

Articles

The Labyrinth of Blameworthiness

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BLAMEWORTHINESS, OR CULPABILITY, IS CENTRAL TO THE LAW, to morality, and, generally, to many social norms. Other than for consensual obligations, such as contracts, a common intuition is that a person should not be liable for harms caused to another person or to the state if she has not engaged in blameworthy conduct. Furthermore, if a person does harm another through blameworthy conduct, the intuition often extends to the belief that the degree of culpability should be a factor in gauging a just requital.¹ Malicious homicide, for instance, deserves greater punishment than negligent homicide does, and an intentional battery should occasion a more extensive liability than a comparable negligent injury. While there may be proper arenas for strict liability, typically it is applied only for substantial reasons that trump the common urge to free a person from responsibility to others for the consequences of her conduct that was reasonable and not culpable.²

Even utilitarians, who champion norms that advance social welfare irrespective of direct consideration of the culpability of the relevant actors, may balk at unfettered strict liability independent of blameworthiness. The famous utilitarian, J.S. Mill, favored a strong re-

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1. That this intuition does not drive the usual rule for tort damages, as in negligence, see *infra* note 57.

2. Strict products liability, for example, may be justified on economic, welfare grounds. For one, the strict liability induces producers to internalize the costs of their goods, thereby telegraphing to potential consumers more accurate information about their true social costs and facilitating efficient markets. For a brief introduction, see Gregory C. Keating, *Strict Liability Wrongs*, in *PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS* 292, 292–93 (John Oberdiek ed., 2014). For “most contemporary moral theorists of tort[,] [s]trict liability is an embarrassment to their theories.” *Id.* at 294. Keating defends strict torts liability. I believe the notion of dignitary harm discussed here would effectively get to a similar place as does strict liability in many cases. Keating does not see such invasive harms as wrongful in themselves. See *id.* at 300–05.

gime of individual rights on the grounds that such a regime increases overall social utility.³ Likewise, we may argue that a regime in which the sword of Damocles hangs over us in the form of strict liability is not as satisfying as one in which we have the comfort of knowing that we are responsible only for consequences of our conduct that can be fairly ascribed to our free, informed, and considered choices and actions. This greater control over our lives and destinies provides us a sense of wellbeing.⁴

The laws of most legal regimes are largely a mixture of utilitarian, consequentialist considerations and Kantian, deontic considerations.⁵ Deontic principles, centered on individual rights, dominate the current jurisprudential and political debates.⁶ In embracing, delineating, and applying deontic maxims of behavior, or, to some extent, utilitarian rules and standards as well, the conflicting liberty and security interests of all affected parties are balanced.⁷ The reach of one person's liberty to do as she wishes ends when it becomes unacceptably invasive of another person's security: "Keep your fist well away from my nose." These two facets of freedom—liberty and security—are inevitably in conflict. They require tradeoffs that primarily focus on the risk of harms that may occur as a result of a person's conduct. The exercise of one person's liberty must not unduly interfere with another person's security by risking unwarranted physical, economic, or psychic harm to her. Under Kantian principles in particular, whereby every moral agent is entitled to equal respect and owes other agents like respect,⁸ one also may not impose another type of harm, called a dignitary harm, on another. One must respect others as moral equals

3. See JOHN STUART MILL, *On Liberty*, in *UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT* 81, 176–200 (4th ed., London 1869).

4. The other side of the coin complicates this issue. A potential victim of a non-blameworthy harm would feel more comfort knowing she will be compensated if harmed despite the actor's blamelessness. Thus a utilitarian, being a consequentialist, would weigh the relative welfarist pros and cons of strict liability. A deep analysis of these would doubtlessly involve many twists and turns.

5. The detritus of historical and political developments, often unprincipled, interferes with any overarching coherence or consistent common threads in legal systems.

6. Two modern classics of political theory reflect this orientation. See ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974); JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

7. See, e.g., MORRIS R. COHEN, *Freedom: Its Meaning*, in *THE FAITH OF A LIBERAL* 161, 163 (1946); WILLIAM LUCY, *PHILOSOPHY OF PRIVATE LAW* 407–08 (2007); ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 6 (1999); Jules L. Coleman, *Second Thoughts and Other First Impressions*, in *ANALYZING LAW* 257, 304 (Brian Bix ed., 1998); Gerald J. Postema, *Introduction to PHILOSOPHY AND THE LAW OF TORTS* 1, 6 (Gerald J. Postema ed., 2001).

8. See IMMANUEL KANT, *The Metaphysics of Morals*, in *PRACTICAL PHILOSOPHY* 353, 557 (Mary J. Gregor trans., 1996) (1797).

and treat them accordingly.⁹ Thus, four types of harm are gauged when balancing liberty and security interests.

When the law is abridged and a person (or the state) is injured, corrective justice in the private realm, and retribution or distributive justice in the public one are predominant guides for requitals in modern legal systems. Blameworthiness is central to conceptions of principled punishment and is usually invoked in conceptions of corrective justice, as in the standard of negligence based upon reasonableness. If an actor is not sufficiently blameworthy, her harmful conduct is typically excused or justified.¹⁰ It is hard to imagine a viable and fair legal regime that does not place blameworthiness in a starring role.¹¹

While the concept of blameworthiness is often summoned, there remains much controversy over its meaning and measure.¹² This article elaborates on two understandings ascribable to the concept. The most established conception derives from Aristotle. He argues that a person is not fairly responsible, and hence not blameworthy (or creditworthy),¹³ for the consequences of her conduct that ensue from her unavoidable ignorance or coercion.¹⁴ I call this “Responsibility Blameworthiness.” A second conception receives less attention from commentators. As suggested above, it derives from Kant’s deontic

9. See *id.* Dignitary harm differs from psychic harm. A stoic, her psyche well mastered, may suffer no psychic discomfort from an outrageous insult.

10. For brief introductions to excuses and justifications, see, *e.g.*, LARRY ALEXANDER & KIMBERLY KESSLER FERZAN, CRIME AND CULPABILITY: A THEORY OF CRIMINAL LAW 88–91 (2009); MARKUS D. DUBBER, CRIMINAL LAW: MODEL PENAL CODE 186–94, 247–51 (2002); H.L.A. HART, *Prolegomenon to the Principles of Punishment*, in PUNISHMENT AND RESPONSIBILITY 1, 13–14 (1968).

11. Even contract law, which is often said to be strict, has room for blameworthiness. See *infra* note 21.

12. See, *e.g.*, Jeremy Horder, *Criminal Culpability: The Possibility of a General Theory*, 12 LAW & PHIL. 193, 214–15 (1993); Douglas N. Husak & Craig A. Callender, *Wilful Ignorance, Knowledge, and the “Equal Culpability” Thesis: A Study of the Deeper Significance of the Principle of Legality*, 1994 WIS. L. REV. 29, 54–55; Arthur Ripstein, *Justice and Responsibility*, 17 CAN. J.L. & JURISPRUDENCE 361, 361–62 (2004) (describing current theories of “moral accountability”). For versions of blameworthiness, see, *e.g.*, GEORGE SHER, IN PRAISE OF BLAME 9 (2006); George P. Fletcher, *The Recidivist Premium*, 1(2) CRIM. JUST. ETHICS 54, 56–57 (1982).

13. In the Oxford English (US) Dictionary, the definitions of “responsible” include: “Being the primary cause of something and so able to be blamed or credited for it Morally accountable for one’s behavior” [online version]. Blameworthiness draws most of the attention in this article. *Responsible*, OXFORD DICTIONARY, <https://en.oxforddictionaries.com/definition/us/responsible> (last visited Sept. 24, 2016) [<https://perma.cc/TZ4W-L74N>].

14. See ARISTOTLE, *Nicomachean Ethics* bk. III, ch. 1 (*Ethica Nicomachea*), in THE BASIC WORKS OF ARISTOTLE 935, 964–67 (Richard McKeon ed., 1941). See generally PETER CANE, RESPONSIBILITY IN LAW AND MORALITY 65 (2002); R. JAY WALLACE, RESPONSIBILITY AND THE MORAL SENTIMENTS 128 (1994).

principles. Under his categorical imperative, every moral agent has a priceless dignity that commands equal respect.¹⁵ Violation of this duty of respect generates a dignitary harm and involves, what I call, “Disrespect Blameworthiness.”

Each of these two primary conceptions of blameworthiness has two aspects. First, as even the brief description above makes evident, under Aristotle’s conception of Responsibility Blameworthiness, B_r , one of its aspects is diminished blameworthiness attributable to a person’s conduct owing to her unavoidable ignorance, B_{ri} ,¹⁶ while another one spotlights any coercion she was operating under, B_{rc} . Second, under Kant’s elaboration of the duty to respect others, one aspect of the notion of Disrespect Blameworthiness, B_d , stems from the actor’s disrespectful attitude towards another person, B_{da} , while the second one issues from her disrespectful treatment of another person, B_{dt} .

All four of these aspects of blameworthiness have scalar qualities. They are matters of degree. Consequently, when we speak of a person as being blameworthy, we can further unpack this assertion into constituent parts with separate gradations. Two people, therefore, may be equally blameworthy overall, but in different ways. For example, one agent may treat another person with substantial disrespect while considering her an equal, such as where the actor beneficently paternalizes a loved and admired one against her will.¹⁷ Another actor may treat another person with respect while considering her an inferior, such as where the actor helps the other person undergo a beneficial, voluntary, painful medical procedure because she enjoys seeing that other, “inferior” person suffer.¹⁸ Even if we judge these forms of blameworthiness as equal overall in some sense, we may still decide that the requitals for the ensuing harms should differ in various ways. We may, for instance, protect against a different range or extent of harms for one form of blameworthiness than for another. One aim of this paper is to unpack some of the difficulties we face in attempting to make these distinctions.

15. See KANT, *supra* note 8, at 557.

16. Thus, B_{ri} stands for Responsibility Blameworthiness (B_r) with respect to ignorance (i). Immediately below, B_{da} stands for Disrespect Blameworthiness (B_d) with respect to attitude (a).

17. The agent may be respectful despite the paternalism because, for instance, she would wish to be equally paternalized if the roles were reversed.

18. This example derives from Graham. See Peter A. Graham, *In Defense of Objectivism about Moral Obligation*, 121 ETHICS 88, 94 n.14 (2010).

I. Responsibility Blameworthiness, B_r

The first aspect of Aristotle's conception of Responsibility Blameworthiness implies that an actor's accountability for her conduct diminishes to the extent that it constitutes an acceptable response to coercive forces. These forces may stem from external sources, such as physical compulsion or economic duress, or internal ones, including irresistible impulse or *akrasia*, or some combination of these two sources. The second prong of Aristotle's conception, unavoidable ignorance, has similar origins. It may come from external causes, such as fraud or deception, or internal ones, including self-deception or naturally disposed cognitive distortions, or a combination of them.¹⁹

When an actor's accountability is diminished by shortfalls in these two facets of Responsibility Blameworthiness, the law typically establishes a threshold above which the actor is held responsible. This level may effectively vary depending on the legal duty at issue. As applied, different torts,²⁰ contracts,²¹ or crimes may have different thresholds.²² The reasonable person is often invoked as the standard: If a reasonable person in the actor's position would have resisted the forces of coercion and sufficiently addressed any initial ignorance, then the actor is held legally responsible for the injurious consequences of the failure to do so.²³ In deciding whether to act in the face of her impaired conditions for full responsibility, the reasonable

19. Aristotle is wary of finding that internal sources of coercion or ignorance undermine voluntariness. For one, this may undermine the ascription of beneficial acts as praiseworthy. See ARISTOTLE, *supra* note 14, bk. III, ch. 1, at 967. Current cognitive science makes it difficult to set aside our inner workings.

20. For example, compare the differing "intent" requirements for tortious trespass and malicious prosecution. See DAN B. DOBBS, *THE LAW OF TORTS* 47–49, 1223–25 (2000); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 33–39, 882–84 (5th ed. 1984). That "intent" requires knowledge, see *id.* at 34–36.

21. Responsibility for breach of contract is often said to be strict. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 235 (1981); E. ALLAN FARNSWORTH, *CONTRACTS* § 8.8 (4th ed. 2004). Nonetheless, many commentators have found the actual law of contracts to include substantial room for notions of fault. See, e.g., Melvin Aron Eisenberg, *The Role of Fault in Contract Law: Unconscionability, Unexpected Circumstances, Interpretation, Mistake, and Nonperformance*, in *FAULT IN AMERICAN CONTRACT LAW* 82, 82 (Omri Ben-Shahar & Ariel Porat eds., 2010) ("fault is a basic building block of contract law, and pervades the field"); TONY WEIR, *The Staggering March of Negligence*, in *THE LAW OF OBLIGATION* 97, 122 (Peter Cane & Jane Stapleton eds., 1998); George M. Cohen, *The Fault that Lies Within Our Contract Law*, 107 MICH. L. REV. 1445, 1445 (2009).

22. "[T]here is no single conception [of 'legal responsibility']." JOHN KLEINIG, *PUNISHMENT AND DESERT* 106 (1973).

23. That legal responsibility turns on what we may reasonably expect of one another, see GEORGE P. FLETCHER, *BASIC CONCEPTS OF LEGAL THOUGHT* 108 (1996); Ripstein, *supra* note 12, at 361 ("reciprocity conception of responsibility").

person considers the nature of her legal duties and the known risks to others. More caution is called for when egregious physical injury to another is in the offing than when an innocuous touching may ensue.

Once the responsibility threshold is surpassed, the degree of the actor's responsibility is normally not taken into account in gauging private law requalifications. Negligence law reflects this.²⁴ The general rule is that once the actor is found to be sufficiently responsible for her conduct, however close to the threshold, the victim is entitled to full recovery for her injuries. This is one justification that often applies: Though the actor may not be fully blameworthy for her conduct, the victim is entirely blameless. Perhaps in a world free of the critical epistemic difficulties in judging the relative responsibility of the actor and victim for particular harms, blameworthiness would play a role in measuring requalifications. Comparative negligence is a substantial step in this direction.²⁵ Unlike usual tort and contract doctrine,²⁶ criminal law, which puts blameworthiness on center stage, often takes into account the actor's relative responsibility or culpability for her conduct when meting punishment.²⁷

Though relative degrees of coercion and ignorance are usually considered factors that affect the extent of responsibility of an actor and, for that matter, the victim, all persons are not the same when it comes to facing these hindering constraints. A particular person's constitution may significantly surpass the threshold standard of the ordinary reasonable person in specific circumstances. She may be unusually resistant to particular forces of coercion or she may be knowledgeable about the risks of her contemplated choice much beyond the average person. For example, as an adept in martial arts, she may not be the least bit intimidated by a specific physical threat, or as a psychologist she may be especially sensitive to the internal impulses that bedevil untrained people. With respect to ignorance, she may be a sophisticated expert who is not taken in by the deceptive claims of

24. See, e.g., DOBBS, *supra* note 20, at 349; Postema, *supra* note 7, at 3; James Goudkamp, *The Spurious Relationship Between Blameworthiness and Liability for Negligence*, 28 MELB. U. L. REV. 343, 343 (2004). But see John C.P. Goldberg, *Misconduct, Misfortune, and Just Compensation: Weinstein on Torts*, 97 COLUM. L. REV. 2034, 2042 (1997) ("[C]ourts . . . have demonstrated sensitivity to the distorting effects of the full compensation principle by varying the scope and stringency of proximate cause doctrine in accordance with the nature of the defendant's wrongdoing.").

25. See generally, e.g., DOBBS, *supra* note 20, at 503–06; KEETON ET AL., *supra* note 20, at 468–79.

26. Punitive damages, having quasi-criminal law overtones, are the most notable exception to this generalization. See *infra* note 52.

27. See *infra* note 57.

the other party, or she may have studied and mastered some of the cognitive distortions that plague humans. Indeed, the common law takes into account some of the unusual strengths of the parties. Thus, in judging whether a party's conduct meets the legal standard for an excuse, the law ascribes to the reasonable person surrogate some of the actual person's superior qualities, such as whether she is, or holds herself out as, a relevant expert.²⁸ Furthermore, under a causation requirement, legal doctrine demands that a claimant's conduct actually results from the effects of ignorance or coercion.²⁹

When the law accommodates the reduced degree of an actor's Responsibility Blameworthiness, B_r , it may separate out the elements of ignorance, B_{ri} , and coercion, B_{rc} . Each of the two factors could be independently gauged on a scale from, say, 0.0 to 1.0, with 1.0 being total freedom from ignorance or coercion. Each aspect could be weighted differently for particular types of conduct. For battery, as an instance, foreseeability (ignorance) of likely harm may be weightier than freedom from coercion. This would mean that the agent's foreseeability of possible harms must be greater and closer to ideal (1.0), than must be her freedom from coercion. In other words, to avoid being held responsible and liable, we are more sympathetic to the claim, "I didn't realize the victim was put at risk by my conduct," than we are to the claim, "I couldn't help myself." In sum, weighing relates to the ontological question regarding the extent to which there is ignorance or coercion, whereas weighting relates to the normative issue of how much (dis)value society ought to ascribe to a particular ignorance or coercion.³⁰ Hence, say, for a wrongful harm from a battery to be sufficiently blameworthy and thereby inexcusable, it must be that $B_{ri} = 0.5$ and $B_{rc} = 0.3$. Since the lack of ignorance is weightier here, more important than the absence of coercion, we require it to weigh more, be more present, for the actor to be declared responsible.

The two factors of ignorance and coercion may be weighted differently depending on whether they stem from external or internal sources, or the nature of the external or internal sources. For in-

28. See, e.g., DOBBS, *supra* note 20, at 290; KEETON ET AL., *supra* note 20, at 185–86.

29. Regarding ignorance, see, e.g., RESTATEMENT (SECOND) OF TORTS § 537 (1977) (discussing fraudulent misrepresentation); RESTATEMENT (SECOND) OF CONTRACTS § 167 (1981) (discussing misrepresentation). For coercion, see, e.g., RESTATEMENT (SECOND) OF CONTRACTS §§ 174–75, 177 (1981) (discussing duress and undue influence).

30. For more on the distinction between weighting and weighing, see ROBERT NOZICK, PHILOSOPHICAL EXPLANATIONS 294 (1981); Bailey Kuklin, *Constructing Autonomy*, 9 N.Y.U. J.L. & LIBERTY 375, 428 n.181 (2015); Andrei Marmor, *On the Limits of Rights*, 16 LAW & PHIL. 1, 13 (1997).

stance, regarding coercion, B_{rc} , responsibility for conduct may have a threshold of, say, $B_{rc} = 0.3$ for external coercion such as physical duress and, say, $B_{rc} = 0.1$ for internal coercion such as impulse. To suffice as excuses, external coercion must be quite substantial while internal impulse must be nearly irresistible.³¹ As another example, excusing a contractual commitment may have a threshold of, for example, $B_{ri} = 0.5$ for externally induced ignorance such as from misrepresentation, and $B_{ri} = 0.2$ for internally centered ignorance, such as from mental inability and cognitive biases. This methodology becomes further complicated when the ignorance springs from a combination of external and internal factors. A merchant, for instance, may knowingly exploit human foibles by selling a flashy, shoddy product in a plush showroom with flattering, attractive salespersons. The nature of external or internal sources may also be relevant, as where physical duress is considered weightier than economic duress. The possible permutations are manifold. Of the two excusing factors, ignorance and coercion, it seems that existing law primarily emphasizes the need for foreseeability (lack of ignorance).³² In torts and criminal law, issues regarding freedom from coercion receive little judicial attention until

31. "Put most generally, a central behavioral morality question for law would be 'Can internal causes ever exculpate?' The predominant answer in both law and legal philosophy has been 'no'" Amanda C. Pustilnik, *Rethinking Unreasonableness: A Comment on Nita Farahany's "Law and Behavioral Morality"*, in *EVOLUTION AND MORALITY* 166, 167 (James E. Fleming & Sanford Levinson eds., 2012). For exceptions, see Walter Sinnott-Armstrong, *A Case Study in Neuroscience and Responsibility*, in *EVOLUTION AND MORALITY*, 194, 205–06 (2012).

32. "Perhaps the most important of the capacities that is requisite to tort liability is the capacity for foresight." RIPSTEIN, *supra* note 7, at 94. "On the view I will defend, foresight is not required because it is a general condition of agency. Instead, it is implicit in the idea of fair terms of interaction." *Id.* at 105. See also Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 *UCLA L. REV.* 585, 602 (2002) ("It is widely agreed that one cannot really be blamed for harming someone when, at the time one acted, one did not anticipate and could not reasonably have anticipated, that acting in the way one did risked harm to another."). In these situations, "it seems unfair to say the defendant should have acted differently." *Id.* While Scanlon questions the moral connection between intention and foresight, see T.M. Scanlon & Jonathan Dancy, *Intention and Permissibility*, 74 *PROC. ARISTOTELIAN SOC'Y* 301, 305–06 (2000), Dancy disagrees with him, see *id.* at 333–34.

it gets rather extreme.³³ In contract law, the modern trend is to be more attentive to the victim's claim of duress.³⁴

The two excusing factors in Responsibility Blameworthiness, ignorance and coercion, occasion many more intricacies. Each factor may be weighted differently depending on whether the claim is civil or criminal, or the nature of the claim or remedy sought, such as battery versus wrongful death or homicide. First, for criminal battery, Responsibility Blameworthiness for ignorance and coercion may be $B_{ri} = 0.5$ and $B_{rc} = 0.3$, respectively, while for civil battery, $B_{ri} = 0.4$ and $B_{rc} = 0.2$. In other words, for battery one must be more responsibility blameworthy for criminal liability than for civil liability. Excuses and justifications are more readily available in the public law context. A warrant for this difference stems from the varied deontic aims of civil and criminal liability. Civil liability primarily seeks to compensate the victim pursuant to corrective justice,³⁵ whereas criminal liability means to punish the actor pursuant to retribution or distributive justice.³⁶ Sec-

33. "Relatively few [tort] cases have dealt with the problem of consent given under duress. . . . [T]here has been no discussion of its place in the law of torts." KEETON ET AL., *supra* note 20, at 121. "The [tort] cases to date in which duress has been found to render the consent ineffective have involved those forms of duress that are quite drastic in their nature and that clearly and immediately amount to an overpowering of the will." RESTATEMENT (SECOND) OF TORTS § 892B cmt. j (1977).

For the Model Penal Code's approach to coercion (duress), see DUBBER, *supra* note 10, at 251–59. "[D]uress is limited to coercion caused by persons (personal duress), and not to compulsion by natural causes or circumstances (circumstantial duress)." *Id.* at 253. "[C]oercion is broader . . . than duress . . ." Peter Westen, "Freedom" and "Coercion"—*Virtue Words and Vice Words*, 1985 DUKE L.J. 541, 591. "Apart from duress, English and American courts have been loathed to recognize excuses based on external coercion, in particular, external coercion generated by natural circumstances." FLETCHER, *supra* note 23, at 106. "The law is . . . much more cautious in admitting 'defects of the will' than 'defect in knowledge' as qualifying or excluding criminal responsibility." H.L.A. HART, *Legal Responsibility and Excuses*, in PUNISHMENT AND RESPONSIBILITY, *supra* note 10, at 28, 33.

34. "Courts originally restricted duress to threats involving loss of life, mayhem or imprisonment, but these restrictions have been greatly relaxed and, in order to constitute duress, the threat need only be improper with the rule stated in [the next section]." RESTATEMENT (SECOND) OF CONTRACTS § 175 cmt. a (1981). For the twisty lines drawn by modern courts, see *id.* §§ 175, 176; FARNSWORTH, *supra* note 21, §§ 4.16–4.18. This greater generosity in contracts as compared to torts and criminal law may be due to the weaker available requitals: avoidance, rescission, and restitution. See *id.* § 4.19.

35. "[C]orrective justice has usually been thought of as comprising those principles that directly govern private transactions between individuals. In developed legal systems, these principles are generally embodied in the law of contract, torts, and unjust enrichment." Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515, 515 (1992). See generally Jules Coleman et al., *Theories of the Common Law of Torts*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/win2015/entries/tort-theories/> (last visited Mar. 7, 2016) [<https://perma.cc/6DJF-SBVD>].

36. See generally Hugo Adam Bedau & Erin Kelly, *Punishment*, STAN. ENCYCLOPEDIA PHIL., available at <http://plato.stanford.edu/archives/fall2015/entries/punishment/> (last

ond, for homicide, the threshold for coercion, B_{rc} , may be nearly 0.0. Here, in other words, coercion, however great, almost never excuses homicide, while foreseeability (ignorance) remains as a higher threshold factor at, say, $B_{ri} = 0.3$. Yet, as above, we may distinguish external coercion (e.g., physical duress) from internal coercion (e.g., insanity, irresistible impulse), establishing a lower threshold of responsibility for one than for the other, or for one type of external or internal coercion than for another type. Provocation by the victim, when seen as a form of coercion,³⁷ raises the threshold for B_{rc} . Looking at (nearly) absolute liability, such as possession of contraband, the threshold for ignorance may be, say, $B_{ri} = 0.0$, while the threshold for coercion remains, say, $B_{rc} = 0.3$.

The excusing factors in Responsibility Blameworthiness may be weighted differently depending on the type of harm at issue. For dignitary harm from an assault or defamation, Responsibility Blameworthiness may be set at $B_{ri} = 0.5$ and $B_{rc} = 0.3$, while for psychic harm from the same conduct, Responsibility Blameworthiness is set at $B_{ri} = 0.6$ and $B_{rc} = 0.3$. In this instance, the foreseeability of the psychic harm must be greater than the foreseeability of the dignitary harm.

Under existing law, courts have struggled with four distinctions among foreseeable harms.³⁸ First, the courts have considered the type of harm (i.e., physical, economic, psychic, or dignitary). If some type of harm is foreseeable, is the actor responsible for other types of

visited Mar. 7, 2016) [<https://perma.cc/8U4P-8XUJ>]. The distinctions among corrective, retributive, and distributive justice are controversial. *See, e.g.*, IZHAK ENGLAND, CORRECTIVE AND DISTRIBUTIVE JUSTICE FROM ARISTOTLE TO MODERN TIMES 9–10 (2009); WOJCIECH SADURSKI, GIVING DESERT ITS DUE 25–36 (1985); C.L. TEN, CRIME, GUILT, AND PUNISHMENT 5 (1987); George P. Fletcher, *The Place of Victims in the Theory of Retribution*, 3 BUFF. CRIM. L. REV. 51, 57–59 (1999); John Gardner, *Corrective Justice, Corrected*, 12 DIRITTO & QUESTIONI PUBBLICHE 9, 13–15 (2012); Ronen Perry, *The Third Form of Justice*, 23 CAN. L.J. & JURISPRUDENCE 233, 242–47 (2010). Consequentialist aims of civil and criminal liability, such as deterrence, are here set aside.

37. “It is proposed both that provocation justifies retaliatory action and that it causes such action. Moreover, the causal imputation commonly carries an implication of compulsion, an implication that can be made to account (at least in part) for the justificatory element in provocation” MARTIN DALY & MARGO WILSON, HOMICIDE 257–58 (1988). Some commentators see provocation as a partial excuse, others as a partial justification. Both views have been criticized. *See* Alon Harel, *Efficiency and Fairness in Criminal Law: The Case for a Criminal Law Principle of Comparative Fault*, 82 CAL. L. REV. 1181, 1212 (1994) (with citations).

38. To put the issues more generally, “it is difficult to see how the principle of reasonable foreseeability ensures that liability only arises in respect of avoidable risks.” Goudkamp, *supra* note 24, at 347. *See id.* at 347–50.

harms that are not (as) foreseeable?³⁹ To draw even finer lines: If recovery for freestanding harms requires, say, $B_{ri} = 0.5$, when a specific type of harm meets this threshold, should the threshold for other types of ensuing harms decrease, or the threshold for other types of harms decrease to different levels for each respective type of harm?⁴⁰ Second, the courts have considered the manner of harm. If a particular type of harm is foreseeable (e.g., physical), is the actor responsible for that type of harm when it occurs in an unforeseeable manner? Third, the courts have considered the extent of harm. Is the actor responsible for a particular type of harm that is more extensive than was foreseeable?⁴¹ Fourth, the person harmed. If harm is foreseeable to one person, does responsibility extend to a similar harm to an unforeseeable person?⁴² Under a wide range of circumstances, these permutations could play out in very complex interplays of B_{ri} and B_{rc} .⁴³

39. "A person should not be liable for the unforeseen consequences of all unlawful acts. He should be responsible for the unforeseen consequences of acts that are unlawful because they are unjust to others because they harm or appropriate what belongs to them." JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT 195 (2006).

40. Goldberg and Zipursky relatedly assert that psychic harm for defamation is parasitic on dignitary harm. See JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, TORTS 311 n.4 (2010). There may be another way to get to this idea. Perhaps the threshold in defamation for responsibility (and disrespect) for dignitary harm is lower than for psychic harm. If so, without meeting the threshold for dignitary harm, the threshold for psychic harm will not be met.

41. The problem with making defendants liable for unusual injuries is . . . that it would encumber liberty too much, as people seeking to avoid wronging others would need to moderate their activity to too great an extent. By contrast, liability for the full *extent* of injury, no matter how surprising, places no burden on liberty. For no extra precautions are required to avoid severe injuries than are required to avoid less severe ones.

Ripstein, *supra* note 7, at 90. But once a defendant is found liable for an unexpected extent of injury, any ensuing reduction in her resources diminishes her future range of choices.

42. The leading case addressing this issue is *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928). For the related problem of transferred intent, see DOBBS, *supra* note 20, at 75–79; KEETON ET. AL., *supra* note 20, at 37–39. "[T]he best explanation of why the intent to shoot the desired victim should be 'transferred' to the actual victim is that both intentions are equally culpable." Paul H. Robinson, *Imputed Criminal Liability*, 93 YALE L.J. 609, 620 (1984). "[I]t is not really that intent is 'transferred.' Where the doctrine applies, the defendant's intent was sufficient all along." Lawrence Crocker, *A Retributive Theory of Criminal Causation*, 5 J. CONTEMP. LEGAL ISSUES 65, 81 (1994) (footnote omitted). Discussing *Palsgraf*, Hurd and Moore opine, "[t]he best thing to do with the doctrine of transferred intent is thus to get rid of it entirely." Heidi M. Hurd & Michael S. Moore, *Negligence in the Air*, 3 THEORETICAL INQ. L. 333, 390 (2002) (footnote omitted).

43. Weinrib offers a guideline. "[W]hen the plaintiff's loss, although caused by the defendant's wrongdoing, is not within the ambit of what makes it wrongful, the defendant's conduct cannot be said to be wrongful with respect to that plaintiff's loss." Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQ. L. 1, 10 (2000).

More generally, we could further conjure up extraordinarily entangled interrelations among various combinations of external and internal coercion which are interconnected to intricately entangled interrelations among external and internal ignorance.

Setting aside practical problems and insuperable epistemic issues, if the level of the actor's Responsibility Blameworthiness, B_r , is exactly discernable, then a case might be made for reducing the requital in some proportion to the extent that B_r falls short of ideal.⁴⁴ For an example that lumps together B_{ri} and B_{rc} into B_r , to trim complications, say that the threshold for a requital is $B_r = 0.5$, and, in a particular case, $B_r = 0.9$. One might then consider reducing the requital by, perhaps, 10% per 0.1 increment to roughly account for the shortfall from the ideal conditions for responsible choice. For each 0.1 drop of B_r below 1.0, the requital would decrease by 10% until at $B_r = 0.5$ (the minimum threshold for responsibility) the requital would be based on 50% of the harm. The reductions need not be linear. Of course, as suggested by some of the analysis above, this could lead to untold complexities from combinations of factors. Further labyrinthine convolutions could be added by the permutations from overlaying the variations in Disrespect Blameworthiness, B_d , discussed below.

Reducing requitals in proportion to an actor's shortfall from the ideal conditions for Responsibility Blameworthiness strongly protects the actor's liberty interest. In a real, if somewhat crude, sense she will be held liable only for wrongful harm to the extent that she could anticipate and avoid it. She is in significant control of her exposure to

Moore suggests that one could deal with the "vagaries in the meaning of 'foreseeable' [by] . . . creat[ing] a sliding scale foreseeability test, less probability being required for more serious harms, more probability for less serious harms." MICHAEL S. MOORE, *PLACING BLAME: A GENERAL THEORY OF THE CRIMINAL LAW* 364 (1997). We might also vary the standard of foreseeability in light of the purpose of the agent's conduct. Where her activity is socially beneficial and her minimization of risks is costly, "the probability with which harm to the claimant must be foreseeable before his rights can be said to have been violated will be higher than where the defendant's activity is pointless or unlawful." ROBERT STEVENS, *TORTS AND RIGHTS* 207 (2007) (footnote omitted). "Reasonable foresight, in relation to culpability, is therefore a practical notion and we may term the harm, the risk of which is sufficient to influence the conduct of a prudent man, 'foreseeable in the practical sense.'" H.L.A. HART & TONY HONORE, *CAUSATION IN THE LAW* 263 (2d ed. 1985) (footnote omitted). The "prudent man" is, of course, a society-created person reflecting society's values.

44. Kolber questions the all-or-nothing liability responses of the law. See Adam Kolber, *Smooth and Bumpy Laws*, 102 CAL. L. REV. 655, 656-57 (2014). In proposing a culpability-based criminal code, Alexander and Ferzan state, "After a jury determines which legally protected interests the actor believed himself to be risking, the jury will need to discount these interests by the actor's belief as to the magnitudes of the various risks he was imposing." ALEXANDER & FERZAN, *supra* note 10, at 282.

the risk of requalifications. She is free to act without the fear of liability for harms or their extent; as such, we cannot truly say, “You are *entirely* blameworthy for causing that injury,” or would say, “You are not *that* blameworthy for it.” On the other hand, let us turn our attention to the security interests of the wrongfully harmed party. She, most often, is not blameworthy in the least.⁴⁵ We must then decide whether to sacrifice some of the blameless victim’s security interest for the sake of the moderately blameless actor’s liberty interest.⁴⁶ Who has the stronger claim? What are the consequences? What types of considerations count?

If we consider requalification principles that do not curtail any of the victim’s security interest that is at risk because of the harming actor’s shortfall from full Responsibility Blameworthiness, how might the remedial standards address this? One possibility is to allow the victim a full, undiminished recovery for wrongful harms once the threshold for requalification is reached. This is the usual rule under the common law conception of corrective justice.⁴⁷ The element of blameworthiness usually plays no role in the gauge of compensation.⁴⁸ Then, if we choose to account for the actor’s Responsibility Blameworthiness beyond the threshold minimum, we could do so by increasing the victim’s award. We could add a surplus to the victim’s recovery, granting her more than the measure of her actual, wrongful harms. This step goes beyond our ordinary understanding of corrective justice and, rather, suggests the idea of distributive justice.⁴⁹ As an example, to implement this step when the threshold for Responsibility Blameworthiness is $B_r = 0.5$, and the particular actor’s blameworthiness is $B_r = 0.9$, we might add an extra proportionate amount to the victim’s recovery. Though the actor would object to the enhanced award with, “But the victim wasn’t hurt *that* much,” we (sometimes) may respond,

45. When the victim is somewhat blameworthy as well, the tort doctrines of contributory and comparative negligence apply. *See generally, e.g.*, DOBBS, *supra* note 20, at 494–98, 503–06; KEETON ET AL., *supra* note 20, at 451–62, 468–79.

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

47. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 903 (1977); DOBBS, *supra* note 20, at 1047–48.

48. *See infra* note 57.

49. Distributive justice, under Aristotle, “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” ARISTOTLE, *supra* note 14, bk. III, ch. 2, at 1005–06. Today it often reaches the distributive effects of all norms. *See generally, e.g.*, Julian Lamont & Christi Favor, *Distributive Justice*, STAN. ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/archives/fall2014/entries/justice-distributive/> (last visited Mar. 7, 2016) [<https://perma.cc/AXM4-S8AZ>].

“Yes, but that was a matter of moral luck,⁵⁰ and, in this particular case, the degree of your blameworthiness is not adequately reflected by the victim’s actual injuries.”⁵¹ How much should the recovery be heightened under this approach? This is a tough question. Should we add, say, 10% to the victim’s recovery for every 0.1 increment above the threshold of B_r of the actor’s blameworthiness? If so, and if the threshold is $B_r = 0.5$, and the actor’s $B_r = 0.7$, then we would add 20% to the victim’s recovery. Instead of simply adding increments, should there be a multiplier? Should the extra amount be nonlinear? Progressive? Regressive? Even tougher than the calculation above is of how much we might reduce the victim’s recovery for Responsibility Blameworthiness that falls below the ideal, $B_r = 1.0$.

The exploration of the possibility of adding a surplus to requalifications for heightened Responsibility Blameworthiness is rather academic and, under existing social norms, unrealistic. Epistemic problems still aside, why should a victim recover for more than her actual harms? We apparently allow this for punitive damages, but this doctrine is distinguishable. While not generally acknowledged by the courts, punitive damages arguably provide a means to requite the victim’s dignitary, psychic, and other harms in extreme cases of disrespectfulness when the standard causes of action do not fully protect against these types of harms, such as for a malicious prosecution.⁵² Malice, of sorts, is usually an element of the claim for punitive damages.⁵³ Sometimes, however, punitive damages are greater than a just requital for the victim’s own dignitary, psychic, and other harms. In these cases, we grant the victim the privilege of recovering punitive damages as a private attorney general for, arguably, wrongful harms to the general pub-

50. “Where a significant aspect of what someone does depends on factors beyond his control, yet we continue to treat him in that respect as an object of moral judgment, it can be called moral luck. Such luck can be good or bad.” Thomas Nagel, *Moral Luck*, in *MORAL QUESTIONS* 24, 26 (1979). See generally, e.g., CANE, *supra* note 14, at 65–78; BERNARD WILLIAMS, *Moral Luck*, in *MORAL LUCK* 20 (1981); John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123 (2007); Stephen J. Morse, *Reasons, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363; Norvin Richards, *Luck and Desert*, 95 MIND 198 (1986).

51. Sometimes, of course, moral luck will cut against the actor. The ordinary requital standard will lead to legal relief beyond the degree of the actor’s blameworthiness. Accounting for these varied circumstances adds yet another level of complexity.

52. See, e.g., KEETON ET AL., *supra* note 20, at 9; Bailey Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1, 3–5 (1989).

53. “Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others.” RESTATEMENT (SECOND) OF TORTS § 908 (1977). See, e.g., DOBBS, *supra* note 20, at 1062–66; KEETON ET AL., *supra* note 20, at 9–10.

lic.⁵⁴ These also are actual harms, the problem being that they may be so dispersed among a wide public that, as with the law of public nuisance, we decline for practical reasons to grant standing to sue to everyone who has been similarly harmed.⁵⁵ Considering instances when an actor produces remediable, wrongful harms with a level of responsibility above the minimum threshold, what is the actual harm to the direct victim or public? Some ensuing harms may be readily identifiable. The victim or public, knowing of the actor's heightened responsibility for her manifested willingness to put them at risk, may react with expenditures for increased security measures and, if bad enough, suffer from physical illness or psychic distress. A society may aptly adopt principles that protect individuals from these and other physical, economic, psychic,⁵⁶ and dignitary harms. Here, however, we have been addressing whether to increase a victim's recovery for the actor's heightened responsibility irrespective of whether, or the extent to which, any of these other ensuing harms have been shown. Realistically calculating any such other consequential harms seems to be a largely futile endeavor that is crude at best. Once again, these concerns do not appear within the usual reach of corrective justice but, rather, more as matters for distributive justice or retribution.⁵⁷

This exhausting, microscopic examination of the role of Responsibility Blameworthiness demonstrates that there are many intricate ways to account, in principle, for this moral consideration. This wide range allows for innumerable choices in the adoption of substantive and requal principles that strike a fair, reasonable balance between one's liberty and security interests. There are many plausible bound-

54. I pursue the argument that punishment is to requite wrongful harms to the general public in my manuscript "Public Requisites: Corrective Justice, Retribution, and Distributive Justice" (on file with author).

55. "No better definition of a public nuisance has been suggested than that of an act or omission 'which obstructs or causes inconvenience or damages to the public in the exercise of rights common to all Her Majesty's subjects.'" KEETON ET AL., *supra* note 20, at 643 (footnote omitted). For the practical reasons supporting the rule that public nuisances can be redressed only by public officials, see *id.* at 646.

56. Nozick and Rawls, among others, identify a "fright" theory of criminality, justifying punishment for the psychic harm to the public. See NOZICK, *supra* note 6, at 65-71; John Rawls, *Two Concepts of Rules*, in THE PHILOSOPHY OF PUNISHMENT 105, 107 (H.B. Acton ed., 1969).

57. See *supra* note 36. "Another important difference between tort and criminal law is that tort generally provides the same sanction (compensatory damages) regardless of the defendant's culpability, while criminal law provides a sanction (punishment) that is proportional to the defendant's culpability." Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 296-97 (1996). Simons goes on to offer a deontological justification for this difference, but expresses caution about the award of punitive damages. See *id.* at 297.

ary lines between one person's freedom and another's, between one person's autonomy, or "autonomy space",⁵⁸ and another's that can satisfy the duty to equally respect one another. But there are certainly limits. At the pole where freedom from ignorance and coercion do not matter for responsibility ($B_{ri} = 0.0$, $B_{rc} = 0.0$), the actor is absolutely liable. When applicable, her liberty in this regard is severely truncated while the victim's security is greatly expanded. In being liable for harms she could neither anticipate nor control, the actor's autonomy is essentially disrespected. At the opposite pole, where freedom from ignorance and coercion must be ideal for responsibility ($B_{ri} = 1.0$, $B_{rc} = 1.0$), the actor is virtually never liable. At the very least, everyone suffers some human quirks that foreclose fully informed choices and freedom to act. Freed from liability, the actor's liberty is greatly expanded while the victim's security is severely constricted. Unable to recover for harms produced by even grossly blameworthy conduct, the victim's autonomy is essentially disrespected. Somewhere between these extreme poles, thresholds for Responsibility Blameworthiness must be drawn. Doubtlessly, the standards will consider principles, consequences, and practical matters. The line-drawing debate has been going on for a long time.

II. Disrespect Blameworthiness, B_d

Disrespect Blameworthiness, like Responsibility Blameworthiness, has two aspects. Pursuant to Kant's categorical imperative, a person by virtue of her rational capability is a moral agent entitled to respect as an equal to all other moral agents, and to be so treated.⁵⁹ Hence, moral agents are blameworthy for failure to maintain a respectful attitude towards others, B_{da} ,⁶⁰ or to treat others with respect, B_{dt} . Such failures constitute dignitary harms. They may also produce other types of harms. From the insult and defamation implied by disrespectful conduct or attitude, a distressed victim may suffer physical and psychic

58. I develop this "autonomy space" metaphor at length in *Constructing Autonomy*, *supra* note 30, at 393–416.

59. See *supra* note 8.

60. Kant emphasizes a criminal's "inner wickedness." KANT, *supra* note 8, at 474. See DAVID BOONIN, THE PROBLEM OF PUNISHMENT 96 (2008) (discussing motive); T.M. SCANLON, MORAL DIMENSIONS: PERMISSIBILITY, MEANING, BLAME 128 (2008) (discussing an "agent's attitudes toward others"); Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3 BUFF. CRIM. L. REV. 65, 66 (1999) (discussing "inner thoughts"); Japa Pallikathayil, *Deriving Morality from Politics: Rethinking the Formula of Humanity*, 121 ETHICS 116, 131–32 (2010) (discussing "duties not to pose as morally superior to others").

harms.⁶¹ Economic harms may also follow. She may be induced to make expenditures for protective measures or may lose economic and social opportunities owing to the negative reactive responses of onlookers.

The standard three types of harms—physical, economic, and psychic—may occur without the actor being responsibility blameworthy at all. She may be justifiably ignorant of the potential consequences of her choice to act, which ultimately harms a victim.⁶² No one in her position would have foreseen the risk to others, except, perhaps, Rube Goldberg. Conversely, her negligibly risky conduct might be a reasonable response to a credible, dire, inescapable threat. Hence, under these situations Aristotelian principles would find her not responsible, not blameworthy, for her conduct. $B_r = \sim 0.0$. On the other hand, when it comes to a dignitary harm produced by disrespect (B_d), the actor's ignorance or coercion is less exculpating. This is especially apparent with respect to a disrespectful attitude (B_{da}). As a state of mind, an attitude cannot be simply a product of vindicating coercion. Nor can an attitude of disrespect be a product of acceptable ignorance of the moral equality of all rational beings. The categorical imperative is unconditional. It is, after all, categorical, and therefore independent of a person's inclination, motive, or desire. Ignorance or coercion cannot be fully excusing. We might partially pardon one's disrespectful attitude, as where a morally uneducated person is nurtured in a classist or racist society, but perhaps short of brainwashing, we would still hold the person blameworthy to some extent for disrespecting another. The apt requital may account for her understandable ignorance or attitude stemming from skewed circumstances, but she will not be let off the hook entirely.

A similar case, though perhaps less straightforward, can be made for disrespectful treatment (B_{dt}). "Treatment" refers to "[t]he manner in which someone behaves toward or deals with someone or something."⁶³ Likewise, "manner" refers to "[a] person's outward bearing

61. See Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 512 (1992). On the other hand, a dignitary harm may be protected independently of whether the victim suffers associated psychic or other harms. A tortious assault, for instance, does not require the victim to experience fright or fear. See RESTATEMENT (SECOND) OF TORTS § 24 cmt. b (1977).

62. I ignore the de minimis "foreseeability" that stems from the knowledge that totally unforeseeable occurrences sometimes happen. See David G. Owen, *Figuring Foreseeability*, 44 WAKE FOREST L. REV. 1277, 1288 (2009) (discussing "foreseeing" the unexpected).

63. *Treatment*, OXFORD ENGLISH (US) DICTIONARY (2016), <https://en.oxforddictionaries.com/definition/treatment> (last visited Nov. 19, 2016) [<https://perma.cc/2WAY-SLYM>].

or way of behaving toward others.”⁶⁴ These two notions, like the notion of “categorical” itself, are independent from the actor’s inclination, motive, or desire. Irrespective of why one acts in a disrespectful manner towards another, it remains disrespectful to the victim.⁶⁵ The treatment is gauged from the victim’s perspective, not the actor’s mental state. Even an extreme coercive threat to the actor does not refute the conclusion that her reactive conduct is disrespectful. In succumbing to the coercive threat, she uses the victim as a means only, not as an end in herself.⁶⁶ Because of the dire threat, again, we may account for the coercion (or ignorance) in formulating an apt requital, but requital there must be. In sum, virtually all forms of, and reasons for, disrespectful attitudes and treatments retain measures of blameworthiness.

Disrespectful treatment, B_{dt} , and disrespectful attitudes, B_{da} , both have scalar qualities. Uncivil treatment has many depths. At the deepest end are vicious slavery and torture. At the shallower end, a crude brushoff and a careless failure to reciprocate a greeting. Likewise, disrespectful attitudes are matters of degree. At one pole is total contempt and condescension, and at the other there is mild stereotypic prejudice and nurtured deference to biased social norms. In some circumstances, disrespectful treatment and disrespectful attitude may greatly diverge. For example, an actor may brutally torture another person who she believes is her moral superior on the rationale that the victim has information that must be revealed for community welfare, as where an uncooperative, principled victim is a priest who obtained privileged information about a terrorist threat from a penitent confessor.

Once we perceive the scalar qualities of the two facets of Disrespect Blameworthiness, we face difficult issues relating to degrees. Thresholds are again suggested for plausible requitals. Different thresholds for different requitals are reflected in social norms. For disrespectful treatment, B_{dt} , a standard legal remedy for criminal as-

64. *Manner*, OXFORD ENGLISH (US) DICTIONARY (2016), <https://en.oxforddictionaries.com/definition/manner> (last visited Nov. 19, 2016) [<https://perma.cc/74NW-NKSX>].

65. This differs from the case, taken up below, in which the actor is ignorant that she is “treating” the victim at all. That is, if the actor, as a reasonable person, cannot foresee that another person is at risk from her conduct, then we would not say that the actor is “treating” the victim in any manner whatsoever. *See infra* note 83.

66. This violates one of the forms of Kant’s categorical imperative. *See* IMMANUEL KANT, *Groundwork of the Metaphysics of Morals*, in PRACTICAL PHILOSOPHY 41, 80 (Mary J. Gregor trans., 1996) (1785) (“So act that you use humanity, whether in your own person or in the person of any other, always at the same time as an end, never merely as a means.”).

sault has a higher threshold requirement than does tortious assault. For example, the mens rea of criminal assault could be $B_{dt} = 0.4$, while the intentional act necessary for tortious assault could be $B_{dt} = 0.2$. In other words, to be subject to sanctions, one's treatment of another person must be more disrespectful for criminal liability than for civil liability. Mens rea is a more demanding standard than is the standard for tortious intentional conduct.⁶⁷ On the other hand, some requital may be appropriate for disrespectful treatment that falls below the thresholds for legal relief. In these instances, social norms may call for the disrespectful actor to respond in some extralegal manner. For minimal disrespect, say, $B_{dt} = 0.05$, a quick apology may suffice. As the rude treatment moves up the scale, more sincere apologies are called for, ranging from a casual "mea culpa" to earnest, tearful contrition. A gift or a public expression of remorse may be appropriate under cultural norms as a way to expiate one's particular disrespectful conduct. These extralegal requitals may substitute for, or supplement, legal remedies.

Finally, disrespectful attitude, B_{da} , also varies up and down a scale from 0.0 to 1.0, as do the other forms of blameworthiness. Since attitude is a subjective mental state, formidable epistemic problems interfere with fine-grained measurements.⁶⁸ For that matter, rough-grained gauges are also challenging in most cases. As a crude aid, we may estimate an actor's subjective disrespectful attitude on the basis of her objective conduct. Based on the manifested conduct, a reasonable person standard may be invoked to infer the accompanying attitude. This may often be a fair surrogate, yet, as seen in the example above of the reluctant torturer of a principled priest, the disrespectfulness of conduct and attitude may not align at all. At times there may be reliable evidence of an actor's attitude. She may make a record of her mental state, report it to an acquaintance, or admit to it after the fact. Nonetheless, the epistemic hurdles, since they relate entirely to privileged mental states, are substantially greater here than for other forms of blameworthiness.

The epistemic obstacles aside, sometimes the law does seemingly take into account disrespectful attitudes. Some torts or private reme-

67. See, e.g., KEETON ET AL., *supra* note 20, at 33–37.

68. Kant recognizes these epistemic hurdles. In judging legal guilt, he relies on "considerations of a person's external behavior and that person's empirical or psychological personality and history." ROGER J. SULLIVAN, IMMANUEL KANT'S MORAL THEORY 243 (1989).

dies (may) require malice.⁶⁹ Examples include the intentional infliction of emotional distress,⁷⁰ malicious prosecution,⁷¹ defamation or libel of a public figure,⁷² and punitive damages.⁷³ These legal doctrines may require different threshold levels of malice or disrespect, varying, say, from $B_{da} = 0.5$ for punitive damages and $B_{da} = 0.4$ for malicious prosecution.⁷⁴ Even for conduct short of the reach of the law, some social norms evaluate and vary according to the degree of a wrongdoer's apparent disrespectful attitude. Derisive ridicule calls for a much greater apology or other remorseful response than does a mild slight from misfired humor.

To reconnoiter, immediately above we have seen that the two aspects of Disrespect Blameworthiness, B_d , may vary from totally absent, 0.0, to maximally present, 1.0. Moreover, the degree of these two aspects (B_{da} , B_{dt}) may be quite independent of one another in particular cases. All combinations are possible. Hence, as seen when discussing the two aspects of Responsibility Blameworthiness, ignorance (B_i) and coercion (B_{rc}), all of the labyrinthine interconnectedness of these two facets of disrespectfulness, including the complications from distinguishing types of harms and requitals, epistemic hurdles, etc., are back on the table. Indeed, the difficulties are further compounded, for now we should consider whether or how these four aspects of blameworthiness are to be linked with one another in our social and legal norms. Frankly, I believe refined gauges of blameworthiness are just not possible in this world; far from it. As a practical matter, if distinctions are to be drawn, we must adopt second-best methods. We might leave the evaluations without explicit direction to the judgment of our reasonable observers (e.g., juries and judges) who, as represent-

69. Hume identifies "malice" as "a joy in the sufferings and miseries of others, without any offence or injury on their part." DAVID HUME, A TREATISE OF HUMAN NATURE 372 (L.A. Selby-Bigge ed., 1975) (1739 & 1740). It "is the unprovok'd desire of producing evil to another, in order to reap a pleasure from the comparison." *Id.* at 377.

70. See RESTATEMENT (SECOND) OF TORTS § 46 (1977).

71. See RESTATEMENT (SECOND) OF TORTS § 653 (1977).

72. See *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

73. See RESTATEMENT (SECOND) OF TORTS § 908 (1977).

74. By way of personal anecdote, several years ago I sat on a federal jury in a case seeking ordinary and punitive damages for malicious prosecution. After we found the defendants liable for malicious prosecution, the jury later reconvened to consider punitive damages. During deliberations the foreman included my (anonymous) query in questions to the judge: why is it necessary for us to find malice for the recovery of punitive damages when we have already found malice for the underlying claim? The judge, clearly annoyed, responded with double talk. A fellow juror reported to me that, as the judge left the jury room, he was mumbling something about "law professors".

atives of the community,⁷⁵ are to evaluate blameworthiness as best as they can. But there is more to consider before doing so.

Let us see how we might cash out Disrespect Blameworthiness with a requital principle that focuses primarily on fairness to the actor who harms another's dignity. Recall that in cashing out Responsibility Blameworthiness with this focus on the actor, it seemed plausible to use shortfalls from ideal responsibility ($B_r = 1.0$) as a gauge for reducing the actor's liability for harms up to the point where the shortfall reaches the minimum threshold for responsibility (say, $B_r = 0.5$). Beyond this point, the victim cannot recover at all because the actor is not sufficiently responsible. Thus, a victim who suffered a \$10,000 injury from an actor whose measure of responsibility, B_r , was 0.8 would possibly recover \$8,000. This orientation favoring the partially responsible actor rejects coming at the problem from the other direction of granting the victim a full recovery once the minimum threshold of responsibility is reached and adding extra to that recovery amount as the actor's Responsibility Blameworthiness exceeded the minimum. Under this second approach, the victim would recover her full loss of \$10,000 once the actor's Responsibility Blameworthiness reaches the minimum threshold of, say, 0.5, and the victim would recover an additional amount in proportion to the extent that B_r exceeds 0.5. This proposal, while (more than) fair to the victim, seems to push standard remedial principles too far unless, perhaps, we invoke distributive justice rather than corrective justice. Distributive justice is mainly a community concern to see that the actor reaps her just deserts, positive or negative.⁷⁶ Corrective justice, on the other hand, is more of a private matter to reestablish the ex-ante balance between the actor and her victim.⁷⁷ Under either standard of justice, the victim has no persuasive deontic claim to recover more than her actual harms.

In discussing the two aspects of Responsibility Blameworthiness, ignorance (B_{ri}) and coercion (B_{rc}), I have largely glossed over the epistemic difficulties of discerning the extent to which the actor's conduct is the product of shortfalls from full responsibility. It is not so easy to gloss over the epistemic hurdles to gauging both facets of Disrespect Blameworthiness. Yet one aspect of it, disrespectful treatment

75. In this context, Adam Smith refers to the "impartial spectator". See, e.g., ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 82–85 (D.D. Raphael & A.L. Macfie eds., 1976) (1759). Hume, Smith's friend, refers to the "judicious spectator". See HUME, *supra* note 69, at 581. For comparison of Smith's and Hume's understandings, see Jon Rick, *Hume's and Smith's Partial Sympathies and Impartial Stances*, 5 J. SCOTTISH PHIL. 135 (2007).

76. See *supra* note 49 and accompanying text.

77. See *supra* note 35.

(B_{dt}), while difficult to measure, may be the easiest of the four factors to discern. It is judged by the actor's manifested conduct with respect to the victim. A reasonable person in the victim's shoes can evaluate the degree of implicit insult and defamation displayed by the actor's conduct. This is a community standard. Our fact-finding representative of the community, a jury or judge perhaps, can gauge this. But when we turn to disrespectful attitude (B_{da}), the epistemic obstacles reign supreme. Attitude is an entirely subjective matter. Can it be objectified to any extent? One possibility is to declare that disrespectful attitude is to be preliminarily gauged by the disrespectful conduct itself. Based on the actor's conduct alone, a reasonable onlooker would surmise that the actor's choice to act in a way that puts the victim at such risk reflects a certain degree of disrespectful attitude toward the victim. This establishes the *prima facie* baseline. Then, insofar as the actor's actual attitude was truly less disrespectful than supposed, as in the priest-torturer hypothetical above, it is incumbent on the actor to so demonstrate. Inversely, if the actual attitude was more disrespectful than supposed, the burden of proof is on the victim. Second-best solutions such as this may be the best we can do for these types of issues.

Above, we examined cases in which the actor's Responsibility Blameworthiness surpasses the threshold for recovery. When we turned our primary attention to the harmed victim, attempting to be protective of her security interest irrespective of the consequences to the actor's liberty interest, we contemplated whether one might add more to the victim's recovery or subtract less from it in proportion to how much the actor exceeded the threshold or fell short of the ideal. These complications are not present in the context of Disrespect Blameworthiness. The actor's heightened disrespect beyond the threshold increases the victim's dignitary harm. It may also exacerbate the victim's other types of harms, especially her psychic harm. Insofar as the relevant substantive or retributive principles fully protect the victim's dignitary interest, the actor has no complaint that she is liable for more than the victim's actual harm. A dignitary harm is real.

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

The discussion of the four aspects of blameworthiness has thus far treated each one of them as primarily univocal and independent of the others. Regarding Responsibility Blameworthiness, the facets of ignorance, B_{ri} , and coercion, B_{rc} may seem to have an unconditional significance and stand quite apart from one another. Yet there are

situations where they are subject to diverse perspectives and interrelationships. Some hypotheticals will help develop these ideas.

Suppose that Jan is driving alone late at night in an unfamiliar, sparsely populated area when she notices that a stranger, Bob, is trailing her suspiciously. When she picks up her speed and uses other evasive tactics, so does Bob in his car. As this action and reaction continues to escalate, Jan feels increasing coercive duress inducing her to attempt evasive tactics.⁷⁸ Let us say it has reached the level where $B_{rc} = 0.6$. At this point she guns her engine, speeds around a blind corner, and runs into an unanticipated car in the oncoming lane. While Jan had reason to know that there were some cars around, it was not very foreseeable to her that she might cause this accident, say, $B_{ri} = 0.2$. She was largely ignorant of the risk she created by her manner of driving. Under these circumstances, we may judge that her blameworthiness was not very substantial. Her coercive duress, after all, measured 0.6. Still, however, the blameworthiness of the party Jan ran into was, presumably, 0.0. Thus, even though we may declare Jan sufficiently blameworthy to hold her liable for tort damages under corrective justice, possible criminal charges pursuant to retributive or distributive justice seem to be inappropriate because of her level of duress and ignorance.⁷⁹ However, on closer examination of the corrective justice overtones, the coercive duress that Jan experienced in this hypothetical has another dimension. Because Bob was threatening Jan's person, we may look at these events as a matter of self-defense that led to Jan's unintentional harming of a third person. Put this way, we may be more generous to Jan by permitting her to escape liability in tort to the third party in circumstances where the level of duress alone, without the self-defense implications, would not free her

78. This hypothetical has aspects of both coercive duress and self-defense. In the criminal context, "[w]hereas self-defense justifies the commission of a crime, coercion affirmatively excuses allegations of criminal conduct." Monique M. Gousie, *From Self-Defense to Coercion: McMaugh v. State Use of Battered Woman's Syndrome to Defend Wife's Involvement in Third-Party Murder*, 28 NEW ENG. L. REV. 453, 461 (1993) (footnotes omitted). "A presumption of coercion exists when the defendant demonstrates that he or she was in imminent danger, with no opportunity to escape, and had a well-grounded fear of death or serious bodily injury unless he or she complied with the captor's commands." *Id.* (footnote omitted). For my purposes here, the distinction is not important to consideration of the underlying diminishment of free, autonomous choice by Jan. But Bob's blameworthy conduct giving rise to Jan's privilege of self-defense distinguishes his potential claims against her from those of any blameless person harmed by Jan's evasive tactics.

79. For consequentialist support, see LEO KATZ, *BAD ACTS AND GUILTY MINDS: CONUNDRUMS OF THE CRIMINAL LAW* 43 (1987). On the other hand, existing criminal law doctrine is not generous to an actor who negligently or recklessly places herself in a necessitous situation. See MODEL PENAL CODE §§ 2.09(2), 3.02(2) (1962).

of responsibility.⁸⁰ The law may account for the deep instinct for self-preservation.

Now let us change one of the facts of the Jan-Bob interaction. Jan is consciously aware that there is much current traffic on the local roads. Therefore, regarding the risk of running into another car by her hazardous driving, $B_{ri} = 0.4$. Even though her level of coercive duress remains the same ($B_{rc} = 0.6$), because of her reduced ignorance of the risky circumstances, we may not excuse her behavior very much, or at all. We might say to her,

Whether we see this issue as a matter of duress alone or as self-defense, we require you to forcefully resist this particular level of coercion when your chosen means of responding to it is to engage in conduct that you have so much reason to know to be substantially risky to others. You are responsible and blameworthy.

Similarly, there are instances in which the level of ignorance remains fixed, say, $B_{ri} = 0.4$, but where the level of duress varies, say, from $B_{rc} = 0.2$ to 0.6 . This occurs as Jan's justified fear of Bob's escalating, threatening conduct increases. Depending on the specific risk involved, when the coercion is significant enough, we may (partially) excuse the conduct, but when low, we may not excuse it at all. Although the Jan-Bob hypothetical dwells on external sources of coercion and ignorance, to some extent a similar analysis would apply to internal sources, such as impulses and cognitive dissonance. In sum, when setting the substantive and requal principles for harms from conduct in which Responsibility Blameworthiness is impaired, we often examine each one of its two aspects separately and from different viewpoints, while keeping one eye on the other.

Setting aside other considerations for the moment, it may seem when discussing these hypotheticals that our intuitions about the sufficiency of Responsibility Blameworthiness mainly turn on the total extent of its two factors. That is, for a particular risk of harm to others, the actor is liable when, say, the two factors add up to 0.9 . This would occur when $B_{rc} = 0.4$, $B_{ri} = 0.5$, when $B_{rc} = 0.2$, $B_{ri} = 0.7$, and so forth. But it may not be so simple. It may be that one of the factors is weightier than the other. Ignorance, for example, may be more important than coercion. We might demand progressively greater resistance to coercive pressure than we require of knowledge acquisition. For instance, an increase of ignorance (B_{ri}) from 0.3 to 0.4 may be normatively equivalent to an increase of duress (B_{rc}) from 0.3 to 0.5 . In other

80. See RESTATEMENT (SECOND) OF TORTS §§ 73, 75 (1977); DOBBS, *supra* note 20, at 169–70; KEETON ET AL., *supra* note 20, at 147–48.

words, we are more sympathetic to a person's plea of ignorance than to her plea of proportionate coercion. These differing weights may also occur regarding increments within each factor. An increase of ignorance (B_{ri}) from 0.2 to 0.4 may be weighted the same as an increase from 0.7 to 0.8. This is likewise for coercion (B_{rc}). To further complicate matters, these varying weights may cut across the two factors. Thus, as above, an increase of ignorance (B_{ri}) from 0.3 to 0.4 may be weighted the same as an increase of duress (B_{rc}) from 0.3 to 0.5, but as the duress increases it may become relatively more weighty, as where an increase of B_{rc} from 0.7 to 0.8 is as weighty as an increase of B_{ri} from 0.3 to 0.4. For another complication, as seen in the Jan-Bob hypotheticals, we may consider comparable levels of coercion to be weightier when seen from one perspective (e.g., self-defense) than when seen from another (e.g., physical duress). These identified twists and turns are just the tip of the iceberg. When we add the many other factors on top, such as the types and extents of harms or the relief being sought, the matrix of blameworthiness potentially grows even more labyrinthine.⁸¹

Unlike common cases for Responsibility Blameworthiness, the two aspects of Disrespect Blameworthiness, treatment (B_{dt}) and attitude (B_{da}), may be quite independent of one another. As in beneficent paternalism, one may treat another person disrespectfully by denying her the freedom to make a choice for herself while, at the same time, thinking of her as one's moral equal. This occurs occasionally within family and other close relationships where one is particularly protective of others. On the other side of the coin, one may treat a person respectfully while having a contemptuous opinion of her, as where an actor dutifully performs a contract with a member of a disdained group. Since a disrespectful attitude is a mental state and a disrespectful treatment is a manifested conduct, they center in essentially different realms of human experience.

The issues relating to the hypotheticals involving Jan and Bob put into focus some of the complications of Responsibility Blameworthiness. A central facet was Jan's relative ignorance, that is, her limited ability to foresee the potential consequences of her possible choices in response to Bob's threatening conduct. When discussing Responsibility Blameworthiness, the focus on knowledge is obviously to be expected since ignorance, B_{ri} , is one of its two aspects. When, however,

81. For an excellent example of the complexities of valuing and weighting competing norms, see SHELLY KAGAN, *THE GEOMETRY OF DESERT* 591–626 (2012) (matching comparative and noncomparative desert).

we turn to Disrespect Blameworthiness, B_{db} , we also see ignorance, in the form of foreseeability, playing a valorizing role for one of the factors, disrespectful treatment, B_{dt} . If an actor has no reason to foresee that her conduct puts another person at risk, the act does not constitute disrespectful treatment of that other person even when such conduct, it turns out, is indeed risky to her.⁸² One is hardly treating a person disrespectfully (or at all) when one reasonably does not know that her choice of conduct might affect the other person.⁸³ The more the unjustifiable risk to another is foreseeable, the more disrespectful it is, all else equal. A similar conclusion does not follow from coercive forces (B_{rc}). Even when one's harmful conduct is entirely the product of duress, one is still treating the victim disrespectfully. The victim is used as a means only to the actor's ends, that is, to escape the coercive threat.⁸⁴ This relationship of knowledge, foreseeability, to disrespectful treatment (B_{dt}) is brought out in the Jan-Bob driving hypotheticals. Disrespectful attitude (B_{da}), on the other hand, remains free of this relationship to knowledge. A person's disrespectful mental state, while it may well influence her chosen conduct, is ultimately independent of foreseeability. An attitude obtains whether or not it is manifested in conduct.

The concept of blameworthiness is clearly one of the most important desiderata in our legal and moral norms. Conceptions of it may play a prominent role in both substantive and requal principles. For example, an overarching substantive principle might be: "Do not

82. The type of ignorance in issue here relates to the actor's foreseeability of the possible consequences of her conduct. This is to be distinguished from ignorance that results from the lack of moral education, in particular, the knowledge that other persons are moral equals. This latter ignorance is not fully exculpating. Under the categorical imperative, all persons are held to the absolute duty to respect others as equals and so treat them. *See supra* note 8.

83. *See* ALEXANDER & FERZAN, *supra* note 10, at 63; Alan Brudner, *Agency and Welfare in the Penal Law*, in ACTION AND VALUE IN CRIMINAL LAW 21, 34 (Stephen Shute et al. eds., 1993). For cautionary observations, see Susan A. Bandes, *Is it Immoral to Punish the Heedless and Clueless? A Comment on Alexander, Ferzan and Morse: Crime and Culpability*, 29 LAW & PHIL. 433, 434 (2010) (explaining that Alexander, Ferzan, and Morse do not consider the public policy debate).

84. That the coercive threat entails a self-defensive risk to a third party, as where Jan evasively runs into another car, does not avoid this difficult moral quandary. Drawing a nebulous line, the Restatement does not privilege an intentional harm to a third person when "the harm threatened to the actor is not disproportionately greater than the harm to the other." RESTATEMENT (SECOND) OF TORTS § 73 (1977). The self-defense privilege for unintentional harm to a third person is unavailable when "the actor realizes or should realize that his act creates an unreasonable risk of causing such harm." *Id.* § 75.

harm another person through blameworthy conduct.”⁸⁵ If one violates this principle, the harmed victim may bring an action in tort based on this requital standard: “If one harms another person through blameworthy conduct, she is to compensate the harmed person to the extent of the harms.” Here blameworthiness is crucial to the substantive principle, but plays an incidental role in the related requital standard. Accordingly, we could drop blameworthiness out of the requital standard altogether by substituting, “If one violates a duty not to harm another person, she is to compensate the harmed person to the extent of the harms.” This diminished role for blameworthiness in the requital standard may be otherwise. Suppose this is the associated requital principle: “If one harms another person through blameworthy conduct, she is to compensate that person to the extent of the blameworthiness of the harms.”⁸⁶ Some criminal punishment suggests a version of this principle. When blameworthiness is a central element in both the substantive and the associated requital principle, the question arises whether both principles rely on the same conceptions of blameworthiness, with all their complicating twists. Depending on the terms and meanings of the principles, we could have one or more thresholds for each of the four aspects of the blameworthiness in the substantive principle grounding a claim for relief, and other thresholds for the requital measure. Each of these could vary depending on the many factors raised already, including the types or extents of the particular harms, the relief being sought, or whether the action is private or criminal. I will not pursue these complications further. It has been sufficiently shown that this line of inquiry triggers a whole new set of intricacies that possibly open a broad range of blameworthiness fractals.

IV. Conclusion

In a society that values personal autonomy, conceptions of blameworthiness play a central role. First, by grounding liability largely on blameworthy conduct, everyone’s liberty and security interests are bal-

85. Here is a substantive principle that unpacks some of the inner workings of blameworthiness: “Do not voluntarily choose (say, $B_{rc} = 0.4$) to foreseeably (say, $B_n = 0.5$) impose on another person a nonreciprocal risk of harm.”

86. Related requital standards with more detail include: “When one wrongfully harms another person through blameworthy conduct, she is to compensate that person to the extent of the [wrongful] harm and [responsibility, disrespect] blameworthiness.” The bracketed terms are possible additions to the underlying standard. It seems implausible, but possible, for one or both prongs of blameworthiness to do double duty in a substantive standard and an applicable requital.

anced by principles that establish rights and duties in ways that fairly allow a person to reasonably control her fate. The potential impacts on an actor of her possible choices and conduct are passably predictable. She is, therefore, in a position to make and pursue her considered choices. In these circumstances, society holds the actor responsible for the consequences of her conduct that invade another person's autonomy space. In such cases, we declare the actor responsibility blameworthy for harming the victim. She was neither sufficiently ignorant of the possible harm to the victim nor substantially coerced into her conduct.

Second, pursuant to the primary foundational justification for protecting personal autonomy, every person is entitled to the equal respect owed to all moral beings. By virtue of her equal moral status, everyone has the right to be respected by others and the parallel right to be treated with respect. Respectful attitude and treatment are both mandated. When this overarching dual mandate is not satisfied, the breaching party is disrespect blameworthy. We hold her liable for the dignitary and other harms that ensue.

Blameworthiness, then, comes in two forms, each form having two aspects. All four aspects of blameworthiness have scalar qualities. An actor may be more or less culpable based on four separate standards. These four aspects of blameworthiness, often tortuously interconnected, typically play two roles. First, the various aspects of blameworthiness may establish a minimum threshold for triggering a legal, moral, or social principle establishing a substantive right, such as the right not to be assaulted. Second, these four aspects of blameworthiness may also serve in differing ways as a minimum threshold or (partial) gauge for determining the appropriate requital for breach of the associated substantive right.

The intricacies in our notions of blameworthiness are further exacerbated by additional considerations. Particularly noteworthy are twists and turns within each of the four types of harms that are protected against: physical, economic, psychic, and dignitary. The extent of the substantive protections for each of these harms varies widely, as do their requitals. A greater source of intricacies stems from considerations of comparative negligence, a concept that was mentioned merely in passing. The liability of the actor is to be (partially) offset by the relative blameworthiness of the victim. Depending on the relevant substantive and requital maxims, a subtle regime may be required to gauge the blameworthiness of the victim with the same detailed attention to the four aspects of blameworthiness and types of harms that

was mainly focused above on the actor. Then the blameworthiness of the two parties must be somehow compared and balanced. There is no reason in logic alone to imply that the same weights and weighing of factors must be applied to the victim's conduct as to the actor's conduct. For one reason, the victim's conduct is typically putting herself at risk, while the actor's conduct is putting another person at risk.⁸⁷ An entirely separate dimension of complexity is thereby introduced.

Exacerbating these complexities are many other norms deeply woven into our social and political fabric. Utilitarian and, arguably, virtue principles stand out, but are not alone. Historical quirks and political tides have also left much in our narratives.⁸⁸ Some of these doubtlessly include conceptions of blameworthiness with various permutations. All of these threads generate claims for accommodation in one way or another. Hanging over all of this are enormous epistemic problems. How can we gauge the four (or more) aspects of blameworthiness, the four types of harms, or the consequences of our principles? We must often bring a machete to an operation needing a scalpel. This article elaborates on part of what awaits us in the operating room: A bloody mess.

87. Of course, depending on the circumstances, the conduct of either the victim or the actor may simultaneously put at risk the other party, herself, and third parties, as where the agent drives negligently.

88. *See generally, e.g.,* GORDLEY, *supra* note 39.