360, 368 (1997) (observing there is no contractual obligation for the types of assertions discussed by Dworkin and Scanlon).

¹⁵⁴ For the debate over whether the duty of promise keeping is grounded on social practices, thereby implying a (partial) grounding in reliance and expectation maxims, or is an independent moral obligation, see TUNICK, *supra* note 128, at 50-54. Those declaring the obligation independent of social practices include Kant, Locke, Grotius, McNeilly, Downie, McCormick, and Scanlon, while those disagreeing include Hume, H.L.A. Hart, Rawls, Melden, Prichard, Hamlyn, Anscombe, Pitkin, and Searle. *See id.* For example, Tunick

Promising is not an independent source of a distinct kind of moral duty. Rather it plays an important but not exclusive role in fixing the scope of a more general responsibility: not to harm other people by first encouraging them to expect that we will act in a certain way and then not acting in that way. That general responsibility is itself a case of the even more general responsibility . . . to respect the dignity of others and in that way to respect our own dignity.¹⁵⁵

Dworkin makes a similar argument for truth telling grounded on respect for dignity.¹⁵⁶

This section examines a sampling of plausible reliance and expectations maxims from broad to narrow. This exercise is to preliminarily reckon the reasonability of adopting such maxims. It overlooks myriad relevant factors that would bear on specifics. Thus, needed “except when” clauses are neglected.¹⁵⁷ While I put together reliance and expectations in the maxims for the sake of expediency, surely one would usually adopt maxims that separate them out, as under the existing law where reliance often receives more protection than “mere” expectations. Or, the substantive, first-order maxims may cover the two together, but the requital, second-order maxims may distinguish them, or both.

“Do not disappoint another person’s reliance or expectations.” This maxim is too general to realistically be considered for adoption.¹⁵⁸ It severely sacrifices liberty for the sake of very expansive security. As one example, owing to human nature, a person’s hope for aid or support from others, perhaps unreasonable or even desperate, is too easily aroused and ripened into reliance or expectations to warrant blanket claims against those other persons.

identifies MacCormick’s conditions for an obligation to keep a promise, which are independent of social practices: “A. You rely on me doing x; B. You would suffer if I did not do x; and C. I knowingly or intentionally induced you to rely on my doing x” *Id.* at 58. See Neil MacCormick & Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 *PROC. ARISTOTELIAN SOC’Y* 59, 59-78 (1972).

¹⁵⁵ DWORKIN, *supra* note 57, at 304. Notice Dworkin’s mention of dignity. Dworkin follows Scanlon in adopting an expectations justification for promise keeping. *See id.* at 307 (quoting Scanlon’s “principle of fidelity”). In Scanlon’s own words, “The account I will offer [regarding ‘the obligation to keep a promise and other related obligations’] describes such obligations as one special case of a wider category of duties and obligations regarding the expectations that we lead others to form about what we intend to do.” SCANLON, *supra* note 143, at 295. *See id.* at 295-327. For critiques of Scanlon’s “expectationalism”, see Allen Habib, *Promises*, *STAN. ENCYCLOPEDIA PHIL.* 29-31, <http://plato.stanford.edu/entries/promises/> (last visited May 8, 2016).

¹⁵⁶ “If you were lying [to me] . . . then you have harmed me just in that act. Dignity explains why” DWORKIN, *supra* note 57, at 305. “You harm me when you lie to me even if your lie makes no further difference because I don’t believe you, or because your lie makes no difference to what I do, or because I suffer no further harm in acting on it.” *Id.*

¹⁵⁷ The examples discussed above of exceptions to broad promise-keeping maxims to account for unexpected rescue delays and family obligations could likewise apply to reliance and expectations maxims. *See discussion supra* note 144.

¹⁵⁸ “Someone who relies upon a promise made to someone else . . . acquires no right by doing so.” STEVENS, *supra* note 41, at 15.

“Do not [foreseeably] disappoint another person’s reasonable reliance or expectations that you have aroused.” Reasonable, foreseeable reliance or expectations may result from a bare, legally unenforceable promise or a mere express or implied statement.¹⁵⁹ The word “reasonable” may suggest a focus of foreseeability not on the arouser or purported invader, but rather on the arousee, the supposed invadee. Yet it is less reasonable for an arousee to rely on an arouser’s communication if she foresees that the arouser cannot reasonably foresee the arousee’s reliance.¹⁶⁰ Reasonable foreseeability is relevant for both arousee and arouser. Blameworthiness, both responsibility and disrespect, emphasizes this. Foreseeability is commonly an element of a claim for the protection of reliance or expectations under existing law,¹⁶¹ as in the doctrine of promissory estoppel.¹⁶² The reasonability of reliance is usually situated or framed by norms, such as legal or moral principles, social mores and practices, that give meaning to statements or conduct.¹⁶³ The topic of norms is discussed below.

“Do not foreseeably disappoint reasonable reliance or expectations that you arouse by a communication meant for the particular arousee.” This is an example of a narrowed maxim designed to limit third-party claims. Protection of *unreasonable* reliance or expectations, of sorts, may also be morally justified in particular circumstances, as when the arouser knows that the arousee is unaware of a trumping norm (e.g., a statute) that frees the arouser from legal liability. Likewise when the arouser knows that the arousee is acting under severe constraints (e.g., coercive desperation). Account may be taken for situations in which the arouser becomes aware of the reliance or expectations sometime after the triggering communication.¹⁶⁴ Perhaps some such accounts should be limited by a narrow requital maxim. For example, “reasonably caution an arousee who may be

¹⁵⁹ Scanlon advances “the principle of Due Care”: “One must exercise due care not to lead others to form reasonable but false expectations about what one will do when one has good reason to believe that they would suffer significant loss as a result of relying on these expectations.” SCANLON, *supra* note 143, at 300.

¹⁶⁰ “The foreseeable *possibility* of detriment, whether by the reliance of the claimant or a third party, is relevant and will commonly be decisive in determining whether, as a matter of construction, the defendant has by his actions implicitly assumed responsibility towards the claimant.” STEVENS, *supra* note 41, at 14.

¹⁶¹ For example, “[a] misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent, or if the maker knows that it would be likely to induce the recipient to do so.” RESTATEMENT (SECOND) OF CONTRACTS § 162(2) (1981).

¹⁶² *See id.* § 90 (1981). “[P]romissory-fraud actions might lie not only in the cases where promissory estoppel is accompanied by misrepresentations of intent but also where even without promise, a speaker’s non-promissory prediction of the future misrepresents the speaker’s true intent.” AYERS & KLASS, *supra* note 144, at 145.

¹⁶³ “Come on back now, you hear,” may be a casual farewell nicety in some communities, but a true invitation elsewhere. *See generally* Bailey Kuklin, *The Plausibility of Legally Protecting Reasonable Expectations*, 32 VAL. U. L. REV. 19 (1997).

¹⁶⁴ Such accounts might cover cases outside the reach of the next considered deontic boundary marker, exploitation, since here the arouser expects or desires no advantage from the arousee’s reliance and expectations. Nevertheless, there may be common features to the exploitation maxims, as where the arousee is acting under partial ignorance or coercion.

foreseeably disappointed by unreasonable reliance or expectations that you arouse by a communication meant for her.”¹⁶⁵

There is a multitude of plausible reliance and expectations maxims. The adoption of any particular maxim within the limits of the categorical imperative is supposedly optional.¹⁶⁶ Though perhaps optional, it strikes me as unlikely that a reasonable, sensible agent would reject all forms of reliance and expectations maxims. At the extremes, altogether unprotected reliance or expectations would severely impact both liberty and security interests. Especially when knowing or purposive, a disappointed arousal may be disrespectful. Disappointment may involve use of the arousee as a means only. Perhaps a survivalist living alone in the wilderness would reject all such maxims, but not the rest of us.

4. Exploitation (Advantage-taking)

The foundational assumption that moral and legal agents, owing to their rational nature, are responsible for their choices and conduct is often put to the test when it comes to exploitation or advantage taking.¹⁶⁷ Circumstances facilitating exploitation are ones in which the exploitee is making a choice under some degree of ignorance or coercion, internal (e.g., cognitive dissonance, impulse) or external (e.g., fraud, economic duress).¹⁶⁸ Her choice is impaired.¹⁶⁹ The exploitee, nevertheless, may not

¹⁶⁵ Cf. TINALEA (“This is not a legally enforceable agreement”) clauses; see AYERS & KLASS, *supra* note 144, at 157-58.

¹⁶⁶ See generally Johnson, *supra* note 130.

¹⁶⁷ “In the moralized sense used here, exploitation is generally understood as taking unfair advantage.” RUTH J. SAMPLE, *EXPLOITATION* 7 (2003) (citation omitted). “To characterize an action as exploitative is to commit oneself to a substantive moral view since, as Joel Feinberg has noted, the essence of exploitation is ‘a way of using another person that is somehow wrongful or unfair.’” MICHAEL J. GORR, *COERCION, FREEDOM AND EXPLOITATION* 8 (1989) (quoting Joel Feinberg, *Noncoercive Exploitation*, in *PATERNALISM* 201, 202 (Rolf Sartorius ed., 1983)). Wertheimer is less sure. “[W]hereas the moral force of coercion is relatively clear, as a coerced agreement is not binding, the moral force of exploitation is not clear, for it is not obvious what follows from characterizing an agreement as exploitative.” Alan Wertheimer, *Remarks on Coercion and Exploitation*, 74 *DENV. U. L. REV.* 889, 894 (1997).

¹⁶⁸ That exploitation does not require coercion, see SAMPLE, *supra* note 167, at 11-12. “Whereas coercion refers to the formation of an agreement, exploitation seems to always include reference to the *substance* or *outcome* of an agreement.” Wertheimer, *supra* note 167, at 896. Gorr distinguishes “incapacity” exploitation from “circumstantial” exploitation. See GORR, *supra* note 167, at 151.

¹⁶⁹ For example, the German Civil Code provides:

[A] legal transaction is void by which a person, by *exploiting* the predicament, inexperience, lack of sound judgment or considerable weakness of will of another, causes himself or a third party, in exchange for an act of performance, to be promised or granted pecuniary advantages which are clearly disproportionate to the performance.”

Melvin A. Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, in *FAULT IN AMERICAN CONTRACT LAW* 82, 86-87 (Omri Ben-Shahar & Ariel Porat eds., 2010) (quoting Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, as amended, § 138(2) (F.R.G.) (emphasis

suffer physical, economic, or psychic harm from the exploitation.¹⁷⁰ She may even be benefitted in these senses, as where she is enticed to enter into a contract that nets more gains than otherwise obtainable.¹⁷¹ But in one sense, one key to my exposition, the exploitee is harmed—her dignity is not respected.¹⁷² Sometimes she is used as a means only.¹⁷³ Even when the exploitee benefits, perhaps more than does the exploiter,¹⁷⁴ she still suffers a dignitary harm. She is not treated with respect. She has deontic reason to object.¹⁷⁵

Some issues of exploitation may fall within the province of substantive maxims about truth telling or promise keeping. Where an agent's impaired choice results from deceit or the violation of a duty to disclose, truth telling is implicated.¹⁷⁶ If an

added). Sample argues that exploitation does not require vulnerability. See SAMPLE, *supra* note 167, at 27-54.

¹⁷⁰ In recent years, mutually beneficial exploitation has drawn most of the philosophical attention. “[Harmful] exploitation has not received much attention, partly, I suspect, because its wrongfulness has seemed obvious, and therefore philosophically uninteresting, and partly because the wrongfulness of such actions can usually be explained by reference to some other less controversial and obscure moral concept such as coercion or deception.” Matt Zwolinski, Book Review, 121 ETHICS 228, 228 (2010).

¹⁷¹ “Exploitation can occur even when the exploited party benefits from, and would voluntarily consent to, the transaction. She may gain more than her exploiter.” Matthew Rendall, *Non-identity, Sufficiency and Exploitation*, 19 J. POL. PHIL. 229, 237 (2011). “Exploitation may not fall within the harm principle because the ‘victim’ is not harmed but is inadequately benefited Yet arguably, each of these types of conduct is immoral.” Alexander, *supra* note 107, at 855. For a taxonomy of exploitation, see Wertheimer, *supra* note 167, at 897-99.

¹⁷² “On my account relationships can be voluntary, noncoerced, and even mutually beneficial and yet may be subject to the moral criticism that they are exploitative. The badness stems from the degradation of one or more of the agents in a transaction for advantage.” SAMPLE, *supra* note 167, at 5. Sample refers to her “account of exploitation” as “Exploitation as Degradation.” *Id.* at 56.

¹⁷³ If the advantaged agent does nothing to induce the choice by the disadvantaged one, as where she passively accepts an offered gratuity based on known misinformation, it seems that she is using the other agent as a means only in, at best, a weak sense.

¹⁷⁴ “Much exploitation is, paradoxically, mutually beneficial. This accommodates the fact that moral agents can fail to demonstrate respect for persons not simply in the course of harming them, but also when improving their situation” SAMPLE, *supra* note 167, at 57. Even in some of these cases, as where the exploitee agrees to a contract beneficial to her, she may have been able to capture more of the consumer surplus if her choice was not impaired. But because the exploited person may benefit, Sample argues, “Much exploitation seems to be activity with which we should not interfere.” *Id.* at 86. One reason is that “the consequences for the exploited person are often worse if he is not exploited.” *Id.*

¹⁷⁵ Recent philosophical examinations of exploitation have two foci: “[T]he former focuses on the fairness or unfairness of the transaction, while the latter bases its assessment on a broadly Kantian idea of respect for persons. Both of these approaches, in turn, admit of specification in a broad variety of ways.” Matt Zwolinski, *Structural Exploitation*, 29(1) SOC. PHIL. & POL’Y 154, 157 (Winter 2012) (footnote omitted).

¹⁷⁶ Against the right to take advantage of another’s ignorance of material facts, Trebilcock observes, “It may be plausible to argue that the buyer’s conduct violates the Kantian categorical imperative of equal concern and respect in that if the roles were reversed . . . , the

exploitee waives an exploiter's promissory obligation because of her impaired condition, then promise keeping is implicated, whether or not the exploiter causes the impairment. Other exploitation circumstances may fall within the province of reliance or expectations maxims. Such maxims, for example, may protect unreasonable reliance or expectations induced or taken advantage of by an exploiter aware of the other party's impaired condition.¹⁷⁷ These other types of maxims, however, will not do all the work of protecting against exploitation in all its forms.

Since choices are perhaps always somewhat impaired, and other agents may benefit from the impairments whether or not they induced them, or were even aware of them, the adoption of plausible exploitation maxims must settle difficult questions about where to draw this autonomy space boundary line.¹⁷⁸ First, exploitation advantage taking is: "At the most general level, A exploits B when A takes unfair advantage of B One problem with such a broad account . . . is that there will 'be as many competing conceptions of exploitation as theories of what persons owe to each other by way of fair treatment.'"¹⁷⁹ This section briefly explores some tenable conceptions, looking down various avenues.¹⁸⁰

buyer would not wish his ignorance to be exploited by the seller in this fashion" MICHAEL TREBILCOCK, *THE LIMITS OF FREEDOM OF CONTRACT* 117 (1993). Fried agrees that taking advantage of another's ignorance for one's own economic gain is disrespectful. *See* FRIED, *supra* note 127, at 78-79. In response, one commentator notes, "There is, in the context of pre-contractual bargaining, a variety of plausible conceptions of what respect for persons requires. For instance, it is plausible to recognize a significant line between fraudulent misrepresentation and non-disclosure of material facts." Marc Ramsay, *The Buyer/Seller Asymmetry: Corrective Justice and Material Non-Disclosure*, 56 U. TORONTO L.J. 115, 135 (2006). As discussed in the next paragraph, I agree with Ramsay.

Purposive deceit for one's own purposes is, of course, far out of bounds. It uses another person merely for one's own ends. "Taking all forms of injustice into account, none is more deadly than that practiced by people who act as if they are good men when they are being most treacherous." CICERO, *DE OFFICIIS* 23 (Harry G. Edinger trans., 1974) (44 B.C.E.). The Lilliputians, Swift reports, "look upon fraud as a greater crime than theft . . . ; for they allege, that care and vigilance, with a very common understanding, may preserve a man's goods from thieves, but honesty has no defense against superior cunning" AYERS & KLASS, *supra* note 144, at 176-77 (quoting JONATHAN SWIFT, *GULLIVER'S TRAVELS* 48-49 (Arthur Case ed., 1938) (1726)).

¹⁷⁷ Disappointed reliance or expectations may not involve exploitation or using the invadée as a means only, as where the arouser did not intend, expect or actually gain anything from the arousee's behavior.

¹⁷⁸ "Some commentators have suggested that the rules of what does (and does not) constitute duress can best be seen as a set of collective choices regarding what sort of 'advantage taking' or 'strategic behavior' we will condone (or even encourage) in transactions" Brian H. Bix, *Contracts*, in *THE ETHICS OF CONSENT*, *supra* note 139, at 251, 257-58. Kronman would allow advantage taking so long as "the welfare of *most people* who are taken advantage of in a particular way be increased by the kind of advantage-taking in question." Anthony Kronman, *Contract Law and Distributive Justice*, 89 YALE L.J. 472, 487 (1980) (footnote omitted).

¹⁷⁹ Alan Wertheimer, *Exploitation*, STAN. ENCYCLOPEDIA PHIL. 4, <http://plato.stanford.edu/entries/exploitation/> (last visited May 8, 2016) (reference omitted) (sampling accounts of exploitation at 4-7). "Some accounts invoke the Kantian notion that one wrongfully exploits when one treats another instrumentally or merely as a means." *Id.* at 7. "On some accounts, the exploited party must be harmed, . . . the exploited party may gain

“Do not accept benefits ensuing from another person’s [foreseeable] [substantial] shortfall from the conditions for fully [reasonably, substantially] responsible [autonomous] choice.” Under these maxims, to produce a wrongful harm, an exploiter need not be a source of the exploitee’s condition of impaired choice.¹⁸¹ Without the exploiter’s involvement in the exploitee’s impairment, some courts and commentators insist these maxims go too far toward protecting the exploitee’s security interest,¹⁸² while others disagree.¹⁸³

from the relationship, . . . the exploited party must be coerced, . . . [there must be] a defect in the quality of the consent, . . . exploitation can be fully voluntary.” *Id.* at 7. For the “definitional landscape” of “exploitation”, see ALAN WERTHEIMER, *EXPLOITATION* 10-12 (1996).

“[W]hat is a ‘desperate vulnerability’ and what is it to ‘exploit’ or ‘unjustly exploit’ or ‘shamefully exploit’ such a vulnerability? . . . Even given our likely agreement on extreme cases, however, there is little hope that we could formulate some neat and simple rule to make formal determinations for all cases.” Jeffrie G. Murphy, *Consent, Coercion, and Hard Choices*, 67 VA. L. REV. 79, 89 (1981) (looking to the contract doctrine of unconscionability for “hints”).

¹⁸⁰ The extent to which foreseeability should be part of the maxims is generally addressed above in the examination of reliance and expectation maxims. *See* discussion *supra* Part IV.A.3.

¹⁸¹ “Genuinely pure exploitation can occur only in cases in which the offeror does no more than take advantage of a *pre-existing* incapacity.” GORR, *supra* note 167, at 152. “Exploiters are typically *opportunists*, they extract advantage from situations that are not of their own making. Coercers, on the other hand, are typically *makers*, rather than mere discoverers and users, of opportunities.” *Id.* at 155 (quoting Joel Feinberg, *Noncoercive Exploitation, in* PATERNALISM 201, 208 (Rolf Sartorius ed., 1983)).

¹⁸² Regarding coercion, as to whether a risk has been assumed voluntarily, “it does not matter that the plaintiff is coerced to assume the risk by some force not emanating from defendant, such as poverty, dearth of living quarters, or a sense of moral responsibility.” *Gibson v. Beaver*, 226 A.2d 273, 276 (Md. 1967) (quoting 2 FOWLER V. HARPER & FLEMING JAMES, JR., TORTS § 21.3 (1956)). “[T]he pressure of commercial or economic necessities in no wise caused by the wrongful act of him who seeks to profit by them . . . will not render his act in so utilizing his neighbor’s distress for his own advantage legally wrongful.” Francis H. Bohlen, *Voluntary Assumption of Risk*, 20 HARV. L. REV. 14, 25 (1906). “True coercion, to put it crudely, requires not merely an unhappy choice but a villain who is responsible for creating the necessity of making that choice.” Murphy, *supra* note 179, at 87; *see* Hila Keren, *Consenting Under Stress*, 64 HASTINGS L.J. 679, 684 (2013); Zwolinski, *supra* note 175, at 155 (“[C]onsideration of background injustices [should] play [a fairly little role] in the correct understanding of exploitation.”).

¹⁸³ Consent to otherwise tortious conduct resulting from a substantial mistake concerning the nature or expected extent of the invasion is invalid when “*the mistake is known to the other* or is induced by the other’s misrepresentation . . .” RESTATEMENT (SECOND) OF TORTS § 892B(2) (1977) (emphasis added). Though a party’s constrained choice is not due to an advantage-taker, “it seems clear that if such circumstances were known and advantage taken of them by the other party a degree of pressure which would not ordinarily amount to duress, might have such coercive effect as to invalidate a transaction.” 5 SAMUEL WILLISTON, *CONTRACTS* § 1608 (rev. ed. 1937) (footnote omitted). The term “exploit”, like “take advantage”, suggests at least an awareness, or reason to know, by the exploiter of the exploitee’s impaired condition. For duress, the general rule grants relief for third-party coercion “unless the other party to the transaction in good faith and without reason to know of the duress either gives value or relies materially on the transaction.” RESTATEMENT (SECOND) OF CONTRACTS § 175 (1981). Feinberg “conclude[s] that coercive offers made in

“Do not [foreseeably, purposely] undermine [substantially, unreasonably] the conditions for [fully] responsible [autonomous] choice of another person and then [unduly] exploit her impaired choice.” If ever exploitation would be seen as producing a wrongful harm, it would be under maxims such as these. The exploiter is not the least bit respectful of the exploitee’s dignity and would likely be using her as a means only. Legal doctrines reaching this conduct, include fraud, deceit, duress, coercion, and undue influence.

“Do not [purposely, intentionally, foreseeably] undermine [substantially, unreasonably] the conditions for [fully] responsible [autonomous] choice of another person.” These maxims, while broader than the ones immediately above, may be abridged without the violator gaining any advantage from the violation. It would not seem, therefore, that the violator is necessarily using the disadvantaged person as a means only, but such conduct may still be disrespectful by not treating the person as an end in herself,¹⁸⁴ and may affect the person’s liberty and security interests in her later impaired dealings with others. Still, when the violator gains nothing, she is not an exploiter in the usual sense. Is there a sufficient dignitary harm before the disadvantaged person chooses conduct influenced by her impaired condition? When requital by the maxim violator is called for, should she be responsible for harms to the disadvantaged person caused in part by interactions with third parties? If so, should this protection be limited to cases in which the third party is not herself an exploiter? In answering these and other questions relating to exploitation, reasonable, principled, people can certainly disagree with one another.

5. Risk Imposition

When an agent’s conduct puts another person at risk,¹⁸⁵ does the risk by itself harm the other person? This depends, to begin with, on what is meant by a risk.¹⁸⁶

circumstances deliberately created by the offeror for the purposes of exploitation do normally invalidate consent, whereas coercive offers made by a party who had no role in creating the circumstances of vulnerability . . . very often do not invalidate consent.” JOEL FEINBERG, *HARM TO SELF* 246 (1986); *see id.* at 176, 197.

¹⁸⁴ The failure to respect a person as an end in herself is different from using her as a means only. *See* F.M. KAMM, *INTRICATE ETHICS* 13 (2007); MICHAEL ROSEN, *DIGNITY* 81-85 (2012); SCANLON, *supra* note 87, at 89-121 (“Means and Ends”).

¹⁸⁵ “There is no form of activity (or inactivity either for that matter) that does not involve some risk.” FEINBERG, *supra* note 183, at 101.

¹⁸⁶ “Risk is defined as a situation in which numerical probabilities can be attached to the various possible outcomes of each course of action” JON ELSTER, *Introduction, in RATIONAL CHOICE* 1, 5 (Jon Elster ed., 1986). “There are famously different interpretations of the notion of risk. Dividing these interpretations into two rough categories, we can say there are objective and subjective accounts of risk.” Claire Finkelstein, *Is Risk a Harm?*, 151 U. PA. L. REV. 963, 972-73 (2003) (footnote omitted). As examples of Finkelstein’s categories, *see* Alexander, *supra* note 107, at 825 (“Risk is an epistemic rather than an ontic notion, and it is always assessed from a particular informational perspective.”); Larry Alexander, *Insufficient Concern: A Unified Conception of Criminal Culpability*, 88 CAL. L. REV. 931, 936 (2000) (“Risk is always relative to someone’s perspective, a perspective that is defined by possession of certain information but not other information.”). *See generally* Sven O. Hansson, *Risk*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/risk/> (last visited May 8, 2016). Feinberg identifies risk within the harm principle as a compound of the magnitude and probability of harm. *See* FEINBERG, *supra* note 18, at 191.

The first definition of “risk” in Black’s Law Dictionary is edifying: “The uncertainty of a result, happening, or loss; the chance of injury, damage, or loss; esp., the existence and extent of the possibility of harm”¹⁸⁷ “Injury”, “damage”, and “loss” are normally associated with harm, though not necessarily wrongful harm.¹⁸⁸ If we focus on “[t]he uncertainty of a result, happening,” it does not appear that the creation of a risk needs to be harmful in itself. For instance, when an agent attempts to effectuate a rescue of another person, there is typically some risk, some chance, that the agent will fail. This uncertainty does not necessarily produce a harm to the rescuee, a setback to her overall interests. In a strong sense, the risky rescue attempt promotes the rescuee’s interests. The rescue attempt has features of both a setback to a particular interest and a promotion of the same or another interest. A carefully hurled lifebuoy may hit the rescuee and injure her. Whether or not it injures her, the lifebuoy may also save her life. Is, then, the creation of a risk from hurling the lifebuoy a harm to her? Yes, and no. It depends on how we characterize the chancy action. We may speak in broad terms, “is a risky rescue attempt (for which there is no better alternative) harmful to the rescuee?” Put this way, the answer, at least when the chance of succeeding at the rescue outweighs the chance of making things worse, is no. We may be more specific and deconstruct the conduct, one aspect being, “is the risk that a hurled lifebuoy will hit a rescuee harmful to her?” Put this way without more, it is easy to answer yes. In this context, the broader characterization of the risk seems more normatively appropriate. This gambit of telescoping an identified risk may be referred to as “the specificity of risk characterization.”¹⁸⁹ In a

With regard to “imposing a risk”, “risk must be conceived in an objective rather than in an epistemic sense, and it must generally be regarded as the joint creation of two interacting actors or activities rather than as something that one person has unilaterally imposed upon another.” Perry, *Responsibility for Outcomes*, *supra* note 27, at 74 (reference omitted). As Perry notes, this suggests the Coase Theorem. *See id.* at 85-86; Ronald Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960). What-is-a-risk-of-what?

¹⁸⁷ BLACK’S LAW DICTIONARY 1353 (8th ed. 2004).

¹⁸⁸ “In non-technical contexts, the word ‘risk’ refers, often rather vaguely, to situations in which it is possible but not certain that some undesirable event will occur.” Hansson, *supra* note 186, at 1. “Injury” has been defined as a harm that is legally protected against, meaning, a wrongful harm. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 7 (1979) (“Injury and Harm”).

¹⁸⁹ The idea stems from Judge Magruder’s discussion in *Marshall v. Nugent*, 222 F.2d 604, 610 (1st Cir. 1955) (“Flexibility [in “decid[ing] each of an infinite variety of cases”] is . . . preserved by the further need of defining the risk, or risks, either narrowly, or more broadly, as seems appropriate and just in the special type of case.”). “The linking of doing to suffering requires describing the risk at a level of generality appropriate both to what the defendant did and what the plaintiff suffered.” Ernest J. Weinrib, *Understanding Tort Law* 23 VAL. U.L. REV. 485, 521 (1989). Pursuant to “the multiple description problem . . . [o]ne can describe any harm particularly enough to say of it (under that description) that it was *unforeseeable* or generally enough to say of it (under the second description) that it was *foreseeable*.” MOORE, *supra* note 56, at 364-65 (citing Clarence Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189 (1952)). Feinberg “speak[s] of ‘relativity to the description of the act.’ Described as ‘signing that legal document,’ the act was involuntary. Described as ‘exercising the limited choice permitted by the gunman,’ the act was voluntary.” FEINBERG, *supra* note 183, at 123. We may distinguish “a *thin* act-description” from “a *thick* one. Actually they are ‘thick’ and ‘thin’ only relative to one another, since there is a kind of breadth spectrum permitting a whole range of act descriptions, some thicker than others.” *Id.* at 129. *See* John Oberdiek, *Towards a Right Against Risking*, 28 LAW & PHIL. 367, 384-87 (2009) (“reference class”).

lawsuit, the accepted specificity of the risk in issue is often outcome determinative. This gambit also affects moral judgments of imposed risks.

Instead of the “risk” that the rescuee will be saved by the hurled lifebuoy, we normally think of this likelihood as a chance, prospect, or possibility without negative connotations.¹⁹⁰ For this Article’s purposes, the relevant meaning of “risk” is narrower than simply the uncertainty or chance of a result or happening. The idea of injury, damage, or loss is crucial. Is, then, the creation of a risk of loss in itself a harm? Courts and commentators espouse various views. Some declare that creating a risk is in itself a harm,¹⁹¹ while others hold that it is not.¹⁹² Some suggest that

¹⁹⁰ Finkelstein “argue[s] that a chance of benefit is itself a benefit.” Finkelstein, *supra* note 186, at 966.

¹⁹¹ “[C]reating a risk [of harm] is itself a kind of harm . . . [I]t harms me when you drive carelessly in my street even if you miss me.” DWORKIN, *supra* note 57, at 306. “[E]ven if we attend only to harmful conduct, the Harm Principle must permit the criminalization of conduct that either causes *or creates a risk of* harm.” R.A. DUFF, *ANSWERING FOR CRIME* 125 (2007) (citing FEINBERG, *supra* note 18, at 11 (“conduct that causes serious primary harm, or the unreasonable risk of such harm”). “[I]mposition of risk and imposition of harm are not distinct forms of conduct. They are identical conduct viewed from an *ex ante* and *ex post* perspective, respectively.” Barbara H. Fried, *The Limits of a Nonconsequentialist Approach to Torts*, 18 *LEGAL THEORY* 231, 239 (2012). Fried points out that the law often protects against *ex ante* risk alone and identifies “a number of curious implications” of the rejection of such protection. *See id.* at 242-44. She discusses various “possibilities . . . floated for explaining the wrong of risk in deontological terms.” *Id.* at 244-48 (“Harm includes expected harm,” “[r]isk-creation is a completed harm,” and “[r]isk-creation violates a different right from the right to be free from harm”). “If a person *X* imposes an unreasonable risk on a person *Y*, then, even if the risk does not eventuate in any tangible damage, *Y* has suffered a genuine loss (albeit a loss that is perhaps not practicably compensable).” Matthew Kramer, *Of Aristotle and Ice Cream Cones: Reflections on Jules Coleman’s Theory of Corrective Justice*, in *ANALYZING LAW*, *supra* note 93, at 163, 166. Kramer finds support from Coleman. “We can treat a reduction in security as a loss, and in the event it results from another’s wrong, it can be a wrongful loss.” *Id.* (quoting Jules Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 *CHL-KENT L. REV.* 451, 465 (1987)). Finkelstein argues that “the imposition of a risk [is] a harm to the person on whom it is inflicted.” Finkelstein, *supra* note 186, at 965 (emphasis omitted). “I claim that risk harm is a form of harm that is independent of outcome harm, on the grounds that minimizing one’s risk exposure is an element of an agent’s basic welfare.” *Id.* at 966. But Finkelstein is cautious about pushing the risk of harm from dangerous conduct too far. “[F]irst, this would be only a ‘secondary’ harm, the harmful character of which derives from that of the primary harm which is risked.” DUFF, *supra*, at 125. Still, might not this secondary harm still be justifiably proscribed? Secondly, Finkelstein observes, some criminalized dangerous conduct does not “actually expose[] others to a risk of harm: someone who drives recklessly round a blind corner is guilty of dangerous driving even if the road is in fact clear and no one is actually exposed to a risk.” *Id.* Yet these “harmless” occurrent risks may also produce harms from the risk of future wrongful risks. Such a reckless driver may be more likely to drive recklessly when someone is exposed to the risk. Knowing this, a cautious driver’s conduct may be negatively affected by defensive tactics. *See* Kimberly K. Ferzan, *Plotting Premeditation’s Demise*, 75 *LAW & CONTEMP. PROBS.* 83, 102 (2012) (“actions at one time that create a risk of a later harm are culpable at the time the risk is first created”). For citations to other commentators who see a (substantial) risk of harm as a harm in itself, see Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 *CLEV. ST. L. REV.* 1, 32 n.94 (1989) (Nozick, Fishkin, Gross, Thomson).

Perry endorses Epstein’s equating the imposition of a known risk of harm to intentional harm. “[T]he imposition of a known risk, or at least of a known, substantial risk, to someone

creating a risk is, at some point, in itself a *wrongful* harm,¹⁹³ while others see it to the contrary.¹⁹⁴ “In summary, the problem of appraising risks from a moral point of view does not seem to have any satisfactory solution in established moral theories.”¹⁹⁵

else’s person or property seems to be akin to the ‘taking’ which Epstein says is involved in intentionally causing harm to another for the purpose of furthering one’s own ends.” Perry, *Impossibility*, *supra* note 93, at 149.

¹⁹² Hurd asks, “Why is it that corrective justice theorists have unanimously eschewed the imposition of liability for risk-taking alone?” Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51, 81 (1991). For her answers, the key one being “no harm, no foul”, see *id.* at 81-84. Under corrective justice, “[c]oherence requires that the injustice relate act to injury and vice versa As negligence law recognizes, the injustice does not consist merely in the unreasonably created risk considered in itself; that would one-sidedly focus on the defendant’s wrongful action and entail liability for unreasonable risk-creation even without damage.” WEINRIB, *supra* note 83, at 3. “Those who are exposed to unrealized risks have no grounds for complaint [even when the risks are wrongful], for their rights to security are intact.” Arthur Ripstein & Benjamin C. Zipursky, *Corrective Justice in an Age of Mass Torts*, in PHILOSOPHY AND THE LAW OF TORTS, *supra* note 27, at 214, 224. “Stated simply, it is either implausible or inaccurate to define ‘harm’ such that a person can be harmed without knowing about it and without any identifiable setback to the person’s interests.” Michael T. Cahill, *Attempt by Omission*, 94 IA. L. REV. 1207, 1218 (2009). See, e.g., PROSSER & KEETON, *supra* note 60, at 165 (“The threat of future harm, not yet realized, is not enough.”); Fried, *supra* note 191, at 240-41 (objecting while providing further citations); Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 208 (2000); Stephen Perry, *Risk, Harm, and Responsibility*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 27, at 321, 330-39 (“Is Risk a Harm in Itself?”). To the contrary, I argue that such a risk may produce damage, a loss, a restriction of one’s autonomous choices, that is, a harm. Even when ignorant of the risk, it may produce at least a dignitary harm, which does not require knowledge by the invadee. Adler suggests the question of whether risk is a harm my turn on whether one adopts a Bayesian or frequentist account of risk. See Matthew D. Adler, *Risk, Death and Harm: The Normative Foundations of Risk Regulation*, 87 MINN. L. REV. 1293, 1298-302 (2003).

¹⁹³ Under the Model Penal Code, “A person commits a misdemeanor if he recklessly engages in conduct which places or may place another person in danger of death or serious bodily injury.” MODEL PENAL CODE § 211.2 (1962) (Recklessly Endangering Another Person). Schroeder challenges the “feature” of tort law that requires caused harm by contending that, under corrective justice, one should be liable for “increas[ing] the risk of harm occurring, whether or not it eventually does.” Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439, 439 (1990). In responding to criticism of his thesis, Schroeder asks, “is the risk of harm itself a harm? The answer may be yes, but less obviously than in the case of physical injury.” *Id.* at 160 (footnote omitted). Cf. Ferzan, *supra* note 191, at 102 (“actions at one time that create a risk of a later harm are culpable at the time the risk is first created”).

¹⁹⁴ See, e.g., Heidi M. Hurd, *The Deontology of Negligence*, 76 B.U. L. REV. 249, 262-65 (1996). Morse rejects Hurd’s argument “that it is viciously circular and deontologically unacceptable to construe creating risks as wrongs” Stephen J. Morse, *Reasons, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 394 (citing Hurd, *supra*, at 264-65). “Harms and wrongs are distinct. Moreover, I see no reason why it is deontologically unacceptable to consider violations of duties to others as wrongs, even in the absence of resulting harms. What could be more obviously wrong in itself than intentionally breaching a moral duty owed to others?” *Id.* I would put Morse’s argument this way. Whether or not creating a risk is seen as a harm in itself, when the conduct violates a deontic maxim, it produces a wrongful harm – a dignitary harm if nothing else. Hence, all deontic duty violations entail harms, indeed, wrongful harms.

Since harm is either physical, economic, psychic, or dignitary, the inquiry resolves to whether a risk of harm in itself is one of these four types.¹⁹⁶ A hypothetical might help. Imagine an agent is target shooting on her large, isolated ranch without any reason to believe that another person is put at risk by this activity. Unknown to her, a person is within range of her bullets because he landed on her property due to the vagaries of his hot-air ballooning. Assume the person at risk is also totally unaware of the shooting risk to him. Without being hit or made aware, does he suffer one of the four types of harms?¹⁹⁷ Because there is no knowledge of the risk by either party, there certainly are no physical or psychic harms at the time. Nor is there a dignitary harm. The shooter is not disrespecting the party unknowingly, unforeseeably put at risk. Perhaps there is an economic harm of some type. If aware of the (substantial) risk, the balloonist would have taken safety measures, including the willingness to pay the agent to stop shooting. This seems to stretch the everyday understanding of what constitutes an economic harm. There are no out-of-pocket losses or even standard lost opportunities.¹⁹⁸ The ignorance of the risk precludes the opportunity of the person to take safety measures, but it is the ignorance of the risk that generates this lost opportunity, not the risk itself. Ignorance of any beneficial trade, such as a better deal on a hot-air balloon purchase, causes this kind of lost chance, but we do not normally think of these losses in terms of protected economic harms. These losses, rather, are missed economic benefits, like the failure to invest in a growth stock because one neglects available information or is risk averse. Unless we subscribe to an expansive notion of economic harm, which

¹⁹⁵ Hansson, *supra* note 186, at 13. Goldberg and Zipursky distinguish “the pure-conduct conception of wrongs,” in which risky conduct may be a wrong in itself, from “the injury-inclusive conception of wrongs,” in which the conduct alone is insufficient. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 934-35 (2010) (emphasis omitted). “Overwhelmingly, modern tort theorists have assumed or insisted that the idea of an injury-inclusive wrong is incoherent.” *Id.* (footnote omitted).

¹⁹⁶ “On my view, the value of autonomy is related to risk in that being subject to risk can narrow one’s acceptable options by narrowing one’s safe options, and this constitutes a diminution of autonomy.” Oberdiek, *supra* note 189, at 373. I would identify this as a dignitary harm, at least.

¹⁹⁷ Oberdiek discusses a hypothetical in which the shooter is aware of the risk, but the person at risk (you) is not. “It is . . . a diminution of your autonomy even though you were unaware that you were targeted. The acceptability of options, and thus their normative availability, depends not upon one’s *belief* that exercising them would be safe, but upon the *fact* that the option, if exercised, would be safe.” *Id.* at 374. Under this reasoning, any fact relevant to an agent’s choice, known to her or not, affects her autonomy, whether or not the creator of that fact is aware of the impact. *Cf.* Alan Wertheimer, *Victimless Crimes*, 87 ETHICS 302, 308 (1977) (“One can surely *be* victimized without *feeling* victimized, as when one unknowingly consumes a harmful product or is unknowingly victimized by corporate conspiracies to raise prices.”).

¹⁹⁸ “Cost to the economist is ‘opportunity cost’ – the benefit forgone by employing a resource in a way that denies its use to someone else.” RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 6 (2d ed. 1977). Moore refers to “the well-charted human tendency to regard out of pocket costs as more serious than opportunity costs of equal value. Economists have long charted such ‘framing effects’ in popular psychology” MICHAEL S. MOORE, *CAUSATION AND RESPONSIBILITY* 456 (2009).

may be tenable, when we look at this harm more traditionally, the creation of a risk of this harm need not be a harm itself.

Perhaps we should look, instead, at the harms that would occur if the risk from the bullets materializes, including reactions to any misses once the person at risk becomes aware. These events might produce a variety of harms. We could then discount the expected harms from each possibility by the likelihood of its occurrence and combine the assortment of discounted possibilities. This prices the overall risk, in a sense putting it in terms of an economic harm. Existing law uses this approach for such things as setting damages for wrongful exposure to toxic substances, when physical or other likely harms have not yet ripened.¹⁹⁹

To stand back, in the context of risk, we generally think of a harm as something that a risk *produces*. If the risk did not, or has not yet, come to fruition, we speculate as to the harms that would have been produced if it had, or will be produced if it does. Then we discount the value of the possible harms by the magnitude of the risk. As part of this calculation, we include the harms produced by the reactive responses to the knowledge of the risk, either by the person at risk or third parties.²⁰⁰ We should also consider the knowledge of the agent producing the risk. When the agent becomes aware of the potential consequences of her conduct, to continue it may cause a dignitary harm. The agent is diminishing the practical choice options of a knowledgeable party at risk, thereby curtailing that person's autonomy.²⁰¹ Depending on the circumstances, by knowingly imposing the risk the agent chooses to use the party at risk as a means only. At some point, then, the risk may reach a magnitude where we declare it a wrongful dignitary harm, irrespective of the absence of other types of harms.²⁰² Again, knowledge of the risk by someone, either the central two parties or third party observers, is crucial. Absent knowledge of the risk, is the creation of the risk a harm in itself? Some commentators answer yes,²⁰³

¹⁹⁹ See generally DOBBS, *supra* note 100, at 434-41 (lost chance rule and increased risk rules).

²⁰⁰ Ripstein notes that exposure to unrealized risks generates disadvantages. "Sometimes risks create reasonable fears; sometime they lead others to treat me differently. Sometimes serious risks of serious harms will cause fear; in such circumstances, the creator of the risk may be held liable, but is liable not for the risk but for fear." RIPSTEIN, *supra* note 27, at 76.

²⁰¹ See *supra* notes 196, 197.

²⁰² That an agent's knowledge that she is violating another person's rights may give rise to a dignitary harm is lost sight of by Gardner and Shute who contend that a rape is harmless when the victim is unaware of the rape and suffers no physical or psychic harm from it. See John Gardner & Stephen Shute, *The Wrongfulness of Rape*, in OXFORD ESSAYS IN JURISPRUDENCE 193, 195-99 (Jeremy Horder ed., 2000).

²⁰³ "The passengers flying in a defective plane have been harmed by the increased risk of death or bodily injury they suffered, and that remains the case whether or not they knew they had been exposed to it." Finkelstein, *supra* note 186, at 971. "If a harm is a setback to a legitimate interest, it should not be difficult to see why a risk of harm is itself a harm, for it is not difficult to make the case that exposure to risk is a setback to a legitimate interest." *Id.* at 972. For others who agree, see *supra* note 202; Fried, *supra* note 191, at 245-46 ("The victim of an attempted murder need not know the attempt has been made for us to conclude that the attempt was wrongful.").

while others suggest not.²⁰⁴ If knowledge of a risk is required for it to be considered a harm, how much knowledge is needed? Suppose we tell a person that during the course of her life she will be unknowingly put at (substantial) risk by another's conduct. "Would you now be willing to pay something to avoid this risk?" "Yes, the greater the risk, the more I would pay!" Is this response to the diffuse knowledge enough for the risk to be considered a harm? A wrongful harm? Again, the answers to these questions by thoughtful, reasonable people may differ.

When known to the person put at risk, a particular risk may produce psychic or dignitary harms, and even physical or economic harms, depending on that person's response. This may be the case despite the actual ignorance by the agent that she produced the risk and whether or not the risk ripens. Furthermore, a risk may produce substantial harms to a person who is put at risk who is never made aware of it, as where third parties see the conduct creating the risk and perceive it as disrespectful or a threat to themselves.²⁰⁵

Fortunately for my endeavor, these difficult issues need not be resolved in the abstract. Whether a particular risk is itself a harm, or whether knowledge of the risk by the actor, the person at risk, or third parties is enough to make it a harm itself, need not be answered in a vacuum when deciding what risk maxims to adopt. As long as the maxims meet the categorical imperative, the maxims declare whether a risk produces wrongful harms and what the requitals for the harms will be.²⁰⁶ Certainly at some point it is reasonable to declare the harms wrongful. This section explores a few plausible maxims for drawing these lines. Before this exploration, I first categorize risks according to their temporal relationship to possible harms. Past, present (occurrent), and future risks sometimes produce different types of harms or produce them in different ways.

a. Past, Present (Occurrent), and Future Risks

Before exploring plausible maxims addressing risky conduct, I first categorize risks according to their temporal relationship to possible harms. Past, present (occurrent), and future risks sometimes produce different types of harms or produce them in different ways.

Occurrent risk refers to the harms that occur when a risk is first manifested but before it is known whether the risk will materialize. Examples include assault as a precursor of battery,²⁰⁷ negligent driving, and a criminal attempt at a targeted person. Included are some of the risks of harms from violations of truth telling, promise keeping, reliance, expectation, exploitation, and other maxims before they eventuate.

²⁰⁴ In the "'fear of cancer' cases . . . damages are for psychiatric effects stemming from the knowledge of potential disease, and not for the exposure to risk itself." JENNY STEELE, RISKS AND LEGAL THEORY 117 (2004). "[E]xamples [of 'risk harm'], such as exposure to a risk of developing cancer, make sense only if the victim both perceives the risk and feels a psychological setback." Sheila B. Scheuerman, *Against Liability for Private Risk-Exposure*, 35 HARV. J.L. & PUB. POL'Y 681, 724 (2012) (citation omitted).

²⁰⁵ For example, third parties may shun a person who is unaware that she was put at risk of a contagious disease. See *supra* note 199 and accompanying text.

²⁰⁶ I may be too quick in trying to finesse these problems. For more on one of them, see *infra* text accompanying notes 216-217.

²⁰⁷ Blackstone refers to assault as "inchoate violence." BLACKSTONE, *supra* note 95, at 120.

For instance, while dignitary and psychic harms, among others, may result from a statement alone by a promisor that she will not give promised aid to the promisee if needed (e.g., bodyguard, insurer), further harms might turn on whether the underlying risk materializes. Generally, as for assault, a person must be aware of an occurrent risk to suffer a cognizable harm under existing law.²⁰⁸ If she is not aware of the occurrent risk, she will not suffer immediate physical, economic, or psychic harms. She may, however, still suffer a defamatory, dignitary harm if others are aware of it where, for instance, observers see an agent disrespectfully throw a shoe at a person. If a party put at risk does not learn of it until after the risk has dissipated, requital for harms from past or future risk may still obtain. If she never learns of it, the harm, if any, is exclusively to, or a consequence of, third parties reactions when they become aware of the risk imposition.

Occurrent risk may cause psychic harm (e.g., fright), and dignitary harm (e.g., insult, defamation). It may also cause physical and economic harms, as where a person reacts to a perceived risk by dropping or running into something.²⁰⁹ The protected interest is purely dignitary when requital for an occurrent risk holds in the absence of other harms (e.g., assault).²¹⁰ Although it seems unlikely that insult would be among the immediate conscious reactions when one sees a tossed object flying toward her, nevertheless, the act may be defamatory or otherwise disrespectful. The psychic harm from feelings of insult is more likely to fall within the harms of a contemplated past or future risk.

If an occurrent risk does not materialize, it is normally not legally equitable under existing private law (e.g., tort relief for negligent driving itself). A purely deontic legal system would, it seems to me, be open to such proscribing maxims. Among the concerns that give the legal community and deontologists caution about such maxims are evidentiary, floodgates, slippery-slope, and nuisance-suit problems. In American and common-law systems, the requital for occurrent risks sometimes falls within, is subsumed by, protections for past risks that have materialized and future risks.²¹¹ Once negligent driving causes an accident, the invadee can recover

²⁰⁸ See, e.g., DOBBS, *supra* note 100, at 63; PROSSER & KEETON, *supra* note 60, at 44.

²⁰⁹ See, e.g., Tuttle v. Atlantic City R.R., 49 A. 450, 451 (N.J. 1901) (allowing recovery when the plaintiff, “[a]cting under the impulse of fear,” injured herself while fleeing from a risk that would not have materialized).

²¹⁰ Prosser refers to assault as causing a “mental” injury or invasion. PROSSER & KEETON, *supra* note 60, at 43. This is consistent with the requirement that the invadee be aware of, “in apprehension of”, the threat as it occurs. See *id.* at 43-44. But it is not consistent with the standard rule that the invadee need not be in fear. See *id.* at 44. When there is no such psychic harm, as I would label it, or other standard harm, then it appears the harm being protected is dignitary only. See generally DOBBS, *supra* note 100, at 63-65.

²¹¹ In justifying her view that an unrealized risk is a harm in itself, Finkelstein addresses troublesome issues, such as whether a person can recover for a risk prior to materialization as well as for the additional harm if it does materialize. To avoid this “double counting” she advances the “Absorption Thesis”: “Outcome harm and benefit, in short, result in antecedent risks or chances being absorbed into the resulting harms and benefits.” Finkelstein, *supra* note 186, at 993. Similarly, “[i]t is assumed that [an] incomplete attempt merges with the crime or the completed attempt.” Larry Alexander & Kimberly K. Ferzan, *Risk and Inchoate Crimes: Retribution or Prevention?*, in SEEKING SECURITY: PRE-EMPTING THE COMMISSION OF CRIMINAL HARMS 103, 117 (G.R. Sullivan & Ian Dennis eds., 2012) (questioning this assumption).

for harms from the past risk (e.g., painful psychic reactions, damages to person and property) and, possibly, future risks (e.g., ongoing fright from the accident preventing the invadee from further driving, physical disabilities that increase various future risks).²¹²

With respect to past risk, once the immediate risk is over, whether or not it materialized, harms may still occur from retrospection.²¹³ These harms may be of all types: physical (e.g., reactive illness); economic (e.g., work missed from trauma); psychic (e.g., fright from “near misses”); and, dignitary (e.g., insult and defamation once the invadee and others learn of a purposive, past risk).

Turning to future risk, after an immediate risk has passed, harms may occur from prospectation.²¹⁴ Again, these harms may be of all types: physical (e.g., illness from insecurity); economic (e.g., expenditures for protections); psychic (e.g., increased feelings of insecurity); and, dignitary (e.g., perception that invader is disrespectful and her insulting, defamatory conduct may recur).

Once an agent imposes a risk on another person, it may be more likely that the agent will further impose another such risk.²¹⁵ Punishment for recidivism takes this into account. The future risk may be to the party who had been put at immediate risk, other identifiable parties, the general public, or some combination. Even a past risk to no one or to the agent alone, as where she drives recklessly on her own property without any other person around, may signal a comparable, increased future risk to others.²¹⁶ As an empirical matter she may be more likely to drive recklessly in a less isolated environment.

b. Maxims Addressing Risky Conduct

Let us look at some plausible maxims regarding risk imposition, starting with the most general: “Do not impose a risk on others.” This maxim is too broad.²¹⁷ It creates a realm of strict, even absolute liability. Agents are not granted sufficient scope to exercise their liberty by choosing conduct based on adequate information

²¹² See DOBBS, *supra* note 100, at 1047-53.

²¹³ Ariel Porat & Alex Stein, *Liability for Future Harm* 221, 233, in *PERSPECTIVES ON CAUSATION* (Richard Goldberg ed., 2011).

²¹⁴ See *id.* at 226.

²¹⁵ “[C]riminal law’ deals with what we might call *the right of extended self defense* [C]riminal law involves using force to respond to threats of future rights violations” RANDY E. BARNETT, *THE STRUCTURE OF LIBERTY* 190 (1998); see Randy E. Barnett, *Getting Even: Restitution, Preventive Detention, and the Tort/Crime Distinction*, 76 B.U. L. REV. 157, 160, 165 (1996); Kimberly Kessler Ferzan, *Beyond Crime and Commitment: Justifying Liberty Deprivations of the Dangerous and Responsible*, 96 MINN. L. REV. 141, 146 (2011).

²¹⁶ Would not a parent whose children played along the boundary road with this reckless neighbor, instruct the kids to stay well away from the road even though the neighbor’s risks from driving had not yet come to fruition? Ripstein seems to analyze this scenario differently; “By imposing a risk on you, I endanger what is yours, but I do not deprive you of it. You are still as free as ever to use what is yours to set and pursue your own purposes.” Ripstein, *supra* note 35, at 77. Zipursky agrees with Ripstein. See *supra* note 191 and accompanying text. Perhaps I misunderstand this point. No parent would say: “Sure, kids, you can play along the neighbor’s road. If worse comes to worst, we can get full compensation.”

²¹⁷ Applicable requisite maxims could limit the reach of this substantive maxim.

about potential normative consequences and freedom from coercive forces. Therefore, an abridging agent may not have been responsibility blameworthy. Nor may she be disrespect blameworthy regarding the party at risk. To the contrary, such extensive strict liability would be, it seems, disrespectful of the agent. This balance between liberty and security overvalues security.²¹⁸ Whether or not the risk materializes, the maxim smacks of absolute outcome responsibility.

“Do not [intentionally, purposively] impose an *unreasonable* [foreseeable] risk on others.”²¹⁹ Contrary to what might be entailed by an unreasonable risk, the imposition of a reasonable risk on another person does not use her as a means only. It is not disrespectful. Under reasonable risk maxims the other person is entitled to impose a comparable risk back on the imposer. The liberty-security balance is reciprocal. It reflects equal respect. It is fair.²²⁰

The concept of “reasonable” is fundamental to these maxims. There are many conceptions of this key term. Under the individualized view taken here, one person’s “reasonable” may be another person’s “unreasonable.”²²¹ People may, for one, have differing risk dispositions, one being risk-preferring and the other risk-averse.

²¹⁸ “[T]he cost of avoiding all behavior that involves risk of harm would be unacceptable. Our idea of ‘reasonable precautions’ defines the level of care that we think can be demanded: a principle that demanded more than this would be too confining, and could reasonably be rejected on that ground.” SCANLON, *supra* note 143, at 209. “Risk impositions thus pit the liberty of injurers against the security of victims and the law of accidents sets the terms on which these competing freedoms are reconciled. Its task is to find and fix terms that are fair.” Keating, *supra* note 31, at 23. “The view is Kantian because of the way that it articulates these ideas of freedom and fairness.” *Id.*

²¹⁹ Alexander argues that “the core criminal injunctions will be of the type ‘do not create an unjustifiable risk of harm X,’ where X designates the type of interest protected.” Larry Alexander, *Crime and Culpability*, 5 J. CONTEMP. LEGAL ISSUES 1, 28 (1994). “The negligence standard entails dividing the possible consequences of the defendant’s acts into those that are the materialization of a substantial risk and those that are not.” Weinrib, *supra* note 189, at 520.

²²⁰ “Issues of interpersonal risk imposition are fundamentally matters of fairness, not matters of efficiency [I]t is fair when so doing is to the long run expected advantage of the person imperiled.” Keating, *supra* note 31, at 30.

²²¹ Existing law, as legal economists emphasize, concretizes “reasonable” conduct satisfying the negligence standard by the Hand formula. *See, e.g.*, RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 371 (1990). The formula comes from *United States v. Carroll Towing Co.*, 159 F.2d 169 (2d Cir. 1947). In Moore’s words, “[o]ne must . . . ‘balance the evils’ to decide whether an act is negligent or reckless.” MOORE, *supra* note 56, at 676. The Hand formula is interpreted as relying upon Kaldor-Hicks efficiency whereby risk must be justified by a cost-benefit analysis. *See, e.g.*, KLAUS MATHIS, EFFICIENCY INSTEAD OF JUSTICE? 153 (Deborah Shannon trans., 2009). Kaldor-Hicks efficiency is outside the high walls of Kant’s realm. It allows individuals to be used as a means for overall social welfare advances. Still outside the walls, but closer, is Pareto superiority, under which trades are allowable so long as at least one person is made better off and no one is made worse off. *See, e.g.*, Lewis Kornhauser, *The Economic Analysis of Law* § 5.2 (“The Pareto Criterion”), STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/entries/legal-econanalysis/> (last visited May 8, 2016). “Pareto efficiency is completely unconcerned with distribution of utilities (or of incomes or anything else), and is quite uninterested in equity.” AMARTYA SEN, RATIONALITY AND FREEDOM 504 (2002). “The test [of the Hand formula] . . . pivots not on the equality of the parties to the transaction but on the surplus that one party realizes at the

A version of the maxim, “do not impose foreseeable, unreasonable risks on others,” is commonly adopted by existing law, but with a major qualification often added: the risk must materialize for the harm to be legally injurious. As mentioned before, for some risks, such as tortious or criminal assault and criminal attempts, the risk, or known risk, alone is remediable,²²² but for other risks, including negligence, the risk must eventuate for the imposee to obtain a requital. Legal damages are an element of the legal claim.²²³ These typically exclude psychic and dignitary harms standing alone. When a risk alone is protected, and it materializes, as where an assault leads to a battery, there may be two, or more, violated maxims.²²⁴

Under existing law, whether an unreasonable risk produces a wrongful harm, either in the private or the public, criminal, sphere, is complicated. In tort law, an issue is whether the imposition of an unreasonable risk that eventuates must be to a

expense of others.” WEINRIB, *supra* note 27, at 48. For objections to Weinrib’s point, see Kenneth W. Simons, *Justification in Private Law*, 81 CORNELL L. REV. 698, 704-05 (1996) (book review). “The problem is that in the Learned Hand Formula, the degree of security to which the victim is entitled is entirely a function of the degree to which the potential injurer values his liberty . . . [Therefore this standard is] in violation of the criterion of fairness, and, thus, corrective justice.” Jules Coleman, *Tort Law and Tort Theory: Preliminary Reflections on Method*, in PHILOSOPHY AND THE LAW OF TORTS, *supra* note 27, at 183, 206 (footnote omitted). “The Learned Hand Test is inappropriate to the practice of tort law because it runs afoul of the principle that best explains tort law – namely, the principle of corrective justice.” *Id.* “The Hand test misses out on important structural features of negligence liability; moreover, it does so because it is at odds with the core idea that one party may not set the terms of interaction unilaterally.” Ripstein, *Philosophy*, *supra* note 97, at 679. Zipursky also objects that the Hand formula “do[es] not capture the meaning of ‘negligence’ or ‘ordinary care’ in our negligence law.” Zipursky, *Foreseeability in Breach*, *supra* note 111, at 1256. See Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 1999-2002 (2007). To raise another problem with the Hand formula, under its economic interpretation, it gives equal weight to the probability of the risk and the loss that would ensue if the risk materializes. A deontic conception of reasonable risk might not do this. The degree of the autonomy space reduction from a risk may be weightier than its probability, or vice versa. For example, a ten percent risk of death may be more than twice as invasive as a five percent risk. A ten percent risk of losing all of one’s resources may be more than twice as invasive as a ten percent risk of losing half of one’s resources. As for invasiveness, along with marginal effects, other weighting factors may include whether the harm is to hypothetical, formal, or material autonomy space. See Kuklin, *supra* note 1, at 408-14.

²²² In cases for which the risk alone is said to be remediable, arguably the risk has come to fruition, either from the knowledge of the imposee (tortious assault) or the reactive responses and increased future risk to the public (criminal assault). “If, without intending harm, I act in a way that I realize might injure you or damage your property, I endanger your physical security or property . . . The criminal law protects these interests against such endangerment.” DUFF, *supra* note 191, at 148 (noting that “English and American law have no general offence of unconsummated endangerment analogous to the law of attempts.”). Contrary to my view, Duff does not see endangerments necessarily as harms. “If the risk is not actualized, I merely endanger him; if it is actualized, I endanger him and harm him.” *Id.* at 151.

²²³ “In principle, the division between wrongs actionable per se and those only actionable upon proof of consequential loss should reflect a choice between those rights which are, and are not, as a question of social fact sufficiently important to be deserving of protection irrespective of the consequences of violation.” STEVENS, *supra* note 41, at 89.

²²⁴ But, for fear of double counting, there may only be one remedy. See *supra* note 209.

person foreseeable at the time of the conduct, or whether an unreasonable risk to the world at large, once it materializes, will suffice.²²⁵ Some risks of harm to particular or random, unidentifiable individuals, impose immediate risks to the general public (e.g., negligent driving, reckless endangerment). These risks may warrant independent claims by the public in the form of criminal prohibitions whether or not the risks come to pass.²²⁶ Criminal proscriptions can be distinguished from civil proscriptions by holding an agent responsible for wrongful risks of harm to unforeseeable persons in the criminal context only.

“Do not impose [foreseeable] nonreciprocal risks on others.” While “nonreciprocal” risks could fall within the ambit of “unreasonable” risks, I separate out these plausible maxims because of the prominence of the idea of nonreciprocal risks in the legal literature.²²⁷ George Fletcher was the first to advance this principle.²²⁸ The standard of nonreciprocal risks resonates in various areas of the law, as in the doctrine of “live and let live,”²²⁹ and the interpretation of *Rylands v. Fletcher* whereby strict liability for ultra-hazardous activities does not apply to customary land uses.²³⁰ It also suggests the Golden Rule, though Kant balks at

²²⁵ See, e.g., *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

²²⁶ For the Model Penal Code section on reckless endangerment, see *supra* note 193.

²²⁷ “Fairness ideas – social contract ideas – in tort theory have long been associated with the idea and criterion of reciprocity of risk.” Keating, *supra* note 192, at 202 (footnote omitted); see *id.* at 202-04.

²²⁸ “The general principle . . . [found in tort] doctrinal standards is that a victim has a right to recover for injuries caused by a risk greater in degree and different in order from those created by the victim and imposed on the defendant – in short, for injuries resulting from nonreciprocal risks.” Fletcher, *supra* note 105, at 542. “[T]he effect of contributory negligence is to render the risks again reciprocal, and the defendant’s risk-taking does not subject the victim to a relative deprivation of security.” *Id.* at 549 (footnote omitted). Fletcher analogizes his “paradigm of reciprocity” to Rawls’s “first principle of justice . . . : we all have the right to the maximum amount of security compatible with a like security for everyone else.” *Id.* at 550 (footnote omitted). Moore sees Fletcher’s analysis as an example of where corrective justice requires the injustice “when one party is unjustly enriched by his own behaviour *vis-à-vis* another, which unjust enrichment may take the form . . . of the less tangible benefit of asymmetrical risk imposition.” MOORE, *supra* note 56, at 6 (footnoting Fletcher).

Even in his seminar article, Fletcher recognizes there are difficulties with his principle of nonreciprocity. For example, see Fletcher, *supra* note 105, at 549, 570-72. The principle has drawn a great deal of attention from commentators, much of it critical. See, e.g., JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *TORTS* 262 (2010); Coleman, *Legal Theory*, *supra* note 93, at 2612-13, 2616-17; Englard, *supra* note 93, at 66; Adam Slavny, *Nonreciprocity and the Moral Basis of Liability to Compensate*, 34 OXFORD J. LEGAL STUD. 417 (2014). See generally Keating, *supra* note 31; Perry, *Responsibility for Outcomes*, *supra* note 27.

²²⁹ See *supra* note 93 and accompanying text. “[T]he reciprocity of mutual imposition and tolerance – the idea that one should ‘give and take, live and let live’ – preserves the equality of the interacting property owners.” WEINRIB, *supra* note 27, at 194 (citation omitted).

²³⁰ *Rylands v. Fletcher*, L.R. 3 H.L. 330 (1868) (Cairns, L.C.); see PROSSER & KEETON, *supra* note 60, at 545-46; RESTATEMENT (SECOND) OF TORTS § 520(e) (1977) (considering as a factor for abnormally dangerous activities the “inappropriateness of the activity to the place where it is carried on”).

interpreting the categorical imperative in this way.²³¹ A maxim that allows the imposition of reciprocal risks seems to get through the filter of the categorical imperative. An agent is not using another as a means only, is not disrespectful, when imposing a risk on another person that is no greater than the comparable risk the other person may impose on the agent. This could even apply to great risks mutually imposed.²³² Reciprocal risks, especially when they are reasonable, strike a fair balance between liberty and security interests.²³³

6. Miscellaneous Substantive Maxims

Before looking at the broadest category of substantive maxims—norms—I briefly mention a few other types of plausible maxims to show the breadth of concerns that can fit within the big tent of the categorical imperative. They have generally fallen outside common law doctrines. This survey is very far from exhaustive.

“Do not disrespectfully discriminate because of a person’s innate characteristics.”²³⁴ For purposes of respecting a person’s equal dignity, this would disallow discrimination on grounds of such traits as race, religion, caste, ethnicity,

²³¹ 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 KANT, *GROUNDWORK*, *supra* note 37, at 80 n.*. 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 PARFIT, *supra* note 129, at 321-30.

²³² Hanging over the permissibility of imposing great risks is the Consent Principle. See *supra* text accompanying note 71. The consenters must know well enough what they are getting into.

²³³ “When *reasonable risks are reciprocal*, each member of the community that imposes and is exposed to them: (1) relinquishes an equal amount of freedom; (2) gains an equal amount of security; and (3) gains more in the way of freedom than they lose in the way of security.” Keating, *supra* note 31, at 31 (discussing Fletcher’s account). “Reciprocity of reasonable risk imposition thus defines a circumstance where risk is fairly distributed.” *Id.* at 33; see also *id.* at 63-64.

Maxims that allow the imposition of reasonable or reciprocal risks may not satisfy all fair-minded people. An agent may ask, “why should I be held to a reasonable person or reciprocal risk standard when I prefer another risk maxim, or none at all?” *But see* SANDEL, *supra* note 2, at 146 (“Consent is not a necessary condition of moral obligation. If the mutual benefit is clear enough, the moral claims of reciprocity may hold even without an act of consent.”). I have another view of what is a reciprocal risk, I have another degree of risk tolerance (disposition), I prefer the social welfare consequences of another balance, I believe it is more virtuous to tolerate more risk than one imposes, etc.” Here as elsewhere, these challenges raise political questions. As Ripstein states, “A particular objective standard is always an expression of particular views about the importance of various interests. As a result, in an important sense, it is always political, and in principle subject to contest.” Ripstein, *supra* note 27, at 88.

²³⁴ “The other way [beyond insulting conduct] that law protects dignity is by prohibiting invidious discrimination.” Jeremy Waldron, *Dignity, Rank, and Rights*, in 29 *THE TANNER LECTURES ON HUMAN VALUES* 207, 234 (Suzan Young ed., 2011).

disability, national origin, sexual orientation, and gender identification. Especially worrisome is discrimination owing to qualities for which the person is not blameworthy, is not responsible, and does not deserve. Some types of discriminatory conduct (e.g., racial) are particularly disrespectful because of their significance in light of existing or historical social practices.²³⁵ On the other hand, denying a person a place on a high school basketball team because she is an innate klutz need not be done offensively. Hence, “do not *disrespectfully* discriminate” Refinement of this plausible maxim is necessary.

“[Reasonably] preserve natural resources [the environment].” The justification for these maxims looks largely to physical, economic, and psychic harms to others, including future generations. The Lockean proviso is off the table.²³⁶ New frontiers for the disadvantaged and disaffected are no longer in sight. Many things that we are doing to our planet impact others. When our damage to the planet becomes irreparable, it may also produce dignitary harm.²³⁷ One might argue that the implicit claim of a right to harm the planet denies the moral equality of future persons who will suffer the consequences.²³⁸ For those currently living, even a claim for a reciprocal right may be disrespectful to those who have no realistic opportunity to exercise or benefit from it, as where egregious air polluters would grant everyone the right to so pollute.

“Undertake [easy, reasonable, safe] rescues.” These maxims expand security interests. They stem from respect.²³⁹ A maxim requiring easy rescues does not,

²³⁵ See SCANLON, *supra* note 87, at 72-74.

²³⁶ See LOCKE, *supra* note 95, at 291 (“Nor was this *appropriation* of any parcel of *Land*, by improving it, any prejudice to any other Man, since there was still enough, and as good left; and more than the yet unprovided could use.”).

²³⁷ For various Kantian justifications for environmentalism, see, for example, MATTHEW C. ALTMAN, *Kant’s Strategic Importance for Environmental Ethics*, in KANT AND APPLIED ETHICS 45 (2011); PAUL GUYER, *Duties Regarding Nature*, in KANT AND THE EXPERIENCE OF FREEDOM 304 (1996); John Martin Gillroy, *Kantian Ethics and Environmental Policy Argument: Autonomy, Ecosystem Integrity, and Our Duties to Nature*, 3 ETHICS & ENV’T 131 (1998); Marc Lucht, *Does Kant Have Anything to Teach Us About Environmental Ethics?*, 66 AM. J. ECON. & SOC. 1 (2007).

²³⁸ The moral claims here are quite complicated. See, e.g., RESPONSIBILITIES TO FUTURE GENERATIONS: ENVIRONMENTAL ETHICS (Ernest Partridge ed., 1981); Edith Brown Weiss, *Implementing Intergenerational Equity*, in RESEARCH HANDBOOK ON INTERNATIONAL ENVIRONMENTAL LAW 100 (Malgosia Fitzmaurice et al. eds., 2010); Anthony D’Amato et al., *Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility*, 84 AM. J. INT’L L. 190 (1990); Joseph Heath, *The Structure of Intergenerational Cooperation*, 41 PHIL. & PUB. AFF. 31 (2013); Bradford C. Mank, *Protecting the Environment for Future Generations: A Proposal for a “Republican” Superagency*, 5 N.Y.U. ENVTL. L.J. 444 (1996); Bradford C. Mank, *Standing and Future Generations: Does Massachusetts v. EPA Open Standing for Generations to Come?*, 34 COLUM. J. ENVTL. L. 1 (2009); Joseph Mazor, *Liberal Justice, Future People, and Natural Resource Conservation*, 38 PHIL. & PUB. AFF. 380 (2010); Richard L. Revesz, *Environmental Regulation, Cost-Benefit Analysis, and the Discounting of Human Lives*, 99 COLUM. L. REV. 941 (1999).

²³⁹ “[A]s Kant well recognized, a general moral duty of mutual aid, requiring supplying a great need to another (for example, saving life) when at minimal cost to the agent, would be universalized as a moral principle of obligation and duty.” David A.J. Richards, *Human Rights*

arguably, unduly interfere with an agent's liberty.²⁴⁰ When rescues entail nonconsensual positive duties, the common law has been reluctant to require them,²⁴¹ unless, generally, the agent has caused, negligently or otherwise, the need for the rescue, or has a special relationship with the person in need.²⁴²

"Reciprocate benefits." With this plausible, unqualified substantive maxim, I may have gone too far. Unless the benefit was overtly sought, this seems to have taken us out of the realm of Kant's perfect, consensual duties and into his realm of imperfect ones. For Kant, imperfect duties are duties of virtue.²⁴³ "Fulfillment of

and the Moral Foundations of the Substantive Criminal Law, 13 GA. L. REV. 1395, 1429 (1979) (citing IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSIC OF MORALS 41 (L.W. Beck trans., 1959)). "It is generally agreed that there is a duty of easy rescue . . ." BARBARA HERMAN, MORAL LITERACY 203 (2007). As Dworkin states:

We owe [strangers] duties of aid when that aid is crucial, when we can give it with no great damage to our own ambitions, and, particularly, when we are directly confronted by suffering or danger. In these circumstances, to refuse our aid would show a contempt for other people's lives that would deny self-respect as well.

DWORKIN, *supra* note 57, at 300. But, "[a] rich and secure person who expects to remain rich and secure may calculate that he or she may be likely to lose more by having to perform nearly risk-free and costless rescues of nearby strangers than he or she realistically stands to gain from others . . ." R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 309 (2002). This calculation can be forestalled by placing maxim formulators behind Rawls's veil of ignorance. *See id.* at 309-10.

²⁴⁰ "[D]emanding easy rescues does not, in fact, interfere with a person's pursuit of his or her own ends. Hence imposing such a demand via the criminal law does not actually abridge anyone's freedom." Ripstein, *supra* note 83, at 779. But, Ripstein continues, tort law is not up to the task of drawing proper lines at easy rescues: "As a result, adding such a duty to tort law would wreak havoc with its structural core. To do so would interfere with freedom." *Id.*; *see* RIPSTEIN, *supra* note 27, at 92. Tort law does not have the resources to do the job properly, as by qualifying the duty with such limits as "easy, reasonable, or safe"? These types of standards thrive elsewhere in the law. Tort law and law in general, as I see it, lives on this kind of slippery slope. Balancing liberty and security is a continuous, difficult endeavor. So be it. If the structural core is the problem, let us revise the core if at all possible. The core is to serve justice, not limit it. "[T]here is no argument of moral principle to support the general failure of Anglo-American law to recognize good samaritan duties in contexts to which the underlying moral duty of mutual aid applies." Richards, *supra* note 239, at 1429 (footnote omitted).

²⁴¹ *See generally* DOBBS, *supra* note 100, at 853 ("Unless the defendant has assumed a duty to act, or stands in a special relationship to the plaintiff, defendants are not liable in tort for a pure failure to act for the plaintiff's benefit."); PROSSER & KEETON, *supra* note 60, at 375 ("the law has persistently refused to impose on a stranger the moral obligation of common humanity to go to the aid of another human being who is in danger").

²⁴² *See* DOBBS, *supra* note 100, at 856-69; PROSSER & KEETON, *supra* note 60, § 56 ("Acts and Omissions"). "[C]ourts have rigidly adhered to the rule that in the absence of some special relationship between victim and bystander, sins of omission are never crimes." LEO KATZ, BAD ACTS AND GUILTY MINDS 138 (1987). Most, but not all, special relationships are consensual. While one may only weakly consent to having children, one does not consent at all to one's natural and, typically, adoptive parents. Fairness, reciprocity, and other principles may do the work in the absence of consent.

²⁴³ *See* KANT, GROUNDWORK, *supra* note 37, at 161.

them is *merit* . . . but failure to fulfill them is not in itself *culpability* . . . but rather mere *deficiency in moral worth* . . . , unless the subject should make it his principle not to comply with such duties.²⁴⁴ If we stick with Kant on this, we must leave the adoption of duties to reciprocate unrequested benefits to individual consciences.

While deontic maxims may not directly mandate the reciprocation of benefits, social norms often adopt standards for such reciprocity. They range over a wide territory. Norms distinguish among the types of benefits to be reciprocated, from supererogatory dangerous rescues, to gifts, opportunities, hospitality, and common courtesy. There may be a natural human disposition to reciprocate.²⁴⁵ From a deontic perspective, the failure to reciprocate a granted benefit is not per se a curtailment of the voluntary grantor's liberty or security, nor constitute using her as a means only, but it may be disrespectful in other ways. Social norms frame society's and a benefiter's understanding of whether failure to reciprocate is disrespectful. The frame may imply, to the contrary, that actual reciprocation is sometimes disrespectful, as where a social or business superior gives a gift to one in a lower position, unless, perhaps, expressed gratitude is considered proper reciprocation. In this case reciprocation is satisfied by a requital maxim, of sorts, to show gratitude or other nonmaterial acknowledgment, but not more.

The demand to reciprocate benefits has taken us outside the immediate realm of deontic maxims and into the realm of norms, both social and legal. We have spent much time there already, particularly when looking to the existing common and criminal laws. Let us take a closer look.

7. Norms

A norm is a standard embraced by a social group that each member is expected to follow.²⁴⁶ I use the term "norm" broadly to include mores, customs, conventions,

²⁴⁴ KANT, *METAPHYSICS OF MORALS*, *supra* note 9, at 521.

²⁴⁵ Reciprocity is a disposition "to return good in proportion to the good we receive, and to make reparation for the harm we have done. Moreover, reciprocity is a fundamental virtue. Its requirements have presumptive authority over many competing considerations." LAWRENCE C. BECKER, *RECIPROCITY* 3 (1986). That there is a human inclination to reciprocate, and expect reciprocation, and other moral inclinations as well, see, e.g., Robert Kurzban, *Biological Foundations of Reciprocity*, in *TRUST AND RECIPROCITY* 105 (Elinor Ostrom & James Walker eds., 2003); Bailey Kuklin, *The Natures of Universal Moralities*, 75 *BROOK. L. REV.* 463 (2009).

²⁴⁶ "Wherever interaction is continual, dense, and valuable to participants, distinctive patterns of behavior emerge. When deviations from these patterns provoke nonlegal sanctions, we say that the patterns are social norms. Social norms both create options and suppress them." ERIC A. POSNER, *LAW AND SOCIAL NORMS* 203 (2000). "For norms to be *social*, they must be (a) shared by other people and (b) partly sustained by their approval and disapproval." JON ELSTER, *THE CEMENT OF SOCIETY* 99 (1989) (citation omitted). See generally ROBERT AXELROD, *THE COMPLEXITY OF COOPERATION* 44-68 (1997) ("Promoting Norms"); ELSTER, *supra*, at 97-151 ("Social norms"); Symposium, *Norms in Moral and Social Theory*, 100 *ETHICS* 725 (1990); Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 *MICH. L. REV.* 338 (1997); Jeffrey J. Rachlinski, *The Limits of Social Norms*, 74 *CHI.-KENT L. REV.* 1537 (2000).

usages, principles, rules,²⁴⁷ regulations, statutes, constitutions, etc.²⁴⁸ Although norms are coercive by putting pressure on group members to conform to their standards, they seem rarely so coercive as to undermine the responsibility blameworthiness of those who are induced to comply with them.²⁴⁹

Norms may or may not be directly grounded on deontic principles. They may be ancient, bottom-up practices whose origins are independent of deontic reasoning, or any perceptible reasoning at all, or specifically based on nondeontic moral reasoning (e.g., utility, communitarianism).²⁵⁰ Many norms are, at least partially, coordination or cooperation rules or standards.²⁵¹ A particular norm may initially be morally

²⁴⁷ “Norms, unlike rules, can be particular as well as general. Some principles as well as rules are norms, but not all the types of rules and principles are norms. Technical rules, e.g., are not norms.” MacCormick & Raz, *supra* note 154, at 79.

²⁴⁸ “Sociologists and anthropologists . . . disagree about the precise definition of norms.” ROBERT NOZICK, INVARIANCES 238 (2001). “It is not obvious how to demarcate ethical norms from other norms, including enforced laws, rules of etiquette, etc.” *Id.* For various loose demarcations, see, for example, TUNICK, *supra* note 128, at 11; Robert Sugden, *The Role of Inductive Reasoning in the Evolution of Conventions*, 17 LAW & PHIL. 377, 382 (1998). Coleman, for example, holds that wrongfulness is a matter of social convention. See JULES L. COLEMAN, RISKS AND WRONGS 334 (1992) (“reasonable care . . . is a failure to abide by governing community norms”).

²⁴⁹ Ripstein bases his “reciprocity conception of responsibility” on what people “are entitled to expect of each other.” Arthur Ripstein, *Justice and Responsibility*, 17 CAN. J.L. & JURISPRUDENCE 361, 361 (2004); see also *supra* note 83 and accompanying text.

²⁵⁰ See COLEMAN, *supra* note 41, at 34 (“On my view, much of the content of the first-order duties that are protected in tort law is created and formed piecemeal in the course of our manifold social and economic interactions. These generate conventions that give rise to expectations among individuals regarding the kind and level of care they—we—can reasonably demand of one another.”) (citation omitted). “The fact that a prevailing understanding exists, even if there is no particularly good reason for it, makes it reasonable at the time it is relied upon.” TUNICK, *supra* note 128, at 116. Jackendoff observes that “a sense of morality is universal, but particular morals are not. Rather, particular moral systems are associated with particular social groups of various sizes.” Ray Jackendoff, *The Natural Logic of Morals and of Laws*, 75 BROOK. L. REV. 379, 388 (2002).

²⁵¹ “A social contract is the set of common understandings that allow the citizens of a society to coordinate their efforts.” KEN BINMORE, NATURAL JUSTICE 3 (2011) (understandings including table manners, significance attached to money, driving rules, word meanings, taboos, fashion, amount of restaurant tips). “The use of criminal law to solve co-ordination problems like getting people to drive on the same side of the road can be justified on legal moralist grounds because the passage of the law makes salient the solution to the problem.” MOORE, *supra* note 56, at 73. For discussions of rules and law as coordination devices, see Gillian K. Hadfield & Barry R. Weingast, *What is Law? A Coordination Model of the Characteristics of Legal Order*, 4 J. LEGAL ANALYSIS 471, 502-05 (2012) (identifying many subscribers to this view); Alexander & Sherwin, *supra* note 132, at 427 n.116. Green, however, finds that “[t]he claim that the primary or basic characteristic of law is that of a coordinative agency does not withstand examination. Such an expectation-based model opens up what I called the ‘reality gap’ between the structure of values and the structure of expectations.” Leslie Green, *Law, Co-ordination and the Common Good*, 3 OXFORD J. LEGAL STUD. 299, 322 (1983). Coordination and cooperation, though run together here, are not identical. “‘Cooperation,’ in the sense in which it is being used here, is a technical term used to describe situations in which a group of individuals, by exercising restraint in their pursuit of

neutral, as is the norm to drive on the right. But the norm may take on moral significance by, say, expanding the liberty and security of those who can depend on conformity, or by increasing social welfare from efficiency.²⁵² Like baseline or default contract and tort rules, which have coordination and cooperation features, some norms are mutable, such as the contract default rule that consideration is gauged by fair market value and the tort limitations on nonconsensual touchings. Other norms are immutable, such as the proscription against the waiver of the good faith duty in contracts and the refusal to allow consensual assisted suicide.²⁵³

If a norm is directly grounded on a deontic maxim (e.g., a criminal battery statute), then this norm does all the deontic work without the need to invoke a second, deontic meta-norm (e.g., “obey the law [norms]”²⁵⁴ “respect others’ self-regarding choices”) to bring it into the deontic sphere.²⁵⁵ As for a norm that is contrary to the categorical imperative, such as one mandating discrimination on the basis of religion or ethnicity, not even an acceptable meta-norm can legitimize it. Dashing reliance or expectations aroused by a disrespectful norm, for instance, gets no deontic traction. For norms not directly deontic, or deontically neutral,²⁵⁶ such as some of the ones relating to voting, wearing seatbelts and helmets, taxes,²⁵⁷ animal

individual self-interests, is able to achieve an outcome that is better for them all.” Heath, *supra* note 238, at 35 (footnoting references identifying a variety of definitions).

²⁵² “Those who drive on the left do a moral wrong because they violate antecedently existing moral norms against risking harm to others, and such moral wrong may legitimately be punished.” MOORE, *supra* note 56, at 73.

Pallikkathayil observes that established social practices, though having benefits, “lack the impartiality needed to establish a rightful condition. There is no mechanism for challenging informal social norms as inconsistent with equal external freedom or for challenging the view another person has about the proper application of a norm in a given case.” Pallikkathayil, *supra* note 55, at 138-39 (calling for “an impartial decision-making procedure for settling disputes over rights”). See TUNICK, *supra* note 128, at 116 (“We should want to change [a prevailing] understanding if it is irrational, but prevailing understandings are the measure of reasonableness at the time agreements are made.”).

²⁵³ See Mark L. Movsesian, *Two Cheers for Freedom of Contract*, 23 CARDOZO L. REV. 1529 (2002) (reviewing *THE FALL AND RISE OF FREEDOM OF CONTRACT* (F.H. Buckley ed., 1999)).

²⁵⁴ That the deontic basis for the duty to obey the law is challengeable, see *supra* note 56 and accompanying text.

²⁵⁵ “[T]here might be a conventional meta-norm that deems publicly flouting moral norms to be disrespectful of those present, and violation of this conventional meta-norm might then legitimate punishment, even if violation of the underlying moral norm would not.” Alexander, *supra* note 107, at 863. Alexander cautions that such a meta-norm may go too far, such as by legitimizing the punishment of any conduct perceived as offensive, including private immoral conduct. See *id.* at 863-64. At this point there occurs a conflict in *prima facie* disrespectfulness: the disrespect shown to the offended observer versus the disrespect shown to the offending agent from disallowing her private choice.

²⁵⁶ A norm may be deontically neutral if violation of it is not disrespectful of another person.

²⁵⁷ For criminal instances of “tax evasion, bribery, obstruction of justice, and damage to public property[.] [t]he rights of private persons are not necessarily violated” Franklin G. Miller, *Restitution and Punishment: A Reply to Barnett*, 88 ETHICS 358, 359 (1978). “In

cruelty,²⁵⁸ victimless crimes,²⁵⁹ the environment,²⁶⁰ and others,²⁶¹ deontic meta-norms are required to do work necessary to create deontic duties and, if relevant, correlative rights. The same can be said of norms relating to Kant's imperfect duties of virtue, such as to be beneficent.²⁶² They may be elevated to deontic duties with correlative rights, as by conduct that falls within a reliance or expectation maxim.²⁶³ An adopted meta-norm puts an agent on alert about its possible indirect effects on her autonomy space boundaries resulting from incorporation of lower-level, non-deontic norms. This allows her to make reasonable, responsible choices either by way of adjusting the boundaries through consent, if mutable, or exercising her liberty and defending her security within the established boundaries.

requiring a citizen to pay taxes we are not requiring her to surrender her autonomy: she will lose the opportunity to use that money for other purposes; but she will not be giving up her ability to determine her own actions." DUFF, *supra* note 49, at 177. Well, taxes may preclude some of her choices, thus constricting her liberty in this regard. Tax laws and others that produce public goods will get deontic support, arguably, under the view that free riders are disrespectful of others. They implicitly claim moral superiority.

²⁵⁸ That Kant offers support for animal cruelty norms, see KANT, *METAPHYSICS OF MORALS*, *supra* note 9, at 564 (Animal cruelty "dulls [a person's] shared feeling of their suffering and so weakens and gradually uproots a natural predisposition that is very serviceable to morality in one's relations with other people."); IMMANUEL KANT, *LECTURES ON ETHICS* 239-41 (Louis Infield trans. 1930) ("Duties Towards Animals and Spirits"). See MATTHEW C. ALTMAN, *Animal Suffering and Moral Character*, in *KANT AND APPLIED ETHICS*, *supra* note 237, at 13; THOMAS E. HILL, JR., *Must Respect be Earned?*, in *RESPECT, PLURALISM, AND JUSTICE*, *supra* note 49, at 87, 103; Christine M. Korsgaard, *Fellow Creatures: Kantian Ethics and Our Duties to Animals*, in *25 THE TANNER LECTURES ON HUMAN VALUES* 77 (Grethe B. Peterson ed., 2005); Onora O'Neill, *Kant on Duties Regarding Nonrational Nature*, 72 *PROC. ARISTOTELIAN SOC'Y* 211 (1998); Allen W. Wood, *Kant on Duties Regarding Nonrational Nature*, 72 *PROC. ARISTOTELIAN SOC'Y* 189 (1998).

²⁵⁹ "[V]iolation of paternalistic laws (such as safety helmet requirements) or moralistic laws (e.g., the prohibition of the sale and use of contraceptives) does not benefit the offender to the detriment of someone else. This, generally, applies to all so-called 'victimless crimes.'" Wojciech Sadurski, *Social Justice and the Problem of Punishment*, 25 *ISR. L. REV.* 302, 327 (1991). Other examples include laws relating to prostitution, pornography, gambling, and recreational drugs

²⁶⁰ See *supra* note 237.

²⁶¹ "[I]f we did accept that drivers might put others at a risk of threats to their autonomy in driving too fast, then it is not the case that all instances of speeding pose such risks as sometimes speed limits are set to conserve energy, not to increase safety." Thom Brooks, *Autonomy, Freedom, and Punishment*, 2 *LEGAL THEORY CHINA* 161, 165 (2011). Once, however, a speed limit is in place, aroused expectations by others may generate wrongful risks to them.

²⁶² See *supra* text accompanying note 242.

²⁶³ Dworkin puts dignity at the center of his "associative obligations", such as those with respect to "my children, parents, lovers, friends, colleagues, and fellow citizens" DWORKIN, *supra* note 57, at 311. The answer to the question of why we have such obligations "lies, once again, in a creative interaction between our very general responsibility not to harm other people and the social practices that refine that responsibility" *Id.* Dworkin cautions against practices where "the dignity of the party denied that special concern is compromised." *Id.* at 312.

Because each member of a social group is expected to follow the group's norms, virtually by definition norms arouse reliance and expectations.²⁶⁴ Other types of maxims may also create or inform duties to observe norms, such as ones about truth telling and promise keeping, exploitation, and risk imposition. Norms are a result of maxims or are influenced by them. Norms are also a precursor of maxims and influence them. The core and penumbral meanings of many of the key terms in common maxims, both first- and second-order, are interpreted or established by a frame erected by norms. The terms "reasonable" and "foreseeable" are obvious examples. So are more foundational terms such as "respect", "dignity", and "balance", as in "righting the imbalance" or "balancing liberty and security interests."

While maxims and norms are often closely linked,²⁶⁵ they do not have to be. A justifiable, adopted maxim may not align with norms, as where one commits to a higher level of reciprocity or safety precautions than required by social practices. Via meta-norms and maxims, particularly those relating to reliance and expectations, existing lower level norms may be overturned as new or modified practices become more common or insistent.²⁶⁶ There may be an ebb and flow as values and practices change with the times. Evolving norms regarding sexual conduct between consenting adults provide examples. Some norms specifically rely upon meta-norms as standards. The right of privacy, for instance, is delineated by a sphere of reasonable expectations.²⁶⁷

The deontic force of consent, which is often reinforced or grounded by truth telling and promise keeping, reliance and expectations, and other maxims, may

²⁶⁴ In a famous case, Judge Traynor protected reliance on a stop sign placed pursuant to an invalid statute. "If a through artery has been posted with stop signs by the public authorities in the customary way and to all appearances by regular procedure, any reasonable man should know that the public naturally relies upon their observance." *Clinkscales v. Carver*, 136 P.2d 777, 778-79 (Cal. 1943). "Custom also bears upon what others will expect the actor to do, and what, therefore, reasonable care may require the actor to do, upon the feasibility of taking precautions, the difficulty of change, and the actor's opportunity to learn the risks and what is called for to meet them." PROSSER & KEETON, *supra* note 60, at 193 (citation omitted). "Custom . . . draws its support from two sources – due care doctrine's quest for salient precautions, and the principle that reasonable reliance should not be disappointed." Keating, *supra* note 31, at 64.

²⁶⁵ "Legal norms fix our social expectations, and through that alter what counts as justified wrongdoing and unjustified wrongdoing." VICTOR TADROS, *CRIMINAL RESPONSIBILITY* 268 (2005). Contrariwise, as Tadros sees it, sufficiently unjust social norms, such as unfair tax laws, may justify refusal to obey when the reasons for disobedience outweigh the reasons for obedience. *See id.* at 268-69.

²⁶⁶ "[S]ocial norms do and should evolve; deviation from a norm is one way of changing it, perhaps in a beneficial way. Overly rigid enforcement of norms might lead to social ossification." Smith, *supra* note 96, at 780 (citation omitted).

²⁶⁷ *See* RESTATEMENT (SECOND) OF TORTS § 652D (1977) (imposing liability for publication of information "of a kind that (a) would be highly offensive to a reasonable person, and (b) is not of legitimate concern to the public"). "I shall argue that whether an expectation of privacy is reasonable depends on our social practices and norms." TUNICK, *supra* note 128, at 139. But in the words of Justice Harlan: "Since it is the task of the law to form and project, as well as mirror and reflect, we should not, as judges, merely recite the expectations and risks [aroused by social practices] without examining the desirability of saddling them upon society." *United States v. White*, 401 U.S. 745, 786 (1971).

incorporate norms of a wide assortment, as where one consents to obey the laws of the state.²⁶⁸ There are limits to incorporation even by explicit consent, however, since once again, the norms must survive the deontic filter.

In sum, for norms that are not directly based on deontic maxims (e.g., drive on the right), the categorical imperative allows for a variety of possible norms, a group selects one of them, and consent, reliance and expectations, and other types of maxims, deontically effectuate the selection.²⁶⁹ Rawls refers to the “categorical imperative procedure” as a means of Kantian constructivism of a set of moral norms.²⁷⁰ Not to be forgotten, however, is that under the individualistic analysis of this Article, a major problem remains: While norms satisfying the categorical imperative may be selected by groups, each individual member must somehow consent to them, or she must herself adopt a reliance and expectation or other maxim that makes the norms obligatory to her. Most likely, in reality, society strong-arms her.²⁷¹

CONCLUSION

The aim of this Article is to survey the terrain that an autonomous agent in a deontic regime must navigate to properly delineate her realm of freedom. Prudently balancing the agent’s liberty and security interests, and those of everyone else under the universalization principle, she embraces a complete and coherent set of substantive maxims and, should these be violated, interrelated requital maxims. For the requitals, corrective justice reigns in the private sphere and retribution in the public, criminal one. The contestable notions of harm, wrongfulness, and blameworthiness, and other associated moral concepts, must be adequately specified to insure this endeavor produces a workable scheme. In fully mapping her autonomy space, the agent will certainly consider morally loaded issues relating to intentional harmful conduct, truth telling and promise keeping, reliance and expectations, exploitation, risk imposition, and, in general, established norms. We wish her great

²⁶⁸ “Making a false promise does victimize the promisee, but a more persuasive explanation than Kant gives for why it does so is that it frustrates expectations arising from a social practice.” TUNICK, *supra* note 128, at 193. “[T]he promise principle dictates an obligation only when a promise was not extracted through coercion or bad faith, but to decide what counts as undue coercion or a lacking good faith, we may need to appeal to convention.” *Id.* at 194 (invoking Atiyah, without citation).

²⁶⁹ For example, physical contact, such as hugging or kissing non-kin, may be proscribed by norms in one group (i.e., considered autonomy invasions), while customary in another, both norms being consistent with the categorical imperative. On implicit social conventions, see EDWARD T. HALL, *THE SILENT LANGUAGE* (1959). Similarly, under Korsgaard’s Kantian “Constitutional Model”, “[i]nclination presents the proposal; reason decides whether to act on it or not, and the decision takes the form of a *legislative act*.” CHRISTINE M. KORSGAARD, *THE CONSTITUTION OF AGENCY* 110 (2008). Might there be a second-order issue here: reliance and expectations on reliance and expectations norms?

²⁷⁰ See JOHN RAWLS, *Themes in Kant’s Moral Philosophy*, in *COLLECTED PAPERS*, *supra* note 15, at 497; see also JOHN RAWLS, *Kantian Constructivism in Moral Theory*, in *COLLECTED PAPERS*, *supra* note 15, at 303; RAWLS, *supra* note 231, at 235-52 (“Moral Constructivism”).

²⁷¹ “The morally authentic person, then, is severely limited in his choice of moral principles, and in respect to general rules that derive from social practices, it seems fair to say that he has scarcely any choice at all.” FEINBERG, *supra* note 183, at 38.

wisdom in this endeavor, for her task entails the determination of the domain of freedom for all of us.