

## LAW AND THE SECOND-PERSON STANDPOINT

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In *The Second-Person Standpoint*, I argue that there is a distinctive reason for acting—a *second-personal reason*—that is conceptually implicated in many central moral notions: moral responsibility, moral obligation, rights, respect for and the dignity of persons, and the concept of moral agent or person itself.<sup>1</sup> What is distinctive about second-personal reasons is that they are analytically related to claims and demands that an addresser has the authority to make of, and address to, the agent second-personally. Reasons of this kind always involve an accountability relation between addresser and addressee—that is, that the addressee is answerable to the addresser in some way, if not for compliance, then at least to give consideration or something similar.

Although the claims I argue for in my book concern *morality*—moral obligation, responsibility, rights, and so on—they would also seem to bear on the *law*.<sup>2</sup> One way of viewing my project, in fact, is that it tries to bring out the distinctive character of that part of morality that is modeled on the idea of law. Moral *obligations*, I argue, are not just what there are good (or even compelling) moral reasons for us to do; they are what members of the moral community have the authority to demand that we do, what we are accountable to one another and ourselves for doing. This is why, like Kant, we naturally speak of the “moral law” in such cases.<sup>3</sup>

Similarly, moral *rights* must also be understood in legal or juridical terms. What a person has a moral *claim right* to is what she

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1. STEPHEN L. DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006) [hereinafter DARWALL, *STANDPOINT*].

2. For a more systematic development of this idea, see Robin Bradley Kar, *Hart's Response to Exclusive Legal Positivism*, 95 *GEORGETOWN L.J.* 393 (2007).

3. See IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* 7–14 (Mary Gregor ed. & trans., Cambridge Univ. Press 1997) (1785).

has standing as an individual to demand that others provide her, along with authority to hold them accountable.<sup>4</sup> What she has a moral *liberty right* to do is what others have no authority to demand that she not do.<sup>5</sup> Moral rights thus also involve the moral law. If I have a moral liberty to do *A*, then I do no wrong in doing *A*; that is, I do nothing that members of the moral community have, as such, the authority to demand I not do. I do not violate the moral law, understood as what members can demand of one another. And if I have a moral claim, as an individual, to your doing *A*, then the moral law gives me special standing as an individual to demand that you do *A* and to hold you accountable if you do not. For example, I could demand that you compensate my injury, release you from compensation, or, even, forgive you for injuring me. This is a standing I have, not as a representative of the moral community authorized to hold one another responsible for moral wrongs in general, but as an individual involved in the transaction.

The authority that is involved in moral obligations and rights is *moral authority*—as I see it, the authority of members of the moral community to make claims and demands of other members of the community. But the notions of authority, obligations, rights, and responsibility are also all obviously central to law (that is, to laws legislated, administered, and enforced by those with *legal authority*). Laws create legal obligations and rights, and the authority to hold responsible is essential both to the criminal and the civil law. Laws are not simply standards that assess conduct in some specific way; laws are promulgated, that is addressed, to those who are subject to them. They make putatively authoritative demands with which addressed subjects are responsible for complying.

Legal sanctions are not just coercive threats, even justified ones. They involve an exercise of putatively legitimate authority that purports to give reasons for compliance that cannot be reduced to the desire to avoid some evil in which the sanction consists, or even to avoid a justified evil. As Hart famously put it, laws purport to *obligate* rather than only *oblige*.<sup>6</sup> However unwelcome or restrictive sanctions may be, there is a fundamental conceptual difference

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4. See John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 516–19 (1980).

5. See DARWALL, *STANDPOINT*, *supra* note 1, at 18–20.

6. H.L.A. HART, *THE CONCEPT OF LAW* 6–8 (2d ed. 1994).

between putting someone on notice of a legitimate sanction as a way of holding him responsible for complying with law, and either coercion or, as Raz has pointed out, even justified coercion.<sup>7</sup> The exercise of authority invariably involves “an appeal for compliance” and “an invocation of the duty to obey.”<sup>8</sup> We respect law not in the same way a fighter might respect his opponent’s left jab; we recognize its authority.

As I see it, the reasons that the law purports to provide are second-personal reasons. I cannot defend this proposal in detail here, but in what follows I nonetheless want to suggest some reasons in its favor and for thinking that the notions of second-personal address and of what I call *second-personal authority* and *second-personal competence* can be useful in understanding the nature of law and legal obligation. First, however, let me say something about the notions of second-personal reason, authority, and responsibility or accountability that I will be employing in my analysis and that I explore at greater length in *The Second-Person Standpoint*.<sup>9</sup>

#### I. SECOND-PERSONAL REASONS

An example can easily illustrate the intuitive idea of second-personal reasons. Suppose someone has stepped on your foot. Compare, to begin with, two different ways in which you might try to give him reason to get off.

The first would simply be to get him to see that you are in pain and to feel sympathy for you in your plight, that is, to want you to be free of pain. In desiring this, he would see your being in pain as a bad thing, as a state of the world that there is some reason to change. He would most naturally see his desire not as the source of the reason, but as a kind of access to an *agent-neutral* reason for removing his foot that is there anyway.<sup>10</sup> The reason would not be

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7. JOSEPH RAZ, *THE MORALITY OF FREEDOM* 25–26 (1986) [hereinafter RAZ, *MORALITY*].

8. *Id.* at 25–26.

9. *See supra* note 1.

10. On this point, see E.J. BOND, *REASON AND VALUE* (1983), JONATHAN DANCY, *PRACTICAL REALITY* (2000), STEPHEN DARWALL, *IMPARTIAL REASON* (1983), JEAN HAMPTON, *THE AUTHORITY OF REASON* (1998); T.M. SCANLON, *WHAT WE OWE TO EACH OTHER* 41–55 (1998), Philip Pettit & Michael Smith, *Backgrounding Desire*, 99 *PHIL. REV.* 565 (1990), and Warren Quinn, *Putting Rationality in Its Place*, in *MORALITY AND ACTION* 228, 228–55 (Warren Quinn ed., 1991).

Agent-neutral reasons contrast with agent-relative reasons, those whose formulation includes an ineliminable reference to the agent for whom they are reasons (like “that it will keep a

essentially *for him* as the agent causing another person pain. It would apparently exist for anyone who is in a position to effect the state of relief of your pain, and *therefore* for him, since he is well placed to do so. Moreover, in “giving” him the reason in this way, you might not need to address or relate to him in any way at all. Anything that would get him to see your being in pain as a bad thing, like an unaddressed grimace or whimper, might serve. In no sense, not even epistemic, need he be taking any reason to move his foot on your authority.

A second way of giving someone a reason to move his foot from on top of yours would be to lay a claim or address a purportedly valid demand. You might demand this as the person whose foot he is stepping on, thereby claiming and exercising what you take to be a right against him. Or you might demand it as a representative of the moral community, whose members understand themselves as holding one another to a (moral) demand not to step on each other’s feet. Or you might do both simultaneously. Whichever, the reason you would address would be agent-relative rather than agent-neutral. It would concern, most fundamentally, your addressee’s relations to others, viewed from a perspective within those relations. In this case, that his keeping his foot on yours causes another person pain, cause inconvenience, and so on, and that this is something we can and do reasonably demand that people not do. The reason would not be addressed to him as someone who is simply in a position to alter a bad state, whether of someone’s being in pain or even of someone’s causing another pain.

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promise I made,” “that it will avoid harm to others, i.e., people other than me,” and so on). Agent-neutral reasons can be stated without such a reference: “that it would prevent some pain from occurring to someone (or some being).” On the distinction between agent-relative (also called “subjective” or “agent-centered”) and agent-neutral (also called “objective”) reasons, principles, values, etc., see THOMAS NAGEL, *THE POSSIBILITY OF ALTRUISM* (1970), THOMAS NAGEL, *THE VIEW FROM NOWHERE* (1986), DEREK PARFIT, *REASONS AND PERSONS* 54, 55 (1984), SAMUEL SCHEFFLER, *THE REJECTION OF CONSEQUENTIALISM* (1982), Stephen Darwall, *Agent-Centered Restrictions From the Inside Out*, 50 *PHIL. STUD.* 291 (1986), and David McNaughton & Piers Rawlings, *Agent-Relativity and the Doing-Happening Distinction*, 63 *PHIL. STUD.* 167 (1991).

Note that philosophers sometimes use “agent-relative reasons” to refer to those that have their source in the agent’s own values or preferences. Although such reasons would also be agent-relative in the “positional” sense I have in mind in this article, not all reasons that are agent-relative in the “positional” sense would be agent-relative in this other sense. That an act would fulfill a promise I made is an agent-relative reason in our current (positional) sense, although it certainly would not depend in any way on the agent’s preference or values.

Someone can sensibly accept this second reason for moving his foot only if he also accepts your *authority to demand* this of him (second-personally). That is just what it is to accept something *as a valid claim or demand*. And if he accepts that you can demand that he move his foot, he must also accept that you will have grounds for complaint or some other form of accountability-seeking response if he does not. Unlike the first reason, this latter is second-personal in the sense that although the first is conceptually independent of forms of second-personal address involved in making claims and holding people responsible, the second is not. A *second-personal reason* is thus one whose validity depends upon presupposed authority and accountability relations between persons and, therefore, on the possibility of the reason's being addressed person-to-person within these relations. Reasons of this kind simply would not exist but for their role in second-personal address and in mediating our relations to one another. Their second-personal character explains their agent-relativity. As second-personal reasons always derive most fundamentally from agents' *relations* to one another, they are invariably agent-relative at the most fundamental level.

Nevertheless, a norm or reason can be agent-relative without being second-personal; in other words, there might be a reason of yet a *third* kind, which is agent-relative but not yet second-personal. We can imagine someone who accepts and scrupulously observes a universal norm of foot-avoidance but who also denies, consistently with that, anyone's authority to claim or demand his compliance with this norm, hence denies that he is responsible to anyone for compliance, even to God. Such a person might conceive of the norm as mandatory in the sense of entailing categorical, indeed supremely authoritative, or "silencing," or even "preemptive" or "exclusionary" reasons, without accepting that he is accountable to anyone for complying with it.<sup>11</sup> He might treat the fact that an action would involve stepping on another's foot as the weightiest possible reason not to do it, while simultaneously denying any responsibility to anyone for such forbearance. However, he could not, consistently

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11. A reason "silences" other reasons if it cancels their weight and thus does not simply outweigh them. John McDowell, *Virtue and Reason*, 62 *MONIST* 331, 331–50 (1979), reprinted in JOHN MCDOWELL, *MIND, VALUE, AND REALITY* (2d ed. 2001). A reason is "exclusionary" or "pre-emptive" if it is not to be added to other reasons but to replace or "exclude" them. JOSEPH RAZ, *PRACTICAL REASON AND NORMS* 35–48 (1975); see also RAZ, *MORALITY supra* note 7, at 46.

with this latter rejection, accept that anyone has a *right* to his foot-avoidance. In respecting the norm of avoiding people's feet, he would not be respecting *them* as persons, since he would not be recognizing any authority anyone might claim as a person to demand anything, and in particular that he avoid their feet.<sup>12</sup> Neither, in my view, could he consistently accept that he is *morally obligated* not to step on others' feet since moral obligation is conceptually related to moral responsibility. I argue that it is conceptually impossible for someone to be morally obligated to do something but not responsible for doing it, neither to the moral community, nor to God, nor to anyone. So someone who thought he was accountable to no one could not think he was morally obligated not to step on others' feet, whatever priority he might give to a norm requiring him not to do so.

There is thus a significant difference between the idea of an authoritative claim or demand, on the one hand, and that of an authoritative or valid norm or normative reason, or even of a normative requirement, on the other. There can be requirements *on* us that no one has any standing *to require of* us. For example, we are under a requirement of reason not to believe propositions that contradict the logical consequences of known premises, but it is only in certain contexts, say, when you and I are trying to work out what to believe together, that we have any standing to demand that one another reason logically. Even here that authority apparently derives from a moral or quasi-moral aspect, namely, our having undertaken a common goal.<sup>13</sup> Requirements of logical reasoning are, in this way, fundamentally different from moral requirements. I follow Mill and a number of contemporary writers in arguing that it is part of the very idea of moral obligation that moral requirements are what those to whom we are morally responsible have the authority to demand that we do.<sup>14</sup> Clearly this is no part whatsoever of the concept of a demand of logic or a requirement of reason.<sup>15</sup>

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12. See JOEL FEINBERG, *The Nature and Value of Rights*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 143 (1980); Stephen L. Darwall, *Respect and the Second-Person Standpoint*, 78 PROC. & ADDRESSES AM. PHIL. ASS'N, Nov. 2004, at 43.

13. Of course, these further constraints are frequently in the background, as they are, for example, whenever we do philosophy, say, right now. Because of the relationship you and I are currently in, each of us *does* have authority to call one another to account for logical errors, a standing that, without some such context, we would lack. But regardless of how frequently some relevantly similar context obtains, the authority comes, not just from the requirement of reason, but from some other presupposed feature of the context.

14. John Stuart Mill states:

## II. A CIRCLE OF IRREDUCIBLY SECOND-PERSONAL CONCEPTS

The notion of a second-personal reason is therefore one of a set of irreducibly second-person concepts that can be defined in terms of one another as follows:

- *Practical authority*: Someone has practical authority with respect to another if, and only if, the latter has a second-personal reason to comply with the former's valid claims and demands and is responsible to the former for so doing.
- *Responsibility to*: Someone is responsible to another if, and only if, the latter has the authority to make some valid claim or demand of the former that the former is thereby given a second-personal reason to comply with.<sup>16</sup>
- *Valid claim or demand*: A valid claim or demand is one that is within the authority of someone having practical authority with respect to another to make of the latter and that the latter thereby has a second-personal reason to comply with and some responsibility to the former for so doing.<sup>17</sup>

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We do not call anything wrong, unless we mean to imply that a person ought to be punished in some way or other for doing it; if not by law, by the opinion of his fellow creatures; if not by opinion, by the reproaches of his own conscience. This seems the real turning point of the distinction between morality and simple expediency. It is a part of the notion of Duty in every one of its forms, that a person may rightfully be compelled to fulfill it. Duty is a thing which may be *exacted* from a person, as one exacts a debt.

JOHN STUART MILL, *Utilitarianism*, in 43 GREAT BOOKS OF THE WESTERN WORLD 445, 468 (Robert Maynard Hutchins ed., 19th prtg. 1971). John Skorupski points out that calling an act "morally wrong . . . amounts to blaming the agent" and maintains that the idea of moral wrong cannot be understood independently of that of blameworthiness. JOHN SKORUPSKI, *ETHICAL EXPLORATIONS* 29, 142 (1999). Allan Gibbard quite explicitly follows Mill's lead in proposing that "what a person does is *morally wrong* if and only if it is rational for him to feel guilty for having done it, and for others to be angry at him for having done it." ALLAN GIBBARD, *WISE CHOICES, APT FEELINGS* 42 (1990). We can find versions of this Millian idea in other writers also. See, e.g., RICHARD BRANDT, *A THEORY OF THE GOOD AND THE RIGHT* (1979) (discussing whether we are "morally free" to do something that is "merely wrong" if there is no affirmative obligation to refrain from doing it); RUSS SHAFER-LANDAU, *MORAL REALISM: A DEFENCE* (2003) (arguing that there are "objectively correct answers to many moral questions" such that wrong-doers are acting "contrary to good reason"); Kurt Baier, *Moral Obligation*, 3 AM. PHIL. Q. 210, 210–26 (1966).

15. I am indebted to Peter Graham for this point.

16. See DARWALL, *STANDPOINT*, *supra* note 1, at 11–12.

17. *Id.*

- *Second-personal reason*: A second-personal reason is one consisting in, or deriving from, some valid claim or demand of someone having practical authority with respect to the agent and with which the agent is thereby accountable for complying.<sup>18</sup>

As I have indicated, I argue in my book that the concepts of moral responsibility, moral obligations, rights, respect for and the dignity of persons, and the concept of person or moral agent all involve these irreducibly second-personal notions.<sup>19</sup> In my view, this is a fact of the first importance for moral theory. It means that no premises that do not involve these second-personal notions can entail any conclusion that does. It follows that substantive theses about moral obligation or right cannot be convincingly supported from premises about how it would be desirable for the world to be. This does not rule out utilitarian or consequentialist moral theories, to be sure, but it does mean that for them to be adequately supported, they will have to be advanced within a second-personal framework, that is, from within a set of assumptions about our authority to make claims and demands of one another at all.<sup>20</sup>

### III. LAW AND LEGAL AUTHORITY

I turn now to ways in which the framework of second-personal ideas I have been sketching might be helpful in illuminating the character of law. To begin with, note that nothing I have said about the four interconnected, irreducibly second-personal notions just discussed ties them exclusively to morality. As I see it, the root idea here is of second-personal normative reasons, which reasons always presuppose authoritative claims and demands, hence authority, along with accountability.<sup>21</sup> As I analyze them, second-personal reasons are grounded in genuine, that is *de jure*, authority of any kind.<sup>22</sup> Moral obligations derive from the equal authority of members of the moral community to hold one another morally responsible;

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18. *Id.* at 5–11.

19. *Id. passim.*

20. I actually think that preference-satisfaction versions of utilitarianism are best thought of in terms of equal claims, since being regulated by another's will when this conflicts with his welfare is a form of respect.

21. DARWALL, *STANDPOINT*, *supra* note 1, at 74–79.

22. *Id.* at 80–82.

obligations within, say, a military chain of command, derive from the authority to issue orders of various kind.<sup>23</sup> So also, I propose, do legal obligations and responsibilities derive from legal authority.

Now I do not want to take any stand on fundamental issues of jurisprudence that divide legal positivists and their critics, at least those in the mainstream. Whether the existence of law depends on anything ethical or genuinely normative, and how law relates to morality, can remain in dispute even if all parties agree that there is a conceptual difference between law and straightforward coercion or the “gunman writ large.” At the very least, both sides can accept that the law *presents itself* as having a kind of authority, whether it actually has it or not. As we might alternatively put the point, in order for law to exist there must be some authority *de facto*. And in order for *de facto* authority to exist, at least some people, maybe just public officials, must be seen to treat some practices or institutions as having authority *de jure* (and maybe, as Hart held, must actually so treat them by taking an “internal point of view”).<sup>24</sup>

The very same is true of morality, actually. Even skeptics like Hume’s “sensible knave” or Hobbes’s “fool” can question whether morality creates genuine normative reasons while agreeing that it purports to do so.<sup>25</sup> They can accept my analysis of moral obligation and distinguish between the putative existence of second-personal reasons and whether such normative reasons exist in fact. They can, if they like, use “moral obligation” and “moral reason” to refer to the former, that is, to the putative normative reasons that they deny are normative reasons in fact. If they do, they can agree that morality creates “moral obligations” and “moral reasons” for action, but deny that these are genuinely obligating or genuine normative reasons. In so doing, they would deny that the putative authority that morality claims is authority *de jure*. (They may even deny that this is such a thing as *de jure* authority.) My suggestion is that the same is true of legal authority and the law. The law presents its demands as issuing from genuine, that is, *de jure* authority, but this may not be so in fact.

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23. See *supra* note 14 and accompanying text.

24. H.L.A. HART, *THE CONCEPT OF LAW* 55–57 (1961).

25. See THOMAS HOBBS, *LEVIATHAN* 90–91 (Edwin Curley ed., Hackett Publ’g Co., Inc. 1994) (1651); DAVID HUME, *An Enquiry Concerning the Principles of Morals*, in *ENQUIRIES CONCERNING HUMAN UNDERSTANDING AND CONCERNING THE PRINCIPLES OF MORALS*, 169, 283 (L.A. Selby-Bigge ed., P.H. Nidditch rev., Clarendon Press 3d ed. 1975) (1777).

I take it, then, that the concept of law requires that of legal authority, that is, not just authority that is *created* by law, as when a law is passed that gives some body the authority to issue a permit to ride bicycles within the city limits, but also the authority to make or find law itself, that is, to make it the case that citizens have legal obligations, responsibilities, and reasons at all that they otherwise would not have had. If this is so, the concept of law would seem to be a second-personal concept, that is, one that can only be defined within the set of interdefinable irreducibly second-personal concepts that I outlined in the last section.

There is, then, a truistic or tautological sense in which the concept of law is a second-personal concept. By definition, laws derive from legal authority and create legal obligations, responsibilities, and reasons to comply, that is, “legal obligations” and “legal reasons” for acting in a sense analogous to that in which even a moral skeptic can accept that there are “moral obligations” and “moral reasons.” Second-personal legal reasons exist in this sense, whether or not such reasons are genuinely normative and whether or not the authority that law and legal authority purport to have is *de jure*. This much is tautologous or nearly so. Whether or not the relevant reasons, obligations, responsibilities, and authority are genuinely normative or *de jure* or not, it should be clear that they have a facially second-personal structure. The concept of legal obligation, for example, seems analytically to entail those of legal responsibility, authority, and reasons. What one is legally obligated to do is what one has a legal responsibility to do, what one has a legal reason to do, and what legal authority requires or demands that one do. And similarly with the other interdefinable legal concepts. Legal reasons of the appropriate kind are just those that are associated with legal obligations and responsibilities, that is, with what is demanded of us by legal authority.

Thus, legal concepts are at least superficially second-personal. Whether or not the law creates genuinely normative second-personal reasons, obligations, and responsibilities, the putative reasons and obligations are nonetheless second-personal in their structure. They are situated within a framework of putative authority and accountability relations. They purport not simply to favor action, or even to provide compelling or conclusive reasons for it, but to give distinctive reasons that derive from authoritative demands, hence

bear conceptually on what we can legitimately be held responsible for doing. This points to a second way in which law may be second-personal, namely, that the putative second-personal reasons and obligations may actually exist. The reasons that the law purports to create are genuine second-personal reasons—normative reasons for acting that derive from some genuine, that is, *de jure* authority to make demands and hold responsible.

Now, if the argument of *The Second-Person Standpoint* is correct, the only way any such authority can be established is within the second-person perspective. But how can any such authority claim be justified? I argue that one thing that distinguishes second-personal reasons from other reasons for acting of other kinds is that the validity of second-personal reasons depends upon its being the case that the person to whom they apply can be expected to accept the reasons and the authority from which they derive by exercising the capacities in virtue of which the reasons apply to him.<sup>26</sup> The root ideas are: first, that second-personal reasons always presuppose an accountability relation; second, that certain capacities (*second-personal competence*, as I call it) are necessary to intelligibly be able to be held responsible at all; and third, that when we hold someone responsible for doing something for some reason, we are committed to thinking that the person is capable of holding himself responsible by recognizing and acting on the relevant reason (along with the requisite authority) through exercising the relevant capacities.<sup>27</sup>

Compare the difference in what you must presuppose about someone to believe that there are, say, reasons of prudence for her to do something, or even to give prudential advice to her, on the one hand, and what you must assume to hold someone responsible for complying with some putatively authoritative demand, on the other. You may sensibly think that it would be for my own good for me to take my medications, say, and therefore that there is a prudential reason for me to do so, without supposing anything about my having any ability to accept and act on this reason. Even in giving me advice to act for this reason, you do not have to think that this is something I must be able to be brought to see the wisdom of for myself. You might just say, “Trust me, this really is a good reason to

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26. DARWALL, *STANDPOINT*, *supra* note 1, at 70–90.

27. *Id.* at 70.

do this and you should do it.” After all, whether the reason exists just depends on whether it would be for my good to so act, not on whether I can be brought to see this. If, however, you address a putatively authoritative demand to someone to get off your foot and hold one answerable for doing so, by contrast, you do assume that this is something he should be able to see for himself, or at least to appreciate when it is pointed out to him, right? After all, how can you hold him responsible for doing something for reasons he cannot himself appreciate even when they are pointed out to him? To intelligibly hold someone else responsible at all, it seems, you have to suppose that he is capable of holding himself responsible, that is, that he can comply with the demand by recognizing the authority to make it and that he is therefore responsible for compliance.

If this is right, then second-personal reasons must satisfy a “reasonable acceptance” condition. Unlike other reasons for acting, their very existence is staked on being the case that those to whom these second-personal reasons apply can reasonably be expected to be valid by accepting the authority from which they derive. But what authority can we reasonably expect people to accept? In my book, I argue that when someone takes a second-person standpoint toward someone else and makes claims and demands of her of any kind, he is committed to the presupposition that both the he and his addressee share a common second-personal authority to make claims and demands of one another by virtue of their capacity to enter into relations of mutual accountability (that is, their second-personal competence).<sup>28</sup>

It follows from what we have said already that the addressee of a second-personal reason must be assumed to have the authority to hold himself responsible through making the relevant demand of himself. This is not a trivial thing. Holding someone responsible for doing something requires trusting and respecting her by giving her authority to answer for her conduct, including to herself as well. Of course, this may involve the application of a sanction. But a sanction through which we hold someone responsible is not just a cost, and the second-personal authority and reasons that it takes to justify sanctions in the right way, that is, as a way of holding responsible, differs from reasons of other kinds that might be sufficient to warrant

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28. *Id.* at 74–79.

imposing costs.<sup>29</sup> To be a reason of the right kind, a consideration must be something the sanctioned agent could reasonably be expected to accept as making the sanction *legitimate*. In other words, that consideration must be consistent with the respective authorities of addresser and addressee and hence, fully respecting the addressee's authority also.

The point can be made with an example drawn from *The Second-Person Standpoint*. If a sergeant orders a private to do ten pushups, she addresses a reason to him that presupposes her authority to give the order and the private's obligation to obey it. So far, she may assume only to have to presuppose a superior authority, that as a sergeant she has the standing to give orders to the private, whereas the private has no standing to give orders to the sergeant. But an order does not simply point to a reason holding in normative space; it purports to address itself second-personally and thereby to hold the addressee responsible for compliance. As a second-personal address, an order presupposes that its addressee can freely determine himself through accepting the reasons it addresses and the authority in which they are grounded and hold himself responsible for complying with it. Any second-personal address whatsoever calls for reciprocal recognition of the authority it presupposes (in this case the sergeant's authority). It attempts to direct an addressee's will through the addressee's own free acceptance of that authority.

In assuming that the private is responsible for complying with the order, the sergeant is committed to thinking that the private would rightly be blamed if he failed to comply without adequate excuse. But attitudes, like blame, address demands from a perspective they presuppose their addressee can share.<sup>30</sup> Their content is not just "I blame you," but "You are to blame (as you should be able to see yourself)." So although the sergeant assumes she has a distinctive authority to hold the private accountable, which goes with her special authority to issue the order in the first place, any such specially authorized standing must ultimately be grounded in an authority she must assume that the private shares with her (to hold himself accountable). Otherwise, threatening a sanction, even

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29. This, I take it, is an important lesson of Strawson's *Freedom and Resentment*. P.F. Strawson, *Freedom and Resentment*, in *STUDIES IN THE PHILOSOPHY OF THOUGHT AND ACTION* 71 (1968).

30. *See id.* at 74–84.

one he could not complain about, would give him a reason of the wrong kind to comply. The reason would not be a second-personal reason to do the pushups whether or not he could escape the sanction, one the acceptance of which is part of holding himself responsible.

In making a claim on the private in this way, consequently, the sergeant must presuppose a distinction between making a legitimate claim on the private's will in a way that respects his authority as free and rational, on the one hand. And on the other, attempting to illegitimately direct his will by simply imposing her will on him by coercion. However hierarchical, therefore, any address of a second-personal reason also implicitly presupposes a common second-personal authority as free and rational.<sup>31</sup>

Suppose, for instance, that the sergeant believes that if the private disobeys, she will then be entitled to put him in detention. Seeing what she regards as signs of incipient disobedience, she reminds the private of this fact; she puts him on notice of a sanction that she would be authorized to apply in holding him responsible. In so doing, she necessarily presupposes a distinction between a legitimately authorized notice of this sanction, which she must suppose to be consistent with the addressee's freely determining himself by the second-personal reasons provided by her order, on the one hand, and attempting to unjustifiably determine him to do the same act by the mere threat of the very same unwanted alternative in which the sanction consists, that is, without the relevant authority, on the other. To use Hart's helpful terms, the sergeant must presuppose a distinction between obligating the private by an order and obliging him illegitimately by coercion.<sup>32</sup> She must assume that although the private is subject to her orders, it would nonetheless be a violation of his normative standing to attempt to direct his will by threatening the very same evil if she lacked the requisite authority (and other things were held equal). This commits her to presupposing his authority as a rational agent with second-person competence.

The upshot, I believe, is that any *de jure* authority must be able to be justified to those over whom this authority is claimed in a way

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31. See DARWALL, STANDPOINT, *supra* note 1, at 22 (summarizing JOHANN GOTTLIEB FICHTE, FOUNDATIONS OF NATURAL RIGHT 49 (Frederick Neuhouser ed., Michael Bauer trans., Cambridge Univ. Press 2000) (1796)).

32. HART, *supra* note 33, at 6–8.

that is consistent with the equal second-personal authority of all persons—second-personally competent rational agents. I argue that this basic proposition can provide a grounding of the right kind for contractualist moral theory of the sort advanced by Scanlon<sup>33</sup> and suggested by Rawls.<sup>34</sup> I conjecture that the proposition can also ground similar approaches to justifying political and legal authority. *De jure* authority of these kinds is also irreducibly second-personal and must consequently be capable of being justified to those subject to it in ways that are consistent with their (equal) second-personal authority. Let me turn now to ways in which the criminal and civil law more specifically illustrate this claim.

#### IV. CRIMINAL LAW AND SECOND-PERSONAL REASONS

Broadly speaking, criminal law is that part of the law where legal punishment is appropriate. But how should we conceive of punishment? It is a familiar idea that punishment essentially involves holding someone responsible for something done based on a finding of culpability and guilt. A legal system, of course, may articulate these latter ideas in formal ways with specific standards. But that does not change the fact that the underlying ideas have the same basic (second-personal) shape as those connected to moral obligation, namely, moral responsibility, culpability, and guilt. The moral emotion of guilt is the feeling that one has failed to respect some moral demand, that one is rightly blamed and held responsible; indeed, feeling guilty is itself part of holding oneself responsible.<sup>35</sup> And guilt's natural expressions are also second-personal—acknowledgment of fault, apology, making amends, and so on. Through their expressions, one makes oneself answerable to the other, thereby acknowledging his authority to hold one responsible and, therefore, to make claims and demands of one in the first place.<sup>36</sup>

Although apology is most appropriately to the victim, and he has a distinctive authority to determine whether or not to forgive the injury to him, guilt is not the feeling that he alone has a justifiable

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33. SCANLON, *supra* note 15.

34. See JOHN RAWLS, *A THEORY OF JUSTICE* 95–96 (2d ed. 1999) (“rightness as fairness”).

35. DARWALL, *STANDPOINT*, *supra* note 1, at 71.

36. *Id.* at 71–72.

complaint. One does not blame oneself as if from the victim's standpoint. One sees oneself as being *to blame*, that is, that blame is appropriate from a common perspective that violator and victim share as members of the moral community. In other words, one feels that punishment and not just compensation is warranted.<sup>37</sup> And in so feeling, one acknowledges, and thereby respects, the authority of the moral community to hold one responsible.

As I see it, viewing legal punishment in terms of responsibility also can give us a more adequate conception than typical retributivist or consequentialist approaches. The problem with purely consequentialist accounts of punishment put simply in terms of the desirability of deterrence or defense is the same one Strawson identified with consequentialist approaches to moral responsibility: they do not provide a reason of "the right *sort*" for practices of moral responsibility "as we understand them."<sup>38</sup> That we have reason to desire to be able to hold people responsible for something, is one thing, whereas our having reasons of the right kind that warrant our *legitimately* doing so—that give us the authority to do so—is another. The only reasons that can justify relating toward someone in some way *as an instance of holding him responsible* are second-personal reasons; facts concerning the desirability of likely outcomes of the action are, taken by themselves, simply reasons of the wrong kind. (This does not mean, however, that consequences cannot figure within second-personal reasons.)

But consequentialist approaches are not the only ones that fail to honor Strawson's point. That some response to a wrong might make for a more fitting whole does not itself establish any authority so to respond. If punishment is, in its nature, holding someone responsible for violations of law, then the right kind of justification for it must be one that can establish its legitimacy; the reasons must be ones the punished can reasonably be expected to expect himself. Violations of law are, at bottom, failures of respect, most obviously of legal authority, but also of the *de jure* authority (as I see it, residing in the

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37. Compare, in this regard, Locke's distinction between the right of compensation that victims of injustice have in the state of nature, and the right of punishment, which is held by everyone. See JOHN LOCKE, TWO TREATISES OF GOVERNMENT 269–72 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690).

38. See Strawson, *supra* note 29, at 74 (emphasis added).

community of second-personally competent persons) that all legal authority purports to have.

Punishment can be justified in the right way, therefore, only by being called for by the underlying mutual respect that mutual accountability itself involves. If and when it is justified by considerations that are rooted in equal second-personal authority, punishment respectfully expresses a demand for respect. Adam Smith writes that when we resent injuries, what our “resentment is chiefly intent upon, is not so much to make our enemy feel pain in his turn, as . . . to make him sensible, that the person whom he injured did not deserve to be treated in that manner.”<sup>39</sup> Properly justified, therefore, a specific form of punishment is called for as a warranted way of holding someone responsible. By accepting punishment, someone thereby recognizes the authority to be held responsible and to make the relevant demand in the first place, and thereby takes responsibility oneself.

To view punishment in this way is to see it as justifiable in fundamentally second-personal terms. It follows that if the appropriateness of punishment is distinctive of the criminal law, then the latter is best viewed in fundamentally second-personal terms also.

#### V. CIVIL LAW AND SECOND-PERSONAL REASONS

Aspects of the civil law seem to have a fundamentally second-personal character as well (in addition to the general second-personal grounding that, if I am right, any genuine *de jure* authority has, and therefore, any putative authority must purport to have). Take, for example, the law of torts. Torts are violations of duties *to* individuals or, equivalently, rights they hold against one. They involve injuries of various kinds that we have duties to others not to visit on them, whether intentionally or through negligence. Of course, these same actions may be proscribed by the criminal law also, but whereas what is at issue in criminal punishment is, as we have just seen, a form of holding responsible that is carried out by duly constituted legal authorities (in the name of the moral community from whom they inherit their authority), what is involved in torts is compensation, that is, something the victim has a

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39. ADAM SMITH, *THE THEORY OF MORAL SENTIMENTS* 129 (Pat Maloney ed., Barnes & Noble Publ'g 2004) (1759).

distinctive right to claim. It is, of course, central to the idea of a society under the rule of law that victims do not have standing to make, or at least attempt to insist on, such claims personally. They must do so through the appropriate legal channels—the courts. Nonetheless, the law gives expression to their distinctive authority to claim such compensation as the right holder. The very idea of torts involves the standing individuals have to decide whether to make or waive claims to compensation.

We can find an appreciation of this point in Thomas Reid. “A favour naturally produces gratitude,” Reid writes, and “an injury done to ourselves produces resentment; and even when done to another, it produces indignation.”<sup>40</sup> Favours are just treatment that goes beyond what we owe to, and have the authority to expect from, one another.<sup>41</sup> And injuries are in their nature treatment (or its imputable consequences) that fails to reach that level.<sup>42</sup> It is one thing to see ourselves as benefited or harmed by others, even intentionally, and another to regard another’s act as a favor or injury. The latter only makes sense in relation to warranted expectations that Reid collects under the concept of justice. What justice requires and allows, as he puts it, “fills up the middle between these two.”<sup>43</sup>

If this is right, then the ideas of compensation and tort are themselves irreducibly second-personal. They essentially involve what a distinctive authority we have as individuals to expect from others, and to claim from them should those expectations be violated (and as well, to waive such claims). In my view, this helps explain why, as Gideon Yaffe persuasively argues, appeals to a standard of the “reasonable person” are often appropriate in law, for example, in defining a standard of negligence or in standards of self-defense.<sup>44</sup> I argue, in fact, that the concept of the reasonable, as opposed to the rational, is itself a second-personal concept.<sup>45</sup> Reasonableness, in the relevant sense, contrasts with rationality both in the sense of

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40. THOMAS REID, *ESSAYS ON THE ACTIVE POWERS OF THE HUMAN MIND* 410 (M.I.T. Press 1969) (1788).

41. DARWALL, *STANDPOINT*, *supra* note 1, at 193.

42. *Id.*

43. REID, *supra* note 40, at 410.

44. See Gideon Yaffe, *Reasonableness in the Law and Second-Personal Address*, 40 *LOY. L.A. L. REV.* 939, 958–66 (2007).

45. DARWALL, *STANDPOINT*, *supra* note 1, at 304–20.

conforming to formal standards of practical reason, such as means/end rationality or the formal principles of the theory rational choice *and* in the more substantive omnibus sense of according with practical reasons generally.<sup>46</sup> Someone is reasonable when they give due weight to others' legitimate demands and respect their authority as equal persons—that is, in Rawls's terms, as equally “self-originating source[s] of valid claims.”<sup>47</sup> Standards of negligence and due care are thus to be understood in terms of what we can reasonably demand of people in light of their and others' equal authority to make claims and demands of one another, and similarly for self-defense. What risk I may reasonably impose on others in my own defense must be assessed in terms of our equal authority to make claims and demands of one another.

## VI. CONCLUSION

These remarks about the criminal and civil law and about the putative authority of law in general have been necessarily sketchy. I hope, however, that they have at least indicated some ways in which the framework of ideas that I present in *The Second-Person Standpoint* might be helpful in accounting for a number of phenomena concerning the law, including legal authority, obligation, responsibility, and, perhaps, the nature of law itself. With this possibility in view, I look forward to the contributions to this volume.

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46. *Id.* at 315–20.

47. *See* Rawls, *supra* note 4, at 546.

