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# Autonomy

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## AUTONOMY

Gideon Parchomovsky\* and Alex Stein\*\*

Personal autonomy is a constitutive element of all rights. It confers upon a rightholder the power to decide whether, and under what circumstances, to exercise her right. Every right infringement thus invariably involves a violation of its holder's autonomy. The autonomy violation consists of the deprivation of a rightholder of a choice that was rightfully hers—the choice as to how to go about her life.

Harms resulting from the right's infringement and from the autonomy violation are often readily distinguishable, as is the case when someone uses the property of a rightholder without securing her permission or, worse, causes her bodily injury. At other times, however, the two harms overlap, as in the case when a rightholder is unlawfully barred from exercising her free speech right or is denied the right to vote.

Furthermore, the autonomy harm may sometimes exceed the physical harm sustained by the victim, as is the case in many sexual harassment incidents. At other times, however, the victim's physical harm or economic loss will outweigh the autonomy harm, as is often the case in automobile accidents.

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\*\* Justice of the Israel Supreme Court. We thank David Abrams, Shyam Balganes, Avi Bell, Stephanos Bibas, Jonathan Cardi, Eric Feldman, Jill Fisch, Allison Hoffman, Dave Hoffman, Jonah Gelbach, Leo Katz, Seth Kreimer, Kiel Brennan Marquez, Peter Siegelman, Beth Simmons, Tomer Stein, and participants in a faculty workshop at the University of Pennsylvania School of Law and at the Remedies Discussion Forum at Aix Marseilles University, France, for useful comments and suggestions. Last but not least, we are also grateful to Konstantin Tretyakov and Benjamin Weitz for outstanding research assistance.

Even though autonomy violations are omnipresent and the harm resulting from them can be severe, the law rarely recognizes a cause of action for violations of autonomy, nor does it provide redress for autonomy harms. The current legal approach to autonomy protection can best be characterized as anomalous and unprincipled. Therefore, from a normative perspective it is untenable.

In this Essay, we set out to make three novel theoretical and doctrinal contributions. First, we advance a comprehensive jurisprudential account of the relationship between rights and autonomy. Second, we show why existing law should be replaced with a legal regime that respects and protects individual autonomy in all cases. Finally, we develop a remedial framework designed to address autonomy violations.

Mindful of administrability constraints, we incorporate three limitations to ensure that our proposal does not overwhelm the court system: (a) suits for autonomy violations would only be allowed when the plaintiff has a cause of action originating from the defendant's infringement of her recognized legal right; (b) any such suit would undergo a strict *de minimis* scrutiny; and (c) no double recovery would be allowed in cases in which the plaintiff's autonomy harm is subsumed in her physical or economic loss.

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### Introduction

Every right has an autonomy component at the very heart of it. The autonomy component bestows upon the rightholder the freedom to choose whether, and under which circumstances, to assert the relevant right against duty-bearers. It also confers upon the rightholder the power to transfer the right to third parties, when such transfers are legally permitted. Stated differently, the autonomy component of rights protects the rightholder from coercive interferences by others. Isaiah Berlin famously defined autonomy as imposing a requirement that a person be “an instrument of [her]

own, not other men's acts of will."<sup>1</sup> On Berlin's view, which we employ throughout this Essay,<sup>2</sup> an individual must be the ruler of her legal right in order for the right to exist as hers, free of interference by other persons or by the government.<sup>3</sup> This feature of autonomy is embedded in its etymology that combines *autos* (self) with *nomos* (rules).<sup>4</sup>

Autonomy is not an incidental feature, or a byproduct, of rights. Quite the contrary: it is their very foundation. In his important philosophical essay, "Are There Natural Rights?," H.L.A. Hart powerfully argued that if there is one natural right shared by all men and women, it is the right of any responsible human being "to forbearance on the part of all others from the use of coercion or restraint against him."<sup>5</sup> According to Hart, the only reason to suspend this right is if one is attempting to use it to coerce, restrain or injure another person.<sup>6</sup> And, while Hart employs the language of liberties and freedom, it bears emphasis that the ultimate interest he underscores as deserving protection is choice or autonomy—the capacity of responsible agents to make decisions for themselves. Hart's analysis indicates that non-autonomous holding of rights is impossible both operationally and conceptually.

In light of the importance of autonomy, one would expect the legal system to provide effective protection to autonomy and remedy its violations. Yet, the current legal regime concerning autonomy violations is confused and internally inconsistent. Worse yet, it is fundamentally misconceived from a deontological perspective.

In the vast majority of cases, where a plaintiff can show that she suffered physical or proprietary harm as a result of her right's violation, she will be fully compensated for her losses, but will receive no remedy for the violation of her autonomy. For example, when

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<sup>1</sup> ISALAH BERLIN, *FOUR ESSAYS ON LIBERTY* 131 (1969). *See also* GERALD DWORKIN, *THE THEORY AND PRACTICE OF AUTONOMY* 13 (1988) (discussing Berlin's conception of autonomy).

<sup>2</sup> *See* in particular Section I.A. below.

<sup>3</sup> BERLIN, *supra* note 1, at 131-33.

<sup>4</sup> DWORKIN, *supra* note 1, at 12.

<sup>5</sup> H.L.A. Hart, *Are There Any Natural Rights?*, 64 *PHIL. REV.* 175, 175 (1954).

<sup>6</sup> *Id.*

Oliver uses Ann's property without her permission, or worse, causes her bodily injury, Ann will receive full compensation for her property or bodily harm. However, she will receive no compensation whatsoever for the fact that her autonomy was violated by Oliver's incursion or attack. In standard cases, harms to autonomy incidental to violations of other entitlements fall by the wayside, neglected and unobserved, even when they are substantial and cannot be brushed aside under the *de minimis* doctrine.<sup>7</sup> Yet, in a very small group of outlier cases, where the plaintiff fails to prove tangible harm, judges and juries—who ordinarily fail to see autonomy violations—award damages for harms to autonomy.<sup>8</sup> These occasional sightings of the right to autonomy typically yield nominal damages to the plaintiff, as befits trifling violations of rights. Only in rare cases will courts use these nominal awards as a platform for awarding punitive damages to the lucky plaintiff.<sup>9</sup>

In this Essay, we reexamine the relationship between autonomy and rights in order to advance a new legal approach to autonomy violations. Specifically, we seek to make three contributions to legal theory: conceptual, normative, and applicative. Conceptually, we demonstrate that every violation of a right invariably involves harm to autonomy, represented by the deprivation of choice suffered by the rightholder. Autonomy thus ought to be understood as a second-order right: the rightholder's entitlement to do with her primary, or first-order, right as she deems fit. Normatively, we take the position that substantial harms to autonomy ought to be recognized and remedied in all cases in which a duty-bearer deprives the rightholder of the power to decide whether and when to exercise her right. Based on this insight, we develop a normative claim that lawmakers should recognize autonomy violations as actionable harms in all, but *de minimis*, cases. We then devise a comprehensive remedial scheme for righting autonomy violations. Finally, we propose a way to apply our core normative recommendation by advancing a remedial mechanism that allows courts to remedy harm to autonomy without overburdening the judicial system.

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<sup>7</sup> See *infra* notes 76-79 and accompanying text.

<sup>8</sup> See *infra* Section II.C.

<sup>9</sup> See *infra* Section II.B.

The contributions this Essay makes differ from prior philosophical and legal investigations of autonomy. Prior work on autonomy has elucidated the relationship between autonomy and constitutional doctrine<sup>10</sup> and identified the role of autonomy in the design of property,<sup>11</sup> contract<sup>12</sup> and other core legal institutions.<sup>13</sup> These contributions, while no doubt important, focus on particular isolated aspects of the relationship between autonomy and law.<sup>14</sup> Specifically, they demonstrate how different legal institutions promote individual autonomy.<sup>15</sup>

<sup>10</sup> See, e.g., Richard H. Fallon, Jr., *Two Senses of Autonomy*, 46 STAN. L. REV. 875 (1994) (analyzing aspects of autonomy promoted by the constitutional right to free speech).

<sup>11</sup> See, e.g., Gregory S. Alexander, *Property's Ends: The Publicness of Private Law Values*, 99 IOWA L. REV. 1257, 1264-65 (2014); Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 345 (1996). Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1329 (1987).

<sup>12</sup> See, e.g., Robin Kar, *Contract as Empowerment*, 83 U. CHI. L. REV. 759, 806 (2016) (associating realization of individual autonomy with the goals of contract law); Nathan Oman, *Corporations and Autonomy Theories of Contract: A Critique of the New Lex Mercatoria*, 83 DENV. U. L. REV. 101, 104 (2005) (discussing autonomy-based rationales of contract law); CHARLES FRIED, *CONTRACT AS PROMISE: A THEORY OF CONTRACTUAL OBLIGATION* 2, 20-21 (1981) (stating that autonomous individuals can freely choose to impose obligations upon themselves in the form of contracts).

<sup>13</sup> See, e.g., Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 167-77 (2017) (associating individuals' right to autonomy with remedies for wrongful interference with their reproductive choices); Laura A. Rosenbury, *Friends With Benefits?*, 106 MICH. L. REV. 189, 208-09 (2007) (stating that modern family law promotes, inter alia, individual autonomy); Jana B. Singer, *The Privatization of Family Law*, 1992 WIS. L. REV. 1443, 1508 (describing "the migration from constitutional to family law of notions of individual privacy and autonomy").

<sup>14</sup> One contribution we found mentions in passing a possible argument that autonomy underlies all rights in private law, but declines to endorse that argument. See Barker, *Damages Without Loss?: Can Hohfeld Help?*, 34 OXFORD J. LEGAL STUD. 631, 639-40 (2014).

<sup>15</sup> See, e.g., Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309, 1316 (2015) ("The metagoals of consumer law include consumer decisional autonomy in the marketplace. ..."); James Edelman, *The Meaning of Loss and Enrichment*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT 211, 236 (Robert Chambers, Charles Mitchell & James Penner, eds., 2009) (rationalizing the law of unjust enrichment as protecting asset owners' autonomy); Thomas O. McGarity & Elinor P. Schroeder, *Risk-Oriented Employment Screening*, 59 TEX. L. REV. 999, 1025-26

Our goal in this Essay is more ambitious. We set out to develop a comprehensive jurisprudential account of the autonomy-law relationship by showing that autonomy is a core component of every legal right. Moreover, our account reveals that the relationship between autonomy and rights is bidirectional: autonomy is not merely a goal of legal rights but is also—and perhaps primarily—the rights’ operating engine. Finally, we translate our theoretical investigations into a set of new legal rules that respect and protect individual autonomy.

Structurally, the Essay unfolds in four parts. In Part I, we explicate the concept of autonomy as a second-order right, discuss its centrality to legal theory and demonstrate our claim that every violation of a right entails harm to autonomy. In Part II, we review the current legal approach to injuries to autonomy, expose its flaws and inconsistencies and explain why it fails to do autonomy justice. In Part III, we develop our normative claim that calls for remediation of all autonomy violations that are not *de minimis* and then explain how compensation for autonomy harms can be carried out expeditiously by the legal system. In Part IV, we raise and respond to three potential objections to our reform proposal. A short Conclusion follows.

## **I. The Place of Autonomy in Rights**

### ***A. The Concept of Autonomy***

Autonomy has two important, yet distinct, aspects: primary and secondary.<sup>16</sup> The primary, or definitional, aspect of autonomy identifies the autonomy’s point of realization. Under this conceptualization, a person is truly autonomous when she chooses how to live her life according to her will and self-determined goals.<sup>17</sup>

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(1981) (“The preservation of individual autonomy is at the heart of our state and federal employment discrimination laws.”).

<sup>16</sup> JOSEPH RAZ, *THE MORALITY OF FREEDOM* 369-72 (1986) (distinguishing between autonomy and the capacity for it).

<sup>17</sup> *Id.* at 144, 370-71.



Put differently, a person exercises her autonomy when she alone “define[s] [her] nature, give[s] meaning and coherence to [her life] and take[s] responsibility for the kind of person [she is].”<sup>18</sup> To put herself in this position, a person must use unfettered reflection in order to scrutinize her “preferences, desires and wishes” and decide whether she genuinely elects to retain them rather than substitute them with a different set of wants.<sup>19</sup> According to this definition, autonomy is an important and conceptually distinct subset of liberty.<sup>20</sup>

The definition of autonomy does not fully obtain in the real world for all persons. The extent to which a person can actually make autonomous choices crucially depends on her individual capacities and life conditions. These two factors represent the secondary, or operational, aspect of autonomy.<sup>21</sup> For example, a person cannot make autonomous choices when her mental capacity is seriously impaired or when she experiences a severe emotional breakdown.<sup>22</sup> By the same token, a person may be unable to realize her autonomous choice to become a violinist when she cannot play violin or when she must work at two jobs in order to provide for her family.<sup>23</sup>

Critically for purposes of this Essay, life conditions affecting a person’s autonomy also include her interactions with other

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<sup>18</sup> See DWORKIN, *supra* note 1, at 20.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> RAZ, *supra* note 16, at 372. See also Jeremy Waldron, *Autonomy and Perfectionism in Raz’s Morality of Freedom*, 62 S. CAL. L. REV. 1097, 1114-22 (1989) (analyzing and criticizing Raz’s account of autonomy).

<sup>22</sup> RAZ, *supra* note 16, at 372-73 (“If a person is to be maker or author of his own life then he must have the mental ability to form intentions of a sufficiently complex kind, and plan their execution. These include minimum rationality, the ability to comprehend the means required to realize his goals, the mental faculties necessary to plan actions, etc.”). See also Robert R. Roca, *Determining Decisional Capacity: A Medical Perspective*, 62 FORDHAM L. REV. 1177, 1196 (1994) (stating that “serious psychiatric symptoms” compromise the person’s “capacity for autonomous choice”).

<sup>23</sup> See, e.g., Wendy A. Bach, *Flourishing Rights*, 113 MICH. L. REV. 1061, 1071 (2015) (detailing how poverty undermines individual autonomy).

individuals.<sup>24</sup> These interactions are indispensable for any person striving to live a safe, healthy, meaningful and prosperous life and to maintain satisfying relationships with other people.<sup>25</sup> Many of these interactions involve mutual commitments and undertakings that find their expression in people's private orderings—for example, in contracts, deeds, and articles of association—and in general laws. By engaging in such interactions, a person changes the scope of her autonomy and the scope of the autonomy of the individuals with whom she interacts. Some of those changes expand the person's autonomy while others limit it. The rights and duties of a person thus reveal how autonomous she is in her relations with other people. An acquisition of a right enhances its holder's autonomy. Conversely, any addition of duties makes their bearer less autonomous.

This interconnection between rights, duties and autonomy is unsurprising. Legal rights make their holder more autonomous by allowing her, at a minimum, to choose between realizing and not realizing the right. For example, a property owner may choose to exercise her right to exclude others from her property in order to secure her exclusive enjoyment of the property or for any other reason.<sup>26</sup> Alternatively, she may elect to allow other people to come to her property. Reasons supporting this choice may include the owner's self-gratifying generosity or desire to form good social and business relations with her visitors. Similar options are also open to the holders of inalienable entitlements, ones that cannot be sold or otherwise transferred to other people.<sup>27</sup> For example, holders of the inalienable right to vote in a presidential election are allowed to choose whether to realize this right or do something else on Election

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<sup>24</sup> See Jennifer Nedelsky, *Reconceiving Autonomy: Sources, Thoughts and Possibilities*, 1 YALE J.L. & FEMINISM 7, 8 (1989).

<sup>25</sup> *Id.* at 30.

<sup>26</sup> See, e.g., *Jacque v. Steenberg Homes*, 563 N.W.2d 154, 157 (Wis. 1997) (owners exercised the right to exclude because of fear of compromising their ownership pursuant to the rule of adverse possession).

<sup>27</sup> See Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849 (1987) (analyzing inalienability and connecting it to personhood); Lee Anne Fennell, *Adjusting Alienability*, 122 HARV. L. REV. 1403 (2009) (examining inalienability rules).

Day. Rights unaccompanied by their holders' autonomous power to make this choice cannot be properly categorized as rights.<sup>28</sup>

Duties are the correlatives of rights.<sup>29</sup> Any duty enforceable by law therefore necessarily limits its bearer's autonomy. For example, when Joan chooses to exercise her right to free speech,<sup>30</sup> the government has a duty<sup>31</sup> not to interfere.<sup>32</sup> Similarly, when Paula selects to exercise her contractual right to have David repay the loan she gave him,<sup>33</sup> David becomes obligated to pay her the requisite amount. Under both scenarios, the duty bearer's autonomy becomes more limited. The government may want to prevent Joan from speaking or even punish her for what she said, but, instead, it must tolerate her speech. Similarly, David must use the money in his bank account to repay the loan he received from Joan even though he would rather buy himself a new car.

### ***B. Autonomy as a Component of Rights***

The straightforward correlation between autonomy and rights does not fully reveal the relationship between the two. Autonomy is not just a consequence of right-holding; it is also a constitutive component of every right. Autonomy is, therefore, best understood as a second-order right: an individual's basic entitlement to choose whether, when and how to realize her first-order rights and to have those choices protected against unwelcome interferences by other people.<sup>34</sup>

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<sup>28</sup> Because compulsory rights are intertwined with a duty enforceable by law, they are best understood as imposing a caregiving or paternalistic obligation on the bearer of the duty.

<sup>29</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913).

<sup>30</sup> Under Hohfeld's taxonomy, this right is categorized as a "privilege." See *id.*

<sup>31</sup> In Hohfeldian terms, this duty constitutes "no right." *Id.* at 32-33.

<sup>32</sup> *Id.* at 35.

<sup>33</sup> Here, Paula would invoke a claim-right in Hohfeldian terms. See *id.* at 30.

<sup>34</sup> For a similar idea, see ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 171 (1974) (observing that a central core of a person's right in X is "the right to determine what shall be done with X").

The view we endorse is illustrated by the Connecticut Supreme Court's decision in *Brett v. Cooney*.<sup>35</sup> The case involved an attorney who purchased the plaintiffs' house at a fair and agreed-upon price, representing to the plaintiffs that he was buying the house for his law-firm partner.<sup>36</sup> In reality, the attorney bought the house for the defendants, whom the plaintiffs considered "undesirable and objectionable as tenants or purchasers."<sup>37</sup> The plaintiffs were unquestionably defrauded,<sup>38</sup> but they suffered no pecuniary losses from the sale of the house, as the court expressly acknowledged.<sup>39</sup> The court nonetheless decided that the plaintiffs are entitled to void the conveyance they made for the following reasons:

The plaintiffs had the right to dispose of their house to whom they would. The defendants fraudulently combined to deprive them of this right, and equity will not suffer them to retain the fruits of their deceitful trickery.<sup>40</sup>

An interesting and potentially more critical question that arises in connection with this case is whether the court should also have remedied the wrong done to the plaintiffs had their house been resold to a bona fide purchaser prior to the proceeding. Under this scenario, the plaintiffs would not have been entitled to equitable annulment of the conveyance<sup>41</sup> and could only ask for compensatory relief.<sup>42</sup> To obtain such relief, they would have had to prove their damage. Because the plaintiffs showed unequivocal resolve to sell their house for the amount they received from the defendants' clandestine agent, their first-order right as owners of the house remained intact. The deprivation they suffered only affected their second-order entitlement to make an autonomous decision about selling or not selling the house.

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<sup>35</sup> *Brett et al. v. Cooney et al.*, 53 A. 729 (Conn. 1902).

<sup>36</sup> *Id.* at 730.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 730-31.

<sup>40</sup> *Id.* (emphasis added and citation omitted).

<sup>41</sup> See DAN B. DOBBS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION (2d ed., 1993) § 4.7(1) at 451 (attesting that bona fide purchasers acquire prevailing legal title).

<sup>42</sup> The question of how to assess compensation for harms to autonomy is an intricate one. We address it head on in Part III, *infra*.

Harm to autonomy consists of the nullification of the person's will as a free human being. In the case at bar, the Bretts were unwilling to sell their house to the Cooneys, but the Conneys and their clandestine agent overrode this decision by fraud.<sup>43</sup> This nullification of the Bretts' will violated their autonomy: it made them chessmen in the clandestine game played by the unwanted buyers of their house. The resulting harm to the Bretts' autonomy was unquestionably serious and warranted compensation.

Autonomy's role as, what we call, a second-order right is fundamental. Yet, it has not received the attention it deserves from scholars and judges. In what follows, we address this omission by explicating the nature of the harm to an individual's autonomy that results from an infringement of her first-order right.

In *Brett v. Cooney*,<sup>44</sup> the rightholders' autonomy was violated by fraud. Fraud, however, is not the only means by which a person's autonomy can be violated. Autonomy can also be violated by force or compulsion. Consider the textbook property case of *Jacque v. Steenberg Homes*<sup>45</sup> that featured an intentional violation of the right of property owners to exclude others from their property. In that case, a mobile-home company plowed a path through the plaintiffs' field to shorten the delivery of a mobile home to a customer.<sup>46</sup> Prior to committing this intentional trespass, the company's crew asked for the plaintiffs' permission to cross the field, but the plaintiffs' refused to grant that permission.<sup>47</sup> The company's manager then told his team to "get the home in there any way you can"<sup>48</sup> and the team followed that order.<sup>49</sup> Based on these facts, the Wisconsin Supreme Court overturned the appellate court's decision to vacate the punitive damage award granted to the plaintiffs by the trial court

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<sup>43</sup> *Brett*, 53 A. at 730-31.

<sup>44</sup> *Id.*

<sup>45</sup> *Jacque v. Steenberg Homes*, 563 N.W.2d 154 (Wis. 1997).

<sup>46</sup> *Id.* at 163-66.

<sup>47</sup> *Id.* at 157.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

and obligated the company to pay the plaintiffs \$100,000 in punitive damages.<sup>50</sup>

Commentators justified this decision based on deterrence theory, suggesting that in order to discourage intentional transgressions on property rights it was necessary to award punitive damages in this case.<sup>51</sup> A different justification, proffered by Professor Keith Hylton, focused on the psychological harm to the plaintiffs, who previously lost part of their property to an adverse possession claim.<sup>52</sup> Our autonomy-focused account suggests a very different perspective on the case. The plaintiffs saw their autonomy sacrificed: they were enlisted against their will to promote the defendant's business.<sup>53</sup> Instead of honoring the plaintiffs' right to rule their property, the defendant made itself a temporary ruler of that property.<sup>54</sup> Although

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<sup>50</sup> *Id.* at 160-61, 164.

<sup>51</sup> *See, e.g.,* Alexandra B. Klass, *Punitive Damages and Valuing Harm*, 92 MINN. L. REV. 83, 87 (2007) ("Courts reason that, because compensatory damages in these cases are often nominal or very small, higher ratios are needed to deter and punish reprehensible conduct that results in harm to the plaintiff beyond any monetary loss.").

<sup>52</sup> *See* Keith N. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 445 & n.78 (1998).

<sup>53</sup> *See* ARTHUR RIPSTEIN, *FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY* 81-83 (2009), who makes the same argument as a justification for forcing autonomy violators to disgorge their profits to the victim. Specifically, he writes that "if I manage to enlist you in support of my projects without your consent, I must surrender to you any gains I make as a result. I must do so because the use I made of your right to set your own ends must be treated as an embodiment of your freedom, and so given back to you." *Id.* at 82-83.

<sup>54</sup> Forced use of another person's property that causes the owner no tangible harm has a historic illustration in English law: *Watson Laidlaw & Co. Ltd. v. Pott Cassels & Williamson (A Firm)*, 1914 S.C. 18 (H.L.). This case features the following statement by Lord Shaw:

For wherever an abstraction or invasion of property has occurred, then, unless such abstraction or invasion were to be sanctioned by law, the law ought to yield a recompense under the category or principle, as I say, either of price or of hire. If A, being a liveryman, keeps his horse standing idle in the stable, and B, against his wish or without his knowledge, rides or drives it out, it is no answer to A for B to say: "Against what loss do you want to be restored? I restore the horse. There is no loss. The

it did so for a short period of time, the plaintiffs' experience of being disempowered and dominated by the defendant amounted to a serious and irreversible harm that called for compensatory relief.<sup>55</sup> The difficulties in meting out the right amount of compensation did not make that call weaker.<sup>56</sup>

Autonomy can also be violated by accident. Consider an actor who negligently causes fire that destroys another person's building. The wrongdoer in this example inflicts two distinct harms on the property owner: the destruction of her building and the obliteration of her second-order right to use the building according to her autonomous vision.<sup>57</sup> The first type of harm consists of the unrealized rental value of the building and the cost of its restoration.<sup>58</sup> This sum, however, does not compensate the rightholder for the harm to her autonomy. As in our previous examples, this additional harm manifests itself in the rightholder's disempowerment: her lost ability to make and carry out meaningful choices with regard to her property. Prior to the building's

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horse is none the worse; it is the better for the exercise. *Id.* at 32.

This statement has recently been rationalized as a rightholder's entitlement to recover compensation for the loss of his Hohfeldian "power" to insist on his right and stop the right's infringement. See Barker, *supra* note 14, at 647-52. This rationalization interprets Hohfeldian "power" too broadly. Under Hohfeld's account, legal power represents its holder's ability to effect a change in the underlying legal relations. Hohfeld, *supra* note 29, at 44-45.

<sup>55</sup> Note that a property owner's right against trespass allows for emergency trespassing that aims to rescue people, animals and chattels. Under this exception, the trespasser must pay the owner the market price for the occupation of the owner's property. See Gideon Parchomovsky & Alex Stein, *Reconceptualizing Trespass*, 103 NW. U. L. REV. 1823, 1850-52 (2009), and sources cited therein.

<sup>56</sup> We address these difficulties below in Part III.

<sup>57</sup> Cf. Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1727-31, 1755--56 (2004) (defending a decentralized property system that supports owners' idiosyncratic uses); Zohar Goshen & Assaf Hamdani, *Corporate Control and Idiosyncratic Vision*, 125 YALE L.J. 560, 565 (2016) (rationalizing entrepreneurs' motivation to buy controlling stock in a corporation by their desire "to pursue business strategies that they believe will produce above-market returns by securing the ability to implement their vision in the manner they see fit.").

<sup>58</sup> See DOBBS, *supra* note 41, § 5.2 at 500-01, § 5.15 at 562 (describing repair-based and rent-based compensation as a remedy for asset destruction).

destruction, the rightholder's control over her destiny was more effectual than after that accident. The wrongdoer therefore should be obligated to compensate the rightholder for the erosion of her autonomy, in addition to paying her for her economic damage.

Although our account is decidedly non-utilitarian, we believe that our core claim is equally persuasive from an economic standpoint. From the perspective of economic efficiency, autonomy confers a valuable option upon a rightholder that allows her to decide whether and when to exercise her right. According to economic theory, options are important assets that are valuable by virtue of their very existence.<sup>59</sup> As such, they are bought and sold on markets and are a standard feature in contractual arrangements. Naturally, when an option holder is unlawfully deprived of the decision-making power, represented by the option, she suffers a loss. The loss can be large or small, depending on the particular circumstances and the nature of the option, but irrespectively of the magnitude of the loss, in principle, compensation ought to be paid to the option holder.

This economic insight escaped the attention of the California Supreme Court when it decided the landmark case *Moore v. Regents of University of California*.<sup>60</sup> This case involved a leukemia patient whose treatment required the removal of his spleen and withdrawals of blood, bone marrow aspirate and other bodily substances.<sup>61</sup> Unbeknownst to the patient, his doctors used these biomaterials for research.<sup>62</sup> As part of that research, they developed and patented a cell-line from the patient's T-lymphocytes.<sup>63</sup> The California Supreme Court held that the doctors' duty to obtain the patient's informed consent to the treatment obligated them to tell the patient about their research and economic interests in his cells and that their failure to do so vitiated his consent to the treatment.<sup>64</sup> The Court, however, affirmed the demurrer of the patient's suit for

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<sup>59</sup> See IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS 2* (2005).

<sup>60</sup> *Moore v. Regents of Univ. Cal.*, 793 P.2d 479 (Cal. 1990), cert. denied 499 U.S. 936 (1991).

<sup>61</sup> *Id.* at 481.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 481-82.

<sup>64</sup> *Id.* at 483-86.



conversion that included a plea to recognize his proprietary interest in the biotechnological products that the doctors might create from his cells or the patented cell-line.<sup>65</sup> The Court decided that human cells cannot be a subject of ownership both conceptually and for policy reasons.<sup>66</sup> The Court also ruled that the patient's ownership claim was doomed to fail anyway because the cell-line patented by the defendants "was both factually and legally distinct from the cells taken from [his] body."<sup>67</sup>

This decision glossed over the fact that the patient's entitlement to prevent the doctors' use of his biomaterials had an option value. The patient may not have owned these materials under the "title" and "possession" criteria, but he was entitled to veto their use by other people.<sup>68</sup> This entitlement and its option value were part and parcel of the patient's right to make autonomous decisions about his body.<sup>69</sup> As such, it incorporated the patient's prerogative to demand remuneration for allowing others to use his biomaterials for research and commercial purposes. The violations perpetrated by the doctors affected primarily this entitlement: its effect on the patient's right to be informed about the treatment he received from the doctors was marginal and relatively insignificant. Because the patient and his attorneys made no complaints about that treatment, it was safe to assume that it was adequate, if not more than adequate, from a medical standpoint. The patient's harm from the informed-consent violation therefore was purely dignitary. As such, it entitled the patient to recover only a modest amount in compensation.<sup>70</sup> This

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<sup>65</sup> *Id.* at 487-92.

<sup>66</sup> Conceptually, the Court explained that people neither possess nor have a title in their cells and that cells consequently cannot be converted. *Id.* at 488-89. Policy-wise, the Court reasoned that requiring scientists to investigate the consensual pedigree of human cells "would affect medical research of importance to all of society" and involve "policy concerns far removed from the traditional, two-party ownership disputes in which the law of conversion arose." *Id.* at 487.

<sup>67</sup> *Id.* at 492.

<sup>68</sup> *See, e.g.,* Schloendorff v. Society of New York Hosp., 211 N.Y. 125, 129 (N.Y. 1914) (Cardozo, J.) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body...").

<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.,* Lugenbuhl v. Dowling, 701 So. 2d 447, 455-56 (La. 1997) (allowing \$5000 in dignitary damages for "deprivation of self-determination" and

amount falls way below the sum that the patient could demand—and potentially receive—for allowing his doctors and the institutions that employed them—to use his biomaterials for research and commercial purposes. The Court’s categorization of the patient’s infringed entitlement as a right to informed consent, rather than as an autonomous choice to sell the permission to use his biomaterials, therefore clearly shortchanged Moore.<sup>71</sup>

These observations are not merely theoretical. A recent experimental study, carried out by Sebastian Bobadilla-Suarez, Cass Sunstein and Tali Sharot, confirms that people strongly value their autonomy and are willing to pay for it.<sup>72</sup> Participants in the study were given a task and offered a monetary reward for successfully performing it. They were also given an option to delegate the task to an expert. The results were striking: participants overwhelmingly preferred to retain control over their tasks, instead of allowing the expert to perform the task on their behalf.<sup>73</sup> Critically, most participants did not change that preference when delegating the task to the expert promised them a higher reward.<sup>74</sup> Instead, they paid the “control premium” in order to act as free agents.<sup>75</sup>

## II. Positive Law

The current stand of the law on harms to autonomy is, at best, unprincipled, and, at worst, anomalous. The legal landscape, insofar as harms to autonomy are concerned, has been largely shaped by the *injuria absque damnum* doctrine that denies redress to victims of wrongdoing who sustained no tangible damage, physical or proprietary. By focusing exclusively on tangible damages and

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surveying precedents upholding modest amounts of compensation for dignitary harm).

<sup>71</sup> Cf. Joanne Belisle, Note, *Recognizing a Quasi-Property Right in Biomaterials*, 3 U.C. IRVINE L. REV. 767 (2013) (alluding to personal autonomy to justify an individual’s quasi-property right in her cells and other biomaterials).

<sup>72</sup> Sebastian Bobadilla-Suarez, Cass R. Sunstein & Tali Sharot, *The Intrinsic Value of Choice: The Propensity to Under-Delegate in the Face of Potential Gains and Losses*, 2017 J. RISK & UNCERTAINTY 1, <https://doi.org/10.1007/s11166-017-9259-x>.

<sup>73</sup> *Id.* at 9-10.

<sup>74</sup> *Id.*

<sup>75</sup> *Id.* at 11.

ignoring other types of harm, the *injuria absque damnum* doctrine has led to the virtual effacement of autonomy harms, rendering them, by and large, a legal nullity.

Over time, though, the no-compensation rule has been riddled with sporadic exceptions in a myriad of legal contexts—primarily medical malpractice and constitutional law—that entitled victims to compensation for violation of their rights, even without tangible harm. Astoundingly, even in those cases, courts have not referred to the victims’ autonomy interest when recognizing their right to redress.<sup>76</sup> Rather, courts chose to invoke questionable legal constructs, such as “presumed harm”<sup>77</sup> or to grant nominal damages to victims and then supplement the award with punitive damages.<sup>78</sup> In addition, at times, courts based victims’ right to redress on the theory of dignitary harms.<sup>79</sup>

As we show, the legal tools courts employ to provide remedy to victims of wrongful acts that resulted in no tangible harms created a baffling array of doctrines that lack a coherent basis. More importantly, we demonstrate that focusing on the victims’ autonomy provides a superior way to do justice to wronged rightsholders.<sup>80</sup>

### **A. *Injuria Absque Damnum***

Among the many shortfalls of extant law, the doctrine of *injuria absque damnum* (or *injuria sine damno*) stands out as most salient.<sup>81</sup>

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<sup>76</sup> See *infra* Sections II.B. and II.C.

<sup>77</sup> See *infra* Section II.B.

<sup>78</sup> See *infra* Section II.C.

<sup>79</sup> See *infra* note 105 and materials cited therein.

<sup>80</sup> Tacit recognition of autonomy losses can also explain the rule not allowing wrongdoers to deduct their victims’ unwanted benefits from the compensation they must pay the victims. For example, when a wrongdoing that injures the victim forces her to change her job into a more profitable one, the wrongdoer cannot deduct the victim’s additional income from the medical expenses, pain and suffering and loss of enjoyment of life, for which he must compensate the victim. The extra leisure time “gained” by the victim is not deductible either. Cf. Ariel Porat & Eric Posner, *Offsetting Benefits*, 100 VA. L. REV. 1165, 1187-88 (2014).

<sup>81</sup> See *Pennsylvania R. Co. v. Int. Coal Mining Co.*, 230 U.S. 184, 246 (1913) (Pitney, J., dissenting) (“The result is, the legal paradox: *Injuria sine damno*.”)

This doctrine recognizes harmless, and hence nonactionable, violations of rights as a real possibility.<sup>82</sup> Correspondingly, it holds that a right's violation does not by itself entitle the victim to recover redress: the victim also needs to show that the violation caused her cognizable harm.<sup>83</sup> Courts apply this doctrine in a variety of contexts to deny remedy,<sup>84</sup> and even standing,<sup>85</sup> to any plaintiff who fails to demonstrate that the defendant's transgression made her worse off economically or materially.<sup>86</sup>

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The plaintiff is wronged, but not harmed; it may sue, but may not recover"). For an illuminating historical and critical discussion of the "injury in fact" requirement for having a cause of action, see F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275 (2008).

<sup>82</sup> See, e.g., *Crawford v. Davis*, 134 S.E. 247, 252 (S.C. 1926) (holding that the "Injuria Sine Damno" principle is among the fundamentals of liability and that a plaintiff needs to show damage to have a cause of action against the violator of his entitlement).

<sup>83</sup> See, e.g., cases cited above in notes 81-82; *Brown Oil Tools, Inc. v. Schmidt*, 148 So.2d 685, 687-88 (Miss. 1963) ("If the negligent act or omission has resulted in no injury or loss to anyone, it is merely injuria sine damno, although it involved violation of a statute or ordinance." (citing *Phillips v. Delta Motor Lines, Inc. et al.*, 108 So.2d 409, 415 (Miss. 1959))); *Uppinghouse v. Mundel*, 2 N.E. 719, 722 (Ind. 1885) ("[W]here an unauthorized act results in [no, sic.] detriment or loss to another, if it is not a damage in contemplation of law, it is injuria sine damno. Conceding, therefore, that by the transaction complained of the appellant was compelled to pay a debt which, by reason of our exemption laws, could not then have been collected from him in this state, and that, under the circumstances and in consequence, much annoyance and inconvenience were inflicted upon him in his business, no injury, in contemplation of law, resulted to him from the transfer of the debt in question."). For a general discussion of this principle, as related to standing, see Hessick, *supra* note 81, at 289-305.

<sup>84</sup> See *supra* notes 81-83 and cases cited therein.

<sup>85</sup> Hessick, *supra* note 81, at 306-315.

<sup>86</sup> During the course of history, this doctrine had its challengers. See *Ashby v. White*, 1 Eng. Rep. 417, 2 Ld. Raym. 938, 955 (1703) (H.L.) ("It is impossible to imagine any such thing, as injuria sine damno. Every injury imports damage in the nature of it."); *Mayor of London v. Mayor of Lynn*, 126 Eng. Rep. 1026, 1041 (1796) (H.L.) ("[T]he inference seems unavoidable that damages actually sustained could not be of the essence of the action, and that the right alone was essential."); *Embrey v. Owen*, 155 Eng. Rep. 579, 585 (1851) (Exch.) ("Actual perceptible damage is not indispensable as the foundation of an action; it is sufficient to shew the violation of a right, in which case the law will presume damage; injuria sine damno is actionable...."). For an insightful analysis of this important challenge and its implications for the American system of remedies, see John C.P. Goldberg, *The Constitutional Status*

This doctrine is flawed when applied to rights. For any right that promotes its holder's interest, "harmless transgression" is a contradiction in terms.<sup>87</sup> As we explained in Part I, every rightholder has a second-order entitlement to do with her right as she pleases. A right's violation always denies the rightholder that entitlement and reduces her autonomy. For that reason, it can never be harmless.<sup>88</sup> Consider the following case: After contracting with Bob to sell him her property at an agreed-upon price, Susan sells the property to Andy—an unsuspecting bona fide purchaser who sees the value of the property plummet one month later on account of a real estate bubble that burst. In this case, Susan's breach of contract causes Bob no economic harm. Yet, it violates Bob's autonomy by annulling his rightful decision to buy the property. Reasons motivating that decision lie within the scope of Bob's autonomy and are not part of Susan's legal dominion. Susan has no right to decide for Bob whether he should or should not buy her property, but this is exactly what she did when she breached the contract. Under extant law, nonetheless, the court will not obligate Susan to compensate Bob for the harm to his autonomy.<sup>89</sup>

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*of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 548-49 (2005).

<sup>87</sup> The right not to be harmed by another person's negligence—the cornerstone of our accident law—was designed not to accrue in the absence of harm. Under this design, negligent conduct that causes a prospective victim no harm does not infringe any vested entitlement and thus does not amount to a transgression. See W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 1 at 4 (5th ed. 1984) (hereinafter: PROSSER & KEETON) (“a wrong is called a tort only if the harm which has resulted, or is about to result from it, is capable of being compensated in an action at law for damages...”).

<sup>88</sup> Barker, *supra* note 14, at 639-40, acknowledges that forced use of another person's property can be conceptualized as a violation of that person's autonomy. According to him, however, “If loss of autonomy were itself an actionable head of damage in private law, it would be hard to avoid sliding to the conclusion that every rights infringement should give rise to a license fee damages award.” *Id.* at 640 (emphasis in original). This argument skips over the core characteristic of autonomy as incorporating every rightholder's second-order entitlement to do with her right as she pleases. Under this understanding of autonomy, law indeed should provide remedy for every nontrivial infringement of a right.

<sup>89</sup> See DOBBS, *supra* note 41, § 12.4.(2) at 777 (observing in connection with the breach-of-contract remedies that “The causation in fact requirement

This hypothetical scenario stands in a stark contrast with the New Jersey Supreme Court's "informed consent" decision, *Matthies v. Mastromonaco*.<sup>90</sup> Comparison between those two cases unveils yet another problem with the *injuria absque damnum* doctrine: the problem of horizontal inequity. Courts applying this doctrine grant remedies for autonomy violations in some cases while refusing to grant those remedies in other cases that are equally strong. In *Matthies*, an orthopedic surgeon prescribed bed rest to an elderly patient suffering from severe backaches, without discussing with her the possibility of having a back surgery.<sup>91</sup> The surgeon thought that such discussion was unnecessary because the patient had porous bones that could not hold orthopedic screws.<sup>92</sup> New Jersey's informed consent law derives doctors' disclosure obligations from a reasonable patient's expectations—a broad standard that obligates doctors to inform patients about all available treatments, including those that the medical profession does not recommend.<sup>93</sup> Based on that standard, the New Jersey Supreme Court ruled that the patient had a viable suit against the surgeon for violation of her "informed consent" right.<sup>94</sup> The negative value of the foregone surgery option, which involved a potential collapse of the patient's bone structure and the resulting threat to the patient's life, did not prevent the court from issuing this ruling.<sup>95</sup> According to the court, the choice between the risky surgery option and the bed rest that confined the patient to her home and made her dependent on help belonged to the patient rather than the doctor.<sup>96</sup>

By making the harm to the patient's autonomy actionable despite the total absence of any economic damage, the court opened up the possibility for the patient to recover compensation for her noneconomic harm. This possibility has been recognized by a

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prevents the plaintiff's recovery for any losses not proven to have occurred at all....").

<sup>90</sup> *Matthies v. Mastromonaco*, 733 A.2d 456 (N.J. 1999).

<sup>91</sup> *Id.* at 458.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 462.

<sup>94</sup> *Id.* at 464.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.*

number of courts that interpreted the patient's right to informed consent as part of her broader entitlement to self-determination,<sup>97</sup> in tune with the seminal precedent, *Canterbury v. Spence*.<sup>98</sup> This legal development<sup>99</sup> has removed harms to medical patients' autonomy from the "injuria absque damnum" category. As a result, patients like Mrs. Matthies are often able to recover compensation for their autonomy losses under the doctrine of lack of informed consent, while other rightsholders whose rights are violated cannot get their day in court, let alone receive a remedy. Our examples of Bob, the property buyer, and Mrs. Matthies, the ailing patient, may be different in degree, but are not different in kind from a rights, or autonomy, perspective. Both of them involve wrongfully inflicted harm to a person's autonomy. Hence, if Mrs. Matthies deserves to recover compensation for her autonomy loss, denying a similar remedy to Bob will be manifestly inequitable.

The "injuria absque damnum" doctrine originates in the law of torts.<sup>100</sup> Under our torts system, when Angela takes a negligent

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<sup>97</sup> See, e.g., *Lugenbuhl v. Dowling*, 96-1757, p. 15 (La. 10/10/97); 701 So. 2d 447, 455 (allowing dignitary damages for "deprivation of self-determination" and "insult to personal integrity").

<sup>98</sup> *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972) (holding that a doctor must present his patient with all possible alternatives that a reasonable person would consider when deciding on their medical treatment). See also *Howard v. University of Medicine and Dentistry of New Jersey*, 800 A.2d 73, 78 (N.J. 2002) (relying on *Canterbury v. Spence* to affirm a "patient-centered view of informed consent [that] stresses the patient's right to self-determination").

<sup>99</sup> This development can be traced back to Justice Cardozo's seminal decision in *Schloendorff v. Society of New York Hosp.*, 105 N.E. 92, 93 (N.Y. 1914) ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body; and a surgeon who performs an operation without his patient's consent commits an assault for which he is liable in damages."). For full doctrinal layout of the autonomy-driven doctrine of informed consent, see Katherine Shaw & Alex Stein, *Abortion, Informed Consent, and Regulatory Spillover*, 92 IND. L.J. 1, 10-19, 29-31 (2016).

<sup>100</sup> See, e.g., *McVickers v. Chesapeake & O. Ry.*, 194 F.Supp. 848, 849 (E.D. Mich. 1961) ("It is basic tort law that wrong without damage does not constitute a good cause of action."); *Fields v. Napa Milling Co.*, 330 P.2d 459, 462 (Cal.App. 1958) (reviewing and explaining the traditional tort doctrines of "injuria absque damno" and "damnum absque injuria" as standing for the proposition that "a wrong without damage does not constitute a cause of action for damages any more than damage without wrong does not ordinarily

action that puts Victor's person or property in danger, but ultimately causes Victor no cognizable damage, as well as no emotional harm such as fear, shock or anxiety, she owes no duty to Victor to compensate him.<sup>101</sup> In this and similar cases, the victim's good luck inures to the benefit of the wrongdoer.<sup>102</sup> Critically, though, this rule only applies to accidental endangerments, as opposed to intentional and malicious torts.<sup>103</sup> Wrongdoers acting intentionally or maliciously against another person are generally held liable to pay their victims dignitary and other noneconomic damages, and punitive damages as well.<sup>104</sup> These remedies are intended to provide adequate compensation to victims for their autonomy losses.<sup>105</sup>

Application of the "injuria absque damnum" doctrine to accidental torts is perfectly justified. When a negligent action causes the prospective victim no physical injury, emotional harm or

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constitute a cause of action."); *Brown Oil Tools, Inc. v. Schmidt*, 148 So.2d 685, 687-88 (Miss. 1963) (stating the same principle).

<sup>101</sup> See *supra* notes 82, 83, 100 and cases cited therein.

<sup>102</sup> *Id.*

<sup>103</sup> See PROSSER & KEETON, *supra* note 87, § 8 at 37 (observing that in intentional tort cases "[m]ore liberal rules are applied as to the consequences for which the defendant will be held liable" and that courts tend to allow plaintiffs to recover compensation without presence of a tangible harm). See also David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 376 (1994) ("When an actor intentionally violates the rights of another person, the actor "steals" the victim's autonomy, reflecting an assertion that the thief is more worthy than the victim. If such thefts of autonomy were not subjected to penalties in addition to the restoration of the stolen goods (compensatory damages), the rectification of the transaction would be incomplete. This is because such theft transactions contain two distinct components: (1) the transfer of goods from the victim to the thief and (2) the deliberately wrongful nature of the transfer in violation of the plaintiff's vested rights—the illicit transfer of freedom from the victim to the thief.").

<sup>104</sup> See DOBBS, *supra* note 41, § 3.11(1) at 312. See also *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996) (setting up constitutional criteria for imposing punitive damages, including reprehensibility of the wrongdoer's conduct); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (reaffirming and applying the *Gore* guideposts).

<sup>105</sup> See Margaret A. Berger & Aaron D. Twerski, *Uncertainty and Informed Choice: Unmasking Daubert*, 104 MICH. L. REV. 257, 282-83 (2005) (identifying dignitary and emotional-distress damages among available reliefs for choice deprivation); see generally DOBBS, *supra* note 41, § 7.3(2) at 635 (specifying when dignitary damages are awarded).



proprietary deprivation, it also inflicts no damage on the victim's autonomy.<sup>106</sup> The reason is obvious. A would-be victim of a non-materialized accident experiences no forced restrictions on her decisions and actions. She moves along with her plans without facing any restraint or compulsion attributable to the negligent actor. Her will encounters no unlawful interference by another person. No one enlists her to promote his plans.

With property, contracts and other transactional areas of private law things are different. Contracts induce one party to rely on another party's undertakings and modify her plans and actions in accordance with that reliance.<sup>107</sup> Breach of contract thus always harms the innocent party's autonomy—a harm that does not depend on whether that party suffers economic damage as well.<sup>108</sup> Consequently, there is no good reason for expanding the “injury absque damnum” doctrine from accidents to transactional law. Unfortunately, a number of courts did exactly this, thus entrenching the flawed concept of “harmless transgression.”<sup>109</sup>

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<sup>106</sup> Here, the no-compensation rule also serves an economic purpose by helping the system to identify the most efficient enforcer of the applicable safety standard. See Alex Stein, *Of Two Wrongs that Make a Right: Two Paradoxes of the Evidence Law and Their Combined Economic Justification*, 79 TEX. L. REV. 1199, 1219-20 (2001) (explaining that tort victims are best positioned to enforce safety standards because they have superior information and motivation to sue); Steven Shavell, *A Fundamental Enforcement Cost Advantage of the Negligence Rule over Regulation*, 42 J. LEGAL STUD. 275, 278-85 (2013) (showing that liability triggered by harm brings about substantial savings in the law enforcement effort relative to ex ante regulation of accident risks).

<sup>107</sup> See Kar, *supra* note 12, at 761 (unfolding a descriptive account of contract law as aiming “to empower people to use promises as tools to influence one another's actions and thereby to meet a broad range of human needs and interests.”).

<sup>108</sup> See DORI KIMEL, FROM PROMISE TO CONTRACT: TOWARDS A LIBERAL THEORY OF CONTRACT 133 (2005).

<sup>109</sup> See, e.g., *Bediako Am. Honda Fin. Corp.*, 850 F. Supp. 2d 574 (D. Md. 2012), *aff'd*, 537 F. App'x 183 (4th Cir. 2013) (applying the doctrine of injury absque damnum to deny damages in a credit case); *Hamilton Watch Co. v. Benrus Watch Co.*, 114 F. Supp. 307 (D.Conn.), *aff'd* 206 F.2d 738 (2d Cir. 1953) (applying the doctrine of injury sine damno to an antitrust violation); *Kane v. Nomad Mobile Homes, Inc.*, 228 N.E.2d 207, 208 (Ill.App. 1st Dist. 1967) (ruling in a breach of contract dispute that since “there were no damages in the claim of plaintiff ... the court should have entered a judgment against plaintiff under the doctrine of injury sine damno.”).

### ***B. Nominal and Punitive Damages***

One technique courts use to mollify the harsh result of the *injuria absque damnum* doctrine is to award nominal damages for rights violations and then supplement the award with punitive damages. This option allows courts to use even very minimal pecuniary or property losses as a basis for granting remedy to rightsholders and then use it as a launching pad for punitive damages. The celebrated property case, *Jacque v. Steenberg Home*,<sup>110</sup> in which the Wisconsin Supreme Court upheld the imposition of substantial punitive damages, in combination with nominal damages of \$1, as a compensation for forcible trespass, is one such example.<sup>111</sup> A more recent example is the 2011 decision of the United States District Court for the District of Columbia in *Feld v. Feld* that also dealt with intentional trespass.<sup>112</sup> The court applied the District of Columbia rule that denies courts the power to impose punitive damages “unless there is a basis in evidence for actual damages, even if only nominal in amount.”<sup>113</sup> Based on this rule and on the summary of the general law in the Restatement of Torts,<sup>114</sup> the court allowed the aggrieved landowner “to seek punitive damages in addition to nominal damages for his trespass claim.”<sup>115</sup>

Another example is the New Jersey Supreme Court decision in *Nappe v. Anschelewitz*.<sup>116</sup> In that case, the defendants convinced the plaintiff to invest his money in their business venture in exchange for a share in that venture.<sup>117</sup> Shortly after making that investment, the plaintiff discovered that the defendants diverted his money to support another business.<sup>118</sup> The agreement between the parties still guaranteed the plaintiff the agreed-upon percentage of the profits from the venture in which he wanted to invest, and the plaintiff

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<sup>110</sup> *Jacque v. Steenberg Homes*, 563 N.W.2d 154 (Wis. 1997).

<sup>111</sup> We discuss this case in Part I: *see supra* notes 45-54 and accompanying text.

<sup>112</sup> *Feld v. Feld*, 783 F.Supp.2d 76 (D.D.C. 2011).

<sup>113</sup> *Id.* at 76 (internal quotation omitted) (citing *Maxwell v. Gallagher*, 709 A.2d 100, 104-05 (D.C. 1998)).

<sup>114</sup> *See* RESTATEMENT (SECOND) OF TORTS § 163 cmt. e.

<sup>115</sup> *Feld*, 783 F.Supp.2d at 76.

<sup>116</sup> *Nappe v. Anschelewitz*, Barr, Ansell & Bonello, 477 A.2d 1224 (N.J. 1984).

<sup>117</sup> *Id.* at 1227.

<sup>118</sup> *Id.* at 1227-28.

therefore suffered no tangible harm from the defendants' fraud.<sup>119</sup> Based on these facts and after ascertaining the role of compensatory, nominal, and punitive damages in our system of remedies,<sup>120</sup> the court ruled that the plaintiff was entitled to recover nominal and punitive damages from the defendants.<sup>121</sup> "[C]ompensatory damage," it explained "is not a requisite element of legal fraud."<sup>122</sup> According to the court, "Even if the person relying on the falsehood were unable to establish actual damages, he should be entitled to vindicate his rights through an award of nominal damages and in appropriate cases to punish the defendant through an award of punitive damages."<sup>123</sup>

A final and perhaps most striking illustration of the use of punitive damages to compensate for autonomy harms can be found in a recent Canadian court decision, *Abramowicz v. Lee*, that won global notoriety.<sup>124</sup> The plaintiff, Abramowicz, was a prodigal clarinetist, whose lifelong dream was to study at the Coburn Conservatory of Music in Los Angeles—a stellar institution that offered him full scholarship and an opportunity to study under the guidance of an internationally renowned clarinet pedagogue.<sup>125</sup> He applied and was successfully admitted. Alas, the admission decision never reached him. Unbeknownst to him, the defendant, his girlfriend at the time, fearing that he may leave her to pursue his lifelong dream, intercepted Coburn's acceptance email and, in its stead sent the plaintiff a fabricated rejection email.<sup>126</sup> She then entered the plaintiff's email system and assuming his identity informed Coburn that he decided to decline. Despite the enormous setback he suffered, the plaintiff managed to become an accomplished

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* at 1230-32.

<sup>121</sup> *Id.* at 1232-33.

<sup>122</sup> *Id.* at 1233.

<sup>123</sup> *Id.* at 1232.

<sup>124</sup> See Sarah Mervosh, *A Clarinetist's Girlfriend Didn't Want Him to Leave. So She Crushed His Dreams.*, NEW YORK TIMES, June 15, 2018, <https://www.nytimes.com/2018/06/15/arts/clarinetist-ex-girlfriend-rejection-lawsuit.html>.

<sup>125</sup> *Abramovitz v. Lee*, 2018 Ont. Sup. Ct. 3684 (Canada), <https://www.canlii.org/en/on/onsc/doc/2018/2018onsc3684/2018onsc3684.html>.

<sup>126</sup> *Id.*

professional musician, although the path to success was much longer, expensive and treacherous.<sup>127</sup>

Years later, the plaintiff serendipitously discovered what had happened and sued his ex-girlfriend for damages.<sup>128</sup> The court readily awarded him \$334,000 for his pecuniary losses—the loss of Coburn’s full scholarship and the two-year delay in his career.<sup>129</sup> But the plaintiff also requested compensation for a non-pecuniary harm represented by the “deflection of his life.” Recognizing this claim, the court granted the plaintiff \$25,000 in aggravated damages “in modest recognition of the anguish and hurt that has cost [him] no money, but which has nonetheless hurt him.”<sup>130</sup>

### ***C. Presumed Damages***

Another doctrine courts use to grant relief in cases of harm to autonomy—without recognizing it as such, of course—is the presumed damages doctrine.<sup>131</sup> This doctrine, as interpreted by the United States Supreme Court, applies in suits for injuries that are “likely to have occurred but difficult to establish.”<sup>132</sup> In any such suit, the court has the power to award the plaintiff damages that “roughly approximate the harm that [she] suffered and thereby compensate for harms that may be impossible to measure.”<sup>133</sup> This power, however, does not allow courts to award compensation to plaintiffs who suffered no cognizable harm.<sup>134</sup> Presumed damages, as the Supreme Court explained, are merely “a substitute for ordinary compensatory damages.”<sup>135</sup>

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<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *See* DOBBS, *supra* note 41, § 7.1(2) at 624-25 (outlining rules authorizing courts to award plaintiffs’ presumed damages and observing that these rules reflect “a desire to value some rights in themselves and not because they are instruments of physical safety or emotional tranquility.”).

<sup>132</sup> *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 311 (1986).

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 310.

<sup>135</sup> *Id.* (emphasis in original).

Courts have asserted their power to award presumed damages in cases involving violations of substantive constitutional rights: for example, the right to free speech or the right against unreasonable searches and seizures.<sup>136</sup> Consider the case of a citizen who was denied her right to vote—a possibility that was discussed in the obiter dictum of several cases.<sup>137</sup> Unable to find a “real” harm to the citizen, but unwilling to condone the wrong done to her, courts suggested that the aggrieved citizen is entitled to legal recourse based on the epistemically contentious notion of “presumed damages.”<sup>138</sup>

Courts have also resorted to the “presumed damages” doctrine in determining compensation for victims of defamation<sup>139</sup> and other dignitary torts.<sup>140</sup> Unfortunately, the caselaw neither provides a policy basis for presuming harm in certain cases (but not in others) nor a principled method for identifying the rights whose violations should trigger a presumption of harm. It is possible to argue as a matter of logic that certain rights (or interests) are more important than others. We are even willing to accept this proposition, *arguendo*. Importantly, however, this assumption does not help one to make sense of the presumed damages doctrine. Note that the presumed damages doctrine focuses on harm, not on rights. A violation of a right either results in harm, or it doesn't. The importance of the right involved cannot change this simple fact.<sup>141</sup> Nor can the nature of the particular violation involved dictate, without empirical support, whether harm should be presumed.

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<sup>136</sup> See *Hessel v. O'Hearn*, 977 F.2d 299, 301 (7th Cir. 1992) (acknowledging that presumed damages can be awarded as a compensation for violation of the right to vote); *City of Watseka v. Ill. Pub. Action Council*, 796 F.2d 1547, 1558-59 (7th Cir. 1986) (awarding presumed damages for violating First Amendment right to free speech).

<sup>137</sup> *Stachura*, 477 U.S. at 311; *Hessel*, 977 F.2d at 301.

<sup>138</sup> *Stachura*, 477 U.S. at 311; *Hessel*, 977 F.2d at 301.

<sup>139</sup> See, e.g., *W.J.A. v. D.A.*, 43 A.3d 1148, 1154-59 (N.J. 2012).

<sup>140</sup> *Id.* at 1159. See also *Dun & Bradstreet v. Greenmoss Builders, Inc.*, 472 U.S. 749, 760-61 (1985) (approving presumed damages award to victim of defamation).

<sup>141</sup> The United States Supreme Court indeed held that the presumed damages doctrine was designed to afford compensation for real harm and there is consequently “no room for non-compensatory damages measured by the jury’s perception of the abstract “importance” of a constitutional right.” *Stachura*, 477 U.S. at 309-10.

Our core insight that every right violation results in harm to autonomy obviates the need to rely on tenuous legal presumptions, as well as the need to devise cardinal or ordinal rankings of rights. By our lights, courts should simply award redress for violations of autonomy.<sup>142</sup> As we explained in Part I, autonomy violations cause victims real, rather than presumed, losses and deprivations.<sup>143</sup>

### III. Remediating Autonomy Harms

The current stand of the law not only fails to do justice to the important value of autonomy, which constitutes an indispensable component of every right, but also renders the law unfair and inconsistent. The law, in its present form, systematically undercompensates rightsholders for autonomy deprivations, save in those few cases in which harms to autonomy are actionable. Worse yet, by undermining rightsholders' autonomy, extant law deflates the value of the rights themselves.

The doctrine's effect on individuals who suffer an autonomy harm that exceeds their tangible harm from a right's violation is particularly unjust. Such victims stand to receive a disproportionately small amount of compensation that falls way short of making them whole. As we noted, some courts attempt to help such victims, without recognizing the root cause of the problem, by awarding them presumed damages or a combination of nominal and punitive damages.<sup>144</sup> Not only does the use of these doctrines fall short of offering a comprehensive solution to the problem, but it

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<sup>142</sup> Cf. Mike Steenson, *Presumed Damages in Defamation Law*, 40 WM. MITCHELL L. REV. 1492, 1492 (2014) ("Despite heavy criticism, the presumed damages rule has had remarkable staying power in American law.").

<sup>143</sup> Under our framework, harm to autonomy would often subsume the victim's dignitary harm. This, however, will not happen in every case. There will be cases in which the victim's dignitary harm will be both separate from and more severe than the harm to her autonomy. See, e.g., *Abner v. Kansas City S. R.R. Co.*, 513 F.3d 154, 164-65 (5th Cir. 2008) (affirming award of \$1 in nominal damages and \$125,000 in punitive damages per person as a remedy for racist slurs that created working environment hostile to African-American employees in violation of Title VII).

<sup>144</sup> See *supra*, Sections II.B. and II.C.

also creates a secondary set of distortions. Because the doctrines of presumed, nominal and punitive damages are discretionary in their nature and are not tailored for autonomy harms, their use engendered doctrinal uncertainty not only in the context of autonomy harms, but also in the law of remedies in general. The caselaw, outside the special area of medical malpractice, masks autonomy harms by omitting specific reference to them, and sporadically uses general doctrines to grant redress to victims on other grounds. This ad hoc approach makes the law unpredictable, inconsistent and inequitable.

### ***A. Recognizing Autonomy Violations***

We submit that the current state of affairs calls for a comprehensive reform. Lawmakers ought to formalize a cause of action for violations of autonomy and allow redress for autonomy losses. Under the proposed rule, all victims who incurred an autonomy harm would be able to get their day in court and receive a remedy for the harm they suffered, unless the harm is trivial and thus identified as *de minimis*.<sup>145</sup> A full-fledged legal recognition of autonomy as a protected interest would bring about fuller protection of rights. It would also have the salutary effect of restoring the integrity of judges, who would no longer need to resort to specious doctrines, such as presumed harms, and artificial imposition of punitive damages to grant compensation for harms to autonomy.

Any proposal to afford legal redress to autonomy harms must take account of two concerns. The first is valuation. Autonomy harms cannot be readily measured. There are no objective criteria, or benchmarks, that can be used to assess such harms, and their magnitude varies from one victim to another. The second concern has to do with administrability. The formalization of an independent cause of action for harms to autonomy and the addition of such harms to the list of remediable losses will, no doubt, increase the workload of courts and introduce delays in the administration of justice. Both concerns are real and valid but are not insurmountable.

It should be noted at the outset that our legal system is no stranger to interests and harms that are not amenable to precise

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<sup>145</sup> See Section IV.A. below.

quantification. Privacy, consortium, and protection against infliction of pain and suffering, for example, are all interests that do not readily lend themselves to objective evaluation.<sup>146</sup> Like autonomy, they are highly individualized and person-specific. The extent and, indeed, very existence of harms to those interests often depends on private information that cannot be verified by objective evidence. Yet, our legal system has long recognized such harms as actionable and granted relief for them.<sup>147</sup>

As importantly, our system has moved in the direction of awarding compensation to rightsholders without proof of harm, when it is clear that there was a breach of a right, but the resulting harm is unclear or difficult to prove.<sup>148</sup> This trend is reflected in the doctrine of presumed damages<sup>149</sup> and, on an even broader scale, in the proliferation of statutory damage provisions.<sup>150</sup> Statutory damages perform two distinct remedial tasks. They provide a means of recompense to rightsholders without proof of actual harm when the rightsholders suffer a loss that is either unclear or difficult to prove.<sup>151</sup> Statutory damages are also available to rightsholders who prefer to forego provable claims for actual damages and to receive the statutorily determined amounts instead.<sup>152</sup>

One possible way of overcoming the ascertainability and verifiability problems that attend autonomy harms is to use defendants' profits as the benchmark of compensation. On this option, disgorgement will become the remedy of choice in all cases.<sup>153</sup> The principal advantage of disgorgement is that it is predicated on an objective measure that can be verified by courts, at least in principle.

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<sup>146</sup> DOBBS, *supra* note 41, § 3.1 at 211, § 8.1(5) at 660-61.

<sup>147</sup> *Id.*

<sup>148</sup> *See supra*, Section II.C.

<sup>149</sup> *Id.*

<sup>150</sup> *See generally, e.g.*, Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439 (2009).

<sup>151</sup> *See* Colin Morrissey, *Behind the Music: Determining the Relevant Constitutional Standard for Statutory Damages in Copyright Infringement Lawsuits*, 78 FORDHAM L. REV. 3059, 3071 (2010).

<sup>152</sup> *Id.* *See also id.* at 3072.

<sup>153</sup> *Cf.* RIPSTEIN, *supra* note 53, at 81-83 (justifying disgorgement as a remedy for violations of a freedom conceptualized here as autonomy).



Disgorgement, however, suffers from three major flaws in the present context. First, many wrongdoers realize no cognizable gain from autonomy violations. Other wrongdoers generate profits that courts cannot expediently ascertain and evaluate. Second, and more importantly, there is no relation whatsoever between the wrongdoer's profit and the victim's autonomy loss. The harm to the victim's autonomy may exceed the wrongdoer's ill-gotten gain or fall below it. Severe injuries to autonomy may result in small gains, or no gain at all, to the wrongdoer—as in the case where Alan pushes Beth against her will. Conversely, wrongful acts that produce significant gains for the wrongdoers may cause only minimal injuries to the victim's autonomy, as in the case where Carol uses Dylan's phone without his permission to make a mega trade on the stock exchange market. Third, and finally, although disgorgement of profits constitutes an objective benchmark, it only partially alleviates the administrability problem. Oftentimes, assessing the wrongdoer's ill-gotten profits is difficult, if not altogether impossible. At the end of the day, therefore, using the wrongdoer's profits as the benchmark for compensation will not economize on judicial resources and will not adequately compensate victims for harms to their autonomy.

### ***B. Compensating for Autonomy Harms***

For nontrivial, and hence actionable, autonomy violations we propose setting up a two-pronged compensation scheme that combines a fixed component and a discretionary component. The fixed component would consist of a predetermined statutory award to be granted in all cases of autonomy violations. The discretionary component would be left to the court's discretion and be limited to cases of egregious autonomy violations. The discretionary amount would always come on top of the fixed amount, and, naturally, it would vary from case to case.

There are two principal ways to determine the fixed compensation amount. The fixed award, or premium, can be a set dollar amount or, alternatively, a percentage of the monetary damages awarded to plaintiffs for their other losses. If set in pure dollar terms, the fixed amount awarded for autonomy losses would bear no direct relationship to the plaintiff's economic losses. If the option of percentage-based premium is selected, compensation for autonomy

losses would be derived from the economic harm suffered by the plaintiffs.

We believe that in most cases percentage-based compensation is clearly preferable to the alternative of set dollar compensation divorced from economic harm. Yet, percentage-based compensation would not work when autonomy harms are unaccompanied by economic losses. This challenge may be particularly acute in the context of violations of constitutional rights. For example, violations of one's right to free speech, to vote, to equal protection, and not to endure illegal searches often inflict small or no pecuniary losses, while leading to considerable autonomy harm.

There are two solutions to this challenge. The first solution would be to incorporate a presumption in favor of percentage-based compensation, but allow courts discretion to order the statutorily set, non-percentage-based amount, in those cases in which the plaintiff suffered no significant economic losses. The second solution would be to let the plaintiff choose her preferred method of compensation. Under this alternative, a successful plaintiff will have the option of selecting between percentage-based premiums and set amounts premiums. The second option reinstates the victim's autonomy better than the first because it gives the victim the power to select the calculation method for her autonomy losses.

As far as the discretionary component of the compensation is concerned, it should be designed to enable courts to step up compensation awards in cases involving particularly severe harms to autonomy. The wrongdoer's blameworthiness is an obvious aggravating factor. Autonomy losses resulting from intentional and malicious behavior warrant higher compensation than losses resulting from merely incidental transgressions. All else being equal, when a person promotes her own self-interest while intentionally or maliciously disregarding the rights of another person, the resulting harm to the victim's autonomy will usually be greater than the harm to her autonomy from an accidental transgression.

Another important factor that lawmakers ought to consider in adopting a compensation scheme for autonomy losses is the distinction between harms to autonomy associated with pecuniary

or property losses and harms to autonomy that grow out of bodily injuries. We believe that, in principle, violations of a person's bodily integrity result in a greater harm to her autonomy than wrongdoings against her pecuniary or property interests. This presupposition should be reflected in the compensatory scheme in the following way: there should be a rebuttable presumption that autonomy losses resulting from violations of bodily integrity should be compensated at a higher amount, or premium, than autonomy losses associated with violations of property or contractual rights. Incorporating such a presumption into our compensation scheme would not only help courts to form accurate assessments of autonomy harms. It would also introduce predictability into our model and enhance the expressive function of the law's responses to wrongdoings.

Importantly, we do not categorically rule out the possibility of awarding punitive damages to plaintiffs for egregious violations of their autonomy. Such awards, however, should be reserved for extreme cases, where courts believe that the wrongdoer's behavior was so reprehensible in terms of its effect on the victim's autonomy that it ought to be addressed by a stricter measure. Punitive damages awards should be rare and the conditions under which they will be granted should be clear.<sup>154</sup> Otherwise, courts will be flooded with punitive damages requests.

By our lights, the award of punitive damages in *Jacque v. Steenberg Home* and *Abramowicz v. Lee* was warranted. However, the disparity between the awards highlights the problem of punitive damages. In *Jacque v. Steenberg Home*, the plaintiffs were awarded \$100,000 in punitive damages although they suffered no property damages and the trespass, albeit intentional, lasted only a few minutes. In *Abramowicz v. Lee*, by contrast, the plaintiff received only 25,000 Canadian Dollars in punitive damages, even though the defendant, through her actions, derailed his life. From reading the cases, one may emerge with the feeling that the amount awarded to the Jacques was too high or that the compensation won by Abramowicz was too low—or both. The adoption of our remedial scheme would inject

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<sup>154</sup> See DOBBS, *supra* note 41, § 3.11 at 312 (stating that punitive damages are generally awarded against defendants “found guilty of particularly aggravated misconduct”).

much needed coherence into this area of the law, and, in particular, would give rise to two benefits. First, by affording direct compensation for autonomy losses, it would dramatically reduce the use of punitive damages. Second, the parameters we specify for computing compensation can instruct judges and juries in assessing punitive damages awards, which should lead to more consistency.

#### **IV. Addressing Potential Objections**

In this Part, we address three potential objections to our proposal. The first objection concerns the proposal's administrability. The crux of the argument is that implementation of our proposal will overwhelm the courts by dramatically increasing litigation. The second objection holds that courts actually afford redress for autonomy losses, but they do so implicitly, or indirectly, via other legal doctrines, without expressly acknowledging this fact. In other words, courts mask autonomy violations under the guise of other doctrines. We term this argument the "masking objection." Third, an argument can be made that our remedial mechanism does not facilitate accurate assessment of autonomy harms and would therefore result in insufficient or excessive compensation. We call this argument the "inaccuracy objection."

##### ***A. Administrability***

The first potential objection we would like to address is the implementability, or administrability, of our proposal. Many readers may be sympathetic to the idea of offering redress for autonomy harm, but at the same time, worry that doing so is impractical in light of the limited financial resources of the court system. Recognizing autonomy harms, so the argument goes, would lead to the filing of innumerable new lawsuits and drive courts to the breaking point. Mindful of this concern, we propose several safeguards that are intended to avert this result. First, we would allow lawsuits for autonomy harms only in those cases in which a recognized legal right of the victim has been violated. In other words, under our proposed scheme, claims of autonomy violations would be actionable if and only if another, first-order, right of the victim was violated. Accordingly, it would not be possible to sue for autonomy violations on a standalone basis. Thus, the

implementation of our proposal would not lead to filing of new lawsuits. Second, we call on courts to apply a stringent de minimis limitation to autonomy violations. The point and purpose of this requirement is to sift out claims of autonomy violations that resulted in insignificant or minor harms to autonomy. Third, we would bar recovery for autonomy losses in cases in which the loss is subsumed in an economic or property harm. By obviating the need to consider autonomy losses for which the victim has been indirectly compensated, the ban on double-recovery does not only promote fairness but also administrability.

### **(1) The Independent Cause of Action Requirement**

Under our vision, not every autonomy violation would be actionable. Only violations arising from the breach of a recognized right would entail an actionable autonomy violation. Hence, an individual would be allowed to seek redress for an autonomy violation only if she can show that the same act or omission that brought about the autonomy harm constituted a breach of recognized legal right. Hence, only individuals who have a recognized cause of action in tort, contract, property, constitutional law, and the like would have standing to sue for an autonomy violation.

It is important to see that this limitation does not arise solely from a desire to protect judicial resources. Rather, it is endemic to our analytical framework. Recall, that under our conceptualization the autonomy component accompanies recognized (first-order) rights. It allows a rightholder to decide whether and how to exercise her right. Where there is no legally protected right there is no *legally* protected autonomy interest that deserves protection. Our goal in this Essay is not to protect every choice, but only those choices that come with the grant of legal rights.

Hence, not every time someone is adversely affected by the behavior of another, she will be able to sue for an autonomy violation. The activities of other individuals affect our lives daily. The decisions of the government, on all levels, routinely restrict our choices, even freedoms. To give a simple example, the decision of my municipality to rezone my neighborhood can have a profound effect on my life

choices. Similarly, the behavior of strangers often forces us to change our plans. A slow driver on a narrow road may prevent me from reaching my destination in a timely fashion. Furthermore, the decision of a fellow train commuter to speak on the phone on the train may upset my plan to read or work on the train. All of these examples involve autonomy violations writ large. Yet, those violations do not merit redress because they are free-standing: the alleged violator does not detract from a legally recognized right of the alleged victim.

Contrast the previous examples, with cases in which an individual is denied a dwelling because of her race or gender or is forced to speak against her will. In these cases, the victim will be able to sue not only for the violation of her first-order right, but also to seek legal redress for her autonomy harms.

The picture that emerges is clear. The implementation of our proposal would neither inundate courts with new lawsuits, nor would it facilitate the filing of suits that cannot already be brought. Thus, the concern that implementation of our scheme would paralyze the courts is wildly exaggerated. Allowing parties to recover for autonomy losses would certainly increase the workload of courts, but it is highly unlikely to drive courts to the breaking point. What is more, the two other measures to which we turn next, would further reduce the burden that our proposal would place on the judiciary.

## (2) **De Minimis**

The second safeguard courts should use to avert the risk of excessive litigation is stringent application of the de minimis doctrine. This doctrine holds that “de minimis no curat lex”—an expression commonly translated to “the law does not concern itself with trifles.”<sup>155</sup>

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<sup>155</sup> For a classic account of the de minimis doctrine, see Max L. Veech & Charles R. Moon, *De Minimis Non Curat Lex*, 45 MICH. L. REV. 537, 544-60 (1947) (specifying and analyzing the criteria courts use to identify harms as de minimis).

The de minimis doctrine is intended to ensure that minor infractions of the law that do not result in significant harm are kept out of the courtroom. A strict application of this doctrine to autonomy harms would ensure that only autonomy violations that inflict a real and substantial harm on the victim would be litigated. The adoption of this measure is necessary to protect the two most valuable resources of the judiciary: time and budget.

In light of the budgetary constraints faced by the legal system, it cannot afford to remedy every minor violation of a person's autonomy. When the harm resulting from an autonomy violation is relatively insignificant, allowing the victim to sue the violator would impose on the legal system unaffordable costs while creating no offsetting benefits. The legal system therefore must sift out trivial suits in order to save its limited resources for more important matters. Hence, insignificant violations of a person's autonomy should yield the person no right to compensation. For example, assume that while attempting to board a subway train during rush hour, two passengers rub shoulders at the doorstep of one of the cars. Despite the unconsented contact, no lawsuit should be allowed. The harm in this case is so trivial that it should be dismissed as de minimis. Or, consider a case of a driver who trespasses a few inches onto another person's driveway while turning her car around on a narrow street.<sup>156</sup> This trespass temporarily overrides the owner's autonomous choice to exclude others from his property, but this deprivation is minimal and thus should not be recognized as actionable in our courts of law. Things, however, would be different in intentional trespass cases such as *Jacque v. Steenberg Homes*,<sup>157</sup> in which the trespasser turns the owner into an instrument to promote its goals. Such violations of autonomy do not qualify as trivial because of the victim's experience of being overpowered and subordinated by the wrongdoer.

Another paradigmatic example of a de minimis violation of autonomy is an employer's breach of an at will employment agreement. Such breaches do not and should not go unpunished.

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<sup>156</sup> See Veech & Moon, *supra* note 155, at 550-51 & n. 60 (stating that courts treat technical trespass as de minimis).

<sup>157</sup> 563 N.W.2d 154 (Wis. 1997).

They call for compensatory relief, but the relief should only cover the employee's pecuniary, as opposed to autonomy, losses. Because the employer can terminate the employment relationship at will while paying the employee for her pecuniary losses,<sup>158</sup> the residual harm to the employee's autonomy is minimal and thus does not merit compensation.

### **(3) *Subsumption***

We would also bar recovery for autonomy harms in cases in which the harm is subsumed in the alleged victim's pecuniary loss. The paradigmatic example is liquidated damages. Liquidated damages are supposed by hypothesis to reflect all the losses a party stands to incur in the case of a breach. By agreeing to a liquidated damages provision, a party effectively consents to accept the stipulated amount as compensation for all of her expected losses. Hence, if the contract is breached, she should be precluded from arguing that she should receive an additional amount of money for her autonomy harm.<sup>159</sup>

By the same token, in the case of violations of certain constitutional rights, the pecuniary loss and the autonomy harm are one and the same. The denial of a free speech right or the right to vote may inflict no pecuniary loss on the rightholder, but will set her autonomy back. In such cases, double compensation is unwarranted; a single amount should fully compensate the rightholder for her loss. With other constitutional rights, however, things are different: violation of those rights typically triggers two distinct losses. For example, unlawful discrimination oftentimes inflicts a pecuniary loss—as with victims who find themselves overcharged or underpaid because of their

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<sup>158</sup> See RESTATEMENT OF EMPLOYMENT LAW § 2.01 (“Either party may terminate an employment relationship with or without cause unless the right to do so is limited by a statute, other law or public policy, or an agreement between the parties, a binding employer promise, or a binding employer policy statement.”); see also RESTATEMENT (THIRD) OF EMPLOYMENT LAW § 2.01 cmt. a (Tentative Draft No. 1, 2008) (“The courts in 49 states recognize the principle that the employment is presumptively an at-will relationship.”).

<sup>159</sup> We assume here that the contract is valid and enforceable and was neither consummated under duress nor tainted by unconscionability, fraud, misrepresentation, or illegality.



gender or race—as well as an autonomy loss represented by the choice the victim was denied.<sup>160</sup>

Another category in which autonomy harms should not be compensable is that of assumption of risk. An individual who choose out of her free will to engage in an extreme sport or adventurous activity should not be entitled to receive compensation for autonomy harms if she gets injured.<sup>161</sup> Importantly, this result should obtain even when the law allows actors to secure compensation for their physical injury by invalidating contractual waivers on public policy grounds.<sup>162</sup> Arguing for an autonomy harm in such cases is antithetical to the very concept of autonomy. And while it is perfectly legitimate for society to provide compensation for victims who assumed a risk that materialized and suffered an injury as result on paternalistic or utilitarian grounds,<sup>163</sup> it would be a stretch to allow compensation for an autonomy harms in such cases.

### ***B. Masking***

The masking objection goes to the very premise of our project. It maintains that although courts do not openly recognize victims' right to recover compensation for autonomy violations, they implicitly (and clandestinely) address the problem via other doctrines. Hence, it is not true that autonomy violations are not addressed by our courts; rather, they are accounted for indirectly.

We find this argument unpersuasive, even mystifying. Our review of court decisions revealed no evidence of tacit recognition of autonomy losses. On the contrary, in the majority of the cases we

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<sup>160</sup> See, e.g., Gregg D. Polsky & Stephen F. Befort, *Employment Discrimination Remedies and Tax Gross Ups*, 90 IOWA L. REV. 67, 71 (2004) (distinguishing between different kinds of economic and noneconomic damages from employment discrimination).

<sup>161</sup> See, e.g., Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. 535, 575-76 (2017) (stating the rules governing assumption of risk).

<sup>162</sup> See DAN B. DOBBS, *THE LAW OF TORTS* §§ 213-214, at 541-46 (2000) (outlining rules invalidating waivers of the right to sue for personal injury).

<sup>163</sup> *Id.* (explaining the effectiveness and the ineffectiveness of waivers of the right to sue for personal injury).

discussed throughout the Essay, courts could indirectly account for the victim's autonomy losses, but openly elected not to do so.<sup>164</sup>

To be sure, one can insist that if courts chose to omit or camouflage references to autonomy violations, no scholar would find them in the caselaw. While it is impossible to disprove this argument, it is a very odd one. As a threshold matter, it is not clear why courts would be interested in concealing autonomy violations and how they collectively arrived at this policy. Furthermore, it is equally unclear what bonding mechanism judges employ to influence new judges to abide by this policy and never deviate from it. The theory that judges would go to such great lengths to mask autonomy violations simply defies logic.

We have another reason for rejecting the masking argument as a basis for objecting to our reform proposal. Assuming, *arguendo*, that this argument accurately portrays the existing legal practice, is that practice normatively attractive? We think it is not, for a fairly simple reason. As Joseph Raz has pointed out, legal rules ought to be “open and adequately publicized.”<sup>165</sup> Legal rules need to possess sufficient specificity, clarity, as well as formality, in order to minimize the potential for arbitrariness and prejudice on the part of judges and jurors who make decisions about individuals' rights, duties and liabilities.<sup>166</sup> This fundamental requirement applies with full force to an individual's right to autonomy. This right and the remedies that respond to its violations are too important to stay hidden in the interstices of informal practice.

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<sup>164</sup> The California Supreme Court's decision in the famous Moore case, analyzed in Part I, is a prime example of this approach. As we demonstrated, this decision characterized a blatant violation of the plaintiff's autonomy, which denied him the option to demand remuneration for biomaterials taken from his body, as a patient's right to receive from his doctors all information relevant to his treatment. *See supra* notes 60-71 and accompanying text. This characterization, as we explained, had a negative effect on the plaintiff's compensation entitlement. *See supra* notes 68-71 and accompanying text.

<sup>165</sup> JOSEPH RAZ, *THE AUTHORITY OF LAW* 214 (1979).

<sup>166</sup> *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 *HARV. L. REV.* 625, 667-68 (1984).

Finally, we think that even if for some unfathomable reason courts remedy autonomy violations without explicitly acknowledging it, it is paramount to make this reality explicit. For all the reasons discussed in this Essay and the scholarship it cites<sup>167</sup>, autonomy is an important value. As such, it should be openly and expressly protected by our legal system.

### ***B. Inaccuracy***

The inaccuracy objection proceeds in two steps. The first step is predicated on our own acknowledgment that accurate compensation for autonomy losses is impossible and impracticable. The second step consists of the inference that since accurate compensation is unachievable, the law should award victims of autonomy violations no compensation at all.

While we openly admit that our mechanism cannot generate perfect information about autonomy losses, we disagree with the claim that it should lead lawmakers to adopt a no-compensation regime. To begin with, we believe that the inaccuracy objection is grossly overstated. As we mentioned earlier in this Essay, imprecise compensation mechanisms pervade our legal system and are used as a matter of course in a myriad of legal contexts, ranging from private, to administrative, to constitutional law.<sup>168</sup> Of course, as a matter of pure logic, the pervasiveness of imprecise compensation mechanisms does not, on its own, call for adopting yet another such mechanism: doing so will likely do more harm than good.

Yet, we believe that this is clearly not the case. The law regularly employs imperfect compensation mechanisms for a reason: they are supported by a powerful rationale that holds true in the case of autonomy as well. These remedial mechanisms generate benefits that outweigh their costs. These mechanisms, despite their imprecision, promote fairness by providing compensation to victims, and enhance efficiency by deterring wrongdoers. If these

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<sup>167</sup> See *supra* notes 1-5, 16-24 and accompanying text.

<sup>168</sup> See *supra* notes 146-149 and accompanying text.

mechanisms did not exist, wrongdoers would be motivated to advance their own self-interest at their victims' expense.

The same calculus justifies our remedial framework for autonomy violations. As we demonstrated in Part I, autonomy rights are important to their holders and to society in general. Fending off autonomy violations is consequently important as well. We therefore believe that the benefits of our proposed framework for remedying autonomy violations outweigh its administrative costs. Furthermore, we anticipate that those costs will decline over time as courts will formulate compensation criteria that can be used in future cases.

### **Conclusion**

Autonomy undergirds rights. It is indispensable to the definition of rights and their functioning. Yet, to date, the law refuses to recognize the interdependence between autonomy and rights and, as a rule, offers no redress for autonomy losses. The current legal regime is unprincipled and indefensible. Not only does it fail to acknowledge the conceptual importance of autonomy, but it also shortchanges rights, undercompensates rightsholders and often leaves them without any redress for their most severe losses.

In this Essay, we reexamined the case for protecting autonomy from three different perspectives: conceptual, normative, and doctrinal. Conceptually, we demonstrated that autonomy is best understood as a second-order right and that every breach of a legally recognized right invariably implicates an autonomy violation. Normatively, we have established the desirability of affording full legal protection to autonomy as a necessary prerequisite for respecting rights. Doctrinally, we developed a mechanism for compensating for autonomy losses that takes full account of the limitations of our legal system.

At the end of the day, our analysis yields a clear thesis: autonomy is the cornerstone of all rights, and as such deserves to be explicitly and universally honored by our legal system.