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Civil Recourse as Social Equality

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CIVIL RECOURSE AS SOCIAL EQUALITY

JASON M. SOLOMON*

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I. INTRODUCTION

In the past decade, civil recourse theory has emerged as an important new way of thinking about tort law as individual justice. Like corrective justice, civil recourse sees tort law as about deontological concepts such as right and wrong, in contrast to utilitarian accounts that focus on maximizing social welfare. This Symposium is a testament to the centrality of civil recourse to contemporary debates in tort theory, and private-law theory more broadly.

Like any new theory, civil recourse theory has drawn its critics. The primary architects of civil recourse theory, Ben Zipursky and John Goldberg, have pitched the theory as an interpretive one and have focused much of their work thus far on the descriptive or explanatory part of the enterprise.¹ But some critics have criticized civil recourse theory as failing to describe key aspects of tort law or as being too indeterminate to explain doctrinal choices or case outcomes. Other critics, like some at this Symposium, characterize civil recourse

* Associate Professor, William and Mary School of Law. Thanks to Angela Banks, Stephen Darwall, Andrew Gold, Michael Steven Green, and Trotter Hardy for thoughtful comments on a previous draft, to the attendees at the 2011 Blackstone Lecture at William and Mary, where I talked about some of these ideas, to all the participants in the Symposium on Civil Recourse Theory, and particularly to Curtis Bridgeman and the *Florida State University Law Review* staff for organizing the Symposium. Thanks to Jordan Bowman for valuable research assistance and Ben Keele for expert library support.

1. I have also contributed to this. See Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749 (2007); John C.P. Goldberg, *Wrongs Without Recourse: A Comment on Jason Solomon’s Judging Plaintiffs*, 61 VAND. L. REV. EN BANC 1 (2008).

not as a competitor to corrective justice theory at all, but rather a variant on or component of it.

Still other critics have focused on the lack of adequate normative foundations, or political theory, undergirding a right to civil recourse.² Such a right needs further justification, this argument goes, particularly because on its face, the right appears to be one of retaliation or vengeance, and it seems unlikely that this is either normatively attractive or an appropriate part of a modern liberal state.³ As one who is sympathetic to civil recourse theory, I am focused on responding to these critiques.

In prior work, I tried to develop the conceptual foundation for a normative defense of the right to civil recourse. Specifically, I argued that the right to recourse could be supported through essentially three related steps: (1) the person harmed was entitled to resent the wrongdoer, in light of the nature of the wrong; (2) the victim calling to account the wrongdoer was a normatively attractive response; and (3) the state can help affirm the political ideal of a community of equals by providing a forum for equal or mutual accountability where individuals can make demands of those who have wronged them.⁴ Zipursky's contribution to this Symposium continues to develop the normative foundations of the right to recourse, building in part on this work.⁵

Although my focus in this Article is on political theory, the discussion will bear on the normative foundation (as a matter of legal theory) as well. In the prior article, I focused on equal accountability as an attractive moral norm and conceptual foundation for the right to recourse, drawing in large part on Stephen Darwall's work in moral philosophy on the "second-person standpoint."⁶ But I also suggest-

2. Concerning the need for a political theory of recourse, see Jules Coleman & Gabe Mendlow, *The Normative Structure of Tort Law* 25 n.16 (2009) (unpublished manuscript), available at <http://www.law.upenn.edu/academics/institutes/ilp/2009papers/ColemanPennWorkshopDraft.pdf>, stating "it is hard to assess the recourse view absent a good deal more work being done on the side of the relevant political philosophy."

3. See, e.g., John Finnis, *Natural Law: The Classical Tradition*, in *THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW* 1, 56 (Jules Coleman & Scott Shapiro eds., 2002).

4. See Jason M. Solomon, *Equal Accountability Through Tort Law*, 103 *NW. U. L. REV.* 1765 (2009). In a related piece, Nathan Oman considers three similar questions in justifying civil recourse: (1) When is acting against a wrongdoer justified? (2) Under what circumstances should the state be involved in providing a mechanism for such action? (3) Are certain kinds of civil wrongs more appropriate for such a response than others? See Nathan B. Oman, *The Honor of Private Law*, 80 *FORDHAM L. REV.* 32 (2011).

5. See Benjamin C. Zipursky, *Substantive Standing, Civil Recourse, and Corrective Justice*, 39 *FLA. ST. U. L. REV.* 299 (2011).

6. See generally STEPHEN DARWALL, *THE SECOND-PERSON STANDPOINT: MORALITY, RESPECT, AND ACCOUNTABILITY* (2006).

ed that some broader notion of equality might help underwrite the state's involvement in an institution like tort law.⁷

This Article further explores whether a conception of “equality” might support having the right to recourse as a matter of political theory. To preview the argument, justifying the right to recourse might draw on two distinct, but related, notions of equality—a distributive one and a relational, or social, one.⁸

These two conceptions relate in the following way: the right to hold accountable those who have wronged you is a good subject to principles of distributive justice. And this good is something that the state provides to help constitute a community that aspires to social equality—where individuals relate to one another as equals. Explaining more what I mean by this is the task of the rest of this Article.⁹

Before beginning this task, let me pause on method and scope. The approach is to look at our society and set of social and political institutions and try to abstract from that a set of principles that might help explain and justify our existing arrangements.¹⁰ But this is not a full-blown political theory of civil recourse. It is a tentative sketch, building on prior work of my own and others, including those in this Symposium.¹¹

I am not claiming that the distributive justice or social equality principles I discuss *explain* the content of tort law.¹² The claim is that they might help *justify* the institution of tort law, or civil justice,¹³ as a matter of legal theory or help us to understand the role of the civil justice system in our structure of government as a matter of political theory. To be sure, if the distributive justice and social equality prin-

7. See Solomon, *supra* note 4, at 1805-11.

8. The particular relationship between these two concepts is heavily influenced by David Miller's conception. See David Miller, *Equality and Justice*, 10 *RATIO* 222, 224 (1997); see also DAVID MILLER, *PRINCIPLES OF SOCIAL JUSTICE* 231-32 (1999).

9. I hope to help illuminate the importance of civil recourse theory in understanding tort law, without taking a position on whether civil recourse and corrective justice are better seen as complementary or rival theories.

10. See TERENCE BALL, *REAPPRAISING POLITICAL THEORY: REVISIONIST STUDIES IN THE HISTORY OF POLITICAL THOUGHT* 57 (1995) (arguing that the role of political theory should be to review, appraise, and criticize the arrangements of one's own society). For another account of how and why political theory may operate, see JOHN RAWLS, *A THEORY OF JUSTICE* 18-19 (1971) (discussing his method of reflective equilibrium, a part of which is deriving a set of principles from the current political system to compare with initial “convictions of justice” for justification of the system).

11. This Article builds on the works of Benjamin Zipursky and John Goldberg generally and in this Symposium. For my previous work on the subject of civil recourse, see Solomon, *supra* note 4 and Solomon, *supra* note 1. See also Oman, *supra* note 4.

12. Arthur Ripstein, *Tort Law in a Liberal State*, 1 *J. TORT L.* 3, 20 (2007).

13. I am using the terms “tort law” and “civil justice” more or less synonymously here. It might well be that the term “private law” works as well. I remain agnostic on that issue for present purposes.

ciples are compelling justifications, they may well inform decisions about the scope and operation of this area of law.

The question of how exactly social equality can underwrite tort law will come later,¹⁴ but first, let us consider how distributive justice principles might support a right to recourse.

II. RECOURSE AS PART OF DISTRIBUTIVE JUSTICE

In this Part, I suggest and consider the following claim: Tort law is justified in part as a fair distribution of the right to hold accountable those who have wronged you by interfering with your rights of personhood and property. Let us consider this “right to hold accountable” a plausible definition of the right to civil recourse and look at whether we can think about the institution of tort law as being, in part, justified by this principle of distributive justice.

By most accounts, our current fault-based system, designed to restore the status quo through corrective justice, is an embarrassment to traditional distributive justice principles, focused on material goods.¹⁵ After all, why should we have a system that restores the status quo if the status quo is unjust? From a distributive justice perspective, if a poor person rear-ends a rich person, why should the poor person have to pay to fix the rich person’s car, even if the poor person was the one at fault?¹⁶

In an attempt to address this, scholars have taken one of a few tacks. Some say that corrective justice is only justified if preexisting holdings are distributively just.¹⁷ Others say that corrective justice and distributive justice are very different concepts altogether, and our current fault-based common law of tort is concerned with the

14. See *infra* Part III.

15. See Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (but Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 270 (2006) (noting several flaws in the context of damages that weaken arguments that tort law is grounded in principles of distributive justice: “[i]f tort law excludes significant damages because victims cannot be compensated, then arguments for general damages grounded in corrective or distributive justice lose some of their force”); Richard L. Abel, *Questioning the Counter-Majoritarian Thesis: The Case of Torts*, 49 DEPAUL L. REV. 533, 543-56 (1999) (offering several examples of legislation making tort damages inadequate in certain situations).

16. This is a familiar example that others have used to help distinguish corrective justice from distributive justice. See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 304-05 (1992).

17. See Stephen R. Perry, *Mischief, Misfortune and Tort Law*, in *ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY* 149 (Brian Bix ed., 1998) (noting that distributive decisions about the allocation of benefits and burdens in corrective justice should be constrained by conceptions of fairness and equality); see also Arthur Ripstein, *Tort, The Division of Responsibility and the Law of Tort*, 72 *FORDHAM L. REV.* 1811, 1843 (2004) (“[T]he claim to enforceable rights, including enforceable private rights, depends on the existence of a largely just basic structure.”).

former, not the latter.¹⁸ Alternatively, there are those who say that our current system needs to be changed to better meet the demands of distributive justice.¹⁹

Consider, though, a more capacious definition of distributive justice. Following John Rawls, Michael Walzer, and others, we can apply principles of “distributive justice” to a range of social goods, not only material goods.²⁰ So distributive justice not only refers to income, wealth, food, and medical care, but also to power, access to justice, rights, respect, status, and other goods not easily reducible to money.²¹ When the state provides individuals with a right to recourse, then, it is distributing a social good—specifically, the right of individuals to call to account those who have wronged them.

A. *Recourse for What?*

One important threshold question is the scope or content of the right or rights that the right to recourse is designed to protect. After all, the right to recourse can be seen as a secondary or enforcement right, with an underlying primary or substantive right that it protects or vindicates.²² If the underlying right is not one worth protecting, then it is difficult to justify the right to recourse.²³

18. See, e.g., JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 180-81 (1980) (arguing that, classically, tort law has been best explained as corrective justice for wrongful actions).

19. E.g., Gregory C. Keating, *Distributive and Corrective Justice in the Tort Law of Accidents*, 74 S. CAL. L. REV. 193, 219 (2000) (arguing that “[i]n a world of insurable risk,” enterprise liability is preferable to negligence on distributive justice grounds).

20. John Rawls said that the “subject of justice is the . . . way in which the major social institutions distribute fundamental rights and duties.” RAWLS, *supra* note 10, at 7. See also WILLIAM GALSTON, *JUSTICE AND THE HUMAN GOOD* 6 (1980); IRIS MARION YOUNG, *JUSTICE AND THE POLITICS OF DIFFERENCE* 24-33 (1990) (summarizing the views that distributive justice should be applied to non-material goods, but arguing against those views); David Miller, *Complex Equality*, in *PLURALISM, JUSTICE, AND EQUALITY* 203 (David Miller & Michael Walzer eds., 1995) (“An egalitarian society must be one which recognizes a number of distinct goods . . .”).

21. Though this is a common move in political philosophy, not everyone agrees with it. See, e.g., YOUNG, *supra* note 20, at 15-16, 24-30 (arguing that while the distributive justice framework can be “metaphorically extended” to a range of social goods, the framework still treats the issue as one of allocating “static things” rather than evolving “social relations and processes”).

22. See Andrew S. Gold, *A Moral Rights Theory of Private Law*, 52 WM. & MARY L. REV. 1873, 1901-06 (2011) (explaining private law as a means for individuals to exercise their “moral enforcement rights”); Andrew S. Gold, *The Taxonomy of Civil Recourse*, 39 FLA. ST. U. L. REV. 65, 68-73 (2011) (describing one version of civil recourse as concerned with enforcement rights).

23. For example, assume there was a tort of racial nuisance. That is to say, someone could bring a lawsuit on the theory that a person of another race moving next door to her was interfering with the use and enjoyment of her property. Now, let us assume that the person enforcing the right is African American, and the intruding neighbor is white. One could have some facially plausible story about the African American traditionally having little power and how having the right to recourse helps achieve equality by providing a form of legal or political power that the individual might not have otherwise. Nonetheless, because the underlying “right” entails a commitment to discrimination based on a charac-

So what *does* the right to recourse protect? The answer can be defined in general terms by looking broadly at the law of torts, or the law of wrongs. Although tort law is frequently conceived of as protecting a variety of interests, one can also view it as a way of supporting individual freedom or autonomy by “protecting people’s liberty, property, and security.”²⁴ At its core in negligence law, tort law protects people from others exercising liberty in such a way, or to such a degree, that it interferes too much with their security—specifically, their person or property.

One can think of a few reasons why this right to security in person or property gets an individual right to recourse. First, the security interest protected, particularly as to bodily integrity, is at the essence of “personhood.” As Mayo Moran put it:

The single most important interest associated with personhood is the right to physical integrity, expressed through the fact that persons, unlike things, have the right to autonomy and hence to vindicate violations of physical integrity. This right is enshrined both in tort law and in criminal law and is the most highly protected interest in both of those areas of law.²⁵

Second, the underlying right of bodily integrity and personal security is a fundamental aspect of freedom.²⁶ In order to go about one’s business in a society of strangers, one needs to know that one will not be hurt by people being careless. And if you are hurt, you can call the other person to account. That might give you some confidence to go about your affairs.²⁷

The reality, though, is that we are in a constant state of vulnerability arising, as Martha Fineman puts it, “from our embodiment, which carries with it the ever-present possibility of harm, injury, and

teristic that should not be normatively relevant, the right to recourse cannot apply. Thanks to Michael Steven Green for this example and, more generally, for the point that the justification for a right to recourse is highly dependent on the content of the underlying right.

24. Gregory C. Keating, *The Priority of Respect Over Repair*, 18 LEGAL THEORY (forthcoming 2012) (manuscript at 45, 45-49), available at <http://works.bepress.com/cgi/viewcontent.cgi?article=1037&context=gregorykeating> (sketching a unified account of the core primary rights in tort as those protecting individuals from harm and intrusions on sovereignty).

25. Mayo Moran, *The Mutually Constitutive Nature of Public and Private Law*, in THE GOALS OF PRIVATE LAW 17, 32 (Andrew Robertson & Tang Hang Wu eds., 2009); see also Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1968 (2007) (“[B]odily health and integrity are fundamental to a person’s ability to make his or her own way in the world.”).

26. See Ripstein, *supra* note 25; see also STEPHEN HOLMES, PASSIONS & CONSTRAINT: ON THE THEORY OF LIBERAL DEMOCRACY 242 (1995) (identifying classical liberalism with the view that all individuals must be “protected *equally* from third-party injury” and have “equal access to the law”).

27. See Solomon, *supra* note 4, at 1809. Though this is certainly an empirical question.

misfortune.”²⁸ This vulnerability is particularly salient in a society of strangers, where we have a web of daily interactions in social and economic life and no particular basis for trusting those with whom we interact. We can see this in the position of the customer of a grocery store who has to go from aisle to aisle and cannot worry about whether the floor has been properly swept and puddles have been properly cleaned up. We can see this in the doctor-patient relationship where, when submitting to a medical procedure, one has to necessarily put one’s fate in the hands of another.²⁹

We can also see this in the position of the consumer in a mass-market economy who has to rely on medicines made in a faraway place by strangers who have no obligations to her in particular.³⁰ Or someone buying a car who, in order to get to work or school or just about anywhere else, has to trust that the car is made properly and will be safe traveling at more than sixty miles per hour alongside many others doing the same.³¹

And again, one can certainly see this vulnerability in the way that we each are subject to the safe driving of others for our physical security and bodily integrity. If someone decides to use a cell phone or text and takes her eyes off the road, we could be harmed and often cannot do much about it. We have to rely on the due care of others for our well-being.

So it can be seen as plausible that if an individual, through carelessness or otherwise, takes advantage of our position of vulnerability, the state would want to set up a system whereby we could then make the other person—the wrongdoer—vulnerable to us. I use vul-

28. See Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1, 9 (2008).

29. See Mark A. Hall, *Can You Trust A Doctor You Can't Sue?*, 54 DEPAUL L. REV. 303 (2005) (“Doctor-patient relationships are characterized by levels of intimacy, dependency, and vulnerability”); David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 720 (1989) (“The power of doctors over the welfare of their patients is of course enormous.”); *Canterbury v. Spence*, 464 F.2d 772, 780-82 (D.C. Cir. 1972). “The patient’s reliance upon the physician is a trust of the kind which traditionally has exacted obligations beyond those associated with arms length transactions. His dependence upon the physician for information affecting his well-being, in terms of contemplated treatment, is well-nigh abject.” *Id.* at 782 (footnote omitted).

30. See Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848, 899 (“Corporate entities that mass-produce products or conduct risk-creating activities leading to mass harms also have far greater power than the individuals they harm both within the relationship and with the outside world.”).

31. Though one could certainly argue that the market should take care of some of these examples, there are various market failures that make this theoretical possibility an unrealistic one. See, e.g., Daniel Schwarcz, *A Products Liability Theory for the Judicial Regulation of Insurance Policies*, 48 WM. & MARY L. REV. 1389, 1436-37 (2007) (describing the market failure “result[ing] from ordinary consumers’ misinformation and cognitive limitations” as critical to the underpinnings of products liability law).

nerable here in a different sense: the sense of being subject to our demands—demands for answers, for compensation, and for justice.³²

B. A Just Distribution of the Right to Recourse

Before people are given the right to recourse—say, in the state of nature or in a society without an equal or just distribution of the right to recourse—there are still ways that some, but not all, people can respond and hold others accountable when they feel they have been wronged.

We can see examples of this in literature. In the best-selling novel-turned-movie *The Help*, set in 1960s Mississippi, when an African-American maid, Minny, tells a writer true but unflattering stories about the white family for whom she worked, the white man in the family gets Minny's husband fired from his job.³³ The white man felt he was wronged and held the maid accountable, with no neutral forum to determine what forms of accountability, if any, were appropriate.

But in the same book, when Minny was blackballed from working for the white families in town for allegedly stealing from a woman for whom she had worked, she had no opportunity to challenge her accuser by, for example, bringing a claim for defamation.³⁴

Similarly, in the Man Booker Prize-winning novel *The White Tiger*, set in contemporary India, a poor boy was run down and killed by a reckless driver, the wife of a rich man.³⁵ The rich man had connections to the police department and got them to drop any investigation. Though the wife, feeling guilty, wanted to find the family and make amends for compensation, the rest of her family overruled her, and we can safely assume the poor family had no wherewithal to find a lawyer to bring a case.³⁶

But in the same book, when a different rich man's family feels wronged because their servant had failed to protect their son, the rich man is able to hold the servant accountable by killing him and his relatives, again without a neutral forum to judge the demands.³⁷

32. See Benjamin C. Zipursky, *Two Dimensions of Responsibility in Crime, Tort and Moral Luck*, 9 THEORETICAL INQUIRIES L. 97, 110 (2008); Dale Miller, *Disrespect and the Experience of Injustice*, 52 ANNU. REV. PSYCHOL. 527, 531 (2001) (summarizing research showing that “[p]eople think they are entitled to explanations and accounts for any actions that have personal consequences for them”).

33. See KATHRYN STOCKETT, *THE HELP* 437-38 (2009).

34. *Id.* at 21.

35. ARAVIND ADIGA, *THE WHITE TIGER* 134-45 (2008). I first talked about this episode in Jason M. Solomon, *What is Civil Justice?*, 44 LOY. L.A. L. REV. 317, 319-20 (2010).

36. ADIGA, *supra* note 35, at 153. A similar example can be found in CHARLES DICKENS, *A TALE OF TWO CITIES*, recounted in Oman, *supra* note 4, at 60-63 (contrasting this with JOHN GRISHAM, *THE RAINMAKER*, where the victim's mother was able to confront the wrongdoer).

37. ADIGA, *supra* note 35, at 56-57.

Or one can think about the right to recourse historically. Try to imagine a peasant in fifteenth century England calling to account a noble whose carelessness in keeping his cows fenced in led to the cows escaping and eating the peasant's food. It is impossible to do so. In a more hierarchical society, people in the lower orders could not call the upper class to account.³⁸ Indeed, we might say that the fact that the noble is not answerable to the peasant helps define the hierarchy in a society. That is, the lack of answerability is part of what tells us: this is *not* an egalitarian society.

With the right to recourse distributed to all citizens, the ability to hold others accountable is not limited to the strong, powerful, wealthy, or well-connected. The right provided, though, is still limited in important ways. Having now seen examples where the right to hold others accountable is not fairly or widely distributed, we can now explore the principles by which we decide who is so empowered in our civil justice system.

C. *How is the Right Distributed? By What Principles?*

With any good subject to distributive justice principles, the first step is to explain why it is a good that need be governed by principles of distributive justice at all. That is what we have just done in sketching an account of the right to recourse as a means of empowerment in response to the violation of the individual's state of vulnerability. Because the rights of person and property are fundamental, the right to recourse is critical both as a means of protecting the underlying right before any harm occurs and as a means of underscoring social equality after the harm.³⁹

The next step is to determine exactly what kind of distributive justice principles do and ought to govern the right. Here, I focus on the existing principles that govern distribution and merely gesture towards possible critiques or improvements.

Today, in the U.S. civil justice system, the right to recourse is distributed largely based on the amount of harm suffered, and perhaps the amount wronged. If you have the right kind and amount of harm, you should be able to get a lawyer to take your case thanks to the relatively unusual contingency-fee system in the United States. This means that your ability to get recourse does not depend on your wealth. Certainly, wealth helps—you will have a broader choice of lawyers and need not depend on having enough physical harm to at-

38. See Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67, 101 (2010) (citing Don Herzog, Comment on Jeremy Waldron's Tanner Lecture 2-3 (Apr. 22, 2009) (unpublished manuscript)).

39. I will explain more what I mean by the social equality aspect of this in Part III.

tract a lawyer at all—but wealth is not necessary for redress or access to justice.

The right to make demands of one who has wronged you is also distributed by the *type* of harm. The closer the harm is to the court interests of bodily integrity and property, then the greater chance you will have the right to hold another accountable. For example, cases of emotional harm are only cognizable if derived from physical harm in some way.⁴⁰ And purely economic harm, if not tied to an injury to person or property, is generally not something that one can use to hold another accountable.⁴¹ The type of harm, then, is a key mechanism for distributing the right to recourse.

Thinking about the distribution of the right to recourse in this way—as being governed by the type and amount of harm—might also provide a basis for criticizing certain “tort reform” efforts such as caps on noneconomic and punitive damages, for example. Under noneconomic damage caps, people who do not work are going to be systematically less likely to get a lawyer to take their case and invest the resources necessary to hold the wrongdoer accountable. And if we think that the degree of wronging is also an important basis for distributing the right, then both punitive and noneconomic damage caps become suspect, particularly in cases with low economic damages.

However the question remains: why do distributive justice principles support an individual right to recourse as opposed to, say, a right to compensation? For now, having seen the kind of distributive principles that support the right to recourse, we return to the idea of social equality and its relationship to both principles of distributive justice and the right to recourse.

III. RECOURSE AS PART OF SOCIAL EQUALITY

We have now seen how the right to recourse might be considered a good subject to distributive justice principles, tied as it is to fundamental rights of personhood and property. Questions remain, though, about the kind of equality this good supports. We can refer to this in part as the familiar “equality of what?” question and then also ask how exactly the right to recourse instantiates that kind of equality.

The leading civil recourse theorists rely heavily on the work of John Locke, who talked quite specifically about the right to redress in terms that resonate with the idea of civil recourse.⁴² And given

40. W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 12 (5th ed. W. Page Keeton ed., 1984) (noting that “the law has been slow to accept interest in peace of mind as entitled to independent legal protection”).

41. *Id.* § 101 (noting that tort action for purchasers suffering intangible economic loss is limited).

42. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541; John C.P. Goldberg &

Locke's influence on the Framers, one could look to his social contract ideas for guidance about the place of recourse in political theory.⁴³ For Locke, we have the right to recourse because this is something we had in the state of nature—the ability to act against another through self-help.⁴⁴ When we form a society, we give up that right—a right often enforced violently—in exchange for a substitute right to act through the state in a mediated way.⁴⁵

But perhaps we ought look to another favorite political theorist at the time of the founding, Rousseau.⁴⁶ For Rousseau, the transition from the state of nature to society is more problematic. Unequal political, economic, and social power differentials prevail.⁴⁷ And so the way to create a community of equals for Rousseau was not to make sure that individuals had the rights they had in the state of nature but actually to give them new rights through political institutions.⁴⁸

Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 982 (2010); Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 623, 637-42 (Jules Coleman & Scott Shapiro eds., 2002).

43. Locke's philosophy is often looked to for explanation or guidance of American political features. See, e.g., Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1430 (1990) (“[Locke’s] influence on the Americans and the first amendment was most direct.”); William Michael Treanor, *Fame, the Founding, and the Power to Declare War*, 82 CORNELL L. REV. 695, 720 (1997). But see Martin S. Flaherty, *History “Lite” in Modern American Constitutionalism*, 95 COLUM. L. REV. 523, 536 (1995) (“In short order the vision of America as an applied version of the *Two Treatises of Government* fell victim to exacting scholarly criticism by specialists in early American history.”).

44. Goldberg, *supra* note 42, at 541 (“Locke maintained that an individual’s delegation of governing power to the state does not include a renunciation of his right to obtain redress from one who has wrongfully injured him.”).

45. See, e.g., *id.* at 541-44. “Locke’s social contract theory claims that victims of wrongs possess a natural right to reparations from wrongdoers, and that government, as custodian of individuals’ rights, owes it to them to provide a law of reparations.” *Id.* at 544; see also Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 735-37 (2003) [hereinafter Zipursky, *Civil Recourse*]; Zipursky, *supra* note 42, at 637-44; Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 85-86 (1998) (discussing the fairness of providing an avenue of recourse using “the language of social contract theory” (citing JOHN LOCKE, SECOND TREATISE OF GOVERNMENT §§ 7-10 (C.B. Macpherson ed., Hackett 1980) (1690))).

46. See *State v. Clark*, 592 S.W.2d 709, 721 (Mo. 1979) (“History tells us that the Framers . . . were influenced by the teachings of Aristotle, Locke, Rousseau, and others, and by the *social contract* concept they espoused.”).

47. Christopher Bertram, *Jean-Jacques Rousseau*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Spring ed. 2011), available at <http://plato.stanford.edu/archives/spr2011/entries/rousseau/> (describing Rousseau’s description of society as one where “unequal and exploitative social relations” were backed by the state and arguing that his social contract was intended as an alternative).

48. This is unlike a Lockean society, which enforces preexisting natural rights. Rousseau envisioned that the people, through the “general will,” would deliberate and decide which rights were necessary for a just society. For Rousseau, these societal rights replaced the natural equality, the physical equality that existed in the state of nature, with a different kind of equality. See PIOTR HOFFMAN, FREEDOM, EQUALITY, POWER: THE ONTOLOGICAL CONSEQUENCES OF THE POLITICAL PHILOSOPHIES OF HOBBS, LOCKE, AND ROUSSEAU 234 (1999) (“[T]he fundamental contract, on the contrary, substitutes a moral

And those rights are in part rights against other persons, of which the right to recourse (though not discussed specifically by Rousseau) ought be considered a prime example.⁴⁹ In order to counter the inevitable inequalities that result when forming a society, then, we need a political institution like the civil justice system to help constitute relationships among equals.

But how exactly does the right to recourse fit into this Rousseauian vision? Let us start with some definitional preliminaries. One might want to achieve something called “social equality,” but the term has a multitude of meanings and components.⁵⁰ Let us define it as the philosopher and equality theorist Samuel Scheffler does: “the question of what it is for people to relate to one another as equals.”⁵¹ It is an ideal for a political community that is reflected or instantiated in many of our governmental structures, political mechanisms, and social practices.

Michael Walzer calls a socially-equal society a “society of misters,” where people have no formal rank; rather, everyone from the gardener to the CEO is addressed as “mister.”⁵² Put another way, we can call social equality “the absence of any natural ranking of individuals into those who command and those who obey.”⁵³ Indeed, in the civil justice system, a person can be one who makes a demand one day, and one who answers such a demand the next, sometimes in the same lawsuit.

and legitimate equality for whatever physical inequality nature may have placed between men.”); JEAN-JACQUES ROUSSEAU, *ON THE SOCIAL CONTRACT* 12 (Paul Negri & Drew Silver eds., G.D.H. Cole trans., Dover Publications 2003) (1762) (“[T]he civil state produces a very remarkable change in man, by substituting justice for instinct in his conduct and giving his actions the morality they had formerly lacked.”).

49. Rousseau did acknowledge that power over one another in society would result in mutual acknowledgement and respect. HOFFMAN, *supra* note 48, at 202 (“On the one hand, I expect the other to acknowledge, in word and in action, my superiority over him But, at the same time, I expect this acknowledgment from a being like myself even if appearing outside me. . . . Thus, while I expect from him the acknowledgement of my superiority, he expects from me—for the same reasons—the acknowledgement of his superiority.”).

50. I make no claim that what follows is a comprehensive overview. For contemporary introductions to the idea or ideas of equality, see generally G.A. COHEN, *RESCUING JUSTICE AND EQUALITY* (2008); RONALD DWORKIN, *SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY* (2000); WILL KYMLICKA, *Liberal Equality*, in *CONTEMPORARY POLITICAL PHILOSOPHY: AN INTRODUCTION* 50-94 (1990); AMARTYA SEN, *INEQUALITY REEXAMINED* (1992).

51. Samuel Scheffler, *Equality as the Virtue of Sovereigns: A Reply to Ronald Dworkin*, 31 *PHIL. & PUB. AFF.* 199, 204 (2003).

52. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* 252 (1983) (“The absence of a universal title suggests the continued exclusion . . . [from] the sphere of recognition as it is currently constituted.”).

53. GERALD GAUS, *POLITICAL CONCEPTS AND POLITICAL THEORIES* 143 (2000) (referring to this as “fundamental human equality” in the liberal egalitarian tradition).

We can think of many things that might contribute to social equality: *equality of opportunity*,⁵⁴ which could be provided through a free public education paid for by the taxpayers; *equality of resources*,⁵⁵ which one could progress towards through a progressive tax system⁵⁶ or a guaranteed income for people over a certain age;⁵⁷ *equality of citizenship or participation*, by providing everyone equal voting rights, speech rights, and association rights;⁵⁸ or *equality of fortune or misfortune*, which could be supported through a universal health insurance system or publicly funded disability insurance for people who cannot work.

So what is missing? It sounds like we have described a number of things which might affirm “social equality,” an ideal where individuals can interact with one another as equals.⁵⁹ But what is missing is a kind of equality that is interpersonal or relational. This is the kind of equality instantiated by civil recourse.

This kind of relational equality has been advanced by contemporary political philosophers like Elizabeth Anderson, Samuel Scheffler, Michael Walzer, and Iris Marion Young, but its roots go back at least to the nineteenth century.⁶⁰ It is interpersonal and so is

54. For a definition, see DWORKIN, *supra* note 50, at 13 (“[O]ne prominent form holds that people are denied equality when their superior position in either welfare or resources is counted against them in the competition for university places or jobs . . .”).

55. This is the type of equality that Ronald Dworkin has advocated. For an account, see *id.* at 65-119.

56. *Id.* at 91, 99-109.

57. In a system such as Dworkin’s equality of resources, old age would be a matter of brute luck, and would therefore be insured against. For a discussion of handicaps and brute luck versus option luck, see *id.* at 73-83.

58. For an account of equality of citizenship, see generally Kenneth L. Karst, *The Supreme Court 1976 Term Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977); Frank I. Michelman, *The Supreme Court 1968 Term Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). See also Kenneth L. Karst, *The Liberties of Equal Citizens: Groups and the Due Process Clause*, 55 UCLA L. REV. 99, 102 (2007) (arguing that equal citizenship gives citizens a right to respect and rights to participation in public life); Kenneth L. Karst, *Why Equality Matters*, 17 GA. L. REV. 245, 248 (1983) (arguing that the chief citizenship values are respect, participation, and responsibility to the community and its members); Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 335 (2006) (arguing that the citizenship clause of the Fourteenth Amendment guarantees equal rights to membership, participation, and dignity).

59. For a definition of “social equality” as being “a society in which people regard and treat one another as equals,” see MILLER, *supra* note 8, at 232. See also Miller, *supra* note 20, at 198-99 (describing social equality as the type of equality that describes the character of relationships); David Miller, *Introduction*, in PLURALISM, JUSTICE, AND EQUALITY, *supra* note 20, at 1, 12 (summarizing the notion of “complex equality” as a society in which relationships between persons “manifest a certain kind of equality”). Jack M. Balkin has recently outlined a tripartite theory for equality, as defined by the Supreme Court—civil, social, and political. He would put the ability to “sue and be sued” in the “civil equality” category. See Jack M. Balkin, Plessy, Brown, and Grutter: *A Play in Three Acts*, 26 CARDOZO L. REV. 1689, 1694 (2005).

60. See DAVID SCHMIDTZ, ELEMENTS OF JUSTICE 117 (“[E]galitarians such as Walzer, Young, and Anderson seem to be regrouping under the banner of an egalitarianism that

tied closely to the moral ideal of equal accountability or answerability.⁶¹ This is equality as a social relationship—and we can think about it as something between you and me.⁶² The idea is that people can look out in the world, in their community, and in their society and say: “I am equal to you and you are equal to me.”

What does civil recourse have to do with any of these kinds of abstract conceptions of equality? By empowering individuals with the right to recourse, the state affirms relational equality in giving individuals the authority to make demands of others and also the obligation to respond to those demands. And then in exercising the right, in the “doing” of recourse, the power allows an individual to say in a very concrete way: You are not better than me. You cannot do that to me. You owe me answers and amends.

In essence, the state demonstrates a commitment to social equality through the “empowering”—simply through the distribution of the right—and then again in the “doing”⁶³—providing a forum for individuals to make putatively legitimate demands of those who have

has roots in a nineteenth-century rebellion against oppression, when egalitarianism was a genuinely liberal movement, allied with nineteenth-century utilitarianism in opposing authoritarian aristocracy.”). Jonathan Wolff also attributes the roots of these egalitarians to the early nineteenth century. See Jonathan Wolff, *Equality: The Recent History of an Idea*, 4 J. MORAL PHIL. 125, 134 (2007) (“This move towards ‘relational’ or ‘social’ equality picks up a concern running from a older tradition in thinking of equality, exemplified in the works of such thinkers as R.H. Tawney . . .”). See also R.H. TAWNEY, *EQUALITY* 86-88 (1931), for a discussion of social equality and the demerits of a system marked by differences of respect based on class distinctions.

61. See *supra* notes 4-7 and accompanying text. For more on how the ideal of mutual accountability or answerability is an important aspect of tort law, see Hershovitz, *supra* note 38, at 135-37.

62. For example, Elizabeth Anderson acknowledges that a relation of respect between individuals is a fundamental component of equality. See Elizabeth Anderson, *What is the Point of Equality?*, 109 ETHICS 287, 336 (1999). For other accounts of equality that emphasize a relational component, see Timothy Hinton, *Must Egalitarians Choose between Fairness and Respect?*, 30 PHIL. & PUB. AFF. 72, 80 (2001) (arguing that for equality to prevail, unjust social relations between groups must be eliminated); Hee-Kang Kim, *Equality as an Evaluation of Social Relations*, 20 PUB. AFF. Q. 313, 313 (2006) (noting that “[u]nderstanding social relations is central to theorizing equality, and the purpose of egalitarian theory is to maintain and promote just social relations in which groups of people stand in relation to one another as equals”); Richard Norman, *Equality, Priority, and Social Justice*, 12 RATIO 178, 191 (1999) (arguing that the moral significance of equality lies in the nature of social relations); Samuel Scheffler, *What is Egalitarianism?*, 31 PHIL. & PUB. AFF. 5, 33-34 (2003) (arguing that equality is most compelling when the relationship between individuals has the structure and character of a “society of equals”); and Jonathon Wolff, *Fairness, Respect, and the Egalitarian Ethos*, 27 PHIL. & PUB. AFF. 97, 109 (1998) (noting that equality is a relation of respect and self-respect: “I am your equal, not your superior”).

63. See Hershovitz, *supra* note 38 (describing these as tort’s “collateral benefits”); John Gardner, *The Mark of Responsibility*, 23 O.J.L.S 157, 167 (2003) (“The fundamental point is to have structured explanatory dialogues in public, in which the object of explanation is ourselves. This point is not a point relative to which the procedure is instrumental; rather the point is *in* the procedure.”).

wronged them. This forum is not necessarily a courtroom but simply the legal system itself and all that operates in its shadow.

A. *Equality of Status*

In thinking about the “equality of what?” question, then, this analysis of the nature of the wrong and the response tells us that we are talking about equality of status or social power. Let us define “status” for these purposes, following David Miller, as “a person’s basic standing within a society, as manifested by the way in which he or she is regarded by the public institutions and by other individuals.”⁶⁴ And true equality of status would achieve the social- equality ideal described above.⁶⁵

In a sense, the wrong is taking advantage of another’s vulnerability—defined as the embodiment of susceptibility to harm—by showing her insufficient care. In doing so, the wrongdoer is treating her as less than an equal.⁶⁶ Empowering the victim makes clear that the “public institutions” do not share the view of her “basic standing within . . . society” evidenced by the wrongdoer’s conduct and serves as a counter to the harm and its stark reminder of human vulnerability.⁶⁷ And in exercising the right to recourse—in the doing of justice—the one empowered is able to remind the wrongdoer that she is worth respect and attention, and thus her status is that of an equal.

The mistreatment at issue in civil justice tends to take place in the particular transaction or incident. But most wrongs are also grounded in a social relationship which makes one person vulnerable to another. Familiar examples include a doctor and his patient, a business and its customers, a product manufacturer and the product user.⁶⁸ To be sure, a person can be vulnerable one day and the dominator the next. And people can be vulnerable to one another at the same time, such as two drivers on a highway.

Exercising too much liberty in violation of another’s security offends the notion of a community of equals by taking more than one’s fair share.⁶⁹ In doing so, it says that I am more important than you,

64. Miller, *supra* note 20, at 206. Miller offered this definition as part of interpreting Michael Walzer’s idea of “complex equality.” *Id.*

65. See MILLER, *supra* note 8, at 232 (using the terms “equality of status” and “social equality” synonymously).

66. See Martin Stone, *The Significance of Doing and Suffering*, in PHILOSOPHY AND THE LAW OF TORTS 159 (Gerald J. Postema ed., 2001) (arguing that the wrongfulness in tort, according to Aristotle’s version of corrective justice, can be seen as acting in a way that is “inconsistent with the equal status of other affected agents”).

67. Miller, *supra* note 20, at 206.

68. See *supra* text accompanying notes 29-31.

69. For Zipursky’s definition of the underlying right, see Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999, 2040 (2007) (“Part and parcel of the idea that such mutual care is a basic expectation of one another is the idea that to injure someone through failing to take such care is to wrong that person.”). For Ripstein’s

or my plans and goals are more important than yours—which is highly objectionable from the standpoint of a liberal society with equal status. To allow such things to go unchecked would be to acquiesce in an inegalitarian society.

In this way, we can see the moral perspective of reciprocal rights and obligations explicated through Darwall’s second-person standpoint turned into a political ideal that recognizes that in order to have genuine social relationships of equality, we need to give individuals “normative powers” that they perhaps did not have before the state, before law.⁷⁰

B. Equality in the Empowering

When equality has been invoked by the recourse theorists, it has been in the sense of *the state* showing equal respect for, or underscoring the equal moral worth of, all persons by providing recourse to hold others accountable when they have been wronged.⁷¹ In setting up a system whereby individuals can make demands of others, and others are treated as responsible agents who can respond to those moral claims, the state underscores the *moral authority* of both plaintiffs and defendants.⁷² Here, the right to recourse promotes social equality simply because it exists.⁷³

How exactly does the right to recourse help contribute to social equality? Ex ante, it provides a signal, a mark, a little like a tattoo—the right to recourse—you either have it or not. And if you have it, it means you are someone to be reckoned with or someone whose well-being one must consider.⁷⁴

discussion, see ARTHUR RIPSTEIN, EQUALITY, RESPONSIBILITY, AND THE LAW 49-50 (paperback ed. 2001) and Ripstein, *supra* note 17, at 1820-21. Keating also discusses the balance between the exercise of liberty and security. Gregory C. Keating, *Rawlsian Fairness and Regime Choice in the Law of Accidents*, 72 FORDHAM L. REV. 1857, 1859 (2004).

70. See Joseph Raz, *Voluntary Obligations and Normative Powers* (pt. II), 46 PROC. ARISTOTELIAN SOC’Y 59 (Supp. 1972).

71. This sense of equality as state-provided “equal respect” is consistent with Ronald Dworkin’s overall political theory account in SOVEREIGN VIRTUE: THE THEORY AND PRACTICE OF EQUALITY. See DWORKIN, *supra* note 50.

72. See Stephen Darwall & Julian Darwall, *Civil Recourse as Mutual Accountability*, 39 FLA. ST. U. L. REV. 17, 30-31 (2011); see also Stephen Darwall, *Justice and Retaliation*, 39 PHIL. PAPERS 315, 324-26 (2010).

73. As John Goldberg put it, “As the Framers of the Fourteenth Amendment understood, to render a person capable of suing (and being sued) for injuries suffered (and caused) is to enforce a conception of equality.” Goldberg, *supra* note 42, at 607-08. “While today some immunities remain, and wealthy defendants undoubtedly enjoy important advantages in the litigation system, tort law instantiates a notion of equality.” *Id.* at 608; see also Goldberg & Zipursky, *supra* note 42, at 982 (“[H]olding individuals accountable . . . reinforces a notion of democratic equality . . .”).

74. See PETER M. GERHART, TORT LAW AND SOCIAL MORALITY 5 (2010) (“[Tort law] determines when and how an actor must consider the well-being of others when deciding how to act.”); see also Arthur Ripstein, *Closing the Gap*, 9 THEORETICAL INQUIRIES L. 61, 76 (2008) (“The standard of care is objective, because it permits each person to impose the

But does anyone really know it exists? Do people think about the fact that they can sue others who have wronged them?⁷⁵ I would argue that they do, even if they do not know the specifics of when they can do so. They may know this through the media, by seeing on television or reading news accounts of other lawsuits. Perhaps they or someone they know has been involved in a lawsuit.⁷⁶ Perhaps they have served on a civil jury.

People have a general understanding that if something goes wrong, you can always “sue the bastard.” And that might well give people a sense that they have some degree of empowerment,⁷⁷ even if they never use the right of action and even if they do not know the precise circumstances when they could take advantage of it.

The wrong that gives rise to the right to recourse is the failure to moderate one’s own exercise of liberty in light of others’ liberty and security interests. In doing so, the wrongdoer has treated the individual harmed as less than a social equal, someone not worthy of equal respect. The wronged individual’s interests were treated as less important than the wrongdoer’s, and the wrongdoer took advantage of the individual’s (inevitable) vulnerability.

The logical response, then, is one of empowerment—the flipside of vulnerability. The state’s interest is in underscoring, for the specific wrongdoer and others, the obligations they owe to all and in affirming the victim’s status as a moral and social equal worthy of respect. So the right to recourse is a means of empowering the victim by providing the political authority for, and therefore underscoring the legitimacy of, making demands on the wrongdoer.

C. Equality in the “Doing”

Once the complaint is brought, and litigation begins, the “doing” itself may show social equality.⁷⁸ As Milner Ball, Robert Burns, and

same degree of risk on others as others impose on them.”); Zipursky, *supra* note 69, at 2033-40 (explaining the “civil competency theory” of the reasonable person standard).

75. For an overview of what we know and what we do not know about who brings lawsuits and why, see generally Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don’t Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L. REV. 4 (1983). See also Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1286-88 (1992) (arguing that data collected about the civil justice is strikingly deficient).

76. According to a 1992 survey commissioned by the American Bar Association, about 20% of Americans have sued someone and about 16% have been sued. Gary A. Hengstler, *Vox Populi: The Public Perception of Lawyers: ABA Poll*, 79 A.B.A. J. 60, 60-61 (1993).

77. Ronen Perry, *Empowerment and Tort Law*, 76 TENN. L. REV. 959, 979-80 (2009) (“Civil litigation may serve to empower victims in several ways.”).

78. See Gardner, *supra* note 63, at 167 (arguing that “the point is *in* the procedure”); see also Hershovitz, *supra* note 38, at 103 (noting that tort procedures are themselves “a way of doing justice”); William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1881 (2002) (noting that procedures can “generate greater equality,” which can enhance social equality).

others have pointed out, the formality and ritual of the trial embodies a commitment to equal respect for each party, whether they are accused of wrongdoing or alleging wrongdoing, rich or poor.⁷⁹ Conversely, a lack of proper process can undermine social equality, or weaken the underlying right, as is seen in a variety of contexts.⁸⁰ Even if the answers do not come in open court, they still come in depositions or even earlier than that, with defendants having to explain to their lawyers what they did for the purposes of settlement.⁸¹ The point is, defendants cannot exercise too much liberty, infringe on another's security, and simply walk away.

When the harm occurs, the wrongdoers know they owe the victims a settling of accounts.⁸² As creditors of sorts, the victims will not just go away.⁸³ They must be dealt with. After accounts have been settled, the plaintiffs may feel that they have received some kind of response and are not left powerless after suffering harm.⁸⁴ The defendants

79. See MILNER S. BALL, *THE PROMISE OF AMERICAN LAW: A THEOLOGICAL, HUMANISTIC VIEW OF LEGAL PROCESS* 46 (1981); Robert P. Burns, *What Will We Lose if the Trial Vanishes?* 2 (Nw. Univ. Sch. Law: Pub. Law & Legal Theory Research Paper Series, Paper No. 11-48, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1851776.

80. For discussions about the importance of procedure to equality in a variety of contexts see, for example, Robert G. Bone, *Twombly, Pleading Rules, and the Regulation of Court Access*, 94 IOWA L. REV. 873, 908 (2009) (noting that, with regard to guaranteeing access to procedural rights, "respect for individual dignity applies equally to defendants and plaintiffs"); Brittany A. Olwine, *One Step Forward, But Two Steps Back: Why Gacaca in Rwanda is Jeopardizing the Good Effect of Akayesu on Women's Rights*, 17 WM. & MARY J. WOMEN & L. 639, 653-56 (2011) (demonstrating how an informal trial known as "gacaca" in Rwanda has undermined the impact of recognizing rape as a crime against humanity); and Judith Resnik, *Whither and Whether Adjudication?*, 86 B.U. L. REV. 1101, 1150 (2006) (noting that the process of litigation offers people dignity and recognition).

81. See, e.g., A.M. Linden, *Tort Law as Ombudsman*, 51 CAN. BAR REV. 155, 159 (1973) (describing litigation over the drug thalidomide, where few cases went to trial but there was much public discussion, and the company's "executive officers . . . had to spend many hours examining their practices, engaging in discussions with lawyers, and justifying their stewardship to their shareholders").

82. WILLIAM IAN MILLER, *EYE FOR AN EYE* 17-20 (2006) (noting the importance of "[g]etting the measure right" such that both parties can sense the rightness in it is at the core of systems of justice).

83. For a discussion of debt as a social relationship, see Margaret Atwood, Op-Ed., *A Matter of Life and Debt*, N.Y. TIMES, Oct. 22, 2008, <http://www.nytimes.com/2008/10/22/opinion/22atwood.html> ("If you don't pay back what's owed, you cause harm to others.").

84. For a comparative study of litigants' perception of different procedures within the civil justice system post-litigation, see FRANK A. SLOAN ET AL., *SUING FOR MEDICAL MALPRACTICE* 9 (1993) ("Overall, claimants appear to be satisfied with the process even when they do not receive compensation."); E. Allan Lind et al., *In the Eye of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 LAW & SOC'Y REV. 953, 967 (1990) ("As one might expect, trials were seen as more dignified and more careful than bilateral settlements. Litigants in trials also reported that they understood the litigation process better and that they felt they participated more than did litigants in bilateral settlement cases."); and Judith Resnik et al., *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 372 (1996) ("Litigants whose cases were decided by trial or arbitration found those experiences more fair, dignified, and careful than did those whose cases ended by negotiations with or without a judge."). See also Tamara Relis, *"It's Not About the Money!": A Theory on Misconceptions of*

may realize that their obligations extend to a wider circle than their immediate family, friends, and colleagues.⁸⁵

Importantly, the “doing” instantiates social equality by pushing back against *inequality*. That is, a certain kind of equality—one that is about social relations, the relations of individuals (or sometimes groups) to one another—is affirmed by efforts to abolish inequality, hierarchies, and differences in status unrelated to merit (say, skin color as a factor in hiring in a society where people of color have always been second-class citizens).⁸⁶

The philosopher Elizabeth Anderson relies particularly on the civil rights movement as an example of this kind of equality. The civil rights movement in large part, as she describes it, worked to erase this kind of status hierarchy.⁸⁷ In a sense, it was less about achieving some kind of affirmative ideal than about tearing down the existing order of inequality.⁸⁸ If you were black or if you were a woman, the then-existing hierarchy said you were of lower status. The civil rights movement came along and said: “No, we are going to tear that down.”⁸⁹ In the same way, exercising the right to recourse is a way of combating the inequality expressed through the wrong of failing to respect another’s interests.

In bringing the lawsuit itself, the plaintiff makes a demand and does say, implicitly or explicitly: “You cannot do that to me.” This is “acting against” the defendant in the way that if someone rear-ends your car and drives away, you might call the police—to make sure the other driver is held accountable, to stand up for yourself, and to communicate that you will not take it lying down.

Plaintiffs’ Litigation Aims, 68 U. PITT. L. REV. 341 (2007) (arguing that plaintiffs’ desire to sue for answers and dignity is, in general, not sufficiently taken into account by their lawyers and that plaintiffs experience frustration as a result).

85. Implicit in this is that the defendant may be more mindful of others’ well-being going forward. This sounds a lot like a deterrence rationale, and to a certain extent, it is; however, in talking about social and moral obligations, I mean a very different kind of reason than regulating risky activity. Thanks to Trotter Hardy for pushing me on this point. T.M. SCANLON, WHAT WE OWE TO EACH OTHER 153-58 (1998) (offering an account of moral motivation that is grounded, in part, on the idea of “justifiability to others”). For a discussion of deterrence in tort theory, see John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 579-80 (2003).

86. See Elizabeth Anderson, Reply to Criticisms of *What is the Point of Equality?*, BROWN ELECTRONIC ARTICLE REV. SERVICE (Jamie Dreier & David Estlund eds.) (Dec. 22, 1999), <http://www.brown.edu/Departments/Philosophy/bears/9912ande.html>.

87. *Id.*

88. Anderson uses the famous *Brown v. Board of Education* case as an example. For a discussion of how *Brown v. Board of Education* relates to relational equality, see Anderson, *supra* note 86 (discussing *Brown v. Bd. of Educ.*, 347 U.S. 483, 495 (1954) (noting that separate but equal is “inherently” unequal)).

89. See generally RICHARD KLUGER, SIMPLE JUSTICE (rev. ed. 2004) (telling the story of the lawsuit that led to *Brown v. Board of Education* as part of the civil rights movement’s struggle for greater social equality to rectify the gap between the country’s ideal of equality and the inequality that faced African Americans).

It is a different kind of “acting against,” though, than chasing the car yourself and rear-ending her in return. That would be inflicting pain on another because of the pain you suffered from that person—properly considered revenge or retaliation—and normatively frowned upon. Calling the police is not.⁹⁰ By providing civil recourse, we help combat inequality through a mechanism where the person treated as less than an equal can say: “You are not better than me.”⁹¹

This way of instantiating equality—by acting *against inequality*—is familiar in our structure of government. It is constitutional, having been identified by legal scholars as part of an “anti-caste” principle through both the Fourteenth Amendment and other parts of the Constitution.⁹² In this sense, it operates to express and operationalize the ideal that no one will be treated as second-class citizens because of some reason unrelated to the merit of whatever is at issue. This is most visible in the Equal Protection Clause and associated claims, but we can also see this principle in Title VII discrimination claims, giving employees and prospective employees a tool to demand that employers not treat them as second-class citizens because of immutable characteristics like race or gender, or core beliefs like religion.⁹³ It is even reflected in statutes such as the Securities Exchange Act of 1934,⁹⁴ which was passed after millions of small investors were left in ruins after people lied to them about the value of investments.

And it is reflected in the common law, adopted in all states initially so that the colonists could have the “rights of English citizens,” including the right to recourse against those who had wronged them.

90. For more on the distinction between acting against someone for retaliation, versus to demand answers or hold someone accountable, see Solomon, *supra* note 4, at 1812-14.

91. Two tort scholars that come close to this idea, I believe, are Allen Linden and Joseph Little. See Linden, *supra* note 81, at 55; Allen M. Linden, *Reconsidering Tort Law as Ombudsman*, in ISSUES IN TORT LAW 1, 21 (Freda M. Steel & Sanda Rogers-Magnet eds., 1983) (“Tort law, with its human focus, enables individuals to protest peacefully and rationally against the abuse of power.”); Joseph W. Little, *Up With Torts*, 24 SAN DIEGO L. REV. 861 (1987). See also Jack B. Weinstein, *The Role of Judges in a Government Of, By, and For the People: Notes for the Fifty-Eighth Cardozo Lecture*, 30 CARDOZO L. REV. 8, 167 (2008) (“Tort law is our primary fall-back method of empowering ordinary people to remedy injustices to themselves through the court system.”). Though scholars such as Thomas Koenig, Michael Rustad, and Carl Bogus emphasize the ways in which tort law can make up for imbalances of power, their work emphasizes the instrumental benefits to society, while mine emphasizes the effect on individuals and their relations to one another. See generally THOMAS KOENIG & MICHAEL RUSTAD, IN DEFENSE OF TORT LAW (2003); CARL T. BOGUS, WHY LAWSUITS ARE GOOD FOR AMERICA (2001); see also Perry, *supra* note 77, at 959 (analyzing “the empowering and disempowering effects of the law”).

92. See Cass R. Sunstein, *The Anticaste Principle*, 92 MICH. L. REV. 2410, 2411 (1994); see also CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 338-39 (1993).

93. Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2006). See also Ed Rubin, *The Obama Administration and the Rise of Positive Constitutional Rights to Sustenance, Health, Housing and Education*, Conference on the Constitution in the Age of Obama, presentation at the William and Mary Law Review Symposium: Constitutional Transformations: the State, the Citizen, and the Changing Role of Government (Feb. 25, 2011).

94. 15 U.S.C. §§ 77a–77aa (2006).

Indeed, the Supreme Court has called “the right to sue and defend in the courts” one of the “most essential privileges of citizenship.”⁹⁵ It is in the same family as other kinds of rights and other aspects of government, but it plays a distinctive role.

To be sure, whether or not the exercise of the right to recourse actually promotes social equality will depend greatly on the social context.⁹⁶ If suing someone is frowned upon, thought to be poor form, then the right to recourse might not increase social equality or provide a certain minimum level of status or respect that aims towards social equality.⁹⁷ Indeed, this may well be the case in many parts of the United States today.⁹⁸ But if the social context is such that exercising the right might instantiate social equality, then it must be distributed according to just principles, in a way that does not contribute to existing social inequalities.

In the next Part, I briefly explore the distinctive aspects of civil recourse theory by comparing the current civil justice system to three alternative models: (1) criminal law; (2) an accident compensation system like New Zealand where individuals apply to the government for compensation; and (3) a civil justice system where apologies, not money damages, are the primary mode of repair.⁹⁹

95. *Chambers v. Baltimore*, 207 U.S. 142, 148 (1903) (dictum) (“The right to sue and defend in the courts . . . is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship . . . Equality of treatment in this respect is not left to depend upon comity between the states, but is granted and protected by the Federal Constitution.”); *see also Lindsey v. Normet*, 405 U.S. 56, 85 (1972) (Douglas, J., dissenting) (stating that “due process entails the right ‘to sue and defend in the courts,’ a right we have described as ‘the alternative of force’ in an organized society” (citing *Chambers*, 207 U.S. at 148)); Goldberg, *supra* note 42, at 586-87 (arguing that the Due Process Clause protects the “right to redress”). Despite the rhetoric in *Chambers*, the Court has not always protected this right with such vigor.

96. For a comparison of litigation in the United States with other countries, see Galanter, *supra* note 75, at 55-61 (noting that, at least in Japan, alternatives to litigation developed because elites believed “that litigation was destructive to a hierarchical social order” (quoting John Owen Haley, *The Myth of the Reluctant Litigant*, 4 J. JAPANESE STUD. 359, 373 (1978))); *see also* TOM GINSBURG & ROBERT A. KAGAN, *Introduction: Institutional-ist Approaches to Courts as Political Actors*, in INSTITUTIONS & PUBLIC LAW: COMPARATIVE APPROACHES 5-6 (Tom Ginsburg & Robert A. Kagan eds., 2005); David M. Engel, *Landscapes of the Law: Injury, Remedy, and Social Change in Thailand*, 43 LAW & SOC’Y REV. 61, 89 (2009) (discussing how delocalization in northern Thailand has reduced the likelihood for compensation of injuries through civil suits because of social conceptions of injury and the law); David M. Engel, *The Oven Bird’s Song*, 18 LAW & SOC’Y REV. 551, 551-54 (1984) (showing how the values of self-reliance and individualism in a rural American community caused citizens to frown upon people who brought law suits) [hereinafter, Engel, *Bird’s Song*].

97. *See* Engel, *Bird’s Song*, *supra* note 96. Thanks to Pete Alces and Lan Cao for this point.

98. *Id.*

99. In a slightly different context, I have explored two (no-fault and apologies) of these three alternatives before. *See* Solomon, *supra* note 35, at 331-36.

IV. THE DISTINCTIVENESS OF CIVIL RECOURSE

While sharing with corrective justice the view of tort as a law of private wrongs built around a normative connection between the doer” and the “sufferer,”¹⁰⁰ civil recourse theory emphasizes a few aspects of tort law that (arguably) distinguish it from corrective justice theory.¹⁰¹ These include the fact that the plaintiff decides whether to bring a claim, and the plaintiff prosecutes the claim.¹⁰² Even if the civil recourse theorists are misguided in suggesting that these aspects *distinguish* recourse from corrective justice, they are distinct points of emphasis.

That is to say, we might profitably view the debate between civil recourse and corrective justice—as with many legal-theoretical debates—as about which aspects of tort law are essential and which are merely contingent. In this light, a key distinction is that corrective justice theory places the payment of money damages as a central component of the practice of corrective justice, while civil recourse seems to view the remedy of money damages as merely socially and historically contingent, while still playing a sensible role in an institution animated by the right to recourse.

If civil recourse theory is to have any bite—or put differently, to be sufficiently distinguished from corrective justice as to warrant discussion as a separate theory—then the aspects of tort law emphasized by civil recourse must carry the bulk of the normative weight of what makes tort law distinctive, or gives it its normative force.

Put differently, and more sharply in the terms of this Article, the question is whether equal distribution of the right to *recourse*—as opposed to the right to compensation, the right to punish, or anything else—is a key component of a state’s commitment to social equality, as I have argued.

To test our intuitions on this score, we can look at other institutions like tort law where certain features are not present. Consider three such institutions: (1) criminal law, where the state decides whether to bring and prosecutes the claim of wrongdoing; (2) no-fault compensation schemes such as New Zealand accident law or the 9/11 Compensation Fund, where victims apply to the government for compensation and need not prove fault; and (3) a hypothetical tort-law regime where the most common remedy was an apology, and not money damages.

100. These terms are Aristotle’s. See ARISTOTLE, NICOMACHEAN ETHICS bk. V, at 125 (Terence Irwin trans., Hackett Publ’g Co. 1985) (c. 384 B.C.E.).

101. I do not mean to suggest that civil recourse is exclusively a theory about the structure and remedy of tort law. The writings of the principal recourse theorists also have a lot to say about primary rights and wrongs, but while valuable, these are largely consistent with corrective justice theory. I focus here on the arguable differences.

102. See Zipursky, *Civil Recourse*, *supra* 45.

A. Criminal Law

Like tort law, criminal law can be conceived as a mechanism for responding to wrongs. Criminal law differs from the dimensions emphasized under civil recourse theory by the fact that the state, not the victim, both decides whether legal action occurs and brings the action. Though some have argued that the state affirms an individual's self-worth by standing up for her in response to a wrong, the individual herself being empowered to respond is stronger.¹⁰³ Moreover, in criminal law, the state decides what is an adequate response to the wrong from the wrongdoer in deciding what kind of plea agreement to accept. In civil justice, the victim decides what constitutes adequate amends.

Criminal law, then, fails to acknowledge the individual's agency. Because the individual does not decide whether to bring the action, she is still in that place of vulnerability or dependency. To be sure, recent efforts to give victims a more active role in criminal justice proceedings may change this assessment a bit.¹⁰⁴ But for now, one could argue that by being dependent on the state for recourse, the state affirms her position of dependency.

B. No-Fault Systems

The answer for many scholars to the problems of the tort system is to move to a no-fault system of *social insurance* for accidents, like in New Zealand. In that system, when people get harmed, the government provides resources for people who are injured, funded by a general tax, and without regard to fault.¹⁰⁵ In such no-fault regimes, the claimants decide whether to bring claims and do so themselves. In this way, no-fault systems are consistent with civil recourse in a way that criminal law is not.

But such a system does not promote equal accountability or advance the relational idea of equality—the idea that we owe one another obligations or answers—in the way that the right to recourse

103. As Nate Oman put it, the helplessness of victims “cannot be remedied by becoming the passive recipient of self-respect that is dispensed by the welfare right by the State.” See Oman, *supra* note 4, at 47.

104. See, e.g., Jayne Barnard, *Listening to Victims*, 79 *FORDHAM L. REV.* 1479 (2011).

105. For an overview of New Zealand's no-fault accident compensation scheme, see Craig Brown, *Deterrence in Tort and No-Fault: The New Zealand Experience*, 73 *CALIF. L. REV.* 976, 982-84 (1985) (describing that, in New Zealand, the Accident Compensation Act makes it mandatory for victims of automobile accidents, whether at fault or not, to seek redress from a government fund, as opposed to bringing a tort action for damages). See also Peter Davis et al., *Compensation for Medical Injury in New Zealand: Does “No-Fault” Increase the Level of Claims Making and Reduce Social and Clinical Selectivity?*, 27 *J. HEALTH POL. POL'Y & L.* 833, 835-37 (2002); Peter H. Schuck, *Tort Reform, Kiwi-Style*, 27 *YALE L. & POL'Y REV.* 187 (2008); Rosemary Tobin & Elsabe Schoeman, *The New Zealand Accident Compensation Scheme: The Statutory Bar and the Conflict of Laws*, 53 *AM. J. COMP. L.* 493 (2005).

does by literally allowing an individual to confront another and forcing the other to answer.

Indeed, this was a criticism that some made of the 9/11 Victim Compensation Fund, a no-fault compensation mechanism set up in the wake of the September 11 terrorist attacks. As Gillian Hadfield put it, civil litigation would be

the only way that a housewife from New Jersey, for example, can make the President of American Airlines or the owner of the World Trade Center show up and answer questions about her husband's death, demanding information about what security screening procedures were followed or not and why, what fire safety measures were taken or not and why.¹⁰⁶

Because the claimants in no-fault systems are generally not empowered to demand answers about why and how they were wronged, no-fault does not retain the normative force of the civil justice system, as explicated through recourse theory.

C. Apologies as a Remedy

We can also think of a hypothetical civil justice system where apologies are the most common remedy, as opposed to money damages. Indeed, many hospitals and doctors have adopted policies in the last several years to apologize to patients and their families in cases of arguable medical error. Research has shown that these apology practices have significantly decreased the number of medical malpractice claims brought.¹⁰⁷ If one views civil justice as a way of forcing actors to internalize the costs of their risky activities, as some economists do, or as a second-best mechanism of "giving back" individuals their means, as some corrective justice theorists do,¹⁰⁸ then apologies are not consistent with a civil justice system.

106. Gillian K. Hadfield, *The September 11th Victim Compensation Fund: "An Unprecedented Experiment in American Democracy"* 23 (S. Cal. Legal Stud. Res. Paper No. 05-7, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=690401. Hadfield describes this as the "normative procedural aspect of litigation: the capacity of a citizen to bring to bear the power of the state to demand an accounting for allegations of wrongdoing in open court." *Id.* at 15.

107. See Jennifer K. Robbennolt, *What We Know and Don't Know About the Role of Apologies in Resolving Health Care Disputes*, 21 GA. ST. U. L. REV. 1009, 1015-24 (2005) (reviewing the survey, experimental, and case study evidence, but cautioning that considerably more empirical research remains to be done); Lee Taft, *Apology and Medical Mistake: Opportunity or Foil?*, 14 ANNALS HEALTH L. 55, 85-87 (2005) (reviewing the evidence, consisting largely of case studies); see also Aaron Lazare, *The Healing Forces of Apology in Medical Practice and Beyond*, 57 DEPAUL L. REV. 251, 256-64 (2008) (discussing the potential positive consequences of medical professionals apologizing to victims of malpractice, while noting some risks of such apologies).

108. See Ripstein, *supra* note 25, at 1982-84 (explaining the relationship between the wrong and the damages remedy in tort in these terms).

But a civil recourse view, at least of the kind I have described here, might see a genuine apology as precisely the kind of interpersonal expression of equality and accountability that ought to be promoted.¹⁰⁹ The apology has the unusual and quite powerful qualities of personally acknowledging and affirming the right of the person harmed to demand an explanation and the obligation of the wrongdoer to provide one.

Taking responsibility through an apology is a way the wrongdoer says: “Yes, I recognize that I owe and owed obligations to you, and I violated those obligations.” In looking the person in the eye, the wrongdoer acknowledges the other person as a social equal, whose interests are worthy of respect.

Some have argued that apologies in the shadow of potential lawsuits—or as a court-ordered remedy—are not genuine and therefore have no moral force. Even if the presence of mixed motives diminishes the moral strength of the apology, though, it may have value in a civil recourse framework. To the extent that victims and their families want an explanation of what happened or an acceptance of responsibility, an apology may meet those desires. Moreover, the fact that the victim receives an answer or explanation means that an apology may better meet the demands of civil recourse than the payment of money damages, and certainly than no-fault systems.

These examples—criminal law, no-fault systems, and apologies as a remedy—help highlight the key distinctive features of the right to recourse. First, there is the direct relational aspect of the way that it expresses, before any harm is occurred, that you have rights against others, and they have obligations to you. Then, that expression is made concrete after harm has occurred by allowing victims the autonomy to bring a lawsuit themselves, to decide whether to bring it at all, and to determine on what terms to make amends and to what degree to accept some measure of accountability.¹¹⁰ The expression is further strengthened by the fact that the response to this demand—whether in the form of an explanation, an acknowledgment of wrongdoing, or even a silent offer of compensation—must be directed to the victim, the one who has been wronged and who had the moral authority to make the demand in the first place.

V. OBJECTIONS

In this Part, I consider two broad sets of objections to this justification of civil recourse. Recall the basic claim: Tort law is justified in part as a fair distribution of the right to hold accountable those who

109. *But see* Goldberg, *supra* note 42, at 602-03 (suggesting that an apology would not provide “satisfaction” to those who suffered significant harm).

110. *See* Zipursky, *Civil Recourse*, *supra* note 45, at 733-35.

have wronged you by interfering with your rights of personhood and property. And a fair distribution of this right contributes to social or relational equality.

The first set of objections can be summarized as whether this account can really be a plausible justification for *tort law*, as opposed to certain kinds of procedure, litigation finance, or private law generally. The second set of objections asks whether our current tort system is really an important component (or even a positive one) for distributive justice and social equality.

A. *Plausible Justification for Tort Law?*

One set of objections might see the account offered here as too limited and narrow in a few different ways, leading to the conclusion that this cannot be a plausible political justification for tort law.

From one direction, one could ask whether the right to recourse is fairly described as being limited to torts. After all, one could argue that the right to recourse seems to refer to all private law, and so must include contract and property.¹¹¹ One could take this a step further and argue that it refers to any legal right or obligation for which there is a private right of action, thereby going beyond the traditional common law categories and drawing in any number of privately enforceable rights. Then the question becomes whether the right to recourse is usefully thought of as something uniquely justified in the case of tort-like wrongs.

From a slightly different direction, one could argue that the political justification offered here may support certain procedural rules, or a way of financing litigation (such as the contingency fee), that promotes access to the courts. For example, whether one can hold another accountable for wrongs depends heavily on the ability to bring a case and not have it dismissed before discovery, which may be getting more difficult.¹¹² And it might depend on the kind and level of damages available, which will affect the lawyer's willingness to invest resources in the case.

111. See Keating, *supra* note 24, at 43 (“[Providing redress to those whose rights have been violated] is . . . distinctive of private law in general, not of tort law in particular. Contracts, property, and restitution share the same structure.”). *But see* Zipursky, *supra* note 42, at 645-48 (articulating how the right to recourse does fit coherently within all of private law, while still playing a unique role in tort law specifically).

112. See *Ashcroft v. Iqbal*, 129 U.S. 1937 (2009); *Bell Atl. Corp. v. Twombly*, 127 U.S. 1955 (2007). For a discussion of the implications of *Twombly*, see Scott Dodson, *Pleading Standards After Bell Atlantic Corp. v. Twombly*, 93 VA. L. REV. IN BRIEF 135, 140 (July 9, 2007), <http://www.virginialawreview.org/inbrief/2007/07/09/dodson.pdf> (“In short, the best reading of *Bell Atlantic* is that Rule 8 now requires notice-plus pleading for all cases.”) and Hillel Y. Levin, *Iqbal, Twombly, and the Lessons of the Celotex Trilogy*, 14 LEWIS & CLARK L. REV. 143, 150-51 (2010). Thanks to Scott Dodson for pressing me on this point.

But litigation finance and procedure are peripheral to what we think of as “tort law,” which includes certain concepts and doctrine, a set of limits internal to that area of law, and perhaps institutional practices like the normative power of the civil jury. So the argument goes.

Together, these arguments add up to an objection that the justification of distributive justice in service of social equality encompasses at once too much (all private law) and too little (no real tort doctrine). These objections have some force, and I leave to another day the question of how well civil recourse fits with the rest of private law.

For now, we can say that it is *particularly* appropriate that someone who is harmed through a lack of due care by another—a sign that the vulnerable person is not worth worrying about—is empowered to stand up as a social equal and make a putatively legitimate demand of the person who wronged her. And we can acknowledge that in evaluating the value of tort law, we have to look at the institution through which it is implemented, not simply the particular rules under the heading “Torts.”¹¹³ Indeed, the structure of the institution may well be the most important aspect of tort law from a political-theory perspective—that the social-equality ideal is affirmed by allowing an individual to respond to a wrong done to her.

B. Is This the System We Would Really Have If Concerned about Distributive Justice and Social Equality?

One might also raise the following objection: if we define distributive justice broadly, then it can encompass access to justice, status, and the like. And perhaps our existing civil justice system advances these values. But even so, the argument goes, if we look at the effect of tort law on distributive justice overall—that is, if we truly take into account all the social goods implicating distributive justice—then the tort law is a very poor tool for advancing it, and perhaps it creates a net harm to distributive justice.

My response is that I view distributive justice in a scheme, borrowing from Michael Walzer, of “complex equality.”¹¹⁴ In such a scheme, one looks at distributive justice within a variety of spheres, but the distributive justice is contained within each sphere. That is to say, if tort law advances equal distribution of status, respect, and relatedly, access to justice, it is of no moment—or at least does not take away from those achievements—to say that tort law does not advance distributive justice in material goods.

113. See Hershovitz, *supra* note 38, at 136.

114. See WALZER, *supra* note 52, at 19 (“In formal terms, complex equality means that no citizen’s standing in one sphere or with regard to one social good can be undercut by his standing in some other sphere, with regard to some other good.”). For another discussion of complex equality, see generally PLURALISM, JUSTICE, AND EQUALITY, *supra* note 20.

The right to recourse, for example, might fit into Walzer's "security and welfare," in the way it acts to protect the underlying right,¹¹⁵ David Miller's "equality of status," in the way that it gives each individual the standing or moral authority to hold another to account,¹¹⁶ or John Rawls' most important "primary good" of "self-respect."¹¹⁷ Empowering individuals themselves to confront those who have wronged them might foster self-respect in a way that the criminal law does not, for example.

Another form of this objection begins: *If you really cared about distributive justice and social equality, then* One version of this objection follows: *then you ought to support a strict liability, or no-fault system.* Gregory Keating's work supports a version of this argument. For Keating, large-scale, risk-creating enterprises particularly ought to bear the cost without regard to fault because of their superior ability to spread the cost among their customers.¹¹⁸ This is a much more just way to distribute the burden or cost of risks, according to scholars like Keating.

Another version of this "if you really cared" critique focuses on other institutions that work towards this kind of interpersonal social equality as well as, or better than, the civil justice system. For example, public schools, in providing equal opportunity for all citizens, allow individuals to get education that will allow them to relate as equals, regardless of background. Our progressive income tax looks at existing levels of income and does not allow the inequality that results to dominate social relations. Rather, a progressive tax redistributes income to put people on a more equal footing.

But unlike the other institutions that I mentioned—public schools, a progressive tax system, social security, and universal health insurance—tort law, like criminal law, is one of the few public institutions

115. See WALZER, *supra* note 52, at 65-66.

116. Miller argues that this type of equality "is not a good that can be directly distributed equally." Miller, *supra* note 20, at 199. For Miller, status is "a person's basic standing within a society." *Id.* at 206.

117. Although much of the discussion surrounding John Rawls' Theory of Justice concerns the proper distribution of primary goods such as income and wealth, Rawls also includes rights and liberties in his social primary goods category. See JOHN RAWLS, A THEORY OF JUSTICE 54 (rev. ed. 1999) (stating "the chief primary goods at the disposition of society are rights, liberties, [etc.]"). In discussing primary goods, John Rawls acknowledges that "perhaps the most important primary good" is that of self-respect. RAWLS, *supra* note 10, at 396. Although self-respect and the respect of others, the kind of respect that is central to the type of equality that I am arguing civil recourse theory advances, are not the same, surely there is a significant relationship. Rawls, too, acknowledges this: "And for the most part this assurance is sufficient whenever in public life citizens respect one another's ends and adjudicate their political claims in ways that also support their self-esteem." *Id.* at 442.

118. See Keating, *supra* note 19, at 219.

that really treats and engages people as moral agents.¹¹⁹ The institution of tort law treats those who sue as moral agents who have the authority to make demands of others and to hold them accountable. On the flip side, those who are sued are also treated as moral agents who must answer to others and who must take responsibility in this liberal society where individual responsibility is something we care about.¹²⁰ Arguably, this kind of treatment makes a stronger statement about social equality than any tax code ever could.

VI. CONCLUSION: THE STATE OF NATURE

To sum up, the political theory of recourse I present here is an example of a particular way that distributive justice and social equality might relate to one another. The good that is the subject of distributive justice—the right to hold accountable those who have wronged you—is something that the state provides, in part to help constitute a community where individuals relate to one another as equals. The right to recourse is not the only good that helps do this, of course; it may be that the right to vote, a minimum adequate income, and other goods are more important. But the right to recourse, distributed justly, plays a role.

One advantage of viewing civil recourse as a matter of distributive justice, broadly defined, is that it brings other issues into the existing policy debates around the civil justice system. So, for example, I have argued in prior work that thinking about a theory of civil recourse can shed light on contemporary debates on issues like tort reform,¹²¹ punitive and noneconomic damages,¹²² and preemption.¹²³ But think-

119. See Hershovitz, *supra* note 38, at 110 (arguing that tort law treats people as moral agents in a way that regulation does not); see also R.A. DUFF, ANSWERING FOR CRIME 50 (2007) (arguing that criminal law treats citizens as “hav[ing] both rights and responsibilities: we are answerable to each other for our conduct as citizens”); R.A. Duff, *Rule-Violations and Wrongdoings*, in CRIMINAL LAW THEORY (Stephen Shute & A.P. Simester eds., 2002) (arguing that one of the purposes of criminal law is that the community will call their [moral] agents to account through a public criminal process).

120. Solomon, *supra* note 4, at 1806 (“By forcing individuals to respond to a claim of wrong by another, we maintain their autonomy and treat them as part of a continued web of mutual obligation in our moral and political community, deserving of respect.”).

121. Solomon, *supra* note 4, at 1754. I first got the idea from John C.P. Goldberg, *What Are We Reforming? Tort Theory's Place in Debates over Malpractice Reform*, 59 VAND. L. REV. 1075 (2006); see also Goldberg, *supra* note 85, at 580-81 (arguing for the need of a theory of tort law that can make sense of various practices and principles in such a way that judges can have a cohesive account of what it is that they are actually doing).

122. See generally Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105 (2005); see also Dan Markel, *Retributive Damages: A Theory of Punitive Damages as Intermediate Sanction*, 94 CORNELL L. REV. 239 (2009). For another recent discussion of civil recourse and punitive damages, see Avihay Dorfman, *What Is the Point of the Tort Remedy?*, 55 AM. J. JURIS. 105, 140-62 (2010).

123. See Solomon, *supra* note 4, at 1766-71.

ing about the right to recourse as a proper subject of distributive justice brings the question of “access to justice” into the foreground.

The degree of access to justice may not be equal—businesses and wealthy individuals can always hire lawyers to go around suing anyone in sight. But there must be some basic access for individuals to respond to wrongs in order for the right to recourse to be distributively just and to genuinely serve a social-equality ideal.¹²⁴ Whether or not our current system provides such access, and if not, how best to get there, are topics not part of the current debate.¹²⁵ But if this political theory of recourse is plausible, then they should be.

And so it might well be that in constructing a community of equals, the right to recourse is a necessary, or at least an important, ingredient. It might well be that in distributing the right to hold accountable those who have wronged you by unduly interfering with aspects of your personhood, the state helps establish social equality, a set of relationships where, regardless of occupation or background, people address one another as mister and know they need to put on their blinker before changing lanes.

124. See HOLMES, *supra* note 26, at 242 (arguing that classical liberal theorists thought that “[a]ccess to the courts must not be distributed according to merit, contribution, inherited social status, or even prior consent”).

125. See Deborah L. Rhode, *Whatever Happened to Access to Justice?*, 42 LOY. L.A. L. REV. 869 (2009). This is not to say that no one is talking about such matters. President Obama, for example, appointed Harvard Law Professor Lawrence Tribe to be the head of an access to justice initiative in the Justice Department. See Charlie Savage, *For an Obama Mentor, a Nebulous Legal Niche*, N.Y. TIMES, Apr. 7, 2010, at A21.