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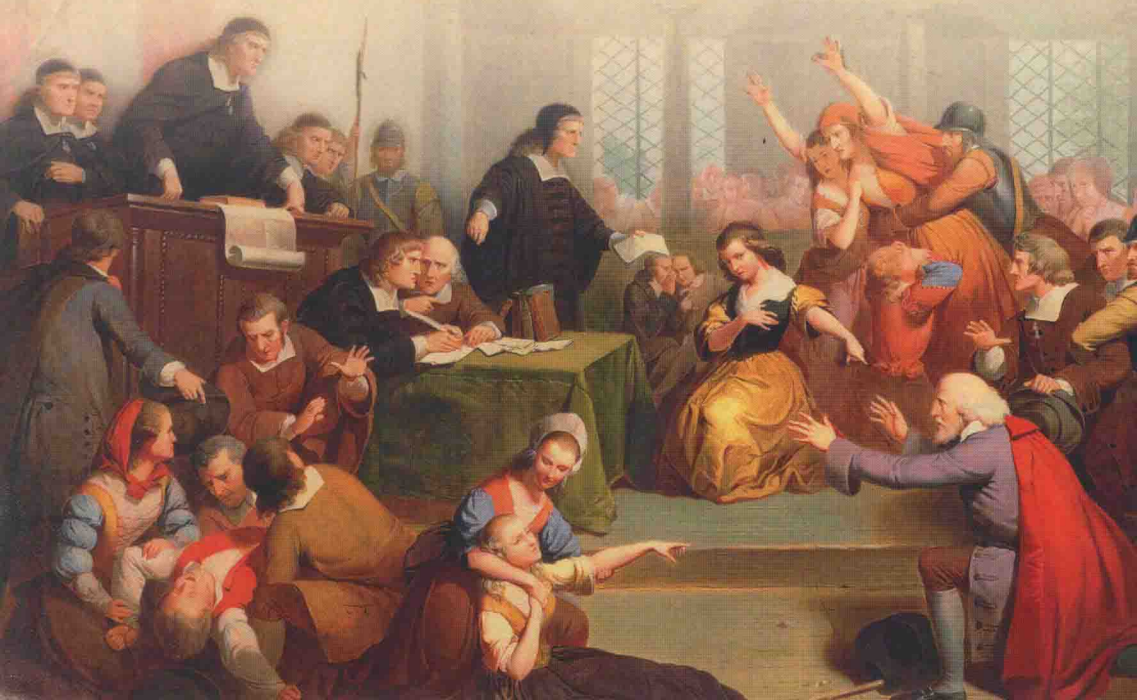
MORALITY, AUTHORITY, & LAW

Essays in Second-Personal Ethics I

STEPHEN DARWALL



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For Laura

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"Because I Want It" was first presented at the Social Philosophy & Policy Center conference on moral knowledge in September 2000. And "The Value of Autonomy and Autonomy of the Will" was written for a conference on autonomy and well-being at the University of Toronto in April 2004.

"Authority and Second-Personal Reasons for Acting" was originally given at a conference on reasons for action in April 2006 at Bowling Green State University. "Authority and Reasons: Exclusionary and Second Personal" was presented at a conference honoring Joseph Raz at the University of Manchester in May 2008. "Law and the Second-Person Standpoint" was written for an issue of *Loyola of Los Angeles Law Review* devoted to *The Second-Person Standpoint*, edited by Robin Kar. "Civil Recourse as Mutual Accountability" was written with Julian Darwall for a conference on civil recourse theory at The Florida State University College of Law in February 2011.

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Many of these essays were originally published elsewhere, and I gratefully acknowledge the publishers listed below for permission to republish them (with light revisions) here.

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"Civil Recourse as Mutual Accountability," with Julian Darwall. Florida State University Law Review 39 (2012): 17–41. Reprinted with the permission of Florida State University Law Review.

Introduction

In *The Second-Person Standpoint* (*SPS*), I argue that many central moral concepts, including those of moral obligation, right and wrong, and moral rights, have an irreducibly second-personal structure. By this I mean that these concepts implicitly refer, in a way other ethical and normative concepts do not, to claims and demands that must be capable of being addressed second personally. For example, I argue that it is part of the very idea of a moral (claim) right that the right holder has the authority to make the claim of the person against whom the right is held and hold him accountable for compliance. As P. F. Strawson argued influentially in "Freedom and Resentment" a half century ago, accountability is second personal (as he put it, "inter-personal") in its nature (Strawson 1968: 77). When we hold people accountable, whether others or ourselves, we take a different perspective on them and implicitly relate *to* them in a way that is different than when we view them in an "objective" or third-personal way.

I argue that the second-personal character of central moral concepts has fundamental implications for the kinds of reasons it takes to justify beliefs and attitudes that involve these concepts. Although nothing can rule out consequentialist moral theories on conceptual grounds alone, I maintain that it does follow from my analysis, as it did indeed from Strawson's, that there is a fundamental conceptual difference between the good and the right, and that considerations showing that an action would be desirable, even from an impartial point of view, are not "reasons of the right kind" to establish by themselves the action's deontic status—its being either morally obligatory, prohibited, or permissible.

In the essays that follow and in this volume's successor (*Honor, History, and Relationship: Essays in Second-Personal Ethics II*), I investigate issues, argumentative threads, and implications that I was only able to touch on briefly in *SPS*. The essays in the current volume are divided into three sections. Those in the first section concern different aspects of *morality*—what is distinctive about morality as an ethical concept, whether the fact that an action is morally wrong is *itself* a reason against doing it that is additional to the considerations that make the act wrong, whether substantive moral norms follow from morality's second-personal form, whether morality could be particularistic and not require general principles, and, finally, the metaethical character of "relational" or "bipolar" obligations that one person has *to* another.

The two essays in the second section concern different aspects of *autonomy*. The first distinguishes different concepts of autonomy, most importantly, between autonomy as

a good, whether personal or impersonal, and autonomy as something we can claim or demand, such as a right to shape our own lives. It discusses what Kant called "autonomy of the will" and argues that there is a way of interpreting Kant's notion in which it is a presupposition of any justifiable claim to autonomy. The second essay approaches autonomy from what may seem an unexpected direction: how an agent's desires and will can give her reasons for acting. It argues that these do create reasons, but not owing to an "internal reasons" thesis of the sort associated with Bernard Williams (Williams 1981b). Rather, an agent's own desires and will gives her reasons in the same way another's do, as a form of respect for her autonomy and second-personal authority.

The essays in the final section are all concerned with different aspects of authority and law. The first two discuss Joseph Raz's influential "normal justification thesis," according to which claims to the (practical) authority to direct someone can be justified by a showing that his following this direction would enable him to comply better with reasons for acting he independently has. Raz's thesis poses a potential challenge to a second-personal account, since if it were true, second-personal reasons to comply with a practical authority might derive from non-second-personal reasons. I argue in the first essay that putative justifications of this kind are insufficient because they do not account for authority's conceptual tie to accountability. Nothing can establish that someone has authority over us in a way that gives rise to a duty to obey without establishing that we are accountable for obedience. Razian "normal" justifications have no tendency to show this. In the second essay, I discuss Raz's claim that satisfying the conditions of the normal justification thesis can show that a putative authority's direction creates a "preemptive" reason for acting as she directs and "exclusionary" reasons against acting on competing reasons. Against this, I argue that reasons for acting of these kinds can be created only by genuine authorities we are accountable for obeying. I conclude that practical authority is irreducibly second personal, despite Raz's arguments.

The final two essays sketch a second-personal approach to law and, more specifically, to the law of torts. The first indicates how fundamental issues of jurisprudence concerning the nature of law and the differences between criminal and private or civil law might be illuminated by a second-personal framework. The second takes up a leading theory in tort law, civil recourse theory, and argues that it is best elaborated in second-personal terms as a form of mutual accountability.

The essays in this volume need not be read consecutively. I assume that most readers will have more interest in one topic or another and will proceed accordingly. There are significant connections between these essays, however, as I hope will become evident. A core set of ideas about second-personal concepts and reasons, and the second-person perspective, runs throughout. Since the essays are not meant to be read in any particular order, I have not seen how to avoid some repetition in laying out the core ideas. I apologize for this, but hope that readers will find the repetition more helpful than annoying.

To provide a more specific idea of what to expect, the essays might be briefly summarized as follows.

Morality

"Morality's Distinctiveness" begins with Anscombe's and Sidgwick's characterization of the difference between ancient ethics and "modern moral philosophy" and argues that what is distinctive about morality as it is conceived in modern ethical thought is the conceptual centrality of irreducibly second-personal notions, such as obligation and accountability (Anscombe 1998; Sidgwick 1964, 1967). The argument proceeds by considering David Hume's famous claim that the distinction between "moral virtues" and estimable non-moral "natural abilities," is purely verbal (Hume 1978, 1985). Hume makes this claim, I argue, because he fails to appreciate the conceptual difference between third-personal evaluative attitudes, like disesteem and contempt, and second-personal Strawsonian "reactive attitudes" like moral blame (Strawson 1968). Hume's failure to see more than a verbal difference between the moral and the non-moral is thus evidence that what is distinctive about morality is its second-personal aspect.

"Bipolar Obligation" investigates the concept of a so-called "relational duty" that is owed *to* someone. Unlike the idea of a moral obligation *period*, bipolar obligations have not only *obligors*, agents who are subject to the obligation, but also *obligees*, those to whom the obligation is owed. They thus entail a correlative claim right that the obligee has to claim *of the obligor* the conduct that the obligor is obligated to the obligee to perform. Although bipolar obligations have figured prominently in recent moral and political theory, little attention has been paid to their metaethics. In what does a bipolar obligation consist? I provide an account of the concept of bipolar obligation that is connected to the account of moral obligation period I present in *SPS*. Both concepts are shown to be second personal, but in different ways. Someone is morally obligated to do something period just in case her doing it is something that anyone (including she) justifiably demands of her as a *representative person*. And someone is obligated *to another* to do something just in case the obligee has the individual discretionary authority to make demands of the obligor *as the obligee* and to hold the obligor *personally* accountable. Moral obligations period conceptually implicate *representative authority*, whereas bipolar obligations involve the obligee's *individual authority*. Both forms of authority are second personal, however, since they implicitly involve address, whether this authority is exercised by first, second, or by third *parties*.

"Moral Obligation: Form and Substance" begins with the second-personal analysis of moral obligation's form that I defend in *SPS* and argues that this analysis has implications for substantive moral requirements. Given what it is to take responsibility for oneself and hold oneself answerable, I argue, it follows that if there are any moral obligations at all, there must also exist a basic *pro tanto* obligation not to undermine one another's moral autonomy.

"But It Would Be Wrong" considers whether the fact that an action would be wrong is *itself* a reason not to perform it. *SPS* defended the conceptual thesis that an action is wrong if, and only if, it would be blameworthy to perform the action without adequate excuse. This is a "warranted attitude" thesis about moral obligation, right,

and wrong. It says that something is morally obligatory if, and only if, failing to perform the action would make the agent a justified object of blame were he to omit the action without excuse. Warranted attitude accounts of *value* suggest what Scanlon has called "buck-passing" about value, that being valuable is not itself a reason, but "passes the buck" to reasons for valuing something in which its value consists (Scanlon 1998). Would a warranted attitude account of moral obligation and wrongness, such as that offered in *SPS*, not entail, therefore, that being morally obligatory or wrong gives no reason for action itself? I argue it does not. Although warranted attitude theories of normative concepts entail buck-passing with respect to reasons for the specific attitudes that are inherently involved in the concept, the concepts of moral obligation and wrong are normative, in the first instance, not for action, but for Strawsonian "reactive attitudes" through which we hold people answerable for their actions. On this analysis, moral obligations are demands we legitimately make as representative persons, and the fact that an act would violate such a demand, and so disrespect the authority these demands presuppose, is indeed a reason not to perform a wrongful act that is additional to whatever features make the act wrong.[1]

"Morality and Principle" argues against what Jonathan Dancy calls "moral particularism." Dancy's arguments for this position proceed entirely on the basis of general features of normative reasons for acting rather than anything having to do with morality in particular. Dancy argues that the existence of normative reason for acting need not depend on there being valid general norms or principles from which these reasons derive. But Dancy does not consider whether there might be something about morality in particular that requires the existence of general *moral* principles. I argue that there is. What is distinctive about morality is not that there are impartial or impersonal reasons that favor or support some action, but that action is required or demanded of us—that we are morally obligated to act in the sense of being warrantedly held accountable for doing so and blamed if we do not and lack valid excuse. Though it is no part of the idea of the existence of a normative reason for acting in general that the agent must be able to know about and guide himself by this reason, this is central to the notion of any standard with which we can warrantedly be accountable for complying. A conceptual requirement of public accessibility is thus central to the existence of moral obligations in a way that is similar to one that requires that anything that can count as *law* (and legally obligate) be promulgated. The same considerations that push toward the necessity of general principles in law, for example, legal doctrines expressed in a judge's *ratio decidendi*, make them no less necessary in morality.

[1] Mostly, when I speak about our representative authority to *demand* obligatory conduct, I do not mean that just any person has standing to make the demand in speech or to reproach others for violations. Like Strawson, I hold that we implicitly make the demand through our "proneness" to demanding reactive attitudes (Strawson 1968: 92–3).

Autonomy

How can an agent's desires or will give him reasons for acting? This is the question with which "Because I Want It" is concerned. Not long ago this question might have seemed silly, since it was widely believed that all reasons for acting must be based in agents' desires.[2] The interesting question, it appeared, was not how what an agent wants could give him reasons, but how anything else could. In recent years, however, this earlier orthodoxy has been turned on its head, as a growing number of philosophers have come to stress the action-guiding role of reasons in deliberation from the agent's point of view. What a deliberating agent has in view is rarely his own will or desires as such, even if taking something as a reason is intimately tied to desire. Desires are "backgrounded"; what is in the deliberative foreground are the objects of desire and their features (Pettit and Smith 1990). Although a central argument of my *Impartial Reason* (1983) proceeded along these lines, I argue here that there is a generally unappreciated way in which an agent's will, desires, preferences, and concerns *do* give him reasons that outstrip any he has to have these attitudes, namely, analogously to the way another person's can give him reasons. To fail to take another person's will, desires, concerns, and so on, into account, say, because one thinks, however correctly, that she lacks good reason to have these attitudes, constitutes a kind of disrespect. I argue that self-respect speaks in favor of taking one's own actual will and concerns into account beyond the reasons one has to have these attitudes. This means, perhaps ironically, that what makes an agent's will normative for her is her capacity to take a second-personal attitude toward herself.

"The Value of Autonomy and Autonomy of the Will" begins by distinguishing the bewildering variety of things "autonomy" has been use to refer to in moral and political philosophy. Kant's famous doctrine of autonomy of the will, that the will is "a law to itself independently of any property of the objects of volition," can seem completely disconnected to any of these. I argue, however, that Kant's idea can be interpreted in a way that is indeed connected to autonomy in a familiar sense, but not autonomy as a good, rather as something to which we can claim a right, namely, a right of independence or self-determination. This is owing to the second-personal character of the concept of claim rights and inescapable presuppositions of the second-person standpoint. When we claim a right to something, we have to assume that the person against whom we claim it can recognize and be moved by the legitimacy of our claim against him and not just by the desirability of states of affairs. The *right* and the *desirable* are fundamentally distinct concepts, and though the latter does not presuppose autonomy of the will, the former does.

[2] For discussion of the "desired-based reasons thesis" see Darwall 1983: 25–82.

Authority and Law

SPS argues that the concepts of authority, legitimate demand, accountability, and of distinctive, second-personal reasons for complying with these demands form a circle of irreducibly second-personal concepts, that each concept entails the others, and that no proposition that involves only concepts outside the circle can entail any proposition involving concepts within it. "Authority and Second-Personal Reasons for Acting" considers a potential challenge to this claim from Raz's "normal justification thesis," which holds that the normal way of justifying someone's claim to authority over another person is that the second would comply better with the reasons that apply to him anyway were he to treat the first's directives as authoritative. I argue against Raz's thesis that it provides "reasons of the wrong kind" for authority. The argument is analogous to Strawson's argument in "Freedom and Resentment" that the fact that it would be desirable to blame someone cannot show that what he did is *culpable*, that blame is a fitting response to what he has done (Strawson 1968). Similarly, the fact that it would be desirable, because one would better comply with independent reasons, to treat someone's directives as authoritative, cannot show that obedience is called for in the way it is to genuine authority. Hence it cannot follow that someone actually *has* the relevant authority.

"Authority and Reasons: Exclusionary and Second Personal" takes on a second aspect of the "normal justification thesis," namely, Raz's claim that when the thesis's conditions are met, the putative authority's directives provide pre-emptive and exclusionary reasons for acting. I argue that this is not true owing to considerations similar to those that show that the normal justification thesis is mistaken about the grounds for practical authority. Raz is right that genuinely authoritative directives create pre-emptive and exclusionary reasons, but that is because genuine authority entails accountability for compliance. Practical authority is thus revealed to be internal to the circle of second-personal concepts; the pre-emptive and exclusionary character of reasons created by legitimate demands cannot be accounted for independently of their second-personal character.

"Law and the Second-Person Standpoint" discusses how a second-personal framework can shed light on jurisprudential issues concerning the nature of law. If the concept of practical authority is irreducibly second personal, it would not be surprising that fundamental legal ideas should turn out to be second personal also. I argue that this is indeed the case. Even if law and legal authority are *de facto* matters, they nonetheless purport to have authority *de jure* and, therefore, that those subject to law are genuinely obligated and answerable for compliance. In this way, the law purports to give citizens second-personal reasons, and this explains their putatively pre-emptive and exclusionary character. A second-personal framework can also explain fundamental differences between distinct branches of law. Criminal law is structurally analogous to the "moral law"; it creates obligations that are analogous to moral obligations *period*. Just as the moral community or representative persons have the authority to demand compliance

with moral obligations, so also are cases in criminal law appropriately brought by "the people" and their representatives (prosecutors). Matters of private law, by contrast, concern legal obligations that, like bipolar moral obligations, are owed to obligees. They therefore entail claim rights held specifically by obligees. It follows from the argument of "Bipolar Obligation" that they entail obligees' individual discretionary authority to hold obligors personally accountable. It is a reflection of this that cases in tort and contract law are not brought by the state or by the people, but by putative victims, and that successful cases involve damages payable to them.

"Civil Recourse as Mutual Accountability," written with Julian Darwall, concerns a prominent theory in the law of torts: civil recourse theory. The main theoretical divide in tort law is between consequentialist (including economic) approaches, on the one hand, and justice-based approaches, on the other. The major justice-based approaches are, respectively, corrective justice theories and civil recourse theories. Corrective justice theories hold that obligors who injure and violate the tort rights of obligees have a derivative duty of repair and that the function of tort law is to enforce that duty. Civil recourse theorists argue that corrective justice theories fail to capture the distinctive standing of victimized obligees. The function of tort law is not to correct injustice or enforce a duty of repair, but rather to provide a forum in which victims can get recourse and take action against their tortfeasing obligors. Civil recourse theorists sometimes characterize this as involving a kind of retaliation or revenge. We argue that civil recourse theory is right about the special standing (*individual authority*) victims have to hold the tortfeasor accountable, but that it risks failing to appreciate what tortfeasors' accountability to victims consists in, since it fails properly to distinguish between accountability and retaliation or vengeance. Accountability's second-personal structure entails that it involves not returning disrespect for disrespect, but a respectful demand for respect. Accountability is always fundamentally reciprocal.

Contents

The forthcoming companion volume to *Morality, Authority, and Law* is:
Honor, History, and Relationship: Essays in Second-Personal Ethics II

I

Morality