

LAW, SCIENCE, AND THE INJURED MIND

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ABSTRACT

Even while we widely recognize legal liability for physical injury, we frequently discount mental, emotional, and psychological injury. We disfavor tort liability for emotional distress; we prohibit prisoners from suing for purely psychological injuries; and we tax the damages victims of emotional injury receive even while leaving damages for physical injury untaxed. This Article argues that neuroscientific, psychological, and technological advances challenge our traditional ideas about the set of injuries that are possible and that merit legal redress. The Article goes on to contend that, while these advances challenge our traditional ideas, they do not inevitably overturn traditional distinctions within tort law. Rather, they present the task of critically examining and clarifying the normative foundations of distinctions we have historically taken for granted, and considering whether those distinctions survive that searching examination.

Part I defines what I call “mind-dependent” injury and presents a set of test cases that challenge current legal approaches to injury and compensation, and discusses the neuroscientific, psychological, and technical underpinnings that moved these cases from science fiction into scientific reality. Part II reviews and examines several legal contexts that distinguish different types of injury and that provide legal remedies for some but not others. Part III considers normative justifications that might be offered for this differentiation, particularly in light of the new information we have. Ultimately, I argue that while new knowledge may require us to reevaluate the distinctions we traditionally have drawn, it does not completely undermine the possibility of normative distinctions between different types of injury. However, it challenges us to better defend those distinctions and ultimately should lead us to abandon the bifurcation between “emotional” and “physical” injuries in favor of a more nuanced approach.

INTRODUCTION

Neal Stephenson’s *Snow Crash* has us imagine (among other things) a universe where hearing the wrong story could reduce you to permanent gibberish, while David Langford’s *comp.basilisk FAQ* presents us with an image that kills.¹ A century earlier, Mark Twain’s *A Literary Nightmare* introduced us to a song that incapacitates, and Robert Chambers’s *The Repairer of Reputations* gave us a world in which reading a book could

1. NEAL STEPHENSON, *SNOW CRASH* (1992); David Langford, *comp.basilisk FAQ*, 402 NATURE 465, 465 (1999).

cause insanity.² In worlds like these—where both our vulnerabilities and our ability to injure others are very different—the law of redress for personal injury might look very different.

But those worlds are not ours. The paradigm cases of legal compensation for personal injury do not involve words, images, or events acting at a distance or via people’s mental faculties—but rather involve interactions between people’s bodies and (as the philosopher John Austin called them) “moderate-sized specimens of dry goods.”³ Sometimes, as in *Palsgraf v. Long Island Railroad Co.*, the chain of interactions leading from tortfeasor to victim recalls a Rube Goldberg machine.⁴ At other times—such as *Escola v. Coca Cola Bottling Co. of Fresno*’s exploding bottle, or *Byrne v. Boadle*’s flour barrel—the chain is short and simple.⁵ These cases seem, at first glance, to reflect a fact about shared human vulnerability: regardless of our knowledge, wisdom, power, or experience, our bodies remain remarkably frail, liable to irreparable injury from a shard of glass, a sharp kick, or even water heated to the wrong temperature. Perhaps for this reason, even while we widely recognize liability for physical injury, we frequently discount mental, emotional, and psychological injury. We regard tort liability for emotional distress as disfavored;⁶ we prohibit prisoners from suing for purely psychological injuries;⁷ and we tax the damages victims of emotional injury receive while leaving damages for physical injury untaxed.⁸

First, this Article argues that neuroscientific, psychological, and technological advances challenge our traditional ideas about the set of injuries that are possible and that merit legal redress. Taken together, they suggest that the reality of injury lies somewhere between Stephenson’s and Twain’s worlds—full of jeopardy from lethal texts, incapacitating images, and tort law’s narrative of people imperiled by falling packages and flour barrels. The Article goes on to contend that while these advances challenge our traditional ideas, they do not inevitably overturn the existing law of tort. Rather, they present us the task of critically examining and clarifying the normative foundations of distinctions we have historically taken for

2. Mark Twain, *A Literary Nightmare*, ATLANTIC MONTHLY, Feb. 1867, at 167–69; Robert W. Chambers, *The Repairer of Reputations*, in THE KING IN YELLOW (1895).

3. JOHN L. AUSTIN, SENSE & SENSIBILIA: RECONSTRUCTED FROM THE MANUSCRIPT NOTES BY G.J. WARLOCK 8 (1962).

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

5. *Escola v. Coca Cola Bottling Co. of Fresno*, 150 P.2d 436 (Cal. 1944); *Byrne v. Boadle*, 159 E.R. 299, 1863 WL 6189 (1863).

6. *E.g.*, *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 158 (2d Cir. 2014) (applying New York law); *Benson ex rel. Benson v. Minn. Bd. of Med. Practice*, 526 N.W.2d 634, 637 (Minn. Ct. App. 1995) (collecting authorities).

7. 42 U.S.C. § 1997e(e) (2015).

8. 26 U.S.C. § 104(a)(2) (2015); *cf.* *Comm’r v. Schleier*, 515 U.S. 323, 329 (1995).

granted, and considering whether those distinctions survive that searching examination.

This Article is among the first pieces of legal scholarship to examine the impact of these new scientific discoveries on tort liability for mental, emotional, and psychological injury. A few others have noted that these scientific developments could have significant impact on law, but have focused on different areas—criminal law or the determination of damages⁹—or have focused on noting the connection rather than examining the normative implications in depth.¹⁰

Part I defines what I call “mind-dependence” and presents a set of test cases that challenge current legal approaches to injury and compensation, and discusses the neuroscientific, psychological, and technical underpinnings that moved these cases from science fiction into scientific reality. Part II reviews and examines several legal contexts that distinguish different types of injury and that provide legal remedies for some, but not for others. Part III considers normative justifications that might be offered for this distinction, particularly in light of the new information we have. Ultimately, while new knowledge may require us to evaluate the distinctions we traditionally have drawn, it does not completely undermine the possibility of normative distinctions between different types of injury. However, it challenges us to better defend those distinctions, and should lead us to abandon the bifurcation between “emotional” and “physical” injuries in favor of a more nuanced approach.

A brief note on language: finding a single term to encompass the categories of injury I discuss below is challenging.¹¹ Terms like “emotional,” “psychological,” or “mental” seem too narrow, since many of the injuries I discuss do not involve the emotions as we now understand them. Meanwhile, “nonphysical” seems to beg the question, since some of the cases I discuss argue that all injuries are in some sense physical. Instead, the umbrella term I will adopt in what follows is more of a mouthful: *body-bypassing mind-dependent* injury. In the fictional cases above, and the potentially real ones I will discuss next, the injuring conduct skips past the outer shield of the human body to visit its effects on the injured party’s mind (or, in one case, on a processing device implanted in the injured party). The conduct in *Byrne v. Boadle* and *Escola*, in contrast, produces pain by first harming the body’s fragile exterior.

9. E.g., Adam J. Kolber, *Will There Be A Neurolaw Revolution?*, 89 IND. L.J. 807, 831 (2014); Francis X. Shen, *Sentencing Enhancement and the Crime Victim’s Brain*, 46 LOY. U. CHI. L.J. 405 (2014); Francis X. Shen, *Mind, Body, and the Criminal Law*, 97 MINN. L. REV. 2036 (2013).

10. E.g., Shaun Cassin, Comment, *Eggshell Minds and Invisible Injuries: Can Neuroscience Challenge Longstanding Treatment of Tort Injuries?*, 50 HOUS. L. REV. 929 (2013).

11. Others have wrestled with this issue of nomenclature as well; see, for example, Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 181–82 (1992).

I. SCIENCE, TECHNOLOGY, AND MIND-DEPENDENT INJURY

A. *Mind-Dependence in the Law*

Despite the centrality of the concept of mind-dependence in philosophical discussions, much less attention has been paid to that concept in the law, particularly as it regards physical injury. No cases refer to the idea of mind-dependence, and only a few legal commentators mention it.¹² In this subpart, I provide a brief summary of the treatment of this concept in the legal literature, and then turn to a fuller explication of it.

Some legal commentators have regarded the concept of mind-dependence as applying broadly to human experience in general, including conscious experience, human will, and law itself.¹³ This view seems highly plausible, in particular regarding the proximate rather than the ultimate cause of these phenomena: rejecting the notion that law, will, and experience are in some sense a product of the mind requires positing some other proximate source—and none is readily forthcoming. Others have posited with equal plausibility that, while various phenomena are mind-dependent, some (such as fundamental laws of science) are not.¹⁴ One of the most prominent debates involving mind-dependence concerns whether normative facts, such as moral or legal facts, are mind-dependent or mind-independent.¹⁵

12. *E.g.*, Dennis J. Baker, *The Impossibility of a Critically Objective Criminal Law*, 56 MCGILL L.J. 349, 368 (2011).

13. Hugh Gibbons & Nicholas Skinner, *The Biological Basis of Human Rights*, 13 B.U. PUB. INT. L.J. 51, 57 (2003) (stating that “conscious states are subjective (mind-dependent) ontological features of the actual world”); *id.* at 59 (“The will is a mind-dependent feature of the ontological landscape. This means that the will exhibits the subjective ontology of other conscious states like pain, and thirst. In other words, the will exists only in so far as it is being experienced. Subtract minds from our world and the will disappears as well. Yet the will’s ontological dependence on the mind does not undermine its actuality.”); *see also* Dennis J. Baker & Lucy X. Zhao, *Responsibility Links, Fair Labeling, and Proportionality in China: Comparing China’s Criminal Law Theory and Doctrine*, 14 UCLA J. INT’L L. & FOREIGN AFF. 275, 316 (2009) (“Blame and fault are mind-dependent, conventionally contingent moral concepts that have evolved from human rationality . . .”).

14. David L. Faigman, *Scientific Realism in Constitutional Law*, 73 BROOK. L. REV. 1067, 1069 (2008); Stephen J. Morse, *An Accurate Diagnosis, But Is There A Cure?: An Appreciation of The Role of Science in Law by Robin Feldman*, 3 HASTINGS SCI. & TECH. L.J. 157, 159 (2011) (“There is a real, physical world that is mind independent and this matters.”).

15. For debates regarding the mind-dependence of moral facts, *see*, for example, Michael S. Moore, *Remembrance of Things Past*, 74 S. CAL. L. REV. 239, 245 (2000) (discussing “the moral realist thesis,” which “asserts that moral values exist and that their existence is ‘mind-independent’”); Stephen J. Morse, *Reason, Results, and Criminal Responsibility*, 2004 U. ILL. L. REV. 363, 382–83 (2004) (noting that some theorists “believe that morality is a human construction that cannot be justified by appeal to an external, mind-independent source of moral authority”). For debates regarding the mind-independence of legal facts, *see*, for example, James Allan, *Jeremy Waldron and the Philosopher’s Stone*, 45 SAN DIEGO L. REV. 133, 141 (2008); Florian F. Hoffmann, “Shooting into the Dark”: *Toward A Pragmatic Theory of Human Rights (Activism)*, 41 TEX. INT’L L.J. 403, 407 (2006).

I take no position on the above issues here. In contrast, what I focus on in this Article is the usefulness of mind-dependence, as a concept, to demarcate certain categories of injuries. The injuries in *Byrne* and *Escola* not only injure the body first, but rely in no essential way on the details of the human mind. A falling barrel or a glass shard could just as well injure or disable a mindless human or a non-human organism as it could a paradigm-human. Indeed, such destructive events can also physically damage and destroy inanimate property—an occurrence frequently described in case law as involving “injury” to that property.¹⁶ In contrast, the injuries I discuss next operate by exploiting vulnerabilities in the mind itself. They are, in that sense, mind-dependent.

Though philosophers discussing mind-dependence have frequently focused on issues similar to those examined in legal literature, they have occasionally employed the concept or related concepts to discuss the moral valence of injuries. The most sustained discussion in the philosophical literature (which I return to in Part III) is Judith Jarvis Thomson’s distinction between “belief-mediated distress”—that is, distress that is dependent on one’s beliefs, which are in turn features of one’s mind—and other forms of distress.¹⁷ This distinction has made its way into legal scholarship in a variety of contexts.¹⁸

B. Test Cases

To focus our attention, I suggest a variety of test cases in which a defendant’s conduct causes injury to a putative plaintiff, but where the mechanism by which the injury is caused involves the defendant’s mind (or, in one case, an information-processing device implanted in the defendant’s body).

1. EPILEPSY: An *avant-garde* online art display incorporates rapidly flashing images. The display earns praise for the way that the flashing images represent ephemerality. But it also triggers seizures in a few viewers with preexisting photosensitive epilepsy.

16. *E.g.*, *Prairie State Loan & Trust Co. v. Doig*, 70 Ill. 52, 53 (Ill. 1873) (“This action was to recover for injury to property of appellees, caused by the falling of a derrick.”).

17. *See infra* Part III; JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* (1990).

18. *E.g.*, Matthew D. Adler, *Against “Individual Risk”: A Sympathetic Critique of Risk Assessment*, 153 U. PA. L. REV. 1121, 1227 (2005) (discussing Thomson’s work in context of right not to be subjected to unreasonable risks); Vincent J. Samar, *The First Amendment and the Mind/Body Problem*, 41 SUFFOLK U. L. REV. 521, 536 (2008) (rejecting bans on same-sex marriage on the basis that there is not “sufficient and credible evidence to suggest same-sex marriage is harmful in a non-belief mediated way”); Frederick Schauer, *Harm(s) and the First Amendment*, 2011 SUP. CT. REV. 81, 82.

2. **PACEMAKER:** New implantable cardiac pacemakers are equipped with wireless technology, which allows physicians to collect information about their patients' health. But they also make it possible for others to transmit specific patterns of data over wireless networks that, when received, cause the pacemaker to malfunction and harm or kill the patient.
3. **BULLYING:** An abusive employer repeatedly tells an employee that she is worthless. During the lawsuit, the employee's lawyer demonstrates—through updated, functional MRI evidence—that telling someone they are worthless causes their brain to change for the worse.
4. **TRIGGER WARNING:** A municipality requires newspapers and magazines distributed within its boundaries to preface descriptions of self-injury by individuals with a “trigger warning” that informs readers that the description depicts events that may trigger negative thoughts and cause individuals to harm themselves.

C. *Scientific Background*

The situations above may be unlikely ones so far, but they are clearly possible. There is scientific evidence that visual perception of certain phenomena can trigger an epileptic response in vulnerable individuals. This phenomenon, known as photosensitive epilepsy, has been documented and studied since the 1880s.¹⁹ The mechanism by which this response occurs is not perfectly understood, but is thought to involve the sustained activity of numerous neurons in the visual cortex in response to the viewed stimulus, which eventually overwhelm normal mechanisms of inhibition and lead to large-scale synchronous firing of neurons.²⁰ The condition is thought to be partially inheritable.²¹ Triggers for seizures include flashing lights at certain frequencies, particularly in red color, as well as patterns of parallel lines, stripes, or gratings.²² Evidence of photosensitive epilepsy has been accepted into and noted by courts.²³ Further, malicious hackers have

19. Robert S. Fisher et al., *Photic- and Pattern-induced Seizures: A Review for the Epilepsy Foundation of America Working Group*, 46 *EPILEPSIA* 1426 (2005).

20. *Id.* at 1430–31.

21. *Id.* at 1429.

22. *Id.* at 1432–33.

23. *See, e.g.,* *Mantolete v. Bolger*, 767 F.2d 1416, 1419 (9th Cir. 1985), as amended (Aug. 27, 1985) (noting a “propensity in certain epileptics to be sensitive to flashing lights so as to cause seizures”); *Green v. Astrue*, No. 08 CIV. 8435 LAP FM, 2012 WL 1414294, at *18 (S.D.N.Y. Apr. 24, 2012), *report and recommendation adopted*, No. 08 CIV. 8435 LAP FM, 2012 WL 3069570 (S.D.N.Y. July 26, 2012) (observing that “a relatively small number of epileptics can have their seizures triggered by flashing or flickering lights”); *Garavito v. City of Tampa*, 640 F. Supp. 2d 1374, 1378 (M.D. Fla. 2009) (discussing “a photoparoxysmal response or photosensitive epilepsy, which would cause a seizure in response to sirens or lights”); *Access Now, Inc. v. Ambulatory Surgery Ctr. Grp.*, 146 F.

“compromised epilepsy support websites by posting animated images on these websites that caused photosensitive epilepsy patients to experience pain and seizures.”²⁴

Although no “pacemaker hack” is yet known to have occurred, several proof-of-concept demonstrations have been presented by computer scientists. Among the devices where a proof-of-concept demonstration, involving malfunction caused by the transmission of harmful data, has been completed include implantable cardiac defibrillators²⁵ and insulin pumps.²⁶ A variety of other devices could also be at risk, such as deep brain and other neural stimulators; implants and prostheses such as cochlear implants and retinal prostheses; and gastric electrical stimulators.²⁷ Two recent law review articles have briefly noted this development,²⁸ as has a 2012 report by the federal Government Accountability Office.²⁹ And a patent application has even been filed for an implantable medical device that is hardened against the introduction of malware or viruses.³⁰

The development of functional magnetic resonance imaging (MRI) and other technologies has brought us closer to a situation where the neural traces of emotional and mental experiences can be made identifiable. A recent study identified the short-term, medium-term, and long-term effects of stressful experiences on neural connections in the brain, and noted that

Supp. 2d 1334, 1338 (S.D. Fla. 2001) (observing that “some types of visual alarms may trigger seizures in patients”); *Rackley v. Coastal Painting*, 570 S.E.2d 121, 122–23 (N.C. Ct. App. 2002) (noting that plaintiff’s “seizures, which are grand mal seizures, are triggered by flashing lights and have occurred when he has played video games or seen the sun breaking through trees”).

24. Tamara Denning et al., *Patients, Pacemakers, and Implantable Defibrillators: Human Values and Security for Wireless Implantable Medical Devices*, Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, Atlanta, Georgia 917, 917 (2010), <https://seclab.cs.washington.edu/pubs/pdfs/chi2010-patients.pdf>.

25. Tamara Denning et al., *Neurosecurity: Security and Privacy For Neural Devices*, 27 NEUROSURG FOCUS 1, 2 (E7, 2009) (asserting that “a third party, using his or her own homemade and low-cost equipment, could wirelessly change a patient’s therapies, disable therapies altogether, and induce ventricular fibrillation (a potentially fatal heart rhythm”).

26. C. Li, A. Raghunathan & N. K. Jha, *Hijacking an Insulin Pump: Security Attacks and Defenses for a Diabetes Therapy System*, Proceedings of the IEEE International Conference on e-Health Networking Applications and Service 150–156 (June 2011), http://ieeexplore.ieee.org/xpls/abs_all.jsp?arnumber=6026732.

27. M. Zhang, A. Raghunathan & N. K. Jha, *Towards Trustworthy Medical Devices and Body Area Networks*, Proceedings of the 50th Annual Design Automation Conference 14:1–14:6 (2013), <http://dl.acm.org/citation.cfm?id=2488751>.

28. Andrea M. Matwyshyn, *Hacking Speech: Informational Speech and the First Amendment*, 107 NW. U. L. REV. 795, 818 (2013); Katherine Booth Wellington, *Cyberattacks on Medical Devices and Hospital Networks: Legal Gaps and Regulatory Solutions*, 30 SANTA CLARA HIGH TECH. L.J. 139, 142 (2014).

29. GOV’T ACCOUNTABILITY OFFICE, FDA SHOULD EXPAND ITS CONSIDERATION OF INFORMATION SECURITY FOR CERTAIN TYPES OF DEVICES (2012), <http://www.gao.gov/assets/650/647767.pdf>.

30. Secure Operation of Implanted Device, U.S. Patent Application No. 12,150,934 (filed Apr. 30, 2008).

connections between two areas of the brain, the amygdala and hippocampus, remained elevated as long as two hours after the stressful event.³¹ Another study identified the long-term persistence of negative or positive associations with the faces of people with whom participants had had hostile or friendly encounters in the past.³² Still other work notes the indelibility of emotional memories, and the potential for reactivating them years after the original event.³³ While the fact that memorable emotional events have a permanent neural correlate should not be surprising, our capacity to identify the biological correlates of emotional experience makes it clear that being subjected to stress or abuse can lead to objectively identifiable changes in the brain. A few legal scholars have noted and discussed this development.³⁴

Finally, recent debates about harmful speech and post-traumatic stress disorder have made the issue of “trigger warnings” highly salient. Psychological research has shown that certain words, images, and phrases may cause survivors of traumatic experiences to experience “intrusive cognition,” or unpleasant memories of the past event.³⁵ For example, exposing military veterans with post-traumatic stress disorder to “scenes of traumatic events (e.g., battlefield casualties) intermixed with neutral images, an emotional faces task, and a verbal task that contained neutral as well as salient trigger words (such as ‘Kandahar’ and ‘grenade’),” exacerbated existing atypical connectivity between brain regions in these patients.³⁶ On the basis of similar findings, a recent medical article argued for removing certain terms, such as “incest,” from the health literacy tests used in typical practice.³⁷ An alternative is the “trigger warning,” where text that includes terms that may cause unpleasant or traumatic

31. Sharon Vaisvaser et al., *Neural Traces of Stress: Cortisol Related Sustained Enhancement of Amygdala-Hippocampal Functional Connectivity*, 7 FRONTIERS HUMAN NEUROSCI. art. 313: 1, 9 (2013).

32. Pascal Vrtička et al., *Memory for Friends or Foes: The Social Context of Past Encounters with Faces Modulates Their Subsequent Neural Traces in the Brain*, 4 SOC. NEUROSCI. 384, 395–98 (2009).

33. Joseph E. LeDoux, *Emotion as Memory: Anatomical Systems Underlying Indelible Neural Traces*, in THE HANDBOOK OF EMOTION & MEMORY 279–80 (Sven-Ake Christenson ed. 1992).

34. Tracy Rightmer, *Arrested Development: Juveniles’ Immature Brains Make Them Less Culpable Than Adults*, 9 QUINNIPIAC HEALTH L.J. 1, 30–31 (2005) (reviewing scientific studies that document the brain traces of abuse).

35. Richard J. McNally, *Implicit and Explicit Memory for Trauma-Related Information in PTSD*, 821 ANNALS N.Y. ACAD. SCI. 219 (1997); Karen Lynn Cassiday et al., *Cognitive Processing of Trauma Cues in Rape Victims with Post-Traumatic Stress Disorder*, 16 COGNITIVE THERAPY & RES. 283, 292–94 (1992).

36. B.T. Dunkley et al., *Resting-State Hippocampal Connectivity Correlates with Symptom Severity in Post-Traumatic Stress Disorder*, 5 NEUROIMAGE: CLINICAL 377, 378 (2014).

37. Alisa K. Lincoln et al., *The Need for Trauma-Sensitive Language Use in Literacy and Health Literacy Screening Instruments*, 18 J. HEALTH COMMUN. 15, 18 (2013).

recollections is prefaced by a warning or disclaimer. A student note presents the text of such a warning:

You are the only one responsible for yourself, just as I am responsible only for me. . . . [K]now that this site contains extremities [sic] which may be triggering or harmful if they happen to exceed your boundaries. If you have or are recovering from an eating disorder or self-injury, know that this may not be a safe place for you to be and think carefully before proceeding.³⁸

At least one administrative decision has credited concerns about the “triggering” of post-traumatic stress disorder by imagery.³⁹ Recently, the District Court for the Eastern District of Pennsylvania upheld a prohibition on presenting a potentially upsetting poster outside a veterans affairs hospital⁴⁰—plausibly on the basis of concerns about triggering PTSD⁴¹—but the conviction was reversed on appeal because the poster presentation was found to have occurred in a public forum.⁴²

II. TENSIONS WITH CURRENT DOCTRINE

The above cases illuminate some challenges within existing legal doctrine. In this part, I focus on the challenges posed for the legal doctrine in four areas. First, mind-dependent injuries challenge aspects of product liability law that distinguish injuries with “intangible” causes from those with tangible causes. Second, as might be expected, mind-dependent injuries pose problems for the First Amendment’s guarantee of freedom of expression. Third, mind-dependent injuries complicate the justification for disfavoring the tort of infliction of emotional distress. Fourth, mind-dependent injuries call into question the underlying justification of the

38. Annika K. Martin, Note, *Stick A Toothbrush Down Your Throat: An Analysis of the Potential Liability of Pro-Eating Disorder Websites*, 14 TEX. J. WOMEN & L. 151, 174–75 (2005) (internal quotation marks omitted).

39. [Title Redacted by Agency], Bd. Vet. App. 0513606 (May 19, 2005) (noting that “the veteran reported that he was unable to watch any war related news for fear of triggering his PTSD”).

40. *United States v. O’Neal*, No. CIV.A. 04-MJ-01060, 2007 WL 3342375, at *5 (E.D. Pa. Nov. 8, 2007), *rev’d*, 431 F. App’x 128 (3d Cir. 2011).

41. Testimony at trial appealed to the risk of triggering:

Q. How are psychiatric patients protected by prohibiting political speech adjacent to the main entrance to the VA Medical Center? A. We do have PTSD [post-traumatic syndrome disorder] patients that respond to the hospital on an outpatient basis. They would see a Presidential election campaign poster such as this, mentioning Vietnam, things of that nature, it could trigger a past experience that a veteran may have had.

Brief of Appellee at 22, *United States v. O’Neal*, 431 F. App’x 128 (3d Cir. 2011) (No. 07-4394), 2011 WL 6968023.

42. *O’Neal*, 431 F. App’x at 129.

numerous statutes that treat “physical injury” differently from other categories of injury.

A. *Tangibility and Product Liability*

Product liability law has drawn an explicit distinction between injuries caused by tangible objects and those with intangible causes. In *James v. Meow Media*—a case considering whether media companies could be liable to the victims of a school shooting—the Sixth Circuit reviewed a variety of product liability cases that draw a tangible-intangible distinction:

Certainly if a video cassette exploded and injured its user, we would hold it a “product” and its producer strictly liable for the user’s physical damages. In this case, however, James is arguing that the words and images purveyed on the tangible cassettes, cartridges, and perhaps even the electrical pulses through the internet, caused Carneal to snap and to effect the deaths of the victims. When dealing with ideas and images, courts have been willing to separate the sense in which the tangible containers of those ideas are products from their communicative element for purposes of strict liability. . . . We find these decisions well reasoned. The video game cartridges, movie cassette, and internet transmissions are not sufficiently “tangible” to constitute products in the sense of their communicative content.⁴³

The test cases discussed in Part I, EPILEPSY and PACEMAKER, represent an intermediate scenario between the actual facts of *Meow Media* and the exploding-cassette hypothetical. The *Meow Media* plaintiffs alleged indirect harm from hazardous products: they alleged that hazardous video games, movies, and websites affected a school shooter, who in turn shot their children. In contrast, the plaintiffs in EPILEPSY and PACEMAKER alleged direct harm: that hazardous images or data transmissions directly harmed their health. However, unlike the exploding-cassette hypothetical, the direct injuries in EPILEPSY and PACEMAKER are traceable not to the product’s tangible container, but are caused by intangible and communicative phenomena.

Some jurists suggest (as *Meow Media* seems to) that product liability can only apply to injuries from a straightforwardly physical source—that “[i]n the products liability area, the imposition of strict liability is meant to impact on the *economic* decisions that manufacturers make about cold,

43. *James v. Meow Media, Inc.*, 300 F.3d 683, 701 (6th Cir. 2002) (internal citations omitted).

tangible products made of metal, steel, iron, plastic and rubber.”⁴⁴ But product liability has also been applied to injuries stemming from an intangible source. For example, an electric company can be subject to product liability when it distributes electricity at an excessively high voltage, even though electricity is intangible.⁴⁵ Some have argued that companies could also be strictly liable for injuries caused by magnetic fields should such fields prove hazardous.⁴⁶

The more complicated questions involve liability for injuries that have both intangible *and* mind-dependent aspects. Courts have imposed liability for injuries caused by misinformation in aeronautical charts.⁴⁷ Some courts have suggested that other information-containing products, such as medical instructions and computer software, could potentially be products for liability purposes.⁴⁸ Other courts, however, have refused to impose product liability on the producers of other forms of information, such as field guides for mushroom harvesting,⁴⁹ diet books,⁵⁰ and medical textbooks.⁵¹

Perhaps the most prominent case limiting liability for intangible, communicative sources of harm is *Winter v. G.P. Putnam’s Sons*, where the Ninth Circuit held that the intangible aspects of physical objects, such as the information contained within a book, were not products for the purpose of finding product liability.⁵² Although the case was not a First Amendment case, the court adverted to a policy rationale that was grounded in free speech:

We place a high priority on the unfettered exchange of ideas. We accept the risk that words and ideas have wings we cannot clip and which carry them we know not where. The threat of liability without fault (financial responsibility for our words and ideas in the absence of fault or a special undertaking or responsibility)

44. *Jansen v. Packaging Corp. of Am.*, 123 F.3d 490, 544 (7th Cir. 1997) (Coffey, J., concurring in part and dissenting in part.), *aff’d sub nom. Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

45. *E.g.*, *Smith v. Home Light & Power Co.*, 734 P.2d 1051, 1054 (Colo. 1987) (“Courts that have addressed the issue have almost uniformly rejected the argument that electricity by its intrinsic nature cannot be a ‘product’”); *Ransome v. Wisc. Elec. Power Co.*, 275 N.W.2d 641, 648 (Wis. 1979); *see also* Charles E. Cantu, *A Continuing Whimsical Search for the True Meaning of the Term “Product” in Products Liability Litigation*, 35 ST. MARY’S L.J. 341, 343 n.8 (2004) (collecting cases).

46. *E.g.*, C. Michelle Depew, *Challenging the Fields: The Case for Electromagnetic Field Injury Tort Remedies Against Utilities*, 56 U. PITT. L. REV. 441, 465 (1994).

47. *E.g.*, *Brocklesby v. United States*, 767 F.2d 1288, 1295 (9th Cir. 1985); *see also Winter v. G.P. Putnam’s Sons*, 938 F.2d 1033, 1035 (9th Cir. 1991) (collecting cases).

48. *Coleman v. Dental Org. for Conscious Sedation, LLC*, 4:10CV798 TIA, 2010 WL 5146603 (E.D. Mo. Dec. 13, 2010).

49. *Winter*, 938 F.2d at 1033.

50. *Smith v. Linn*, 563 A.2d 123, 126–27 (Pa. Super. Ct. 1989), *aff’d*, 587 A.2d 309 (Pa. 1991).

51. *Jones v. J.B. Lippincott Co.*, 694 F.Supp. 1216, 1217 (D. Md. 1988).

52. *Winter*, 938 F.2d at 1035.

could seriously inhibit those who wish to share thoughts and theories.⁵³

Similarly, in *Watters v. TSR*, the Sixth Circuit noted that

[T]he doctrine of strict liability has never been extended to words or pictures. Other courts have looked in vain for decisions so expanding the scope of the strict liability doctrine. . . . The plaintiff's complaint alleges that the defendant violated its duty of ordinary care in two respects: it disseminated Dungeons & Dragons literature to "mentally fragile persons," and it failed to warn that the "possible consequences" of playing the game might include "loss of control of the mental processes." To submit this case to a jury on either theory, it seems to us, would be to stretch the concepts of foreseeability and ordinary care to lengths that would deprive them of all normal meaning. The defendant cannot be faulted, obviously, for putting its game on the market without attempting to ascertain the mental condition of each and every prospective player. The only practicable way of insuring that the game could never reach a "mentally fragile" individual would be to refrain from selling it at all—and we are confident that the courts of Kentucky would never permit a jury to say that simply by marketing a parlor game, the defendant violated its duty to exercise ordinary care.⁵⁴

Another case, *Herceg v. Hustler*, similarly asserts that

No court has held that the written word is either an attractive nuisance which would impose a special duty on defendant magazine, or a dangerous instrumentality for which defendant would be strictly liable. A magazine article is easily distinguishable from items such as gunpowder, fireworks, gasoline and poison which have an obvious physical effect. It is not, for example, like a slingshot with physical properties which cause harm, and which raises the question for a jury whether, balancing of the magnitude of the risk against the utility of defendant's conduct for society, the risk of harm in a particular case is unreasonable.⁵⁵

Watters and *Winter* enact a regime where those injured by certain types of information, such as words or images, cannot recover for their injuries

53. *Id.*

54. *Watters v. TSR, Inc.*, 904 F.2d 378, 381 (6th Cir. 1990).

55. *Herceg v. Hustler Magazine, Inc.*, 565 F. Supp. 802, 803 (S.D. Tex. 1983) (citation omitted).

within a product liability regime. *Herceg* extends the bar against recovery even to ordinary causes of action in tort law.

Examples like EPILEPSY, PACEMAKER, and TRIGGER WARNING pose hard questions for the idea that intangible causes of injury—such as words and pictures—cannot generate liability. Notably, these courts did not simply deny that the magazine, book, or game in question in fact caused the injury in question, either because some other cause—such as the user’s misconduct—interposed itself between the intangible cause and the alleged injury, or because the chain of causation between the intangible cause and the injury was too attenuated. Rather, *Watters*, *Winter*, and *Herceg* all take the position, as a matter of law, that allegations of harm stemming from words or pictures cannot even be brought to a jury. Yet the harm from rapidly strobing images or a wireless transmission containing a computer virus or malware, although it stems—like the alleged harms in *Waters*, *Winter*, and *Herceg*—from the content of the expression rather than its manner, seems analogous to the harm from a loud sound or blinding light, harms which have been treated as appropriate for product liability, or at the very least triable by a jury. That words and pictures are not tangible in the way that slingshots are does not obviously foreclose liability.

B. Harmful Expression and the First Amendment

Whether or not product liability law applies, the victims in EPILEPSY and PACEMAKER could arguably bring other types of tort claims, such as claims for negligent injury. These claims, as well as product liability claims, would then have to survive attempts to bar them on First Amendment grounds—that the imposition of tort liability would constitute an impermissible restriction on freedom of expression.

The First Amendment arguably does not bar tort liability where *non-communicative* aspects of a communication cause injury. For instance, “the First Amendment does not protect the noise from a helicopter.”⁵⁶ Nor, presumably, would the First Amendment bar tort recovery where excessively amplified music or speech damaged someone’s hearing or disturbed property, where the light from a billboard caused a disturbance, or where radio waves that encoded the information of an audio or musical program caused dangerous interference.⁵⁷ Although it is normatively unclear why the First Amendment should protect individuals who cause such harms at all, the imposition of tort liability in such cases would

56. John Copeland Nagle, *The Idea of Pollution*, 43 U.C. DAVIS L. REV. 1, 38 (2009).

57. *Tufariello v. Long Island R.R. Co.*, 458 F.3d 80, 84 (2d Cir. 2006); *People v. Smit*, 726 N.E.2d 62, 64 (Ill. App. Ct.2000) (finding that unwanted illumination with laser pointer can constitute criminal liability for assault); *Neal v. Bolton*, 3:06CV17/MCR/EMT, 2008 WL 5156685, at *4 (N.D. Fla. Dec. 9, 2008) (finding that alleged laser pointer injury survived motion for summary judgment).

constitute an unproblematic “time, place, or manner” restriction on speech, and thereby not violate the First Amendment.⁵⁸

First Amendment doctrine is unclear regarding tort liability resulting from expression whose content directly causes injury, as in *EPILEPSY*. Some language in core First Amendment cases suggests that expression is not protected if it directly causes injury: in *Chaplinsky v. New Hampshire*, the Court held words that “by their very utterance inflict injury” are outside the protection of the First Amendment,⁵⁹ while in *Schenck v. United States*, the Court held that the First Amendment “does not even protect a man from an injunction against uttering words that may have all the effect of force.”⁶⁰ As the Supreme Court held in *R.A.V. v. City of St. Paul*, “Fighting words are thus analogous to a noisy sound truck: Each is, as Justice Frankfurter recognized, a ‘mode of speech’; both can be used to convey an idea; but neither has, in and of itself, a claim upon the First Amendment.”⁶¹ Further, if we accept the argument that “data is speech,” the same analysis is applicable to *PACEMAKER*.⁶²

However, courts and commentators have argued that the “inflict injury” language in *Chaplinsky* was silently overruled by later cases,⁶³ and that language that inflicts direct injury is only legally prohibited when it also produces a breach of the peace. The Alabama Court of Criminal Appeals, for example, noted that, “in light of the recent case law concerning words denoting racial hate, political slurs, and slurs regarding another’s sexual orientation, such speech is not curtailed as to the ideas or concept that the words embody, but rather their use is curtailed under circumstances where retaliation is likely.”⁶⁴ Similarly, the Sixth Circuit observed that, “[t]he Supreme Court has refined its holding . . . so that suppression of speech

58. *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949) (holding that a restriction on loud sound trucks did not violate the First Amendment).

59. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words doctrine).

60. *Schenck v. United States*, 249 U.S. 47, 52 (1919).

61. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 386 (1992) (citation omitted).

62. Compare Jane Bambauer, *Is Data Speech?*, 66 *STAN. L. REV.* 57, 72 (2014) (contending that “courts have concluded unequivocally that the communication of raw data is speech”), with Agatha M. Cole, Note, *Internet Advertising After Sorrell v. IMS Health: A Discussion on Data Privacy & the First Amendment*, 30 *CARDOZO ARTS & ENT. L.J.* 283, 305 (2012) (arguing that “treating all data as speech seems overbroad and highly problematic”). See generally Alex Colangelo & Alana Maurushat, *Exploring the Limits of Computer Code as a Protected Form of Expression: A Suggested Approach to Encryption, Computer Viruses, and Technological Protection Measures*, 51 *MCGILL L.J.* 47, 68–73 (2006) (describing the application of First Amendment doctrine to the dissemination of computer viruses); Robert Plotkin, *Fighting Keywords: Translating the First Amendment to Protect Software Speech*, *U. ILL. J.L. TECH. & POL’Y* 329 (2003) (similar).

63. *Purtell v. Mason*, 527 F.3d 615, 624 (7th Cir. 2008) (“Although the ‘inflict-injury’ alternative in *Chaplinsky*’s definition of fighting words has never been expressly overruled, the Supreme Court has never held that the government may, consistent with the First Amendment, regulate or punish speech that causes emotional injury but does *not* have a tendency to provoke an immediate breach of the peace.”).

64. *Conkle v. State*, 677 So. 2d 1211, 1215 (Ala. Crim. App. 1995).

which in no way tends to incite an immediate breach of the peace cannot be justified under *Chaplinsky's* 'fighting words' doctrine."⁶⁵

This narrowed interpretation has also been challenged: in the Sixth Circuit case discussed *supra*, Judge Keith argued that the court should "remand this case so that it can be determined whether the word 'Sambo's' creates injury by its very utterance."⁶⁶ The First Amendment scholar Rodney Smolla identifies the choice between these two perspectives: on one reading,

it may be appropriate for society to prohibit and punish certain expression because the expression itself is *inherently* harmful. The words themselves are 'bullets' that inflict injury. No extraneous proof of injury, no additional assessment of causation or imminence or likelihood of damage, is required to justify laws that penalize their utterance.⁶⁷

Meanwhile, a different approach "rejects the notion that words may ever be banned on the grounds that they are *intrinsically* harmful. 'Sticks and stones may break my bones but words will never hurt me.'"⁶⁸

City of Billings v. Nelson, a recent Montana case, indicates the continued life of both the positions Smolla discusses.⁶⁹ The *Billings* defendants directed a racial slur at a thirteen-year-old boy and were charged with disorderly conduct. In upholding their conviction, the Montana Supreme Court cited another case stating that being the target of a racial slur "is like receiving a slap in the face. The injury is instantaneous."⁷⁰ But it also suggested that the First Amendment only permitted the punishment of face-to-face insults, not telephonic ones:

The potential to elicit an immediate violent response exists only where the communication occurs face-to-face or in close physical proximity. Telephone communications are not included within the fighting words doctrine, because there is no possibility the listener will react with immediate violence against the speaker.⁷¹

65. *Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 694 (6th Cir. 1981).

66. *Id.* at 697 (Keith, J., dissenting).

67. Rodney A. Smolla, *Words "Which by Their Very Utterance Inflict Injury": The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory*, 36 PEPP. L. REV. 317, 357 (2009).

68. *Id.*

69. *City of Billings v. Nelson*, 2014 MT 98, ¶ 23–28, 374 Mont. 444, 322 P.3d 1039.

70. *Taylor v. Metzger*, 706 A.2d 685, 691 (N.J. 1998) (quoting Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431, 452 (1990)).

71. *Billings*, 2014 MT 98 at ¶ 23–28 (citation omitted).

Yet, if the first citation is to be believed, a racial slur works instantaneous injury, separate from any tendency it has to provoke a violent reaction. Even if someone were entirely unable to respond violently—for instance, if confined or disabled by her tormentor—the slur would still do injury. The same is true for *In re J.K.P.*, a recent Kansas case examining a disorderly conduct conviction for use of a slur, which discusses “evidence that the word tends to inflict injury by its very utterance,” and goes on to ultimately hold that “there was sufficient evidence for the district court to find that J.K.P. knew or should have known that” his use of a racial slur “would alarm, anger, or disturb them or provoke an assault or other breach of the peace.”⁷² *J.K.P.* seems to hold that language known to alarm, anger, or disturb others can be punishable in itself, even if it does not tend to provoke a breach of the peace. The possibility that certain words, used in certain circumstances, could be punishable in themselves was raised again recently in *Snyder v. Phelps*, in which Justice Breyer’s concurrence stated, citing *Chaplinsky*, that “in some circumstances the use of certain words as means would be . . . unprotected.”⁷³

Cases like EPILEPSY and PACEMAKER put clear pressure on the “sticks-and-stones” position that has gained increasing popularity. Even if later cases cabin the “inflict injury” language of *Chaplinsky* to exclude punishment for speech that causes offense, emotional injury, or affront, scholars and courts who regard that language as entirely irrelevant seem to commit themselves to also protecting those who, via the communication of information, cause injuries of the kind found in EPILEPSY and PACEMAKER—particularly since such injuries also disable their victim from responding with violence.⁷⁴ Further, they call into question the doubts we may have about allowing recovery in BULLYING or about permitting the restraint on speech in TRIGGER WARNING—to the extent we can be certain that such speech causes injury, we have good reason to abandon a categorical presumption against punishing or prohibiting it.

C. *Infliction of Emotional Distress*

Both EPILEPSY and PACEMAKER involve scenarios where the victims have unusual, preexisting frailties. In most cases of injury, the “eggshell plaintiff” rule subjects tortfeasors to liability for the full extent of the victim’s injuries, even where the victim had unusual and unforeseeable frailties. The most recent *Restatement of Torts* likewise does not restrict

72. *In re J.K.P.*, 296 P.3d 1140 (Kan. Ct. App. 2013).

73. *Snyder v. Phelps*, 562 U.S. 443, 447 (2011) (Breyer, J., concurring).

74. *Cf. State v. Dugan*, 2013 MT 38, ¶ 43–45, 369 Mont. 39, 303 P.3d 755.

liability in cases where victims suffer harm because of their psychological or emotional frailties:

Reflecting the recent broadening of this principle in many jurisdictions, the *Restatement (Third) of Torts* . . . expands the rule to encompass (1) not only preexisting physical conditions but also mental conditions and “other characteristics” of the victim, and (2) not only those injuries that are greater than could be foreseen, but also those that are “of a different type” than could be foreseen.⁷⁵

Outside of the *Restatement*, however, there has been extensive debate about whether and how the eggshell plaintiff rule should be extended to harms such as the informational harms I discuss:

- Two courts have held that the eggshell plaintiff rule does not apply at all outside the context of “physical injuries.”⁷⁶
- Courts in Maine and North Carolina limit liability to cases where “the harm” in question “reasonably could have been expected to befall the ordinarily sensitive person.”⁷⁷ But where the defendant’s conduct would have harmed an ordinary person, the defendant is fully liable for all consequences of his conduct, even those attributable to his victim’s frailty.⁷⁸
- Massachusetts and New Jersey hold defendants liable for the distress an *ordinary* person would experience, rather than the victim’s *actual* experienced distress.⁷⁹

75. Mary LaFrance, *The Disappearing Fourth Wall: Law, Ethics, and Experiential Theatre*, 15 VAND. J. ENT. & TECH. L. 507, 540 (2013).

76. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 908 (2d Cir. 1993); *Munn v. Algee*, 924 F.2d 568, 576 (5th Cir.), *cert. denied*, 502 U.S. 900 (1991).

77. *Theriault v. Swan*, 558 A.2d 369, 372 (Me. 1989) (“When the harm reasonably could affect only the hurt feelings of the supersensitive plaintiff—the eggshell psyche—there is no entitlement to recovery.”).

78. *Id.* (“If, however, the harm reasonably could have been expected to befall the ordinarily sensitive person, the tortfeasor must take his victim as he finds her, extraordinarily sensitive or not.”); *Poole v. Copland, Inc.*, 498 S.E.2d 602, 604–05 (N.C. 1998) (“[I]n deciding whether the plaintiff’s injury was a foreseeable consequence of the defendant Haynes’ wrongful actions, you must determine whether such wrongful actions under the same or similar circumstances could reasonably have been expected to injure a person of ordinary mental condition. If so, the harmful consequences from the defendant’s wrongful acts would be reasonably foreseeable and therefore would be a proximate cause of plaintiff’s injury. Under such circumstances the defendant would be liable for all the harmful consequences which occur even though these harmful consequences may be unusually extensive because of the peculiar or abnormal mental condition which happened to be present in the plaintiff.”).

79. *DiMare v. RealtyTrac, Inc.*, 714 F. Supp. 2d 199, 211 (D. Mass. 2010) (“To recover for negligent infliction of emotional distress, plaintiff must show that a reasonable person would have suffered the same level of emotional distress under similar circumstances.”); *Payton v. Abbott Labs*, 437 N.E.2d 171, 181 (Mass. 1982) (“[U]nless a plaintiff proves that the defendant knew or should have known of special factors affecting that plaintiff’s response to the circumstances of the case, the plaintiff can recover only for that degree of emotional distress which a reasonable person, normally constituted,

- Still other courts apply the eggshell plaintiff rule across the board, holding defendants fully liable even in cases where an ordinary person would not have suffered harm.⁸⁰ Similarly, if a defendant aggravates an underlying psychological vulnerability and the resulting damages cannot be apportioned, the defendant is liable for the entirety of the damages.

All applications of the eggshell plaintiff rule except the last entail a distinction, which requires defense, between mind-dependent and mind-independent injuries. Almost all courts, however, do recognize the eggshell plaintiff rule in cases where the defendant knows—or, in some cases, should have known—about the victim’s unusual vulnerability.

The Maine rule faces the additional challenge that it might allow defendants to escape liability for injuries to vulnerable people even where their conduct would have injured an ordinary person in a different way—for instance, where the defendant’s conduct would have caused an ordinary person to react angrily, but causes a vulnerable person to suffer an emotional breakdown. Since an ordinary person would not have suffered the alleged harm (the emotional breakdown), defendants might escape liability, just as they would in cases where their conduct unforeseeably fails to cause harm (“thick-skulled” cases). The vulnerable person is thick-skulled with respect to the ordinarily predictable harm, but is thin-skulled with respect to the actual harm that occurs. Meanwhile, where a defendant’s conduct would cause an ordinary person to suffer an emotional breakdown but would cause a vulnerable person to suffer a much more severe breakdown, the Maine rule is unclear—if we regard the more severe breakdown as a *different* harm, the defendant escapes liability, but if we regard it as a more severe *effect* of the *same* harm, the defendant is fully liable.

Beyond the eggshell plaintiff issue, many jurisdictions treat infliction of emotional distress as a generally “disfavored” tort, only to be pled when no other theory of recovery will be effective. The arguments for disfavoring these torts are various, but frequently rely on the risk that plaintiffs will malingering or that the emotional distress in question cannot be quantified or made publicly visible. In response, several commentators have complained that the disfavoring of emotional distress torts represents

would have experienced under those circumstances.”); *Williamson v. Waldman*, 696 A.2d 14, 22 (N.J. 1997) (“[W]e hold that a person claiming damages for emotional distress based on the fear that she has contracted HIV must demonstrate that the defendant’s negligence proximately caused her genuine and substantial emotional distress that would be experienced by a reasonable person of ordinary experience who has a level of knowledge that coincides with then-current, accurate, and generally available public information about the causes and transmission of AIDS.”)

80. *Nickerson v. Hodges*, 84 So. 37, 39 (La. 1920); *Wilkinson v. Downton*, [1897] 2 Q.B. 57 (Eng.).

an unjustified bias that is particularly disadvantageous to female plaintiffs.⁸¹ Our increasing ability to identify the underlying neural correlates of harms caused by cruel or negative speech and conduct, as in BULLYING, may remove what I'll describe in Part III as the “epistemic” argument against recognizing emotional distress torts—which relies on the risk of malingering and the difficulty of measurement—and require the advancement of a substantive argument that makes the case that emotional distress is simply less important for society to prevent.

D. Statutory Law

A variety of statutes do not provide recovery for mind-dependent injuries in cases like BULLYING:

- Many statutes defining domestic abuse exclude injuries that are emotional in nature.⁸²
- Some states' workers' compensation statutes do not allow recovery for emotional injuries.⁸³
- The Internal Revenue Code taxes damages for non-physical injury, but not damages for physical injury.⁸⁴
- The Prison Litigation Reform Act prohibits prisoners from suing for emotional injury without being able to show physical injury or sexual misconduct.⁸⁵

Various justifications have been offered for these statutory limitations. Among the most prominent are the subjectivity involved in individuals'

81. E.g., Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in A Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Deborah K. Hepler, *Providing Creative Remedies to Bystander Emotional Distress Victims: A Feminist Perspective*, 14 N. ILL. U. L. REV. 71 (1993); Fernanda G. Nicola, *Intimate Liability: Emotional Harm, Family Law, and Stereotyped Narratives in Interspousal Torts*, 19 WM. & MARY J. WOMEN & L. 445 (2013).

82. See Joy M. Bingham, *Protecting Victims by Working Around the System and Within the System: Statutory Protection for Emotional Abuse in the Domestic Violence Context*, 81 NOTRE DAME L. REV. 837, 839–40 & n.14 (2005) (classifying statutes).

83. See Marc A. Antonetti, *Labor Law: Workers' Compensation Statutes and the Recovery of Emotional Distress Damages in the Absence of Physical Injury*, 1990 NYU ANN. SURV. AM. L. 671, 671–72 (1992) (“Recently, workers have begun to seek compensation for mental and emotional injuries caused in the workplace without being accompanied by physical injury. Neither workers' compensation statutes nor tort law traditionally allowed for recovery of emotional distress damages in such cases.”); Martha S. Davis, *Rape in the Workplace*, 41 SAN DIEGO L. REV. 411, 424 (1996) (noting that a “substantial minority of jurisdictions . . . have not recognized or been willing to compensate purely mental and emotional injuries” as part of their workers' compensation scheme).

84. 26 U.S.C. § 104(a)(2) (2012).

85. 42 U.S.C. § 1997e (2012) (“No Federal civil action may be brought by a prisoner confined in a jail, prison, or other correctional facility, for mental or emotional injury suffered while in custody without a prior showing of physical injury or the commission of a sexual act . . .”).

psychological reactions to conduct, as well as concerns about malingering.⁸⁶

Investigating the legislative history of these and other statutory provisions is often revealing. During 2000, there was a bipartisan effort to eliminate taxation on emotional distress awards, rendering them parallel to physical injury awards. Sen. Charles Robb (D-VA) argued that the existing tax regime is unfair: “damages received for emotional distress in civil rights cases are taxable, while those received in slip and fall accidents are not. There is no defensible reason for this disparity and it must be changed.”⁸⁷ Sen. Charles Grassley (R-IA) made parallel remarks.⁸⁸ In contrast, several members of Congress have spoken in favor of differentiating emotional distress damages from damages for mind-independent injuries.⁸⁹ A similar debate took place surrounding the Prison Litigation Reform Act, with some commentators arguing that the Act should have included relief for mind-dependent injuries.⁹⁰ We also see similar discussions when liability and damage provisions in other federal statutes come up for debate, such as a proposal to amend the Interstate Commerce Commission Sunset Act to preempt state and federal laws that

86. Antonetti, *supra* note 83, at 672.

87. 146 CONG. REC. S7160-03 (daily ed. July 18, 2000) (statement of Sen. Robb), 2000 WL 986303. This inclusion had previously been rejected: in 1996, Senator Carole Moseley-Braun (D-IL) stated that

I regret the deletion by the conference committee of safeguards against the taxation of non-physical compensatory damages. That provision is inequitable because it makes a distinction between physical and non-physical compensatory damages. Under this bill, victims of sex discrimination, race discrimination, and emotional distress would be required to pay taxes on any damages they receive while, on the other hand, victims of battery will not be taxed. Not only is this provision bad tax policy but it is discriminatory, and will make it more difficult for victims of these crimes to achieve justice.

142 CONG. REC. S9541-01 (daily ed. Aug. 2, 1996), 1996 WL 438355.

88. 146 CONG. REC. S7160-03 (daily ed. July, 18, 2000) (statement of Sen. Grassley), 2000 WL 98603.

89. *E.g.*, 141 CONG. REC. S6068-02 (daily ed. May 3, 1995) (statement of Sen. Abraham), 1995 WL 255991 (“Noneconomic damages are awarded to compensate plaintiffs for subjective harm, like pain and suffering, emotional distress, and humiliation. Since noneconomic damages are not based on tangible losses, however, there are no objective criteria for calculating their amount. As a result, the size of these awards often depends more on the luck of the draw, in terms of the jury, than on the rule of law.”); 140 CONG. REC. H7274-01 (daily ed. H7274-01) (statement of Congressman Horn), 1994 WL 416899 (“[T]hese are caps on payments for emotional distress, they are not compensation for actual and real harm suffered.”).

90. *E.g.*, *Prison Abuse Remedies: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm on the Judiciary*, 110th Cong. (2008) (statement of Ernie Preate, Jr., attorney), 2008 WL 1815202 (criticizing the PLRA’s “physical injury” requirement); *Prison Litigation Reform Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm on the Judiciary*, 110th Cong. (2007) (statement of Margo Schlanger, Professor of Law, Washington Univ. in St. Louis), 2007 WL 3349768 (criticizing “the PLRA’s ban on awards of compensatory damages for ‘mental or emotional injury suffered while in custody without a prior showing of physical injury’”).

provide damages for mind-dependent injury;⁹¹ the inclusion of provisions limiting the liability of foreign cruise ships for mind-dependent injury to passengers in a Coast Guard authorization bill;⁹² the imposition of caps on damages for mind-dependent injury as part of a medical malpractice tort reform bill;⁹³ the amendment of the Privacy Act to allow for damages for mind-dependent injury;⁹⁴ and the inclusion of such damages in a litigation reform proposal advanced in response to the “Y2K” glitch.⁹⁵

III. NORMATIVE DIRECTIONS

How should we resolve the pressure that new species of injury put on tort law? Some argue in favor of preserving the existing distinction between mind-dependent and mind-independent injuries. These arguments generally rely on one of two strategies. What I call *epistemic preservationism* argues for a distinction grounded in the practical difficulty

91. 141 CONG. REC. S17593-01 (daily ed. Nov. 28, 1995) (statement of Sen. Ashcroft), 1995 WL 699382 (“You cannot recover emotional harm or pain and suffering because of the anguish of learning that your Aunt Millie’s vase was crushed in the shipment. You can only get the value of the vase. So, the carrier is protected from having to pay some very subjective damages”); see also *Household Goods Moving Industry: Hearing Before the H. Comm. on Transp. and Infrastructure*, 107th Cong. (2001) (statement of Joseph M. Harrison, President, Am. Moving and Storage Assn.), 2001 WL 800488 (“The fact that Mrs. Jones sustained emotional stress because of damage to a cherished piece of furniture is akin to the shop owner who sustains emotional stress because merchandise was not delivered in time for an announced sale. Wisely, Congress and the courts have rejected claims for damages predicated upon these scenarios.”).

92. 141 CONG. REC. S17362-01 (daily ed. Nov. 17, 1995) (statement of Sen. Kerry) (“The first provision would allow foreign cruise ship owners to use the fine print on the back of tickets to deny liability for emotional distress claims brought by passengers, unless the passengers also suffered substantial physical injuries. A number of women’s groups and organizations across the country, including the Women’s Legal Defense Fund, the Women’s Law Center, and the NOW Legal Defense Fund, have expressed strong opposition to this provision. They are rightfully concerned that it could make it more difficult for victims of rape on foreign-flag cruise vessels, who suffer tremendous emotional scars but sometimes only minor physical injuries, to bring civil lawsuits against the cruise lines that bear responsibility for their trauma.”).

93. *Compare* 151 CONG. REC. H6974-03 (daily ed. Jul. 28, 2005) (statement of Congressman Smith), 2005 WL 1788540 (arguing for caps on pain and suffering damages, and arguing that “[b]etween two-thirds and three-quarters of the American people support exactly what we are trying to do”), with *id.* (statement of Congressman Larson) (contending that the proposed cap would “punish victims of malpractice and cause significant inequalities in compensation for women, children, seniors, and lower-income workers”).

94. 158 CONG. REC. S5904-02 (daily ed. Aug. 3, 2012) (statement of Sen. Akaka), 2012 WL 3136303 (“The Court concluded that the plaintiff could not recover damages for emotional distress My amendment would heed the call of scholars across the political spectrum to amend the Privacy Act and fix this decision.”).

95. *Year 2000 Computer Problems, Lawsuits and Liability: Hearing on H.R. 775 Before the H. Comm. on the Judiciary*, 106th Cong. (1999) (statement of Sally Greenberg, Senior Prod. Safety Counsel, Consumers Union), 1999 WL 216365 (“While we are pleased that personal injury cases are outside the scope of this legislation, we are concerned that damages for mental suffering, emotional distress and other non-physical injuries appear to be precluded. For example, it appears that a claim for mental suffering or emotional distress brought by someone whose positive HIV status or cancer is made public due to a Y2K glitch might be severely limited or barred.”).

of determining conclusively that an individual has suffered a mind-dependent injury. In contrast, what I call *moral preservationism* argues for a distinction based on a moral difference between mind-dependent and mind-independent injuries. A third view, *metaphysical preservationism*, which has not been defended in the literature but I believe forms a tacit basis for many defenses of the distinction, rests the distinction on the adoption of a metaphysics that regards the mind and body as different categories of stuff.

Others argue for what I will call *assimilationism*: on this approach, our treatment of mind-dependent injuries in the law should become no different from our current treatment of the existing category of mind-independent injuries, without reconsidering our treatment of the latter.

I will defend a third approach, which I call the *disintegration* approach. Rather than treating mind-dependent or mind-independent injuries as a monolithic category, the disintegration approach regards changes in our understanding of mind-dependent injuries as an opportunity to rethink our legal treatment of both. In particular, it suggests a more nuanced and granular approach to the legal treatment of injury, which considers and differentiates the underlying interests that are affected by different types of injuries, whether those injuries be mind-dependent or mind-independent.

A. *Preservation*

1. *Epistemic*

Epistemic (i.e., knowledge-based) preservationism relies on concerns about whether courts can reliably know that someone has experienced an injury. One species of epistemic preservation appeals to doubts about the severity of the injury itself. The Massachusetts Supreme Court effectively summarizes this version of preservationism in its dismissal of an emotional distress claim: “in the absence of the guarantee of genuineness provided by resulting bodily harm . . . emotional disturbance can be too easily feigned or imagined.”⁹⁶ This claim has two parts: first, it assumes that identifiable bodily harm guarantees the “genuineness” of an injury, and, second, it asserts that emotional disturbance does not similarly guarantee

96. *Payton v. Abbott Labs*, 437 N.E.2d 171, 178 (Mass. 1982); *see also Gardner v. Cumberland Tel. Co.*, 268 S.W. 1108, 1110 (Ky. 1925) (asserting that emotional distress is “easily simulated and hard to disprove” (quoting *Reed v. Ford*, 112 S.W. 600, 600 (Ky. Ct. App. 1908))); *Bosley v. Andrews*, 142 A.2d 263, 267 (Pa. 1958) (“For every wholly genuine and deserving claim, there would likely be a tremendous number of illusory or imaginative or ‘faked’ ones.”).

genuineness. Scholarly commentary has similarly discussed concerns about plaintiffs who malingering or pretend injuries.⁹⁷

Another species of epistemic preservationism involves doubts about causation: this argument makes that case that, even when we are certain that an injury has happened, we frequently cannot perceive its cause. We see this form of preservationism in the Massachusetts Supreme Court's decision discussed *supra*,⁹⁸ as well as in several decisions discussing the "impact rule," which barred recovery for emotional distress unaccompanied by visible physical injury.⁹⁹ Some commentators have noted the difficulty of proving causation in cases involving the "emotional distress" tort, and have surmised that concerns about proving causation (as well as, or instead of, concerns about the provability of emotional injury itself) may support the deprecation of claims for emotional distress.¹⁰⁰

Epistemic preservationism has been questioned from its inception, as many courts and judges have identified contexts where mind-dependent harms are clearly identifiable and attributable.¹⁰¹ And, relevantly for our purposes, it has been called into further question by advances in neuroscience and in the behavioral sciences more generally. Behavioral scientists have developed better tests to identify malingering, and are developing the capacity to directly identify neural traces of pain and other effects of injury. As Adam Kolber argues,

For a long time, psychologists, psychiatrists, and social workers have provided expert testimony about litigants' emotional distress, including their experiences of panic, depression, and anxiety. One way these experts make assessments of subjective experience is by obtaining litigants' self-reports. But in forensic contexts, litigants

97. *E.g.*, John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 838 (2007) (identifying "concern over the genuineness of the emotional distress claim"); Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 18 (2011) (noting "concerns about malingering or exaggeration and the great difficulty in quantifying emotional distress").

98. *Payton*, 437 N.E.2d at 184 ("[W]e have relied in part on the difficulty of proving causation and the existence and extent of purely emotional distress as a reason for denying recovery of damages for emotional distress in the absence of some objective evidence of physical harm."); *Carrillo v. Boise Tire Co.*, 274 P.3d 1256, 1265 (Idaho 2012); *Toney v. Chester Cnty. Hosp.*, 36 A.3d 83, 90 (Pa. 2011) (noting that "our Court has limited recovery for emotional distress due to the difficulty of proving its causation"); *cf. Duncan v. United States*, 667 F.2d 36, 48 n.23 (Ct. Cl. 1981) (discussing the "practical difficulties of assessing causation" where a breach of trust was alleged).

99. *Hughes v. Moore*, 197 S.E.2d 214, 218 (Va. 1973) (discussing "medical science's difficulty in proving causation between the claimed damages and the alleged fright").

100. *See, e.g.*, Ellen L. Luepke, Note, *HIV Misdiagnosis: Negligent Infliction of Emotional Distress and the False-Positive*, 81 IOWA L. REV. 1229, 1232 (1996).

101. *E.g.*, *Dillon v. Legg*, 441 P.2d 912, 917 (Cal. 1968) (rejecting argument that emotional distress claims are so likely to be fraudulent that recovery should not be permitted); *Harrison v. Loyal Protective Life Ins. Co.*, 396 N.E.2d 987, 991 (Mass. 1979) ("As for the proof of the defendant's actions or words, an emotional distress case is no different from a case of battery or contract . . .").

have incentives to lie, and we are disinclined to trust their claims. While mental health professionals have some methods of detecting malingering, in the experiential future, they will have far better methods of diagnosing psychiatric symptoms and estimating their severity, even when subjects have incentives to lie.¹⁰²

In a recent article, Betsy Grey has similarly detailed the ways in which new scientific findings regarding emotional distress injuries challenge existing arguments for distinguishing mind-dependent from mind-independent harms. Grey suggests that ultimately, neuroscience and other scientific advances will undermine the epistemic preservationist argument: “Psychic injury should no longer raise the concerns it once did of fraud or lack of predictability.”¹⁰³

While advances in neuroscience and the behavioral sciences can help to call the epistemic justification for preservationism into doubt, they cannot, on their own, show that preservationism is mistaken.¹⁰⁴ Even if clear scientific evidence shows that someone has suffered a particular consequence—for instance, that the conduct in BULLYING has led to identifiable changes in the victim’s brain that have negative consequences for her—the *normative* significance of those changes can still be called into doubt. For instance, some might doubt that the changes are of moral significance. Others might assert that they are not the putative tortfeasor’s moral or legal responsibility, therefore nullifying the case for fault-based compensation. I turn to these morally-based, rather than epistemically-based, preservationist arguments next.

2. *Moral*

The moral-preservation argument contends that, even if undisputed examples of mind-dependent injury can be identified, such injuries are morally less deserving of compensation. This argument, like the epistemic preservation argument, comes in at least two flavors. One supports the idea that the *injury itself* is a diminished one: it makes the case that mind-dependent injuries are inherently less hurtful than mind-independent ones. The second holds out that, regardless of the severity of the injury, *liability*

102. Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 617–18 (2011) (footnote omitted).

103. Betsy J. Grey, *Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims*, in 13 LAW AND NEUROSCIENCE: CURRENT LEGAL ISSUES 225 (Michael Freeman ed. 2011).

104. Grey concedes as much. *See id.* at 229 (“If there is to be no or lesser recovery for mental distress claims, then this choice should be better explained by policy concerns about ruinous liability and a desire to reserve funds for victims of other harms rather than based on an unexamined mental-physical boundary.”).

for mind-dependent injuries should be less than for mind-independent injuries.

I will examine the moral-preservation argument by engaging with one of its most recent exemplars, a proposal by Erica Goldberg. After reviewing and cogently rejecting some epistemic-preservationist arguments, as well as some of the arguments for assimilation that I discuss below, Goldberg argues that a distinction between physical and emotional harm “can be justified by reference to a duty that we owe to take care of ourselves, which in turn limits the duties others owe to avoid distressing us.”¹⁰⁵

The central question for a moral-preservation theory like Goldberg’s is what justifies a duty to take care of ourselves *emotionally* that exceeds our duty to take care of ourselves physically. After all, if I suffer a broken arm because of a falling bag of flour, I am capable of taking care of myself: I can seek medical care, get my arm stabilized in a cast, and ensure that I do not engage in activity that is likely to lengthen the healing process. Furthermore, I am also capable of taking precautions to avoid the broken arm in the first place—for instance, by strengthening my bones and by avoiding areas where objects are likely to fall. Yet we allow me to recover even if I am avoidably physically weak.¹⁰⁶

Goldberg offers several possible justifications for a distinctive duty to pay the costs of dealing with emotional harms that one suffers. One justification she offers is the efficient promotion of welfare. She argues that

when an action causes physical injury, there are reasons to think that it is more likely to be socially inappropriate or harmful than an action that causes emotional harm. An action that causes physical injury is less likely to have positive consequences, and it is more likely that the perpetrator could have reaped many of the action’s benefits without causing harm by taking more precautionary measures. It is also more likely that the defendant can properly account for all the harms and benefits that result from her behavior when making rational calculations about whether to engage in the behavior.¹⁰⁷

However, the reasons Goldberg identifies for regarding the broad category of “actions causing emotional injuries” as more likely to be socially productive than actions causing physical injuries are not persuasive. In many cases—for example, those involving the use of racist or sexist

105. Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 842 (2015).

106. *E.g.*, *Doty v. Sewall*, 908 F.2d 1053, 1059 (1st Cir. 1990) (“In personal injury law, it is well settled that in an action for damages, the tortfeasor ‘takes his victim as he finds him.’”).

107. Goldberg, *supra* note 105, at 854 (footnote omitted).

slurs—it is easy to foresee that an action will cause emotional harm, and difficult to see what social benefit such slurs advance.¹⁰⁸ Meanwhile, there are many actions, such as the provision of vaccinations, that predictably cause some physical injuries but engender major social benefits.¹⁰⁹ As I will argue in the final subpart of this Article, we would do better to move away from a dichotomy between mind-dependent and mind-independent injuries, and toward a more fine-grained differentiation of injury types.

A different justification offered by Goldberg appeals to the claim that emotional harms are attributable to the harmed individual, rather than the putative cause of harm. Goldberg argues for this as follows:

I control the use of my body, and any actions to which I did not consent and that injure my body violate that right and impose upon my ability to make decisions about my body. However, in the case of emotional injury, someone's wrongful action may have caused me to suffer emotional upset, but, in most cases, my mind was not invaded by that person's actions and my free will was not disrupted. The harms are therefore attributable to me.¹¹⁰

Goldberg does not specify what it means for someone's mind to be invaded, nor her free will disrupted. While psychology and neuroscience cannot provide us with ultimate moral truths, they can provide us with strong and compelling evidence regarding attributability. Though historical concerns about subliminal messages have largely proven meritless, recent research in the brain sciences shows that one person's presenting information to another frequently can have direct impacts on the latter individual's mind that is not mediated by her own judgments.¹¹¹ John Greenman has questioned whether such transmission of information or content constitutes "communication" at all, as opposed to conduct that imposes burdens on others.¹¹² Further, even if someone can take measures to protect her mind from being affected in these ways, Goldberg has not offered us a reason to believe that she has a moral duty to so protect herself that differs from her duty to protect herself from physical injury in the ways

108. See Susan Brison, *Speech, Harm, and the Mind-Body Problem in First Amendment Jurisprudence*, 4 LEGAL THEORY 39, 47–57 (1998); Lawrence, *supra* note 70, at 452.

109. See *Bruesewitz v. Wyeth LLC*, 562 U.S. 223, 228 (2011).

110. Goldberg, *supra* note 105, at 858 (footnote omitted).

111. See, e.g., Daniel T. Gilbert et al., *You Can't Not Believe Everything You Read*, 65 J. PERSONALITY & SOC. PSYCH. 221, 222, 230–32 (questioning whether people are "capable of the skepticism that good science and free speech apparently require," and providing evidence that "information changes people even when they do not wish to be changed"). See generally Jeremy N. Sheff, *The Myth of the Level Playing Field: Knowledge, Affect, and Repetition in Public Debate*, 75 MO. L. REV. 143, 160–61 (2010) (summarizing evidence from the behavioral sciences regarding the effect of mere exposure and repetition on listeners).

112. John Greenman, *On Communication*, 106 MICH. L. REV. 1337, 1350 (2008).

with which we are familiar—avoiding unsafe paths, paying attention to her surroundings, ensuring that her body is in good working order.

Moreover, going beyond Goldberg's discussion, it is unclear why we should conclude that mind-dependent harms are always attributable to the injured individual while mind-independent harms are attributable to some other party. Judith Jarvis Thomson has attempted to argue as much, however, in her work on rights. Thomson argues that individuals do not have a right against being subject to "belief-mediated distress," where belief-mediated distress results from conduct whose injurious nature is dependent on one's beliefs and would not be injurious but for those beliefs.¹¹³ An insult is a paradigm case of conduct that causes belief-mediated distress. Thomson asserts—like Goldberg—that people have "some responsibility" for their beliefs, even if those beliefs (for instance, that ethnic slurs should not be used) are entirely reasonable ones.¹¹⁴ Additionally, she argues that compensation for belief-mediated distress is unfair to individuals who have cultivated such equanimity that they are not injured by insults or similar conduct.¹¹⁵

Alan Wertheimer provides several compelling reasons to reject a view like Thomson's. Wertheimer points out that the argument that individuals bear some responsibility for minimizing the belief-mediated injury they suffer from others' conduct seems applicable to non-belief-mediated distress as well, and that it can sometimes be easier to protect oneself against the latter than the former.¹¹⁶ Further, Wertheimer observes that "even if [someone] *can* reduce her level of distress, it does not follow that the burden of such reduction should fall on" the injured rather than the injurer.¹¹⁷ Here, Wertheimer is restating a classic point due to Ronald Coase: any injury is attributable, in a formal sense, to both the injured party and the injurer, and who should bear the burden of avoiding the injury is a normative rather than causal question.¹¹⁸

In a recent article, Andrew Cornford provides a further basis for rejecting the sort of categorical distinction Thomson and Goldberg defend. Cornford notes several "respects in which negative feelings differ materially from physical pains," notably the fact that "we exercise a degree

113. JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 250–54 (1990).

114. *Id.* at 253.

115. *Id.* at 255.

116. ALAN WERTHEIMER, *CONSENT TO SEXUAL RELATIONS* 99 (2003) ("An airline baggage handler can avoid the non-belief-mediated distress of loud noise by wearing ear plugs, but it may be difficult to steel oneself against one's belief-mediated fear of Doberman pinschers or anger at an ethnic slur."); *see also* Anthony Ellis, *Thomson on Distress*, 106 *ETHICS* 112, 114 (1995) (noting that "how much pain I suffer if you punch me in the stomach is very significantly a function of my own actions"); Brison, *supra* note 108, at 55–58.

117. WERTHEIMER, *supra* note 116, at 99.

118. *Cf.* MICHAEL MOORE, *CAUSATION AND RESPONSIBILITY* 94 (2010).

of control over our mental states that we do not typically exercise over sensations of other kinds.”¹¹⁹ However, Cornford goes on to reject the view that mental injuries are less morally significant than physical ones because they are attributable to the injured party rather than the injurer:

Since we exercise a degree of control over our beliefs, we also have a degree of control over whether or not we suffer belief-mediated negative feelings. One might therefore think that we are to an extent morally responsible for the occurrence of such feelings, even when they are prompted by the actions of others. Once again, though, it is difficult to believe that we do not have duties to cause belief-mediated negative feelings *simply* because we exercise some degree of control over them. . . . Rather, the uniquely problematic aspect of belief-mediation does not become apparent until we consider cases in which the relevant beliefs are *unreasonable*.¹²⁰

Cornford’s point is that we are entitled not only to legal protection against conduct whose injurious nature depends on our *immutable* properties as individuals (e.g., that we are vulnerable to extreme cold and heat), but also to protection against conduct whose injurious nature derives from non-immutable aspects of ourselves that are nonetheless morally legitimate (e.g., that we are upset by racial slurs).¹²¹ The move from an immutability to a legitimacy argument in favor of legal protection is familiar from other contexts, most notably antidiscrimination law. Rather than arguing that individuals should be protected from discrimination on the basis of sexual orientation or religion because these characteristics are immutable, scholars have moved toward arguing that these characteristics are ones that, as Andrew Koppelman puts it, “the state has no legitimate interest in influencing.”¹²²

Ultimately, the danger of the moral preservationist approach is that it maintains the structure of prior precedent even after the underlying justification for that precedent has disappeared. The philosopher and psychologist Joshua Greene, for instance, has advanced this as a criticism

119. Andrew Cornford, *Criminalising Anti-Social Behavior*, 6 CRIM. L. & PHIL. 1, 6 (2012).

120. *Id.*

121. See also WERTHEIMER, *supra* note 116, at 100 (arguing that legal regulation should turn on whether beliefs are legitimate or illegitimate, rather than merely whether distress is or is not belief-mediated).

122. Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men Is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 203 (1994). See generally Edward Stein, *Immutability and Innateness Arguments About Lesbian, Gay, and Bisexual Rights*, 89 CHI.-KENT L. REV. 597, 616 (2014).

of Kantian morality;¹²³ the political theorist Alasdair MacIntyre has similarly argued that Enlightenment and post-Enlightenment ethical theory attempts to retain the structure of traditional ethics, but without the underlying religious and metaphysical commitments that make that tradition compelling.¹²⁴ Similarly, the moral preservationist approach strives to retain the traditional distinction between mind-dependent and mind-independent injuries, but frequently lacks a compelling basis for that distinction.

3. *Metaphysical*

This argument straightforwardly asserts that mind-dependent and mind-independent injuries belong to different ontological categories. It relies on a sort of mind-body dualism, in which mind is treated as an entirely nonphysical substance. That some preservationist arguments are grounded in dualism should not be surprising. As a matter of history, mind-body dualism was the predominant view in the West during much of the time in which the legal doctrine classifying different types of harm was developing.¹²⁵ Perhaps the most prominent defender of a dualist view was Descartes, who postulated that mind and body are comprised of ontologically different substances.¹²⁶

Some courts have astutely identified a dualist metaphysics underlying legal precedent that differentiates bodily from mental injury. The New York Court of Appeals did so in a seminal 1974 case:

[I]n its ordinary usage, the term “bodily” suggests opposition to “mental”. This traditional dualism may or may not reflect the actual physiological structure of the human organism; it may be that fright and emotional distress are as much “bodily”, in the sense of “physiological”, as a broken leg. But the relationship between “mind” and “body”—a stubborn problem in human thought—is not the question before us nor one we would presume to decide. Rather, in seeking to apply the treaty’s terms to the facts before us,

123. JOSHUA D. GREENE, *The Secret Joke of Kant’s Soul*, in *MORAL PSYCHOLOGY: THE NEUROSCIENCE OF MORALITY: EMOTION, BRAIN DISORDERS, AND DEVELOPMENT* 35, 61–66 (Walter Sinnott-Armstrong ed., 2008).

124. ALASDAIR MACINTYRE, *AFTER VIRTUE* ch. 5 (3d ed. 2011).

125. *Cf. Ware ex rel. Ware v. ANW Special Educ. Coop. No. 603*, 180 P.3d 610, 621–22 (Kan. Ct. App. 2008) (Greene, J., dissenting) (“Whatever the best minds of the day might have thought about the difference in physical and emotional harm when tort law came of age, the best minds of today do not support such a stark mind-body dichotomy. Our current understanding rejects this Cartesian dualism and leads us in the direction of an integrated model for understanding harm.” (quoting Daniel W. Shuman, *How We Should Address Mental and Emotional Harm*, 90 *JUDICATURE* 248, 248–49 (2007))).

126. RENÉ DESCARTES, *Meditations on First Philosophy*, in 2 *THE PHILOSOPHICAL WRITINGS OF RENÉ DESCARTES* 1–62 (J. Cottingham et al. trans., 1984).

we ask whether the treaty's use of the word "bodily", in its ordinary meaning, can fairly be said to include "mental". We deal with the term as used in an international agreement written almost 50 years ago, a term which even today would have little significance in the treaty as an adjective modifying "injury" except to import a distinction from "mental". In our view, therefore, the ordinary, natural meaning of "bodily injury" as used in article 17 connotes palpable, conspicuous physical injury, and excludes mental injury with no observable "bodily", as distinguished from "behavioral", manifestations.¹²⁷

More recently, an opinion by the California Court of Appeals has identified a dualist basis for the doctrinal distinction between emotional and physical distress in the law of torts. In *Lawson v. Management Activities, Inc.*,¹²⁸ the court interpreted California tort jurisprudence, in particular a passage from the California Supreme Court's decision in *Sloane v. Southern California Railway Co.*:

The interdependence of the mind and body is in many respects so close that it is impossible to distinguish their respective influence upon each other. It must be conceded that a nervous shock or paroxysm, or a disturbance of the nervous system, is distinct from mental anguish, and falls within the physiological, rather than the psychological, branch of the human organism.¹²⁹

The *Lawson* court identified the dualist underpinnings of the *Sloane* decision:

The passage from *Sloane*, if read carefully, suggests that the Supreme Court casually accepted an almost "Cartesian" view that there is a mental world wholly divorced from the physical body, but simply located the particular damages in the *Sloane* case on the "body" side of the divide. Thus the implication was that if the damages were really "mental" there would have been no recovery.¹³⁰

Several other cases similarly identified "damage to the nervous system" as separate from purely emotional distress, regarding the nervous system as physical and not mental.¹³¹

127. *Rosman v. Trans World Airlines, Inc.*, 314 N.E.2d 848, 855 (N.Y. 1974) (footnote omitted).

128. 81 Cal. Rptr. 2d 745, 752-53 (Cal. Ct. App. 1999).

129. 44 P. 320, 322 (Cal. 1896).

130. *Lawson*, 81 Cal. Rptr. 2d. at 752-53.

131. *Id.* at 664 (collecting cases).

As a matter of intellectual history, it is not surprising that early tort law precedents reflected Cartesian commitments. As a recent survey article notes, Cartesian dualism did not lose its popularity until the twentieth century, with the advent of behaviorism in the social sciences and Gilbert Ryle's 1949 critique in *The Concept of Mind*.¹³² Yet Cartesian dualism is widely rejected today: the Cartesian view is broadly agreed to be incorrect, even though there is little consensus on which theory of the mind-body relationship should replace it.¹³³

Despite the widespread rejection of dualism among academic experts, many ordinary people may well continue to maintain some version of a Cartesian dualist position. As Joshua Greene and Jonathan Cohen contend, "Most people's view of the mind is implicitly *dualist* Dualism, for our purposes, is the view that mind and brain are separate, interacting, entities. . . . Many people, particularly those who are religious, are explicitly dualist. . . ." ¹³⁴ Greene and Cohen go on to examine two quotes from criminal law scholars that suggest commitment to an underlying dualism that differentiates brain from mind.¹³⁵

The prominence of dualism during the development of tort doctrine indicates that tort law's underlying commitments regarding injuries involving the mind may well reflect the influence of dualism. Further, to the extent Greene and Cohen are correct that even educated scholars frequently slip back into dualist thinking, we should expect to see dualist commitments continue to play a role in modern jurisprudence. However, dualism can no longer be regarded as a defensible basis for a distinction between mind-dependent and mind-independent injuries.¹³⁶ To the extent such a categorical distinction is defensible, a straightforwardly moral argument appears the only promising route.¹³⁷

132. See Howard Robinson, *Dualism* § 1.2, THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2013), <http://plato.stanford.edu/archives/win2012/entries/dualism/>; see also WILLIAM G. LYCAN, CONSCIOUSNESS 1-3 (1995) (reviewing reasons for dualism's loss of popularity and dating its loss of popularity to the twentieth century); Rebecca Dresser, *Culpability and Other Minds*, 2 S. CAL. INTERDISC. L.J. 41, 66 (1993) (similar).

133. See Shen, *supra* note 9, at 418–19 (collecting evidence).

134. Joshua Greene & Jonathan Cohen, *For the Law, Neuroscience Changes Nothing and Everything*, 359 PHIL. TRANSACTIONS ROYAL SOC'Y LONDON B 1775, 1779 (2004).

135. *Id.*

136. Cf. Michael C. Dorf, *Same-Sex Marriage, Second-Class Citizenship, and Law's Social Meanings*, 97 VA. L. REV. 1267, 1279 (2011) ("[F]eelings are not literally intangible. They correspond with physical states of the brain. Whether *D* punches *P* in the nose or calls *P* a hurtful name, *P* will experience discomfort through a complicated sequence of neurochemistry. Emotional harm thus *is* physical harm. Accordingly, to the extent that expressive theories of law aim to identify and provide redress for the emotional pain that insults and other actions or statements can cause, they may best be understood as simply striving to combat mind/body dualism.").

137. *Id.* (observing that "[i]ssues of proof and floodgates concerns probably suffice to explain tort law's historical and ongoing wariness" concerning mind-dependent injuries).

B. Assimilation

The assimilation argument simply argues that we should treat all types of torts as we currently treat ordinary physical injuries. This argument has been frequently advanced by courts and commentators.¹³⁸ The Wyoming Supreme Court effectively presents one version of the assimilation argument, which attempts to rebut a variety of arguments in favor of a distinction:

Any time a defendant must pay for his wrongs he is burdened. And any time he passes that liability on to his insurer, as anticipated in his contract with the insurer, the loss is felt by persons other than the defendant. Insurance is a loss spreading device by design. Increased insurance premiums are “unwarranted” only when we decide that a loss should fall on the innocent victim rather than the guilty tortfeasor, his insurer, and the public. Finally, the fact that legal causation must terminate somewhere does not mean it must terminate short of mental injuries.¹³⁹

Other courts and judges have proffered similar arguments.¹⁴⁰ And neuroscientific evidence has been employed to give this argument additional force.¹⁴¹

The primary problem with the assimilation argument is that it moves too uncritically from the analogy between mind-dependent and mind-independent harm to the conclusion that mind-dependent harm should simply be treated as mind-independent harm now is. As a formal matter, such a parallelism equally suggests that mind-*independent* harm should be assimilated to our current treatment of mind-dependent harm. More generally, that the set of potentially tortious conduct is evolving suggests reason to rethink and reconsider our legal treatment of that conduct, rather

138. E.g., Jean Macchiaroli Eggen & Eric J. Laury, *Toward a Neuroscience Model of Tort Law: How Functional Neuroimaging Will Transform Tort Doctrine*, 13 COLUM. SCI. & TECH. L. REV. 235, 289 (2012) (“[T]he neuroscience model we propose would abandon the distinction between the treatment of mental and physical disabilities upon the introduction of reliable and relevant neuroscience evidence.”).

139. *Gates v. Richardson*, 719 P.2d 193, 197 (Wyo. 1986).

140. *Ware ex rel. Ware v. ANW Special Educ. Coop.* No. 603, 180 P.3d 610, 622 (Kan. Ct. App. 2008) (Greene, J., dissenting) (approvingly citing statement by commentator that “[t]oday and tomorrow’s scientific paradigms do not support differential legal treatment of mental and physical harm.”).

141. E.g., *Allen v. Bloomfield Hills Sch. Dist.*, 760 N.W.2d 811, 816 (Mich. Ct. App. 2008) (“[A]s a matter of medicine and law, there should be no difference medically or legally between an *objectively* demonstrated brain injury, whether the medical diagnosis is a closed head injury, PTSD, Alzheimer’s, brain tumor, epilepsy, etc. A brain injury is a ‘bodily injury.’”).

than simply insisting that new torts fit into the same paradigm that we have hitherto adopted.

In other contexts where a category evolves, the evolution of that category has provided an opportunity to reconsider the proper status and evaluation of that category, rather than simply allowing new members into a fixed and unchanging institution. For instance, some have argued that expanding the definition of marriage to include same-sex couples should prompt us to reconsider the present gender norms and scripts that have hitherto characterized marriage. In a recent article, Deborah Widiss observes that “[t]ens of thousands of same-sex couples are now married, and this reality offers the opportunity to rethink aspects of marriage law more generally.”¹⁴² Widiss goes on to speculate that same-sex marriage may allow us to differentiate the effects of gender norms from those of substantive marriage law, and “that the advent of same-sex marriage also invites reconsideration of the normative vision of equality within marriage. Perhaps, rather than idealizing a marriage in which both spouses equally share breadwinning and caregiving responsibilities, it is appropriate to accept and expect a certain level of specialization in many marriages.”¹⁴³ In an earlier article, Nan Hunter similarly noted the potentially transformative effect of same-sex marriage on marriage more generally, though her speculation reached a different outcome: she concluded that legalizing same-sex marriages could “destabilize the gendered definition of marriage for everyone.”¹⁴⁴ In particular—as Martha Nussbaum suggests in the marriage context—the proposed inclusion of new members in a category can prompt us to consider fragmenting that category into more finely distinguished subcategories.¹⁴⁵ I consider such a proposal in the next subpart.

142. Deborah A. Widiss, *Changing the Marriage Equation*, 89 WASH. U. L. REV. 721, 729 (2012); see also Barbara A. Atwood, *Marital Contracts and the Meaning of Marriage*, 54 ARIZ. L. REV. 11, 40 (2012) (observing that “socioeconomic shifts between men and women and the emergence of same-sex marriage invite us to rethink traditional limits placed on the contractual autonomy of spouses”); Vanessa A. Lavelly, Note, *The Path to Recognition of Same-Sex Marriage: Reconciling the Inconsistencies Between Marriage and Adoption Cases*, 55 UCLA L. REV. 247, 252 (2007) (“The legalization of same-sex marriage requires courts to undergo a two-step process: first acknowledging the social fact of same-sex marriages, and then, in turn, rethinking whether the traditional legal definition of marriage is still capable of protecting the rights of all citizens.”).

143. Widiss, *supra* note 142, at 794.

144. Nan D. Hunter, *Marriage, Law, and Gender: A Feminist Inquiry*, 1 LAW & SEXUALITY 9, 12 (1991); see also Ralph Richard Banks, *Rights and Meanings: How Same Sex Marriage Will Change Marriage for Everyone*, 17 J. GENDER RACE & JUST. 1, 7 (2014) (“I cannot help but think that same-sex marriage, over time, will further the evolution of marriage away from its gendered meanings.”).

145. Martha C. Nussbaum, *A Right to Marry?*, 98 CAL. L. REV. 667, 694 (2010) (considering “whether government should continue to offer a package of benefits similar to those offered in today’s institution of marriage, or whether those benefits ought to be disaggregated and attached to a variety of distinct relationships”); see also MICHAEL WARNER, *THE TROUBLE WITH NORMAL: SEX, POLITICS, AND THE ETHICS OF QUEER LIFE* 81–148 (1999) (discussing the replacement of traditional marriage by a wider variety of legal relationships).

C. Disintegration

I borrow the title of this last approach—which this Article qualifiedly defends—from Thomas Grey’s seminal article, *The Disintegration of Property*.¹⁴⁶ Grey’s article argues that the category of “property rights” no longer picks out a well-defined set of claims. Property rights are not invariably rights in tangible things, nor are they necessarily complete rights over the objects in question.¹⁴⁷ A variety of attempts to identify and cabin the category of property rights—as rights with respect to real estate, as rights against the world at large rather than against specific individuals, or as rights enforced via injunctions rather than damages—are unavailing. At the end of his article’s introduction, Grey proposes that “the specialists who design and manipulate the legal structures of the advanced capitalist economies could easily do without using the term ‘property’ at all.”¹⁴⁸ At the close of the same article, Grey predicts “the decline of property as a central category of legal and political thought.”¹⁴⁹

My proposal in this subpart is that we treat the categories of mind-dependent and mind-independent injury as Grey treated the category of property. Rather than attempting to shore up the divide between the two, as preservationist approaches do, or folding one into the other, as assimilationist approaches do, the disintegration approach uses the pressure neuroscience and the kinds of injuries discussed in Part II placed on the distinction between mind-independent and mind-dependent injuries as a starting point of a more extensive fragmentation of the larger category of tortious injury. The disintegration approach asks us to replace a broad-brush rule (“mind-independent injuries are compensable, mind-dependent ones aren’t”) with a case-by-case analysis. Rather than being able to advert to a metaphysical or moral bright line to hive off some torts from others, the disintegration approach asks us to look at each injury with new eyes, and assess each on its merits to determine what legal response is appropriate. It might recommend fuller compensation for some mind-independent injuries, but might equally recommend recognizing a broader duty to take care of oneself for some physical injuries.

Cass Sunstein’s proposal that we differentiate injuries along a permanent/temporary divide, rather than a mind-dependent/mind-independent divide,¹⁵⁰ might be seen as representing one version of a disintegration approach. Sunstein tacitly proposes the disintegration of one

146. Thomas C. Grey, *The Disintegration of Property*, 22 NOMOS 69 (1980).

147. *Id.*

148. *Id.* at 73.

149. *Id.* at 82.

150. See generally Cass R. Sunstein, *Illusory Losses*, 37 J. LEGAL STUD. S157, S168 (2008).

distinction, but its replacement by another binary distinction. Similarly, Francis Shen discusses Joel Feinberg's distinction between harm and mere unpleasantness as a potential alternative to the mind-dependent/mind-independent distinction.¹⁵¹ In contrast, I suggest that the class of compensable injuries might be best cross-cut by numerous distinctions and categories, with greater attention to the details of particular injuries and a greater willingness to face up to the idea that different actors owe different duties of care.

In some ways, the disintegration approach harks back to an earlier era of tort law. That earlier era relied more heavily on juries' idiosyncratic judgments.¹⁵² And it forthrightly acknowledged a multiplicity of different standards for liability.¹⁵³ However, a realistic approach to the law of torts as it is actually developed in present-day legal practice further supports the disintegration approach. In practice, we already draw many lines within the category of mind-independent injuries. Some mind-independent injuries are or have been subjected explicitly to special standards of care in the law. Examples include strict liability for abnormally dangerous conduct,¹⁵⁴ liability that extends to only "slight negligence" for certain businesses or industries,¹⁵⁵ or liability that applies a standard of care derived from professional norms rather than a reasonableness standard.¹⁵⁶ Others are removed entirely from the reach of tort law and placed within a no-fault insurance regime.¹⁵⁷ Still others are implicitly known to be treated as distinct in practice. For instance, empirical studies have shown that juries are substantially more likely to award punitive damages in cases involving intentional or business torts.¹⁵⁸ Studies also suggest that juries differentiate

151. Shen, *supra* note 9, at 438–39 & n.152.

152. See, e.g., Michael D. Green, *The Impact of the Civil Jury on American Tort Law*, 38 PEPP. L. REV. 337, 348 (2011) (arguing that "the history of tort law since the [1900s] has been the development of various devices to control the jury, often covertly, and to shift to judges greater authority over the outcome of tort cases"); Ann Woolhandler & Michael G. Collins, *The Article III Jury*, 87 VA. L. REV. 587, 658–59 (2001) (recounting history of increasing encroachment on jury's role by judges).

153. Cf. Kurt Philip Autor, Note, *Bailment Liability: Toward A Standard of Reasonable Care*, 61 S. CAL. L. REV. 2117, 2119 (1988) (discussing and rejecting "traditional rules governing bailment liability which rely on systems of classification and on varying degrees of care and negligence").

154. E.g., *In re Hanford Nuclear Reservation Litig.*, 534 F.3d 986, 1004 (9th Cir. 2008).

155. E.g., *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999).

156. Neil Vidmar, *Empirical Evidence on the Deep Pockets Hypothesis: Jury Awards for Pain and Suffering in Medical Malpractice Cases*, 43 DUKE L.J. 217, 233 (1993) ("In automobile cases, as in almost all other areas of torts, the negligence rules are based on the reasonable man standard. In contrast, in medical malpractice cases, the rule is whether the health care provider's treatment violated professionally accepted standards of practice in his area of specialization, in that community, and during that period of time.").

157. See generally Robert L. Rabin, *The Renaissance of Accident Law Plans Revisited*, 64 MD. L. REV. 699 (2005).

158. See Theodore Eisenberg et al., *The Predictability of Punitive Damages*, 26 J. LEGAL STUD. 623, 659 (1997).

medical malpractice cases from product liability cases and cases involving motor vehicle accidents, and potentially apply different standards to these different types of cases.¹⁵⁹

Indeed, even finer-grained classifications are frequently apparent: Peter Hoffman notes, for instance, that “injuries resulting from rear-end collisions are an extremely common type of claim. Perhaps because of their frequency, the rules of liability are well-settled, and the driver of the vehicle following behind almost always pays.”¹⁶⁰ The rear-end collision cases Hoffman discusses may well form a better-defined category within the wider universe of injuries compensable in tort than either mind-dependent or mind-independent injuries do. Ultimately, the disintegration approach may free us to face up to the fact that the actual law of injury and compensation may in fact function like the sometimes-derided “law of the horse,”¹⁶¹ with different rules for different social contexts, rather than applying general principles that govern all mind-dependent and all mind-independent injuries respectively.

CONCLUSION

More than thirty years ago, Duncan Kennedy identified and proposed a taxonomy that recapitulates the “six stages in a distinction’s passage from robust good health to utter decrepitude.”¹⁶² Kennedy did not include the distinction between mind-dependent and mind-independent harms among the distinctions he discussed. But that distinction has arguably progressed through several of Kennedy’s stages already. There have certainly been “[h]ard cases with large stakes” that implicated the distinction, and there have been intermediate classes of harms that exhibit features both of mind-dependent and mind-independent harm.¹⁶³ And recent scientific findings strongly suggest that the distinction has progressed further down the path toward infirmity in recent years. Our improved understanding of the biological correlates of mind-dependent harms suggests that the line

159. Vidmar, *supra* note 156, at 232; Paul C. Weiler, *Fixing the Tail: The Place of Malpractice in Health Care Reform*, 47 RUTGERS L. REV. 1157, 1174 (1995).

160. Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 13.

161. For criticism of a more contextual approach, see, for example, *Seegars v. Gonzales*, 396 F.3d 1248, 1254 (D.C. Cir. 2005); Karl N. Llewellyn, *Across Sales on Horseback*, 52 HARV. L. REV. 725, 737 (1939). For a different perspective, see Henry T. Greely, *Some Thoughts on Academic Health Law*, 41 WAKE FOREST L. REV. 391, 405 (2006) (“Applying an otherwise admirable privacy scheme, for example, to health care, without a real knowledge of health care, may well be a mistake.”).

162. Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350 (1982).

163. *Cf.* Kennedy, *supra* note 162, at 1350–51.

between “body” and “mind” is no longer sufficient to support the differential legal treatment of these harms.¹⁶⁴

In Kennedy’s typology, what I have argued in the final part of this Article might be understood as a brief for the “loopification” of our understanding of the distinction between mind-dependent and mind-independent injuries. Loopification occurs, or so Kennedy argues, “when the ends of the continuum seem closer to one another, in some moods (for some purposes, in some cases), than either end seems to the middle.”¹⁶⁵ Once a distinction has reached this stage, it loses its justificatory power.¹⁶⁶ I hope to have persuaded you that the putative distinction between mind-independent and mind-dependent injuries has now reached this stage. Many mind-dependent injuries have more legally salient features in common with mind-independent injuries than they have with fellow category members, and vice versa. But that fact, as I have argued, does not support simply assimilating the former to the latter. Rather, it opens a space for us to move beyond that distinction altogether, and frees courts and juries to examine new distinctions and classes of injury. No doubt these distinctions and categories, too, will in time collapse as well—but it is time for them to occupy a more central place in law, as the distinction this Article has analyzed and criticized fades from the stage.

164. *Cf. id.* at 1351–52.

165. *Id.* at 1354.

166. *See id.* at 1357.