Wrongs Without Recourse: A Comment on Jason Solomon's *Judging Plaintiffs*

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I. INTERPRETIVE TORT THEORY

Interpretive theories of tort seek to find coherence amidst the welter of tort law, much like interpretations of a play or novel seek to find within its characters and events a unifying set of themes or concerns. Yet the diversity among the numerous tort causes of action, as well as the complex procedural and institutional framework within which they are litigated, pose a stark challenge to those who aspire to provide a general theory of tort. It is thus no surprise to find that many of the best twentieth-century tort scholars combined a very subtle appreciation of tort doctrine with an aversion to all but the thinnest general descriptions of their subject. Indeed, some were inclined to say simply that tort is law that authorizes the bringing of civil suits before judges and jurors, in turn empowering those actors to advance any of several goals that might be accomplished by ordering the payment of damages or injunctive relief, including compensation of the injured and deterrence of antisocial conduct.[1]

Thin interpretations such as these enjoy certain advantages. Just as it is relatively uncontentious to describe *Hamlet* as a play about a prince in which several of the principal characters die, it is uncontentious to assert that tort law confers power on judges and

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1. John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L.J. 513, 521–25 (2003).

juries, and that the exercise of this power might advance one or more policy agendas. But of course such descriptions also come with costs. A nearly vacuous description of a play is uninteresting. A nearly vacuous description of tort is not merely uninteresting, it is misleading in a way that can generate practical effects. In particular, to say that tort is nothing more than law that empowers judges and juries to attend to various policy goals is to cast judges and jurors as ministers without portfolios: lawmakers free to give to tort law the content it needs to have to serve the relevant goals. In turn, a judge anxious to promote, say, loss spreading, will want to insist—and will on this view be encouraged to insist—that tort concepts (e.g., "duty" and "causation") are ciphers; that they mean whatever they need to mean to allow for damages to be awarded to injury victims in their actions against superior loss spreaders such as employers and manufacturers.[2]

Troubled by the thinness of thin interpretive accounts and their implications, some academics began in the 1970s to develop substantially more robust theories. Particularly important was the effort of William Landes and Richard Posner.[3] Disdainful of the judicial loosey-gooseyness invited by ultrathin theories, and disturbed by the degree to which these theories lent themselves to then-prevalent redistributive political agendas, Landes and Posner claimed to find within tort a substance and an overarching purpose that circumscribe its proper field of operation. Specifically, they argued that tort is a scheme by which government uses the threat of liability to induce individuals and firms to take cost-efficient precautions (and only cost-efficient precautions) against injuring others. Accordingly, they set out to demonstrate how tort's key features—including, for example, its core doctrinal rules, its articulation in leading judicial decisions, and its status as common law—reveal it to be, and help it to function as, a scheme for inducing efficient precaution taking.

Puzzled as to why negligence law adopts an objective rather than a subjective standard of fault? No need to be. (Or so said Landes and Posner.) The puzzlement stems only from falsely supposing that legal fault is a subspecies of moral fault, and hence bound up with notions of blame. The fault of which tort law speaks is the failure to take efficient precautions, a standard that demands an objective inquiry into the costs and expected benefits associated with taking a precaution. Wondering what to make of Learned Hand's cryptic suggestion that it would be helpful to think of carelessness in terms of

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2. *Id.* at 526.

3. WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987).

an algebraic formula (B < P x L)? Wonder no more, for this turns out to be just a particularly self-conscious judicial rendering of the idea of fault as the failure to take cost-justified precautions. Unable to grasp the significance of tort law as being primarily common law rather than statutory law? An explanation is at hand. Statutory law, being captive to interest groups, is about redistribution. Common law, being the relatively apolitical province of judges, is about the attainment of a consensus good, viz., the efficient use of resources.

Admirable in their willingness to get their hands dirty with the ins and outs of doctrine, Landes and Posner nonetheless failed at their self-appointed task. Efficient deterrence theory does not so much capture as alter the meaning of basic tort concepts such as "fault."[4] Its analysis of leading opinions, including even *Carroll Towing*, mischaracterizes their reasoning and their holdings.[5] Its treatment of waste avoidance as a consensus value is unjustified. Its account of how tort functions as a scheme of efficient deterrence even though lawyers, judges, and juries do not understand it as such amounts to a just-so story. And, as Ernest Weinrib and Jules Coleman each have emphasized,[6] the economic account ultimately is unable to explain satisfactorily the basic structure of tort law. If tort really were a system that uses threats of monetary sanction to induce actors to take cost-efficient precautions, why does it require someone to be injured before a suit can be brought? And why does it specify that injured persons may only recover from those who have actually injured them? (As long as someone, *anyone*, brings a suit against anyone else that exposes inefficiently unsafe conduct and thereby creates a threat that stands to induce actors to change their conduct, the system will be doing what it is supposed to do.) In short, the economic interpretation treats as superficial and highly contingent what is actually essential to tort—the idea that the victim of a legally defined wrong, *and only the victim*, is empowered by tort law to respond to the wrong by seeking a remedy from the wrongdoer who injured her, and *only the wrongdoer*.

Affirmatively, Weinrib, Coleman, Stephen Perry, and others have maintained that a more satisfactory yet still robust account of tort treats it as a scheme for the doing of corrective justice.[7] In contrast to distributive justice, which concerns the fairness of how

4. Benjamin C. Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007).

5. *Id.*

6. JULES L. COLEMAN, THE PRACTICE OF PRINCIPLE: IN DEFENCE OF A PRAGMATIST APPROACH TO LEGAL THEORY (2001); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995).

7. *See* Goldberg, *supra* note 1, at 570–75 (citing and briefly summarizing some of the relevant works).

basic goods such as liberty and property are allocated among individuals and peoples, corrective justice is concerned with the justness of interpersonal interactions. Specifically, it supposes that individuals have rights or interests with which others must not interfere, and that violations of these rights or interests—wrongs—generate in the wrongdoer a second-order duty to repair either the wrong itself or the loss stemming from the wrong. (This duty to repair is "second order" because it is parasitic on the first-order duty not to invade the rights or interests of the other.) On the corrective justice account, tort law converts first-order moral duties (e.g., the duty to refrain from intentionally striking another without sufficient reason) into first-order legal duties (e.g., the duty not to commit battery), and the second-order moral duty of repair into a second-order legal duty of repair. Here we seem to have a better explanation for why tort law borrows heavily from the language of morality and why tort suits take the form of a wrongfully injured victim bringing a claim for compensation against someone whose wrong has injured her.

Corrective justice interpretations of tort law mark a major advance in modern interpretive tort theory. Yet they face difficulties of their own. My frequent collaborator Benjamin Zipursky has argued that the actual requirements for tort liability are in basic ways more demanding than they ought to be if tort really were an avenue by which a wrongdoer fulfills his moral duty to repair his wrong or the losses stemming from it.[8] This much, he claims, is evidenced in the most famous torts chestnut of them all: *Palsgraf v. Long Island Railroad Co.*[9] Cardozo's majority opinion requires more for negligence liability than merely commission by the defendant of a careless act causing physical harm to a foreseeable victim—a set of requirements, which should suffice to establish a moral wrong that generates a moral duty of repair. In addition, the defendant's careless act must be careless *as to* the victim, rather than careless as to others who are differently situated in relation to the defendant's conduct. This is why Mrs. Palsgraf's suit failed. Even if her injuries were proximately caused by the train conductors' careless pushing of the mysterious package-carrying passenger, the conductors were at most acting carelessly *as to* the package carrier and the persons in his immediate vicinity, not as to persons who were standing away from the site of the push. This same requirement of "*as-to*" or *relational* wrongfulness,

8. Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L. J. 695 (2003); Benjamin C. Zipursky, *Rights, Wrongs and Recourse in the Law of Torts*, 51 VAND. L. REV. 1 (1998).

9. 162 N.E. 99 (N.Y. 1928).

rather than generic wrongfulness, runs throughout tort law. For example, it is evidenced in the rule holding that a fraud plaintiff must prove "actual reliance" and the rule that a defamatory comment is actionable only if it is "of and concerning" the plaintiff.

Zipursky has further argued that tort law's requirement of relational wrongfulness is not an anomalous or technical requirement of the law but instead is bound up with a deeper set of issues about how best to characterize the personal injury lawsuit. On the corrective justice account, tort suits are treated as mechanisms by which a wrongdoer's moral duty of repair is converted into an enforceable legal duty. Notice, however, that the conversion of the moral duty of repair into a legal duty does not happen through the tort system unless and until the victim decides to press a claim against the defendant. In other words, if the defendant is going to be made to heed his duty of repair, it will only be by virtue of the law's having empowered the victim to demand of the defendant that he make amends for the wrong done. (In this regard, tort is distinct from a readily imaginable alternative scheme that relies on official prosecutions to force wrongdoers to fulfill their duties.) Corrective justice theory thus fails to capture accurately the terms on which tort links a victim to a person who has victimized her. Tort law does not of itself "correct" things as between victim and injurer—the agent of correction is not the law (or government) but the victim, empowered by the law. And tort does not operate by adjusting the figures on society's moral ledger so as to restore a pre-tort equilibrium between victim and wrongdoer.

So what is tort and what does it do? Zipursky and I have argued that tort is best understood as law that empowers the victim of a wrong to obtain a fair measure of satisfaction by extracting something from the wrongdoer. The notion here is one of a civilized and legalized form of redress, rather than a restoration of an equilibrium. This is why the victim's remedy will often suffice even though it leaves her somewhat worse off or somewhat better off than she was prior to the commission of the tort. In short, tort law is a law of civil recourse—law that empowers a person victimized by conduct that is both *wrongful as to her* and *injurious to her* to bring suit against a wrongdoer and, if she prevails, to obtain recourse against the wrongdoer via a damages payment or injunctive relief.

Another way to appreciate the differences between civil recourse and corrective justice theories is to consider the historical sources that scholars in the respective camps draw upon. Corrective justice theory finds its roots in Aristotle's ethics, which attests to its conception of tort as an expression in law of first- and second-order moral obligations that exist independently of law. Civil recourse

theory, by contrast, builds on the work of political and legal theorists, particularly John Locke and William Blackstone.[10] In Locke's view, government, in the name of civil order and justice, takes away (criminalizes) what Locke regarded as a victim's natural right to respond to another who has done her wrong. In turn, if it is to be legitimate, government must provide a substitute for self-help—a legal avenue of victim recourse. Picking up on this idea, but grounding it in the common law tradition, Blackstone insisted that it is a recognized duty of government to provide a body of law that defines and prohibits certain "private wrongs" while also providing victims of these wrongs with the opportunity to redress them through suits in the courts. Reflecting these roots, recourse theory is as much a political theory as a moral theory of tort. While it shares with corrective justice theory the idea that tortious conduct closely resembles (and indeed often is) immoral conduct, it insists that one misses something basic about the enterprise of tort law if one sees it simply as a mechanism for enforcing morality or restoring some sort of moral equilibrium between injurer and victim. It instead is a scheme by which government gives victims the chance to harness the procedures and powers of the legal system as a way of getting back at their wrongdoers in light of the outlawing of self-help.

II. WRONGS, ENTITLEMENTS TO REMEDIES, AND *JUDGING PLAINTIFFS* DOCTRINES

The preceding tour sets the stage for Professor Solomon's valuable contribution to interpretive tort theory in *Judging Plaintiffs*.[11] The main aspiration of the article is to vindicate, further develop, yet also challenge certain aspects of civil recourse theory. Specifically, its concern is to identify and draw links between various doctrines that he sees as explicable from within recourse theory and inexplicable (or only clumsily explained) by corrective justice theory. Each of these doctrines provides a ground for denying or limiting a tort plaintiff's recovery *on the basis of something about the plaintiff* or *something the plaintiff has done*. The challenge they pose for corrective justice theory is that they seem to block or limit liability even as to defendants who have acted wrongfully so as to injure another, which ought to suffice to trigger the moral duty of repair that corrective justice theorists claim is being enforced by tort law.

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10. John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 YALE L.J. 524, 541–49 (2005).

11. Jason M. Solomon, *Judging Plaintiffs*, 60 VAND. L. REV. 1749 (2007).

What are these doctrines? Solomon divides them into three types.[12] The first involves rules that deny or limit recovery based on the contribution of the plaintiff's own *conduct* to his injuries. For example, victim carelessness that functions as a cause of the victim's own injuries can reduce or bar her recovery in a negligence action by virtue of comparative fault rules. Likewise, unjustified reliance on another's intentional misrepresentation will defeat a plaintiff's fraud claim. The second type—really a subset of the first—bars tort claims based on how a plaintiff's *choices* have figured in the plaintiff coming to be injured. A negligence plaintiff who knowingly and voluntarily chooses to confront a risk of physical injury that attends a defendant's careless conduct may find her suit tossed out under the doctrine of implied assumption of risk. A person who knowingly and voluntarily consents to a wrestling match will not have a claim for battery if injured by his opponent's deployment of a standard wrestling technique. One who chooses to trespass on another's land is usually denied the right to sue the landowner for carelessly creating or permitting a dangerous condition on the land. The third type of doctrine denies victims remedies because they lack a certain degree of *resilience* or, conversely, because they have failed to demonstrate that the defendant's wrong inflicted a significant-enough harm on them. Thus, a putative assault victim whose apprehension of being touched offensively by the defendant is unreasonable cannot recover. A plaintiff who hopes to prevail on a claim for intentional infliction of emotional distress must establish not merely that the defendant's conduct caused her some upset, but instead must show that she experienced *severe* distress.

In each of the foregoing instances and others, Solomon contends, a victim may be able to establish that the defendant behaved wrongfully and that the wrongful behavior intentionally or foreseeably resulted in harm to the plaintiff. Yet there is no liability. According to Solomon, these doctrines therefore leave the corrective justice theorist in a bind. If a wrong has been done, there should be a duty to repair.[13] True, the plaintiff's conduct, choices, frailties, and/or fortitude figured in how the defendant's wrong ultimately generated or failed to generate an injury to the plaintiff, but so what? As a matter of morality, shouldn't the intentional defrauder be required to make amends even to the victim who was unjustified in relying on his misrepresentation? Why shouldn't the person who acts outrageously

12. *Id.* at 1761.
13. *Id.* at 1783.

with the intention of distressing someone have to make reparations if the victim is merely distressed, as opposed to severely distressed?

In a more affirmative vein, Solomon argues that the foregoing doctrines bolster the case for the civil recourse theory of tort, and that they do so because each evidences the importance of the concept of *self-help* to tort law.[14] I noted above that Zipursky and I have suggested that tort recourse was understood and justified by the likes of Locke and Blackstone as a state-provided alternative to retaliatory self-help. Solomon's claim is that tort not only operates as a substitute for self-help, but that, by the same token, *it denies relief to those who could have helped themselves before the tort occurred* (i.e., those who could have taken actions that would have *prevented* their being wrongfully injured or ameliorated their injuries), as well as to those *who can lawfully and peaceably help themselves after the tort has occurred* (i.e., those who can effectively respond to what has been done to them without the law's assistance). The doctrines of comparative fault, justified reliance, and assumption of risk send a message to would-be victims that tort will not make its remedial apparatus available to them (or will be less than fully accepting of their claims) if it turns out that they would not have needed to resort to the legal system had they done enough to protect themselves. To say the same thing: the exercise of a certain degree of self-protection by victims is set by the law as a threshold condition of being granted the power to seek legal recourse against a wrongdoer. Likewise, Solomon argues, tort law is unwilling to provide a remedy to a class of victims that have an adequate response even without it. Hence in public-figure defamation cases, courts have cited as a justification for the high hurdle of actual malice that public figures tend to have the means and media access to respond effectively to false and disparaging remarks without pursuing a lawsuit.

As Solomon recognizes, his argument to this point is incomplete, for it establishes only that it is consistent with the basic terms of recourse theory for tort law to deny or limit remedies to claimants who could have prevented harm to themselves or now can help themselves. Still, it might be equally consistent with recourse theory for tort *not* to set these hurdles. A further explanation is therefore needed. Solomon fills this gap by grafting onto recourse theory a principle associated with certain strands of liberal political theory. This is the principle that government should stay its hand absent a need for intervention.[15] In other words, in Solomon's view,

14. *Id.* at 1784–87.

15. *Id.* at 1795.

the doctrines discussed in *Judging Plaintiffs* do *not* limit injury victims' access to tort remedies because the victims do not deserve to recover (they may or may not). Rather, they exist because a state operating a system of civil recourse on liberal principles has insufficient reason to get involved in situations in which they are applicable. A variation on the legal maxim *de minimis non curat lex*, Solomon's maxim of liberal civil recourse is that an injury victim has no entitlement to invoke the apparatus of the law to obtain a remedy if she either could have helped or can now help herself.[16]

According to Solomon, a recognition that the seemingly disparate set of tort doctrines he canvasses belong together as "judging plaintiffs doctrines"—for convenience I will now refer to these as "JP doctrines"—both promotes conceptual clarity and provides practical guidance to judges. For example, he argues that judges should now realize that certain rules that they have heretofore regarded as part of the tort plaintiff's prima facie case (such as proof by a personal injury claimant that he was a permitted occupant of defendant's land instead of a trespasser, or proof of justified reliance on a defendant's misrepresentation) should instead be cast as affirmative defenses.[17] More generally, when it comes to litigating any of the JP doctrines, the issue, he says, should be framed in terms of whether there was or is a need for courts to grant a remedy, given what the claimant could have done, or what she may now do to respond to the wrongdoer. Solomon envisions that this inquiry will tend to be more categorical and objective, and hence more manageable, than the subjective inquiries sometimes called for under certain JP doctrines as they presently tend to be applied. For example, the traditional defense of implied assumption of risk will no longer call for an inquiry into what the plaintiff herself actually understood about the dangers of the situation in which she was injured, but instead would require a judge to ask what, in a situation like the one faced by the plaintiff, "individuals like the plaintiff could do to avoid the harm."[18]

Finally, although it is written in an effort to elaborate and advance civil recourse theory, Solomon concludes with an internal critique of that theory. Specifically, he argues that Zipursky and I have erred in treating the requirement of relational or "as-to" wrongfulness as built into the definition of the various torts.[19] What

16. *Id.* at 1796.

17. *Id.* at 1803–06.

18. *Id.* at 1805.

19. *See supra* text accompanying note 9.

we describe as the requirement of relational wrongdoing is better understood—like the plaintiff self-help doctrines discussed throughout his article—as a right-of-action / entitlement-to-remedy rule. In this view, it is erroneous to say that Mrs. Palsgraf lost her suit because she could not establish that the Long Island Railroad committed the tort of negligence against her. In fact, he says, the Railroad did commit that tort when its employees acted carelessly so as to injure her. What, then, is the significance of Cardozo's observation that the conductors' conduct was not careless as to Mrs. Palsgraf? Solomon's answer is as follows. That the conductors' wrong was not a wrong as to Mrs. Palsgraf provides a reason why a court would be justified in staying its hand so as not to grant her a remedy. However, that decision should turn on *whether there are policy grounds that favor or disfavor the granting of a remedy to this class of claimant*. Whereas Zipursky and I argue that the absence of as-to wrongfulness entails that no tort was committed, and hence that the denial to Mrs. Palsgraf of a remedy requires no further policy inquiry, for Solomon (as for Judge Andrews in his *Palsgraf* dissent) the decision to permit a claimant like Mrs. Palsgraf to recover turns on just such an inquiry.[20]

III. RIGHTS OF ACTION AND RELATIONAL WRONGS REVISITED

Judging Plaintiffs has several virtues; I will mention three. Much to their discredit, modern tort scholars often display a tendency to treat tort law as if it were exhausted by negligence law or accident law. Solomon draws connections between the law of negligence, defamation, battery, invasion of privacy, fraud, and appropriation of trade secrets. His is the work of a torts scholar, not a dabbler.

In substance, the basic message of *Judging Plaintiffs* is quite sound. Various tort doctrines *do* limit or eliminate liability for reasons having little or nothing to do with an assessment of the defendant's conduct, and everything to do with whether the legal system is prepared to entertain a claim of the sort raised by the plaintiff. In other words, in tort law, there are analogues to equitable maxims such as the maxim that one who seeks equity must come to equity with clean hands. In insisting that tort law is as much about a plaintiff's *entitlement to invoke the apparatus of the law* as it is about a defendant's having acted in a manner that renders the defendant eligible for legal sanction, Solomon departs from and helps to correct the unhealthy tendency of modern tort theorists to treat the question

20. Solomon, *supra* note 11, at 1801.

of tort liability as a unilateral question about whether the state has reasons to impose liability on a certain category of actor.

Finally, there probably will be practical payoffs to Solomon's argument. At least in some instances, his invitation to judges to consider whether there is something about the plaintiff, the plaintiff's conduct, or the plaintiff's post-tort position that warrants the withholding of relief will frame a more appropriate and manageable question than those that judges have heretofore been asking. That a certain kind of a claimant could easily have protected herself, or can now help herself, surely is the sort of consideration that ought to be on the minds of judges as they fashion tort doctrine. More concretely, *Judging Plaintiffs* ought to aid their understanding and application of certain otherwise puzzling doctrines, such as the justified reliance component of fraud.

While there is more to say in praise of *Judging Plaintiffs*, I will in the interest of brevity turn to the task of critical commentary, trusting that what follows will be read against the backdrop of the preceding praise. My first comment is more of a request for clarification than a criticism. The second argues that *Judging Plaintiffs* overreaches in that some of the main examples said to exemplify the category really do not. Finally, I will suggest that Solomon's concluding thoughts, which admittedly are offered in the spirit of suggestions rather than fully developed arguments, point recourse theory in an undesirable direction.

Solomon's linkage of JP doctrines to a liberal principle of state nonaction is intriguing, but in need of further development. As a historical matter, recourse theory was developed by scholars, including Locke and Blackstone, who predated the nineteenth-century idea that a government built on a foundation of individual rights must take the form of minimal government. And of course since the nineteenth century, it has been common for self-avowed liberals to reject the linkage of liberalism with a default rule of state non-intervention. So why is there reason to suppose that tort law, whether as it was initially fashioned or as it now stands, incorporates into its system of civil recourse a default rule against making itself available to injury victims absent some pressing need?

Apart from this abstract question of theory, there are doctrinal problems with the "Judging Plaintiffs" category and, relatedly, with Solomon's concept of self-help. Consider the following scenario:

> Homeowner *H* is sitting on her open front porch, which is set back well away from the street that passes in front of her house. She observes a car driving by at an excessive speed.

> Noticing that the car's windows are rolled down, *H* instinctively calls out to the driver: "Please slow down!" A moment later, *T*, who is sitting in the front passenger seat, flings a small object out of the car in *H*'s general direction, shouting, "Eat this lady!" In fact, *T*, who is annoyed at *H*'s admonition, has intentionally thrown a half-eaten apple in her direction. *T* hopes that the apple will hit or at least scare *H*, although he knows that the distance from street to porch entails that his hopes are entirely in vain. Indeed, the distance is such that a reasonable person in *H*'s position would know to a certainty that there was no chance that the object would actually hit her. However, *H*, who is exceedingly fearful of physical contact, apprehends that the object will hit her and is seriously traumatized as a result.

If *H* were to sue *T*, her tort claims would probably be for assault and for negligent infliction of emotional distress ("NIED"). Yet under blackletter law, both should fail. An assault plaintiff must prove that her apprehension of imminent harmful or offensive contact was reasonable, which in this case it was not. Likewise, NIED law typically requires the victim to prove that she became distressed over having *actually been endangered* by the defendant's careless conduct.

Solomon would want to treat this scenario as a "Judging Plaintiffs" case. Yet doctrinally it is an instance of *no-legal-wrongdoing*, not an instance in which the victim of a wrong is disqualified from obtaining a remedy for it. Moreover, the rationale for the relevant doctrinal limits does not seem to be that the state will refrain from intervening when a victim can help herself. Unlike the "timorous" Murphy whom Cardozo infamously advised to "stay at home," *H* did stay at home![21] Certainly she did not choose to participate in a rough-and-tumble activity. Nor does she have any way of responding to the defendant after the fact other than by means of a lawsuit. The law does not deprive *H* of a remedy because of what she could have done or can do to help herself. Instead, the justification for denying recovery to *H* lies in a no-wrongdoing idea. If one happens to be an exceedingly timid soul, or prone to overreact massively to events that would cause only mild unease in normally constituted persons, and if one is injured by the acts of another only because of one's extreme psychic fragility, there will ordinarily be no tort, at least absent a showing that the other knowingly exploited one's

21. Murphy v. Steeplechase Amusement Co., 166 N.E. 173, 173–74 (N.Y. 1929). Solomon treats *Murphy* as a poster child for JP doctrines. *See* Solomon, *supra* note 11, at 1751.

vulnerability. The law generally demands ordinary fortitude of each of us—it is on each of us to be able to hold ourselves together in the face of standard stress-inducing events. And it does so primarily out of a concern not to saddle us with the potentially burdensome obligation to take care against acting in ways that would cause harm only to especially fragile victims.[22]

To be sure, one could play word games and cast the demand for ordinary fortitude in terms of "self-help." (It would not do horrible violence to the English language to say of *H* that she is being denied relief because she *was expected to protect herself* against the harm of apprehending offensive contact from another.) But to phrase things this way is to use the concept of self-help metaphorically, and thereby to threaten to expand it into the nearly-vacuous idea that any victim whose volitional act plays a causal role in producing her injury can be deemed to have failed to help herself. What victim does not fall into this category? For what *failure* are we denying *H* access to legal recourse? Stated most accurately, the message sent in this instance by the law is that *even the hypersensitive who cannot protect themselves* will have no cause for complaint just because it is *not wrong* for an actor to engage in conduct that would upset only a hypersensitive victim.

Now consider a second scenario:

> Cyclist *C* misreads an ambiguous traffic sign to suggest that the road immediately to his right is a public road leading to his destination. It is in fact a private drive owned by *O*. *C* rides on it. Because the drive is very poorly maintained, *C* is thrown from his bike and injured.

Solomon argues that the denial of *C*'s claim because of his status as a trespasser is also properly treated as a JP doctrine. There is something to this. Negligence law treats trespassers as in some sense *disqualified from complaining* about unsafe conditions on land. But what are the grounds of the disqualification? Solomon says that they reside in trespassers' "choice" to trespass, which he links to the idea of a trespasser being able to help herself to avoid injury by choosing not to trespass. But of course there was no choice to trespass in this scenario, only a choice to ride along the drive, which the victim perhaps reasonably mistook for a public road. More generally, the law

22. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1685–93 (2002) (developing a version of this argument and applying it to claims for assault, NIED, and other torts).

does not and has never drawn the line between no liability and liability in terms of a distinction between trespassers-by-choice and accidental trespassers. Thus, the reason for denying recovery to trespassers injured by unsafe conditions on land cannot be that the trespasser has the ability to protect herself through choosing not to trespass. Rather it relates to the property owner's rights. The owner, by virtue of her right to exclude, is freed from the responsibility of making the grounds safe for unpermitted entrants, and therefore *does them no wrong* by failing to keep the drive in a safe condition. (This, even though it might be a wrong to permitted entrants to maintain the land in an unsafe condition.)

Now a third scenario:

> Graduate student *G* is invited by her friend *M* to play in a low-key intramural softball game. *M*, an amateur but avid player, has put together the team and serves as manager. *G* has never played or been interested in organized sports. She is aware that other non-athletes regularly play softball without incident and thus infers that the game is neither particularly physical nor dangerous, although she notices when she arrives at the field that the ball is fairly heavy and that batted balls can travel rapidly through the air. *M* asks *G* to play second base, directing her where to stand to field batted balls. Instead of starting off *G* with a slowly rolling ground ball, *M* sharply hits a line drive in her direction. (In doing so, *M* neither intends to hit *G* with the ball, nor knows that she will be hit.) *M* takes two steps in the direction of the ball, but is unable to catch or deflect it, and it fractures her jaw.

Were *G* to sue *M* for negligence, many courts would grant summary judgment for *M*. One ground for doing so would be a matter-of-law ruling for the defendant on breach, although it seems to me arguable that *M* was careless for hitting a ball sharply in *G*'s direction, particularly at the very outset of practice. More likely, the court would invoke the doctrine of implied assumption of risk, which tends to block negligence liability that otherwise might arise when one participant in a voluntary recreational activity carelessly injures another. Again Solomon wants to treat this as a JP doctrine, and again I'm not convinced the label fits.

There are certain instances—those in which the victim really does appreciate and chooses freely to encounter a discrete and well-defined risk of injury associated with another's carelessness—in which courts deny relief on the ground that the victim's choice to encounter

the danger estops her from seeking relief after the fact. Indeed, Zipursky and I have suggested that these are the heartland instances of the traditional implied assumption of risk defense.[23] Yet even in these cases, the ground for disqualifying the plaintiff seems to reside not so much in the fact that the plaintiff had it open to her to take measures to protect herself (by choosing not to engage in the activity), as in the idea that—for better or worse from the plaintiff's perspective—the law ought to respect certain kinds of choices. In other words, the animating idea seems to be a "liberal" one, though not exactly the one Solomon associates with liberal civil recourse. The operative thought is not that courts should stay their hands where people can make choices that will spare them from being injured, but rather that courts should *enforce or respect* appropriately made choices, regardless of whether they are ones that permit persons to help themselves.

Moreover, when courts and legislatures today cordon-off recreational activities as no-liability zones, they seem to have something very different in mind than the traditional notion of implied assumption of risk. (Some courts, including most notably the California Supreme Court, indicate this difference by distinguishing between "primary" and "secondary" implied assumption of risk, with only "secondary" assumption of risk referring to the traditional plaintiff-conduct oriented defense.[24]) Instead, they seem to conclude that there are certain modes of social interaction—especially informal recreational activities—that ought not to be subject to regulation and scrutiny by judges and jurors on the issue of whether participants have conducted themselves with sufficient care for each other's physical well-being. This conferral of something like an immunity does not find its source in the idea that participants can protect themselves from injury. Indeed, it tends to be expressed in terms of a "no-duty" rule that operates *irrespectively of whether the victim suing in negligence actually knew or could have known of the risks to which she was exposing herself by participating*. What, then, explains the recognition of recreational activities as duty-free zones? Courts and legislatures seem to have in mind some combination of the following considerations: (a) participation in these activities is optional rather than required; (b) these activities have an irreducible element of physicality that render personal injury more likely in them than in

23. John C.P. Goldberg & Benjamin C. Zipursky, *Shielding Duty: How Attending to Assumption of Risk, Attractive Nuisance, and Other "Quaint" Doctrines Can Improve Judicial Decisionmaking in Negligence Cases*, 79 S. CAL. L. REV. 329 (2006).

24. *See, e.g.*, Knight v. Jewett, 834 P.2d 696 (Cal. 1992).

quieter pursuits; (c) participants are in some sense on the same plane ("professionals" are not interacting with "amateurs"); (d) the application of a legally enforceable norm of reasonable care to these activities, and the prospect of liability for careless conduct, threaten to introduce a rigidity and formality that would significantly alter the spirit of and detract from the value of these activities; and (e) these informal modes of social interaction are sufficiently common and sufficiently valued that the law ought to err on the side of leaving them under-regulated, even at the cost of denying remedies to victims of careless conduct. For these and perhaps other reasons, judicial decisions and legislation concerning "primary" assumption of risk speak the language of *no wrongdoing*, as opposed to the language of no entitlement to sue.

The broader point to extract from the foregoing examples is this. Several of the doctrines that figure centrally in Solomon's analysis do not withhold from victims of completed wrongs the right to obtain a remedy. Moreover, the justifications explicitly or implicitly invoked by judges and legislatures in fashioning these doctrines have little to do with the notion that the victim did things or made choices such that the law now declines to make itself available to her because she could have helped herself yet (in some non-trivial sense) failed to do so. Rather, they defeat claims on the ground that no wrong has been established. The "Judging Plaintiffs" category is thus substantially less broad than Solomon suggests, and indeed may prove best suited to cover the doctrines of comparative fault in negligence and justified reliance in fraud.

It would be one thing for a certain kind of tort theorist—i.e., one dismissive of the language of the law and keen to substitute for it an alien language that purportedly makes better sense of it—to downplay what lawmakers actually say and what they seem to have in mind. However, recourse theory is built on the notion that fidelity to lawyerly and judicial language is critical to the development of a sound, constructive, and useful account of tort law. The lack of fit between Solomon's category and standard usage is therefore problematic. Unlike, say, the efforts of Magruder and Prosser in the 1930s to extract the new tort of intentional infliction of emotional distress out of a smattering of decisions that lacked a comfortable doctrinal home, Solomon's attempt to place a vast array of heretofore distinct doctrines under the umbrella concept of "Judging Plaintiffs" is perhaps more artificial and more potentially confusing than natural and clarifying.

Now for my last critical observation, which pertains to the reflections offered at the end of *Judging Plaintiffs* as to the possible

implications of its argument. Here Solomon suggests that JP doctrines are but one cluster within the broader category of right-of-action doctrines. Other such doctrines include what I described above as the "relational" or "as-to" wrongdoing requirement evidenced in negligence decisions such as *Palsgraf*.

To understand what Solomon is driving at here, as well as my worries about his approach, it will be helpful to introduce a fourth scenario:

> *P* owns a riverfront property on which he has built a house near the edge of the river. One mile downstream from the property, *D* operates a commercial dock. *D* carelessly moors a large boat to its dock. As a result, the boat breaks free and travels downriver, hitting other boats and causing them to break free from their moorings. Another mile downstream, where the river is particularly narrow, the flotilla crashes into a bridge and topples it. The wreckage dams the river, which causes it to spill over its banks at points more than two miles upstream. As a result, *P*'s house suffers severe flood damage.

This scenario of course builds on the famous *Kinsman* case.[25] The critical difference is that this imagined claimant, unlike the actual claimants in *Kinsman I*, is located *upstream* rather than downstream from the carelessly operated dock. The difference is critical because, even if one is prepared (as was Judge Friendly) to hold the dock operator liable to downstream owners for flooding damage on the theory that, in some generic sense, "property damage to downstream owners" is a foreseeable consequence of carelessly permitting a large boat to become unmoored, the contention that property damage is foreseeable to *upstream* owners is vastly less plausible. It follows, in my judgment, that *P* ought to lose on his negligence claim against *D*, and he ought to lose for precisely the reason that Mrs. Palsgraf lost on her claim. Whatever the dock owner did that was careless, it could not reasonably be deemed careless as to the integrity of property located upstream from the dock. (Who would imagine that letting a boat float downstream would risk property damages to upstream properties?) There was no carelessness "as to" persons such as *P*, and therefore *P* has no cause of action against *D*.

What are we to make of this sort of reasoning? Solomon, as indicated, does not treat the relationality requirement as a JP

25. Petitions of the Kinsman Transit Co., 338 F.2d 708 (2d Cir. 1964), *cert. denied*, 380 U.S. 944 (1965).

doctrine. (But why not? After all, *P* could have "chosen" to live on property located further away from water sources, and in this sense could have helped himself avoid suffering property damage.) Nonetheless, he would claim to see in it a comparable focus on the *plaintiff's entitlement* to invoke the apparatus of the law, rather than on whether the defendant committed a wrong. Thus he would say that *D* wronged *P* simply by causing harm to *P* through action that was careless, even if it was careless only toward downstream property owners, just as Judge Andrews's *Palsgraf* dissent maintains that the train conductors committed the tort of negligence against Mrs. Palsgraf by acting carelessly "to the world" so as to injure her. But if a wrong has been done, why might tort law nonetheless disqualify a claimant such as *P* from obtaining relief? As we have seen, the answer cannot reside in the maxim of liberal civil recourse—there seems to be no suggestion from Solomon that the law's intervention is unnecessary because self-help was or is available. Instead, he seems to suppose that, if the law is going to decline to assist this sort of wronged victim, it will be out of a different sort of "policy judgment," for example, the judgment that courts must take steps to avoid being 'flooded' with litigation, or to keep out frivolous claims.

I see several problems with taking recourse theory in this direction. One is that Solomon is again departing from standard judicial usage and therefore again raising questions as to the interpretive accuracy of his rendition of that theory. Courts overwhelmingly locate the relationality requirement in the elements of a given tort's prima facie case. Defamation law requires the plaintiff to prove that the defendant's allegedly defamatory remark was of and concerning the plaintiff. Fraud law requires proof of actual reliance by the plaintiff. If courts did not and do not regard these requirements as helping to specify what sort of conduct and consequences amount to the legal wrongs of defamation and fraud, why have they built them into the definitions of these torts? Cardozo's *Palsgraf* opinion is equally emphatic on this point, asserting that the absence of careless conduct by the defendant toward the plaintiff entailed that the conduct "did not take to itself the quality of a tort,"[26] and concluding that the question of what damages might be recovered was premature because it presupposed "a finding of a tort"—which was exactly the finding that could not be made.[27]

There is also a mismatch between Solomon's treatment of the "as-to" requirement of tortious wrongdoing and his prior treatment of

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

27. *Id.* at 101.

JP doctrines. Regardless of whether the latter category holds together quite as well as Solomon supposes, it is defined in a way that renders it explicable and potentially justifiable on terms *intrinsic* to civil recourse theory. Recall that, on Solomon's view, it is because recourse theory treats tort law as a state-provided substitute for self-help that it makes sense for courts charged with developing and applying such law to consider whether the availability of pre-tort or post-tort self-help provides a reason to withhold tort remedies. In other words, the existence of JP doctrines are said to attest to the soundness of the civil recourse interpretation of tort precisely because they fit so well with the idea of victim response that resides at the heart of recourse theory's account of what tort law is all about. When it comes to the requirement of "as-to" wrongfulness, however, the grounds on which courts would stay their hands are no longer intrinsically connected to notions of recourse and self-help. Instead, they are entirely *extrinsic* concerns, such as the administrative concern to establish floodgates against court-clogging litigation.

To connect right-of-action doctrines to concerns of judicial housekeeping—or, as Solomon suggests in another place, to concerns that tort law meshes well with other areas of law, such as the First Amendment's favoring of free speech[28]—would seem to invite a general and open-ended inquiry into the policy plusses and minuses of granting remedies for acknowledged wrongs. Perhaps this is exactly what Solomon has in mind. That is, by siding with Judge Andrews's *Palsgraf* dissent, he may be hoping to loosen the strictures of extant tort law so as to enable certain classes of plaintiffs to prevail even given their inability to prove that the defendant acted wrongfully *as to them*. But to say that courts are authorized to fashion right-of-action doctrines based on extrinsic policy considerations would then seem to open up for reconsideration all such doctrines, *including the JP doctrines of which Solomon seems generally supportive*. What if a rule that allows even massively at-fault negligence plaintiffs to prevail on their claims will better deter antisocial conduct, or provide needed compensation to certain injury victims? Would not this extrinsic policy consideration favor the recognition of an entitlement to sue for these claimants, given that they are victims of wrongs? Of course to do so would be to ignore the liberal civil recourse maxim of state noninvolvement where claimants could have helped or can help themselves. Yet if the value of grasping the distinction between "right

28. Solomon, *supra* note 11, at 1801 (arguing that courts might insist on "as-to" wrongfulness in defamation suits via the "of and concerning" doctrine in order to serve the policy goal of promoting free speech).

of action" doctrines and "wrongdoing" doctrines is precisely that it permits judges and legislatures to see that the former, in contrast to the latter, rest more heavily on, and hence should be fashioned in light of, a range of policy considerations, why isn't the lesson here that courts can and should depart from the nonintervention principle where doing so will serve one or more of these policies? In short, Solomon's approach drives what strikes me as too sharp a wedge between tort doctrine that defines wrongs (largely insensitive to policy-based adjustments) and tort doctrine that determines entitlements to sue (readily adjusted in light of an apparently wide range of policy considerations).

Solomon's rendition of recourse theory seems to be walking a tightrope. It simultaneously embraces recourse theory's robust (and therefore constraining) conception of what tort law is about, and what tort concepts and doctrines mean, yet also seems keen to create vast spaces for judicial open-field running, much like the ultra-thin tort theories that I mentioned at the outset of this Response. I fear that this position may in the end be unstable. The relational nature of tortious wrongs cannot be cast as a secondary feature of this body of law. That a tort is never merely just a wrong in the generic sense of conduct violating a standard of right conduct, but more specifically conduct that is wrongful *as to* a victim (or set of victims) goes hand-in-hand with the idea that torts are always *injurious* wrongs (i.e., wrongs that result in the victimization of another, rather than victimless wrongs) and with the idea that there ought to be law that authorizes victim *recourse* against those who have done them wrong. By contrast, if one adopts Solomon's rendering of the relationality requirement as purely a right-of-action doctrine, one is left to wonder what it really means for tort to be a law of injurious wrongs and legal recourse. Divorced from the notion of a victim responding to *having herself been injuriously wronged*, the concept of recourse seems to be drained of its distinctive meaning. To be sure, the plaintiff's suit is still in some sense a response to the wrongdoing of another. But it is the sort of response that the state might just as well authorize of a bystander or public prosecutor: a response simply to the antisocial quality or undesirability of the conduct.