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REDRESS AND REPARATIONS FOR INJURIOUS WRONGS*

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ABSTRACT. In Recognizing Wrongs (Cambridge, MA: Harvard Univ. Press, 2020), John C. P. Goldberg and Benjamin C. Zipursky develop and defend "civil recourse theory," according to which torts are injurious wrongs that give rise to a claim of redress. My discussion extends beyond tort law to explore the ethics of reparations for historical injustice, in particular, regarding the case of Black Americans. I begin by relating the notion of wrongdoing that figures prominently in civil recourse theory to morality. Then I explore the idea that the relevant sort of wrongdoing is relational and injurious, and how this claim applies to historical injustice. Finally, I take up the idea that a redress claim is one a victim is entitled but not obligated to make in order to think about whether the discretionary nature of tort action is empowering to persons who have been wrongfully injured.

I. CIVIL RECOURSE AS ACCOUNTABILITY

According to civil recourse theory, torts are injurious wrongs that give rise to a claim of redress. Redress typically takes the form of compensatory damages that a court requires a defendant to pay to the plaintiff. A victim's recourse to a procedure for obtaining redress represents the tortfeasor's accountability to the victim.

My remarks will explore some aspects of the theory of accountability belonging to civil recourse theory, as it is presented by John C. P. Goldberg and Benjamin C. Zipursky in *Recognizing Wrongs* (Cambridge, MA: Harvard Univ. Press, 2020). In particular, I will focus on three features. First of all, according to civil recourse theory, accountability concerns *wrongdoing*. Tort law, on the civil recourse view, identifies certain interactions that, by virtue of being wrong,

* My gratitude to John Goldberg and an anonymous reviewer for Law and Philosophy for very helpful comments on an earlier draft.

generate a claim for the victim to recourse against the wrongdoer. Civil recourse thus includes a normative dimension resembling if not overlapping with morality. Secondly, the relevant sort of wrongdoing is *relational and injurious*. Victimless transgressions cannot give rise to civil action and accountability is personal. Finally, according to civil recourse theory, a redress claim is one a victim is entitled but not obligated to make. The *discretionary* nature of tort action is emphasized in civil recourse theory to signify the importance of empowering persons who have been wrongfully injured. Tort law empowers the victims of injurious wrongs by enabling them to take legal action to secure acknowledgement and recompense.

I will focus on these three features to explore what we might learn from civil recourse theory about the value of accountability in private law as well as criminal law and, more broadly, in civic life. My discussion of civil recourse theory will go beyond tort law to explore the ethics of reparations for historical injustice, in particular, regarding the case of Black Americans.

II. ACCOUNTABILITY WITHOUT BLAME

I'll start with discussion of the idea that the grounds of civil action are *wrongs*. Goldberg and Zipursky assert that torts are "legal wrongs." According to civil recourse theory, legal wrongs are not best understood as rules or judgments courts have fashioned in order to achieve a desirable policy outcome. Civil recourse theory thus stands in sharp contrast to economic theories of tort law, which understand tort liability as a kind of deterrence and compensation mechanism, guided by considerations of the public good.[1] By contrast, the focus of civil recourse theory is the accountability of wrongdoers for injurious wrongs. Furthermore, the theory identifies the relevant wrongs in a way that is meant to resonate roughly with common-sense morality. But in what sense?

The phrase "legal wrongs" is ambiguous. Should we understand legal wrongs to be institutionally-recognized moral wrongs? This would be to emphasize that they are a subset of a broader moral category. Or, on the other hand, are they a distinct kind of nor-

[1] *See* Oliver W. Holmes, "The Path of the Law," *Harvard Law Review* 10 (8) (March 1897): pp. 457–478, and Guido Calabresi and A. Douglas Melamed, "Property Rules, Liability Rules, and Inalienability: One View of the Cathedral," *Yale Law Journal* 85 (6) (April 1972): pp. 1089–1128.

mative wrong? If the latter, what sort of normativity do they have? Goldberg and Zipursky endorse neither positivism nor anti-positivist views about the relationship between law and morality, so these questions cannot be answered in theory. Instead, we might think of civil recourse theory as emphasizing a historically-based overlap between tort liability and common-sense morality, that is, an overlap in fact, which is perhaps not surprising, if it is true, as Goldberg and Zipursky assert, that tort law has been fashioned by courts in response to allegations and denials, in individual cases, of wrongdoing.

For example, the tort of battery prohibits intentional offensive or harmful touchings. This rule draws normative relevance from its recognition by legal authorities. The rule is recognized by authorities in the sense that they accept the procedures, reasoning, and coercion involved in its adjudication and enforcement. The conduct and attitudes of officials are a social dimension of the law's "authority." But the rule also draws normative force from a recognition by the public, past and present, that this sort of touching is a morally wrongful violation of another person's rights. While the common moral belief in the moral wrongfulness of harmful and offensive touching does not suffice to establish the tort of battery, it helps to explain why the common law has evolved to include that rule and how it has come to be publicly accepted as legally valid. Legal norms depend on social norms, including the public's acceptance, for moral reasons, of legal rules.

Despite its connection with common sense morality, the moral focus of tort law is limited, and appropriately so. As just suggested, the set of wrongs that establish tort liability is established by legal history or "precedent." An established set of legal rules, ideally, puts everyone on notice about what sort of behavior will run afoul of the law.[2] Transparency and predictability are important requirements of a society ruled by law even if, in particular cases, straying from established norms would have better consequences.[3]

The normative scope of tort law, in particular, is limited in other ways as well. Its focus is limited to behavior (including omissions)

[2] H. L. A. Hart emphasizes the importance of law as a choosing system. *See* "Legal Responsibility and Excuses," *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Oxford University Press, 1968), pp. 44–8, and "Punishment and the Elimination of Responsibility," *Punishment and Responsibility*, pp. 181–2.

[3] Lon Fuller, *The Morality of Law,* rev. ed. (New Haven: Yale University Press, 1969), pp. 33–41. While Fuller emphasizes a certain type of notice associated with the promulgation of authoritative codes, tort law, as primarily common law, must give "notice" in other ways. One way it may do so is by sticking close to positive morality.

that cause injury. Furthermore, civil liability for injurious outcomes does not depend on or encompass sanctions directed at the *blameworthiness* of the wrongdoer. Moral blameworthiness concerns the suitability of a wrongdoer to a certain kind of condemnatory treatment, namely, the enactment of negative responses that express claims about what a wrongdoer deserves.[4] Tort law is not concerned with moral desert and condemnation. Even punitive damages, which seem to point to a tortfeaser's moral culpability, are "anchored in the actual injury the plaintiff suffered at the defendant's hands."(172) Punitive damages permit a response to injuries arising out of "malicious" mistreatment or "wanton disregard," which are treated by civil recourse theory as aspects of the injury. These forms of mistreatment do not depend on whether a defendant is criminally responsible, in the sense of meeting the *mens rea* conditions of liability to criminal prosecution, or the possibly more elaborate specifications of a moral understanding of the wrongdoer's culpability. According to civil recourse theory, even when it comes to punitive damages, tort law's preoccupation is with the recourse that should be provided to victims to redress their wrongfully inflicted injuries. In sum, redress for injuries may be appropriate even when it has not and perhaps could not be established that the person who caused harm should be criminally punished or morally condemned.

Because tort liability does not depend on adjudicating blameworthiness, it illustrates the possibility of separating identifiable instances of wrongdoing from evaluations of personal blameworthiness, even in the absence of excuse. Wrongdoing is conceptually separable from blameworthiness; it has its own identification criteria. A person acts wrongly, in either a moral or legal sense, when she violates a duty it is reasonable to ascribe to persons in circumstances like hers. Morality spells out the reasonableness conditions by reference to moral principles, while tort law elaborates them by reference to legal doctrine (and, as we have seen, legal doctrine overlaps with morality). In the case of negligence, for example, the relevant duty of care is formulated by appeal to the

[4] On the connection between blame and desert, *see* Strawson, P. F. "Freedom and Resentment," *Proceedings of the British Academy* 48 (1960), section 6; reprinted in Strawson, *Freedom and Resentment and Other Essays* (London: Methuen, 1974). *See also* T. M. Scanlon, "Giving Desert its Due," *Philosophical Explorations* 16 (2) (2013), p. 104, and T. M. Scanlon, *Moral Dimenions: Permissibility, Meaning, Blame* (Cambridge, MA: Harvard University Press, 2010), p. 188. *See also* the notion of "basic desert" developed by Derk Pereboom in *Living without Free Will* (Cambridge: Cambridge University Press, 2001).

care to avoid causing injury that would be taken, in similar circumstances, by a person of ordinary prudence. In many cases, we can determine that someone has violated a reasonable expectation even when we do not know why she has failed. For example, we might determine that a person has damaged another person's property, created a nuisance, or harmed another person's reputation, without understanding the reasons or motivation for her behavior. Excusing considerations—such as good intent, ignorance of the possible consequences, or the pressure of difficult circumstances—might temper the wrongdoer's moral blameworthiness, but they do not establish that she has failed wrongfully to cause injury. In sum, tort law is entirely focused on whether it can be established that a wrongful injury has occurred, and not at all on whether a tortfeasor is morally blameworthy. There is no role for excuses in tort law.

The claim is that there can be—and indeed is—a domain in which persons are deemed wrongdoers and held accountable for their wrongs without their being blamed. This sets up an interesting apparent contrast with criminal law. Yet the contrast is more apparent than real. In this respect, civil recourse theory, even though a theory of tort law, may shed some light on how to think about criminal responsibility.

Criminal guilt is often associated with moral blameworthiness, and many people are inclined to infer moral blameworthiness from criminal guilt. Furthermore, among philosophers of punishment it is commonly thought that this inference is critical to the justification of punishment. Specifically, *retributivists* maintain that punishment is justified when and only because criminal wrongdoers deserve it.[5] In order to deserve punishment, criminal wrongdoers must be morally blameworthy. Thus, according to the retributive theory, it is crucial that liability to criminal sanctions also establishes a criminal lawbreaker's moral blameworthiness.

If we look at how the criminal law actually functions, however, we see that criminal liability tracks the commission of criminal acts, and that the definition of criminal acts does not establish an offender's moral blameworthiness. The mental state (*mens rea*) elements

[5] *See* Douglas Husak, "Holistic Retributivism," *California Law Review* 88 (3) (2000): pp. 991–2000; Douglas Husak, "Retributivism in Extremis," *Law and Philosophy* 32 (1) (2013): pp. 3–31; and Michael S. Moore, "The Moral Worth of Retribution," *Responsibility, Character, and the Emotions: New Essays in Moral Psychology*, ed. Ferdinand Schoeman (Cambridge: Cambridge University Press, 1987).

of criminal law establish (minimal) rational agency, but not moral blameworthiness. Morally mitigating factors, such as debilitating social pressure or deprivation, troublesome practices of criminalization, and forms of mental illness that do not entirely undermine rational thought, are compatible with criminal guilt.[6] We ignore a range of important moral considerations when we conclude that criminal lawbreaking is only done by "bad people." Ignorance or minimization of the relevance of mitigating considerations may be motivated or, at least, opportunistic, since moral blame is a politically powerful response. In the United States, the infliction of punishment as an expression of moral blame and personal condemnation has served to normalize a brutal and racialized criminal justice system.[7]

My contention is that, in the U.S. context, moral blame functions through the criminal justice system to maintain an objectionable hierarchy of social status rankings. Arguably, the U.S. carceral state may itself be viewed as an expression of hierarchal accountability relations. By contrast, the separation of wrongdoing and blame encouraged by civil recourse approach avoids hierarchy-preserving retributive responses.[8] Civil recourse theory does not purport to establish moral blameworthiness and desert through tort liability and this means that morally-charged emotions commonly associated with wrongdoing are less easily manipulated in the tort context. Instead of retributive blame, civil recourse theory offers a nonretributive understanding of accountability between persons as equal citizens.[9] Admittedly, it is often difficult for people without financial resources to pursue tort litigation. But sometimes legal action is available, and when it is, civil recourse theory plausibly invites us to view tort liability as a practice of accountability between social equals. Seen in this way, civil recourse theory presents an example of an appealing dimension of accountability relationships, even against objectionable background inequalities.

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[6] *See* Erin I. Kelly, *The Limits of Blame: Rethinking Punishment and Responsibiltiy* (Cambridge, MA: Harvard University Press, 2018), chapters one and six. On the use of the war on drugs to prosecute Black Americans, see Michelle Alexander, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* (New York: The New Press, 2010).

[7] This is a central theme of Kelly, *The Limits of Blame*.

[8] I will return to this theme in section 3.

[9] *Cf.* Stephen Darwall, "Justice and Retaliation," *Philosophical Papers* 39 (3) (November 2010): pp. 335–39.

This model of accountability without blame could be extended to criminal law. Criminal conviction need not be accompanied by expressions of moral blame and the summary condemnation of criminally guilty people as morally inferior. It is enough to understand the criminal law as a set of directives and sanctions meant to discourage and repudiate the violation of laws protecting the basic rights and fundamental interests of all members of society. The public good, understood to encompass the basic rights and interests of all members of society, should underpin criminal justice policy and procedures, which stand squarely in the domain of public law. We should use the criminal law to reduce the harm crime does, while protecting the rights and equal standing of all persons, including criminal defendants. Appeals to blame exaggerate the moral significance of criminal conviction. This, in turn, serves to rationalize retributive punishment and the punitive culture that surrounds it.

By clearly separating judgements of wrongdoing from evaluations of blameworthiness, civil recourse theory helps us to visualize what a less retributive criminal law could look like. Appreciating the distinction between wrongdoing and blameworthiness could help us to correct a vindictively punitive public culture surrounding the criminal justice system.

III. FROM CIVIL RECOURSE TO REPARATIONS

A second aspect of civil recourse theory analyzes the nature of torts as *relational and injurious* wrongs. Torts are wrongful injurings that involve an actor acting wrongfully in relation to another and causing injury (or failing to prevent injury). Conceptualizing these wrongs as relational and ''injury-inclusive,'' points to a distinct accountability that wrongdoers have to the people they wrongfully injure and, reciprocally, helps to establish that persons who have been wrongfully injured have a special moral standing and legal authority to hold their injurers accountable.[10]

[10] Stephen Darwall analyzes this relationship to involve ''biconditional'' second-person accountability. See Stephen Darwall and Julian Darwall, ''Civil Recourse as Mutual Accountability,'' *Florida State University Law Review* 39 (1) (Fall 2011), especially pp. 19–27. See also Stephen Darwall, *The Second Person Standpoint: Morality, Respect, and Accountability* (Cambridge, MA: Harvard University Press, 2006), chapters five and six.

Here, again, civil recourse theory stands in strong contrast to the impersonal nature of economic theories of tort law, which concern accountability in only an attenuated sense. Civil recourse theory also distances itself from many theories of *distributive justice*. Generally speaking, theories of distributive justice focus not on remedies for wrongs but on what an ideal distribution of the benefits of social cooperation would look like and, more broadly, on how to achieve a just distribution. This is especially true of allocative theories of distributive justice. Allocative theories are what Robert Nozick called "patterned."[11] They set out criteria for evaluating the justice of a distributive pattern, abstracted from its history. Prescriptions for a just social order are oriented to a desired pattern, for example, equality, meritocracy, or a needs-based pattern of assessment.

Despite lingering differences in philosophical orientation, philosophers of tort law tend to agree that the claims of tort law should be sharply distinguished from the requirements of distributive justice.[12] Goldberg and Zipursky are explicit about this. A rightful plaintiff in a tort case may be a privileged member of society, entitled to exact compensatory damages from a disadvantaged but negligent member of society, perhaps as a result of a car accident. The fact that someone without resources to pay is not a good bet for obtaining monetary damages is compatible with the harm being an actionable injurious wrong. But Goldberg and Zipursky are clear that a successful tort case between parties such as these does not achieve justice, in any meaningful sense (356). In that vein, they argue that calls for courts to decide tort cases based on which outcome would adhere to or advance the cause of distributive justice have been misguided (279–80, 350–8).

[11] Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), pp. 15–60.

[12] See, for example, discussion by Jules Coleman, "The Mixed Conception of Corrective Justice," *Iowa Law Review* 77 (2) (January 1992): pp. 427–44.

To complicate the picture somewhat, we might consider that not all models of distributive justice are allocative. Procedural theories attend to how a distribution of goods came about. They maintain that a just distribution is one that results from a fair procedure.[13] Procedural theories maintain that we should attend not just to *who has what* but also to whether the "haves" acquired their wealth and opportunities *unjustly*, by mistreating the "have nots." This historical orientation is more closely aligned with the structure of tort law, as civil recourse theory interprets it. People who have been mistreated should have recourse to redress injuries they have suffered, recourse that involves holding those who have wrongfully injured them accountable.

We might not expect civil recourse theory to help much, however, to enhance procedural understandings of distributive justice. Procedural models of distributive justice are more sensitive to considerations of fairness than tort law is. Nothing in tort law mandates fair bargaining positions in the history of a pattern of holdings. Furthermore, even grossly unjust benefits might have been acquired legally, which could mean there is no tort remedy. To that extent, we should not expect the results of tort liability to enhance distributive justice, even when it is understood procedurally.

Still, in another way, civil recourse theory could be a resource for philosophers of distributive justice. Theories of distributive justice have not effectively addressed problems of historical injustice.[14] Instead, through idealizing abstractions, they often seem, in effect, to suppress concern for past wrongs from their theories. Even Nozick, who maintains that a history of theft and fraud could invalidate a current distribution of holdings, infamously dedicated only five pages of his 350-page book to discussing this concern.[15]

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[13] Rawls understands his theory of justice as procedural, in a sense connected with his appeal to a hypothetical contract. A particular distribution counts as just if it could have been the outcome of a fair procedure. A fair procedure is designed to be to the greatest advantage of those who are least well off. This requirement limits the range of actual distributions that could be considered just. See John Rawls, *A Theory of Justice*. rev. ed. (Cambridge, MA: Harvard University Press, 1999), pp. 74–77, 104, 118. By contrast, Nozick is interested in the actual history of transactions. An actual distribution with a history of uncorrected rights violations would not be just. Nozick endorses a minimal libertarian conception of "self-ownership" rights (freely to enter contracts and to transfer property). This means that a pattern of significant inequality might not be unjust, if it has been produced in a way that has not violated any person's rights (so understood).

[14] *See* Erin I. Kelly, "The Historical Injustice Problem for Political Liberalism," *Ethics* 128 (1) (October 2017): pp. 75–94.

[15] Nozick, *Anarchy, State, and Utopia*, pp. 152–3, 173, 230–1.

Historical injustice presents a problem for thinking about justice, since historical injustice shapes current distributions of wealth and opportunity, sometimes profoundly. For example, the 10:1 wealth gap between whites and blacks in the United States is the upshot of a long history of slavery and Jim Crow policies of racial segregation, terror, and discrimination.[16] Furthermore, the racial wealth gap is accompanied by a swath of other inequalities, for example, in home ownership, education, political influence, health, and access to legal representation.

In grappling with historical injustice, we might learn something from civil recourse theory. To be clear, I am here extending the insights of civil recourse theory beyond tort law by considering how its reasoning could be brought to bear on legislative efforts to redress historical injustice. I would argue, for example, that a philosophy of civil recourse enhances the case for reparations for Black Americans.

To understand this, let's return to the central features of civil recourse theory. Civil recourse theory emphasizes the importance of providing institutional avenues of recourse to wrongfully injured parties by empowering victims to hold their injurers accountable. This idea has potentially broad application and seems well suited to support the importance of reparations for historical injustice, at least in the following respects: 1. Historical injustice involves wrongdoing, in a sense that connects with common sense morality. 2. Historical injustice involves relational wrongs. It involves wrongful injuries inflicted on some people by others for the sake of erecting and maintaining social hierarchy, caste, and other unjust forms of domination and subordination. 3. Historical injustice inflicts enduring injuries, injuries that are passed across generations in the form of wealth inequality, social subordination, and collective trauma. 4. Historically enduring injustice calls for redress.

The first two features of civil recourse theory—a focus on wrongdoing and its relational character—both help to frame the case for reparations. The emphasis on wrongdoing, apart from blameworthiness, also aids the argument by addressing a possible source of resistance to calls for reparations, namely, one stressing that subse-

[16] In 2016, the median family wealth in the U.S. for whites was $171,000 and $17,600 for blacks. *See*, e.g., Trymaine Lee, "A Vast Wealth Gap, Driven by Segregation, Redlining, Evictions and Exclusion Separates Black and White America," *The New York Times Magazine* (August 14, 2019), https://www.nytimes.com/interactive/2019/08/14/magazine/racial-wealth-gap.html.

quent generations are not to blame for the wrongdoing of their ancestors. Civil recourse theory helps us to see that the argument for repair does not depend on an assessment of moral blameworthiness.

There are, of course, many important questions about the nature and scope of the historical wrongs, how to identify the agents of those wrongs, whether wrongdoing should be construed to include the passive acquisition of unjust benefits, the relationship between omissions and duties of justice, and how to understand the scope of the wrongful injuries.[17] Proper discussion of these complex issues goes beyond this paper. My aim here is to evaluate civil recourse theory and what is distinctive about it. In what follows, I will focus on the third feature of civil recourse theory: the idea that claims for redress are discretionary. I will investigate whether the idea that claims for redress are discretionary is at odds with the moral urgency of redress for historical injustice.

As we have seen, civil recourse theory maintains that the state is obligated to give victims of legally recognized wrongs the ability to respond, civilly, to having been wronged, which is distinct from any obligation on the part of the state to see to it that corrective justice is done. A wrongfully injured party is empowered with a legal tool to take action against her injurer to secure damages, provided the injured person has the motivation and resources to do so. Clearly, as suggested above, socioeconomic inequality is an obstacle to the pursuit of many valid tort claims, and a political state has a moral duty of distributive justice to correct objectionable inequalities. Absent a distributively just social order, a lack of private resources among some groups to initiate claims for redress is a good reason for the state to assume a duty of repair. Does this mean that the emphasis in civil recourse theory on the discretionary nature of tort action is a mistake? Does the state have a duty to redress the legacy of historical injustice that should lead it to recognize in tort law a duty, owed by the state to members of the polity, to ensure that corrective justice is done between wrongdoers and victims?

To answer these questions, let us delve more deeply into the role discretion plays in a civil recourse theory of accountability.

[17] Thanks to John Goldberg for pressing me on these issues.

IV. EMPOWERMENT THROUGH CIVIL RECOURSE

I have just suggested that the discretionary nature of remedy-seeking, on a civil recourse approach, even if interpretively accurate when it comes to tort law, may be vulnerable to moral and political criticism, given the role the state has played in enabling historical injustice and preserving the injurious legacy of that injustice. In view of the state's role in historical injustice and its enduring social impact, it is plausible to think that the state has a duty to rectify the historically wrongful treatment of some of its members. In turn, this might seem to suggest that a rival theory of tort law—corrective justice theory—has a stronger claim to justification, and provides a better framework for helping us think about how the state is obligated to respond to historical injustice. Whereas civil recourse theory emphasizes the importance of empowering victims to respond to wrongs, if they so choose (and if they are able), corrective justice theory insists that wrongdoers have a moral duty to correct injustices they have perpetrated.

For present purposes, I am not entering into longstanding interpretive debates about which theory better captures tort law's core features. Rather, I will investigate whether civil recourse theory's emphasis on the normative significance of giving victims a power, and hence discretion, to pursue reparative claims illustrates something important about the nature of wrongful injury, something that would be lost by positing a state's duty of corrective justice to resolve that injury. In what follows, I explore some ideas that favor a civil recourse approach.

The discretion civil recourse theory accords to victims about whether to seek redress calls attention to an important aspect of their injuries. Central to civil recourse theory is the notion that, while tort victims usually experience harms or losses and seek compensation for them, their fundamental complaint is about having been mistreated. As we have seen, civil recourse theory emphasizes that torts are relational, injury-inclusive wrongs. What springs from the relational nature of these injurious wrongs is an understanding of them as requiring, morally speaking, that an avenue of recourse be available to the victim. Without a right of recourse, injured parties must not only reckon with losses but also with their wrongful injurers' lack of accountability to them. Viewing the wrong as

relational highlights this aspect of unresolved injustice. A state that steps in as proxy for a victim might secure compensation for a victim's losses, but it would fail fully to acknowledge the relationally disempowering nature of the injury.

We might say that a wrongfully injured person who is denied recourse suffers a more deeply social injury than what is captured by the notion of loss and "whole-making" recompense. It is not just that someone has lost property, health, money, bodily integrity, or reputation and, without a right to recourse, may never recover it. When injured people are denied a right to recourse, they are confronted, through their powerlessness to obtain redress, with their social inequality. Wrongfully harmed persons who lack recourse have their lack of social standing to hold others accountable exposed. This form of inequality is deeply alienating and can threaten a person's sense of self-worth.

Suffering wrongful harms without recourse undermines what John Rawls refers to as the social bases of self-respect. Rawls claims that security in the social bases of self-respect is fundamental to well being because self-respect is a condition of the effective exercise of other rights and liberties as well as the belief that one's life is worth living.[18] A similar idea is found in communitarian philosophies. Injuries to a person's sense of self-worth give rise to what communitarians refer to as a need for recognition. Recognition is a relational form of valuing that is sensitive to identity. Distorted and contemptuous forms of "recognition" stigmatize their subjects.[19] A failure to secure respect—social recognition that matches a subject's inner sense of self—amounts to a kind of social erasure. Remediation calls for the social affirmation of, for example, ethnic minorities

[18] Rawls, *A Theory of Justice*, p. 386. *See also* John Rawls, *Political Liberalism*, (New York: Columbia University Press, 1993), p. 203.

[19] *See* Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity* (New York: Simon and Schuster, 1963), chapter one, and discussion by Stephen Darwall, "Respect as Honor and as Accountability," *Honor, History, and Relationship: Essays in Second Personal Ethics II* (Oxford: Oxford University Press, 2013), pp. 15–16.

through cultural rights, legal exemptions, and identity-based political representation.[20]

I think the conceptual framework of civil recourse theory, with its focus on redress, is more appealing than a communitarian focus on identity-affirmation, because it gets at the deeper reason for the appeal of identity politics—the social alienation and exclusion that results from systematic group-based mistreatment and the absence of adequate avenues for redress, including material redress. In the context of historical injustice, recognition cannot be primarily symbolic, at least not when historical injustice has produced a legacy of serious socioeconomic inequality.

A strength of civil recourse theory, and something that distinguishes it from a corrective justice paradigm, is its focus on empowerment. At least in theory, an injured party is empowered by the state to bring a complaint that a wrongful injurer must answer. This kind of empowerment addresses the social dimension of injuries and it adds something to the Rawlsian picture. Though Rawls emphasizes the importance of the social bases of self-respect, he has surprisingly little to say about it. Understanding a right to redress as basic, as civil recourse theory claims it is, helps to substantiate the social bases of self-respect. It is not just wrongs that are recognized, but also persons, by enabling them to hold those who wrongfully injure them to account.

But what does it mean to hold others to account? Stephen Darwall insightfully describes two different accountability frameworks. The first operates within a framework of relative social dominance, in which an expression of ''status-lowering disrespect'' is taken to be ''annulled by reciprocal disrespect,'' that is, through revenge.[21] In a hierarchically-organized social order, social status depends on how people conceive of one another's lives positionally, each in relation to social groups who stand above or below one another in the social

[20] *See* Will Kymlicka, *Multicultural Citizenship*: *A Liberal Theory of Minority Rights* (Oxford: Clarendon Press, 1995). On the importance of social recognition, *see also* Charles Taylor, *Modern Social Imaginaries* (Durham: Duke University Press, 2004); David Miller, *On Nationality* (Oxford: Oxford University Press, 1995); and Alasdair MacIntyre, *After Virtue: A Study in Moral Theory* (Notre Dame: University of Notre Dame Press, 1984). For empirical data on how minority group identification can serve to counter the harmful effects of prejudice, *see* Nyla R. Branscombe, Michael T. Schmitt, and Richard D. Harvey, ''Perceiving Pervasive Discrimination Among Black Americans: Implications for Group Identification and Well-being,'' *Journal of Personality and Social Psychology* 77 (1) (1999): 135–149.

[21] Darwall and Darwall, ''Civil Recourse as Mutual Accountability,'' p. 20. *See also* Darwall, ''Justice and Retaliation,'' and Stephen Darwall, ''Respect as Honor and as Accountability,'' pp. 11–29.

order. Hierarchy-legitimizing ideologies help to stabilize group-based inequality, and group-based mistreatment functions as a kind of status-sensitive dishonor.[22] In that context, a wrongful injury threatens to lower the victim's social status by representing a lack of respect due to a person of his or her social position from someone of the wrongdoer's position. Or it may serve to confirm a victim's already low social status. In this connection, a victim's stake in her own social standing demands a response. Avenging one's lowered or low social position is a form of resistance to domination. Vengeance aims to hurt, to disgrace, to humiliate, and to degrade—to unsettle the position of one's injurer in the social hierarchy. When successful, retaliation is status-enhancing. It permits an injured person to recover her social position, and perhaps to enhance it.[23]

So understood, the practice of accountability—confrontational, possibly violent, deliberately harmful—describes a power struggle that takes place within a social framework in which social standing depends on hierarchical position-sensitive social recognition. Social hierarchy creates a need for and shapes the meaning of accountability. It also assigns a role to the state. An established social order is typically preserved and stabilized *de jure* or *de facto* by the state. Positional social status tends to be historically entrenched and backed up by social and political institutions, for example, through the distribution of wealth, practices of discrimination against disfavored groups, and the selective use of criminalization and official violence. Practices of accountability, authorized by the state, mediate social positions and confirm people's social standing. Social investment in these practices may be significant. After all, in hierarchically-organized political societies, the stakes are existential.

Things look very different when social standing is established more generically through the rights and opportunities of *equal citi-*

[22] Felicia Pratto, James Sidanius, Lisa M., Stallworth, and Bertram F. Malle, "Social Dominance Orientation: A Personality Variable Predicting Social and Political Attitudes," *Journal of Personality and Social Psychology* 67 (4) (1994): pp. 741–763; Frank Asbrock, Chris G. Sibley, and John Duckitt, "Right-Wing Authoritarianism and Social Dominance Orientation and the Dimensions of Generalized Prejudice: A Longitudinal Test," *European Journal of Personality* 24 (4) (2010): pp. 324–340; Victoria M. Esses, Scott Veenvliet, Gordon Hodson, and Ljiljana Mihic, "Justice, Morality, and the Dehumanization of Refugees," *Social Justice Research* 21 (1) (2008): pp. 4–25, https://doi.org/10.1007/s11211-007-0058-4; Gordon Hodson and Kimberly Costello, "Interpersonal Disgust, Ideological Orientations, and Dehumanization as Predictors of Intergroup Attitudes," *Psychological Science* 18 (8) (2007): pp. 691–698.

[23] Jean Hampton, "The Retributive Idea," in Jeffrie G. Murphy and Jean Hampton, *Forgiveness and Mercy* (1998), Cambridge: Cambridge University Press, pp. 124–143. *See also* Jean Hampton, "Correcting Harms vs. Righting Wrongs: The Goal of Retribution," *UCLA Law Review* 39 (1992): pp. 1659–1702.

zenship. In the register of equality, accountability is calibrated to a relationship between equals. This is Darwall's second model. As he puts it, accountability requires "mutually respectful address between persons that is incompatible with retaliation and vengeance."[24] This understanding of accountability involves, as Darwall describes it, reciprocal respect from the second-person standpoint of mutual address.[25] It displays an understanding of morality as equal accountability.[26]

In a society of equals, what calls for redress is not the 'downward' movement an injury causes in some previously established hierarchy. Between equals, no one's social standing is taken down by another person's transgression and there is no one who needs to be elevated through an act of retaliation in order to rectify the social order. Instead, what calls for redress is a victim's assertion of a violation of her rights. When a victim's claim is actionable, that is, when it is valid, it should not be ignored. A valid claim that gains no traction casts into doubt whether a society between equals has been established. By contrast, when recourse is available, its accessibility to an injured party helps to confirm that injured and injurer stand a relationship of equality. The injured party receives redress from her injurer and public, second-personal acknowledgement of the wrongfulness of the injury. This is a socially meaningful outcome, though sometimes Goldberg and Zipursky seem to reach for more. "When a community deems a person responsible for having wrongfully injured the victim, it is deeming the victim's resentment appropriate."(143) But this further claim is not needed in order to distinguish a victims's right to recourse from her entitlement to "whole-making recompense." It is sufficient to assert the morally important claim that behind the principle of civil recourse stands the value of redressing injurious wrongs and thereby treating the members of a political community as equals (134).

In a society of equal members, wrongdoing does not deeply threaten the social order, and there is no need for vengeance to restore it. A wrongful injury may involve a setback, but it does not pose an existential threat. When members of society have a right to

[24] Darwall and Darwall, "Civil Recourse as Mutual Accountabiltiy," p. 20.

[25] Darwall, *The Second-Person Standpoint*, chapter six.

[26] Darwall, "Respect as Honor and Accountability," p. 17, and Darwall, *The Second-Person Standpoint*, chapters ten and eleven.

seek recourse for injuries they have wrongfully suffered, the social order affirms their equal social standing by offering a fair process for resolving disputes, acknowledging wrongs, and redressing wrongful injuries.

Now let's consider the role the state might assume in order to reckon with its own historical injustice. The state could step in as a proxy for victims—grappling with its own injustice and deciding that it owes a remedy to those who have been mistreated. This would be better—much better—than nothing. But something would be lost, namely, an opportunity to make room for injured persons to advance their own legitimate claims as equal members of society. The state would miss an opportunity to enhance the agency of the injured, to allow them to voice their grievances, and to have their expression of those grievances validated.

In a society of equal members, a universal right to recourse represents the equal standing of all persons. Of course, a society marked by historical injustice bears the legacy of an unjust hierarchy of domination and subordination. A society which displays that legacy in its social order has not established itself as a society of equals. Its failure to do so is open to view, for example, through group-based disparities in access to wealth, education, jobs, health care, and the protection of law. A state with aspirations to justice could acknowledge the presence of enduring injustice by standing for and acting on behalf of persons who have been wrongfully mistreated. As their proxy, it could take up their cause and help to establish their rightful claims.[27] Yet the state is in an awkward position to act on behalf of the victims of its own unjust policies. It is rightfully mistrusted by them for having abused its power.

The alternative would be for the state to promote a social order that differs from its past, thus helping to move the society from one of hierarchical social relations to one in which individuals relate to one another as equal members. In a society of equals, the state's role in a practice of accountability is not to rescue the downgraded. It is to facilitate an encounter between equals.[28] The aggrieved have a

[27] Indeed, some retributivists would argue that criminal punishment should serve this function. A similar position could be taken in the domain of civil law.

[28] In the criminal domain, this encounter could be facilitated in practices of restorative justice. It is not well suited to the criminal trial and state-directed practice of criminal sentencing. On accountability through restorative justice, see Danielle Sered, *Until We Reckon: Violence, Mass Incarceration, and A Road to Repair* (New York: The New Press, 2019), especially chapter three.

right to air their grievances and to stake their claims. Private law, albeit imperfectly, models the rights of equal citizenship. A victim-oriented right to recourse is a critical element of that model. Reciprocal rights, recourse, and recognition in an accountability process that is mediated, but not directed, by the state affirms the social equality of those who have been wrongfully injured.

Reparations legislation could permit descendants of American slavery to stake their claims. Black Americans could assert their identity and ancestry in a petition for compensation for the wrongful injuries inflicted upon them. William A. Darity and A. Kirsten Mullen outline a reparations program for the U.S. Congress to authorize payments to Black Americans. They argue that it is important for the U.S. government to foot the bill. ''[W]hen the entire political order is complicit,'' they argue, ''it is not sufficient to bill individual perpetrators.''[29] Government complicity is long-standing and broad-based. Sometimes the government has itself been the agent of wrongful injury. In other instances, it has supported countless violations by private parties (in the terminology of tort low: batteries, false imprisonments, conversions of private property, et cetera), by permitting injurious wrongs by nongovernmental agents to be perpetrated under color of law.

From the period of American slavery, through the Jim Crow era, and to the present day, the U.S. government has devised and enforced racially discriminatory policies designed to deny Black Americans equal or even *basic* opportunities to advance themselves and to live on equal terms with White Americans. There is a long history of discrimination, supported by law, in housing policy, education, health care, employment, social services, criminal justice, and political rights. This history includes legalized slavery, post-Civil War Black Codes (targeting and enforced only against Black Americans for vagrancy, loitering, and lack of employment) and the associated practice of convict leasing (forced penal labor without pay), a government-supported, slavery-like sharecropping system, state appropriation or auction of land ''abandoned'' by terrorized or murdered Blacks, Jim Crow segregation in education, housing, and public accommodations, a Federal G.I. bill (1945–1956) that was structured to exclude Black veterans from receiving its substantial

[29] William A. Darity and A. Kirsten Mullen, *From Here to Equality: Reparations for Black Americans in the Twenty-First Century* (Chapel Hill: The University of North Carolina Press, 2020), pp. 256–7.

benefits (college tuition, low-cost home loans, and unemployment insurance), a 1949 Federal Housing Act that funded "slum clearance" for housing developments that were often unaffordable to Black families, government-sponsored redlining (a policy restricting access to home mortgages and other services in inner-city Black neighborhoods), racially restrictive housing covenants (preventing home sales to Blacks), the formation in the 1950s and 1960s of White Citizens Councils (including governmental officials) to resist racial desegregation with violence, state-sanctioned nonconsensual medical experimentation on Black Americans, state-sanctioned forced sterilization programs, a multi-billion dollar Federal Interstate Highway Program, beginning in 1956, that authorized the construction of highways through Black residential and business districts in many cities, tax incentives for developers to gentrify Black neighborhoods, governmental deregulation of banks and other lending agents in the 1980s and 1990s resulting in a surge of predatory lending schemes targeting Black communities, ongoing governmental efforts to disenfranchise Black voters, the mass incarceration of Black Americans, and the ongoing execution of unarmed Blacks by state police and federal agents.[30]

Darity and Mullen's focus is compensatory damages. They write, "It is customary, in the American court system, to assign monetary values for damages to human lives."[31] By their reasonable criteria for estimating the monetary value of a Black reparations bill, the debt is enormous. They outline various criteria, including calculations for unpaid wages, the purchase prices of human property, and the land promised to the formerly enslaved, compounded at an interest rate of 4, 5, or 6 percent.[32] Estimates range from $3.4 billion to $17.7 trillion. The criterion favored by Darity and Mullen is a measure of what would be required to correct the current racial wealth gap. By their calculation, the sum is $7.95 trillion, or $240,000 for each individual Black American.[33]

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[30] See Darity and Mullen, *From Here to Equality*, pp. 207–36. See also Richard Rothstein, *The Color of Law: A Forgotten History of How Our Government Segregated America* (New York: W. W. Norton and Co., 2017), and Carol Anderson, *White Rage: The Unspoken Truth of our Racial Divide* (New York: Bloomsbury, 2016). For a fascinating discussion of the history of how race ideology has been used to rationalize racial subordination, see Lionel K. McPherson, "The Afterlife of Race: An Informed Philosophical Study," forthcoming with Oxford University Press (2021).

[31] Ibid, p. 259.

[32] Ibid.

[33] Ibid, pp. 259–263.

They also take up the question how distributions would be made, and they argue that eligibility should be established by those who claim it. Claims would be distributed according to individual petition. Persons seeking reparations would be required to provide evidence that they self-identify as Black and that they have at least one ancestor who was enslaved in the United States.[34]

The brilliance of this proposal is that it encompasses at once a claim to identity-based recognition and material reparation for injurious wrongs. Darity and Cullen write, ''While a personal check or its equivalent need not be the only form in which the program makes payments, both the symbolism and the autonomy it conveys will be a key dimension of a black reparations program. *For both symbolic and substantive reasons,* an effective program of restitution must include direct payments to eligible recipients.''[35] An avenue to compensatory damages protects the value of autonomy or, as Goldberg and Zipursky would put it, the *independence* of persons to make and execute plans and projects (134–5). The prospect of material redress for wrongful setbacks enables persons to make plans that depend on being free from wrongful injury at the hands of another, something that Goldberg and Zipursky interpret as critical to the Fourteenth Amendment's guarantee of ''equal protection'' of the laws to all citizens (139). Substantive and symbolic reasons intersect. Redress through individual petition encompasses the important requirement that victims have an avenue through which they may assert their rightful claim that their society acknowledge their social equality. The second-personal nature of the accountability process encompasses, as Darity and Cullen put it, *acknowledgement*, as well as redress.[36]

It is important that rectifying distributive injustice take a reparative form. A seemingly ahistorical rectification of distributive injustice would miss the social dimension of unjust economic disadvantage. That's not to deny that making a society more distributively just has important symbolic import insofar as it affirms the equal standing of each citizen. But doing so would not, as such, acknowledge the state's role in subordinating one group of citizens

[34] Ibid, p. 258.

[35] Darity and Mullen, *From Here to Equality*, p. 265.

[36] Ibid, p. 2.

to another, and thus it would fail to repair the injury of that subordination.

These various considerations support Goldberg and Zipursky's argument that it is important for those who have endured serious wrongdoing to have recourse to rectifying, as much as possible, the wrongs they have suffered. Civil recourse theory offers a plausible account of why redress is called for and what it might look like. It attends both to the material, the psychological, and the symbolic dimensions of reparations. Recourse is importantly connected to the socially and psychologically healing potential of reparations. A reparations movement provides the injured with a public voice to air their legitimate grievances and it links the claim for material redress to its broader symbolic value. This form of civic engagement is an important aspect of reckoning seriously with historical injustice.

V. JUSTICE IN CIVIL SOCIETY

I close with a suggestion that political philosophy has yet fully to explore the notion of *civic justice*—the requirements of justice in civil society, something that takes us beyond the requirements of law and government to grapple with norms of inclusion and exclusion in public life. One of the many virtues of *Recognizing Wrongs* is that it invites us to explore the contribution of civil recourse to justice in the civic realm.

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