

## THE SECOND-PERSON STANDPOINT AND THE LAW

### INTRODUCTION

*Robin Bradley Kar*\*

One of the most exciting, and, to my mind, potentially fecund developments in recent moral philosophy is due to a line of thought developed by Stephen Darwall. In a series of articles that have recently culminated in *The Second Person Standpoint: Morality, Respect and Accountability*, Professor Darwall has begun pressing a seemingly innocuous and simple claim, but one which may nevertheless have far-reaching implications for normative theory. It is this: while moral and political philosophers have, for some time now, been clear about the distinction between the first-person standpoint (which includes the standpoint of ordinary practical deliberation) and the third-person standpoint (which includes the standpoint of empirical observation), and have sometimes plumbed this distinction to great effect in their moral thought, they have typically been unaware—or at least insufficiently aware—of the distinctive and critical role that the second-person standpoint plays in our practical lives. The second-person standpoint is the standpoint we take up when we address one another with claims and grievances, or respond to such claims with apology, excuse or justification. It is the standpoint I take up when I confront you in anger for a perceived wrong, or that you take up in response to me when you say I have no right to treat you that way, and, in Darwall's view, it is a standpoint irreducible to the other two.

In his recent work, Darwall has developed a number of important implications of this distinction, which include, among other things, an enriched account of what awareness of our practical freedom amounts to and a distinctive foundation for moral

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obligation, which purports to place contractualist accounts of the right on a firmer basis. He has also spent time carefully tracing out important precursors to his thoughts in the history of ethics and ensuring that his views make moral obligation out to be something we might actually be capable of attending and responding to, given a naturalistically sound moral psychology that is attentive to recent empirical developments. The force and validity of Darwall's views on moral obligation have already become lively sources of debate within moral philosophy proper. As I have argued elsewhere,<sup>1</sup> however, I believe there is enormous untapped potential in these thoughts for legal theory as well. Perhaps the broadest such potential lies in the following fact: Darwall's thoughts point to fundamental features of legal obligations that cannot easily be accounted for from within a consequentialist framework. Darwall's work thus presents a robust and potentially far-reaching challenge to efficiency-based accounts of many areas of the law. The purpose of this Symposium—which was organized in coordination with Loyola's Center for Interdisciplinary and Comparative Jurisprudence—is to prompt further explorations of that potential.

The Symposium itself consists of a leading piece by Darwall<sup>2</sup> and three responses to his work. In the opening contribution, Darwall describes some of the central propositions defended in *The Second-Person Standpoint*. Perhaps the most important and novel concept he has articulated is that of a “*second-personal reason*,” or a reason the validity of which is dependent upon authority and accountability relations between persons, and, therefore, on the possibility of the reasons being addressed person-to-person.<sup>3</sup> Darwall has argued that second-personal reasons are conceptually implicated in a number of familiar moral notions, including those of moral responsibility, moral obligation and moral rights. In his words, these notions represent a circle of irreducibly second-personal concepts: no second-personal reasons in, no second-personal reasons out. Moreover, as Darwall observes in his contribution, the main arguments from his book would appear to apply equally well to the

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1. Robin Bradley Kar, *Hart's Response to Exclusive Legal Positivism*, 95 GEORGETOWN L.J. 393 (2007).

2. Stephen Darwall, *Law and the Second-Person Standpoint*, 40 LOY. L.A. L. REV. 891 (2007).

3. *Id.* at 898.

analogous family of concepts in the law. Indeed, one illuminating way to view his project in moral philosophy is as trying to “bring out the distinctive character of that part of morality that is modeled on the idea of law.”<sup>4</sup> It should thus come as no real surprise if these contemporary developments in moral philosophy end up having large-scale consequences for legal theory.

One way to begin seeing how transformative these ideas might be for the law is to contrast second-personal reasons with other reasons that are more familiar from the legal literature. Second-personal reasons are distinct from the full set of reasons that arise from the values of various states of affairs, and, hence, from the full set of reasons typically acknowledged in the current law and economics literature. Second-personal reasons are also different from reasons that operate in first personal deliberation about what to do merely by settling that question in a conclusive manner. Second-personal reasons are thus different from what Joseph Raz has called “exclusionary reasons,” and which Raz takes to be partly constitutive of both *de facto* and legitimate legal authority. If, as Darwall argues here, there is an essential relationship between the law and second-personal reasons, then something critical would therefore appear to be missing from these contemporary discussions about the law and its reason-giving force. In Darwall’s words, “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”<sup>5</sup> that he discusses in his piece.

But what exactly does this tell us about the law? Darwall argues that two general points follow. First, there is a point about *de facto* legal authority, or about the authority that the law purports to have and that many people—presumably including most officials—believe the law to have. Darwall argues that we cannot fully understand the distinctive nature of this authority without seeing the law, and legal obligations, as giving us the standing to make demands of one another and hold one another accountable for various legal transgressions. If this is right, then the law purports to do more than just guide first personal deliberation about how to act. It also purports to mediate a number of important interpersonal authority relations that we have with one another and that give us the

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4. *Id.* at 891.

5. *Id.* at 900.

standing to make various legal demands through acts of second-personal address. Second, Darwall argues that these facts about *de facto* legal authority have important implications for when this purported legal authority might be real. Because the law purports to give rise to second-personal reasons, and because these reasons depend for their validity on the possibility of their being addressed person-to-person, Darwall argues that they must meet certain specific constraints of mutual acceptability in order to be valid. These constraints—which do not necessarily apply to reasons of other kinds in Darwall’s view—commit us, in turn, to a fundamentally contractualist account of legal and political authority of the kind espoused by T.M. Scanlon and John Rawls. Darwall’s work thus casts significant doubt on the capacity of other familiar normative principles, such as principles of efficiency maximization, to provide genuine, stand-alone justifications for legal obligations.

Before concluding his piece, Darwall gestures, finally, towards applications of his thoughts to the criminal law and tort law. As Darwall observes, criminal punishment essentially involves holding people responsible for something they have done based on a finding of blameworthiness or guilt. Criminal punishment should thus be understood as implicitly second-personal, according to Darwall. But this means that neither consequentialist (deterrence-based) nor orthodox retributivist justifications for criminal punishment can provide reasons of the right kind for these practices. In order to determine when these practices are legitimate, we must instead—according to Darwall—proceed from contractualist standards that we are implicitly committed to when we take up the second-person standpoint and hold people responsible for various crimes.

Despite a number of familiar distinctions between public and private law, Darwall believes that the basic points hold for tort law. Tort law purports to give us the standing to demand that people act toward us with a certain requisite level of care, and to demand compensation for various legal injuries that arise from breaches of this standard. Concepts like those of compensation (as opposed to a gift) and injury (as opposed to a harm) cannot, however, be fully understood—in Darwall’s view—except against the backdrop of what we as individuals have the authority to expect or demand from one another from the second-person standpoint. Hence, in Darwall’s view, the appropriate standards of care in tort law should also be

identified by reference to contractualist standards that we are implicitly committed to when we take up the second person standpoint and bring claims against one another for negligence. Although Darwall does not explicitly relate these views to predominant ones in the tort literature, the implications should be clear. If Darwall is right, then efficiency-based accounts of tort law provide justifications of the wrong kind for the rules in this area of the law; and justifications in terms of principles of corrective justice would appear, at minimum, to require further elaboration from within a fundamentally second-personal framework to provide justifications of the right kind.

In *Legal and Other Governance in Second-Person Perspective*,<sup>6</sup> Aaron James provides an initial response to Darwall, by critically assessing his arguments for the fundamentally second-personal nature of morality. In James's view, Darwall's main conclusions about *de facto* and *de jure* moral authority do in fact have natural and compelling applications to the law and to legal authority—at least in the context of modern democratic society. But James believes that the reasons these conclusions apply ultimately undermine Darwall's broader views about morality's essentially second-personal nature. In effect, James believes that Darwall's work is ultimately more applicable to the law than to morality.

To explain this complex set of reactions, James begins by articulating a distinctive argument for the validity of Darwall's main conclusions about *de facto* and *de jure* authority in application to democratic legal authority. In James's view, one can derive these conclusions from special features of the democratic ideal of collective self-governance—which would render each citizen the joint author and subject of any duly enacted legislation—along with the historically contingent proposition that “no one could reasonably reject democratic society for all the reasons it can seem to be a good idea—because history has shown that it tends to be less unjust than authoritarian regimes, because collective self-governance is a worthy ideal, and so on.” According to James, nothing in Darwall's work rules out this alternative justification for Darwall's main conclusions. Hence, in James's view, nothing in Darwall's work forces us to accept that these conclusions arise from a special and irreducibly

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6. Aaron James, *Legal and Other Governance in Second-Person Perspective*, 40 *LOY. L.A. L. REV.* 911 (2007).

second-personal standpoint that we necessarily take up toward one another in morality and law.

James's arguments would appear to leave much of what is important about Darwall's work for legal theory intact. His arguments would nevertheless favor a fundamentally different understanding of what morality and law are ultimately about. According to James's favored conception of morality, or "*morality as self-governance*," the basic moral (and presumably practical) problem is one of self-governance—i.e., concerning how each person is to govern his or her own conduct from the first-person standpoint of practical deliberation. It should be noted that this idea is a familiar one from moral philosophy, and one that in one form or another has typically been presumed in the legal literature as well. In James's view, considerations of self-governance can, in turn, sometimes justify either the creation or acceptance of specific authority and accountability relations, which might appear to be fundamentally second-personal in nature. This is—after all—precisely what James has argued for in the case of democratic legal authority. James argues that the justifications for these relations nevertheless arise primarily in certain special social and political contexts, where, absent the standing to make various demands on one another's conduct, we would likely govern ourselves poorly due to a number of natural and predictable human frailties. A special challenge for James's view will be to articulate how precisely considerations related only to self-governance might give rise to reasons of the right kind for accountability relations, with all of their seemingly second-personal features. In the latter parts of his contribution, James attempts to meet just this challenge.

James closes with an intriguing suggestion about the nature of these debates. He suggests that in order to adjudicate between morality as self-governance and Darwall's account of morality as mutual accountability, we may ultimately need to take a stand on certain meta-ethical issues concerning the meaning of blame and related reactive attitudes. In James's view, Darwall's conception of morality would be helped if expressivism about blame were true; but would be less plausible if—as T.M. Scanlon has suggested in some of his unpublished writing—blame need not have any necessary connection either to expressions of blame or to their perceived warrant. Whether expressivism about blame is true is a topic that has

garnered very little sustained attention, but, if James is right, then this may be an issue that deserves increased attention.

The next contribution is from Gideon Yaffe. In *Reasonableness in the Law and Second-Personal Address*,<sup>7</sup> Yaffe builds on Darwall's work to develop a novel account of when references to reasonable person standards are legitimate in the law. As Yaffe observes, the law makes reference to the so-called "reasonable person" in numerous and varied places. To take two of Yaffe's examples, it does so when defining standards of negligence in tort law, and, sometimes, when defining the element of force needed to establish a conviction for rape. As of yet, however, there has been very little attention paid to the specific question of when, if ever, reference to the "reasonable person" is legitimate.

Yaffe suggests a particular approach to this question, which draws heavily on Darwall's work. Rather than trying to define reasonableness, Yaffe suggests that we try to understand reasonable person standards as legitimately governing a specific type of communicative act: namely, the second-personal address of a second-personal reason. In support of this position, Yaffe draws on Darwall's arguments concerning the pragmatic presuppositions involved in acts of second-personal address. Because the validity of second-personal reasons depends upon the possibility of their being addressed person-to-person, and, hence, on their acceptability from a certain common vantage point, reasonable person standards are directly applicable to questions of liability and culpability, in Yaffe's view. Facts like these may ultimately help us identify what precisely reasonableness amounts to in some contexts, but Yaffe's initial aim is just "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."<sup>8</sup>

Yaffe then applies this approach to test the legitimacy of several reasonable person standards in the law, beginning with the law of negligence. In Yaffe's view, when we bring tort claims against one another seeking to establish liability for negligence, we are, in effect, asking the court to adjudicate the validity of a second-personal claim,

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7. Gideon Yaffe, *Reasonableness in the Law and Second-Personal Address*, 40 LOY. L.A. L. REV. 939 (2007).

8. *Id.* at 942.

which includes deciding whether the plaintiff has the relevant authority to give the defendant a (second-personal) reason to have taken greater care. The court's judgment should thus depend critically upon whether a reasonable person could accept the plaintiff's claim from within the space of second-personal accountability relations—or on whether the defendant, who is the relevant addressee of the claim, exercised a *reasonable* amount of care in the circumstances. Yaffe concludes that this use of a reasonable person standard in tort law is thus legitimate, and Yaffe's discussion should leave us with a picture of negligence law that is deeply vindicating.

The story is more complex, however, when we turn to the question of how force should be defined in the law of rape. Force is one of the common elements of rape, but—as with many other legal concepts—it can be interpreted in either subjective or objective terms. On the former interpretation, the relevant question is whether the victim's will was in fact overborne by the defendant's actions, whereas on the latter, the relevant question is whether a reasonable person's will would have been overborne. At a certain level of generality, the element of force in rape thus parallels the criminal defense of duress, which is typically defined by reference to a reasonable person standard. Yaffe argues that there is nevertheless an important asymmetry between these concepts, which can be clarified by reference to his second-personal account of when reasonable person standards are legitimate. In particular, Yaffe argues that it is legitimate to employ a reasonable person standard when assessing duress as a defense to criminal liability, because holding someone criminally responsible involves attempting to engage that person in the second-personal address of a second-personal reason. Because the relevant question in a rape conviction is whether the defendant is to blame, rather than whether the victim is the appropriate object of second-personal censure for not resisting, however, the reasonable person standard has no such legitimate use in defining the element of force in rape. As Yaffe observes, many jurisdictions have already abolished this particular use of the reasonable person standard in criminal law. If Yaffe is right, then the rest should follow suit.

In *Contract Law and the Second Person Standpoint: Why Efficiency-Maximization Principles Can Neither Explain Nor Justify*

*the Expectation Damages Remedy*,<sup>9</sup> finally, I try to articulate the robust challenge that I believe Darwall's work poses to efficiency-based accounts of the law, using modern contract law as an example. Modern contract law is one of the areas of law where efficiency theorists can arguably claim the clearest explanatory advantages—at least when compared to leading alternative deontological accounts of contract law, which are typically framed in terms of either private autonomy or the ordinary morality of promise-keeping. One of the most oft-cited examples of this purported explanatory advantage lies in the economist's account of expectation damages in terms of so-called "efficient breach." If principles of efficiency maximization cannot, in fact, account for central features of this standard contractual remedy, then that fact should thus prompt a much more cautious understanding of the power of efficiency-maximization principles to account for this area of the law.

In my contribution, I argue that there are, in fact, important aspects of the standard contract law remedies that cannot be fully explained or justified in terms of familiar notions like "efficient breach." In particular, contract law remedies are owed *to* specific persons, who are parties to specific contracts, and the legal duties we have to keep our contracts are thus fundamentally agent-centered in form. These aspects of contractual remedies can, on the other hand, be accounted for very easily and naturally from within the second-person standpoint. I argue that the problem with efficiency-based accounts of contract law remedies arises from the fact that consequentialist accounts of reasoning are thoroughly first- and third-personal, whereas our contractual obligations have irreducibly second-personal aspects to them.

As discussed, Darwall has argued that we cannot even understand the notion of an obligation without its giving rise to some second-personal standing to raise claims for non-compliance. The law is replete with obligations, and analogous points should therefore hold for many other areas of the law. I argue that Darwall's work should thus be viewed as giving rise to a very deep and robust challenge to the law and economics movement. His work suggests,

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9. Robin Bradley Kar, *Contract Law and the Second Person Standpoint: Why Efficiency-Maximization Principles Can Neither Explain Nor Justify the Expectation Damages Remedy*, 40 *LOY. L.A. L. REV.* 977 (2007).

in effect, that the law and economics movement cannot account for *legal obligations*.

If Darwall is right, then when we take up the second-person standpoint, we are, moreover, committed to a fundamentally contractualist account of what we owe to one another. In the remainder of my contribution, I thus develop a contractualist account of the expectation damages remedy that is, I argue, more robust and accurate to doctrine than either current efficiency or promise-based theories. The resulting view suggests the promise of a more extended contractualist account of contract law—a project that I take up in future publications. Once again, however, this example illustrates the very deep challenge that I believe Darwall's work should be viewed as posing to the law and economics movement. Darwall's work suggests that an authentic life of obligation will be constituted by commitments to a standard of the right, and to ways of interacting with one another, that can neither be reduced to nor derived from principles of efficiency-maximization. In the end, the lives we lead with one another under the law—and the reasons we give to one another in these pervasive social interactions—would appear to be more than instrumental.