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# Judging Plaintiffs

Jason M. Solomon

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# Judging Plaintiffs

Jason M. Solomon

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*With its powerful account of the normative principles embodied in the structure and practice of the law of torts, corrective justice is considered the leading moral theory of tort law. It has a significant advantage over instrumental and other moral theories in that it is more consistent with what judges say when they analyze tort law concepts. And with criticism of instrumental accounts, like law and economics, on a number of fronts, it is the leading descriptive theory of tort law.*

*In this Article, I take up a question that has never been answered adequately by corrective-justice or other moral theorists: Why do we judge plaintiffs – their conduct, state of mind and other factors – to determine liability in tort law? This Article attempts to answer that question, and in doing so, shed light on contemporary theoretical, doctrinal, and practical debates about tort law.*

*To do so, I first recast a variety of disparate doctrines in tort law as instances of a singular phenomenon—“judging-plaintiffs law”—and argue that existing explanations of this phenomenon fall short. Next, I suggest that judging-plaintiffs law can be explained and unified through a principle of self-help. Then, I argue that a new moral theory of tort law, civil recourse theory, is uniquely well positioned to explain why plaintiff’s capacity for self-help ought to lead to a judgment of no liability.*

*Finally, I suggest that my interpretation of judging-plaintiffs law lends support to a more robust “right of action” concept in civil recourse theory, and I describe the doctrinal and practical payoff of such an analytic move. I aim to help move the debate over tort theory and doctrine forward by placing civil recourse theory at the center of the discussion.*

# Judging Plaintiffs

Jason M. Solomon\*

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## I. INTRODUCTION

Through the rhetorical force of a few landmark opinions, Judge Benjamin Cardozo helped shape modern American tort law. In *MacPherson v. Buick Motor Co.*,<sup>1</sup> Cardozo led a successful assault on the “citadel of privity,”<sup>2</sup> according to which manufacturers could not be held liable in tort to those with whom they did not have a contractual relationship. *MacPherson* opened the door for the area of law we now know as products liability and, more broadly, towards an understanding of tort law known as “enterprise liability” that saw tort law as a vehicle for identifying the entity best situated to minimize the costs of accidents and accident prevention, as well as spread the loss from harm.<sup>3</sup>

In *Palsgraf v. Long Island Railroad Co.*, Cardozo articulated an understanding of negligence law built on notions of obligation between individuals.<sup>4</sup> His idea was that duties of care ought to be understood relationally, as running from one individual to another, as opposed to Judge Andrews’ dissent, which articulated a duty “to the whole

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1. 111 N.E. 1050 (N.Y. 1916).

2. *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 445 (N.Y. 1931).

3. The development is discussed in George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

4. 162 N.E. 99, 101 (N.Y. 1928).

world.”<sup>5</sup> Though scholars criticized Cardozo’s opinion for years, recent scholarship approves of Cardozo’s opinion as helping to explain moral theories of tort law.<sup>6</sup>

Along with *MacPherson* and *Palsgraf*, another Cardozo opinion sometimes appears in first-year torts casebooks, though it is less celebrated. This case, *Murphy v. Steeplechase Amusement Co.*, involved a man who was injured on a Coney Island amusement park ride known as “the Flopper.”<sup>7</sup> *Murphy* is taught for its articulation of “assumption of risk” themes, and it is remembered for Cardozo’s signature rhetorical flourishes that captured his view of Murphy’s quest for compensation. The plaintiff, Cardozo said, was a “vigorous young man,” and the “timorous may stay at home.”<sup>8</sup> No tort remedy for young Murphy.

Unlike *MacPherson* and *Palsgraf*, this case is largely ignored in debates over the purpose of tort law. But the analytic move employed in *Murphy*—judging the plaintiff in order to determine liability—ought to be as central to our understanding of the normative structure and practical operation of tort law as any Cardozo opinion. Or so I will argue in this Article.

My task here will not be to analyze in great depth the *Murphy* case, or even the “assumption of risk” doctrine for which it stands. This ground has been well covered by other scholars.<sup>9</sup> Rather, I use *Murphy* to call our attention to a nagging and important question that tort theorists never have answered adequately: *Why do we judge plaintiffs—their conduct, choices, and other factors—to determine liability in tort law?* This Article attempts to answer that question and, in doing so, to shed light on contemporary theoretical, doctrinal, and practical debates about tort law.

Instances of judging plaintiffs can be seen most clearly in the form of affirmative defenses like the assumption of risk arguably at issue in *Murphy*, but they also come in the form of sometimes puzzling doctrines that are treated as part of a plaintiff’s prima facie case, such as justifiable reliance in fraud,<sup>10</sup> the public figure doctrine in

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5. *Id.* at 102 (Andrews, J., dissenting).

6. See ARTHUR RIPSTEIN, *EQUALITY, RESPONSIBILITY, AND THE LAW* 66-67 (1999) (approvingly discussing the principle found in *Palsgraf* that an actor’s liability in negligence should be limited to those toward whom the actor is negligent, or wrongs); ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 159-65 (1995) (comparing Cardozo’s and Andrews’ approaches to the duty of care, and favoring that of Cardozo, as Andrews’ approach “makes manifest his failure to integrate negligence and injury”).

7. 166 N.E. 173, 173-74 (N.Y. 1929).

8. *Id.* at 174.

9. See *infra* Section III.B.1 and accompanying notes.

10. See *infra* Section III.A.3.

defamation law,<sup>11</sup> and the reasonableness and contemporaneous awareness requirements in false imprisonment and assault claims.<sup>12</sup> Indeed, these judging-plaintiffs cases are pervasive and have long been a feature of tort law.<sup>13</sup>

The argument proceeds as follows: First, I briefly set out the competing theoretical frameworks for contemporary American tort law, which form the backdrop for my argument.<sup>14</sup> Second, I recast a variety of disparate tort law doctrines as instances of a singular phenomenon—"judging plaintiffs"—and argue that existing explanations for this phenomenon fall short.<sup>15</sup> Third, I suggest that judging-plaintiffs law can be explained and unified through a principle of self-help.<sup>16</sup> Fourth, I argue that a new moral theory of tort law, civil recourse theory, is uniquely well positioned to explain why a plaintiff's capacity for self-help, either to prevent or remedy the wrong, ought to lead to a judgment of no liability.<sup>17</sup> Finally, I suggest that my interpretation of judging-plaintiffs law has important implications for the "right of action" concept in civil recourse theory, which has both a theoretical and a practical payoff for tort law.<sup>18</sup>

The Article's methodology entails using a particular dimension of tort law that is underexplored to critique and build on existing interpretive theories. If a theory does not account adequately for the reasoning and outcomes of judging-plaintiffs cases, it is evidence of the

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11. See *infra* Section III.A.4.

12. See *infra* Sections III.C.1-2.

13. To be sure, to the extent that a descriptive theory of torts includes historical claims about why tort law is the way it is, there may be no puzzle here. The historian can trace notions of contributory negligence, for example, back to Roman law, to early English common law after that, through Blackstone, and on to twentieth century America. Others writing from a more Marxist perspective, like Morton Horwitz, trace contributory negligence's rise to 19th-century judges seeking to subsidize the industrial revolution. See NORMAN F. CANTOR, *IMAGINING THE LAW: COMMON LAW AND THE FOUNDATIONS OF THE AMERICAN LEGAL SYSTEM* 8 (1997) (explaining Horwitz's Marxist approach as the view that "legal systems simply serve as the instruments of dominant classes"). But to the extent that one wants more than historical claims from a positive theory of tort law—and, as I explain below, I think we do—one needs further justification of this social institution.

14. See *infra* Part II.

15. See *infra* Part III.

16. See *infra* Section IV.B.

17. See *infra* Section IV.C.

18. See *infra* Part V. Following in the footsteps of other torts scholars, I am working on a satisfying theoretical framework for what tort law *is*—mostly, I leave whether that is what tort law *ought* to be (or even whether tort law is something that ought to exist) for another day. See, e.g., Stephen D. Sugarman, *Assumption of Risk*, 31 VAL. U. L. REV. 833, 835-36 (1997) (employing a "mixed descriptive/prescriptive" approach to analyzing tort law).

theory's weakness as an interpretive account of tort law.<sup>19</sup> The kind of theory at work here is what Jules Coleman calls "middle-level theory:" looking at the concepts and practices at work in the particular area of law, and asking whether there are broader principles that can help explain and justify these practices.<sup>20</sup>

## II. TORT LAW'S THEORETICAL MOMENT

At all levels—theoretical, doctrinal, and practical—the foundations of American tort law stand on shaky ground. Doctrinally, the *Restatement (Third)*'s Liability for Physical Harm has recently been finalized,<sup>21</sup> yet the place of many fundamental concepts within tort law—duty, proximate cause, and assumption of risk, to name a few—remains up in the air.

In order to explicate the role of these concepts, one might want a descriptive account of tort law. What is tort law's purpose? At a more basic level, what is the institution of tort law?

But consensus is nowhere in sight. Descriptive theories of tort law belong to one of two categories: instrumental or moral.<sup>22</sup> The leading exemplars of each approach, law and economics (instrumental) and corrective justice (moral), have spent much of the past few decades attacking one another as irrelevant, with both sides at a standoff. One of the *Restatement (Third)* drafters, the late Professor Gary Schwartz of UCLA, tried to break the impasse a decade ago by proposing a "mixed theory of tort law."<sup>23</sup> His article took the tone that fellow Angeleno Rodney King had taken a few years earlier in the midst of widespread rioting: "People, I just want to say, you know, can

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19. See Benjamin Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 707 (2003) (explaining "pragmatic conceptualism," based on the approach that "understanding of legal concepts requires an understanding of the structure of practical inferences in which our legal concepts and principles are involved").

20. JULES L. COLEMAN, *RISKS AND WRONGS* 8-9 (1992). I take as a given the desirability of a unifying account for tort law, rather than a pluralist account. Without such a unified account, it is difficult to prevent granular issues in tort doctrine from dissolving into ad hoc policymaking by judges, liberated to choose from an unprioritized menu of policy goals depending on political or other preferences. I recognize that many scholars believe that a unified account is not possible, and I do not defend the desirability of a unified account at any length here.

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (Proposed Final Draft No. 1, 2005).

22. Deontological (morality-based) and consequentialist (what I call instrumental) are alternative denominations for these theoretical camps.

23. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

we all get along?"<sup>24</sup> But Schwartz's plea met with even less success than King's.

The doctrinal and theoretical moment is sharpened by the presence of "tort reform" efforts nationwide, efforts which affect the day-to-day practice of tort law. These are efforts to change tort law legislatively, and the purpose of tort law is relevant to these efforts in two related ways. First, to the extent that the tort reform debates take place on the merits and are about anything but raw clashes of political power (an open question), one needs a descriptive theory of tort law to judge whether a particular change or set of changes will have a beneficial effect on the functioning of tort law. As one scholar recently put it, one ought to start tort reform debates with the question: "What are we reforming?"<sup>25</sup> Second, for those who think tort law has a legitimate and important function, the coherence of and justification for tort law impacts its ability to withstand scrutiny.

The judging-plaintiffs cases are a significant subset of the class of cases that pose the greatest challenge to any explanatory theory of tort law, namely, cases where the defendant foreseeably has caused legally cognizable harm to the plaintiff, yet liability is denied. In this sense, the judging-plaintiffs cases are like the famous *Palsgraf* case, where the defendant railroad's employees carelessly dislodged a package that harmed Mrs. Palsgraf, who was standing at the end of the platform, yet the railroad was not held liable.<sup>26</sup> Indeed, I argue that a new moral theory of tort law—civil recourse theory—is uniquely well positioned to explain judging-plaintiffs law and that judging-plaintiffs law can help illuminate and extend the explanatory power of recourse theory in a way that its architects have not yet articulated.

The following section provides a brief sketch of the leading theoretical accounts of tort law to set the stage for consideration of judging-plaintiffs law and the light it may shed on these theoretical accounts.

#### *A. Instrumentalism and Its Discontents*

Since the publication of Oliver Wendell Holmes' *The Common Law* in 1881,<sup>27</sup> the dominant perspective among scholars is that tort

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24. RALPH KEYES, *THE QUOTE VERIFIER: WHO SAID WHAT, WHERE, AND WHEN* 22 (2006).

25. John C.P. Goldberg, *What Are We Reforming? Tort Theory's Place in Debates over Malpractice Reform*, 59 VAND. L. REV. 1075 (2006).

26. *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 99, 101 (N.Y. 1928).

27. OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* (Dover Publ'ns 1991) (1888).



law can be justified on instrumental grounds<sup>28</sup>—that is, that the social institution we call tort law is designed to achieve one or more of several public policy or social goals, including compensating the injured, deterring or regulating risky activity, achieving an efficient level of accident prevention, and equitably spreading the loss from physical harm.<sup>29</sup>

We might think about instrumental theories of tort law as falling into three categories: compensation-deterrence, enterprise liability, and economic.<sup>30</sup> Compensation-deterrence scholars see tort law as an institution designed to achieve the goals of compensating victims and deterring risky activities that might result in harm.<sup>31</sup> This perspective is ingrained in first-year law students when they are told that tort law is designed to achieve these twin goals. In difficult cases, judges are to assess whether a particular result would best serve these twin goals, both as to the parties before the court and future parties. This view was dominant for much of the twentieth century, but it has been undermined by considerable evidence that our system of tort law neither compensates nor deters particularly well. Another problem is how to determine when these goals conflict. This leads to one of two conclusions: either tort law should be eliminated (a view embraced by many in the late twentieth century) or tort law must be doing something other than compensating and deterring.

A second instrumental theory, “enterprise liability,”<sup>32</sup> is based on the idea that companies that manufacture cars, prescription drugs, or other consumer products are in the best position to spread the risk by passing along the cost of injury to consumers and to minimize the

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28. For a discussion of instrumentalism in legal reasoning, see Robert S. Summers, *Pragmatic Instrumentalism in Twentieth Century American Legal Thought: A Synthesis and Critique of Our Dominant General Theory About Law and Its Use*, 66 CORNELL L. REV. 861 (1981).

29. Here, I refer to what are variously called “descriptive,” “interpretive,” or “positive” theories of tort law—theories that focus on what tort law *is*, as opposed to normative theories that focus on what tort law *ought* to be.

30. See John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521-60 (2003) (grouping instrumental theories within these categories).

31. *Id.* at 525 (“And so we arrive at the baseline proposition of compensation-deterrence theory, repeated at the outset of countless law review articles published in the last fifty years: The function of tort law is to compensate and deter.”).

32. This concept has intellectual founders that include Realists like Fleming James and Leon Green, and economic theorists like Guido Calabresi. See, e.g., Priest, *supra* note 3, at 471, 500 (citing James’ argument that most defendants are enterprises and thus better positioned than individual plaintiffs to distribute risks, and Green’s 1952 declaration that the fault system of tort should be replaced with a simple compensation system); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 514 (1961) (arguing that a compensation system based on enterprise liability “would enhance proper resource allocation”).

cost of accidents by taking efficient levels of precaution.<sup>33</sup> According to this view, tort law is best justified as a means of achieving these loss-spreading and accident-prevention goals. In the enterprise-liability narrative, plaintiff-conduct defenses like assumption of risk will fall away gradually as tort law moves towards principles that treat the problem of accidents as a systemic one, not one of individual morality and fault.<sup>34</sup> But this has not happened. Indeed, with products liability's move away from strict liability principles and the stalled movement towards no-fault auto insurance, enterprise liability has lost plausibility as a descriptive theory, as even its proponents acknowledge.

Under the economic account, the goal of tort law is to maximize social welfare by minimizing the costs of accidents and accident prevention.<sup>35</sup> Liability rules can be both explained and evaluated with reference to this goal. Under this microeconomic perspective, people and companies are the objects of incentives (liability rules) which lead them to increase or decrease their levels of activity depending on how much they are expected to pay if they cause harm to others.<sup>36</sup> At the time this economic account emerged, most tort scholars still saw tort law as a way to provide compensation to the injured and achieve deterrence of risky activities. The economists, however, provided the first comprehensive theoretical framework for understanding tort law. And the economic account provides a coherent account of why we judge the conduct of plaintiffs—like young Murphy on the Flopper—to properly incentivize them to take due care.

Besides the important questions raised about how well tort law achieves these social goals, these instrumental accounts of tort law have come under attack on a more fundamental level in recent years and, as a result, stand on shaky foundations as a plausible justification for tort law.<sup>37</sup> Legal theorists like Jules Coleman and Ernest Weinrib have argued that the economic account does not provide the kind of explanation that an interpretive legal theory

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33. Goldberg, *supra* note 30, at 540.

34. *Id.* at 538-39 (describing the enterprise-liability view that traditional negligence law, with its plaintiff-conduct defenses, is ill-suited to govern the kinds of inevitable accidents that dominate the modern industrialized economy).

35. See GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26 (1970) (taking as "axiomatic" that this is the principal function of accident law); WILLIAM M. LANDES & RICHARD POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 58-62 (1987) (modeling due care levels to minimize the social costs of accidents).

36. Goldberg, *supra* note 30, at 544-60.

37. I am referring here to their interpretive as opposed to normative form. For an overall critique of instrumentalism as a legal theory, see BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006).

demands.<sup>38</sup> That is, its functional account is too detached from the actual practices of the law to provide a legitimate interpretation of it. According to this critique, a legal theory is inadequate if it fails to account for and discuss the concepts and structure that are actually employed by the legal actors within that area of law.<sup>39</sup> Because purely instrumental accounts of tort law, like law and economics, do not provide analyses of tort law concepts, they are inadequate as descriptive theories of tort law.<sup>40</sup>

A version of this “second-order” critique has been around almost as long as law and economics itself. As one scholar sympathetic to interpretative economic theory put it, “From its inception, the economic analysis of the common law has been embarrassed by an open secret: common law decisions are cast in the language of morality, not efficiency . . . .”<sup>41</sup> Terms like “duty,” “assumption of risk,” and “reasonable care” are loaded with morality and, on their face, bereft of utilitarian considerations. If we take seriously H.L.A. Hart’s admonition that legal theory must provide an account of the “internal point of view” of those that operate within the law, then instrumental accounts fail to measure up.<sup>42</sup>

Corrective justice theorists have articulated a more specific and structural version of this critique in the tort law context. The economic account of tort law as a pricing mechanism for risky activity treats plaintiffs as private attorneys general, induced by a bribe (the promise of compensatory damages) to help regulate risky activity.<sup>43</sup> But the account ignores the fundamental “bipolarity” of tort law, according to corrective justice theorists:<sup>44</sup> A plaintiff brings a lawsuit against a

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38. See, e.g., COLEMAN, *supra* note 20, at 382 (“[T]he victim’s connection to his injurer is fundamental and analytic, not tenuous and contingent. Thus, even if the current structure of tort litigation is consistent with economic analysis, it is better understood as embodying some conception of corrective justice.”); WEINRIB, *supra* note 6, at 132-33 (“[E]conomic analysis makes the wrong kind of considerations the primary building blocks of its enterprise. At the core of this treatment lies a straightforward idea: welfare cannot supply the normative underpinning for private law because private law relationships are bipolar and welfare is not.”).

39. Benjamin Zipursky, *Pragmatic Conceptualism*, 6 LEGAL THEORY 457, 466 (2000).

40. *Id.*

41. Jody S. Kraus, *Transparency and Determinacy in Common Law Adjudication: A Philosophical Defense of Explanatory Economic Analysis*, 93 VA. L. REV. 287, 289 (2007).

42. H.L.A. HART, *THE CONCEPT OF LAW* 88-90 (2d ed. 1994); see also STEPHEN A. SMITH, *CONTRACT THEORY* 15 (2004) (“[T]here has been a general agreement that a central feature . . . of [law’s] self-understanding is [its] claim to authority—the claim or belief that law is morally justified.”).

43. WEINRIB, *supra* note 6, at 15.

44. See Ernest J. Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403, 408 (1989) (“[T]he tort relationship is not a means to an end. Rather, each harm done and suffered is the core of a single transaction that relates *this* doer to *this* sufferer . . .”).

defendant, and the defendant, if proven liable, does not pay a fine to the state in the amount necessary to deter future parties. Instead, the defendant pays the plaintiff an amount that is intended to make the plaintiff "whole." The failure of law and economics to account for the bilateral structure of tort law is thus a serious strike against it as a descriptive theory.<sup>45</sup>

On a broader level, instrumentalism as a legal theory raises significant concerns. If law is simply an instrument to achieve a variety of social ends, then judges deciding cases are simply policymakers, no different than legislators, and their legitimacy and institutional competence to make policy is questionable. Concepts in the law are drained of all meaning and are better seen as empty vessels for a particular judge's policy preferences. One might say that the collapse of law into policy is unavoidable, and transparency as to the law's instrumentality is better than judges advancing hidden agendas.<sup>46</sup> But I agree with the critics of instrumentalism who are not willing to cede "the concept of law."<sup>47</sup> I agree with the "second-order" critique of leading instrumental accounts of tort law and therefore focus in this paper on how judging-plaintiffs law can be explained within moral theories of tort law.<sup>48</sup>

### *B. Tort Law as Individual Justice*

What we are left with, then, is a return to a more traditional account of tort law, an account that was dominant before Holmes shaped the horizons of twentieth century tort scholars, an account of tort law as private law or individual justice,<sup>49</sup> not a regulatory scheme that one scholar famously called "public law in disguise."<sup>50</sup>

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45. Zipursky, *supra* note 19, at 703 ("Weinrib and Coleman . . . seem to agree that the bipolarity critique is a powerful argument that economists have never adequately met . . ."). It also fails to explain the causation requirement in tort law—that is, why *all* unreasonably risky activity is not taxed, as opposed to only such activity that causes harm.

46. SMITH, *supra* note 42, at 24-32; Robert L Rabin, *The Duty Concept in Negligence Law: A Comment*, 54 VAND. L. REV. 787, 794 (2001) ("[D]octrinal analysis is essentially static—an organizing tool but little more—unless it is attentive to the policy concerns that channel discretion in one direction or another.").

47. See HART, *supra* note 42, at 8-13 (outlining some issues that must be addressed to develop an adequate concept of law).

48. I do not mean to suggest that instrumental theories, such as economic accounts, do not have valuable insights to add to our understanding of tort law, particularly as a normative vision for what tort law should aspire to achieve. But I do think they are inadequate as descriptive accounts of tort law.

49. I use the term "individual justice" to mean justice between private parties, as opposed to social justice.

50. Leon Green, *Tort Law: Public Law in Disguise*, 38 TEX. L. REV. 1 (1959).

The leading individual justice theory for tort law is corrective justice.<sup>51</sup> For corrective justice theorists, tort law is rooted in Aristotelian notions of the obligations of one citizen to another and the role of the state in mediating those obligations.<sup>52</sup>

Corrective justice treats an injury as disturbing the equilibrium that existed before the injury and tort law as the mechanism for “correcting” or restoring the normative equilibrium.<sup>53</sup> An injured person has had something wrongfully taken from her, and if there is someone else with the requisite normative connection to the harm suffered by the victim, then that person must “give back” what he has taken through the mechanism of compensatory damages. In this way, tort law helps achieve justice between private parties, even if, for example, a poor person who recklessly hits Bill Gates’s car is required to pay for the damage caused.<sup>54</sup> The concepts and practice of tort law both are reflective of and help constitute primary duties of conduct (obligations to behave so as not to harm another) and secondary duties of repair (the obligation to pay damages). Violations of the primary duties of conduct by defendants, with the requisite causal and other normative connection to the plaintiff, necessarily lead to a secondary duty of repair to the plaintiff.

Corrective justice theory treats the bilateral structure of tort law—the fact that victims sue wrongdoers, and liable defendants pay “make whole” damages to the plaintiff—as the embodiment of the normative principle of corrective justice. Though corrective justice theories are generally agnostic on what precisely it means to wrong another, the theory takes seriously the structure and practice of tort law as helping explain what tort law is, what the practice of tort law is doing.

With its powerful account of the normative principles embodied in the structure and practice of tort law, corrective justice is rightfully considered the leading moral theory of tort law.<sup>55</sup> Corrective justice

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51. See, e.g., COLEMAN, *supra* note 20, at 432-35 (1992) (comparing conceptions of corrective justice); RIPSTEIN, *supra* note 6, at 2-3 (“Corrective justice, criminal law, and tort law together set out the conditions of responsibility, the conditions under which agents appropriately bear the costs of their choices.”); WEINRIB, *supra* note 6, at 19 (claiming that corrective justice is essential to conceptualizing the structure of private law coherently).

52. See WEINRIB, *supra* note 6, at 56-83 (explaining Aristotle’s account of corrective justice).

53. *Id.* at 114-36.

54. This is a familiar example that helps distinguish corrective justice from distributive justice. Corrective justice is indifferent as to the fairness of individuals’ prior holdings.

55. See, e.g., G. Edward White, *The Unexpected Persistence of Negligence, 1980-2000*, 54 VAND. L. REV. 1337, 1341 (identifying welfare economics and corrective justice as the dominant theories of tort law). Other morality-based justice theories of tort law, based on libertarian

has a significant advantage over instrumental and other moral theories because it is more consistent with what judges say when they reason about tort law. With the criticisms of instrumental accounts appearing on a number of fronts, it is the leading descriptive theory of tort law.

On its face, though, it is unclear how corrective justice might explain judging-plaintiffs law, and the leading theorists have not said much on the topic.<sup>56</sup> Under corrective justice theory, the secondary duty to repair—tort liability—is wholly dependent on the breach of the primary duty of conduct by the defendant. But in the judging-plaintiffs cases, a defendant that has breached its duty of conduct is still not held liable. In Part III, I recast an array of disparate doctrines as instances of a singular phenomenon—judging plaintiffs to determine a defendant's liability—and then consider whether this phenomenon can be explained by corrective justice.

### III. JUDGING-PLAINTIFFS LAW

A look at tort law reveals several examples where plaintiffs are denied a remedy because of their conduct, choices, or degree of harm. These examples range across economic, dignitary, physical, and property torts.<sup>57</sup>

Grouping together these disparate doctrines under one umbrella is new and, in some cases, quite contestable. But I argue that we can and should consider them together as the law of “judging plaintiffs.” I use the term “judging” intentionally and in two ways: One, more factual, speaks to the “assessing” part of judging—assessing a plaintiff's conduct, choices, or extent of harm. The other refers to the normative or moral determination of whether a plaintiff is entitled to recourse against the defendant.

My aim in this Part is threefold: (1) to recast a variety of seemingly disparate doctrines as instantiations of a single and pervasive phenomenon in torts that I call judging-plaintiffs law; (2) to demonstrate that existing justifications for these doctrines are

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notions, distributive justice, or social justice, fail as plausible descriptive accounts. See Goldberg, *supra* note 30, at 563-78 (describing goals of different individual-justice tort theories).

56. See *infra* text accompanying notes 90-91.

57. This Part is quite similar in methodology to the development of the “substantive standing” rule by Benjamin Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 15-40 (1998). I hope he considers it flattery.

inadequate; and (3) to explore whether corrective justice can account for this phenomenon.<sup>58</sup>

This Part is organized by the aspect of the plaintiff that we are judging—her *conduct*, her *choices*, her degree of *harm*, and her *efforts to prevent* the harm. Some of the doctrines discussed are affirmative defenses, but many are considered part of a plaintiff's *prima facie* case. In what follows, I discuss the ways in which tort law takes account of each of these aspects across a range of doctrines and torts in determining liability.<sup>59</sup>

### A. Judging Plaintiffs' Conduct

In a series of doctrines, a plaintiff's conduct is judged in determining whether the defendant is held liable for the plaintiff's harm. At one level, this practice may seem intuitive, but the precise justification for it has never been adequately articulated.

#### 1. Contributory Negligence<sup>60</sup>

Under the doctrine of contributory negligence, a defendant who foreseeably has harmed another person can demonstrate that the plaintiff's conduct also fell below a standard of reasonable care. The doctrine is used primarily in cases of accidental physical harm, but it also has been applied in products liability, nuisance, and other areas.<sup>61</sup> Under traditional contributory negligence doctrine, such a showing would preclude any recovery by the plaintiff. After much criticism of this all-or-nothing approach, most jurisdictions moved, in the 1960s and 1970s, to a comparative negligence approach in which a defendant's liability is reduced in proportion to the factfinder's relative assessment of responsibility. So under a "pure" comparative negligence scheme, if a plaintiff was deemed sixty percent responsible for his harm, and the defendant forty percent, then the plaintiff could recover forty percent of the total amount of damages from the

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58. It is worth noting that corrective justice has little to say about the content of wrongful behavior or wrongful loss—that is, how we ought to define the primary rules of conduct between citizens. My argument here necessarily leaves the precise contours of wrongfulness undefined.

59. Each of these doctrines could be, and have been, the subject of separate articles; my discussion of them here will be necessarily brief.

60. I use the term "contributory negligence" to refer to both the traditional all-or-nothing doctrine and the various forms of comparative negligence now in place in most jurisdictions.

61. The origin of contributory negligence in Anglo-American tort law is somewhat unclear, although most scholars agree it made its first appearance in *Butterfield v. Forrester*, 11 East 60, 103 Eng. Rep. 926 (K.B. 1809), where the court announced the principle as if it were well-established and uncontroversial.

defendant. This move was thought to allocate responsibility more fairly and, perhaps as a result, attention to why we judge a plaintiff's conduct at all has been largely absent.<sup>62</sup>

But the triumph of comparative negligence has been overstated. A plurality of jurisdictions now follows a "modified" comparative negligence system that bars a plaintiff's claim entirely if the plaintiff's conduct is deemed more negligent than the defendant's, as in the sixty-forty example above.<sup>63</sup> In other words, in a significant class of cases, the complete bar of contributory negligence is alive and well.

To make this concrete, take the case of Mikeal Preston, who was driving a truck with his brother on I-75 in Georgia. Somewhere near the town of Valdosta, he lost control of the vehicle, and it flipped over and came to a stop at the median. Preston was uninjured and went back onto the highway to collect the scattered equipment he was delivering for his employer. In doing so, he was struck and killed by a car driven by Clifford West. West was uninjured.<sup>64</sup>

Preston's widow brought a wrongful death claim against West, and the jury determined that fault lay between Preston and West at sixty and forty percent, respectively. Under Georgia's "modified" comparative negligence regime, because the plaintiff was judged more negligent than the defendant, Preston's widow recovered nothing. Assuming that Preston's estate suffered \$2,000,000 worth of pecuniary damages, a jury would have deemed the defendant to be responsible for almost \$1,000,000 worth of the plaintiff's harm, and yet in nearly four out of five states, the plaintiff would have been precluded from recovery.<sup>65</sup> Why should Preston's widow bear the entire financial burden of this harm? The answer is not at all clear under a corrective justice framework.

In the most sophisticated recent consideration of the underpinnings of contributory negligence doctrine, Kenneth Simons considered several possible justifications, including a "moral parity"

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62. For a notable exception, see Kenneth Simons, *The Puzzling Doctrine of Contributory Negligence*, 16 CARDOZO L. REV. 1693 (1995), which provides an in-depth analysis of plaintiff's conduct-defenses, including contributory negligence.

63. Moreover, no jurisdiction has adopted the "pure" form of comparative negligence since 1980, and some jurisdictions have moved from a pure to a modified form during that time.

64. The facts of this case are described in an opinion arising from collateral litigation over insurance coverage, *U. S. Fid. & Guar. Co. v. Preston*, 26 S.W.3d 145, 146 (2000).

65. Thirty-eight states follow either old-fashioned contributory negligence or some kind of "modified" comparative negligence regime whereby if the plaintiff's negligence exceeds the defendant's, the plaintiff recovers nothing. See VICTOR E. SCHWARTZ, *COMPARATIVE NEGLIGENCE* 31-33 (4th ed. 2002) (describing the different types of comparative negligence and listing which states follow each variation).



approach (essentially that victims cannot legitimately expect more of injurers than injurers can expect of victims<sup>66</sup>) and the notion of forfeiture of remedy.<sup>67</sup> He concludes that there remain “some surprisingly undeveloped and fertile issues for future inquiry” and acknowledges that resolution of these issues “will depend in part on one’s substantive views about the nature and purpose of tort liability.”<sup>68</sup>

Though appealing, the notion of moral parity seems unsatisfying in a case like Preston’s, where the victim only risks harm to himself. It is not clear why Preston’s careless risks with regard to his own well-being ought to translate into West’s being off the hook for his wrongful conduct with respect to others. In corrective justice terms, the normative equilibrium has been upset, and it is not clear why it ought to stand uncorrected. Perhaps, then, Simons’ alternative idea of forfeiture of remedy has a role to play here.

## 2. Products Liability

A plaintiff’s conduct is also judged in two kinds of product liability claims, design defects and failure to warn. In products liability cases brought under a design defect theory, defendants are not held liable for harm that is a result of product misuse.<sup>69</sup> Sometimes, this is analyzed as a matter of proximate cause—the type of harm was unforeseeable because the product was not used as intended. In other cases, product misuse is considered a separate affirmative defense, though with the advent of comparative negligence, product misuse as a defense has largely been subsumed into that inquiry.<sup>70</sup>

Most frequently, a plaintiff’s misuse of the product is considered as to whether the product is defective at all—in other words, the defendant will argue that the product is not defective because it was not designed to be used in the way that the plaintiff

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66. Simons, *supra* note 62, at 1722-23.

67. *Id.* at 1723-25.

68. *Id.* at 1747.

69. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. h (1965) (“[The] product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling . . . or from abnormal preparation for use, . . . or from abnormal consumption, . . . the seller is not liable.”).

70. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. p (1998) (“Product misuse, modification, and alteration are forms of post-sale conduct by product users or others that can be relevant to the determination of the issues of defect, causation, or comparative responsibility.”).

did.<sup>71</sup> The widely used "Wade factors"<sup>72</sup> for determining design defect under a risk-utility analysis include two factors that speak to a plaintiff's conduct or state of mind—the fifth factor, the user's "ability to avoid danger by the exercise of care in the use of the product,"<sup>73</sup> and the sixth factor, "[t]he user's anticipated awareness of the dangers inherent in the product and their avoidability."<sup>74</sup> Product misuse is relevant to defect, even in jurisdictions where contributory negligence and assumption of risk are not permissible defenses to product liability claims.<sup>75</sup>

In cases brought on a failure-to-warn theory, defendants are said to have no duty to warn of obvious dangers,<sup>76</sup> similar to a formerly widespread rule in design defect law that defendants could not be held liable for "patent defects." If taken literally to mean that a defendant has no *obligation* to warn of such a danger, it is not clear why this should be true.<sup>77</sup> It could be that warning about obvious dangers dilutes the value of warnings about less obvious ones.<sup>78</sup> Or it may be that in such cases the burden of warning is deemed to be too great relative to its benefit.<sup>79</sup> But the doctrine traditionally has not rested on such rationales, at least explicitly, and such inquiries could be made on a case-by-case basis.

For example, take a recent Ninth Circuit case, *Maneely v. General Motors Corp.*, where the plaintiffs were thrown from the back

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71. *Id.*

72. See John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973), for a full enumeration of the seven factors in Wade's proposed risk-utility analysis of a product's defectiveness.

73. *Id.* at 837.

74. *Id.* The sixth factor also looks in part to the adequacy of the warnings—a way of helping determine whether defendant has satisfied its obligation and therefore whether any injury is really the plaintiff's fault, in the lay sense of the word.

75. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. d (1998) ("Product misuse, alteration, and modification have been treated by some courts as an absolute bar to recovery and by others as a form of plaintiff fault that should be compared with that of other parties to reduce recovery.").

76. See James A. Henderson & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 314 (1990) ("[M]ost courts agree that product suppliers owe no duty to warn of open and obvious dangers . . .").

77. See *id.* at 297 (admitting that "the visible monetary costs of additional warnings are typically quite low—a few pennies for a bit more paper and ink").

78. *Id.* at 314 ("[A]s product warnings address each new level of risk, the lists of warnings becomes increasingly longer and consumer focus more attenuated and difficult.").

79. Indeed, under the current *Restatement*, this cost-benefit analysis matters explicitly in determining whether there is a post-sale duty to warn. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 10(b) (1998) ("A reasonable person in the seller's position would provide a warning after the time of sale if . . . the risk of harm is sufficiently great to justify the burden of providing a warning.").

of a pickup truck when the truck crashed.<sup>80</sup> Defendants succeeded in getting summary judgment—upheld on appeal—on the ground that General Motors had no duty to warn of such an obvious danger.<sup>81</sup> But this need not be the case. Though it is unclear from the opinion precisely what kind of warning the plaintiffs thought should have been given, perhaps a small sign or label on the back of the pickup, or even something in the owner's manual, would not have been too onerous and might have given potential passengers second thoughts. Certainly the harm is foreseeable.

Perhaps, then, this no-liability decision can be understood as a judgment that, in light of the obviousness of the danger, it was the plaintiff's *responsibility* to avoid the harm or bear the burden of the harm that occurred.<sup>82</sup> The *Manely* court's statement—"Anyone getting into the cargo area of a pickup could not fail to recognize that it is neither designed nor equipped to transport passengers. A cargo bed is for cargo, not people . . ."—<sup>83</sup>—indicates the disdain that the judges may have felt for the plaintiffs' quest for a remedy. From the word "anyone," we can sense the judges' conclusion that the plaintiffs either were really careless or, more likely, must have appreciated the risks and rode in the truck notwithstanding them.<sup>84</sup> My point here is not that "no wrong by the defendant" does no work in such a case, but that judging the plaintiff's conduct is also doing normative work that is not easily explained within corrective justice theory.

### 3. Justifiable Reliance in Fraud

In common law fraud, even if one intentionally deceives another, a defendant is only liable if the plaintiff actually and justifiably relied on the deception.<sup>85</sup> To award damages, a court must

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80. 108 F.3d 1176, 1178 (9th Cir. 1997).

81. *Id.* at 1180.

82. *Id.* at 1181 ("Appellants cannot meet the consumer expectations test because just as ordinary consumers would recognize that riding in a pickup cargo bed is dangerous, they also would not expect the pickup truck to protect passengers in the cargo bed during an accident.").

83. *Id.* at 1180.

84. *Id.* ("At some point, manufacturers must be relieved of the paternalistic responsibility of warning users of every possible risk that could arise from foreseeable use of their product. That point comes when ordinary users readily recognize the risk on their own."). If the plaintiffs' awareness of the risk is what really drives the no-liability determination, then this case might better be seen as a species of assumption of risk in the "judging plaintiffs' choices" category. See *infra* text accompanying notes 108-112.

85. RESTATEMENT (SECOND) OF TORTS § 525 (1977); DAN B. DOBBS, *THE LAW OF TORTS* 1359 (2000). But see Margaret V. Sachs, *The Relevance of Tort Law Doctrines to Rule 10b-5: Should Careless Plaintiffs be Denied Recovery?*, 71 CORNELL L. REV. 96, 138-40 (1985) (arguing that

assess the plaintiff's conduct (in relying on the misrepresentation) and deem it justified. But why must the reliance be justifiable?

Consider *Williams v. Rank & Son Buick, Inc.*, where Williams bought a used car after being told falsely that it had air-conditioning.<sup>86</sup> The statement was an intentional deception by the salesman, and Williams actually relied on it.<sup>87</sup> Nevertheless, the court held that it was not actionable fraud because the plaintiff could have and should have checked the air-conditioning when taking the car for a test drive.<sup>88</sup> Therefore, the court reasoned, the plaintiff's reliance was not reasonable, and there was no liability. This kind of case is quite common, even though black letter law says that "contributory negligence"—the plaintiff's carelessness—is not a defense to an intentional tort like fraud.<sup>89</sup>

Scholars have struggled to explain this justifiable-reliance requirement.<sup>90</sup> Some have considered it merely a proxy for other elements that are essential to the tort, leaving the question of whether the reliance was justified as superfluous.<sup>91</sup> After all, the wrongful nature of the defendant's conduct exists in the deception—the improper interference with a plaintiff's ability to make informed

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courts were historically quite divided on the requirement of justifiable reliance, despite the Supreme Court's characterization of it as established doctrine).

86. 170 N.W.2d 807, 808 (Wis. 1969).

87. *Id.* at 810.

88. *Id.* at 811 ("In the instant case the respondent had ample opportunity to determine whether the car was air-conditioned. He had examined the car on the lot and had been allowed to remove the car from the lot unaccompanied by a salesman for a period of approximately one and one-half hours. . . . No great search was required to disclose the absence of the air-conditioning unit since a mere flip of a knob was all that was necessary.").

89. RESTATEMENT (SECOND) OF TORTS § 481 (1965) ("The plaintiff's contributory negligence does not bar recovery against a defendant for a harm caused by conduct of the defendant which is wrongful because it is intended to cause harm to some legally protected interest of the plaintiff or a third person.").

90. See John C.P. Goldberg, Anthony J. Sebok & Benjamin C. Zipursky, *The Place of Reliance in Fraud*, 48 ARIZ. L. REV. 1001, 1004 (2006) (discussing the related issue of whether the element of actual reliance itself captures something distinctive or is merely a stand-in for causation, and finding that there are independent justifications for the reliance requirement in fraud).

91. Courts and commentators have also struggled with whether or not this is more appropriately considered akin to contributory negligence, the notion captured in the phrase "reasonable reliance" that the plaintiff acted carelessly, or closer to the notion of reckless disregard for the truth captured in "justifiable reliance." Different jurisdictions use different terms, some interchangeably. See DOBBS, *supra* note 85, at 1361 ("[T]he justified reliance requirement seems less like a separate issue and more like evidence about the plaintiff's actual reliance or the defendant's culpability. . . . Courts could, in other words, abolish the separate requirement of justified reliance without changing the outcome of cases, only the mode of analysis."); Andrew R. Klein, *Comparative Fault and Fraud*, 48 ARIZ. L. REV. 983, 987 (2006) ("According to some scholars, courts do not actually view justifiable reliance as an independent element.").

decisions about her life and how to employ her resources. Whether the plaintiff was foolish in relying upon the misrepresentation does not affect our assessment, as a matter of morality or ethics, of the wrongful character of a defendant's conduct.<sup>92</sup> The purpose of the justified-reliance requirement, then, remains a bit of a puzzle.

#### 4. Defamation and Privacy

The plaintiff's efforts to avoid harm are also judged in defamation and privacy. In the common-law privacy tort of public disclosure of private facts, a plaintiff's efforts to keep certain facts private are assessed in determining liability.<sup>93</sup> If a plaintiff has not taken care to keep the relevant facts of her life private, then she cannot hold the defendant liable.<sup>94</sup> This is so even if she has not consented to the public disclosure of these facts.<sup>95</sup> If the plaintiff has not taken sufficient steps to protect her privacy, then she is not entitled to complain about unwanted disclosures.

The limit on liability for "public figures" in defamation law is also based on judging the plaintiff's ability to prevent, or even combat, the harm.<sup>96</sup> To bring a defamation claim, a plaintiff who is deemed to be a "public figure"<sup>97</sup> has to show "actual malice" by clear and convincing evidence<sup>98</sup>—an extremely difficult hurdle to overcome. This doctrine, created by the Supreme Court as a way of protecting First Amendment values, is based explicitly on two factors: the plaintiff's prior activities and his capacity to rebut the defamatory statement.<sup>99</sup> The "prior activities" factor is a variant of assumption of risk: if the plaintiff has thrust himself into the public domain, he has, in some sense, assumed the risk of false and defamatory statements being made about him.<sup>100</sup> Meanwhile, the capacity to rebut the statement is a judgment about a plaintiff's capacity for self-help, with the apparent

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92. This is the case unless we are talking about puffery. See David A. Hoffman, *The Best Puffery Article Ever*, 91 IOWA L. REV. 1395 (2006) (arguing that the puffery defense is a legitimate concept that is unfortunately lacking uniform application).

93. RESTATEMENT (SECOND) OF TORTS § 652D cmt. b (1977).

94. *Id.* ("[T]here is no liability for giving further publicity to what the plaintiff himself leaves open to the public eye.").

95. Jonathan B. Mintz, *The Remains of Privacy's Disclosure Tort: An Exploration of the Private Domain*, 55 MD. L. REV. 425, 440 (1996) ("[F]acts that either are public knowledge or have already been publicized[] are not actionably private, regardless of their nature." (footnotes omitted)).

96. RESTATEMENT (SECOND) OF TORTS § 580A cmt. c (1977).

97. *Id.*

98. See *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

99. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-45 (1974).

100. *Id.* at 345.

assumption that if the plaintiff has the ability to respond, there is less need for the law to provide a remedy.

### 5. Trade Secrets Law

In trade secrets law, information deserves legal protection as a trade secret if (1) it has independent economic value not readily ascertainable to others, and (2) the plaintiff took reasonable steps to protect the secrecy of the information.<sup>101</sup> This second prong has been explained in various ways: as an evidentiary requirement in a situation where the property at issue is intangible; as circumstantial evidence of the first prong, the independent economic value; or as an incentive for firms to engage in self-help.<sup>102</sup> But the requirement seems odd—if someone steals something of value from someone else, why should the victim need to show that she made efforts to safeguard it in order to recover damages from the person who stole it? One court described it as “anomalous” for the courts to prohibit the use of information that the “rightful owner did not undertake to protect.”<sup>103</sup> The precise anomaly is left unexplained.

### 6. Possible Justifications for Judging Plaintiffs’ Conduct

Corrective justice theorists have little to say about why a plaintiff’s conduct ought to matter to whether a defendant is held liable for the plaintiff’s harm.<sup>104</sup> In his book on corrective justice, Ernest Weinrib discusses the issue in a footnote, indicating that contributory negligence is based on “transactional equality,” the notion that “the plaintiff cannot demand that the defendant should

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101. This two-prong test comes from the common law and is now widely accepted. *E.g.*, *Dicks v. Jensen*, 768 A.2d 1279, 1283 (Vt. 2001). It has since been codified in the Uniform Trade Secrets Act, 14 U.L.A. 437 (1990), which has been adopted in some form in at least 45 U.S. jurisdictions. R. Mark Halligan, *U.S. Trade Secret Protection by State*, <http://my.execpc.com/~mhalign/41state.html> (listing trade secret statutes and date of enactment, updated through July 13, 2005) (last visited Nov. 3, 2007).

102. *See, e.g.*, Douglas Lichtman, *How the Law Responds to Self-Help*, 1 J.L. ECON. & POL’Y 215, 226-30 (2005).

103. *Dicks*, 768 A.2d at 1284.

104. *See, e.g.*, COLEMAN, *supra* note 20, at 216 n.7 (acknowledging that he has not given enough thought to positive defenses to liability); RICHARD A. EPSTEIN, *A THEORY OF STRICT LIABILITY* 83-131 (1980) (arguing that contributory negligence should be a separate defense); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 549 (1972) (mentioning contributory negligence only briefly); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 499, 512-13 (1992) (arguing that corrective justice as comparative apportionment is consistent with “outcome-responsibility”); Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEMPHIS ST. U. L. REV. 45, 75-78 (1992) (looking at possible differences between victim and injurer negligence).

observe a greater care than the plaintiff with respect to the plaintiff's safety."<sup>105</sup>

This idea faces a few objections. First, as a matter of primary conduct, it is not clear that the plaintiff is demanding anything of the defendant. Rather, the plaintiff is demanding that the defendant compensate her for the harm he caused. Second, the Kantian principle at the root of Weinrib's theory—of not using others for one's own projects or exercising too much autonomy at the expense of others—would seem to carry much less, if any, force when applied to conduct that risks harm to self as opposed to others.<sup>106</sup> Mikeal Preston did not behave wrongfully towards Clifford West in this way by risking his own life to save his employer's equipment.<sup>107</sup>

Indeed, the very way in which corrective-justice theorists frame the question of tort liability—"Did the defendant wrong the plaintiff?"—would seem to leave little conceptual space for consideration of the plaintiff's conduct, unless the argument is that if the plaintiff has acted carelessly, then the defendant has not wronged the plaintiff. But this logic is weak. If we assume that the defendant's wrongful behavior consists of insufficient attention to the risk that her conduct will create harm for others, then that behavior is wrongful because she was not more careful, and it is wrongful relative to the class of persons (ostensibly including the plaintiff) for whom she created an unreasonable risk of harm. It seems anomalous that the wrongful character of the defendant's behavior would change depending on what level of care each class member happens to take, though that level of care could be relevant to liability for other reasons.

### *B. Judging Plaintiffs' Choices*

Unlike the doctrines just discussed, where the plaintiff's conduct is judged, the plaintiff's *choices* are judged in another class of cases. Though much of the doctrine below is generally talked about in terms of "no wrong" by the defendant, an explanation that fits squarely into corrective justice theory, scholars and judges were uncomfortable with this conclusion in many of these cases. Indeed, I think the idea of judging a plaintiff's choices provides a more satisfying explanation of the outcome of many of these cases. To a

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105. WEINRIB, *supra* note 6, at 169 n.53.

106. See Simons, *supra* note 62, at 1713-18 (explaining why "this view of negligence as unjustifiable egoism does not easily carry over to a victim's negligence").

107. See *supra* text accompanying note 64.

certain extent, this conclusion is uncontroversial, but it is an explanation that does not fit easily into the dominant moral theory of tort law.

### 1. Assumption of Risk

In negligence law, defendants can argue that because the plaintiff has “assumed the risk” of injury, she is not entitled to a remedy. Under traditional “implied” assumption of risk doctrine, if the plaintiff was aware of and voluntarily chose to encounter the risk that resulted in harm, then the plaintiff is precluded from recovery.<sup>108</sup>

Scholars have struggled with formulating a satisfying answer as to what exactly is meant by “assumption of risk,” with many concluding that the defense should be eliminated entirely. As Stephen Sugarman puts it, “[W]hen we are tempted to say ‘assumption of risk,’ we should instead say something else.”<sup>109</sup> Indeed, the draft *Restatement (Third)* recommends *abolishing* assumption of risk and sorting the relevant remnants into the duty, breach, and comparative negligence inquiries.<sup>110</sup> Several jurisdictions have done just that.<sup>111</sup> But some form of assumption of risk, whether as a distinct doctrine or in other guises, still holds sway in many jurisdictions.<sup>112</sup>

Many courts and scholars treat “assumption of risk” as meaning that there was no wrong by the defendant when the criteria of voluntariness and awareness are satisfied. Indeed, *volenti non fit injuria*—the Latin phrase for assumption of risk—translates as “to one who consents no wrong is done.” But the logic of the phrase, in any language, does not appear to withstand scrutiny.

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108. I do not deal with explicit assumption of risk defenses because those claims are more straightforward and are based on contract, rather than tort, principles.

109. Sugarman, *supra* note 18, at 835. Sugarman persuasively argues that consent to the risk of *physical harm* does not logically entail consent to *legal injury*, or consent to bearing the full *financial burden* of physical harm. *Id.* at 834.

110. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 cmt. i (2000) (implied assumption of risk distinguished). This Section abandons the traditional doctrine of implied, voluntary assumption of risk embodied in RESTATEMENT (SECOND) OF TORTS §§ 496C-G (1965).

111. See Annotation, Effect of Adoption of Comparative Negligence Rules on Assumption of Risk, 16 A.L.R.4th 700, § 2 (1982).

112. See Kenneth W. Simons, *Reflections on Assumption of Risk*, 50 UCLA L. REV. 481, 482 (2002) (pointing out that “[r]eports of the death of assumption of risk are slightly exaggerated,” as many courts continue to recognize assumption of risk as a substantive doctrine, and also rely implicitly on the consensual rationale behind assumption of risk in applying other doctrines).



Take *Murphy v. Steeplechase*, the Cardozo opinion where the plaintiff injured himself on “the Flopper” ride at Coney Island.<sup>113</sup> Assume the amusement park defendant had known that the belt on the Flopper machine was due to be changed but decided to delay the upgrade for cash-flow reasons. The amusement park has committed a moral and legal wrong towards the “vigorous young man,”<sup>114</sup> the plaintiff held responsible by Cardozo on an assumption-of-risk theory. Indeed, the structure of the negligence tort itself—duty, breach, causation, and harm (all of which were satisfied)—indicates that once all these elements are satisfied, there is a “tort,” a wrong.<sup>115</sup> To say that assumption-of-risk doctrine is really an example of an innocent defendant is in considerable tension with the structure and practice of tort law.

Alternatively, one could describe the assumption-of-risk defense as expressing the idea that “a plaintiff who decides to allow his or her rights to be imperiled cannot complain when a risk materializes.”<sup>116</sup> So says Ernest Weinrib, one of the leading corrective justice theorists (though again, in just a footnote). This idea sounds promising. Perhaps we could think of assumption of risk not as an affirmative consent to face a physical risk, but as a judgment about what the plaintiff is entitled to expect in terms of a legal remedy.<sup>117</sup>

The problem is that there does not appear to be any room in Weinrib’s analytic structure of tort law for such an argument to have any normative force; that is, under Weinrib’s corrective justice theory, the violation of a primary duty of conduct gives rise to a secondary duty of repair (to compensate), and there is not a place in the analysis to deem certain plaintiffs ineligible for relief.

One leading scholar in this area, Kenneth Simons, has suggested that assumption-of-risk doctrine can be seen as furthering the value of autonomy by respecting individuals’ “full preference” for

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113. 166 N.E. 173, 174 (N.Y. 1929) (finding that the risk of injury on a ride at defendant’s amusement park was foreseeable, and plaintiff therefore assumed the risk). See introductory discussion in text accompanying *supra* notes 7-9.

114. *Murphy*, 166 N.E. at 174.

115. BLACK’S LAW DICTIONARY 1489 (6th ed. 1990). The word “tort” derives from Latin word for “to twist.”

116. WEINRIB, *supra* note 6, at 169 n.53.

117. The recourse theorists make this point. See John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other “Quaint” Doctrines Can Improve Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329, 344 (2006) (“[I]mplied assumption of risk concerns whether the plaintiff has done something that undermines her entitlement to complain about the defendant’s conduct, not whether the defendant was under an obligation to take care to avoid injuring a person such as the plaintiff, or whether that obligation was breached.”).

engaging in risky activities.<sup>118</sup> This is certainly consistent with (and has influenced) my account of judging plaintiffs' choices. But it is not clear, from Simons's work or the main corrective justice accounts, what role furthering autonomy has in the normative structure of tort law.<sup>119</sup> Moreover, it seems odd to argue, at least in an individual case, that it advances an individual's autonomy by denying her a remedy when she suffers harm caused by another's negligence. On the other hand, it may be that tort law should respect such choices on a "wholesale" level by recognizing that there are categories of activities like skiing, bungee jumping, and Flopper-riding with inherent risks that some might prefer to face rather than not doing the activity. As such, the tort system should not intervene if the risk results in harm.<sup>120</sup>

## 2. Consent to Intentional Torts

The issue of consent to intentional torts has long posed conceptual and practical problems for tort scholars and practitioners. Like assumption of risk, courts have an intuitive sense that there is a category of cases where a plaintiff's knowledge, imputed or actual, of a particular risk ought to preclude recovery.<sup>121</sup> But the use of terms such as "consent" and "assumed the risk" quickly lead to difficult questions about what risks can be consented to or assumed.<sup>122</sup>

Because of these conceptual difficulties, courts are split on whether consent to battery, for example, is properly considered an

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118. See Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213, 218-48 (1987) (presenting model of full preference).

119. It might well be consistent with Arthur Ripstein's account, based on Kant and Rawls, of tort law reinforcing people's ability to pursue their own ends. RIPSTEIN, *supra* note 6, at 24-47; Arthur Ripstein, *The Division of Responsibility and the Law of Tort*, 72 FORDHAM L. REV. 1811, 1820-29 (2004).

120. See Simons, *supra* note 112, at 508 (describing no-duty rules as "wholesale, categorical rules conclusively presuming that adequately warned participants in such an activity sufficiently consent to the risk and therefore should not obtain recovery"); Kenneth W. Simons, *Murphy v. Steeplechase Amusement Co.: While the Timorous Stay at Home, the Adventurous Ride the Flopper*, in TORTS STORIES 179, 201-02 (Robert L. Rabin & Stephen D. Sugarman eds., 2003) (explaining the difference between the more "individualized and subjective" assumption of risk approach, and the more "wholesale" no-duty approach).

121. Simons, *supra* note 118, at 248 (defining consent as plaintiff's "relative certainty that the risk will materialize").

122. I am referring to implied consent here, not express consent, as the latter does not pose such conceptual difficulties. For discussion of the difficulties in defining the proper scope of consent doctrine, see Kenneth Simons, Book Review, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577, 616-29 (2006), a review of PETER WESTEN, *THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT* (2004).

affirmative defense or something that a plaintiff must negate as an element of her prima facie case.<sup>123</sup> In favor of the “element” approach, many commentators say that one who consents has not been wronged.<sup>124</sup> Consistent with this view, Heidi Hurd talks about the “moral magic of consent”—the ability of individuals to transform wrongful behavior into acceptable behavior.<sup>125</sup> But many of the cases that most commonly lead to litigation over issues of “consent” in torts are at odds with this view.

Take two common areas where difficult consent issues arise: football and sex. In the context of football, the question frequently arises whether harmful contact that is outside the rules of the game is something that a player consents to and, therefore, precludes him from tort recovery. In a well-known and illustrative case, *Hackbart v. Cincinnati Bengals*, one player intentionally struck another in the back of the neck with his forearm in the middle of a play out of frustration.<sup>126</sup> In other words, he intentionally caused harmful contact. By any moral definition, and by the legal definition of the tort of battery, such behavior is wrongful. Yet, the trial court in *Hackbart* denied recovery on a consent theory.<sup>127</sup>

In the context of sex, the issue tends to arise when one person sues another for battery, after being infected with a sexually transmitted disease (“STD”). The defendant then responds that the plaintiff consented to the contact by agreeing to sex, while the plaintiff argues that consent was vitiated because she did not know that the defendant had an STD. The results in these cases have been mixed, frequently turning on whether or not the plaintiff asked about such diseases and was lied to (consent vitiated) or whether the defendant simply failed to volunteer the information (not enough to vitiate consent).<sup>128</sup> Either way, the defendant was substantially certain that

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123. See *Jaske v. State*, 539 N.E.2d 14, 17 (Ind. 1989) (“We first note that lack of consent is not included among the statutory elements of the offense of battery.”); RESTATEMENT (SECOND) OF TORTS § 5 cmt. c (1965) (“The word ‘defense’ is not used in any technical procedural sense. Thus in an action for battery the burden rests upon the plaintiff to prove that the contact inflicted was without his consent.”).

124. E.g., RESTATEMENT (SECOND) OF TORTS § 496A cmt. b (1965) (“[N]o wrong is done to one who consents.”).

125. Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 123 (1996).

126. 601 F.2d 516, 519 (10th Cir. 1979).

127. *Id.* at 518-19.

128. See *Hogan v. Tavzel*, 660 So. 2d 350, 352 (Fla. Dist. Ct. App. 1995) (“Consent to sexual intercourse is not the equivalent of consent to be infected with a venereal disease.”); *Kathleen K. v. Robert B.*, 150 Cal. App. 3d 992, 997 (Cal. Ct. App. 1984) (“[A] woman’s consent to sexual intercourse [is] vitiated by the man’s fraudulent concealment of a risk of infection with venereal disease.”); RESTATEMENT (SECOND) OF TORTS § 892B cmt. e, illus. 5 (1979) (“A consents to sexual

harmful contact would result, fulfilling the basic tort of battery. Again, it is difficult to say that the defendant's behavior was anything but wrongful morally; yet if he simply failed to disclose, the plaintiff is frequently precluded from recovery under a theory that she consented to such risk.

In both categories (assumption of risk and consent), to say that the defendant's behavior was not wrongful, simply because the plaintiff was aware of and chose to risk harm, is at odds with social norms of right and wrong. It must be, then, that the decision not to impose liability is driven by something else—some reason why the plaintiff cannot expect to recover from the defendant, despite having been treated wrongfully. In my view, these cases are best read as turning on the plaintiff's choice to play football or to have sex unprotected; but again, the reason why such a choice ought to matter for purposes of tort liability remains unclear.

### 3. Harm from Use of Land

Under common law, the standard of care owed by a landowner in negligence claims depends on the status of the plaintiff: licensee, invitee, or trespasser.<sup>129</sup> Licensees are people who enter the property as social guests,<sup>130</sup> while invitees are invited for some kind of business purpose.<sup>131</sup> Historically, these categories have their roots in feudal notions,<sup>132</sup> but why should they be relevant for determining the level of care owed? Some jurisdictions, led by California, have determined that they are not relevant and have imposed a general duty of reasonable care for landowners.<sup>133</sup> Nonetheless, many jurisdictions

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intercourse with B, who knows that A is ignorant of the fact that B has a venereal disease. B is subject to liability to A for battery.”).

129. See RESTATEMENT (SECOND) OF TORTS §§ 333, 342, 343 (1965) (setting forth standards of care owed to trespassers, licensees, and invitees).

130. *Id.* § 330.

131. *Id.* § 332.

132. *E.g.*, *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959) (“The distinctions which the common law draws between licensee and invitee were inherited from a culture deeply rooted to the land, a culture which traced many of its standards to a heritage of feudalism.”).

133. The California Supreme Court stated the rationale underlying this choice:

A man's life or limb does not become less worthy of protection by the law nor a loss less worthy of compensation under the law because he has come upon the land of another without permission or with permission but without a business purpose. Reasonable people do not ordinarily vary their conduct depending upon such matters, and to focus upon the status of the injured party as a trespasser, licensee, or invitee in order to determine the question whether the landowner has a duty of care, is contrary to our modern social mores and humanitarian values.

have retained the tripartite division under the common law,<sup>134</sup> with a plurality abolishing the licensee-invitee distinction, but retaining the distinction for trespassers.<sup>135</sup>

One common explanation for the higher level of care accorded invitees is the *quid pro quo*: because the defendant expects a potential benefit from those invited for business purposes, he owes a higher level of care for the invitee's safety.<sup>136</sup> But as Prosser showed many years ago, this rationale is on weak footing.<sup>137</sup> It is not the potential financial benefit at work here, but rather an implied representation of safety made to people you invite onto your property, which applies equally to both business and social guests, though not to trespassers.

Though many of the cases where licensees and trespassers are denied recovery are framed in terms of "no duty," this conclusion is difficult to understand if duty is a guide to primary conduct. After all, many landowners have different kinds of people coming in and out all the time. And they either have to put a sign up that says "Watch out for the hole," or not. In most cases, this is better understood as a judgment that the plaintiff is not entitled to complain because of her choice, for example, to trespass.

Moreover, the *Restatement (Second)* and much of the case law emphasizes the plaintiff's choices or conduct as much as the defendant's.<sup>138</sup> The *Restatement* speaks repeatedly about what the plaintiff is "entitled to expect" based on her status.<sup>139</sup> The dividing line

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Rowland v. Christian, 443 P.2d 561, 568 (Cal. 1968). By statute, California has since made an exception for trespassers.

134. See, e.g., Nicoletti v. Westcor, Inc., 639 P.2d 330, 332 (Ariz. 1982) ("The particular duty owed to the entrant on the land is defined by the entrant's status."); Caroff v. Liberty Lumber Co., 369 A.2d 983, 985 (N.J. Super. Ct. App. Div. 1977) (refusing to abolish the historical distinctions among invitees, licensees, and trespassers).

135. See, e.g., Mounsey v. Ellard, 297 N.E.2d 43, 51-52 (Mass. 1973) (abolishing the distinction between licensees and invitees); O'Leary v. Coenen, 251 N.W.2d 746, 751 (N.D. 1977) (determining that abandonment "of the common law categories of licensee and invitee in premises liability cases" is a matter of "judicial necessity"); Antoniewicz v. Reszczynski, 236 N.W.2d 1, 10 (Wis. 1975) (finding "little to commend the continued use of the categories of licensee or invitee in respect to the liability of the occupier of the property").

136. See Fleming James, Jr., *Tort Liability of Occupiers of Land: Duties Owed to Licensees and Invitees*, 63 YALE L.J. 605, 612-13 (1954) (describing this as "the economic benefit theory").

137. William L. Prosser, *Business Visitors and Invitees*, 26 MINN. L. REV. 573, 585 (1942) ("[T]he duty of the occupier toward his 'invitee' was not, in its inception, a matter of a *quid pro quo* for a benefit conferred . . .").

138. See *Rowland*, 443 P.2d at 564 (holding that a major consideration in the determination of an occupier's liability is the foreseeability of harm to the plaintiff).

139. RESTATEMENT (SECOND) OF TORTS § 336 cmt. f (1965) ("A trespasser who intrudes upon the premises of another is not *entitled to expect* the possessor to sacrifice his own safety and that of persons lawfully upon the land in order to secure the safety of the trespasser." (emphasis added)); *id.* § 343 cmt. b ("Therefore such a licensee is *entitled to expect* only that he will be placed

between actionable and nonactionable harms, then, seems to turn on the ordinary person in the plaintiff's position, what risks she is entitled to be warned of or protected from, and what risks she is deemed to have consented to on entering the property. Contrary to being about what the defendant should have done or not done, these cases appear to turn on what the plaintiff should have expected when choosing to enter the land.<sup>140</sup>

Plaintiffs' choices are also at work in the doctrine that defendants can be held liable only for "artificial" or "non-natural" uses of land in premises liability cases.<sup>141</sup> Take a recent Wisconsin case, *Louah v. Riechling*, involving a twenty-five-year-old woman who sued her parents after she fell and broke her ankle on their icy driveway.<sup>142</sup>

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upon an equal footing with the possessor himself by an adequate disclosure of any dangerous conditions that are known to the possessor." (emphasis added)); *id.* § 343 cmt. d ("An invitee is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair or to give warning of the actual condition and the risk involved therein." (emphasis added)).

140. For cases in which plaintiff is *denied* recovery because the plaintiff, given her status, was not entitled to expect certain precautions and actions by landowner or occupant, see *Williams v. Martin Marietta Alumina, Inc.*, 817 F.2d 1030, 1045 (3d Cir. 1987), in which the court distinguishes "commercial construction where the contractor and his employees expect certain risks and are prepared to cope with them" from "a situation where the invitee is a patron of a store, hotel, theater, or office building who is entitled to expect that the owner of the property will have made far greater preparation to secure the safety of invitees than will have been made by the owner of an industrial plant about to undergo alteration by the invitees"; *Wriglesworth v. Doyle*, 417 P.2d 999, 1000-01 (Or. 1966), in which the court holds that a land occupier who invites a repairman onto premises has no general duty to inspect the land unless the occupier had a reasonable belief that the land was unsafe and that the repairman, as a business invitee, was not entitled to expect more; *Stimus v. Hagstrom*, 944 P.2d 1076, 1081 (Wash. Ct. App. 1997), in which the court denies recovery for injuries sustained while on the premises to do reroofing work because the plaintiff was not entitled to expect the landowner to warn about dangers of which the plaintiff, a business invitee, has superior knowledge.

For cases in which plaintiff is *granted* recovery because, given her status, she was entitled to expect certain precautions and actions by landowner or occupant, see generally *Crim v. International Harvester Co.*, 646 F.2d 161, 163 n.3 (5th Cir. 1981), in which the court allows the invitee plaintiff to recover against the landowner for not warning the invitee about risks of dust exposure or providing protective mask because "[a]n invitee is entitled to expect that an owner or occupier will take reasonable care to ascertain the actual condition of the premises"; *Thacker v. J. C. Penney Co.*, 254 F.2d 672, 677 n.8 (5th Cir. 1958), in which the court holds that a child in a store who is injured when playing on a railing "is entitled to expect that the possessor will take reasonable care to discover the actual condition of the premises and either make them safe or warn him of dangerous conditions" (citing RESTATEMENT (SECOND) OF TORTS § 343 (1965)); *Sheil v. T.G. & Y. Stores Co.*, 781 S.W.2d 778, 782 (Mo. 1989), in which the court allows recovery from the store owner for a customer who tripped over a box in the aisle because "one entering a store, theatre, office building, or hotel, is entitled to expect that his host will make far greater preparations to secure the safety of his patrons than a householder will make for his social or even his business visitors" (quoting RESTATEMENT (SECOND) OF TORTS § 329 cmt. e (1965)).

141. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 57, at 354-56 (4th ed. 1971).

142. *Louah v. Riechling*, No. 06-C-31-C, 2006 U.S. Dist. LEXIS 47720, at \*2 (W.D. Wis. July 11, 2006).

Though the relationship between the plaintiff and defendants may be a bit unusual,<sup>143</sup> this is a classic slip-and-fall case. In the motion for summary judgment, the defendants argued that the plaintiff could not meet her burden of demonstrating that an “artificial” accumulation of ice caused her fall.<sup>144</sup> This distinction mattered under Wisconsin law because property owners had “no duty” to clear ice or snow that accumulated naturally.<sup>145</sup>

Seen as a rule of primary conduct, this analysis makes little sense. That is, property owners *do* have an ethical or moral duty to clear their driveway or sidewalk of ice or snow if it is foreseeable that people will be walking on it. Rather, this no-liability doctrine seems better understood from the plaintiff’s-choice perspective—as a statement about the risks for which the plaintiff ought to expect to be responsible based on the decision to go out in those conditions.

This natural-versus-artificial distinction is also critical to liability for ultrahazardous activities.<sup>146</sup> Under the common law, if the activity or use of land is non-natural, then the plaintiff could hold the defendant liable without fault. But if the use was natural, then the plaintiff was required to prove fault. Scholars have pointed out that this distinction was drawn in reference to community norms about the use of property.<sup>147</sup> In other words, the distinction was less about whether something was man-made or an “act of God,” and more about

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143. Or not so. *See, e.g.*, *Streenz v. Streenz*, 471 P.2d 282, 282 (Ariz. 1970) (allowing an unemancipated child to bring a negligence suit against her parents for injuries from her mother’s negligent driving); *Gibson v. Gibson*, 479 P.2d 648, 654 (Cal. 1971) (allowing an unemancipated child to bring negligence suit against his father); *Dunlap v. Dunlap*, 150 A. 905, 913 (N.H. 1930) (allowing an emancipated child to sue his father for injuries sustained while working for him); *Unah v. Martin*, 676 P.2d 1366, 1368 (Okla. 1984) (allowing an unemancipated child to sue his father for injuries received from the father’s negligent driving).

144. *Louah*, 2006 U.S. Dist. LEXIS 47720, at \*7.

145. *Id.* at \*11-12 (“In Wisconsin, it is well-established that when ice or snow accumulates on a sidewalk abutting private property, said property owner ‘owes no duty to passers-by’ either to clear said sidewalk or to scatter abrasive material thereon. However, a defendant may incur liability for artificial accumulations. Whether an accumulation of ice constitutes a natural or an artificial condition is a question of law.”).

146. RESTATEMENT (SECOND) OF TORTS § 520 cmt. f (1977). The term “non-natural” use originated in *Rylands v. Fletcher*, 159 Eng. Rep. 737 (Ex.1865), rev’d, L.R. 1 Ex. 265 (1866), aff’d, L.R. 3 H.L. 330 (1868).

147. *See, e.g.*, Danielle Keats Citron, *Reservoirs of Danger: The Evolution of Public and Private Law at the Dawn of the Information Age*, 80 S. CAL. L. REV. 241, 245 (2007) (arguing that the *Rylands* approach ought to apply to emerging technologies like computerized databases of personal information); Jed Handelsman Shugerman, Note, *The Floodgates of Strict Liability: Bursting Reservoirs and the Adoption of Fletcher v. Rylands in the Gilded Age*, 110 YALE L.J. 333, 335 (2000) (arguing that the most direct and substantial cause for the *Rylands* decision was a series of tragic dam failures, in contrast to assertions that socioeconomic, political, and academic forces were the catalyst). A full discussion of the vast literature around this case is beyond the scope of this paper.

whether the activity was common in the community. George Fletcher described this idea in terms of “non-reciprocal risks.”<sup>148</sup> If the community is one where landowners frequently use their property for irrigation, water leakage onto a neighbor’s property is not so unusual, and therefore the plaintiff is not entitled to complain about harms that result.

Finally, the doctrine of “coming to the nuisance” contains a similar idea.<sup>149</sup> In nuisance law, this doctrine may lead a court to deny a remedy to a plaintiff when the defendant’s activity preceded the plaintiff’s possession or use of the property.<sup>150</sup> Having actual or constructive knowledge of the activity before choosing to move there, the plaintiff cannot be entitled to complain afterwards that the activity interferes with her use and enjoyment of the property. As Blackstone put it, “[i]f my neighbor makes a tan-yard, so as to annoy and render less salubrious the air of my house or gardens, it will furnish me with a remedy; but if he is first in possession of the air, and I fix my habitation near him, the nuisance is of my own seeking, and must continue.”<sup>151</sup>

Though the “coming to the nuisance” common law doctrine holds sway only in a minority of jurisdictions,<sup>152</sup> it has been revived by statute in many others,<sup>153</sup> and its spirit lives on elsewhere in nuisance law. Take a recent Tennessee case where the plaintiff built a house near a stream junction, and the house was flooded by debris from the defendant’s construction of a private road on his property.<sup>154</sup> Though the plaintiff’s construction preceded the defendant’s building of the road, making the “coming to the nuisance” doctrine inapplicable, the defendant argued that the plaintiff’s failure to exercise reasonable

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148. Fletcher, *supra* note 104, at 547 (“It is apparent, for example, that the uncommon, ultrahazardous activities pinpointed in the *Restatement* are readily subsumed under the rationale of nonreciprocal risk-taking. . . . They represent threats of harm that exceed the level of risk to which all members of the community contribute in roughly equal shares.”).

149. RESTATEMENT (SECOND) OF TORTS § 840D (1979).

150. *Id.*

151. 2 SIR WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 402-03 (16th ed. 1766), quoted in Donald Wittman, *Coming to the Nuisance*, in THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW (Peter Newman ed., 1998).

152. RESTATEMENT (SECOND) OF TORTS § 840D cmt. b (1979) (“The rule generally accepted by the courts is that in itself and without other factors, the ‘coming to the nuisance’ will not bar the plaintiff’s recovery.”).

153. These are contained in “right to farm” statutes that provide immunity from nuisance liability for agricultural operations that were established before plaintiff’s acquisition of or use of land. See, e.g., Note, Alexander A. Reinert, *The Right to Farm: Hog-Tied and Nuisance-Bound*, 73 N.Y.U. L. REV. 1694, 1706-14 (1998) (giving an overview of right-to-farm statutes).

154. *Manis v. Gibson*, No. E2005-00007-COA-R3-CV, 2006 Tenn. App. LEXIS 153, at \*1-2 (Tenn. Ct. App. Mar. 3, 2006).



care in building his home near the stream junction ought to preclude liability or at least reduce damages.<sup>155</sup> This was not a comparative fault defense per se because the plaintiff's claim was in nuisance, not negligence, but the Tennessee Court of Appeals upheld the trial court's application of "principles of comparative fault" in determining liability.<sup>156</sup> In the context of determining nuisance liability, this illustrates a court's assessment of the plaintiff's choices and, therefore, what the plaintiff has a right to expect.

#### 4. Possible Justifications for Judging Plaintiffs' Choices

I have explained how a variety of tort doctrines, commonly construed as instances of "no wrong by the defendant," are better described as instances where courts are making judgments about plaintiffs' choices. But the question remains: How does this fit conceptually within a moral theory of tort law? To answer, we must focus on what we mean by "choices."<sup>157</sup>

The language of many of these cases seems to indicate that the plaintiff's choice of activity ought to mean lower expectations about the level of care provided by the defendant. A trespasser, for example, is not entitled to expect that the possessor of land will warn him about dangerous conditions. The thirteen-year-old playing football is not entitled to expect that the coach will handle him gently when demonstrating tackling techniques.<sup>158</sup> And the "vigorous young man" at Coney Island is not entitled to expect that the Flopper will have been designed such that he will not get hurt when he falls.

But this is precisely the idea that has troubled commentators and courts, and for two good reasons. First, the notion that people's general duty to use reasonable care to avoid causing harm to others might be reduced depending on something about the plaintiff seems offensive to "modern social mores and humanitarian values."<sup>159</sup> Second, if the level of care varies depending on the particular plaintiff, then these doctrines are difficult to see as primary rules of conduct that can be followed easily.

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155. *Id.* at \*2.

156. *Id.* at \*15 (affirming the trial judge's application of comparative fault principles).

157. I recognize the meaning of "choice" is a difficult issue in philosophy, political theory, neuroscience, and many other disciplines (not to mention law). Here, I focus narrowly on how the concept appears to be used in judging-plaintiffs law.

158. See *Koffman v. Garnett*, 574 S.E.2d 258, 262 (Va. 2003) (Kinser, J., dissenting). Even in a friendly game of touch football, this might hold true. See, e.g., *Knight v. Jewett*, 834 P.2d 696, 710-11 (1992).

159. *Rowland v. Christian*, 443 P.2d 561, 568 (Cal. 1968).

A different understanding of what we mean by "choices" is consistent with the outcomes of these cases but provides a more satisfying explanation. That is, despite language to the contrary, the courts are not really judging a plaintiff's expectations about the *level of care* provided by the defendant, or even the potential risk of harm. Rather, these are judgments about what a plaintiff is entitled to expect in terms of a *remedy* after the harm. In other words, it is not that the trespasser is wrong to expect the possessor of land to warn of dangerous conditions; it is that once harmed, the trespasser is not entitled to expect the state to provide him with a right of action to coerce the landowner into paying for the injury. Though this account seems plausible, it has difficulty fitting into corrective justice theory.

### C. Judging Plaintiffs' Degree of Harm

In another class of cases, one individual has acted wrongfully towards another, but courts judge the plaintiff's degree of harm and determine if it is severe enough, or reasonable enough, to warrant tort liability.

#### 1. Assault

The tort of assault is designed to protect the interests of personal security and bodily integrity, and the wrong is realized when those interests are invaded by a person intentionally causing the apprehension of harmful or offensive contact.<sup>160</sup> Nonetheless, there is a requirement in the assault tort that the apprehension be "reasonable," at least if the defendant's act consists primarily of a verbal threat;<sup>161</sup> if the apprehension is not reasonable, a defendant is not to be held liable. In other words, the reasonableness of a plaintiff's apprehension is judged to determine whether she receives a remedy against this defendant.

This requirement is illustrated in *Brooker v. Silverthorne*, a staple of first-year torts casebooks involving a telephone operator in South Carolina who was threatened by a caller.<sup>162</sup> The operator tried to connect the defendant's call but failed to do so.<sup>163</sup> The defendant promptly "cursed and threatened her," saying, "You God damned

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160. RESTATEMENT (SECOND) OF TORTS § 21 (1965).

161. *Id.* § 31 ("Words do not make the actor liable for assault unless together with other acts or circumstances they put the other in reasonable apprehension of an imminent harmful or offensive contact with his person.").

162. 99 S.E. 350, 351 (S.C. 1919).

163. *Id.*

woman! None of you attend to your business.”<sup>164</sup> When the plaintiff tried to explain that she had done the best she could, he said, “You are a God damned liar. If I were there, I would break your God damned neck.”<sup>165</sup> At that point, and for many weeks afterwards, the plaintiff’s sense of security was badly shaken, and she had trouble sleeping and working.<sup>166</sup> This seems like precisely the kind of conduct against which the tort of assault is designed to protect.

Yet the plaintiff was denied liability on the ground that her apprehension of imminent harmful contact was unreasonable. As the South Carolina Supreme Court put it, “There must be just and reasonable ground for the fear.”<sup>167</sup> But it is not clear why this is the case. Perhaps it is to protect the courts from a flood of trivial claims, but that could be done by ensuring that the defendant’s conduct is sufficiently outrageous, as in the tort of intentional infliction of emotional distress, and that the plaintiff’s harm is real and severe.<sup>168</sup> Why assess the reasonableness, in some sense the legitimacy, of a plaintiff’s apprehension in determining a defendant’s liability for assault?

## 2. False Imprisonment

A similar dynamic is present in the related tort of false imprisonment.<sup>169</sup> The essence of this tort is the intentional and unjustified confinement of another, and it protects an aspect of the fundamental right to liberty: the ability to move freely.<sup>170</sup> However, being confined intentionally without justification is not enough for a plaintiff to recover. A plaintiff must also be contemporaneously aware of her confinement.<sup>171</sup>

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164. *Id.*

165. *Id.*

166. *Id.* (“[H]er nervous system was so shocked and wrecked that she suffered and continues to suffer in health, mind, and body on account of the abusive and threatening language addressed to her by defendant.”).

167. *Id.* at 352.

168. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) (“One who by extreme and *outrageous* conduct intentionally or recklessly causes *severe* emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.” (emphasis added)).

169. *Id.* § 35.

170. *Id.* § 35(1)(a)-(b).

171. *Id.* § 35 (1)(c) (requiring as an element of false imprisonment that the plaintiff was “conscious of the confinement or . . . harmed by it”); *id.* § 42 (“Under the rule stated in § 35, there is no liability for intentionally confining another unless the person physically restrained knows of the confinement or is harmed by it.”).

The reason for this contemporaneousness requirement is not entirely clear. A California appellate court recently considered this issue in some detail, noting that "there is scant authority bearing upon this discrete issue," and "no rationale is given for the positions taken by the various courts."<sup>172</sup> Prosser criticized the first *Restatement* for approving of this requirement as a necessary one,<sup>173</sup> and the *Restatement (Second)* backed off by saying that it also can be satisfied by a showing of actual harm.<sup>174</sup> Still, Prosser was not satisfied, arguing that even nominal damages should be enough because "the tort is complete with even a brief restraint of the plaintiff's freedom."<sup>175</sup> Many jurisdictions, however, continue to require contemporaneous awareness of the confinement, perhaps as a proxy for determining degree of harm, despite the California court's conclusion that this "is not, and need not be, an essential element of the tort."<sup>176</sup>

### 3. Intentional Infliction of Emotional Distress

A plaintiff's degree of harm is a critical part of an intentional infliction of emotional distress ("IIED") claim as well. In bringing a claim for IIED, a plaintiff has to prove as part of the prima facie case that the emotional distress she suffered was severe.<sup>177</sup> This is a clear example of judging a plaintiff's extent of harm in order to determine liability. The purpose of this requirement is reasonably clear: to act as a screening mechanism for only the most serious of claims in an area outside tort law's core concern with physical harm. As the *Restatement* puts it, "[t]he law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it."<sup>178</sup>

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172. *Scofield v. Critical Air Med.*, 45 Cal. App. 4th 990, 1003 (Cal. Ct. App. 1996).

173. William L. Prosser, *False Imprisonment: Consciousness of Confinement*, 55 COLUM. L. REV. 847, 849-50 (1955).

174. RESTATEMENT (SECOND) OF TORTS § 42 cmt. h (1965) ("There may, however, be situations in which actual harm may result from a confinement of which the plaintiff is unaware at the time. In such a case more than the mere dignitary interest, and more than nominal damages, are involved, and the invasion becomes sufficiently important for the law to afford redress.").

175. *Scofield*, 45 Cal. App. 4th at 1004 (citing Prosser's critique of the second *Restatement* in W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 11 (5th ed. 1984)).

176. *Id.* at 1006.

177. RESTATEMENT (SECOND) OF TORTS § 46(1) (1965) ("One who by extreme and outrageous conduct intentionally or recklessly causes *severe* emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm." (emphasis added)).

178. *Id.* § 46 cmt. j.

But why is this requirement necessary? IIED has other screening mechanisms for trivial claims, most notably that a defendant's conduct be outrageous, and related torts like assault and battery do not require proof of serious harm before imposing liability. After all, such considerations could and do come into play in determining damages. Certainly, even if the harm is not severe, the defendant who has acted intentionally or recklessly, and in an outrageous manner, in order to bring about emotional harm has acted no less wrongfully. Still, tort law denies liability here.<sup>179</sup>

#### 4. Possible Justifications for Judging Plaintiffs' Degree of Harm

These doctrines within the torts of assault, false imprisonment, and IIED are located in the plaintiff's *prima facie* case, and so we might infer that only a certain level of harm constitutes a legal "wrong" in torts. But it is difficult to argue that a defendant's conduct itself is not wrongful in these cases. In corrective justice terms, these defendants have upset the normative equilibrium by acting in a way that is contrary to social norms of acceptable conduct; nonetheless, this violation of the primary duty of conduct does not translate into a secondary duty of repair. It is not clear why. Even if the equilibrium between the two parties has not been upset considerably, there is still a moral need to "correct" the situation and restore justice. If there are reasons why even if such an obligation is breached, there should be no liability, corrective justice does not seem to account for them.<sup>180</sup>

#### *D. Summary*

We have looked to the leading moral theory of tort law, corrective justice, for possible justifications for judging-plaintiffs doctrine. But the "no wrong" explanation, which would fit most easily within the corrective justice framework, is unpersuasive, and other explanations are no more compelling.

It is perhaps unsurprising that corrective justice has little to say about these doctrines. First, corrective justice generally operates at an abstract level, without much attention to individual doctrines in tort law. Indeed, one of its leading architects, Ernest Weinrib, seems

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179. To be sure, it is an empirical question whether this screening mechanism is, indeed, necessary to keep more trivial claims out of the courts.

180. COLEMAN, *supra* note 20, at 216 n.7 (explaining that the problem remains unresolved). See generally WEINRIB, *supra* note 6, at 56-83 (discussing the foundations and critiques of corrective justice theory).

to have admitted as much.<sup>181</sup> Second, corrective justice theory focuses primarily on the defendant. In corrective justice theory, plaintiffs are primarily objects of analysis, not actors. They are people to whom relational duties are owed, and their economic and other losses can be measured for the purpose of making them whole. But their states of mind or conduct are not necessarily proper subjects for tort law.

Corrective justice's simplicity is one of its great strengths. Ernest Weinrib describes the corrective justice principle this way: "The obligation to compensate is the juridical reflex of an antecedent obligation not to wrong."<sup>182</sup> But in that context, the very existence of doctrines that judge plaintiffs as a part of determining tort liability is a bit of a puzzle. I take the inability of corrective justice to explain judging-plaintiffs law as a strike against it as an interpretative theory.

#### IV. CIVIL RECOURSE AND THE SELF-HELP PRINCIPLE

If corrective justice cannot explain judging-plaintiffs law, is there another way to think about it within an "individual justice" framework for tort law? In this Part, I introduce a new and promising challenger, civil recourse theory, and explain how it is uniquely well positioned to explain judging-plaintiffs law and its concern with individuals' entitlement to complain about being wronged.

##### A. Civil Recourse Theory

John Goldberg and Benjamin Zipursky are two tort theorists who entered the corrective-justice-versus-law-and-economics debate firmly on the side of corrective justice. But in the mid-1990s, they began to look for ways to strengthen corrective justice's explanatory power while retaining its notion (*contra* both the economists and the legal realists) that tort law was fundamentally a matter of "private wrongs," not a regulatory scheme or "public law in disguise."<sup>183</sup>

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181. See Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 158 (2001) ("[F]or all its theoretical sophistication, the exploration of corrective justice by tort theorists has involved a comparatively narrow set of legal doctrines.").

182. Weinrib, *supra* note 44, at 409.

183. Compare Goldberg, *supra* note 30, at 571 ("[Under corrective justice theory,] the basic features of tort law are not a mere historical byproduct, nor a convenient means of achieving deterrence or compensation, but instead a system designed for the goal of correcting private injustices by transferring wrongful losses to the wrongdoer who caused them."), and Zipursky, *supra* note 57, at 92 ("The justice in the enforcement of private law lies in recognizing in those who are aggrieved a right to recourse against those who wronged them. It does not lie in the

Indeed, their critiques of corrective justice theory form the basis for their explanatory theory of torts.

A key mistake for corrective justice, the recourse theorists say, is assuming that the breach of a duty leads to an obligation of repair. As the recourse theorists point out, no such “free-standing” obligation arises—that is, once an individual has behaved tortiously, the state does not itself undertake to repair the harms for money damages, nor does it coerce private parties to do so.<sup>184</sup> Rather, it *empowers* private parties—victims and potential plaintiffs—with a right of action that they can choose to bring in order to obtain a remedy, usually money damages, against the tortfeasor.<sup>185</sup> For the recourse theorists, this distinction tells us something important about the normative structure of tort law—namely, that tort law is about private (not public) wrongs, and that by empowering plaintiffs with a right of action, tort law also empowers plaintiffs politically, instantiating notions of equality in liberal civil society.<sup>186</sup>

For the recourse theorists, the right of action (which they also call “right to redress” or simply “recourse”) is a distinct and important concept in the structure of tort law, in addition to “rights” and “wrongs.”<sup>187</sup> Indeed, one of their primary criticisms of the corrective justice theories is the conflation of “wrongs” and the “right to action.”<sup>188</sup> The structure of tort law, in other words, cannot be explained only in terms of rights and wrongs; it must also take into account the distinct question of a plaintiff’s right to recourse.

Perhaps their most compelling critique of corrective justice theory is its failure to explain the wide swath of cases for which defendants are responsible for foreseeable physical harm but are not

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justice of bringing about a state of affairs that is optimal from a social point of view, whether corrective, distributive, or economic considerations provide the criteria of optimality.”), with Leon Green, *Tort Law: Public Law in Disguise*, 38 TEX. L. REV. 257, 269 (1960) (“[T]ort law calls for as delicate and as profound probing as any of the other areas of law in which the public good is more obvious. It is thus that I conclude that tort law is public law in disguise.”).

184. Zipursky, *supra* note 57, at 81.

185. *Id.*

186. See John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for Redress of Wrongs*, 115 YALE L.J. 524, 626 (2005) (“[A] society without a law for the redress of private wrongs may be a society more prone than ours to accept . . . a less robust civil society, and a more statist conception of how government interacts with its citizens.”).

187. See Benjamin C. Zipursky, *A Theory of Punitive Damages*, 84 TEX. L. REV. 105, 150 (2005) (“What we in fact have is a system in which the power to bring a tort action belongs to the one who has been wronged. It is literally a legal power to force defendant to pay plaintiff, a legal power to take from the defendant. This legal power is a right of action.”).

188. See Zipursky, *supra* note 57, at 87-88 (“Harm per se does not entitle a plaintiff to recourse.”).

held liable. As Zipursky puts it, “[t]he problem is that our tort law does not, in fact, make tortfeasors liable to those who have suffered wrongful losses for which the tortfeasors are responsible.”<sup>189</sup> In other words, being the agent of another’s wrongful loss is necessary but not sufficient for liability. In Zipursky’s view, “what determines whether the plaintiff is the beneficiary of liability imposition” is “substantive standing,” a rule that the tort must have the quality of “wrongfulness-relative-to-plaintiff.”<sup>190</sup> In many cases where liability is denied for lack of “substantive standing,” the harm is perfectly foreseeable.<sup>191</sup>

The civil recourse theorists also fault corrective justice for focusing too much on the defendant. Rather than frame the ultimate question as whether the defendant has wronged the plaintiff, as the corrective justice theorists do, the recourse theorists invert the inquiry. The ultimate question is whether “plaintiffs are entitled to act in various ways against defendants, through the state.”<sup>192</sup> Seen in this light, questions about “what the defendant has done” are subsidiary to questions about “what the plaintiff is entitled to get.”<sup>193</sup> This inversion is a very important advance in tort theory. However, while they look at tort law “from the other end,”<sup>194</sup> the recourse theorists don’t quite look *at* the other end—the plaintiffs and how they’re judged.

Zipursky calls the concept of a “right of action” a “state-created avenue of self-help.”<sup>195</sup> And his invocation of self-help, given up as a part of the social contract, brings to mind aspects of judging-plaintiffs law. For example, the doctrines described in Section III.D.—such as trade secrets law and the public figure doctrine in defamation law—look to the plaintiff’s efforts at self-help to avoid or remedy the harm in order to determine the defendant’s liability.

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189. Zipursky, *supra* note 19, at 714.

190. *Id.*

191. *Id.* at 715 (“The substantive standing rules are most startling in the wide range of cases in which the defendant commits a tort in a context in which it could have been foreseen that the commission of this tort would injure the plaintiff. Yet courts often deny recovery in these cases on the grounds mentioned above: The defendant’s conduct was not wrongful relative to the plaintiff.”).

192. Zipursky, *supra* note 57, at 81, 85 (“The law solves this problem by recognizing a privilege and creating a power in the person whose rights were violated to act against the rights-violator through the authority of the state. In doing so, the law creates what is literally a *right of action* against the rights-violator.” (emphasis added)).

193. See Zipursky, *supra* note 19, at 733. Zipursky also describes it this way: “The very question of whether the defendant will be held liable is a question of whether the plaintiff is genuinely entitled to an avenue of recourse—to an action—against the defendant.” *Id.* at 739.

194. *Id.* at 733 (emphasis added).

195. Benjamin C. Zipursky, *Philosophy of Private Law*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW 623, 632 (Jules Coleman & Scott Shapiro eds., 2002).



Perhaps this notion of self-help can shed light on the important questions that remain about judging-plaintiffs law: What is it about a plaintiff that makes her ineligible to complain? Are there other reasons for ineligibility for a right of action besides the ones that we have just canvassed? Why should this mean no liability for the defendant, as opposed to a reduction in damages? And how does this all fit within a framework for tort law that relies on some notion of individual justice?

*B. Judging-Plaintiffs Law as Self-Help Inquiry*

“Self-help” is commonly defined as: “legally permissible conduct that individuals undertake absent the compulsion of law and without the assistance of a government official in efforts to prevent or remedy a legal wrong.”<sup>196</sup> In the defamation context, the idea is that a public figure who has experienced reputational harm can remedy that legal wrong, at least partially, through speech of her own.<sup>197</sup> And so the familiar notion in First Amendment jurisprudence—that the best cure for speech is more speech—enters tort law by indicating that plaintiffs who have access to such a self-help remedy (public figures) should not be entitled to a legal remedy, given the First Amendment’s disfavor for government regulation.<sup>198</sup>

This same notion of a self-help remedy goes beyond areas of tort law where the First Amendment plays a role. Indeed, my argument in this Section is that judging-plaintiffs law can be explained as a coherent whole with reference to this self-help alternative. Below, I explain how it can be understood that way and why it is a legitimate factor in considering whether to impose tort liability.

When we think of self-help in the law, we generally think about means of self-help that the law authorizes or condones. For example,

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196. Douglas Ivor Brandon et al., *Self Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society*, 37 VAND. L. REV. 845, 850 (1984); Richard A. Epstein, *The Theory and Practice of Self-Help*, 1 J.L. ECON. & POL’Y 1, 2 (2005) (citing the Brandon article’s definition of self-help); see also Tom W. Bell, *Free Speech, Strict Scrutiny, and Self-Help: How Technology Upgrades Constitutional Jurisprudence*, 87 MINN. L. REV. 743, 743 (2003) (espousing a normative concept of self-help, that “[t]he state ought not to help those who can better help themselves”).

197. See *supra* Section III.A.4.

198. Bell, *supra* note 196, at 751 (“[C]ourts have found state action restricting speech based on its content unconstitutional in cases where they have found self-help capable of generating the same benefits.”); Lichtman, *supra* note 102, at 216-17 (“On countless occasions, courts have struck down government restrictions on speech for the simple reason that self-help provides a seemingly adequate alternative.”).

an act of violence that might normally be a battery in tort, and aggravated assault in crime, might be considered lawful as self-defense depending on the circumstances.

Self-help plays an important role in other ways. As we have seen, use of self-help before the alleged wrong can be a prerequisite to a legal remedy—in trade secrets law, for example.<sup>199</sup> In other areas of the law, the existence of an adequate self-help remedy is a factor in knocking down government regulation. First Amendment jurisprudence is the best example of this; the existence of a self-help remedy is a factor in that there is not a “compelling state interest” and that there are “less restrictive means” of achieving the same goal.<sup>200</sup> And the notion of self-help to prevent or remedy a legal wrong is the backdrop for enforcing norms in pre-legal societies<sup>201</sup> before a more centralized mechanism of remedying wrongs emerges through the creation of the state.<sup>202</sup>

By “self-help,” I refer to both the ability to *prevent* the harm and the ability to *remedy* it without resort to legal recourse. Judging-plaintiffs law contains instantiations of both the preventive and remedial aspects. For example, the justifiable reliance requirement can be seen as a denial of a right of action to a plaintiff because she could have prevented the harm from occurring by investigating or questioning the misrepresentation. On the remedial side, the additional hurdle for public-figure plaintiffs in defamation law can be seen as a denial of recourse to people who can repair their reputations without resort to the law.<sup>203</sup>

Far from being a historical anomaly, or just a puzzling set of doctrines, judging-plaintiffs law has a logic that can be understood by reference to the self-help rationale, and it is consistent with the structure and purpose of tort law. The following will consider whether

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199. See Lichtman, *supra* note 102, at 226 (explaining that trade secret law “denies a remedy to any trade secret holder who has failed to exercise reasonable self-help precautions”). For an overview of trade secret law, see *id.* at 225-29.

200. See Bell, *supra* note 196, at 745-46 (“These two aspects of strict scrutiny—the ‘compelling interest’ prong and the ‘least restrictive means’ inquiry—have provided two openings for courts to consider self-help alternatives to state action.”); Lichtman, *supra* note 102, at 219 (“[S]elf-help . . . reduces the government’s overall role in regulating speech.”).

201. See generally Epstein, *supra* note 196, at 4-18 (describing the origins of purely self-help regimes in a state of nature).

202. See generally *id.* at 24-30 (describing how self-help governs in civil society); JOHN LOCKE, THE SECOND TREATISE ON CIVIL GOVERNMENT 10 (Prometheus Books 1986) (1690) (“[Without self-help,] the law of Nature would, as all other laws that concern men in this world, be in vain, if there were no body that in the state of Nature had the power to execute that law.”).

203. The assumption of risk aspect of the public-figure doctrine encompasses the preventive aspect as well.

self-help can explain and unify the two major categories of judging-plaintiffs doctrine in tort law: conduct and choices.

First, judging plaintiffs' conduct. We saw in Part III that corrective justice fails to explain why plaintiffs' carelessness ought to matter. Self-help provides an answer. Contributory or comparative negligence is an example of the law saying to the plaintiff that there was a self-help remedy available—taking due care—and the law will not invoke state intervention when you could have prevented the harm yourself.<sup>204</sup>

Recall the example of Mikeal Preston, struck and killed by a car near Valdosta, Georgia. Because the plaintiff was judged to be sixty percent at fault, his widow was denied liability altogether. Corrective justice theory has trouble explaining this result because the defendant has acted wrongfully in a way that has caused significant harm to the plaintiff, according to the jury verdict. It sounds like an invasion of a right leading to a duty of repair.

On the other hand, under civil recourse theory as informed by self-help, tort law looks at this case and says that the plaintiff could have avoided the harm altogether through self-help (taking due care), and therefore, though the plaintiff *has* been wronged by the defendant, she is not entitled to invoke the machinery of the state to get even.<sup>205</sup>

For another example, take securities fraud, which maps fairly closely the common law tort of fraud. The justifiable reliance requirement can be seen as the law saying that yes, top executives lied about the company's future growth, and yes, you relied on their optimistic statements and bought stock in the company. But if you had done your homework and looked at what the analysts were saying, you would have seen that the company's leading product was in trouble. You could have avoided losing all that money without resorting to a state remedy.<sup>206</sup> Because the state can only intervene so much, it will not allow you to bring a tort claim when you could have avoided the harm through self-help.

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204. See generally Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2033-36 (1996) (describing how the law operates to create socially accepted norms in dangerous activities, providing a threshold of legally expected behavior).

205. See Zipursky, *supra* note 19, at 755 ("To be sure, individuals exercising their rights of action are often seeking to restore themselves, to 'get even' or to achieve corrective justice, but the state's recognition that such individuals have a right of action must not be misinterpreted as an embrace of corrective justice.").

206. See Margaret V. Sachs, *Materiality and Social Change: The Case for Replacing "the Reasonable Investor" with "the Least Sophisticated Investor" in Inefficient Markets*, 81 TUL. L. REV. 473, 481-82 (2006) (describing the Securities Exchange Act of 1934 Rule 10-b5 requirement that a plaintiff establish her justifiable reliance on fraud).

The doctrines used to judge plaintiffs' choices work in similar ways. This notion that the plaintiff could have avoided the harm through self-help resonates in Cardozo's opinion in *Murphy*.<sup>207</sup> First, there is the famous phrase that Cardozo uses to describe the plaintiff—a "vigorous young man"<sup>208</sup>—denoting someone who should be able to take care of himself on an amusement park ride and, if not, ought not to come crying to the courts for recourse. Then there is the appeal to personal responsibility for one's choices: "The antics of the clown are not the paces of the cloistered cleric . . . . The plaintiff was not seeking a retreat for meditation. . . . The timorous may stay at home."<sup>209</sup> The theme "you could have avoided this yourself" and the tone of moral disapproval—not of the plaintiff's conduct per se, but of the plaintiff's choice to go on the ride and then *pursue a legal remedy* when he was injured—dominates the brief opinion.<sup>210</sup>

By indicating that the plaintiff assumed the risk, Cardozo seems to be saying that one could have avoided the injury by not participating in the activity. But in choosing to go on the Flopper, he must now bear the responsibility for the harm.

The assumption-of-risk branch of the public figure doctrine in defamation law operates in a similar way.<sup>211</sup> According to the law, there was a way to avoid the harm to one's reputation. One could have stayed out of the public eye, not "thrust [herself] into the vortex,"<sup>212</sup> and then one would not have had people commenting on her, let alone making false and defamatory statements. Though this logic certainly can be—and has been—called into empirical question, the rationale does ring of self-help and choice, of the possibility that the plaintiff could have avoided the harm without dragging the state into the picture.

Other doctrines that look to choices are consistent with a self-help rationale as well. To the trespasser who is injured on someone else's land, tort law says: well, you could have prevented that harm by not trespassing in the first place!<sup>213</sup> Similarly, the non-natural

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207. *Murphy v. Steeplechase Amusement Co.*, 166 N.E. 173 (1929).

208. *Id.* at 174.

209. *Id.*

210. See Simons, *supra* note 62, at 1722 ("Another approach, which I call the *moral parity*, asserts that what victims can legitimately expect of injurers, injurers can legitimately expect of victims. Insofar as a victim is seeking a remedy based on the injurer's deficient behavior, the injurer has two prima facie arguments: first, that the victim should be held to a similar standard of behavior; and second, that the victim's failure to do so should limit recovery." (emphasis added)).

211. See *supra* Section III.A.4.

212. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974).

213. See *supra* Section III.B.3.

requirement for strict liability for ultrahazardous activities draws a boundary between activities that a plaintiff ought to expect to encounter living in a particular community and those that are not “natural” activities in the area.<sup>214</sup> For activities that are “natural” in this sense, a plaintiff could have avoided non-negligently caused harm by the self-help mechanism of choosing not to live in that particular area and cannot be heard to complain (or at least invoke the machinery of the state on her behalf) if such harm is suffered.

I anticipate a few objections to this account. One is to the idea that individuals should have to use self-help to protect themselves from others’ wrongful conduct or to prevent other people from being harmed by their own wrongful conduct or that of a third party.<sup>215</sup> This is the classic problem posed by the *LeRoy Fibre* case, where the plaintiff may have stacked his flax too close to the railroad,<sup>216</sup> and its modern counterpart, the line of seatbelt defense cases, where the negligent defendant argues that the plaintiff would not have been injured had she worn her seatbelt.<sup>217</sup>

The precise objection to my account could come from one of two directions. First, one might say that because plaintiffs are able to recover in many of these cases, they constitute evidence against the self-help principle as explaining judging-plaintiffs doctrine. Second, one could argue that if the self-help principle really is embedded in tort law, then tort law needs to be changed.

Indeed, from a corrective-justice perspective, these “no liability” cases seem odd. There is a negligent actor who has caused harm to another. Why should that person not be responsible for cleaning up the mess? As a matter of interpersonal morality, holding that defendant liable seems sound. Perhaps, though, what is really at work here is not a principle of interpersonal morality, but rather a principle of political morality—an issue about when someone can call upon the state for a legal remedy.

Seen this way, these cases are in some sense about the state’s responsibility—that the plaintiff can ask the state to hold the defendant accountable for the speedy driving that caused her harm, or the negligent railroad that let sparks burn the hay, because the

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214. *Id.*

215. Heidi Hurd discusses this issue in *Is it Wrong to Do Right When Others Do Wrong?: A Critique of American Tort Law*, 7 LEGAL THEORY 307 (2001). My thanks to Tom Eaton for pushing me on this objection.

216. *LeRoy Fibre Co. v. Chicago, Milwaukee & St. Paul Ry. Co.*, 232 U.S. 340, 349-50 (1914).

217. *E.g.*, *Connelly v. Hyundai Motor Co.*, 351 F.3d 535, 542-44 (1st Cir. 2003) (discussing the admissibility of evidence of seatbelt use for purposes of establishing the comparative negligence of the plaintiff, and citing several additional seatbelt cases).

defendant is deemed responsible for these outcomes.<sup>218</sup> On the other hand, because Preston was more careless (sixty percent) than the driver who hit him, he is deemed responsible for that outcome, and cannot call on the state to hold the driver liable.<sup>219</sup>

Another objection is: "Wasn't the plaintiff the cheapest cost avoider in all of these cases?"<sup>220</sup> Indeed, I think the cheapest-cost-avoider concept, broadly defined in both economic and philosophical terms, is consistent with much of this doctrine, but its explanatory power is inadequate. First, its relatively neutral ethos is at odds with the moralistic language seen in many cases denying plaintiff recovery. It is, therefore, difficult to argue that what judges are *really* doing in deciding these cases is calculating the cheapest cost avoider.<sup>221</sup>

Second, the cheapest-cost-avoider framework is designed for—and has currency with respect to—accidentally caused harm, not the "gallery of wrongs" that make up all of tort law.<sup>222</sup> For example, defamation and fraud are two torts where the harm caused by the defendant is not accidental. It seems odd analytically to ask which party is best positioned to avoid harm when one party is affirmatively trying to cause harm. Moreover, telling the truth is quite cheap, but the defendants in the defamation and fraud examples discussed in Part III were not held liable.

Finally, it is not at all clear that many of the plaintiffs in these cases—even those involving accidental harm—are the cheapest cost avoiders. In the products liability context, for example, the manufacturer is generally in the best position to determine how consumers might misuse the product and take steps to avoid any

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218. I refer here to the notion of "outcome-responsibility," developed in the context of tort law by Stephen Perry, building on the work of Tony Honore. See Perry, *supra* note 104, at 489-514 (elaborating on outcome-responsibility).

219. The concept of "responsibility" is by no means self-defining, and is the subject of great debate in both the philosophical and legal literatures. A more complete exploration of what we mean by "responsibility" within the normative structure of tort law awaits future work, but I begin to explore this topic in Part V.

220. The concept of the cheapest cost avoider is described in CALABRESI, *supra* note 35, at 135-97.

221. Even a non-economic, autonomy-based version of the cheapest cost avoider concept, such as the one put forward by John Attanasio, does not really work here. See John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677, 723 (1988) (positing as a formulation of aggregate autonomy: "act to protect the individual against severe constrictions of life plans whenever such protection may be accomplished through de minimis wealth-related interference with the life plans of some members of society"). It seems odd to suggest that it promotes "aggregate autonomy" to allow people to get ripped off without recourse simply because they failed to investigate.

222. Goldberg, *supra* note 30, at 519.

resulting harm.<sup>223</sup> But plaintiff-consumers frequently are asked to bear the burden of harm from product misuse. In a premises liability context, a trespasser is not in a better position than the landowner to investigate what dangers might be lurking on a particular piece of land and what precautions are sensible to take. Though the trespasser may well be deserving of liability for other reasons, being the cheapest cost avoider is not one of them.<sup>224</sup>

Another possible objection is that the self-help inquiry is inadequate to make distinctions between plaintiffs who should or should not recover. Arguably, self-help is always available in that one can always choose not to engage in a particular activity and, therefore, avoid physical and legal injury. Coase made a related point with respect to factual causation's inability to do real normative work.<sup>225</sup> Everything is a but-for cause of everything else, so a pedestrian could be considered a but-for cause of her own harm, even if the driver that hit her recklessly ran a red light.

This objection is sound and points to the necessity of the self-help inquiry being a heavily normative one, not simply a factual inquiry. But what is to guide this normative inquiry? What question is tort law trying to answer in judging plaintiffs?

To make this concrete, let's return to Mikeal Preston. Why is it that his widow was denied liability altogether because he was judged to be sixty percent at fault, but if he had been judged forty-nine percent at fault, she would have received nearly \$1,000,000? Again, because this is the result in four out of five states,<sup>226</sup> a descriptive theory of tort law ought to be able to account for this distinction. I begin to answer these questions below.

### *C. Why Available Self-Help Means No Right of Action*

I have now explained how we can understand judging-plaintiffs doctrine as denying liability where the plaintiff could have prevented or remedied the legal wrong through self-help—in other words,

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223. *Id.* at 552 ("Here the debate among economists centers on the degree to which parties are likely to enter into such transactions with access to good information, clear understandings of that information, a genuine will and ability to negotiate, and the like.").

224. Schwartz, *supra* note 23, at 1822-23. To be clear, I take no issue here with the cheapest-cost-avoider concept as a normative framework for deciding certain kinds of tort cases. But that is not my project. My project is interpretive, to look at a particular swath of tort law that is relatively unexamined in order to see what tort law *is* doing, and to use this analysis to help illuminate the theoretical debate. The cheapest-cost-avoider doctrine *is not* determining liability in judging-plaintiffs law.

225. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

226. See *supra* note 65 for statistical information.

without invoking the power and machinery of the state. The critical question remains: Why exactly should the plaintiff be denied liability in these circumstances?

In many areas of the law, legal self-help is one possibility, but it is not *required* in order to avail oneself of the legal remedy.<sup>227</sup> If you want to put up a fence to repel trespassers, you may, but if you decide not to, and someone walks across your property, you can still take him to court.<sup>228</sup> If someone pushes you across the room, you can push him back to repel a further attack. But you can also take your lumps and sue him for battery without a court saying, "Sorry, tough luck, you should have pushed him back when you had the chance."

In defamation law, the answer to why the existence of a self-help remedy should bar liability is clear: the First Amendment's thumb on the scale against government action.<sup>229</sup> But why negligence law, products liability, fraud? The answer comes from the origin and purpose of tort law—and this answer supports civil recourse theory as a descriptive theory of tort law.

In Anglo-American law, tort law arose as a substitute for individuals or clans taking revenge on one another for harm done.<sup>230</sup> In the early common law, crime and tort were indistinct.<sup>231</sup> For "breaches of the king's peace," the king could get compensation, but private victims could also initiate an appeal of felony, which might result in criminal punishment and compensation to the victim.<sup>232</sup>

Drawing primarily on Locke and Blackstone, the recourse theorists point to the transition from the "state of nature" to the liberal state and embrace tort law's roots as a substitute for private vengeance.<sup>233</sup> As the redress theorists have explained with reference to social contract theory, people agree to enter into a civilized legal society with the understanding that, though they are giving the state a monopoly on violence, there are adequate systems in place as a substitute for remedying wrongs.<sup>234</sup> The substitute is the "right of action" in tort law, according to recourse theory.

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227. Lichtman, *supra* note 102, at 229 ("Most legal rules do not require self-help as a precondition to formal legal process . . .").

228. *Id.*

229. *See supra* Section III.A.4.

230. Brandon et al., *supra* note 196, at 849 ("The judicial scheme survived despite its apparent contravention of American wherewithal and human nature, partly because the courts and laws provide an adequate and efficient alternative for redressing wrongs.").

231. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 59 (1996).

232. *Id.*

233. Goldherg, *supra* note 186, at 542-43.

234. Zipursky, *supra* note 57, at 85-86.



But what is a right of action exactly, or, more precisely, what is its role and function in tort law, perhaps even private law more generally? Hart and Sacks refer to it as a species of “remedial power.”<sup>235</sup> Zipursky refers to a private right of action as a “privilege” granted by the state in return for citizens giving up their right to violent self-help,<sup>236</sup> and he elsewhere calls it a “state-created avenue of self-help.”<sup>237</sup>

When the state created this alternative to vengeance, though, it did not outlaw all self-help remedies—just the violent and therefore socially undesirable ones. Therefore, a legal remedy should only be provided where there is no longer a lawful means of getting even. This stems from a basic tenet of liberal political theory: that the state should only do what it must and not more.<sup>238</sup> For political authority to be justified, it must be acting where private ordering cannot. Too much state intervention means improper infringement on liberty, according to this view.

Moreover, this principle of non-interventionism is consistent with tort law. Tort law is a substitute for private vengeance in situations where such action would be warranted. It is not a redistribution scheme among manufacturers and consumers, as some torts scholars have argued. When, absent tort law, a person would be justified in “getting even” through violence or other means, that person is entitled to a tort remedy instead. But if “getting even” is not warranted, a tort remedy is not either, even if such a remedy would provide compensation for serious injuries and deter future accidents.

In the context of judging-plaintiffs law, a plaintiff’s capacity for self-help does not mean, contrary to the conventional view, that she has less of a moral claim against the defendant. The claim based on morality or justice against the defendant stems from the wrongful behavior—the false imprisonment, the lying about the used car’s air-conditioning, the reckless driving. Rather, there is no liability in such

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235. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 137 (William N. Eskridge, Jr. & Philip P. Frickey eds., Foundation Press 1994).

236. See Zipursky, *supra* note 195, at 636 (explaining that Zipursky did not mean “privilege” in a Hohfeldian sense). For Hohfeld’s use of privilege—in terms of liberty to act without infringing on another’s rights—see Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 32-33, 36-37 (1913).

237. Zipursky, *supra* note 195.

238. See Bell, *supra* note 196, at 748-49 (“[A] fundamental principle of liberal jurisprudence [is this]: Political entities should undertake only those projects that they can accomplish more effectively than private ones can.”).

cases because the plaintiff has no moral or political entitlement to the state's coercive authority.<sup>239</sup>

To be sure, not all of judging-plaintiffs law can be explained with reference to this self-help principle. For example, the category of "not enough harm"—the severity requirement in IIED, reasonableness in assault, and contemporaneousness in false imprisonment—does not fit within the self-help framework. Nonetheless, it *can* be explained by the background principle of liberal non-interventionism, which the self-help principle mediates in other areas of judging-plaintiffs law. That is, these doctrines can and should be seen as limits on a plaintiff's entitlement to recourse, even where the defendant has acted wrongfully towards the plaintiff, on the ground that the state ought to do only what it must, and the law is judging the plaintiff to be insufficiently harmed to be entitled to invoke state authority.

In other words, rights of action are not to be given out like candy on Halloween. After all, besides scarce state resources, there is a countervailing interest at work: individuals have a security interest in not allowing the state to take their property.<sup>240</sup> When the state sets up a system of tort law, enabling plaintiffs to invoke the machinery of the state to "get even" with those who have harmed them, the state will only recognize those rights of action that are necessary to achieve this goal. If plaintiffs could have prevented the legal wrong through self-help, whether it be more careful conduct or avoiding a particular activity, then the state will not make available a right of action. To do otherwise would be to bring the reach of the state beyond its legitimate bounds.

For understanding judging-plaintiffs law, then, the payoff of civil recourse theory is its isolation of and focus on the question of a right of action and its connection to the backdrop of self-help—a further improvement on corrective justice theory, which stops with "rights" and "wrongs." Put simply, tort law replaces (and makes unlawful) certain forms of self-help (like violence) and provides a remedy instead. But the flip side is that tort law denies a remedy in cases where the plaintiff could have taken advantage of lawful self-help mechanisms. Questions about the conduct or choices of plaintiffs are subsidiary to the question whether this plaintiff should be entitled to a remedy against this defendant.

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239. Zipursky, *supra* note 57, at 5.

240. John C.P. Goldberg, *Rights and Wrongs*, 97 MICH. L. REV. 1828, 1835 (1999).

Seen this way, judging-plaintiffs law is neither an anachronism nor an anomaly, as some scholars have argued.<sup>241</sup> Rather, judging-plaintiffs law is a legitimate and important part of the normative structure of tort law.

## V. THEORETICAL AND DOCTRINAL IMPLICATIONS

### A. *Strengthening Civil Recourse Theory*

#### 1. A Robust Right of Action

The isolation of a right of action is an important contribution to tort theory, but in its current form, the right of action as a distinct analytical concept is somewhat thin. To be sure, the isolation of a right of action as an essential, structural feature of tort law is an important step in shedding light on the law's normative underpinnings. But does the concept of a right of action do any independent work?

The recourse theorists' answer is unclear, but it appears to be no. Once it is established that defendant wronged the plaintiff, then the state provides the right of action. Whether the plaintiff brings the right of action, of course, is up to her. Once the wrong occurs, though, the analytic inquiry is over: she is provided a means for recourse.<sup>242</sup> This analytic thinness has led some critics to underestimate civil recourse theory, deeming it simply another version of corrective justice, with the distinction of rights of action from wrongs as mere semantics.<sup>243</sup>

Even though the recourse theorists isolate the concept of a right of action, they seem to fall into the same trap that Hohfeld did in

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241. See, e.g., Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558, 604 (1985) ("The much-vaunted individualized attention to victims in practice sanctions flagrant horizontal inequity . . . ." (footnote omitted)).

242. The one exception that I have been able to identify is that of assumption of risk, which the recourse theorists appear to treat as forfeiture of remedy. See Goldberg & Zipursky, *supra* note 117.

243. See Alan Calnan, *In Defense of the Liberal Justice Theory of Torts: A Reply to Professors Goldberg and Zipursky*, 1 N.Y.U. J.L. & LIBERTY 1023, 1024-26 (1996) (referring to recourse theorists as corrective justice "insiders"); John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE AND PHILOSOPHY OF LAW, *supra* note 195, at 1, 55-58 (arguing that recourse theory fails by refusing to engage in "full-blooded normative justification").

analyzing the concept.<sup>244</sup> As Hart and Sacks pointed out, Hohfeld saw a remedial right of action as simply part of the primary right violation, or its corollary, the breach of a primary duty.<sup>245</sup> Similarly, the recourse theorists treat the right of action as something provided by the state when there is a “‘wrong’ relative to the plaintiff.”<sup>246</sup> But this ignores many important limitations on the “remedial power” of a right of action that are bound up with the content of tort law.

In contrast, I argue that the question whether the plaintiff has a right of action *is* and *should be* a distinct analytic inquiry, and viewing it that way can strengthen civil recourse theory. Indeed, it is not notions of duty or wrongs that are relational, as the recourse theorists argue.<sup>247</sup> The *right of action* is itself the locus for the relational inquiry on whether the plaintiff is properly situated relative to the defendant.<sup>248</sup> That is, a court ought not to evaluate whether the defendant has wronged the particular plaintiff; the court must instead evaluate whether the plaintiff is entitled to a remedy against this defendant as part of the right-of-action inquiry.

There is nothing inherently flawed about locating the relational aspects of negligence in the “wrong” category as opposed to the “right of action” box. Put differently, I see no particular normative superiority inherent in a right-of-action concept that has analytic content (as I argue for below), as opposed to a right-of-action concept that only tells us about the fundamental structure and purpose of tort law (no small thing). Nonetheless, I argue that analyzing a right of action in a tort claim offers theoretical benefits to civil recourse and conceptual and practical benefits for tort doctrine and practice.<sup>249</sup>

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244. See Hohfeld, *supra* note 236, at 33 (positing that “a duty is the invariable correlative of that legal relation which is most properly called a right or claim” but failing to analyze the remedial right separately).

245. HART & SACKS, *supra* note 235, at 136.

246. Zipursky, *supra* note 57, at 8-10.

247. See Zipursky, *supra* note 19, at 743 (arguing that legal norms and wrongs are relational). A full analysis of this claim awaits a subsequent paper. For now, I agree with the thrust of Jane Stapleton’s critique of the recourse theorists on relational duties and wrongs. See Jane Stapleton, *Evaluating Goldberg and Zipursky’s Civil Recourse Theory*, 75 FORDHAM L. REV. 1529, 1541-51 (2006) (describing several major objections to civil recourse theory).

248. To be sure, the recourse theorists acknowledge that a right of action is relational. But they do not treat the concept as necessitating a separate analytic inquiry.

249. Although much of my discussion below relates to how to reconstruct and strengthen civil-recourse theory with respect to negligence law, in Section V.B. I indicate the practical payoff for other types of tort claims.

## 2. Connecting the Wrong to the Harm

What analytic work would a right of action do in determining tort liability? This Section takes a first cut at answering this question. My basic answer is twofold: *structurally*, the right of action connects the defendant's wrong to the plaintiff's harm, and *conceptually*, the right of action answers the question whether this plaintiff is entitled to a remedy against this defendant through an inquiry designed to attribute "historic" responsibility.<sup>250</sup>

I intend this answer to be both descriptive, a friendly amendment to civil recourse as a positive theory of tort law, and normative, in that embracing this understanding will bring conceptual clarity and its practical benefits to tort law. This Section explains the structural point, and Section V.B. begins to translate the conceptual understanding into a practical payoff for tort doctrine and practice.

Structurally, the right of action is the normative connection between the defendant's wrong and the plaintiff's harm.<sup>251</sup> The idea is that the "recourse" of the recourse theorists' "rights, wrongs, recourse" model ought to do a lot of the work now in the "wrongs" category, including answering the question of self-help at the heart of judging-plaintiffs law. The basic approach is this: when a plaintiff can demonstrate a *right* that was invaded by a defendant who behaved carelessly (*wrongfully*), she presumptively is entitled to a right of action.

At that point, though, the defendant can challenge the plaintiff's entitlement to a right of action on one or more possible grounds such as: (1) the tortious aspect of the defendant's conduct was not a factual cause of the plaintiff's harm; (2) the harm suffered by the plaintiff was not within the scope of the risk that made the defendant's conduct tortious (proximate cause); and (3) the plaintiff could have avoided or mitigated the harm with self-help (judging-plaintiffs law).<sup>252</sup> All these arguments are challenges by the defendant to the plaintiff's entitlement to a remedy based on a lack of normative connection between the wrong and the harm, preventing the state from attributing responsibility to the defendant.<sup>253</sup>

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250. See PETER CANE, *RESPONSIBILITY IN LAW AND MORALITY* (2002) (explaining the concept of "historic responsibility" and distinguishing it from other forms of responsibility in morality and law).

251. Compare to discussion in *supra* Section III.B.1, describing Weinrib's analytical structure of tort law, which does not include a normative force.

252. I would probably include duty in one of these categories, but will further develop this idea in future work.

253. It is beyond the scope of this paper to defend or criticize these particular requirements or more fully develop the meaning of historic responsibility. My task here is to explain how they

The need for a normative connection between the wrong and the harm is driven by the bilateral structure of tort law, where a plaintiff-victim brings a lawsuit against a defendant-wrongdoer. For the recourse theorists, the necessary normative connection, and its explanatory power for the structure of tort law, lies in the notion of relational wrongs.<sup>254</sup> I think this is unpersuasive.<sup>255</sup> In my view, the plaintiff's entitlement to a right of action, arising presumptively from the defendant's wrong invading the plaintiff's right, is limited by a liberal principle of non-interventionism and a proper understanding of the purpose of tort law as a replacement for vengeance.<sup>256</sup>

In this context, we can properly understand the role of judging-plaintiffs law and its self-help rationale. As part of the overall inquiry whether the defendant ought to be held liable for a plaintiff's harm, we ask the question whether the plaintiff could have avoided the harm through the exercise of due care or a different choice of how to pursue her ends. If the answer to that question is yes, then there is not the requisite normative connection between the defendant's wrong and the harm, and so the plaintiff is not entitled to a remedy against the defendant.

To make this claim is not to say that the defendant—say someone who rear-ends the plaintiff while driving eighty miles per hour in a fifty-five miles-per-hour zone—has not behaved wrongfully towards the plaintiff, who had to brake suddenly (a but-for cause of the outcome) because she was fiddling with the radio and not watching the road. The defendant has behaved wrongfully towards this plaintiff and all other drivers around who might have been harmed by his unreasonable creation of the risk of physical harm. Nonetheless, the plaintiff is not entitled to a right of action from the state because of her own carelessness.

Similarly, the used car salesman who intentionally deceived the buyer about whether there was working air-conditioning in the car has acted wrongfully for the purposes of common law fraud. But if the buyer was unreasonable in not testing the air-conditioning before buying the car, he is responsible for the outcome and not entitled to a right of action against the salesman.

The separate analytic inquiry on a right of action encompasses more than judging-plaintiffs law. For example, in the tort of negligent

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fit within the normative structure of tort law.

254. See *supra* text accompanying notes 190-91 (discussing Zipursky's "substantive standing" rule as "wrongfulness-relative-to-plaintiff").

255. I will explain why in future work.

256. See COLEMAN, *supra* note 20, at 437 (describing the role of corrective justice in sustaining societal norms and autonomous choice).

infliction of emotional distress, jurisdictions use a variety of tests to limit the number of such claims that can be brought.<sup>257</sup> In these cases, it strains common understanding to say that no wrong has been committed because, for example, harm to the particular plaintiff was unforeseeable as she was not within the “zone of danger.” The defendant has been careless—the wrong—and caused emotional harm to the plaintiff. This analysis is really about responsibility—whether, despite the defendant’s committing the wrong, the plaintiff ought not to be entitled to a remedy against this defendant for whatever set of policy reasons.

Zipursky’s “substantive standing” rule also belongs in this right-of-action inquiry. Zipursky frames the substantive standing issue as whether the plaintiff has been wronged by the defendant, which is itself predicated on the defendant having “invaded the plaintiff’s right.”<sup>258</sup> In defamation, for example, Zipursky describes the “of and concerning” requirement—that is, that the defamatory statement by the defendant must be “of and concerning” the plaintiff—as instantiating the substantive standing requirement. He points out that this requirement applies “even if the defendant defamed someone” and even if “the foreseeable result of this defamation was a reputational injury to the plaintiff.”<sup>259</sup> If the “of and concerning” requirement is not met, then the defendant has not behaved wrongfully towards the plaintiff, or correlatively, the plaintiff’s right has not been invaded by the defendant.<sup>260</sup>

I see it differently. In my view, if the defendant defamed someone, that constitutes a “wrong.” If a plaintiff suffers a reputational injury as a result, her “right” to a reputation unvarnished by false statements has been violated. Nonetheless, she may not be entitled to a right of action if she cannot meet the “of and concerning” requirement. This requirement, normatively, may be a reflection of a policy judgment not to flood the courts with defamation claims or to avoid chilling speech. Regardless, the condition is properly thought of as limiting remedy, not whether there is a “wrong” in the first place.

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257. See, e.g., Christina Hull Eikhoff, Note, *Out with the Old: Georgia Struggles with Its Dated Approach to the Tort of Negligent Infliction of Emotional Distress*, 34 GA. L. REV. 349, 356-57 (1999) (summarizing different approaches).

258. Zipursky, *supra* note 57, at 87-88.

259. *Id.* at 17.

260. *Id.* at 18.

*B. Judging-Plaintiffs Law in a Right-of-Action Framework*

Important questions remain. As a practical matter, how would this reconstruction of civil recourse theory translate into the practice of tort law? Conceptually, the right of action asks the question whether this plaintiff is entitled to a remedy against this defendant and provides the defendant a handful of reasons for arguing that the plaintiff is not. Here, I argue that the conception of a right-of-action inquiry that I present above has a practical payoff for tort doctrine and practice. And I move from the descriptive to prescriptive—that is, I use the analysis of Parts III and IV to prescribe doctrinal shifts, focusing on judging-plaintiffs law.

1. Understanding Traditional Defenses

Understanding contributory negligence's place in the normative structure of tort law helps illuminate the logic of modified comparative negligence regimes. In a modified comparative negligence scheme, a plaintiff is prevented from recovering if she is deemed more negligent than the defendant. The idea is that the right-of-action inquiry asks whether the plaintiff is entitled to help from the state to hold the defendant responsible. If the plaintiff acted more culpably than the defendant, then she would not be entitled to "get even." This makes normatively attractive the idea that a plaintiff should be barred from recovering if she is more negligent than the defendant.<sup>261</sup> This vengeance lens also helps us see why a contributory negligence defense is not allowed (and self-help not required) in intentional torts.<sup>262</sup>

The idea of a right of action with analytic content also has implications for assumption of risk. Express assumption of risk, properly identified as a contractual defense by the *Restatement (Third)*,<sup>263</sup> would sit comfortably in the right-of-action box. Defendant ski resort, for example, might well have behaved *wrongfully* in not clearing fallen trees from the slope and invaded the plaintiff's *right* to bodily security. But the plaintiff has no *right of action* if he has waived

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261. See Schwartz, *supra* note 23, at 1818 ("[T]ort law can be understood in economic terms as supplying appropriate incentives to injurers and victims alike.").

262. See Ellen M. Bublick, *Citizen No-Duty Rules: Rape Victims and Comparative Fault*, 99 COLUM. L. REV. 1413, 1427 (1999) (indicating that courts accept or reject comparative fault defenses based on the defendant's status as an intentional or negligent tortfeasor); Ellen M. Bublick, *Comparative Fault to the Limits*, 56 VAND. L. REV. 977, 989-90 (2003) (describing rules that limit the availability of comparative fault defenses).

263. RESTATEMENT (THIRD) OF TORTS: APPOINTMENT OF LIAB. § 2 cmt. a (2000).



this remedial right by contract before hitting the slopes. The plaintiff essentially has waived the remedial right to hold the ski resort responsible for an unfortunate outcome. This is consistent with the treatment of express assumption of risk.

Implied assumption of risk would be retained, but only in its core, traditional form. That is, the notion of “primary implied assumption of risk”—that there are certain risks inherent in activities such that defendants have no duty to take care to avoid them—would be treated as part of the plaintiff’s prima facie case, generally under breach.<sup>264</sup> The “secondary assumption of risk” argument, though—that plaintiff voluntarily and knowingly encountered the particular risk that constitutes the defendant’s negligence—would still be treated as an affirmative defense and analytically distinct from contributory negligence.<sup>265</sup> This would be an argument about the plaintiff’s entitlement to a “right of action.” In making the choice to encounter the risk (a choice that may be reasonable or unreasonable), the argument would go, the plaintiff essentially has forfeited her right to call upon the state to coerce the defendant into paying for any harm that results.

## 2. Moving from Elements to Defenses

In other areas, the primary practical effect of my interpretive analysis of judging-plaintiffs law and its theoretical implications would be to move what are now *elements* of a plaintiff’s prima facie case to *defenses*. This change is more than superficial, with the burden of proof now shifted to the defendant on several issues.

Premises liability cases, making up nearly twenty percent of tort cases,<sup>266</sup> would be impacted significantly by the theoretical structure outlined here. If the different rules governing liability to trespassers, licensees, and invitees are properly conceived of as assessing whether plaintiffs are entitled to a remedy, as opposed to varying duties by defendants, then there are two practical consequences. First, all jurisdictions should adopt California’s *Rowland v. Christian* rule, whereby landowners have a duty to use

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264. See, e.g., *Scott v. Pac. W. Mountain Resort*, 834 P.2d 6, 13 (Wash. 1992) (“To the extent a plaintiff is injured as a result of a risk inherent in the sport, the defendant has no duty and there is no negligence.”); KEETON ET AL., *supra* note 175, § 68.

265. By saying that the concept is analytically distinct, I do not mean to say that it could not be considered alongside plaintiff’s negligence as part of the comparative responsibility inquiry as, for example, New York does by statute.

266. MARIKA F. X. LITRAS ET AL., BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, BULLETIN: TORT TRIALS AND VERDICTS IN LARGE COUNTIES, 1996, at 2 (2000), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ttvlc96.pdf>.

reasonable care to avoid causing physical harm to others through the condition of their property, no matter the "status" of the person who eventually is harmed.<sup>267</sup> This enables duty to be a plausible guide to primary conduct for landowners. Second, landowners should have the opportunity to raise the defense that the plaintiff was a trespasser and therefore (unless the plaintiff is a child falling under the "attractive nuisance" doctrine) not entitled to a remedy. The distinction between business and social guests (invitees and licensees), though, would become irrelevant.

In constitutional defamation law, rather than a public figure having to prove a higher degree of culpability by the defendant in order to hold a defendant liable, the standard for wrongdoing would remain the same regardless of the plaintiff's status, and the defendant would be able to bring a defense that the plaintiff could have used self-help (the opportunity for rebuttal or staying out of the public eye) to avoid the harm. Despite the defamatory statements, then, there would not be the requisite normative connection between the wrong and the harm, and the defendant could not be held responsible for the outcome of reputational damage.

Similarly, in the fraud claim, the plaintiff used car purchaser would not have to prove that his reliance on the salesman's misrepresentation about the air-conditioning was reasonable. Rather, once the plaintiff demonstrated that the representation was false, made with the requisite intent, and actually relied on by the plaintiff, the burden would shift to the defendant to show that the plaintiff's reliance was unreasonable—that if he had done his homework (self-help), then he would have avoided the harm. The outcome of buying a lemon cannot be laid at the feet of the defendant, and thus, there can be no liability.

As indicated in Part III, courts are split on whether consent to battery is part of the *prima facie* case or an affirmative defense. I explained earlier that in many cases, even if we determine that the plaintiff has "consented" in the relevant sense, the defendant's behavior is still wrongful. So it may not make sense to characterize a lack of consent as an essential "element" of the wrong of battery. On the other hand, the idea that judging plaintiffs' entitlement to a right of action is legitimate and ought to be guided by a self-help principle lends support to considering consent an affirmative defense—an inquiry conceptually separate from the wrong itself, with the burden of proof on the defendant. If the plaintiff could have avoided the harm, she is not entitled to invoke the machinery of the state for recourse.

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267. See *supra* Section III.B.3 for a discussion of the California rule.

The judging-plaintiffs framework also helps untangle another puzzle in consent doctrine. Courts are split on whether consent ought to be judged based on whether (a) the defendant believed that the plaintiff had consented to the relevant contact; (b) the plaintiff actually consented; or (c) the defendant actually and reasonably believed that the plaintiff had consented.<sup>268</sup> Understanding the consent defense as an instantiation of judging plaintiffs' right to recourse supports framing this inquiry as about a plaintiff's state of mind and conduct—whether actual consent was given—as opposed to assessing the defendant's state of mind, either subjectively (actual belief in consent) or objectively (the reasonableness of that consent).

The reason is that we are not judging whether the defendant's conduct was wrongful—we are assuming it was—but judging whether the plaintiff is still entitled to recourse. In the undisclosed STD context, for example, we look at the plaintiff and, if she did not resort to self-help in avoiding the harm by either using protection or asking about sexual history, then we deem her to have consented to the risk of infection and preclude her recovery.

The right-of-action inquiry ought to be decided by judges for two reasons—one conceptual, the other pragmatic. Conceptually, the right to a remedy is a kind of categorical determination best made by judges. To be sure, it frequently will be fact intensive and often case specific. But the factual inquiry is simply a guide to a classic legal question: Should the plaintiff be entitled to a remedy? From a pragmatic perspective, much of judging-plaintiffs law appears to be driven by the desire of judges to keep cases from juries and out of the courts.<sup>269</sup> Any proposal for refining tort law must take this impulse into account in order to have any practical chance of success.

Take the example of self-help as a principle in deciding assumption-of-risk cases. It discards the legal fiction of a state-of-mind inquiry into what the plaintiff has or has not consented to and makes it an objective test about what individuals like the plaintiff could do to avoid the harm—i.e., what self-help remedies are available. This kind of objective inquiry into available self-help alternatives can and should be decided by judges, including on motions for summary judgment, allowing courts to prevent some of these cases from going to trial.<sup>270</sup>

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268. The last is the most common. See generally DOBBS, *supra* note 85, at 534-49.

269. Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 487 (1998).

270. Careful scrutiny of these judicial decisions must be undertaken given the adverse effect such judgments have on disadvantaged groups. Specific and corroborated incidences of judicial bias in courts throughout the country are well-documented. See Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional*

Indeed, that is precisely one of the key rationales behind judging-plaintiffs doctrine, properly understood with the self-help rationale: victims who had access to self-help remedies would not be entitled to invoke the expensive and cumbersome machinery of the state. Allowing these cases to go to juries would undermine that rationale.

### 3. Towards a New Doctrinal Framework for Negligence Law

One possible objection to this reconstruction of civil recourse theory goes something like this: "Wait a second. Wouldn't your theory imply changing the duty-breach-causation-harm-plus affirmative-defenses construct we use to determine tort liability?" My basic response is "yes." Below I elaborate, explaining why this deconstruction and reconstruction of basic black letter negligence law is worth the candle.

First, let's be clear-eyed about the current disarray that is negligence law. First-year tort professors like me are familiar with the experience of trying to explain to students how concepts like duty and proximate cause both work analytically and hang together conceptually, before (at some point) admitting that they do neither.

A quick look at the activities surrounding the drafting of the *Restatement (Third)'s Liability for Physical Harm* reveals the doctrinal disarray.<sup>271</sup> The first draft of the duty section suggested that duty rarely should be an issue in negligence cases.<sup>272</sup> This is consistent with the progressive view that duty is used by judges to take cases from juries on unarticulated, or simply regressive, policy grounds.<sup>273</sup> The recourse theorists responded with a typically thoughtful and forceful article arguing for a strengthened role for duty in negligence law.<sup>274</sup>

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*Argument*, 63 *FORDHAM L. REV.* 73, 87 (1994) (examining judicial neutrality and relevance of race-based economic data in calculating damage awards); Sherrilyn A. Ifill, *Judging the Judges: Racial Diversity, Impartiality and Representation on State Trial Courts*, 39 *B.C. L. REV.* 95, 102 (1997) (finding that race bias is a common feature within state court systems); Sheri Lynn Johnson, *Black Innocence and the White Jury*, 83 *MICH. L. REV.* 1611, 1621 (1985) ("Both black and white judges convicted black defendants more often than white defendants . . .").

271. *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM* (Proposed Final Draft No. 1, 2005).

272. *RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES* §§ 3, 6 (Discussion Draft, 1999).

273. See Dylan Esper & Gregory C. Keating, *Abusing "Duty,"* 79 *S. CAL. L. REV.* 265, 267-73 (2006) (picking up this critique of more recent California decisions); Goldberg & Zipursky, *supra* note 117, at 331 ("Esper and Keating decry the excessive eagerness of contemporary California appellate judges to circumvent juries and issue matter-of-law rulings for defendants.").

274. See John C.P. Goldberg & Benjamin C. Zipursky, *The Restatement (Third) and the Place of Duty in Negligence Law*, 54 *VAND. L. REV.* 657, 724-32 (2001) (explaining the benefits of a robust conception of duty for negligence law).

But the *Restatement* drafters stuck to their guns and rejected the recourse theorists' suggestion.<sup>275</sup> Still, the place of duty is highly contested.

On proximate cause, the *Restatement* drafters think so little of the term, if not the concept, that they title the relevant section, "Scope of Liability (Proximate Cause)." They also propose limiting the doctrine's scope and relevance and articulate the fervent hope that the term "proximate cause" will be unnecessary by the time the *Restatement (Fourth)* is published.<sup>276</sup> Relating to both duty and proximate cause (and breach) is the role of "foreseeability" in negligence law, and one scholar demonstrates the academy's ambivalence toward this concept with companion articles entitled "Purging Foreseeability"<sup>277</sup> and "Reconstructing Foreseeability."<sup>278</sup>

Full development of a new doctrinal framework for negligence law—explicitly centered on "rights, wrongs, and recourse"—is beyond the scope of this paper. For now, I hope to have persuaded the reader that the time is right for such a framework and that separating the question of wrongs from recourse and treating the right of action as an umbrella for a series of conceptual inquiries about the plaintiff's entitlement to a remedy has the potential both to help clarify tort doctrine and to illuminate the overall purpose of tort law. Such a framework would be different than that offered by corrective justice and would modify but build upon civil recourse theory.

## VI. CONCLUSION

With the inadequacy of instrumental theories as accounts of tort law and the limits of corrective justice in explaining various tort doctrines, including judging-plaintiffs law, there is room for a new descriptive theory of tort law to help us understand what tort law is doing and, indeed, what we are reforming. In this Article, I have used

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275. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 (Proposed Final Draft No. 1, 2005) (recommending that "no-duty" determinations occur only in "exceptional cases"); *id.* at § 7 cmt. a (arguing that this position is consistent with the approach taken in "almost every torts treatise and casebook").

276. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM, Scope Note cb. 6 (Proposed Final Draft No. 1, 2005).

277. W. Jonathan Cardi, *Purging Foreseeability*, 58 VAND. L. REV. 739, 790-94, 799-802 (2005) (supporting the proposed *Restatement (Third)*'s § 7 for its purging of foreseeability considerations from the "duty" element, in part because foreseeability is better decided by the jury under the rubric of breach and proximate cause).

278. W. Jonathan Cardi, *Reconstructing Foreseeability*, 46 B.C. L. REV. 921, 924 (2005) (arguing that foreseeability "might fit wholly and seamlessly within the elements of breach and proximate cause").

the disparate doctrines that I recast as “judging-plaintiffs law” to help inform the theoretical debate, but in a way that provides a doctrinal and practical payoff. Civil recourse theory’s ability to explain judging-plaintiffs law in a way that other theories cannot constitutes strong evidence for civil recourse theory as an interpretive account. But I think that the recourse theorists’ notion of relational wrongs is both misguided and not essential to the theory’s success. In my view, we can use recourse theory’s isolation of the right of action to create a new doctrinal framework that uses the right of action to do important analytic work—work currently being done in the “wrongs” category.

The corrective justice theorists are right. Tort law is about individual morality and the obligations of one citizen to another. But it is also about political morality, the obligations of the state to its citizens, and the limits of citizens’ claims on the coercive power of the state. When we judge plaintiffs by reference to a principle of self-help, we help to define the contours of the obligations of the state to its citizens. Borrowing from Cardozo, “the timorous” need not stay at home, but they cannot then call upon the state to help clean up the mess if things go wrong when riding the Flopper.