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CIVIL RECOURSE AS MUTUAL ACCOUNTABILITY

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INTRODUCTION

In *The Second-Person Standpoint* (*SPS*) and a number of papers since, I have attempted to work out a theory of moral obligations as involving mutual accountability between equals, where the latter, I argue, is irreducibly second personal, since it entails an equal authority we have to address claims and demands *to* one another and ourselves.[1] As many writers have pointed out, moral obligations concern the part of morality that is modeled conceptually on legal, or as Sidgwick called them, "quasi-jural," concepts of responsibility and authoritative demands and claims.[2] What we are morally obligated to do is not just what morality recommends or what there is good, weighty, or perhaps even conclusive reason to do from the moral point of view. It is what morality requires. It is what is legitimately demanded of us as moral agents or persons, just as legal obligations concern what the law demands of citizens subject to it. Illegal and

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1. STEPHEN DARWALL, THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY (2006) [hereinafter DARWALL, SECOND-PERSON STANDPOINT]; Stephen Darwall, *But It Would Be Wrong*, 27 SOC. PHIL. & POL. 135 (2010); Stephen Darwall, *Moral Obligation: Form and Substance*, 110 PROC. ARISTOTELIAN SOC. 31 (2010). This Article is a collaborative attempt by the authors to say something about how the second-personal framework developed in *SPS* and more recent papers, for example, Stephen Darwall, *Bipolar Obligation*, *in* 7 OXFORD STUDIES IN METAETHICS (Russ Shafer-Landau ed., forthcoming 2012) [hereinafter Darwall, *Bipolar Obligation*] might apply to tort law and, more specifically, to civil recourse theory. In what follows, the authorial "I," "my," etc., will refer to Stephen Darwall, and the authorial "we," etc., will refer to both coauthors of this Article, Julian Darwall and Stephen Darwall. "You" will refer to you, dear reader, and "we," used nonauthorially, will have its usual presumptive sense—referring to you, the authors, and indeterminate others. We regret any confusion; perhaps, however, presuming on your pronominal sensitivity is appropriate in a paper about "second-personal" matters.

2. HENRY SIDGWICK, THE METHODS OF ETHICS 106 (7th ed. 1967); G.E.M. ANSCOMBE, *Modern Moral Philosophy*, *in* VIRTUE ETHICS 26 (Roger Crisp & Michael Slote eds., 1997).

wrongful actions are violations of what the law and the moral law, respectively, mandate or require.

Similarly, both moral and legal obligations conceptually entail distinctive forms of responsibility or accountability. What we are morally obligated to do is what we are responsible or accountable for doing, just as legal obligations entail legal responsibilities. I argue that moral responsibility is irreducibly second personal since it entails accountability or answerability, and that these are always, as a conceptual matter, *to* someone with the authority to hold us thus answerable (even if that person is we ourselves). When it comes to morality, theological voluntarists, like the early modern natural law theorists Pufendorf and Locke, hold that the moral law implicates our accountability to God.[3] My theory is that moral obligations concern our accountability to one another and ourselves as equal moral persons or members of the moral community.

The idea of answerability is no less implicated in our idea of law, pure and simple. Criminal proceedings seem, by their very nature, to involve answering charges, defenses, determinations of culpability, mitigation, excuses, and holding the guilty accountable through criminal punishment. Similarly, proceedings in civil or private law, including torts, involve a form of answerability, although one that is importantly different from that involved in criminal cases. Complaints are brought not by the state on behalf of the community as a whole but by individual plaintiffs, who claim to have been injured by the violation of a legal obligation or duty *to them*. In civil proceedings, defendants are required to respond to such complaints, and courts attempt to establish the justice of the complaint and, if justified, whether compensation of some sort is owed by the defendant to the victim.

In some recent papers, I suggest that the form of authority and accountability that underpins civil or private law is different from that at the root of criminal law and that this legal distinction tracks a moral distinction between, respectively, obligations that are owed *to* others, so called "relational," "directed," or "bipolar" obligations, and moral obligation, pure and simple, or as I sometimes call it, moral obligation *period*.[4] As a moral philosopher, I have mainly been interested to point to differences between civil and criminal law that I take to be uncontroversial among legal philosophers—that civil cases

3. JOHN LOCKE, ESSAYS ON THE LAW OF NATURE (W. von Leyden ed., 2002) (1676); SAMUEL VON PUFENDORF, OF THE LAW OF NATURE AND NATIONS (C.H. Oldfather & W.A. Oldfather trans. 1934) (1688).

4. Darwall, *Bipolar Obligation*, *supra* note 1; Stephen Darwall, *Law and the Second-Person Standpoint*, 40 LOY. L. REV. 891, 905-09 (2007); *see also* Michael Thompson, *What is it to Wrong Someone? A Puzzle About Justice*, *in* REASON AND VALUE: THEMES FROM THE PHILOSOPHY OF JOSEPH RAZ 333, 338-45 (R. Jay Wallace et al. eds., 2004).

are appropriately brought by plaintiffs and that criminal cases are brought by "the people" and their representatives—in order to illustrate by analogy differences that I have been arguing exist in morality between relational or bipolar moral obligations and moral obligations period.

Here, however, we want to say something about how the second-personal framework I have been developing might apply to tort law, particularly to an important and influential theory of torts: the *civil recourse theory* that has been worked out in the writings of John Goldberg and Benjamin Zipursky. In our view, civil recourse theory captures an important truth about the structure of relational or bipolar legal obligations, which we take to be the kind that are normally involved in torts, namely, that injured victims of violated bipolar obligations owed *to them* have a distinctive standing to hold their injurers responsible that neither third parties nor the community at large have. I have called the analogous moral standing *individual authority*. This is an authority that, distinctively, *obligees* (that is, individuals to whom bipolar moral obligations are owed, or correlatively, claim-right holders) have to hold obligors accountable *to them individually*. This authority is individual, moreover, in the further sense that it is discretionary; it is distinctively up to the individual who has the authority whether or not to exercise it. For example, a victimized obligee has a distinctive individual authority to decide whether to complain or to seek an apology or to forgive a deadbeat obligor, or, indeed, to pursue any combination of these options; she can exercise this authority at her discretion. We believe that the distinctive moral standing that is involved in being owed a bipolar moral obligation and having a correlative claim right against an obligor are de jure analogues of (de facto) bipolar legal obligations and claim rights that are in play in tort law and that the former plausibly underpin the latter.

By contrast, the authority that is implicated in moral obligation period (and, by analogy, in the criminal law) is no individual's authority but something we have as *representative persons* or members of the moral (or legal) community. I argue in *SPS* that we presuppose such an authority when we hold one another and ourselves accountable for unexcused moral wrongs, for example, through what P.F. Strawson called "reactive attitudes," such as indignation, moral blame, and self-blaming attitudes like guilt.[5] We do not presuppose any such authority as the particular individuals we are or as having any particular relation to the wrongdoer. We presuppose it rather as representative persons or members of the moral community. Nor is this authority discretionary. When we feel blame toward and thereby

5. P.F. Strawson, *Freedom and Resentment*, *in* STUDIES IN THE PHILOSOPHY OF THOUGHT AND ACTION 71, 76 (P.F. Strawson ed., 1968).

imaginatively address a putatively valid demand to someone, we, as it were, "second" or "give voice" to a demand that we take to be legitimate from the third-party (not to say, "third-person"—more on this later) perspective of a representative person.

We shall therefore argue that what civil recourse theory gets right is the distinctive *individual authority* that victims have to hold their victimizing obligors accountable to them. However, defenders of the civil recourse theory sometimes present their view as legitimating retaliation, vengeance, or action against victimizers by victims. Here we shall suggest that an understanding of true mutual accountability between obligees and obligors—correlatively, between claim-right holders and those they hold rights against—shows this to be mistaken. To realize genuine mutual accountability between equals, tort actions should be seen as expressing a kind of mutual respect that is actually incompatible with retaliation and vengeance. The latter notions, I have argued, invoke a notion of respect that is more at home in honor cultures—where dishonoring, status-lowering disrespect can be annulled by reciprocating disrespect (e.g., revenge).[6] In "accountability cultures," as I have called them, disrespect calls for attitudes and treatment that respectfully demand respect.

As we see it, the idea of justified retaliation is not really central to civil recourse theory, and, to be fair, Goldberg and Zipursky's allusions to it seem offhand and noncommittal. The present Article might therefore best be seen as an argument for developing civil recourse in one way rather than another: that is, within a framework of mutual accountability rather than legitimate reprisal. In addition, we suggest a tentative account of tort remedy and process within that framework.

I. BIPOLAR OBLIGATIONS AND MORAL OBLIGATION PERIOD

We shall begin by saying something about how the ideas of moral obligation period and bipolar or relational moral obligations or duties differ conceptually. Here we assume that the kind of relational duties we are concerned with are not merely conventional or even legal but moral in the sense that violation of a bipolar obligation to someone *wrongs* that person, other things being equal at least.

On a second-personal analysis, both moral obligations period and bipolar obligations involve legitimate demands and so presuppose an authority to make the demand and hold the person who is subject to the obligation accountable. What distinguishes the two is the different authorities they respectively presuppose.

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6. Stephen Darwall, *Two Kinds of Recognition Respect for Persons*, 88 ETHICS 36, 37 (1977); Stephen Darwall, *Two Kinds of Recognition Respect for Persons*, *in* EGUALE RISPETTO (Ian Carter ed., 2008); Stephen Darwall, *Justice and Retaliation,* 39 PHIL. PAPERS 315, 321 (2010).

To see moral obligation period's conceptual tie to legitimate demand, consider the idea of morally supererogatory action. The concept of a supererogatory act is that of an act that morality recommends but does not require, that is, an act that, "is above and beyond the call of duty." Such an act might be thought to be morally good for the agent to do, but one that the agent is nonetheless not morally obligated or required to do, say, because it involves a level of sacrifice that cannot be legitimately demanded of him or her. Now notice that whether there are any supererogatory actions, whether this concept is actually instantiated, is a substantive normative issue and therefore a conceptually open question. Some normative ethical theories—for example, act consequentialism—hold that there can be no such thing. On an act consequentialist theory of right, moral agents are always under a moral obligation to do whatever morality would most recommend they do—by consequentialism's lights, to perform the action, of those available to them, that would produce the best consequences overall. But act consequentialism is a substantive normative theory, not a conceptual one. No normative theory, neither act consequentialism nor any other, could hold that supererogation is conceptually impossible.

If a critic claims act consequentialism to be "too demanding" and a consequentialist denies this, they must employ the same concept of moral obligation to disagree. The consequentialist must agree that the possibility of supererogation is conceptually open, even if she denies as a normative thesis that there is any such thing. She must agree that her critic is not being self-contradictory or conceptually confused when she denies consequentialism because it denies the (normative) possibility of supererogatory action.

The space between the concepts of moral recommendation, however weighty, and moral obligation is explained by the latter's (but not the former's) conceptual tie to legitimate demand and accountability. Any discussion of whether consequentialism is "too demanding" a moral theory assumes, as we all normally do, that what is morally obligatory is what morality *demands*, that is, what we are legitimately held accountable for as moral agents.

The Second-Person Standpoint follows a number of philosophers, including John Stuart Mill, Richard Brandt, and Allan Gibbard, in arguing that the concepts of moral obligation, duty, right, and wrong are tied to those of legitimate demand, accountability, and, therefore, conceptually to moral *blame*.[7] What is morally obligatory is not just what there are good moral reasons to do, however weighty these rea-

7. RICHARD B. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 163-76 (1979); DARWALL, SECOND-PERSON STANDPOINT, *supra* note 1; ALLAN GIBBARD, WISE CHOICES, APT FEELINGS: A THEORY OF NORMATIVE JUDGMENT 132 (1990); JOHN STUART MILL, UTILITARIANISM Ch. 5 (Roger Crisp ed., 1998) (1863).

sons might be. It is what it would be morally *wrong* not to do. And a moral wrong is not just any kind of moral failing, but what it would be *blameworthy* to do, were one to do it without excuse.[8] As Mill put it, "There are other things . . . which we wish that people should do, which we like or admire them for doing, perhaps dislike or despise them for not doing, but yet admit that they are not bound to do . . . ."[9] In these cases, Mill adds that "it is not a case of moral obligation; we do not blame them."[10] It is a conceptual truth that an act is morally wrong if, and only if, it is blameworthy if done without excuse.

Blame, as it functions in this line of thought, is not a speech act but a Strawsonian reactive attitude. When we blame someone in speech, indeed, we normally intend to express, and to be taken by our interlocutor to express, the distinctive attitude of blame. *SPS* follows Strawson in arguing that reactive attitudes have a special role in mediating human practices of responsibility—more precisely, accountability or answerability—because they are essentially "interpersonal," as Strawson put it, or "second personal," in the terms of *SPS*.[11] They implicitly address demands *to* their objects in a way that other critical attitudes like disdain or contempt need not. And they presuppose an authority to address the demand and bid for the other's recognition of that authority. They have an implicit R.S.V.P.

Strawson did not give a formal definition of reactive attitudes, but their central features are clear from the role they play in his argument about moral responsibility and freedom of the will. Strawson's core idea is that reactive attitudes involve a characteristic, "interpersonal" way of regarding the individuals who are their objects that commits the holder of the attitude to certain assumptions about the object individual and her capacities to regulate her will. Unlike "objective attitudes," such as disdain, disgust, and annoyance, reactive attitudes are essentially characterized by "involvement or participation with others in inter-personal human relationships."[12] There is always a second-personal element to reactive attitudes. Through the

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8. Note that the concepts of moral wrong and of violation of moral obligation are nonetheless distinct from that of blameworthiness. Something is morally wrong and violates a moral obligation if, and only if, it would be blameworthy *if done without excuse*. Excuses defeat claims of blameworthiness but not that of having done moral wrong. To the contrary, an excuse itself presupposes that the conduct it excuses was nonetheless wrong.

9. MILL, *supra* note 7, at para. 14.

10. *Id.* ("We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience.").

11. DARWALL, SECOND-PERSON STANDPOINT, *supra* note 1, at 8-9; STRAWSON, *supra* note 5; *see also* Gary Watson, *Responsibility and the Limits of Evil*, *in* RESPONSIBILITY, CHARACTER, AND THE EMOTIONS: NEW ESSAYS IN MORAL PSYCHOLOGY 263 (F.D. Schoeman ed., 1987) [hereinafter Watson, *Responsibility and the Limits of Evil*]; Gary Watson, *Two Faces of Responsibility*, 24 PHIL. TOPICS 227-48 (1996).

12. STRAWSON, *supra* note 5, at 79.

attitude, we *hold* its object *to* something and thereby implicitly make a demand *of* (and so implicitly address the demand *to*) him or her. As Strawson put it, "The making of the demand is the proneness to such attitudes."[13] The reason that reactive attitudes distinctively implicate freedom of the will, then, is that we can intelligibly address a demand to someone to regulate her will appropriately only if we suppose that she can so regulate it as a result of recognizing our demand's legitimacy. That supposition is, as Gary Watson says, a "constraint[] on moral address."[14] In this way, reactive attitudes like moral blame are unlike other critical attitudes, such as disesteem, contempt, and disgust, which lack an intrinsically addressing, second-personal element, whether these latter take a distinctively moral form, as in moral disesteem or disgust, or not.

Strawson makes a distinction, which is important to our argument, between *personal* and *impersonal* reactive attitudes. A personal attitude, like resentment, is felt as if from the perspective of an involved party (like the victim in a tort), while an impersonal reactive attitude is felt as if from an uninvolved, third party's standpoint. It is, however, crucial to Strawson's argument, as it is to that of *SPS* and to our argument here, that both personal *and* impersonal reactive attitudes are essentially "interpersonal" in Strawson's sense (or "second personal" in ours), since both implicitly address demands. Thus "first-party" reactive attitudes, like guilt, second-party attitudes, like resentment, and third-party attitudes, like indignation or moral blame, are all *equally* "interpersonal" or second personal.[15] "Second person" does not mean "second party." Reactive attitudes, whether personal or impersonal, are all equally second personal in having implicit *addressees*. As Strawson puts it, they are all equally "participant" as opposed to "objective" attitudes, such as annoyance, disesteem, or disgust.

If moral obligations period are what it would be blameworthy to fail to do without excuse, and if blame is an impersonal reactive attitude that implicitly makes a demand, then both obligation and blame presuppose the idea of a standing or *authority* that any third party, or as we might put it, any representative person or member of the moral community, has to hold wrongdoers responsible and implicitly address the demand to them. We can formulate this point by saying that each and every one of us has a *representative authority* to ad-

13. *Id.* at 92 (emphasis omitted).

14. Watson, *Responsibility and the Limits of Evil*, *supra* note 11.

15. The first two are personal reactive attitudes; the third is an impersonal reactive attitude.

dress the moral demands we implicitly make of ourselves and one another, as we presuppose when we feel blame.[16]

I argue that bipolar moral obligations, that is, directed duties whose violation entails that the violating obligor has injured *and*, at least other things equal, *wronged* his obligee, also conceptually entail an authority to address claims and demands.[17] However, the kind of authority distinctive of bipolar obligations is not representative authority but an *individual authority* that the individual obligee has to make claims and demands of an obligor who is obligated *to him* and to hold the obligor personally accountable. To be sure, violations of bipolar obligations not only wrong the obligee; they are also wrong *period*, at least other things being equal.[18] And this entails, on a second-personal analysis, that third parties have a *representative authority* to hold the wrongdoer accountable as well. But third parties do not have the distinctive *individual authority* that the victim has and which, moreover, he may exercise at his discretion.

As Hohfeld famously pointed out, bipolar obligations entail correlative claim rights and vice versa.[19] If X is obligated to Y to do A, then Y has a right against X that X do A. *SPS* follows Joel Feinberg in maintaining that claim rights conceptually implicate a distinctive standing (*individual authority*) to claim that to which they are entitled.[20] It follows that bipolar obligations essentially involve this distinctive second-personal authority also.[21]

We can easily imagine a society (Feinberg's "Nowheresville") in which it is thought morally wrong (period) to step on others' feet, unless, say, they desire or do not mind one's doing so; but where the latter is not seen as a giving of consent, which can only be understood only within a framework of bipolar obligations and claim rights. Consent, by definition, is required for actions that would otherwise wrong the person who gives it. In Nowheresville, others' will and preference appear simply as features of the moral landscape that bear on moral

16. *See* Darwall, *Bipolar Obligation*, *supra* note 1 (Note that no authority to express this attitude publicly follows straightway. What standing anyone has to do that I take to be a substantive normative, rather than a conceptual, matter.).

17. *Id.*

18. This is true unless the obligor has a *justification* for the violation. In this case, the action is no longer wrong, even if there remains a compensable injury. We take it to be a semantic choice whether or not to say that the obligee is "wronged" in this case. We can follow Jules Coleman and say that in such cases the entailed claim right (and bipolar obligation) are "infringed" rather than "violated." JULES L. COLEMAN, RISKS AND WRONGS 300 (1992).

19. WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING 65-75 (Walter Wheeler Cook ed., Greenwood Press 1978) (1919).

20. JOEL FEINBERG, *The Nature and Value of Rights*, *in* RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 143, 151 (1980) (stating that "having a claim consists [of] being in a position to claim, that is, to make claim to or claim that") (emphasis omitted).

21. The next several paragraphs draw heavily from Darwall, *Bipolar Obligation*, *supra* note 1.

obligations period. Others are not regarded as having any prerogative, normative power, or authority to consent, where consent is conceived as something that can be given only through a second-personal address that reciprocally presupposes the individual authority to release one from what would otherwise be a bipolar obligation *to* the other.

Consent in this sense can only be given second personally, and it implicates bipolar obligations and claim rights by definition.[22] It is an exercise of a normative power, in this case, to release someone from a bipolar obligation he would otherwise have had, say, not to step on your feet.[23] Normative powers, in general, are authorities or standings to enter into reciprocally recognizing, second-personal engagements with others that alter bipolar obligations and claim rights between the parties, but which also presuppose that the parties are already obligated to one another in various ways. Other essentially bipolar normative powers include the authority to make promises, to enter into agreements and contracts, and to exercise such prosaic normative capacities as simply asking someone to do something or acceding to a request.[24]

The power of consent is but one of an ensemble of individual normative powers or authorities that enter into the having of a claim right against someone and therefore into another's having a bipolar obligation to one. Moreover, these powers or authorities are all essentially second personal. Feinberg emphasizes that the right holder's authority to demand or *claim* her rights enters into the very idea that she has a claim right. "[I]t is claiming," Feinberg writes, "that gives rights their special moral significance."[25] The authority to claim our rights "enables us to 'stand up like men,' to look others in the eye, and to feel in some fundamental way the equal of anyone."[26] When we regard persons as having a claim right that others not step unbidden on their feet, part of what we think is that each person has a distinctive set of individual authorities over others' conduct with respect to *his* feet that he does not have with respect to the treatment of other people's feet. And these powers include the individual authority to hold the person against whom the right is held personally accountable. If the right is violated, the right holder has an authority or

22. ARTHUR RIPSTEIN, FORCE AND FREEDOM 111-32 (2009); Darwall, *Bipolar Obligation*, *supra* note 1.

23. JOSEPH RAZ, PRACTICAL REASON AND NORMS 98-104 (1999); Joseph Raz, *Voluntary Obligations and Normative Powers*, 46 ARISTOTELIAN SOC'Y 79, 92-101 (Supp. Vol. 1972).

24. David Enoch, *Giving Practical Reasons*, 11 PHILOSOPHERS' IMPRINT 4 (2011), Gary Watson, *Promises, Reasons, and Normative Powers*, *in* REASONS FOR ACTION 155-78 (David Sobel & Steven Wall eds., 2009); Stephen Darwall, *Demystifying Promises*, *in* PROMISES AND AGREEMENTS 255, 268-76 (Hanoch Scheinman ed., 2011).

25. FEINBERG, *supra* note 20, at 151.

26. *Id.*

standing that others do not have to decide whether or not to complain, seek apology or compensation, or to forgive.

Right holders have a distinctive authority to hold others answerable for violations of *their* rights that third parties do not have. The point is not that third parties have no authority. To the contrary, I argue in *Bipolar Obligation* that the individual authorities that right-holding obligees have can exist only if obligees share a *representative authority* with third parties, as well as with any obligor who might violate their rights.[27] The point is that there is a special *individual* authority an obligee has to hold the obligor personally answerable that can, like the power of consent, be exercised only by the right-holding obligee herself at her discretion.

One way to see this is to reflect on forgiveness.[28] Just as it is uniquely up to the right holder to decide whether or not to consent or to waive her right (assuming the right is waivable), so is it distinctively up to a victim whose right has been violated whether to forgive someone who has violated it. No one else has the same authority or standing.[29] Moreover, just as the power to consent can exist only against the background of bipolar obligations and rights that are in force without consent, so also can the authority to forgive exist only against the background of a distinctive authority that obligees and right holders have to hold their obligors personally responsible. Forgiveness involves the victim's somehow moving past personal reactive attitudes, like resentment, that mediate personal responsibility.[30]

The situation is similar with apology. An apology is, by definition, addressed to someone who receives it and who has the authority to accept it or not. If a victim comes upon an unaddressed admission of guilt and expression of sincere regret in her victimizer's diary, she has not discovered an apology.[31] Apologies are a way of holding oneself personally answerable to an obligee whose authority to hold one thus answerable is thereby reciprocally recognized. It is a second-personal acknowledgment of having violated a bipolar obligation to the obligee and of the obligee's special authority to hold one answerable for it.

On a Strawsonian analysis, impersonal or "third-party" reactive attitudes through which we hold ourselves and others accountable, and presuppose the representative authority to do so, are implicated

27. Darwall, *Bipolar Obligation*, *supra* note 1.

28. *See, e.g.*, CHARLES GRISWOLD, FORGIVENESS: A PHILOSOPHICAL EXPLORATION (2007).

29. Though others who are specially related to the victim may have some standing, it is nonetheless not the same.

30. 1 JOSEPH BUTLER, *Sermon IX. Upon Forgiveness of Injuries*, *in* THE WORKS OF BISHOP BUTLER 112 (1900).

31. Though she might if she came across something with the same content addressed to her.

in the concept of moral obligation period. A moral obligation (period) is what it would be blameworthy not to do, were one to fail to perform without excuse. Similarly, *personal* reactive attitudes are implicated in the concept of a directed duty or bipolar obligation. A bipolar obligation exists where failure to perform would warrant the obligee in *resenting* the obligor.

To summarize, moral obligations period and bipolar moral obligations involve different authorities to address their demands and hold obligated subjects answerable for compliance. Bipolar obligations of the sort underpinning the legal obligations in play in tort law involve, as part of their conceptual structure, an individual authority that obligees have to hold obligors personally accountable to them.

II. CIVIL RECOURSE, CORRECTIVE JUSTICE, AND INDIVIDUAL AUTHORITY

We turn now to tort law and to civil recourse theory as a theory of torts. To this point, we have been considering conceptual claims about moral obligation period and bipolar moral obligations, including arguments that these concepts respectively involve distinctive forms of authority—representative and individual authority, respectively—and distinctive forms of accountability. Torts involve violations of bipolar legal obligations, not moral ones. But though the legal obligations that torts violate are not themselves moral or even necessarily de jure in some broader nonmoral sense, they arguably nonetheless purport to have de jure force, as even legal positivists can allow. If this is so, and if, as we submit, the arguments of *SPS* apply to de jure obligation and authority more generally and not just to morality more narrowly conceived, it will follow that torts must purport to involve a distinctive form of accountability that is analogous to that involved in bipolar moral obligations and claim rights; namely, a distinctive accountability of tortfeasors *to their victims*. We believe that civil recourse theory can give theoretical expression to this fact, though we shall suggest that it can do so adequately only if it is developed in a way that stresses the mutual accountability of tortfeasor and victim alike.

Civil recourse theory seeks to reframe the theory of torts in a fundamental way. As Goldberg and Zipursky see it, torts came in the last century to be viewed primarily in terms of the fair or efficient allocation of costs, an idea whose root they find in Holmes and in later writers like Prosser and law and economics theorists like Calabresi.[32] Civil recourse theory reframes tort as a law of private *wrongs* and recourse. Tort law defines duties to refrain from injuring others,

32. John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 925-27 (2010).

duties which are directed or bipolar in the sense that they are owed *to* others. When these duties are breached by an action, that action constitutes a wrong *to* the obligee; it wrongs him. An action that breaches a right protected by tort law therefore provides a legal basis for private recourse by the obligee against the obligor in court—a private right of action, through which a plaintiff may attempt to exact damages or relief from an injurer.

Now it might seem that *corrective justice theories* had already offered a substantially similar reaction to views concerned primarily with loss allocation. These views, developed by Jules Coleman, Stephen Perry, Arthur Ripstein, Ernest Weinrib, and others, take as their wellspring a principle of corrective justice that holds that tortfeasors acquire a duty to repair the wrongful losses that their conduct causes. Coleman's view, in particular, has understood tort law as embodying both first- and second-order duties: first-order duties not to injure and second-order duties of repair.[33] When conduct breaches a relevant first-order duty and causes injury, the principle of corrective justice triggers a second-order duty of repair.

For a loss to be wrongful in the sense of requiring repair from the point of view of corrective justice, the wrongdoer need not be blameworthy. Indeed, the tortfeasor need not even be a genuine *wrongdoer* in the sense of having done something wrong, all things considered. A person can be wronged in the sense of being made subject to a wrongful loss even by actions that are morally permissible or perhaps even praiseworthy. Coleman writes:

> Culpability is not a condition of a wronging . . . . Indeed, in the case of some wronging, the injurer's conduct is actually morally praiseworthy or, at least, permissible . . . . Wronging can sometimes create wrongful losses even in cases of justifiable conduct. In cases of wronging, neither the absence of blame nor the presence of praiseworthiness is sufficient to defeat a claim that a loss is wrongful. The wrongfulness of the loss derives from the fact that the conduct is . . . invasive of a right.[34]

The tortfeasor's act need only have fallen below a legal norm of conduct established by the duty not to injure. The tort of negligence, for example, imposes liability on those who injure by conduct that falls below a standard of due care: the conduct of a "reasonable person of ordinary prudence." Coleman emphasizes that people are often not blameworthy for falling below this standard but are nonetheless lia-

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33. COLEMAN, *supra* note 18, at 316-17.

34. *Id.* at 335. Without the ellipsis: "The wrongfulness of the loss derives from the fact that the conduct is a wrong, and the conduct is a wrong because it is invasive of a right." *Id.* Our elliptical construction is designed to set up the contrast Goldberg and Zipursky wish to draw. Note also, as mentioned *supra* note 18, that Coleman calls justified breaches of bipolar obligations "infringements" or "invasions" of the entailed claim right. *Id.* at 300.

ble in tort. The sense of *wrong* and *wronging* that is relevant to Coleman's corrective justice theory is simply that of an infringement of the victim's right not to be injured, which is correlative to the wrongdoer's first-order duty not to injure. Breaches of this first-order duty trigger a duty to repair the injury caused by the breach, regardless of whether the tortfeasor's conduct was culpable or perhaps even morally justifiable.

The significance of corrective justice theory, according to Goldberg and Zipursky, is that even if it takes a wronging of a victim to trigger the duty of repair, what matters for the theory is the tortfeasor's duty to repair the victim's *loss*.[35] They distinguish corrective justice theories, all animated by the duty to repair a loss, from their own civil recourse view, according to which tort remedy is driven by the defendant's responsibility for having *committed a wrong* against the plaintiff "in a manner that renders her a victim *entitled* to respond to the wrongdoer."[36]

Goldberg and Zipursky stress Coleman's insistence that tort law is fundamentally about losses, not about wrongdoing. "Tort law is about messes. A mess has been made, and the only question before the court is, who is to clean it up?"[37] If tort were a state response to wrongs, Coleman and Perry argue, the state would offer a legal remedy or penalty based on the gravity of the wrong, rather than awarding a plaintiff damages typically keyed to the losses caused by a wrong.[38]

Goldberg and Zipursky thus align corrective justice theory with "loss allocating" views that are concerned fundamentally with a just distribution of resources to remedy losses. What makes the civil recourse view distinctive, in their view, is that it offers a relational account of tort as a law of *redress for wrongs*, which they claim better fits fundamental features of tort doctrine. According to Zipursky, "The key to tort liability . . . is that plaintiffs have rights to act against defendants, *not* that defendants have prior legal duties of repair to plaintiffs."[39] For civil recourse theory, the point is not that tort defendants have a duty, but that they have a tort *liability*. As Zipursky puts it, "Liability is not best explained as a form of duty to those whom one has wronged, but rather as a form of vulnerability to the one who has been wronged."[40] Tort law concerns the sorts of con-

35. Goldberg & Zipursky, *supra* note 35, at 920-28.

36. *Id.* at 944.

37. Jules Coleman, *Second Thoughts and Other First Impressions*, *in* ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 257, 302 (Brian Bix ed., 1998).

38. *See generally* COLEMAN, *supra* note 18; Stephen R. Perry, *On the Relationship Between Corrective and Distributive Justice*, *in* OXFORD ESSAYS IN JURISPRUDENCE: FOURTH SERIES 237-38 (Jeremy Horder ed., 2000).

39. Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort, and Moral Luck*, 9 THEORETICAL INQUIRIES L. 97, 110 (2008).

40. *Id.*

duct our legal system defines as wrongfully injurious in the sense that, when committed, "the victim is entitled to exact something from the wrongdoer."[41]

What do Goldberg and Zipursky mean by a right to "exact something"? Their accounts have evolved and continue to do so. We hope that the present Article will contribute to this progression. Goldberg and Zipursky have portrayed the power to exact remedy within the context of what they call a Lockean or "social-contract" view.[42] On this picture, citizens relinquish the liberty to respond aggressively to a wrong and receive in return from the state a certain level of security against responsive aggression by others and additional assurance that a civil avenue of redress against wrongdoers will be supplied.[43] The state is therefore obliged to provide plaintiffs with an avenue of recourse through which they are empowered to act against their victimizers. The private right of action is the state's civil empowerment of individuals who have been wronged against the wrongdoer. "The state recognizes itself as obliged to empower the plaintiff to act in some manner against the defendant and acts on that obligation by permitting the plaintiff to exact damages or have the defendant enjoined against performing certain acts."[44]

Zipursky notes also that the existence of punitive damages suggests that tort law "permit[s] the plaintiff to 'be punitive,' or to 'be vindictive'—to inflict hardship upon the defendant out of resentment, spite, or the desire for revenge, not necessarily as an aspect of self-restoration."[45] In a similar vein, Goldberg says that the civil recourse theory's "animating ideas . . . are relational and retaliatory, involving notions of empowerment, response, and satisfaction."[46]

Presently we shall argue that justified retaliation or vindication is not the most promising way of developing civil recourse theory's fundamental insights. We think civil recourse theory is right to stress

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41. Goldberg & Zipursky, *supra* note 32, at 919. Goldberg and Zipursky's contrast with corrective justice may seem somewhat exaggerated. They acknowledge that Coleman calls tortious "infringements" of victim's rights "wrongs." After all, they note, Coleman's influential book is titled *Risks and Wrongs*. *Id.* at 925. Still, they claim that tort law, for Coleman, as for Perry, does not respond to wrongs *as wrongs* even in Coleman's defined sense. It responds to the wrongfully created injury or loss, which the tortfeasor has a duty to repair. For civil recourse theory, by contrast, the tortfeasor does not so much acquire a duty as incur a liability, consisting in victim's right of recourse, her entitlement "to exact something from the wrongdoer." *Id.* at 919.

42. *Id.* at 974.

43. Goldberg & Zipursky, *supra* note 32, at 974; Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735-37 (2003).

44. Goldberg & Zipursky, *supra* note 32, at 974.

45. Zipursky, *supra* note 43, at 751 (remarking that "[i]t may simply reflect the principle that a plaintiff who has been willfully wronged is entitled to be punitive in this manner, if he or she so chooses").

46. John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair V. Full Compensation*, 55 DEPAUL L. REV. 435, 436 (2006).

tort liability as a distinctive "vulnerability" that tortfeasors have to their victims.[47] However, we think it is a mistake to conceive this vulnerability in terms of susceptibility to vindication, vengeance, or retaliation—ideas that are more appropriate to an honor culture or ancient Greek tragedy and myth than to the law of torts (or, indeed, to the criminal law). As we see it, the vulnerability that characterizes torts is a form of accountability or answerability of the same genus as the one involved in bipolar moral obligations. Private law, and the law of torts more specifically, involve the fundamental idea that individuals have obligations to and rights against one another, and that each person has an individual authority to hold others answerable for complying with obligations to him and his rights against them, just as others have the same authority to hold him answerable for complying with his obligations to them and their rights against him. Goldberg and Zipursky might well agree with this point. "Even when a particular tort is not also a moral wrong," they write, "saying that it is a legal wrong is similar to saying that it is a moral wrong in at least the following respects: it asserts that the act in question . . . merits some form of accountability when done."[48] And even more to the current point: "Individuals who are able to prove that someone has treated them in a manner that the legal system counts as a relational, injurious wrong shall have the authority to hold the wrongdoer accountable to him."[49]

Goldberg and Zipursky offer a number of reasons to think that the doctrine of tort better fits their view than corrective justice. We focus here on the fact that tort doctrine gives a distinctive right to the injured individual to seek tort remedy, which we suggest is the legal expression of a conceptual point about the normative structure of bipolar obligations and claim rights more generally, namely, that obligees have an *individual authority* and consequently a distinctive standing as victims to hold their obligors responsible for violating obligations held *to them*.

In *Civil Recourse and Separation of Wrongs and Remedies*, Arthur Ripstein argues that a Kantian corrective justice of the kind he holds can also explain why it is that only victims have standing to bring a case in torts.[50] However, while Ripstein's argument establishes that a

47. Zipursky, *supra* note 39, at 110.

48. Goldberg & Zipursky, *supra* note 32, at 950.

49. *Id.* at 974; *see also id.* at 944 ("A morally significant aspect of what an actor has done is whether his acts—described in a result-inclusive way—are ones that another person could fairly demand that he be held accountable for.").

50. Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 200-01 (2011). It seems to us that Coleman's version might also do the same, along the following lines. It is important that the first-order duty not to injure is bipolar, since it entails the correlative claim right (of obligees) not to be injured. And so also is the duty to repair an injury to a wronged victim bipolar, since it entails the victim's

Kantian account like his can explain victims' distinctive standing to bring tort actions, we believe that it nonetheless falls short of providing a view on which a defendant can be seen to be accountable to a plaintiff; nor, indeed, can it explain a genuinely bipolar obligation of the wrongdoer *to* the wronged individual.

Ripstein also rejects Goldberg and Zipursky's claim that corrective justice cannot view tort as a law of wrongs. Ripstein builds his argument on a Kantian theory of right, according to which each person has an "innate right of humanity" to pursue whatever ends he or she chooses independently of the choices of others and consistently with others' equal right.[51] Since pursuing ends is impossible without some means or other, every person must be presumed to have some means by right—most clearly, his own body, but also external things he can rightfully acquire as property.[52] Individuals are wronged when others take their means or otherwise infringe on their right to them. According to Ripstein, tort law remedies wrongs, conceived as violations of such rights, by restoring the means to which individuals have a right.[53]

The Kantian doctrine of right flows, again, from the idea that individuals have the right to use their means to pursue whatever ends they adopt, independently of the choices of others and consistently with others' equal right. From the point of view of tort law, an individual's means are her bodily powers and mental capacities, her reputation, and her property. These individual entitlements taken together create a system of rights through which each is his own master and independent of others.

It is important to Ripstein that the victim's original right to her means continues to exist even if someone takes her means from her in violation of her right (and so wrongs her).[54] She remains entitled to use of her means even after another person has taken them. The duty of repair that is the cornerstone of corrective justice theories of tort is, according to Ripstein's Kantian theory, just the tortfeasor's duty to restore to someone any means to which she has a right. And a remedy simply restores to the wronged individual that to which she is already entitled. Remedy replaces the deprived means to which an individual continues to have a right after the wrong. Ripstein's version of corrective justice conceives of right and remedy as continuous, in

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right to have her injury repaired. If, however, bipolar obligations and claim rights conceptually implicate the individual authority of obligees (claim-right holders) to hold obligors (those against whom obligees' claim rights are held) answerable for compliance, then victims' distinctive standing to hold their victimizers accountable follows directly from that. And this can explain within a Colemanian corrective justice theory why only victims have standing to bring cases in torts.

51. RIPSTEIN, *supra* note 22, at 30-56.

52. *Id.* at 57-109.

53. Ripstein, *supra* note 50, at 178.

54. *Id.*

that an individual's primary right to her means is the same right for which she claims restoration in demanding remedy. The right to remedy is no different from the primary right to her means.

Having set out his Kantian version, Ripstein's response to Goldberg and Zipursky's charge that corrective justice theory cannot explain why the law of tort gives only an injured person a private right of action is then simple. A right constrains the conduct of others, but only the bearer of the right can determine whether to exercise it. Only the injured victim has a right to *her* means against interference from others. And so only the injured victim has a right to claim the restoration of her means when she is deprived of them. It follows from this analysis that a tort suit must be initiated by a plaintiff simply because a plaintiff is the only one with standing to exercise any right that she has. The law of tort may not afford a plaintiff distinctive standing in the civil recourse sense, but it uniquely affords a plaintiff a private right of action since a plaintiff alone is entitled to determine the purposes for which her means are used. Where she does not claim restoration of means after a deprivation, she effectively allows another the use of her means.

Although we cannot pursue the matter fully here, we believe that though Ripstein's Kantian theory of right can explain victims' distinctive standing to bring tort actions, it cannot explain any distinctive *accountability* tortfeasors have to victims, nor indeed, any genuinely bipolar obligations owed to their victims in the first place. The point concerns not Kantian theories in a broad sense, but theories, like Ripstein's, that are based on Kant's theory *of right*. And it derives from the fact of what, according to Kant, a right most fundamentally is. For Kant, a claim right to something is an "authorization" to use coercion in defending or securing that thing.[55] As Ripstein puts it, Kant "identifies a right as a 'title to coerce.' "[56] Violations of a right are, Kant says, "hindrances," and since a right is an entitlement to the use of coercion to protect that to which one has a right, Kant holds that it follows from the very idea of right that the hindering of hindrances is itself rightful.[57]

If a right is a justification to coerce, then tort law is the mechanism through which victims can rightfully coerce tortfeasors to provide them with the means to which they had a right to in the first

55. IMMANUEL KANT, THE METAPHYSICS OF MORALS (1797), *reprinted in* PRACTICAL PHILOSOPHY 353, 388 (Mary J. Gregor ed. & trans., 1996).

56. RIPSTEIN, *supra* note 22, at 30.

57. Kant begins the section of "The Doctrine of Right" (in *The Metaphysics of Morals*) titled "The Supreme Principle of the Doctrine of Right Was *Analytic*; That of the Doctrine of Virture is *Synthetic*" as follows: "It is clear in accordance with the principle of contradiction that, if external constraint checks the hindering of outer freedom in accordance with universal laws (and is thus a hindering of hindrances to freedom), it can coexist with ends as such." KANT, *supra* note 55, at 526.

place, or with its nearest replacement. Our point, however, is that this entails no accountability of the tortfeasor to the victim. In fact, it does not entail any accountability to anyone. It just means that tortfeasors cannot complain if their victim recovers her means, whether by a tort suit or in some other way, just as they could not have complained if she had used force to prevent the tort in the first place.

Would not, however, some kind of accountability flow from the obligations that follow from the original rights that justify victims' tort action? Not necessarily. The sense in which rights "constrain" conduct, on a Kantian view of right, is not that they entail *moral* constraints in the sense of genuinely bipolar obligations to victims that the tortfeasor's tortious conduct violates. The only moral constraint that follows from rights, conceived as justifications for coercion, is that right holders are justified *in constraining* violations of their rights.

This is a fundamentally different picture from the view that claim rights entail that the person against whom the right is held is *obligated, and therefore accountable, to* the right holder not to violate her right. No distinctive accountability to the victim is entailed; indeed, no accountability to anyone whatsoever is entailed. We could even say that, on the Kantian theory of right, the fact that one has a right against someone is not itself a moral reason of any kind for that person to accord one what one can claim from him by right. Of course, there may, and most usually will, be reasons that a Kantian moral theory will explain why one should not violate the right. The point is, the fact that someone has a right is not itself such a reason—that is simply the fact that the right holder will be justified in constraining the person against whom the right is held not to violate the right.

We believe that civil recourse theory has a potentially better account of victims' distinctive standing to bring a suit in torts. To theorize adequately *both* the original rights and bipolar obligations with which tort law is concerned *and* the distinctive standing that tort law gives to victims, it is essential, in our view, to appreciate the way the concept of accountability enters into both. Claim rights and bipolar obligations are, as a conceptual matter, what obligors are accountable to obligees (right holders) for doing, and the law of torts provides an appropriate legal expression of this fundamental idea.

In this respect, civil private law, in general, and torts, in particular, are to bipolar obligations as the criminal law is to moral obligation period. Just as representative third parties or the moral community have the authority to hold wrongdoers responsible through accountability-seeking reactive attitudes, it is also appropriately up to the people's representatives to decide whether to bring a criminal action. Even whether to *prosecute* a rights violation is not uniquely up to the victim. But if the issue is civil rather than criminal responsibility, then since this concerns the obligee's individual authority

rather than community members' representative authority, obligees really should have special legal standing.

In recognizing the distinctive individual authority of victims, a civil recourse theory of torts is supported by a conception of mutual accountability that is grounded in the second-person standpoint. At the same time, however, Goldberg and Zipursky sometimes present civil recourse theory in terms of "vindication" and "revenge," as we noted above.[58] So we would like to say more about why we think this is a mistake and to suggest that the idea of the mutual accountability of equals can provide a more promising alternative.

At one point, Goldberg places a more agonistic interpretation of civil recourse theory within an ideal of equal respect. "Part of the state's treating individuals with respect and respecting their equality with others," he says, "consists of its being committed to empowering them to act against others who have wronged them."[59] It is important, however, to distinguish two fundamentally different conceptions of (recognition) respect for persons that relate to fundamentally different conceptions of the person and that mediate different conceptions of social order.[60] One is the idea of respect for one another as mutually accountable equals—second-personal respect. And the other is the form of recognition respect that mediates a status hierarchy of honor—honor respect. Vindication, retaliation, and revenge are responses to disrespect within an order of honor. Dishonoring disrespect (contempt) seeks to lower its victim's status, and when it is unopposed, it effectively does so. The victim's status can only be restored by retaliation against the dishonorer, which avenges the insult. The response to disrespect is a reciprocating disrespect.

The sense of *person* in play in an honor culture is that of *persona*, an individual's social presentation or *face*. Someone has a certain status—or occupies a social role—when others respect his person (*persona*) in the sense of allowing him the social role he wishes by playing along with him as supporting actors in a social drama. When, however, they treat his self-presentation with contempt, his persona is no longer supported, and he loses face. The emotional response to contempt is shame, whose natural expression is to cover one's face and hide, to remove oneself (even if only) imaginatively from view.

Even if the ideas of retaliation and vengeance are most at home within a hierarchical status culture, that is not, of course, what Goldberg and Zipursky are proposing. They see the state, through tort law, as "respecting [victims'] equality with others."[61] Nonetheless,

58. *See* Goldberg & Zipursky, *supra* note 32, at 982; Zipursky, *supra* note 43, at 750.
59. Goldberg & Zipursky, *supra* note 32, at 974.
60. We draw here generally on sources cited *supra* note 6.
61. Goldberg & Zipursky, *supra* note 32, at 974.

the way the state would be doing so would still be within the conceptual framework of an honor culture, by providing victims the opportunity to restore their status by avenging their dishonoring wrong.

Consider in this connection a similar proposal that Jean Hampton made about how to conceive of punishment of rights violations. Those who violate others' rights presume a kind of authority over others. They act towards their victims as though their victims have lesser value. They arrogate a kind of "lordship" over their victims and seek to establish this by making their victims submit to the indignity involved in their crime.[62] According to Hampton, the "retributive idea" is that the appropriate response to such attempted diminishment and "defeat" of the victim is to turn tables and force the wrongdoer's "submission," thereby defeating him and reconfirming or "vindicating" the victim's value.[63] According to Hampton, punishment involves a public humiliation of the arrogant violator that simultaneously brings him down a peg and restores his victim's status or honor.[64]

We might think of Hampton's proposal as the analogue in criminal law of a vengeance interpretation of civil recourse theory in tort law. The point of the tort proceeding is not for the state to humiliate the rights violator and thereby restore the equal status of criminal and victim, but to provide a public forum in which the victim can do so. In our view, however, this imports the idea of equality into a conceptual structure that is still fundamentally that of an honor culture.[65] Respect for one another as mutually accountable equals is a different idea, not just in the sense that honor cultures are generally hierarchical, but because respect in this latter sense is essentially second personal and reciprocal in a way that honor respect even between equally honored equals is not.[66]

To respect someone as a mutually accountable equal is to hold oneself answerable to him at the same time one holds him answerable to oneself. It is to be in second-personal relation to someone. Respect for persons in this sense is what Strawson calls a "participant's" attitude, an attitude of "involvement or participation with others in inter-personal human relationships."[67] Honor respect and contempt, by contrast, even honor respect for equals or peers, are third personal; they are "observer's" or "objective" attitudes in Strawson's sense. Con-

62. Jean Hampton, *The Retributive Idea*, *in* FORGIVENESS AND MERCY 124 (1998).
63. *Id.* at 125.
64. *Id.*
65. Other writers who make a similar move are Jeremy Waldron and Kwame Anthony Appiah. *See* KWAME ANTHONY APPIAH, THE HONOR CODE: HOW MORAL REVOLUTIONS HAPPEN (2010); Jeremy Waldron, *Dignity, Rank, and Rights, The 2009 Tanner Lectures at UC Berkeley* (N.Y.U. Pub. L. & Legal Theory Working Papers, Paper No. 09-50, 2009), *available at* http://ssrn.com/abstract=1461220.
66. DARWALL, SECOND-PERSON STANDPOINT, *supra* note 1, at 119-47.
67. STRAWSON, *supra* note 5, at 79.

tempt towards someone, for example, is not necessarily expressed *to* that person; rather, it is more characteristically expressed to peers who are invited to join in the contemptuous attitude.

When someone in a community of mutually accountable equals violates an obligation, whether an obligation period or a bipolar obligation, she does not thereby become a legitimate object of contempt. To the contrary, she is held accountable for her violation. And this reciprocating response is no form of disrespect that seeks to lower her status or retaliate. It is rather a reactive attitude like moral blame that implicitly seeks to engage the other second-personally and demand respect. Because the attitude is essentially interpersonal or second personal, it views another in a way that recognizes him as a mutually accountable equal. As Strawson puts the point, reactive attitudes continue to "view [someone] as a member of the moral community; only as one who has offended against its demands."[68] They demand respect in a way that is itself respectful, at least implicitly.

It is a reflection of this that the "first-party" attitude that responds to second- or third-party reactive attitudes is not shame, but guilt. Guilt is the feeling as if being appropriately charged (second personally) with some violation, and its natural expression is also second personal—the desire to acknowledge guilt and take responsibility. That is partly what it is to hold oneself answerable.

When we hold one another answerable, whether for wrongdoing period, as representative members of the moral community, or for wronging us individually, as the individual to a victim to whom the injurer is bound by a bipolar obligation, we enter into a relation of reciprocal recognition and mutual respect for one another as mutually accountable equals. Holding someone answerable thus precisely does *not* return disrespect for disrespect; it embodies a respectful demand for respect.

If we project these ideas into the law of torts, it would seem that for the legal system to "trea[t] individuals with respect and respec[t] their equality with others," would not, in Goldberg's words, "empower[] them to act against others who have wronged them."[69] Rather, the legal system would enable individuals to hold their victimizers answerable by respectfully demanding respect. Only in this way, we believe, can tort law genuinely express an ideal of mutual accountability.[70]

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68. *Id.* at 93.

69. Goldberg & Zipursky, *supra* note 32, at 974.

70. Jason Solomon argues that at an ideal of equal accountability grounded in the second-person standpoint can support a civil recourse theory of victims being given legal standing to demand respect of their victimizers by "acting against" them. Jason Solomon, *Equal Accountability Through Tort Law*, 103 NW. U. L. REV. 1765, 1785. As we see it, however, equal accountability is always implicitly mutual, recognizing the equal standing of all to demand respect.

III. TORT REMEDY, PERSPECTIVE, AND THE COMMUNITY

Having emphasized the role of mutual accountability in civil recourse, our account of tort remedy deserves clarification. A tort suit not only is an attempt to exact remedy from a defendant but also serves to hold a defendant accountable in a characteristic way—according to legal standards that have general application to a community of mutually accountable equals. Thus, although a plaintiff bringing a claim based on her individual authority advocates her own position, her prayer for tort relief is at bottom a call to initiate a legal process that seeks mutual recognition of the rights of each party.

In the course of this judicial process, courts apply norms and directives established for the whole society to individual cases, settling disputes through the application of those norms.[71] Courts accomplish this with hearings structured to enable an impartial determination of the rights and responsibilities of particular persons on the basis of evidence and argument from each party. When presented, evidence is made available to be examined and confronted by an opposing party in open court, and each party has the opportunity to answer publically the arguments of the opposing party on the record. In making and interpreting arguments in court, lawyers and judges conceive of the law as a whole, attempting to discern and articulate coherence by integrating particular propositions into a systematic legal structure. Parties and their representatives frame legal arguments within this integrated system, inviting judges and juries to consider how their position fits into a coherent conception that has general application to the community.[72] The parties' arguments are tailored, of course, to their individual situations and commitments. As Waldron points out, part of the law's respecting individuals is that it treats them as though they "had a view or perspective of their own to present on the application of the norm to their conduct and situation."[73]

Even so, a tort claim is not simply a demand from the plaintiff's perspective in what Waldron has called a "lobbying sense"; it does not merely say what the law should be from only the plaintiff's point of view. Rather, civil suits allow the parties to influence the court's deliberation about what that the law is, such that all members of the community should be held accountable to its requirements. To be sure, a plaintiff asks the court to adopt her arguments, but in order to prevail, these must be offered in a way that is susceptible of general public application to a community of mutually accountable

71. Jeremy Waldron, *The Rule of Law and the Importance of Procedure* 10 (N.Y.U. Pub. L. & Legal Theory Working Papers, Paper No. 234 2010), *available at* http://lsr.nellco.org/nyu_plltwp/234.

72. *Id.* at 17.

73. *Id.* at 14.

equals. Thus, in a suit arising from a plaintiff's individual authority, a judgment is imposed from a more general perspective.[74]

Focusing on this feature of tort as mutual accountability further illuminates the way in which the institution supports, as others have argued, social equality and the dignity of persons. Waldron and Seanna Shiffrin have both recently argued that reasonableness standards, which undergird a significant amount of tort law, respect the dignity of each party in part because they embody this particular conception of persons as capable of holding themselves accountable to each other.[75] Applying reasonableness standards to individual conduct "embodies a crucial dignitarian idea—[that] those to whom the norms are applied [are] *beings capable of explaining themselves*."[76] The application of legal standards to individual conduct conceives of citizens as capable of apprehending the rationales by which the law governs them and of relating standards to their view of the relation between their actions and purposes and those of the community.[77] Shiffrin further reminds us that rather than requiring application of a rule by rote, reasonableness standards induce deliberation among citizens, requiring that they ask themselves, for example, whether they are taking due care, behaving reasonably, or treating one another fairly.[78] This is itself an exercise in mutual accountability. Reasonableness standards make possible "richer forms of moral and demo-

74. This account of tort remedy fits an account of a tort suit as a second-personal claim, of the sort Gideon Yaffe has spelled out. Gideon Yaffe, *Reasonableness in the Law and Second-Personal Address*, 40 LOY. L.A. L. REV. 939, 959 (2007) ("It is a fact, and a non-obvious fact, that the question before the court in any negligence case is whether or not to make successful the plaintiff's act of second-personal address of a second-personal reason."). In deciding for the plaintiff, the court in any civil case is acting on behalf of the plaintiff, enacting her request for damages. In this sense, when the court decides for the plaintiff, the plaintiff successfully conveys to the defendant, "[y]ou had a reason to take a precaution that would have prevented my injuries"—an argument whose validity depends on presupposed authority and accountability relationships between persons. *Id.* at 960.

75. *See* Jeremy Waldron, *Vagueness and the Guidance of Action*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE AND THE LAW (Andrei Marmour & Scott Soames eds., 2010); Seanna Valentine Shiffrin, *Inducing Moral Deliberation: On the Occasional Virtues of Fog*, 123 HARV. L. REV. 1214 (2010); Waldron, *supra* note 71.

76. Waldron, *supra* note 71, at 14.

77. Waldron finds this idea in Lon Fuller's notion the law has an "inner morality" demanding that it be general, public, prospective, intelligible, consistent, practicable, stable, and congruent. *See* LON L. RULLER, THE MORALITY OF LAW 39 (1964). Every departure from these principles is "an affront to man's dignity as a responsible agent," because subjecting human conduct to rules involve a commitment to the view that persons are "responsible agent[s], capable of understanding and following rules." *Id.* at 62. Waldron argues that particular aspects of legal procedure, not just form, for example, courts, hearings and arguments, are indispensable to the law's respect for the freedom and dignity of each person. Waldron, *supra* note 71, at 20-22.

78. Shiffrin, *supra* note 75, at 1217.

cratic relations"[79] and require individuals to actively apprehend and appreciate others' rights.[80]

Tom Tyler's experimental studies show that tort victims seek, not compensation pure and simple, but to hold tortfeasors accountable through fair procedures that enact mutual accountability. The "primary focus," Tyler observes, "is on bringing to account 'responsible people.' "[81] Tort claimants "are primarily interested in receiving an apology and restoring social order and respect."[82] "[T]he key issue on people's minds [is] moral accountability."[83] Where an individual has been negligently injured, compensation is generally "a poor substitute for . . . accountability."[84] It is important, moreover, that accountability come through fair procedures. Studies of decision acceptance suggest that while both outcome and procedural fairness matter, procedural justice usually matters more.[85] People are more apt to accept unfavorable outcomes when they result from procedures they regard as fair.[86]

What makes a procedure fair according to litigants?[87] First, having a voice or participating in the process.[88] Second, the perceived neutrality and lack of bias of authorized deciders.[89] Judicial openness and explanation of the basis for decisions also bolster perceived fairness, as does the quality of interpersonal treatment by authorities. Acknowledgment of litigants' rights increases individuals' sense that they have been treated with respect and dignity.[90]

In our view, both remedy and process in the law of torts enact the parties' mutual accountability to one another. We conclude, therefore, that civil recourse theory is best elaborated in these terms. What is at issue is not simply an individual authority that victims have to act

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79. *Id.* at 1223.

80. *Id.* at 1222-25. This fits also with Elizabeth Anderson's view. Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999).

81. Tom R. Tyler & Hulda Thorisdottir, *A Psychological Perspective on Compensation for Harm: Examining the September 11th Victim Compensation Fund*, 53 DEPAUL L. REV. 355, 361 (2003).

82. *Id.*

83. *Id.*

84. *Id.*

85. Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283, 292 (2003).

86. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 6 (2006).

87. *See* Tom R. Tyler, *What is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures*, 22 LAW & SOC'Y REV. 103 (1988). See also Tyler's work on California's five-year procedural fairness in court initiative. CENTER FOR COURT INNOVATION, PROCEDURAL FAIRNESS IN CALIFORNIA: INITIATIVES, CHALLENGES, AND RECOMMENDATIONS (May 2011), *available at* http://www.courts.ca.gov/documents/Procedural_Fairness_In_California_May_2011.pdf.

88. Tyler & Thorisdottir, *supra* note 81, at 380-81.

89. Tyler, *supra* note 85, at 298; Tyler & Thorisdottir, *supra* note 81, at 381.

90. Tyler & Thorisdottir, *supra* note 81, at 381.

against their victimizers, but an authority to hold tortfeasors accountable that victim and tortfeasor share reciprocally or mutually.[91]

91. Shiffrin, *supra* note 75, at 1222-25. This fits also with Elizabeth Anderson's view. Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287 (1999).