

# REASONABLENESS IN THE LAW AND SECOND-PERSONAL ADDRESS

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## I. INTRODUCTION

Law students discover very early in their legal educations that the “reasonable person” is a ubiquitous fixture of the law. Whether or not an injury is the product of negligence in tort law depends on whether or not a reasonable person would have taken a precaution which would have averted the injury.<sup>1</sup> Whether or not an offer has been made in contract law depends on whether or not a reasonable person would have taken the party to be conferring a power to create an agreement through acceptance.<sup>2</sup> Whether or not an act of killing an aggressor was done in self-defense in criminal law depends on whether or not a reasonable person would have taken deadly force to be required to repel the threat.<sup>3</sup> The list goes on and on. Over and over again the law asks not just what the plaintiff or defendant actually did or thought, but also what a reasonable person would have done or thought, or what a reasonable person would have understood another person to have done or thought. Defendant’s actions and thoughts are compared, that is, to those of the reasonable person. In fact, sometimes what the defendant actually did or thought is irrelevant; all that matters is what the reasonable person would have done or thought. Such is the case, for instance, in the mens rea of negligence in criminal law. If, for example, a reasonable person would have expected a particular act to kill another human being, then one of the mens rea elements of negligent homicide is

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1. See RESTATEMENT (SECOND) OF TORTS §§ 282, 283 (1965).
2. RESTATEMENT (SECOND) OF CONTRACTS § 2 cmt. b (1981).
3. MODEL PENAL CODE § 3.04(1) (1962).

present even if the defendant did not expect that result, or even if the defendant expected the opposite.<sup>4</sup> Our law gives tremendous weight to the acts and thoughts of the reasonable person.

Yet despite its ubiquity in the law, not enough thought has been given to the question of what the reasonable person is doing there. Plenty of writing has been done on the question of what constitutes reasonableness in particular domains.<sup>5</sup> Think, for instance, of the volumes of work on the Hand Formula as a means of assessing reasonable care in negligence torts.<sup>6</sup> What has not been sufficiently discussed, however, is the following macro-level question: is there any justification for the use of reasonable person standards in the law? To put the question another way, under what conditions is it justified for a judge to employ a reasonable person standard or for a legislator to write one into the law? While it is possible that the answer will be “never,” it is more likely that we can identify a legitimate role for the reasonable person standard. We will then be able to determine if the law’s reliance upon such a standard in a particular area is or is not justified by determining whether or not the reasonable person is playing its justifiable role in that domain. Further, with the identification of a legitimate role for the reasonable person standard could come criteria for determining what does and does not legitimately count as reasonable in a particular domain of the law. When we have an idea of what the reasonable person is doing in the law, we should be able to determine what is and is not reasonable by determining whether or not those classifications serve the legitimate ends for which reasonable persons were appealed to in the first place.

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4. *Id.* § 2.02(2)(d).

5. See, e.g., Stephen G. Gilles, *On Determining Negligence: Hand Formula Balancing, the Reasonable Person Standard, and the Jury*, 54 VAND. L. REV. 813 (2001); Saba Ashraf, Note, *The Reasonableness of the “Reasonable Woman” Standard: An Evaluation of Its Use in Hostile Environment Sexual Harassment Claims Under Title VII of the Civil Rights Act*, 21 HOFSTRA L. REV. 483 (1992); Carrie L. Hoon, *The Reasonable Girl: A New Reasonableness Standard to Determine Sexual Harassment in Schools*, 76 WASH. L. REV. 213 (2001); Melissa K. Hughes, Note, *Through the Looking Glass: Racial Jokes, Social Context, and the Reasonable Person in Hostile Work Environment Analysis*, 76 S. CAL. L. REV. 1437 (2003).

6. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); see also *R.I. Hosp. Trust Nat’l Bank v. Zapata Corp.*, 848 F.2d 291, 294–95 (1st Cir. 1988) (finding that the bank met reasonable commercial standards in converting to a “bulk-filing” system where increased loss was reasonable in light of the costs the new practice would save); cf. *East River S.S. Corp. v. Transam. Delaval*, 476 U.S. 858, 872 (1986) (finding that the increased cost to the public from holding a manufacturer liable in tort for injury to the product itself is not justified).

This article considers the fruitfulness of a particular hypothesis about the legitimate role of reasonableness in the law. Using Stephen Darwall's recent work on the second-personal standpoint, I propose a justification for the use of the reasonable person in the law.<sup>7</sup> Unilluminatingly put, that justification is as follows: reasonable person standards are justifiably employed in the law only if the law in question is regulating or implementing a very particular sort of communicative act. Darwall refers to this as an act of "second-personal address" of a "second-personal reason," a complex notion to be defined in what follows.<sup>8</sup> Metaphorically speaking, such an act is a transaction between parties in which what is passed from addresser to addressee is a reason for the addressee to act. It is often the case, as we will see, that the prospects of success of such an act of communication can be assessed by determining what a reasonable person—someone equipped to give or receive reasons through such an act of communication—would have done or thought. It is also often the case that making such an assessment is essential if the law is to accomplish its aim.

Part II explains the elements of Darwall's view that are essential to understanding what this thesis amounts to and for arguing for it. Part III explains how those elements supply a justification for the use of the reasonable person standard in one place in which it plays a particularly prominent role: in the determination of negligence in tort law. Finally, Part IV uses the elements of Darwall's view to explain the role of the reasonable person in criminal law, namely in the element of force in rape. There we see how an appeal to the reasonable person can be unjustified precisely because it fails to play the role that such standards can legitimately play. Once we see the legitimate work that the reasonable person can do in the law, we also see how it can be used illegitimately.

I do not mean to suggest that every justified usage of the term "reasonable" in the law is justified for the reasons proposed here. The term is used too widely and in too many areas of the law to expect any theory of its proper function to explain all of its varied legitimate usages. Nor do I mean to suggest that the only way to

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7. The most important statement of Darwall's view, and the statement from which my reconstruction of his position is taken, is STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006).

8. *Id.* at 8; *see also infra* Part II (discussing this concept).

understand the role of reasonableness in the law is through appeal to the concept of second-personal address. Perhaps this is so, but nothing to be said here depends on that. Rather, my aim is to show that the role of reasonableness in the law can be highly illuminated under the hypothesis that wherever there is a legitimate appeal to reasonableness in the law, there is an act of second-personal address being either implemented or regulated.

## II. CONCEPTUAL DEFINITIONS

The central thesis that will be driving the discussion here is Darwall's notion of "the second-personal address" of "second-personal reasons."<sup>9</sup> What does that mean? The notion has two components—namely "second-personal address" and "second-personal reasons"—which, as I see it, are to be defined separately.<sup>10</sup>

### A. *Second-Personal Address*

Second-personal address is a type of communicative act. To engage in a communicative act is to engage in an act the aim of which is to communicate information to another person. The notion of second-personal address can be understood broadly or narrowly; the narrow sense will be of greater importance here, but it is important to appreciate the distinction.

In the broad sense, a communicative act is one of second-personal address where, and only where, the information intended to be conveyed through the act is expressed, or would be aptly expressed, using the second-person pronoun "you." If I say to you in

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9. See DARWALL, *supra* note 7, at 8. A disclaimer is in order at just this point: Whether what I am about to describe is in fact what Darwall understands by the second-personal address of second-personal reasons is not of much importance for our purposes here. It is possible that Darwall would not accept all the elements of what I will be ascribing to him in this section. Still, the notion to be described here is certainly in the neighborhood of Darwall's. Whether or not my explanation is exactly in line with Darwall's notion, my account of his theorems will play an important role in the next two sections of this paper.

10. Because Darwall is primarily concerned with the second-personal address of second-personal reasons, and not with the second-personal address of other kinds of reasons, or with other kinds of address of second-personal reasons, he sometimes writes as though the two concepts cannot be independently defined. He sometimes writes, that is, as though the term "second-personal address" only applies when what is being addressed is a second-personal reason, and sometimes writes as though it is only through second-personal address that a second-personal reason can be addressed. Robin Kar, for one, reads him in this way. See Robin Kar, *Hart's Response to Exclusive Legal Positivism*, 95 GEO. L.J. (forthcoming 2007). I find it helpful, and it is harmless, to distinguish the two notions.

an ordinary circumstance, for example, “There’s something stuck in your teeth,” I am engaging in an act of second-personal address in this broad sense: I use the second-person pronoun to convey the information that I am aiming to convey. If I were instead to point significantly at my own teeth without saying a word, I might also be engaging in an act of second-personal address in the broad sense, for the information that I am conveying through this act could just as well have been expressed by my saying “There’s something stuck in your teeth.” Similarly, an act of communication is one of first- or third-personal address where, and only where, the information intended to be conveyed through the act is expressed, or would be aptly expressed, using the first- or third-personal pronouns, respectively.

In this broad sense, there are various nice questions, questions that will not concern us, about when communicative acts are first-, second-, or third-personal. When a professional athlete says, for instance, “Barry has to do what’s best for Barry,” is he engaged in first-personal, or third-personal address? He does not use the term “I,” but he is obviously referring to himself and much of the information that his utterance aims to convey (although not the information about his degree of self-regard) could have been conveyed by saying “I need to do what’s best for me.” Consider another example, which will be more important for our purposes: if in *B*’s hearing, and with the intention that *B* should hear him, *A* says to *C*, “*B* has something stuck in his teeth,” is *A* engaging in an act of second-personal or third-personal address? He has not used the second-person pronoun, and the primary piece of information that he conveys—that *B* has something stuck in his teeth—could be expressed, and in fact was expressed, without it. However, *A* may also be aiming to convey the following piece of information: *A* is addressing *B*. That is, *A* might want *B* to know that he, *A*, is communicating to *B* the information that there is something stuck in his teeth. (He has other reasons, one can imagine, for speaking directly to *C* rather than to *A*.)

In fact, we often care to express this sort of information to others. We are often interested to communicate to others the fact that *we* are communicating with them. We want them to know not just the primary piece of information that we aim to convey; we also want them to know that *we* ourselves are conveying it. This suggests

a narrower sense of second-personal address: a communicative act is one of second-personal address in the narrow sense where, and only where, among the pieces of information the actor intends to communicate is that he is addressing the person to whom he intends to communicate the information. One of the things he is saying is, "I am addressing you."

Second-personal address in this narrow sense has no correlate in first- and third-personal address. Insofar as we intend to express to those whom we address the fact that we are addressing them, we are engaged in second-personal address in this narrow sense. So an act of first-, third-, or even second-personal address in the broad sense may or may not be an act of second-personal address in the narrow sense that concerns us, because the actor may or may not be aiming to express that he is addressing his addressee.

To see the point, compare the following two examples: (1) *A*, seeing that *B*'s glass is empty, asks the bartender to give *B*, at the other end of the bar, a drink, but not to identify who bought it; and (2) *A*, seeing that *B*'s glass is empty, asks the bartender to give *B* a drink and to say, while delivering it, "From the gentlemen at the end of the bar." In the first case, *A* just wants *B* to have another drink (and perhaps to give *B* a sense of mystery). In the second, *A* wants it known that he is the one who caused the drink to be delivered. Second-personal address in the narrow sense is analogous to the second case, except that what is being conveyed is not a drink but some piece of information, like a piece of information about the state of *B*'s teeth.

From here on, I will be using the term "second-personal address" to refer to the narrow sense of second-personal address. It does not matter for our purposes, or for Darwall's, what pronouns are or could be used to express the information being communicated. What matters is that in some but not all acts of communication between parties, the communicator is intending to communicate the fact that *he is communicating* with the person to whom he is communicating. It is those acts of communication that concern us and which we will refer to with the term "second personal address."

All acts of second-personal address, then, convey two pieces of information: a primary piece of information (such as that there is something stuck in the addressee's teeth) and a secondary piece of information, namely, that the addressee is being addressed by the

addresser. It is that second piece of information that makes acts of second-personal address distinctive; it is what makes it peculiarly appropriate to engage in them while looking the addressee in the eye.

A point of clarification is in order. In many cases, one party does, in fact, communicate to the other that he is addressing him without that piece of information being any part of what the communicator intends to communicate, in the sense of “intends” that is relevant here. Such cases are not instances of second-personal address in the narrow sense. For instance, seeing that a large object is about to fall on *B*, *A* says, “Look out!”. *A* knows perfectly well that *B* will recognize not just that he is in danger and needs to act quickly to avoid injury, but also that *A* is addressing him and conveying that information to him. But, in ordinary cases, the success of *A*’s act of communication does not turn on whether or not *B* comes to believe that *A* was addressing him; *that* is not part of what *A* intends to communicate, even though he knows full well that he will communicate it. If, for some reason, *B* gets confused and takes the warning to have been given by *C* instead of *A*, while *A* may wish that he was being given the credit for saving *B*’s life, he would not see his act of communication, as such, as having failed. He succeeded in communicating the information that he intended to communicate, namely that *B* was in danger and needed to act quickly to avoid it.

Now there are, of course, senses of the term “intend” in which one who (1) foresees that his act will have a certain result, (2) sees the occurrence of that result as among the reasons for performing the act, and (3) performs the act in part for that reason, also intends the result. Such might be the case here: *A* might want not just for *B*’s life to be saved but for *B* to recognize that he, *A*, is the savior; and he might anticipate that if he warns him, *B* will recognize him as such since he will recognize *A* to be the one who is communicating the life-saving information to him. He might warn *B* in part for that very reason. But still, in the sense of “intend” that interests us here, *A* does not intend to communicate the fact that he is addressing *B*, but merely foresees that the information will be communicated. Suffice it to say that it would take us too far afield to work out a precise theory of the notion of intention that supports these claims. As the Gricean program in the philosophy of language has borne out, it is very difficult to specify the nature and content of communicative

intentions with the precision necessary to informatively capture what information is and is not part of what a communicative act is intended to communicate.<sup>11</sup> For our purposes, an intuitive understanding of that distinction will suffice for delineating the class of acts of second-personal address.

### B. *Second-Personal Reasons*

Not all acts of second-personal address are of the special sort that are of particular concern to Darwall. He is particularly interested in the second-personal address of *second personal reasons*. What does that mean? Here is Darwall's definition of a second-personal reason: "A second-personal reason is one whose validity depends on presupposed authority and accountability relations between persons and, therefore, on the possibility of the reason's being addressed person-to-person."<sup>12</sup> It is important to pull apart two entwined ideas here corresponding to two classes of reasons: (1) the class of reasons for a person to act that depend for their validity upon authority and accountability relations between people; and (2) the class of reasons for a person to act that depend for their validity upon the possibility of their being communicated through an act of second-personal address.

Consider the first class. Some reasons to act would be valid even if there were no authority or accountability relations between people. That I am in pain gives me some (perhaps overridden) reason to take steps that would lead to the pain's ceasing regardless of who does or does not have authority over me, who I have authority over, who I am accountable to, or who is accountable to me. A father, son, brother, judge, jury member, and professor have reason to make their pain stop quite independently of their occupancy of any of these roles.

However, many reasons for action are dependent upon roles of this sort and the implied relations of accountability and authority that occupants of these roles stand in with respect to one another. I have

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11. See PAUL GRICE, *STUDIES IN THE WAY OF WORDS* chs. 5, 6 (1989). See generally Richard E. Grandy & Richard Warner, *Paul Grice*, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Summer 2006), <http://plato.stanford.edu/archives/sum2006/entries/grice/> (describing Grice's influential distinction between the literal meaning of a phrase and a speaker's meaning in uttering it, and observing some of the contemporary controversies about how precisely to draw this distinction).

12. DARWALL, *supra* note 7, at 8 (emphasis omitted).



reason to report an act of plagiarism in part because I have authority over the student who engaged in it, in part because the students in my courses are accountable to me for the things they do in their capacity as students, and in part because I am accountable to my university for the things I do and omit doing in my capacity as a professor. I would not have the full list of valid reasons to report an act of plagiarism that I have (although I might still have some) if it were not for these relations. At least some, then, of my reasons to report an act of plagiarism depend for their validity upon the existence of authority and accountability relations among people, and so belong to the first class of reasons.

It is far from obvious that the validity of reasons of the first sort depends upon the possibility of their being communicated through an act of second-personal address; membership in the first class does not appear to automatically imply membership in the second. It is not obvious (although it may be true) that my reason to report the act of plagiarism depends for its validity upon the possibility of anyone communicating that reason to me through an act of second-personal address, or of my communicating it to anyone through such an act.

Imagine, for instance, that we have a double-blind grading system: I do not know who the student is and the student does not know who is grading his paper. And imagine that we also have a double-blind procedure for reporting an act of academic dishonesty: those who receive the report are barred from knowing who reported it, and the reporter is barred from knowing who he is reporting to. In such a case, I am not in a position to communicate my reason to report to anyone *while at the same time communicating that I am the one communicating this*. And no one is in a position to communicate to me my reason to report *while at the same time communicating to me that he is the one communicating this*. So while it might be possible to communicate to me my reason for reporting—the faculty handbook, we can imagine, communicates this in general terms—it is not possible to communicate it *through an act of second-personal address*, since such an act requires that part of what is intended to be conveyed is the fact that a particular person is doing the communicating.<sup>13</sup>

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13. I am assuming here that the university is not the sort of entity that can have authority over me, and is not the sort of entity capable of communicating with me through an act of second-personal address. Under these assumptions, the relevant sections of the faculty handbook are not

Another way to put the point: it seems silly to think that those who are in a position to communicate to me, through an act of second-personal address, my reason to report the plagiarism have anything to do with the reason's validity. When I tell my wife about the situation, she might tell me that I have reason to report the act of plagiarism, and she might intend to communicate to me that she is the one communicating this. But the possibility of that happening cannot be even part of what makes my reason to report the plagiarism valid. Whatever authority and accountability relations hold between my wife and myself are not relevant to the question of what reasons I have to report an act of plagiarism, since that is surely between myself and the student, myself and the university, and the student and the university; unmarried faculty have the same reasons to report plagiarism as those who are married. Still, it seems I have a reason to report, and this reason's validity depends upon various authority and accountability relations among people. So a reason's being in the first class does not imply that it is in the second.

Notice that in the passage from Darwall just quoted, in which he gives his definition of a second-personal reason, he seems to think that membership in the first category does imply membership in the second. In fact, although this is not generally true, it is true in a restricted range of cases, and it is likely that Darwall has this restricted range in mind. Sometimes a person has a valid reason to act only because he stands in some relation of authority or accountability to another person *and that person exercises his power to give reasons for action by communicating such reasons through a successful act of second-personal address.*

The obvious cases of this sort are those involving the authority to give orders. If *A* has the authority to tell *B* what to do, then *B* gains a reason to do some particular thing when *A*, by telling *B* to do that thing, successfully communicates to *B* that he has such a reason. The reason does not precede the communication of it but is, instead, generated *by* the act of communication, for that act is itself the exercise of *A*'s power to generate such a reason. The parent who

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plausibly understood as an act of second-personal address of a second-personal reason where the university is the addresser and I am the addressee. Of course, these assumptions can be questioned. The question is whether a different example, similarly illustrative of the fact that a reason could belong in class (1) without belonging in class (2), could be tailored to the position of someone who denies them. I suspect so, although I have no argument for the claim.

answers a child's request for a justification for a demanded act by saying, "Because I told you to do it" is, in some cases, speaking the simple truth: the child has a reason to act precisely because the parent addressed him and thereby exercised a power to give the child such a reason.

Further, in such cases, the reason cannot be generated except through the performance of an act of second-personal address. What gives *B* reason to do what *A* demands is, in part, that *A*, who has authority over him, is demanding it. Hence it is essential to the generation of the reason that *A* communicate to *B* not just the demand, but also that he, *A*, is demanding it of *B*. And further, in such cases, the reason cannot be generated unless the act of communication is successful (or *could* be): if *A* issues an order that *B* cannot understand, *B* does not yet have a reason to do what *A* demanded of him. *A* must be understood in order for what he is communicating, namely that *B* has a reason to do something, to be true.

There is another class of cases where dependency of the reason's validity on authority and accountability relations is linked to dependency of its validity on the possibility of the reason's being communicated through an act of second-personal address. These are cases in which something about the situation in which one finds oneself makes it clear that another person who stands in an authority relation to oneself, or to whom one is accountable, *would* exercise her power to generate a reason for one to act by successfully communicating the reason through an act of second-personal address, if she had an opportunity to do so. For instance, to use Darwall's leading example, say that *B* is treading on *A*'s foot.<sup>14</sup> *A* has the authority to tell *B* to remove his foot, and would exercise that authority through an act of second-personal address, thereby generating a reason for *B* to remove his foot, if given the chance. In such a case, *B* has reason to move his foot, even if *A* never tells him to. In cases like this, the validity of *B*'s reason to move his foot depends on the truth of a counterfactual: if given the chance, *A* would demand that *B* move his foot, thereby (1) exercising his authority over *B* in this matter; and (2) successfully communicating to *B* both his desire that *B* should move his foot and the fact that *A*,

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14. *Id.* at 5-7.

who has authority in this matter, is communicating this to *B*. That is, the reason's validity depends upon the (unrealized) *possibility* of the reason being successfully communicated through an act of second-personal address.

The two kinds of reasons just discussed—those that are generated by a successful act of second-personal address and those that are generated by a non-actual hypothetical act of this sort—constitute an area of overlap between the two categories of reasons identified above. They are reasons that depend for their validity upon authority or accountability relations among people and, because those relations give powers to persons to generate reasons for others through acts of second-personal address, they depend for their validity upon the possibility of their communication through such acts. The term “second-personal reasons” will be used to refer to reasons in this class.<sup>15</sup>

The second-personal address of a second-personal reason, then, is an act of second-personal address that is itself an exercise of a power of the addresser to give the addressee the very reason that he communicates to the addressee. By communicating to the addressee that he, the addresser, is communicating with the addressee, the addresser puts the addressee on notice that he is exercising this power and, thereby, gives validity to the reason he communicates.

So defined, it is arguable that the reason to report the act of plagiarism is a second-personal reason. On the criteria discussed above, Darwall appears to think so. Perhaps I have a valid reason to report the act of plagiarism only because an imaginary person, with authority to speak for the university, would demand that I do so and would thereby communicate both his desire that I do so and that he, the one in authority, is communicating this to me. Of course, nobody actually does this. But perhaps I have a reason to report only because such an imaginary person *would*. Perhaps this is right. But one should not acquiesce to such a claim without further argument.

In fact, Darwall offers an argument, a form of inference to the best explanation. It turns out, he thinks, that if we construe a very large class of reasons as second-personal reasons in his sense, and, in particular, the moral reasons, then we are able to explain a wide

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15. The fact that Darwall takes membership in the first category to entail membership in the second suggests that he, too, uses the term in this way. *See id.* at 8.

range of their more peculiar characteristics (for instance, in the case of moral reasons, their “overridingness”).<sup>16</sup> While I could quarrel with this argument in places, I will not here, for I think the idea of second-personal address of second-personal reasons is of great importance both to morality and the law, even if it should turn out that Darwall overstates its range of application.

*C. Successful Second-Personal Address of Second-Personal Reasons*

The notion of the second-personal address of second-personal reasons can be put to use in a number of different ways. To see the uses to which it can be put, it helps to reflect on what must be true for an act of second-personal address of a second-personal reason to be successful. A first point to note is that the addresser must stand in relations of authority or accountability that confer on him a power to give the addressee a reason to act. Where there are no such relations, there cannot be a successful act of second-personal address of a second-personal reason.

This observation alone provides us with a tool for systematically distinguishing between coercive and non-coercive transactions among people. If *A* has power over *B*, but no authority, and he exercises that power by threatening *B* and thereby gives *B* a reason to perform some act, has *A* performed an act of the second-personal address of a second-personal reason? No: the power that *A* has to generate reasons for *B* through an act of second-personal address does not derive from authority and accountability relations between *A* and *B*, but simply from the fact that *A* has a bigger stick than *B*. But it is important to see the similarity between successful acts of coercion and acts of second-personal address of second-personal reasons. In particular, acts of coercion are often acts of second-personal address of reasons: the coercer communicates to the coercee that he has a reason to act, and he communicates that he is the one communicating this. Often this act of communication is, in fact, an exercise of a power on the coercer’s part to give the coercee a reason to so act. Such acts differ from acts of second-personal address of *second-personal* reasons only in the source of the power of the addresser to give the addressee reasons.

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16. See, e.g., *id.* at 26–28.

What else is required for an act of second-personal address of a second-personal reason to be successful? Certain powers are required of the addresser. Most importantly, the addresser must stand in relations of authority and accountability that actually confer upon him a power to generate a reason for the relevant action through an act of second-personal address. Further, a great deal is required of the addressee. In general, a communicative act will be successful only if the addressee has the capacities necessary to understand what the addresser aims to communicate, and has the capacities necessary to extract the information he aims to communicate from the medium through which he communicates it. We do not succeed in telling small children about the relative pros and cons of various foreign policies because they are not yet equipped to understand. And we do not succeed in communicating in English when we speak to those who do not speak it even if they are well-equipped to understand what we are attempting to convey. Similarly, for a second-personal act of communication of a second-personal reason to be effective, the addressee, *B*, must have the capacity to understand the following pieces of information and the capacity to extract them from the medium in which they are conveyed to him by *A*: (1) *B* has a reason to do some act *X*; (2) *A* is conveying that reason to do act *X* to *B*; (3) *A* has the power to generate a reason for *B* to do *X* through engaging in an act of second-personal address of such a reason; and (4) *A*'s act of communicating with *B* now is such an act.

This is a lot, but it is not all that needs to be true for the second-personal address of a second-personal reason to be successful. The reason is that the communication of a reason ordinarily has an aim quite different from the communication of non-normative information; it is not intended merely to induce bare understanding, although that is part of what is intended. It is also intended to induce action, or at least deliberation that involves the weighing of the communicated reason. Imagine that *A* has the authority to issue orders to *B* and orders *B* to do *X*. *B* understands that he is being addressed by *A*, that *A* has the authority to generate a reason for him to do *X* by addressing him as he is, and even that he now has a reason to do *X*. But he goes on to deliberate about whether or not to do *X* without even taking into account the fact that *A* demanded that he do so. Has *B* really understood what was communicated? What answer

one is drawn to probably depends on what one means by “understanding” and what one takes “understanding that one has a reason to *X*” to consist in. But this much is certainly true: there has not been the kind of practical incorporation intended by *A* of the information that *A* communicated. A necessary condition of this sort of practical incorporation—a term designed to be a catch-all for the special sort of uptake of reasons that we find in successful cases of the communication of reasons—is the *capacity for* the relevant sort of practical incorporation, a sort that at least involves the strong consideration of the reason in further relevant deliberations about what to do.

Darwall links this sort of capacity with freedom of the will.<sup>17</sup> His idea is that the kind of freedom required for moral responsibility is just the sort that is required of the addressee for the second-personal address of a second-personal reason (of the sort involved in morality) to be successful. The chain of ideas runs roughly as follows: a moral reason is a second-personal reason; a second-personal reason depends for its validity upon the possibility of its being communicated through an act of second-personal address; such a possibility requires that the addressee have a variety of capacities for grasping the reason and allowing it a place in deliberation and the guidance of action; such capacities are what we term “freedom of will.”

This last step is the most difficult in the chain. It is far from clear that there is the sort of alignment between the capacities that are required on the part of the addressee if an act of second-personal address of a second-personal reason is to be successful and the set of capacities that we ordinarily tag “freedom of will.” Part of the problem is that our concept of freedom appears to be both less and more than our concept of the set of capacities necessary for moral responsibility: less in that we also take people to need a variety of non-volitional, cognitive capacities to be rightly held responsible, and more in that we take morally accountable creatures to vary from one another in their degree of freedom. Darwall makes an effort to address this concern, however, in the most valiant defense yet of an already valiantly defended claim, namely, Kant’s so-called “reciprocity thesis,” according to which freedom is not just necessary for

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17. *Id.* at 213–42, 277–99.

subjection to the moral law, but sufficient for it as well.<sup>18</sup> If the reciprocity thesis is true, and if it is also true that moral judgments are a species of second-personal address of a second-personal reason, then it would be no surprise that the capacities of the addressee required for an act of moral address to be successful would be just the capacities that are necessary and sufficient for freedom of will.

However, whether or not Darwall's defense of the reciprocity thesis, and his corresponding defense of the claim that what is presupposed by at least one species (namely the moral species) of the second-personal address of second-personal reasons is freedom of will, is successful is a question we can sidestep here. Darwall is certainly right that there are a variety of capacities that are required by the addressee (as well as by the addresser) for the second-personal address of a second-personal reason to be successful, and only this much will be important to what follows.

One of the more interesting capacities on the part of the addressee that is required for a successful act of second-personal address of a second-personal reason is expressed in what Darwall calls "Pufendorf's Point."<sup>19</sup> Darwall often refers to a passage from Pufendorf as an expression of the idea. In the passage, Pufendorf is describing the distinctive way in which an obligation "acts on the will." He writes: "[A]n obligation . . . forces a man to acknowledge of himself that the evil, which has been pointed out to the person who deviates from an announced rule, falls upon him justly . . ."<sup>20</sup> The idea that Darwall takes from the passage is this: a person is under an obligation to act in a particular way only if she has the capacity to recognize that it would be just for her to suffer censure should she fail to act that way.<sup>21</sup> Put another way: a necessary condition of violating an obligation is the capacity to recognize that one has violated an obligation (and is therefore justly subject to censure for so doing). We can only hold people to standards to which they can recognize themselves to be rightly held.

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18. *See id.* at 29–38. There is a great deal of secondary literature on the reciprocity thesis. For a start, see H.J. PATON, *THE CATEGORICAL IMPERATIVE: A STUDY IN KANT'S MORAL PHILOSOPHY* (Harper & Row 1967) (1947), and Henry E. Allison, *Morality and Freedom: Kant's Reciprocity Thesis*, 95 *PHIL. REV.* 393 (1986).

19. *See, e.g.*, DARWALL, *supra* note 7, at 22–25, 107–15.

20. SAMUEL PUFENDORF, *ON THE LAW OF NATURE AND NATIONS* 91 (James Brown Scott ed., C.H. Oldfather & W.A. Oldfather trans., Oceana Publications, Inc. 1964) (1688).

21. *See, e.g.*, DARWALL, *supra* note 7, at 23.



Pufendorf's Point has great appeal. The idea is that moral obligation requires the capacity to look at oneself in the mirror and, at once, to both look with disapproval and to see oneself looked upon with disapproval by oneself. This is a recurrent idea in much Western literature, a fact which, itself, suggests the deep entrenchment of the idea in Western moral thought. To take just one striking and obvious example, consider H.G. Wells's *The Invisible Man*.<sup>22</sup> In the story, the Invisible Man does not just become invisible; he also becomes an amoralist. Why? Why should invisibility be accompanied by amorality? Why would invisibility not make one, by contrast, that much more benevolent? The answer is that the invisible are invisible also to themselves and so lack the capacity to look upon themselves with disapproval; this lack of self-scrutiny undermines their capacity to be governed by moral norms.

At one point in the story, the Invisible Man is telling a friend, Kemp, how he assaulted an innocent man in his own home solely for the purpose of advancing his personal ends. Kemp gives him a look of disapproval, and the Invisible Man replies:

"My dear Kemp, it's no good your sitting and glaring as though I was a murderer. It had to be done. He had his revolver. If once he saw me he would be able to describe me—"

"But still," said Kemp, "in England—today. And the man was in his own house, and you were—well, robbing."

"Robbing! Confound it! You'll call me a thief next! Surely, Kemp, you're not fool enough to dance on the old strings. Can't you see my position?"

"And his too," said Kemp.

The Invisible Man stood up sharply. "What do you mean to say?"

Kemp's face grew a trifle hard. He was about to speak and checked himself. . . .

. . . "You don't blame me, do you? You don't blame me?"

"I never blame anyone," said Kemp. "It's quite out of

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22. H.G. WELLS, *THE INVISIBLE MAN* (Patrick Parrinder ed., Penguin Books 2005) (1897).

fashion.”<sup>23</sup>

Of course, Kemp does blame the Invisible Man, but the Invisible Man, invisible also to himself, is unable to see himself as to blame. Even though he sees the look of disapproval in Kemp’s eyes, what he lacks is the ability to turn that look upon himself and with that inability comes the inability to be subject to action-guiding obligations.

One might accept Pufendorf’s Point without accepting the claim that obligation is best analyzed through appeal to the notion of the second-personal address of second-personal reasons. Darwall suggests, however, that Pufendorf’s Point can be derived from the notion of second-personal address of a second-personal reason, and this fact lends support to the contention that our ordinary notion of obligation is intertwined with this sort of communicative act.<sup>24</sup> His idea is that, for such an act of communication to be successful, the addressee must have the capacity to address the relevant reason to herself.

What is the argument for this claim? Notice that Pufendorf’s Point does not fall out of the notion of second-personal address of *just any* reason. If, for reasons quite independent of any authority or accountability relations between people, *A* mistakenly thinks it is in *B*’s best interests to do *X*, it would be much better for *B* not to do *X*, and *B* knows this. And say that *B* knows, and *A* knows that *B* knows, that *A* truly has *B*’s best interests at heart. When *A* says to *B*, “You should do *X*,” *A* very well might be intending to communicate not just that doing *X* is in *B*’s best interests, but also that he, *A*, is communicating this to *B*. After all, it is in part because this advice is coming *from A*, whom both *A* and *B* know to have *B*’s best interests at heart, that *A*’s advice is to be taken very seriously, and *A* might want to communicate this to *B*. *A* is engaging in the second-personal address of a reason: his is an act of second-personal address since one of the things that he is aiming to communicate is that he is the one communicating with *B*. And *A* is communicating a reason—he is telling *B* that *B* has a reason to do *X* and, because this advice is coming from *A*, that he has a reason to take the advice very seriously. This act of communication might be completely successful, however,

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23. *Id.* at 118.

24. DARWALL, *supra* note 7, at 23–24.

even if *B*, knowing as he does that he has no reason at all to do *X* and even strong reason not to do it, is completely incapable of recognizing himself to be justly censured for failing to give the reason weight in his deliberations. *B* is not capable of recognizing this since it is not in fact true, and knowing what he knows rules out the possibility of his mistakenly believing that it is.

What this example shows is that, if Pufendorf's Point is to be derived from the notion of the second-personal address of second-personal reasons, it must be by appeal to the fact that what are addressed are *second-personal* reasons, and not just reasons. In short, it must be that the capacity to recognize the justice in one's being held to a particular standard must be required for the successful second-personal address of a *second-personal* reason, even though it is not required for the successful second-personal address of every reason. The distinctive feature of second-personal reasons is that they are generated by the act of addressing them: that act is the exercise of the power to generate a reason to act, a power deriving from authority or accountability relations between addresser and addressee. This is not true in the example just described in which *A* takes himself merely to be reporting what reasons he takes *B* to have to do *X* and not to be generating, through the reporting, any such reasons. Perhaps this distinctive feature is the key to seeing how Pufendorf's Point falls out of the notion of the second-personal address of second-personal reasons.

In fact it is. The point of an addresser using *second-personal address*, and thereby communicating that he is communicating with the addressee, is that he thereby places the addressee on notice that the act of communication is itself an exercise of the addresser's power to generate reasons for the addressee to act. The act of address would not succeed in providing such notice if the addressee were not capable of recognizing the authority or accountability relation that conferred the relevant power on the addresser. But the power to recognize that relation, and the power to recognize that the addresser is exercising it through the act of address, just amount to the power to which Pufendorf points—the power to recognize oneself as justly subject to censure should one fail to practically incorporate the addressed reason.

In short, if the reasons to act that are provided by moral obligations are second-personal reasons, then it is no surprise that a

person is under a moral obligation—he is given that distinctive sort of reason to act or omit acting—only if he has the capacity to recognize the legitimacy of his being censured for a failure to respond. In fact, the derivation of Pufendorf's Point from the notion of second-personal address suggests that it is not special to *moral* obligation. From what has been said it follows that a person has a second-personal reason to do something only if he is in a position to recognize the justice of censure for failure on his part to respond to the reason. If some set of legal reasons, or even prudential reasons, are second-personal, then this will be just as true of them as it is of moral reasons.

Recall the hypothesis to be discussed in this paper: the law is justified in appealing to reasonableness where, and only where, it is implementing or regulating an act of second-personal address of a second-personal reason. We are now in a position to understand this hypothesis. Reasonableness is justifiably invoked in the law when the term "reasonable" refers to one or more of the capacities required by either addressee or addresser if the background act of second-personal address of a second-personal reason is to be successful. In the next two sections, this article will explore this idea in action.

### III. THE "REASONABLE" STANDARD: AN EXAMPLE OF AN APPROPRIATE USE

In our tort law, a defendant is liable for negligently causing a plaintiff's injury only if a reasonable person would have taken some precaution which would have prevented the injury.<sup>25</sup> The fundamental question about reasonable person standards with which this paper is concerned can be phrased in the context of negligence in tort like this: why must the relevant untaken precaution have been reasonable rather than rational or prudent, morally obligatory or morally permitted, or possessing some other characteristic altogether? Of all the various features that the untaken precaution might reflect, why does the law single out reasonableness as the crucial feature? In short, what, if anything, makes an appeal to reasonableness in negligence law particularly apt or justified?

It might appear that this question cannot be answered without a definition of reasonableness in this context. We need to know what

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25. See RESTATEMENT (SECOND) OF TORTS § 283 (1965).

it is to say that an untaken precaution was reasonable in order to know why the law is concerned with reasonableness. The project of defining the relevant notion of reasonableness—the project of drawing the line between reasonable and unreasonable untaken precautions—must be addressed prior to justifying negligence law's appeal to what reasonable persons would do. My approach here, however, travels in exactly the opposite direction. We start by defending a justificatory hypothesis, a good reason for appealing to reasonableness in assessing negligence in tort. This justification provides a tool for determining which untaken precautions are reasonable and which are not: the reasonable precautions are all, and only, those that are justified by the law's appeal to reasonableness.

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. If the plaintiff wins the case, then (in most cases) the defendant has to pay damages and, therefore, has a new and powerful reason henceforth to take the precaution he failed to take. One of the downstream consequences, therefore, of the defendant's failure to take the relevant precaution is the damages paid to the plaintiff. Given that this is one of the consequences of that omission, the defendant had reason to take, rather than omit, the relevant precaution. We need not assume that the reason for taking the precaution provided by the assignment of damages is solely the callous financial motive: the assignment of damages also marks the defendant's failure to take the precaution as something of which the state disapproves. That disapproval itself, or even what it indicates about the nature of the failure, might supply the defendant with a new reason to take the untaken precaution in the future. Conversely, if the court decides for the defendant, then the plaintiff's suit has given the defendant no new reason for taking the suggested precaution.

In short, the court must decide whether to give the defendant a new reason to have taken the precaution. By virtue of the authority relation between the state and the defendant, the court has the power to give the defendant a reason for action through an act of addressing the defendant. By saying to the defendant, "You must pay damages to the plaintiff," the court thereby gives the defendant reason to do something. Further, and importantly, in deciding for the plaintiff, the

court in any civil case is acting on behalf of the plaintiff. The court is enacting the plaintiff's request for damages. In this sense, when the court decides for the plaintiff, the *plaintiff* successfully conveys to the defendant, "You had a reason to take a precaution that would have prevented my injuries." And by saying that, it comes to be the case that the defendant does indeed have such a reason.

And yet further, it is important that this act of address communicates to the defendant that the plaintiff himself is communicating this to him; it is to the *plaintiff* that damages are to be paid, and not merely to some insurance fund, say, from which the plaintiff is to be compensated. By bringing suit and obtaining a verdict against the defendant, the plaintiff has exercised a power to give the defendant a reason to take the precaution he failed to take. The plaintiff exercises that power by engaging in an act of second-personal address of the defendant.

When the court therefore decides for the plaintiff, all the elements of a successful act of second-personal address of a second-personal reason are in place. There is an authority relation between the state and the defendant and between the state and the plaintiff. As a result of this relation, the plaintiff can be empowered to give the defendant a reason for action. The plaintiff exercises this power by addressing the defendant. And one of the things that the plaintiff communicates through this act of address is that he, the plaintiff, is communicating with the defendant. Put this way, then, we can see a negligence case (and, really, any case in private law) as an effort on the part of a plaintiff to successfully execute an act of second-personal address of a second-personal reason. The question before the court in any such case is whether or not to make the plaintiff's effort successful.

As we saw in Part II, for an act of second-personal address of a second-personal reason to be successful, the addressee must possess a number of capacities. First, the addressee must have the capacity to understand and practically incorporate the reason. And, as we saw in Pufendorf's Point, the addressee must have the capacity to recognize the justice of his suffering censure for failing to respond to the reason given. If the defendant lacks these capacities, then the plaintiff's attempt will necessarily fail; there will be no way for the

plaintiff to successfully perform an act of second-personal address of a second-personal reason.<sup>26</sup>

This tempts one to suggest that by appealing to reasonableness in negligence cases, the law distinguishes those defendants who have the capacities required for the plaintiff's attempted act of second-personal address to be successful from those who do not. According to this tempting line, "reasonable" in negligence law means "possessing those capacities required by the addressee if an act of second-personal address of a second-personal reason is to be successful." But, in fact, this temptation should be resisted, for negligence law does not ask if the *defendant* was reasonable, but, rather, if the *precaution* was reasonable.

This is not to say that the capacities of the defendant are ignored. Quite to the contrary, negligence law's appeal to the foreseeability of the harm, for instance, is arguably intended to identify at least some defendants (namely those who could not foresee the harm) who could not play their part as addressee in a successful act of second-personal address of the relevant second-personal reason. But, still, it does not appear that *reasonableness* is being used by negligence law to identify the defendants who have the needed capacities. It is being used for some other purpose.

To see what purpose reasonableness serves in negligence law, note that *even if the defendant has the capacities* required for the act of second-personal address to be successful, the act might still necessarily fail, for it is possible that any plaintiff's act of second personal address could not supply the reason for the precaution in question, no matter what the defendant's capacities. This could happen if the relations of authority and accountability between defendant, plaintiff, and state do not provide the plaintiff with the power to create a reason for the defendant to take that precaution. This suggests that, by asking if the precaution was reasonable, the court is asking whether an act of second-personal address of a reason

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26. See *supra* Part II.C. It is important to see that even if the defendant lacks one or more of the capacities required of the addressee in a successful act of second-personal address of a second-personal reason, the court could still give the defendant a reason to have taken the precaution: The assignment of damages alone provides a powerful reason. But in so doing, the court would not thereby be making successful the plaintiff's effort to perform an act of second-personal address of a second-personal reason. A wrongly decided case, then, might have just this failing: It might involve the assignment of damages to a defendant without thereby making successful any act of second-personal address of a second-personal reason.

to take that precaution would have been successful were the defendant invested with the basic capacities necessary to make it successful. If the answer is “no,” then the court must decide for the defendant, for the thing that the plaintiff is trying to do in bringing suit—namely perform an act of second-personal address of a second-personal reason to take the precaution—cannot be done.

This brings us to the justification of the appeal to reasonableness in negligence law: what makes the law’s appeal to reasonableness in this context appropriate is the nature of the very activity in which the court is engaged in negligence cases. Since the court is trying to decide whether or not to make the plaintiff’s attempted act of second-personal address of a second-personal reason successful, the court must determine if the act *could possibly* be successful. And so the court needs to know if a person with the capacities required by the addressee in a successful act of second-personal address of a second-personal reason would have come to have a reason to take the precaution by the act of address. This is what the court is exploring by asking if the untaken precaution was reasonable.

The court is trying to determine if the precaution is reasonable, we might say. Is the precaution the sort of thing that could have been given further support by reasons through the plaintiff’s act of second-personal address of a second-personal reason? If, for instance, taking the precaution would have been degrading for the defendant, or would have required him to act in a self-destructive way, or would have placed other parties at equal or greater risk of equal or greater injury, then (quite possibly) it is not something that the plaintiff is invested with the power to demand of him. In such cases, the plaintiff’s attempted act of second-personal address would necessarily fail even if the defendant, the potential addressee, has all the capacities needed to make it successful. In short, it is appropriate for the law to appeal to reasonableness in this context because the task which the court must undertake requires that the court determine if the relevant untaken precaution is the sort of thing that one citizen is empowered to demand of another by the authority and accountability relations in which the parties and the state stand. Put roughly, the question of whether or not the precaution is reasonable is just the question of whether the plaintiff has the right to demand that the defendant take it.



Different moral theories will provide different answers to *that* question. If we hold, as Darwall does, that the adequacy of a moral theory is assessed by examining the degree to which it does justice to the idea that moral reasons are second-personal reasons addressed by a particular sort of addresser,<sup>27</sup> then we would not want to stop here. We would want, instead, to determine what moral theories do and do not meet this constraint. Then we would use the moral theories that meet this constraint to determine whether the plaintiff has the right to demand that the defendant take some precaution that would have averted the injury. But this is to extend the notion of second-personal address of a second-personal reason beyond the boundaries needed for our purposes here. Whatever the best moral theory, and whatever the relationship between the best moral theory and the idea of the second-personal address of a second-personal reason, what we have learned is that the role of reasonableness in negligence serves to put a moral question before the court. What reasonableness is doing in this part of negligence law is focusing the court's attention on that moral question.

It is worth grounding this abstract discussion through consideration of a case. Consider the famous case of *Davis v. Consolidated Rail Corp.*,<sup>28</sup> the case in which Judge Posner applies the "Hand Formula" to determine the reasonableness of the various precautions that the defendant failed to take. Davis was an inspector who crawled under a train and was injured when the conductor, unaware of his presence, moved the train without first (1) walking the length of the train to see if anyone was under it; (2) ringing the train's bell; or (3) blowing the train's horn.<sup>29</sup> By applying the Hand Formula, Posner reaches the conclusion that (1) and (2) were unreasonable. In the case of (1) the burden to Conrail was too high, while in the case of (2) the probability of averting injury was too low.<sup>30</sup> Functionally, this methodology determines that a precaution is reasonable where, and only where, it has positive expected social

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27. Darwall, *supra* note 7, at 27 ("I develop this theme and argue that any account of the distinctive normativity of moral obligation that fails to capture this second-personal element is deficient.").

28. 788 F.2d 1260 (7th Cir. 1986).

29. *Id.* at 1262-64. Posner also briefly considers and dismisses the fact that no Conrail employee informed the conductor that there was an unknown man on the premises. *Id.* at 1263.

30. *Id.* at 1264-65.

utility. If the approach to reasonableness advocated here is correct, then Posner arguably reaches the right conclusions. He is even justified in using the Hand Formula to reach them, but not for anything like the reasons that he accepts.

Davis should not be construed merely as trying to get compensation for his injuries, but, instead, to be attempting to exercise a power to give Conrail a reason to take a precaution. He tries to do this by addressing a demand to Conrail, a demand in which he communicates to Conrail that he, Davis, has been injured and is, on those grounds, making that demand. Davis is attempting to induce a very particular form of recognition from Conrail: he is attempting to make Conrail recognize a reason to take a precaution and recognize that Davis himself, by virtue of his injury, has and has exercised a power to give Conrail that reason.

But Davis has no right to demand that Conrail require an employee to walk the length of the train every time the train moves, precaution (1) stated above, or that Conrail ring a bell every time each train moves, precaution (2) in the case. Davis has no right to demand (1) because he has no right to demand that Conrail take a precaution that would result in an inconvenience greater than his injury could have been expected to be. And he has no right to demand (2) because he has no right to demand that Conrail behave in a way which was so unlikely to have averted his injuries, given their magnitude. But he has every right to demand (3), that Conrail blow each train's horn before moving it, precisely because he has the right to demand that Conrail appreciate its workers' safety to such a degree as to undertake burdens small enough to be outweighed by the expected injury.

The Hand Formula therefore provides us with an excellent guideline for determining whether or not a precaution is reasonable. But it provides us with this guideline because it provides us with a rough guide for determining what people have the right to demand of others when they stand in roughly reciprocal relationships of authority and accountability. This is the relevant issue because plaintiffs in negligence suits are attempting to perform an act of second-personal address of a second-personal reason. Such an act requires that the addresser, the plaintiff, has, in virtue of the authority and accountability relations in which he stands with the defendant,

the power to give the defendant a reason in that way, through an act of second-personal address.

Notice that the Hand Formula can be distorting in cases in which the plaintiff and defendant stand in non-reciprocal relations of authority and accountability. For example, the fact that it is either customary or standard in a particular profession to fail to take a certain precaution often counts in favor of the defendant in negligence cases.<sup>31</sup> The result is that a precaution can be unreasonable even though taking it had positive expected social utility.

It therefore follows that the Hand Formula does not supply a sufficient condition for reasonableness across the board. The hypothesis under discussion here—namely, that the appeal to reasonableness in negligence is justified because the court is trying to determine if the plaintiff has the authority to demand that the defendant take the precaution—provides an explanation for this. What matters is what the plaintiff has power to demand as a result of the authority and accountability relations in which he and the defendant stand. If those relations are entirely reciprocal, then the Hand Formula provides us with a good guide for determining if the untaken precaution was reasonable. But when the defendant also stands in a relation of accountability to a profession as a whole, or to a group of people conforming to a customary standard of behavior, then the plaintiff's power to demand precautions of him can be weaker. The fact that the hypothesis under consideration here provides this explanation counts as further evidence for it.

This section applies a recipe of sorts for determining what a particular reasonable person standard is doing in the law, and, correlatively, an account of what is and is not reasonable under the law in question. We start by taking seriously the idea that where there is an appeal to reasonableness in the law, there is an act of second-personal address of a second-personal reason, the success of which requires various capacities on the parts of addresser and addressee. We then look at a particular appeal to reasonableness (in this case, the appeal to it in negligence in tort) and we try to determine which party's capacities are in question (in this case, surprisingly, the plaintiff's) and precisely what capacities the law is

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31. See, e.g., *T.J. Hooper v. N. Barge Corp.*, 60 F.2d 737, 740 (2d. Cir. 1932).

concerned with (in this case, the capacity to give another person a reason to take the particular precaution at issue). This gives us, then, both a justification for the law's appeal to reasonableness—it is required by the law's involvement with the second-personal address of second-personal reasons—and an account of what reasonableness means in the relevant domain—it means one or more of those capacities that are required for the particular act of second-personal address with which the law is entwined.

In the case of negligence in tort, we discover that the law is justified in appealing to reasonableness because what is before the court is the question of whether or not to make successful the plaintiff's attempt to engage in an act of second-personal address of a second-personal reason for the defendant to take the identified precaution. And we discover that the reasonable in this domain is just what citizens have the right to demand of each other given the authority and accountability relations in which they stand, and in which they stand with the state. While this does not provide us with a practicable test for determining which precautions are reasonable or unreasonable, it tells us, at least, what hard question we are trying to answer when making that determination.

One of the morals of this section is that taking seriously the idea of the second-personal address of second-personal reasons provides us with a form of self-understanding: it helps us understand what we are really doing in appealing to reasonableness in the law. This self-understanding, in turn, helps us understand how an appeal to reasonableness ought to proceed in a particular domain. It helps us to see, that is, what is and is not reasonable in a particular domain. In the next section, we will explore a different way in which the notion of the second-personal address of second-personal reasons can help us understand an appeal to reasonableness: it can help us understand what went wrong in appeals to reasonableness in defining the element of force in rape law.

#### IV. THE "REASONABLE" STANDARD: AN EXAMPLE OF AN INAPPROPRIATE USE

In many jurisdictions, it is not sufficient for rape for *A* to have had sexual contact with *B* without *B*'s consent. In addition, the act must have been accomplished through force or threat of force. Further, in a diminishing number of jurisdictions, to determine if

there is a threat of force, the jury must consider what a reasonable person would think or feel. In particular, in many jurisdictions, the jury must determine whether or not a reasonable person would have believed herself to have been in danger of serious harm given the defendant's actions.<sup>32</sup> Call this "the requirement of reasonable fear." This requirement is relevant only where a complainant, usually a woman, has had some kind of sexual contact with a defendant, usually a man, not as a result of the application of physical force, but instead because she came to believe that she or another would suffer some serious harm if she did not submit.<sup>33</sup>

The requirement of reasonable fear makes it harder to convict some defendants and easier to convict others. Under the requirement, force that causes the complainant to subjectively believe herself to be in danger is not enough, even if the defendant knew that she had this belief and acted so as to induce it. If a reasonable person would not have felt sufficient fear to submit, then there was no rape. In this sense, then, the doctrine protects the defendant. In particular, defendants who induce a complainant to comply by exploiting her tendency to believe herself to be in great danger when a reasonable person would not have that belief are not guilty of rape under this doctrine. On the other hand, a defendant could be convicted if it would have been reasonable for the complainant to have believed herself to be in danger, even if she did not in fact have that belief.

Hence, as a result of its appeal to reasonableness, the doctrine makes it unnecessary for the state to convince the jury that the

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32. See generally *Roberts v. State*, 530 S.E.2d 535, 541 (Ga. Ct. App. 2000) (stating that "a reasonable apprehension of bodily harm" is an adequate jury instruction); *State v. Rusk*, 424 A.2d 720, 727 (Md. 1981) (stating that most jurisdictions require that the victim reasonably fear the assailant to prove the element of force); *Commonwealth v. Guisti*, 747 N.E.2d 673, 677-78 (Mass. 2001) (noting that to prove a rape charge, "[i]t is sufficient that the Commonwealth prove that the victim reasonably feared that the defendant would harm her if she did not submit"); *State v. Roberts*, 235 S.E.2d 203, 211 (N.C. 1977) ("The mere threat of serious bodily harm which reasonably induces fear thereof constitutes the requisite force."); *Commonwealth v. Rhodes*, 510 A.2d 1217, 1220, 1226 (Pa. 1986) (the criminal code for rape identifies "person of reasonable resolution"); *Schrum v. Commonwealth*, 246 S.E.2d 893, 896 (Va. 1978) (holding that a "victim is not required to resist . . . if she reasonably believes that resistance . . . would be useless"); *Tryon v. State*, 567 P.2d 290, 292 (Wyo. 1977) (finding no consent if "induced by fear or reasonable apprehension of severe bodily harm").

33. The threat of force element intersects in confusing ways with the element of non-consent. To avoid conceptual confusion in the doctrine, it must be possible to acquiesce to a threat of force without thereby consenting. Exactly what conception of consent is required in order to maintain this distinction is a difficult question. The discussion to follow assumes that some appropriate notion of consent could, in principle, be delineated.

complainant was actually afraid or acted from any actual fear. In this sense, the reasonable person standard operating here protects the complainant by removing from her a burden to act frightened, or to in any way communicate her fear to her assailant or others. The jury can convict even if nothing the complainant did indicates at all, much less beyond a reasonable doubt, that she believed herself to be in serious danger of harm.

It is an empirical question whether defendants or complainants end up with greater protection from a legal regime that accepts the requirement of reasonable fear. Although my hunch is that defendants receive the greater protections, a more powerful critique of the use of the reasonable person in this context would show that it is illegitimate even if empirical studies were to point in favor of the victims. That is, if it can be shown that the use of the reasonable person is illegitimate regardless of whether defendants or complainants are given greater protections, then there would be good reason to reject such a legal regime quite independently of any empirical results. This section argues for just this point by appeal to the justificatory hypothesis under consideration in this paper. My claim is that the requirement of reasonable fear makes sense only if one mistakenly thinks that for the defendant to be guilty, the complainant must be the addressee of some act of second-personal address of a second-personal reason. And, since no such act is justifiably required for the defendant's guilt, there is no legitimate place here for the law to appeal to reasonableness.

To see why things go wrong in the requirement of reasonable fear, consider a similar place in the law in which reasonableness has a legitimate role to play, namely, in the affirmative defense of duress. The *Model Penal Code* ("MPC"), for instance, requires for the defense that the defendant show not just that he acted as accused from coercion but also that "a person of reasonable firmness in his situation would have been unable to resist" the coercive pressure applied to him.<sup>34</sup> This requirement of reasonable firmness runs exactly parallel to the requirement of reasonable fear in rape. In both

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34. MODEL PENAL CODE § 2.09(1) (1962). The MPC does not accept the requirement of reasonable fear in its definition of rape, *see id.* § 213.1(1), but accepts something very close to it in its definition of the crime of "Gross Sexual Imposition," *see id.* § 213.1(2). There, instead of requiring that the fear be reasonable, the MPC requires that the threat would have prompted compliance from a "woman of ordinary resolution." *Id.* § 213.1(2). The practical effect of this requirement, however, is much the same as the requirement of reasonable fear.

cases, the requirement is not met if a reasonable recipient of a threat would not have complied with the threatener's demand. It might appear, then, that the two requirements should stand or fall together. If there is some good reason for the requirement of reasonable firmness, then perhaps there is also some good reason for the requirement of reasonable fear, and vice versa. As we will see, however, there is a good reason for the requirement of reasonable firmness, and that reason does not extend to the requirement of reasonable fear.

Notice another parallel between duress doctrine and rape doctrine: both appeal to reasonableness in an attempt to delineate the same very particular class of actions performed in response to pressures supplied by another. *A* can get *B* to do what he wants in a whole variety of different ways. For example, *A* can bypass *B*'s will by throwing *B* to the ground. If *B* behaves illegally in response to pressures of this sort—ordinarily physical pressures—then *B* has failed to meet the act requirement, and so is not criminally responsible. Duress never comes into play. Similarly, if *B* finds herself in sexual contact with *A* as a result of this kind of pressure—if, for instance, *A* attacks *B* in a parking lot and overpowers her—then the force requirement is met without any discussion of the requirement of reasonable fear, for there is no need to discuss whether or not *B* was responding to a threat of force. On the other end of the spectrum, *A* can also get *B* to do what he wants by making it worthwhile to *B*. Many cases of illegal behavior performed in response to such pressures will rise to the level of justifications. This will be so, for instance, if *A* makes it the case that a rational and moral person is at least permitted, and maybe even required, to act criminally. Think, for instance, of committing a robbery in order to prevent a loved one from being murdered by another, or submitting to sexual contact for an analogous reason.

While the duress doctrine does serve to excuse people in cases like this—if a rational and moral person would have done as the defendant did then, clearly, a person of “reasonable firmness” would have as well—the duress doctrine is not devised for cases of this kind. Under the MPC, for instance, such a person can escape responsibility by noting that he was justified in acting as he did,<sup>35</sup> and never

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35. *Id.* §§ 3.01–3.11.

needs to show that he was under duress. Such cases are well over the bar of “reasonable firmness.” Analogously, if the defendant has placed the complainant in a position in which a moral and rational person would have submitted to the relevant sexual contact, then there has been a threat of force of the sort required to meet the reasonable fear requirement. But in both cases, the pressures exerted might not be such as to *sail over* the bar of reasonable firmness or reasonable fear for the requirement to be met.

There are closer cases, such as cases in which the defendant lacks a justification but was still under duress, or, correlatively, cases in which a perfectly rational or moral person would not have submitted as the complainant did but in which there was the threat of force needed for rape. Both the requirement of reasonable firmness and of reasonable fear are intended to capture a set of cases in which someone less than perfectly rational or perfectly moral, but possessing frailties much like anyone else’s, would have given in. Such people are thought to be given a defense of duress by the requirement of reasonable firmness and are thought to be protected against sexual contact to which they do not consent by the requirement of reasonable fear. In such cases, we might very well recognize that the person did not do the right thing—she should not have complied—but we nonetheless see her acquiescence as having been due more to the person who pressured her than to herself.

Why should the law include the requirement of reasonable firmness in its definition of duress? A first and natural answer to this question fails, despite its appeal. We might think that the appeal to reasonableness here is helping to distinguish those who are weaker than we demand them to be from those who meet normative expectations in this regard. The latter class of defendants are given a defense, but not the former, because those who are not of “reasonable firmness” are thought to be at fault for being weak. The problem is that failure to meet a normative standard is not sufficient for being at fault for that failure: among other things, some people fail to meet standards because of factors largely or entirely outside of their control. In fact, the defense of duress is designed with one class of such people in mind: the defendant failed to meet a normative standard, but he is given the opportunity to present a defense of duress precisely because we think those who have not met standards



may still not be at fault. Among other things, they may have failed to meet them because they were under duress.

So, the defense of duress itself enshrines in law the rejection of the claim that failure to meet a standard is sufficient for being at fault for that failure. To impose a second standard—a person must be of “reasonable firmness”—as part of the defense itself without allowing defendants the opportunity to show that they failed to meet this standard as a result of something that mitigates or eliminates their responsibility for this failure is flatly hypocritical.

The framers of the MPC were aware of this sort of problem and offered the following alternative justification for their appeal to reasonable firmness in defining the defense of duress:

[The] law is ineffective in the deepest sense, indeed . . . it is hypocritical, if it imposes on the actor who has the misfortune to confront a dilemmatic choice, a standard that his judges are not prepared to affirm that they should and could comply with if their turn to face the problem should arise.<sup>36</sup>

The idea is that it is a necessary condition of justifiably holding someone accountable for failure to meet a legal standard that those who are holding him could themselves claim to have met the standard had they been in his position. This approach suggests that “reasonable firmness” means “the degree of firmness of those who are holding the defendant accountable.” This approach leads us to difficult questions about who, exactly, is holding the defendant accountable—the judge? the jury? the people as a whole?—and depending how we answer that question we will find ourselves with different accounts of “reasonable firmness.” But even if we assume that such a question can be answered, the MPC’s approach gives rise to a question which does not have an immediate answer: why should it be a necessary condition of legal accountability for failure that the judges, whoever they are, would not have failed?

We often justifiably hold people to standards that we ourselves could not have met. We often have good reasons for requiring others to act better than we ourselves are capable of. Holders of public office, for instance, are justifiably criticized for giving in to temptations, financial and otherwise, that the very people justifiably

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36. *Id.* § 2.09 cmt. 2 (“Proper scope of Defense”).

criticizing them would have accepted. Similarly, most of us have no idea how we would have acted had we found ourselves in Rwanda, say, at the wrong moment. We hope we would have acted well; but our hopes may be vain. And yet we have every right to hold those who committed atrocities there to account. Perhaps there is something about legal accountability in particular that would help to solve this problem. Perhaps the activity of justifiably holding someone to account for failure to meet a *legal* standard—although not every other kind of standard—requires that one can say that one would have met that standard oneself in the circumstances. If this is so, however, the case needs to be made to support the MPC's proposed justification for appealing to "reasonable firmness" in defining duress.

The hypothesis under consideration in this paper—that where there is a justified appeal to reasonableness in the law there is an act of second-personal address of a second-personal reason being implemented or regulated—suggests a different justification for the requirement of reasonable firmness. Recall Pufendorf's Point: A person is not justifiably criticized for failure unless he has the capacity to recognize the justice of such criticism.<sup>37</sup> As was suggested in Part II, Pufendorf's Point can be derived from the notion of the second-personal address of a second-personal reason: Such an act cannot be successful unless the person being addressed has the capacity to recognize the justice of criticism should she fail to practically incorporate the addressed reason for action.

Accordingly, the act of proclaiming a person guilty of a crime is an act of second-personal address of a second-personal reason. By assigning punishment, the court is exercising a power to give the defendant a reason not to have acted as he did. In addition, the court is communicating that reason to the defendant, and at the same time is communicating to the defendant that the entity for which the court speaks (the state or the people) is communicating this reason to him. Furthermore, it is important that this last element be communicated for it reminds the defendant that the entity exerting its power to give him a reason has the authority to do so. It therefore follows that for the court's proclamation of guilt to be successful, the defendant must have the capacity to recognize the justice of his punishment.

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37. See *supra* Part II.C.

If, as is the case when the defense of duress arises, the defendant acted as he did in response to a coercive threat from another party, the defendant may lack the capacity to recognize the justice of his punishment precisely because he believes that he acted in response to a threat to undermine his responsibility. Such a person, if jailed for his crime, might sit in his cell and say to himself, "I still would have done the same thing, even if I had it all to do over again. I did my best." He might really lack the capacity to see his act as having been sufficiently under his control to be attributed to him. But sometimes we recognize that even though we acted in response to a threat, we are nonetheless responsible for acting as we did. We are sometimes in a position to attribute the act to ourselves, and not to the person who issued the threat. In such cases, the defendant did not merely act freely in response to a threat while perfectly capable of resisting, as is always the fact in duress cases.

In addition, in such cases the defendant recognizes, or could recognize, that he responded wrongly to the pressures that he was under. He recognizes that resistance was within his power. In such cases, a person meets the necessary condition for censure specified by Pufendorf's Point, even though he acted in response to a threat: He maintains the capacity to recognize the justice of his condemnation for acting as he did.

The requirement of reasonable firmness, I suggest, represents an attempt to assess whether or not the defendant does indeed have this capacity. The background question is a factual one regarding the defendant's capacities. Is the defendant capable of a particular form of regret for what he did? Is he capable of looking at his act and recognizing that it is to be attributed to himself, and not to the threatener? If he is not, then the act of second-personal address of a second-personal reason that the court is contemplating making—namely, the proclamation of the defendant's guilt—cannot hope to be successful: The defendant should be acquitted. But if he is, then the court should ignore the fact that the defendant acted in response to a threat, since the defendant maintains the capacity to recognize that the threat was not analogous to a push from behind. The threat was not genuinely incapacitating.

Under this approach, duress does not excuse because the defendant was incapacitated by the threat. If that is the case, there are other ways for the defendant to avoid criminal responsibility.

Duress excuses if and only if the defendant cannot help but see the threat that he was given as functioning *just as though* it was incapacitating. Such a defendant lacks one of the capacities required of the addressee if the court's contemplated act of second-personal address of a second-personal reason is to be successful.

If what really needs to be assessed is whether the defendant has the capacity to recognize that he was wrong to comply with the threat, that his action is to be attributed to himself and not to the threatener, why does the doctrine ask what a reasonable person would have done when faced with the threat? The reason is that a necessary condition of seeing oneself as at fault for what one did in response to a threat is that a person who was responding properly to his reasons for action—a person who recognized what reasons he had and gave them the weight they deserved—would not have done so.

One cannot have the relevant capacity to hold oneself accountable unless one can recognize adequate reasons for not giving in to the threat. On the other hand, one can see such reasons only if there were such reasons; and there were such reasons only if a person who recognized and weighed all the reasons appropriately would not have capitulated. So, "reasonable" in duress doctrine should be interpreted as meaning "has the capacity to recognize what reasons he has for resisting the threat and to give them appropriate weight in his deliberation." But the reason we care whether such a person would have complied with the threat is this: If he would not have capitulated, then we cannot hope that the defendant will hold himself accountable for failure. He is therefore an inappropriate target of the act of second-personal address that the court, in weighing his guilt, is deciding whether to make.

If this is right, it follows that the requirement of reasonable firmness is justified, while the requirement of reasonable fear is not. The reason is that the requirement of reasonable firmness is needed in order to determine if a particular defendant is really responsible. As an addressee of an act of second-personal address of a second-personal reason on the part of the court, the defendant must have certain capacities for that act to be successful. If he cannot recognize that the threat he responded to did not, in fact, undermine his responsibility, then he lacks one of the needed capacities. The reasonable person question posed by the requirement of reasonable

firmness helps us to determine if the defendant has the needed capacity.

On the other hand, the complainant in a rape trial is not the addressee of any act of second-personal address on the part of the court. As is so often said, she is not on trial. But the requirement of reasonable fear, parallel as it is to the requirement of reasonable firmness, only has a legitimate place if the person complying with the threat is the one whose responsibility is being assessed. It therefore follows that the requirement of reasonable fear is unjustified.

This last point can be put another way by looking at the MPC's definition of "criminal coercion"—the crime of inducing another person to act in a certain objectionable way by threatening her with serious harm if she does not.<sup>38</sup> It is a striking fact that there is no appearance of the reasonable person in the elements of criminal coercion. In particular, the jury does not need to determine if the threats that the defendant issued would have induced a reasonable person to comply. This is perfectly justified, however, under the view of reasonableness being explored here. We need to know if a reasonable person would have complied with the threat. The jury is not concerned with whether the threatener acted wrongly, but whether the threatened has. If a reasonable person would have complied, then that suggests that the threatened cannot be expected to see herself as rightly censured for her failure. She is therefore an inapt addressee of an act of second-personal address of a second-personal reason. But in the crime of criminal coercion, the recipient of the threat—the victim—is not to be the addressee of the court's act of second-personal address. The reasonableness of compliance with the threat is therefore not relevant. Similarly, there should be no requirement of reasonable fear. Since the complainant in a rape trial is no more on trial than the recipient of the threat in a criminal coercion trial, the question of the reasonableness of her fear is of no relevance to the proceeding.

## V. CONCLUSION

My aim in this paper has been to illuminate the fruitfulness of a particular hypothesis: Appeals to reasonableness in the law are

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38. *Id.* § 212.5.

justified where, and only where (1) the court is involved in implementing or regulating some act of second-personal address of a second-personal reason; and (2) the relevant act of second-personal address's success, or possibility of success, depends on the answer to a question about some party's capacity to generate, recognize or respond to those communicated reasons. As we have seen, someone who accepts this hypothesis can explain why the appeals to reasonableness in the tort of negligence and in the affirmative defense of duress are justified, and why it is unjustified to require for rape, as courts have for many years and still do in some jurisdictions, a woman's fear of serious injury to have been reasonable when it formed the basis of her acquiescence to sexual contact. Of course, there are many more places in the law where reasonableness is invoked. But the discussion here gives some hope that their justifiability can be assessed by consideration of their relevance or irrelevance to some act of second-personal address of a second-personal reason being either regulated or implemented by the court.

As discussed, Darwall believes, and not without reason, that acts of second-personal address of second-personal reasons are fundamental to a wide range of ordinary human practices involving the evaluation of conduct, character, motive and capacity. If the argument of this paper is correct, then they also play a fundamental role in the law, a fact which emerges through reflection on the myriad ways in which legal assessment requires an assessment of the thoughts, feelings and actions of the reasonable person.