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The Costs of Changing Our Minds

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ABSTRACT

The neuroscience revolution poses profound challenges to the doctrine of avoidable consequences in tort law and exposes deep theoretical riddles about the right to our own mental experiences and memories. To address this profound question, this Article begins with a deceptively simple principle of tort law: A victim of tortious wrongdoing by another is held responsible for mitigating her own physical injuries. This Article addresses whether that same doctrine should require a tort victim to likewise mitigate her emotional injuries. The answer to that question is of great and increasing importance because it goes to the heart of how society should address dramatic advances in neuroscience that enable us to change our own minds. This Article proposes a revolutionary way to understand both the answer to this question and to bring daylight to many puzzling doctrines in law—through the right to cognitive liberty. Through an introduction to the groundbreaking concept of cognitive liberty, the confusion plaguing the doctrine of avoidable consequences in tort law for emotional distress injuries is solved and new insights are developed with respect to other doctrines in law. These implications are as far-ranging as the deliberative privilege afforded to judges to the forced competency of prisoners. It quickly becomes apparent that cognitive liberty is the interest upon which many of our most cherished freedoms are secured.

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INTRODUCTION

Rape kits do not yet include propranolol, but they soon may. Propranolol, a beta-blocker drug developed in the 1960s as a treatment for high blood pressure, could blunt or even altogether extinguish the fear and emotional memory of a recent rape.[1] When the victim presents in the emergency room just hours after her assault, her physician cannot then predict if she will become one of the one-third of rape victims who will develop post-traumatic stress disorder (PTSD). If she does develop PTSD, then even years later the smallest trigger—a sound, the refrain of a song, a smell—could recall for her in full force the anguish of her attack, as if it were yesterday. While the physician cannot initially predict the victim's likelihood of future psychological trauma, he can know that her memories of the attack, just like all newly formed memories, are extremely fragile[2]—so fragile that if the physician could somehow help her alter her brain activity then and there, she might never form the long-term fear memory associated with her assault.[3]

Propranolol may offer precisely that. If the physician administers propranolol to her in those early hours after her assault, her memory of that horrific experience may soon fade, so that she might come to observe that terrible day as just another day long passed. This may sound like a medical miracle—and it very well may be—but with those prospects, would anyone reasonably refuse the drug? The answer to that question brings daylight to an increasingly critical issue in society—the role of cognitive liberty in our law and lives.

Surely, if the drug is safe, then a rape victim should have the choice to lessen the lasting psychological trauma of her assault. But how should the legal system regard a decision by her to decline the drug? Had she been stabbed during a robbery instead of raped, we would consider it perverse for her to refuse reasonable medical treatment of her wounds. And in a tort suit against the robber, a judge or jury would limit her physical damages because of her failure to mitigate her own injuries. Is her refusal to take propranolol analogous? Or is there some societal and individual value to remembering her attack more clearly? Could blunting her suffering have the paradoxical effect of diminishing societal outrage to, and condemnation of, rape? Could altering her memory

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1 Cassandra Willyard, *Remembered for Forgetting*, 18 NATURE 482, 483 (2012).

2 Cristina M. Alberini, *Long-term Memories: The Good, the Bad, and the Ugly*, 2010 CEREBRUM 1, 3.

3 *Id.* at 4 ("[M]emory consolidation requires the activation of molecular and cellular pathways, including those involved in stress, cell survival, cell-to-cell communication, and the release of several neurotransmitters (chemicals released in the brain to transmit signals across cells).").

render her an ineffective witness in the prosecution of the crime? Perhaps the police could take her statement the moment before she ingests propranolol. But would the use of her statement, which she has later partially forgotten, violate the alleged perpetrator's constitutional right to confront witnesses against him? Moreover, would she be better off remembering and then transcending her assault? How would memory modification impact her sense of self and her identity? Writers, public figures, artists, and others speak openly about how overcoming a pivotal adversity in their lives has enabled them to reach a new consciousness, gain new insight, or achieve new courage. Do these stories of transcendence impact how the law should consider her refusal?

This Article begins with a deceptively simple principle of tort law: A victim of tortious wrongdoing by another is held responsible for mitigating her own physical injuries. This Article then addresses whether that same doctrine should require a tort victim to likewise mitigate her emotional injuries. The answer to that question is of great and increasing importance because it goes to the heart of how society should address the dramatic advances in neuroscience that enable us to change our own minds.

Already, new discoveries in neuroscience enable us to selectively remember or forget past experiences by erasing parts of, or even entire memories from, our brains. With the advent of selective forgetting, rape victims, car accident victims, burn victims, and others may soon have to choose whether to numb their memories or have their civil damages reduced for failing to mitigate their own suffering. This prospect poses a deep puzzle that tort law and theory are ill-equipped to solve. Courts and commentators have almost entirely ignored the increasingly crucial issue of whether the doctrine of avoidable consequences should require a civil plaintiff to mitigate her own pain and suffering. This doctrine requires that an individual injured by the tortious acts of another exercise ordinary care under the circumstances to prevent the aggravation of her injuries.[4] Courts and commentators all agree that a plaintiff must take reasonable steps to mitigate her ordinary physical injuries. But they remain utterly perplexed about whether or to what extent a plaintiff must similarly mitigate her pain and suffering.

Pain and suffering are the "invisible" injuries—the fright, anxiety, shock, humiliation, indignity, terror, or loss of enjoyment of life—that a tort victim endures because of the civil wrongdoing of another.[5] While no sum of money

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[4] Lawrence J. Ackerman, *The Doctrine of Avoidable Consequences in Disability Insurance*, 4 U. NEWARK L. REV. 8, 9–10 (1938).

[5] *See, e.g.*, Capelouto v. Kaiser Found. Hosp., 500 P.2d 880, 883 (Cal. 1972) (describing pain and

can ever restore the peace of mind disturbed by assault, these compensatory damages "give to the injured person some pecuniary return for what he has suffered or is likely to suffer."[6] These damages also reflect societal "disapproval of the harm caused by the tortfeasor," and "promote loss avoidance goals by sending a fuller deterrent signal."[7]

Some important scholarship has already articulated the role of agency in limiting the availability of emotional damages in tort law.[8] But pharmacological advances like propranolol that mitigate invisible injuries by literally changing one's brain pose a theoretical riddle that pushes the issue several layers deeper. Only a few articles have addressed this issue at all, and none have attempted to locate it within its broader scientific, philosophical, and ethical context.

Judges, likewise, have not yet squarely addressed this issue. Those few courts that have considered what measures, if any, a plaintiff must take to mitigate her own emotional pain and suffering express deep ambivalence about the issue.[9] Several courts have found a duty to mitigate emotional distress damages, but none have quite explained what that duty entails or how it might be breached.[10] Other courts have intuited that something more is at stake in these cases—and have invoked concepts like self-determination and autonomy to conclude that the doctrine of avoidable consequences may not apply to pain and suffering.[11]

The time has come for a systematic and thoroughgoing inquiry into the issue. Modern neuroscience and medicine have heralded stunning advances in our ability to understand and change the subconscious and conscious human experience—with meditation, psychotherapy, electrical stimulation, drugs, and more. Yet we have made almost no progress on deciding whether our legal regimes will encourage, or even oblige, individuals to alter their brains in such

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suffering as encompassing "fright, nervousness, grief, anxiety, worry, mortification, shock, humiliation, indignity, embarrassment, apprehension, terror or ordeal").

[6] RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. LAW INST. 1977); *see also* McDougald v. Garber, 536 N.E.2d 372, 374–75 (N.Y. 1989) ("[R]ecovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rest on 'the legal fiction that money damages can compensate for a victim's injury' . . . We accept this fiction, knowing that although money will neither ease the pain nor restore the victim's abilities, this device is as close as the law can come in its effort to right the wrong.").

[7] Lars Noah, *Comfortably Numb: Medicalizing (and Mitigating) Pain-and-Suffering Damages*, 42 U. MICH. J.L. REFORM 431, 440 (2009).

[8] John C.P. Goldberg & Benjamin C. Zipursky, *Unrealized Torts*, 88 VA. L. REV. 1625, 1685–86 (2002).

[9] *See infra* Part II.

[10] *See infra* Part II.

[11] *See infra* Part III.

ways, lest they be deemed to have wrongfully failed to lessen their own suffering.

The answer to this question bears on far more than just a legal rule governing the apportionment of damages in civil suits. It implicates an interest that is distinct from liberty in the ordinary sense, an interest that is only dimly recognized in the cases and the scholarship, and an interest that is increasingly implicated by dramatic advances in modern science. This is an interest in cognitive liberty.

This value appears (although obliquely) throughout many modern legal debates. Consider, for example, the doctrine of absolute judicial deliberative privilege, which protects the deliberative process a judge uses in decision-making from discovery by others. What is the source of this common-law tradition, and can it survive developments in modern neuroscience? What about forcibly medicating prisoners who lack competency to stand trial? Are there contexts in which their cognitive liberty trumps societal interests in bringing those individuals to justice? And what if the victim of a sexual assault provides a statement to the police and then dampens her memory? Can her statement be used in a criminal case, and should we reexamine what this means for a defendant's rights under the Confrontation Clause of the U.S. Constitution?

Although this Article focuses on the legal obligations concerning mitigation of emotional pain and suffering in tort, it does so as a critical foray into this much wider theoretical issue—the role of cognitive liberty in our legal system and in our society. Part I puts the concern in context, explaining the extraordinary advances in modern medicine and neuroscience that enable us to quite literally change our minds, and therefore ourselves. Part II explains the normative underpinnings of the doctrine of avoidable consequences, and how it has been applied to emotional distress injuries in tort law. It illustrates how judges have intuited but not yet articulated that a different interest is at stake, the interest in cognitive liberty. Part III discusses the broader concept of cognitive liberty, and when and how courts should apply it to limit the applicability of the doctrine of avoidable consequences to emotional pain and suffering. It proposes a two-tiered approach to doing this: deeming treatments that clearly impact self-identity as per se reasonable for a plaintiff to forgo, and submitting to the jury other treatments for emotional distress that may not be identity-changing. Finally, this Part posits that our understanding of cognitive liberty may bring daylight to many other puzzling doctrines in law.

I. CHANGING YOUR MIND

A. Memories Can Be Changed

Do you remember where you were on September 11, 2001? Can you recall in vivid detail the events of that day, the emotions you experienced, the people you were with, whom you first called? Millions remember the excruciating details of 9/11 even more strongly than they can remember what they ate for breakfast this morning or where they parked their car. This is because traumatic memories tend to be the strongest memories.[12] The emotional content of a memory enhances the strength with which the memory is stored in the brain, and the degree to which it can be modified by intervention.[13] Because they are so strongly encoded, traumatic memories often haunt the victim weeks, months, or even years after the event, leading to secondary effects such as anxiety, stress, and sometimes post-traumatic stress disorder (PTSD).[14]

Memories do not immediately become permanent upon experiencing events in the world.[15] The common wisdom held by scientists just a few decades ago was that our adult brains are static, fixed, and immutable.[16] By the 1970s, new research dramatically changed our understanding of the human brain. We now understand that the brain is plastic and changeable, and that the memories stored therein are changeable as well.

Newly formed memories remain particularly fragile and changeable as they are initially being stored in the brain.[17] The hippocampus in the brain, like the random-access-memory (RAM) of a computer, processes and temporarily stores a new memory for a short time before that memory is transferred and

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[12] Dean G. Kilpatrick et al., *Rape-Related PTSD: Issues and Interventions*, 24 PSYCHIATRIC TIMES 50, 53 (2007) (describing how the emotional charge of traumatic events causes the body to release stress hormones such as adrenaline or epinephrine, which may enhance memory consolidation and the strength of the memory itself). Because of the mechanism by which such memories are stored and the strength of their consolidation, pharmacological interventions that block the effect of stress hormones such as beta-adrenergic antagonists like propranolol may reduce the strength or stability of these memories. *Id.*

[13] Alberini, *supra* note 2, at 6.

[14] *Id.* at 7 ("Recent studies report that 8 percent of Americans suffer from PTSD and about 15 percent of veterans experience multiple or all PTSD symptoms at some point after returning from combat. Available therapies rarely exceed 60 percent success rates, and no more than 20 to 30 percent of patients achieve full remission.").

[15] Yutaka Matsuoka, *Clearance of Fear Memory from the Hippocampus Through Neurogenesis by Omega-3 Fatty Acids: A Novel Preventive Strategy for Posttraumatic Stress Disorder?*, 5 BIOPSYCHOSOCIAL MED. 3, 4 (2011).

[16] Meghan O'Rourke, *Train Your Brain: The New Mania for Neuroplasticity*, SLATE (Apr. 25, 2007, 8:55 PM), http://www.slate.com/articles/life/brains/2007/04/train_your_brain.html.

[17] Alberini, *supra* note 2, at 3.

consolidated for long-term storage into the hard drive that is the cortex of the brain.[18] During this initial window of time that the memory is first in the brain's RAM and has not yet been consolidated, it remains unstable.[19] As the brain moves the memory from short-term to long-term storage, it synthesizes new proteins that strengthen the connections between neurons.[20] After a day or two, the event has been etched into our minds.[21] As a result, each time we recall an experience, it comes out of long-term storage and goes back into the short-term cache. From there, the memory is reconsolidated into long-term storage.[22]

During the fragile period of memory consolidation, if brain activity is tampered with (such as through drug administration), then a long-term memory of the event might never form.[23] It is as though the computer were switched off before clicking save. A drug such as propranolol (long used as a first-line drug therapy for cardiovascular care) may do precisely that, by preventing noradrenaline from binding to its receptors in the amygdala.[24] Several studies have confirmed that administering propranolol within six hours of a traumatic event substantially reduces the likelihood a trauma victim will experience PTSD by disrupting the affective experience of the memory.[25]

This same effect can even be achieved without drugs. One research team has shown that playing the video game *Tetris* (a simple visuospatial task) substantially reduces the flashback symptoms of PTSD when played continuously up to four hours post-trauma.[26] In studies of other species, scientists have selectively erased long-term memories by precisely blocking protein molecules involved in maintaining those memories,[27] by weakening the communication between specific neural pathways in the brain,[28] or by

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[18] Matsuoka, *supra* note 15, at 2–3.

[19] Willyard, *supra* note 1, at 483.

[20] *Id.*

[21] *Id.* at 482.

[22] *Id.*

[23] Alberini, *supra* note 2, at 3.

[24] Willyard, *supra* note 1.

[25] Kilpatrick, *supra* note 12. In a randomized placebo-controlled ten-day trial of propranolol beginning six hours after a traumatic event, 30% in the placebo group and 18% in the propranolol group developed PTSD. *Id.* A subsequent nonrandomized controlled trial of propranolol with survivors of motor vehicle accidents or victims of physical assault yielded similar results. *Id.*

[26] Emily A. Holmes et al., *Key Steps in Developing a Cognitive Vaccine Against Traumatic Flashbacks: Visuospatial Tetris Versus Verbal Pub Quiz*, 5 PLOS ONE 1, 5 (2010).

[27] Jiangyuan Hu et al., *Selective Erasure of Distinct Forms of Long-Term Synaptic Plasticity Underlying Different Forms of Memory in the Same Postsynaptic Neuron*, 27 CURRENT BIOLOGY 1888, 1888 (2017).

[28] Woong Bin Kim & Jun-Hyeong Cho, *Encoding of Discriminative Fear Memory by Input-Specific LTP in the Amygdala*, 95 NEURON 1129, 1129 (2017).

administering a toxin that targets the brain cells necessary to maintain a memory.[29]

With these novel interventions, we could one day choose to blunt ourselves from the emotional pain and suffering that accompanies the recall of traumatic experiences. In the case of rape, this decision comes shortly after the traumatic event. But it is also possible to make this choice beforehand. Soldiers, for example, might take a pill before going into battle, to blunt the trauma to come.

Earlier memory modification techniques posed less significant quandaries than those of today by offering wholesale memory dampening. Electroconvulsive therapy (ECT) has long been used to impair the memory of patients.[30] Entire memories from the days and weeks prior to ECT have been permanently degraded.[31] Earlier drug interventions have been used to dampen or extinguish entire memories. The ingestion of alcohol and other mind-altering substances can cause blackouts that prevent conscious awareness and the formation of memories of experiences. These wholesale memory modification techniques bear on the broader value of cognitive liberty but have never become widespread in use.[32]

The brain interventions of today are importantly different. They offer the possibility of *selective* forgetting, by disassociating the pain and suffering from the factual content of the experience itself. The fear and emotion associated with the memory of a traumatic event could be lessened, while the factual content would be preserved.[33] For our hypothetical rape victim, propranolol would allow her to recall the facts of the sexual assault that she endured, but not the emotional fear and trauma she suffered. This decreases her risk of developing PTSD, which is akin to reliving emotional trauma over and over again each time a memory is

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[29] Jin-Hee Han et al., *Selective Erasure of a Fear Memory*, 323 SCIENCE 1492, 1492 (2009).

[30] Jan-Otto Ottosson, *Experimental Studies of Memory Impairment After Electroconvulsive Therapy*, 35 ACTA PSYCHIATRICA SCANDINAVICA 103, 103 (1960); *see, e.g.*, Maximilian Gahr, *Electroconvulsive Therapy and Posttraumatic Stress Disorder: First Experience with Conversation-Based Reactivation of Traumatic Memory Contents and Subsequent ECT-Mediated Impairment of Reconsolidation*, 26 J. NEUROPSYCHIATRY & CLINICAL NEUROSCIENCES E38, E38 (2014); Marijn C W Kroes et al., *An Electroconvulsive Therapy Procedure Impairs Reconsolidation of Episodic Memories in Humans*, 17 NATURE NEUROSCIENCE 204, 204 (2014).

[31] Anne B. Donahue, *Electroconvulsive Therapy and Memory Loss: A Personal Journey*, 16 J. ECT 133, 134, 138 (2000).

[32] Reagan R. Wetherill & Kim Fromme, *Alcohol-Induced Blackouts: A Review of Recent Clinical Research with Practical Implications and Recommendations for Future Studies*, 40 ALCOHOLISM CLINICAL & EXPERIMENTAL RES. 922, 922 (2017).

[33] Stephen Maren, *Seeking a Spotless Mind: Extinction, Deconsolidation, and Erasure of Fear Memory*, 70 NEURON 830, 836 (2011); *see* Lars Schwabe & Oliver T. Wolf, *New Episodic Learning Interferes with the Reconsolidation of Autobiographical Memories*, 4 PLOS ONE e7519, e7519 (2009).

evoked. By remembering the facts alone, she would remember the rape, perhaps, as though it were a movie she had once seen. Her relationship to that memory would be forever changed.

There are serious consequences to disaggregating emotions from facts. Reducing the emotional charge associated with a memory might weaken the strength of the declarative memory itself. The strength—and therefore the long-term accuracy—of memories are enhanced when the emotional stimuli accompanying that memory is consolidated along with it. Would a weakened memory impair a victim's ability to testify against her perpetrator?

Weakened declarative memory is just one of the consequences to changing our memories. Our self-identities and societal norms are challenged by these changes. The ability to selectively shape and change the brain opens a Pandora's box of legal, ethical, and social concerns.[34]

B. The Pandora's Box of Memory Modification

Our legal norms ought to treat choices that preserve the narrative thread of our own lives as reasonable. An essential element of narrative self-identity is that our sense of self cohere with reality.[35] Even narratives that are factually correct can seem clearly wrong if an individual has a bizarre interpretation or reaction to the facts. When a person is paranoid, for example, their interpretation of the facts may be utterly at odds with reality.[36] A person may be depressed or angry, by contrast, which would not make their interpretation incomprehensible. Therapies that would tamper with memories to selectively eliminate or blunt an individual's emotional response may violate this coherence with reality because one's memory will be at odds with how that person *really* felt at the time, and how a person would *actually* experience and remember a traumatic event.[37]

Our affective experiences of past events enable us to learn about ourselves and predict how we will navigate future circumstances. They help us understand how we may act when confronted with traumatic events in the future, and perhaps give us greater emotional fortitude to face life events knowing that we

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[34] For an elegant and extensive discussion of the ethical, legal, and social implications of memory modification, see Adam J. Kolber, *Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening*, 59 VAND. L. REV. 1561, 1566 (2006).

[35] MARYA SCHECHTMAN, THE CONSTITUTION OF SELVES 108, 112, 119–25 (1996). At the heart of philosophical accounts of personhood or self-identity, too, from John Locke onwards is the role of memory.; Stanley B. Klein & Shaun Nichols, *Memory and the Sense of Personal Identity*, 121 MIND 677, 677 (2012).

[36] SCHECHTMAN, *supra* note 35, at 126.

[37] *Id.* at 128.

have survived past ones. Facing legal pressure to modify or forget past experiences may deprive us of this learning.

Memory modifications that change our affective experience and reaction to trauma may also fundamentally reshape our moral response to a significant life event. Matthew Liao, Anders Sandberg, and Julian Savulescu illustrate this idea:

> Suppose that you are hit by a drunk driver and given a treatment to soften the emotional memory at the hospital. Later you reencounter the driver. Looking back at the event you certainly feel that it was a bad event, but you do not feel the anguish you would perhaps otherwise have felt. When the driver asks for forgiveness, is there a risk that you would forgive him too easily?[38]

Similarly, would changing the affective experience of a tortious wrong lead individuals to forgive wrongdoers too easily by changing their moral reactions to the wrongs they endured? Should a legal norm exist that encourages this?

Consider the implications for society beyond the individual tort victim. There is social value to memory, particularly where witnessing and remembering major life events, such as the September 11th attacks on the World Trade Center or landing the Mars Curiosity Rover, may be critical to individual and ultimately societal development of social norms.

One scholar gives a powerful example by considering Martin Luther King Jr.'s childhood, which was marked with traumatic experiences arising from racial discrimination. Had King blunted the emotional experience associated with these memories rather than using his affective experience to inspire his fight for equality, King may never have become the great civil rights advocate that he did, and the world would have been far worse off for it.[39]

Legal norms should not be at odds with the preservation of self-narratives. And we should not refuse to compensate an individual who suffers emotionally at the hands of another for continuing their own life story. But courts are decidedly unsure of when and if emotional distress injuries should be modified, lest the damages of an individual be diminished.

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[38] S. Matthew Liao et al., *Should We Be Erasing Memories?*, PRAC. ETHICS BLOG (Nov. 3, 2008), http://blog.practicalethics.ox.ac.uk/2008/11/should-we-be-erasing-memories.

[39] Joseph Yukov, *Enduring Questions and the Ethics of Memory Blunting*, 3 J. AMER. PHIL. ASS'N 227, 246 (2017).

II. LEGALLY AVOIDING PAIN AND SUFFERING

Compensation in tort law for ordinary bodily pain is treated differently than the mental distress that follows.[40] The reasons for this, as discussed below, are myriad, including that emotional distress injuries have traditionally been viewed as difficult to prove, quantify, and justify.[41]

Although the discussion that follows on the historical compensation for physical versus emotional distress injuries sheds light on current tort law doctrine for damages, that history still leaves unresolved whether a plaintiff's recovery for emotional distress injuries should be limited by the doctrine of avoidable consequences. For ordinary physical injuries, courts weigh the risks of a recommended treatment, such as the likelihood and severity of pain it may cause, the risks of further injury, and the likelihood of its success.[42] Do these same factors apply equally to the mitigation of invisible injuries like the emotional suffering and pain of rape? The opinions below reveal that the answer to that question remains altogether unclear.

A. Bodily Pain and Mental Distress

For the rape victim who sues her attacker, the physical and emotional injuries she suffered when attacked are compensable, but so is the emotional distress that follows from the memory.[43] And yet the compensation for her bodily pain is treated differently than the mental distress she suffers.[44]

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[40] Rick Swedloff & Peter Huang, *Tort Damages and the New Science of Happiness*, 85 IND. L.J. 553, 579 n.135 (2010). For a discussion of the historical evolution of awarding mental distress damages, see Betsey J. Grey, *Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims* 1, *in* 13 LAW AND NEUROSCIENCE: CURRENT LEGAL ISSUES (Michael Freeman, ed., 2011).

[41] *Id.*; Deirdre M. Smith, *Diagnosing Liability: The Legal History of Posttraumatic Stress Disorder*, 84 TEMP. L. REV. 1, 15 (2011).

[42] *See, e.g.*, Hayes v. United States., 367 F.2d 340, 341 (2d Cir. 1966) (finding it unreasonable to select the longer treatment rather than the shorter course of treatment, which would have involved pain and minor surgery, and reducing pain and suffering awards to make consistent with the shorter course of treatment); Rounds v. Rush Trucking Corp., 51 F. Supp. 2d 374, 383 (W.D.N.Y. 1999) (finding that, absent evidence medical treatment would have been superior to chiropractic manipulations used, award of damages was not excessive); Young v. Am. Exp. Ibrandsten Lines, Inc., 291 F. Supp. 447, 450 (S.D.N.Y. 1968) (examining the risks of the surgical procedure, the physical condition of the plaintiff and deeming it unreasonable to refuse surgical treatment); Collova v. Mutual Serv. Cas. Ins. Co., 99 N.W.2d 740, 743 (Wis. 1959) ("No injured person is required to undergo surgery or treatment that is hazardous or unduly expensive but one injured by the wrong of another is obliged to exercise reasonable care to minimize damages.").

[43] Swedloff & Huang, *supra* note 40, at 579.

[44] *Id.* at 579 n.135; *see also* Grey, *supra* note 40, at 1.

Other scholars have explained well the bodily/mental divide in tort law:

> As a start, physical harm, or bodily injury, could be defined as injury to any part of the body that is not the brain, plus injury to the structures of the brain through trauma or tumor, independent of changes in neural circuitry. Purely emotional harm could be defined as changes to one's neural pathways or balance of neurotransmitters that impact one's moods, thoughts, feelings, and cognition, and are not the immediate, direct result of physical trauma or structural changes within the body. At the margins, there may be difficulties classifying a particular injury as physical or emotional. However, this definition captures what the Restatement terms as 'the ordinary distinction between bodily harm and emotional harm.' Fright, shame, anger, and schizophrenia are all considered emotional and psychological concerns, while brain tumors, broken bones, and inflammation of the brain are all physical injuries.[45]

Courts have historically regarded emotional distress injuries with skepticism, purportedly because such injuries were so hard to prove, quantify, and justify.[46] Professors John Goldberg and Benjamin Zipursky argue that courts are engaged in legal norm-setting "of fostering the thick-skinned response of getting on with life, rather than dwelling in one's upset," and recognizing that the plaintiff "bears responsibility for the depth of emotional harm she feels."[47] Nevertheless, since the beginning of the twentieth century, U.S. courts have recognized emotional distress damages for a wide array of actions, including deceit, invasion of privacy, defamation, malicious prosecution, false imprisonment, and more.[48]

But these sorts of damages remain controversial,[49] and continue to face scrutiny by courts and commentators.[50] Professor Erica Goldberg, for example, argues that because emotions are more within our control than other physical injuries, the law ought to limit compensation for emotional injuries because individuals have the ability to protect their own minds.[51] Others argue that the valuations of emotional distress are so variable that they confound predictable deterrence *ex ante* and reasonable settlement of claims *ex post*.[52] How can we

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45 Erica Goldberg, *Emotional Duties*, 47 CONN. L. REV. 809, 846 (2015) (quoting RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 4 cmt. b (AM. LAW INST. 2010)).

46 *Id.*; Smith, *supra* note 30, at 15.

47 Goldberg & Zipursky, *supra* note 8, at 1681.

48 Eugene Kontorovich, *The Mitigation of Emotional Distress Damages*, 68 U. CHI. L. REV. 491, 493 (2001); *Developments in the Law of Damages*, 61 HARV. L. REV. 113, 139 (1947)

49 Noah, *supra* note 7, at 439.

50 *See, e.g.*, Goldberg, *supra* note 45.

51 *Id.* at 841.

52 Noah, *supra* note 7, at 441–42.

determine, for example, the financial equivalent of PTSD that develops from being sexually assaulted?

For at least some injuries, tort compensation for emotional suffering has broad support, where no reasonable person could be expected to endure a particular kind of insult.[53] Tort compensation for the emotional suffering following intentional wrongs such as rape may do more. Acknowledging these sorts of damages may help reify social norms against the wrongdoing and in support of the plaintiff's bodily integrity.[54] These damages recognize the enduring impact of the assault on the victim, and express additional social condemnation of the act and its consequences.

B. The Doctrine of Avoidable Consequences

Wherever one draws the line about what is compensable as an emotional distress injury, that line still leaves unresolved whether a plaintiff's recovery should be limited by the doctrine of avoidable consequences. This doctrine (sometimes inaptly called a "duty" to mitigate injuries) is a widely accepted principle in law that limits the amount of damages a plaintiff can recover for her injuries in a civil case.[55] Victims of tortious wrongdoing are awarded damages to restore them to the position they would otherwise have enjoyed absent the wrongdoing.[56] But the doctrine limits the damages a defendant must pay for losses the plaintiff reasonably could have avoided based on their own actions after being injured.[57] If someone breaks your arm, they are liable for pain, suffering, and medical bills associated with the broken arm. But if you unreasonably refuse any treatment, and so the arm gets gangrene and must be

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[53] Goldberg & Zipursky, *supra* note 8, at 1686–88 (recognizing that there are circumstances under which one has a visceral response to "extreme imperilment or serious injury to another" or where it is unreasonable for a court to send the message of "'get over it'" or "'keep a stiff upper lip'" because of the severity of the circumstances giving rise to the injury).

[54] Noah, *supra* note 7, at 440 (also noting the greater deterrent signal such damages offer, as well as compensation for attorneys to bring such claims).

[55] RESTATEMENT (SECOND) OF TORTS § 918(1) (AM. LAW INST. 1977); Yehuda Adar, *Comparative Negligence and Mitigation of Damages: Two Sister-Doctrines in Search of Reunion*, 31 QUINNIPIAC L. REV. 783, 792 (2013) (citing RESTATEMENT (SECOND) OF CONTRACTS § 350(1) (AM. LAW INST. 1979)). Note also that despite the call in the Third Restatement of the Apportionment of Liability to abolish the mitigation of damages doctrine from tort law in the year 2000, this call has gone unheeded and unacknowledged by courts and commentators alike. *Id.* at 793–94.

[56] John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 435 (2006).

[57] JOSEPH CHITTY, CHITTY ON CONTRACTS 1478–79 (Hugh G. Beale Gen. ed., 29th ed. 2004); HARVEY MCGREGOR, MCGREGOR ON DAMAGES 235–36 (18th ed. 2009).

amputated, the defendant is only liable for an ordinary broken arm, not an amputated one.[58]

This rule promotes self-reliance as societally efficient. Injured individuals are often in the best position to mitigate their injuries, and society benefits from decreasing the costs of accidents.[59] For these reasons, modern tort law continues to impose a social duty on plaintiffs to make reasonable efforts to prevent the worsening of their injuries.[60]

The doctrine is not without limits. Individuals need only act reasonably to mitigate their damages, and are "not ordinarily required to surrender a right of substantial value in order to minimize loss."[61] What constitutes reasonable effort and substantial value, however, are often contested.[62] A plaintiff is not required to go beyond what an average, prudent individual would do to minimize her injuries.[63] For ordinary physical injuries, courts weigh the risks of a recommended treatment, such as the likelihood and severity of pain it may cause, the risks of further injury, and the likelihood of its success.[64] A plaintiff could reasonably forgo serious, major, or critical surgical interventions,[65] or treatments

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[58] Walter v. Wal-Mart Stores, Inc., 748 A.2d 961, 970 (Me. 2000).

[59] Kontorovich, *supra* note 48, at 496–97 (explaining that the doctrine reduces the moral hazard created by tort insurance that might otherwise incentivize a tort victim to allow her injuries to worsen for greater compensation); *Developments*, *supra* note 48, at 131 ("[I]n the interest of conserving human and material resources, a plaintiff should not be permitted to recover for losses which accumulate while he sits idly by.").

[60] Adar, *supra* note 55, at 814.

[61] RESTATEMENT (SECOND) OF TORTS § 918 cmt. j (AM. LAW INST. 1977).

[62] *Developments*, *supra* note 48, at 131.

[63] *Id.*; Adar, *supra* note 55, at 835.

[64] *See, e.g.*, Hayes v. United States., 367 F.2d 340, 341 (2d Cir. 1966) (finding it unreasonable to select the longer treatment rather than the shorter course of treatment, which would have involved pain and minor surgery, and reducing pain and suffering awards to make consistent with the shorter course of treatment); Rounds v. Rush Trucking Corp., 51 F. Supp. 2d 374, 383 (W.D.N.Y. 1999) (holding that, absent evidence medical treatment would have been superior to chiropractic manipulations used, award of damages was not excessive); Young v. Am. Exp. Ibrandsten Lines, Inc., 291 F. Supp. 447, 450 (S.D.N.Y. 1968) (examining the risks of the surgical procedure, the physical condition of the plaintiff and deeming it unreasonable to refuse surgical treatment); Collova v. Mutual Serv. Cas. Ins. Co., 99 N.W.2d 740, 743 (Wis. 1959) ("No injured person is required to undergo surgery or treatment that is hazardous or unduly expensive but one injured by the wrong of another is obliged to exercise reasonable care to minimize damages.").

[65] Aetna Life Ins. Co. v. Sanders, 178 S.W.2d 4, 6 (Ark. 1936) ("The rule of general application seems to be that a person is not required to undergo a major surgical operation against his will for the purpose of freeing another from consequent damages; on the other hand, a simple minor surgical operation may be compelled only where a reasonably prudent person would submit thereto."); White v. Chi. & Nw. Ry. Co., 124 N.W. 309, 311 (Iowa 1910) (holding no right more sacred than the right of an individual to be free from restraint or interference with others, and so unless small risk and small inconvenience it is reasonable to refuse surgery); Louisville Taxicab & Transfer Co. v. Byrnes, 178 S.W.2d 4, 6 (Ky. 1944) (finding that an individual is not required to submit to an operation or suffer a reduction in damages if there are serious risks and possible failure); Williams v. Campbell, 185 So. 683, 688–89 (La. App. 1938) (holding that a an injured person is not required to undergo

unlikely to be effective.[66]

Do these same factors apply equally to the mitigation of invisible injuries, like the emotional suffering and pain of rape? Does society similarly benefit from placing a social expectation upon victims to decrease their emotional suffering? Based on current doctrine, the answers to these questions remain unclear.

C. How Courts Address Mitigating Emotional Injuries

There has been scant little theoretical work done on whether the doctrine of avoidable consequences should apply to emotional distress injuries.[67] Much of the scholarship that has been written favors applying the doctrine equally to these injuries. Professor Lars Noah, for example, has argued that advances in treatment of emotional distress favor applying the avoidable consequences doctrine to those damages as well.[68] Other scholars have made similar arguments about how advances in neuroscience and psychology support limiting recovery for emotional distress injuries based on the mitigation employed.[69] Professor Noah focused on the favorable effects of this approach: The cost to mitigate the damages could provide a baseline from which to calculate noneconomic damages,[70] and further encourage victims to take reasonable steps to reduce the severity of their emotional injuries, by rewarding mitigating efforts over persistent complaints of enduring pain.[71] He argues that it might also improve clarity over the role of rewarding noneconomic damages by limiting those rewards to the category of untreatable pain and suffering, such as the loss of

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an amputation because of the risks of doing so and the hope that the limb might be saved).

[66] Jennifer Parobek, *God v. the Mitigation of Damages Doctrine: Why Religion Should be Considered a Pre-Existing Condition*, 20 J.L. & HEALTH 107, 112 (2006).

[67] *Cf.* Kontorovich, *supra* note 48, at 493 (2001) (focusing on the moral hazard created by a psychiatric mitigation rule, where there is a value to psychiatric treatment use apart from the mitigation itself).

[68] Noah, *supra* note 7, at 474.

[69] *E.g.*, Grey, *supra* note 40, at 204 (arguing, using developments in neuroscience, that the historical distinction between physical and emotional distress claims should be abandoned in favor of a unitary view of damages); Kevin C. Klein & G. Nicole Hininger, *Mitigation of Psychological Damages: An Economic Analysis of the Avoidable Consequences Doctrine and Its Applicability to Emotional Distress Injuries*, 29 OKLA. CITY U. L. REV. 405, 414–15 (2004) (reviewing new treatment options for depression and pain as evidence that the historic distinction between emotional distress and physical damages should be abandoned); *cf.* Goldberg, *supra* note 45, at 848 (while arguing in favor of a duty to cope with the emotional stress on sufferers, states that fashioning this as "an actual duty to mitigate, however, would be unwieldy and require proof of steps taken to mitigate emotional damages that could compromise plaintiffs' autonomy and privacy interests in their medical and mental health decisions").

[70] Noah, *supra* note 7, at 474.

[71] *Id.* at 476.

enjoyment of life or pain and suffering unresponsive to modern medical interventions.[72]

Courts are not nearly as certain about whether the doctrine of avoidable consequences applies to emotional distress injuries.[73] Across the board they issue exceedingly tentative and often inconsistent opinions about its applicability to emotional pain and suffering. Perhaps this is because at least some courts intuit that rather different costs are at stake in these cases: the impact of the proposed treatment on the personality, self-identity, and the dignity of plaintiffs.[74] In other words, some courts at least implicitly recognize its impact on cognitive liberty.

1. Treating Emotional Distress Damages Differently

Some courts express serious discomfort with requiring plaintiffs to undertake mitigating treatments that change their brain states and affect their personality, self-identity, and personal autonomy. These courts also recognize that emotional distress could render a Plaintiff unable or unwilling to seek treatment because of its effect on individual agency.[75] The more intrusive upon personality a method of treatment seems, the less likely these courts will find a plaintiff unreasonable for refusing it.

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[72] *Id.* at 477.

[73] *See, e.g.*, Klein and Hininger, *supra* note 69, at 407; Kontorovich, *supra* note 48, at 493–94; Noah, *supra* note 7, at 448 (arguing that with advances in treatment of pain and suffering, judicial hesitance to apply the doctrine makes little sense).

[74] *E.g.*, Pool v. City of Oakland, 728 P.2d 1163, 1172 (Cal. 1986) (finding a duty to mitigate emotional distress damages when police had wrongfully arrested him for passing counterfeit currency, but that defendant introduced no evidence that the suggested failure to mitigate—making a phone call from jail—would have reduced his time in jail and therefore emotional suffering that resulted); Panion v. United States, 385 F. Supp. 2d 1071, 1088 (D. Haw. 2005). After plaintiff was sexually assaulted by a nurse while unable to defend herself in the hospital, she suffered debilitating psychological injuries including PTSD. *Id.* She did not participate in a full regiment of counseling but she had an "understandable mistrust of medical personnel after she was assaulted in a hospital by a nurse." *Id.*

[75] *E.g.*, Templeton v. Chicago & N.W. Transp. Co., 628 N.E.2d 442, 453–54 (Ill. App. Ct. 1993) (finding a jury determination that plaintiff had not failed to mitigate his damages, when, inter alia, he refused to cooperate with a psychological treatment plan for depression, even though the expert physician believed that appropriate medication and psychotherapy would have cured his depression. His lack of insight into his own problems precluded him from seeking the treatment he needed); Stemple v. Bores, 2005 WL 4186814 at *1, *8 (N.J. Super. Ct. App. Div. July 19, 2006) (finding that the jury should not have been instructed on the duty to mitigate emotional distress injuries. The emotional distress that plaintiffs suffered as a result of defendant's negligence led them to reject the needed counseling so there was no factual basis for having submitted the issue of mitigation to the jury); Feld v. Merriam, 461 A.2d 225, 234 n.12 (Pa. Super. Ct. 1983). This case concerned the rape of plaintiff at gunpoint, in front of her husband, the court rejected the defendant's contention that the husband failed to mitigate his own damages by failing to seek professional counseling. *Id.* The court found that because the rejection of psychiatric treatment was a manifestation of his emotional injuries, he was not precluded from recovering damages. *Id.*

Consider, for example, treatments that cause a change in personality such as electroshock therapy for the treatment of depression. In *Dohman v. Richard*,[76] a plaintiff who had been negligently struck by a truck suffered pain in his left leg, hip, head, neck, and testicles. Although his ordinary physical injuries were "not overly serious," he suffered significant depression following the accident.[77] He was initially treated with high doses of tranquilizers and antidepressants, but eventually had no further hope for improvement of his mental condition with continued treatment of that kind.[78] His physician then recommended electroshock treatment for the plaintiff, claiming the treatment had an 80–90% chance of successfully treating the depression.[79] The defendant unsuccessfully sought to limit the plaintiff's damages for refusing that treatment.[80] In rejecting the defendant's claim, the court distinguished "treatment[s] of the mind" from treating other physical injuries: "Plaintiff is not being asked to have a fractured bone placed in a cast, a hernia repaired, or any other conventional form of surgery. Instead it is proposed that he subject himself to electro-shock, a form of treatment designed to work a change in his personality."[81] Recognizing that personality-impacting interventions are different from other forms of self-care, the court was "not prepared to hold at this time that psychiatric therapy of this sort falls within the spirit, or the letter, of that line of jurisprudence which requires injured persons to mitigate their damages."[82]

On occasion, treatments that insult the personal dignity of the plaintiff have also been rejected. In *Carnival Cruise Lines, Inc. v. Goodin*,[83] a wheelchair-bound individual went on a four-day cruise with the prior assurance by Carnival Cruise Lines that it had wheelchair-accessible bathrooms and showers on board.[84] In fact, not a single bathroom on the entire ship was wheelchair accessible.[85] The plaintiff had to rely upon others to help him into and out of the bathrooms, causing him significant emotional distress and embarrassment.[86] He

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[76] 282 So. 2d 789, 792 (La. Ct. App. 1973).

[77] *Id*.

[78] *Id*.

[79] *Id.* at 793.

[80] *Id*. at 794.

[81] *Id.* at 793.

[82] *Id.* at 794; *see also* Gottfried v. Ill. Cent. R.R. Co., 1995 WL 12478 at *1, *2 (N.D. Ill. Jan. 10, 1995), where the defendant argued Plaintiff had failed to mitigate his damages by refusing to undergo electroshock treatment as recommended by his treating psychiatrist. The court allowed the affirmative defense to go forward because while electroshock treatment may involve risks, "[W]e do not agree with the plaintiffs that [plaintiff's] refusal to undergo electric shock therapy is, as a matter of law, reasonable." *Id.*

[83] 535 So. 2d 98, 100 (Ala. 1988).

[84] *Id.*

[85] *Id.*

[86] *Id.*

felt so deeply humiliated by the situation that he refused to allow stewards onboard to assist him.[87] In response to his suit against Carnival Cruise Lines, the defendants argued he should have accepted such assistance to mitigate his own injuries.[88] The court concluded that his refusal to accept assistance "was not unreasonable" because of "the delicate matter of [plaintiff's] dignity involved."[89]

Sometimes, courts recognize the value of self-reliance and self-determination of plaintiffs in overcoming their emotional injuries over medical interventions. When a flight attendant who survived a commercial airline crash sued for emotional injuries, the court validated his choice to rely on self-help instead of antidepressant medication to mitigate his depression as consistent with his personality.[90] Traumatized by what he witnessed after the crash—charred and decapitated bodies, bodies with missing body parts—he had also labored under the fear of his own probable death.[91] Since the accident, plaintiff had made substantial efforts to regain a normal life, but he experienced depression and PTSD, irritability and anxiety, and an overall flat affect.[92] He attended therapy for over two years, but experts opined that he was unlikely to fully recover to his pre-accident self.[93] Although defendant had refused taking antidepressant medication, the court found his refusal "not a wholly unreasonable choice."[94]

The language in each of the above cases is exceedingly tentative. "Under the present circumstances" and "not prepared to hold at this time" speak of uncertainty and caution. These are the words of judges unsure of how to legally recognize their uneasy sense that mitigating the mind may be different in kind.

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87 *Id.*

88 *Id*. at 103.

89 *Id*.

90 *In re* Air Crash Disaster at Charlotte, N.C. on July 2, 1994, 982 F. Supp. 1101, 1112 (D.S.C. 1997).

91 *Id*. at 1105.

92 *Id*. at 1106.

93 *Id*. at 1106–07.

94 *Id.* at 1112 ("He has, instead, made major efforts in other ways and obviously declined the reliance on medication based on the same attitude of self-reliance and determination that have brought him thus far in his recovery. Therefore, the court does not find this personal choice to be a failure to mitigate damages under the present circumstances."). Even in Title VII cases pertaining to statutory duties to mitigate loss of front pay by an employee, at least one court has recognized that a refusal to attend therapy and take medications is a reasonable choice, because "[i]t would be unreasonable for the Court to require Plaintiff to take medications that impair her cognitive ability." Pollard v. E.l. Dupont de Nemours, Inc., 338 F. Supp. 2d 865, 879 (W.D. Tenn. 2003).

2. Treating Emotional Damages the Same

Other courts draw no distinction whatsoever between physical and emotional distress injuries, holding that the doctrine of avoidable consequences applies equally to both. These courts embrace treatments of the mind as relevant to whether a plaintiff reasonably mitigated her emotional distress injuries and give jury instructions on the same.

In an employment discrimination case, for example, an Oregon district court judge held that there was a genuine issue of material fact as to whether plaintiffs, who alleged the defendant created a sexually hostile work environment, ought to have had their damages reduced for failing to seek psychological counseling.[95] The court relied on a long line of other cases that had applied the doctrine of avoidable consequences to emotional distress damage to justify its decision.[96]

For some courts, a duty to mitigate emotional distress in principle might include an obligation to take antidepressant medications, seek psychotherapy, or even undergo electroshock treatment.[97] Applying the same standard for

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[95] *See* EEOC v. Fred Meyer Stores, Inc., 954 F. Supp. 2d 1104, 1115 (D. Or. 2013) (on reconsideration in part).

[96] *Id*. at 1114–15 (first citing Petroci v. Transworld Sys., Inc., No. 12-00729, 2012 WL 5464597, at *4 (W.D.N.Y. Oct. 19, 2012) (applying the doctrine of avoidable consequences to emotional distress injuries by holding that defendants should be given the opportunity to determine through discovery in a Fair Debt Collection Practices Act violation case whether plaintiff failed to mitigate her actual—not statutory—damages, by, for example, failing to seek medical or psychological counseling for her alleged emotional distress); then citing Neal v. Dir., D.C. Dep't of Corr., No. 93-2420, 1995 WL 517249, at *15 (D.D.C. Aug. 9, 1995) (reducing plaintiffs damages for refusal to take antidepressants to mitigate her depression following injury); then citing *In re* Air Crash Disaster at Charlotte, N.C. on July 2, 1994, 982 F. Supp. 1101, 1111 (D.S.C. 1997) (in holding that even though plaintiff refused to take antidepressants, he did not fail to mitigate damages, the court explained that a plaintiff has the duty to mitigate damages and the "court can consider whether that person has failed to follow the advice of their physician or other treating professional") (citation omitted); then citing Salas v. United States, 974 F. Supp. 202, 211 (W.D.N.Y. 1997) (implicitly finding a duty to mitigate by concluding that plaintiff cannot be charged with a failure to mitigate damages because she made reasonable efforts to treat and cure her condition); then citing Baker v. Dorfman, 1999 WL 191531, at *6 (S.D.N.Y. Apr. 6, 1999) (holding that a jury could have reasonably concluded, after receiving an instruction on mitigation of damages related to pain and suffering, that plaintiff took reasonable steps to alleviate his distress); then citing Rogan v. Lewis, 975 F. Supp. 956, 966 n. 14 (S.D. Tex. 1997) (explaining that plaintiff's failure to exhaust administrative remedies may be relevant to plaintiff's failure to mitigate emotional damages); and then citing Chuy v. Phila. Eagles Football Club, 431 F. Supp. 254, 263–64 (E.D. Pa. 1977) (upholding a jury instruction on mitigation of emotional damages), *aff'd*, 595 F.2d 1265 (3d Cir. 1979)).

[97] *See, e.g.*, Maynard v. Ferno-Washington, Inc., 22 F. Supp. 2d 1171, 1173, 1176 (E.D. Wash. 1998) (finding a genuine issue of disputed fact as to whether plaintiff, a volunteer EMT thrown from an ambulance while unloading a patient, had failed to mitigate her own emotional distress injuries because "she failed to seek psychiatric intervention or the prescription of anti-depressants"); Gottfried v. Ill. Cent. R.R. Co., No. 94 C 5249, 1995 WL 12478, at *2 (N.D. Ill. Jan. 10, 1995) ("[T]here is nothing before us regarding the nature of [electric shock therapy]. Thus, we do not agree with the plaintiffs that [plaintiff's] refusal to undergo electric shock therapy is, as a matter of law, reasonable."); *see also* Hetzel v. County of Prince William, 89 F.3d 169, 172–73

reasonable mitigation to emotional and ordinary physical injuries, courts have reduced plaintiffs' damages with the judgment that they unreasonably failed to mitigate their emotional distress.[98]

3. Analogous Physical Tort Law Cases

A plaintiff's personality and identity can also be impacted by treatments of ordinary physical injuries. Courts have similarly struggled with whether the doctrine of avoidable consequences should apply when a plaintiff raises religious or procreative concerns about proposed treatments.

Jurors have been instructed to consider the tort doctrine of avoidable consequences when plaintiffs have raised a religious objection to a treatment, such as a refusal by a Jehovah's Witness to accept a blood transfusion in a life-threatening situation.[99] In these cases, courts have instructed jurors to consider

(4th Cir. 1996) (vacating emotional distress award in a discrimination case as excessive because the plaintiff did not suffer noticeable physical injuries and never saw a doctor or a therapist for his claimed emotional distress, and remanding for reconsideration). In *Fox v. Evans*, 111 P.3d 267, 268–69, 271 (Wash. App. 2005), the court affirmed the trial court's instruction to the jury on failure to mitigate regarding the plaintiff's refusal to accept a diagnosis of depression, undergo psychotherapy, or take antidepressants to lessen her emotional pain and suffering resulting from a car accident. On appeal, the plaintiff did not present as an issue and the court did not explore whether the doctrine of avoidable consequences applies to emotional distress injuries. *Id*.

[98] In *Skaria v. State*, Skaria suffered severe emotional distress and became phobic of leaving the house after being raped. 442 N.Y.S.2d 838, 841 (Ct. Cl. 1981). She lost her desire to resume sexual relations with her husband, and suffered from long-lasting emotional trauma, likely a form of PTSD. *Id.* Because of her fears, she and her husband relocated from New York to Texas. *Id*. Following the initial rape, she was treated by a clinical psychologist for the severe emotional disorder and fear that prevented her from functioning. *Id*. Although the psychologist advised her to continue her treatments when she went to Texas, lest her condition become permanent, Mrs. Skaria did not seek treatment because she did not want anyone else to know about her rape. *Id.* at 841–42. The court restricted its award of damages for long-term suffering she experienced, holding that she unreasonably failed to mitigate her emotional distress because had had an affirmative duty to seek out and follow a physician's advice. *Id.* at 842. *See also* Gomez v. Am. Empress Ltd. P'ship, 1999 WL 595330, at *2 (9th Cir. Aug. 9, 1999) (finding that the court appropriately reduced both economic and non-economic damages when plaintiff unreasonably failed to mitigate his damages, including harm to his psychological well-being from being unemployed); Saad's Healthcare Servs. Inc. v. Meinhardt, 19 So. 3d 847, 856–57 (Ala. Civ. App. 2007) (holding compensation benefits in a worker's compensation claim should be suspended for an eighteen-month period, during which time plaintiff did not follow up with psychiatric treatment and medication for depression, constituting unreasonable refusal for treatment), *aff'd sub nom. Ex parte* Saad's Healthcare Servs., Inc., 19 So. 3d 862 (Ala. 2008), *as modified on denial of reh'g* (Apr. 3, 2009); Grieff v. Par. of Jefferson, 780 So. 2d 425, 435 (La. Ct. App. 2000) (reducing the amount of damages because Plaintiff failed to seek timely psychiatric assistance which extended his inability to return to full employability); Munoz v. City of Perth Amboy Police Dep't, No. A-6254-06T1, 2009 WL 2244035, at *22 (N.J. Super. Ct. App. Div. July 29, 2009) (finding that the trial court properly reduced damages to a police officer who suffered emotional distress from being subject to a hostile work environment because of his national origin, because he failed to engage in psychotherapy recommended by a family physician and experts at trial).

[99] *See Medical Care, Freedom of Religion, and Mitigation of Damages*, 87 YALE L.J. 1466 (1978).

the reasonableness of the plaintiff's refusal on a case-by-case basis.[100] The opinion in the case of *Corlett v. Caserta* advances the rationale of this approach, finding that the voluntary practice of one's religion does not necessarily entitle one to impose tort liability upon another:

> The freedom to act upon one's religious convictions does not encompass the privilege of imposing tort liability on another for injuries resulting not from another's tortious conduct, but rather from the voluntary practice of one's religious convictions.[101]

The court in *Corlett* reasoned that a plaintiff remains free to conscientiously refuse treatments and therefore can still freely exercise her religion, but that, in rendering its judgment on compensation, a jury need not financially reward the plaintiff's exercise of religious beliefs.[102] Other courts have similarly instructed juries to consider on a case-by-case basis the plaintiff's religious beliefs together with all other evidence in determining whether the plaintiff acted reasonably in caring for her injuries.[103]

Conversely, some courts have ruled as a matter of law on the doctrine of avoidable consequences in suits concerning the wrongful birth of children.[104] Because the "treatments" available—abortion or adoption—are such profound, life-altering choices, courts have near-universally held that defendants cannot use plaintiffs' choices as a reason to reduce plaintiffs' damages.[105]

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[100] For a detailed discussion of whether the case-by-case approach violates the First Amendment, see *Munn v. Algee*, 924 F.2d 568 (5th Cir. 1991), *cert. denied*, 502 U.S. 900 (1991) (recognizing that weighing a plaintiff's religious objections could result in impermissible evaluation of the reasonableness of plaintiff's religion, running afoul of the Establishment Clause).

[101] 562 N.E.2d 257, 262 (Ill. App. Ct. 1990).

[102] *Id*.

[103] *See* Wilcut v. Innovative Warehousing, 247 S.W.3d 1, 7 (Mo. Ct. App. 2008) (finding that a decision by an employee to refuse a blood transfusion based on sincerely held religious beliefs was not unreasonable in light of his beliefs, so his dependents were owed death benefits); Williams v. Bright, 658 N.Y.S.2d 910, 912 (App. Div. 1997) (noting that the trial jury considered the Plaintiff's beliefs as a factor in determining whether the Plaintiff "acted as a reasonable prudent person, under all the circumstances confronting her," when she refused a blood transfusion consistent with her religious beliefs as a Jehovah's Witness following a car accident); Rozewicz v. N.Y.C. Health & Hosps. Corp., 656 N.Y.S.2d 593, 595–96 (Sup. Ct. 1997) (explaining in dicta that if the case were about mitigation of damages, it would be proper to instruct the jury to ask if refusal of treatment was based on a sincerely held religious belief and, if so, to not reduce the damages by reason of the injured party's refusal).

[104] *See* Comras v. Lewin, 443 A.2d 229, 230 (N.J. Super. Ct. App. Div. 1982).

[105] *See, e.g.*, Troppi v. Scarf, 187 N.W.2d 511, 520 (Mich. Ct. App. 1971) (a personal choice that the Plaintiff may suffer more by the choice to abort is not an unreasonable refusal to mitigate damages, and the weighing of the psychological impact of giving the child up for adoption rather than rearing them cannot be used as the basis for reducing damages); *see also* Univ. of Ariz. Health Scis. Ctr. v. Superior Court, 667 P.2d 1294, 1301 (Ariz. 1983) (holding parents in a wrongful pregnancy action cannot have their damages offset by not choosing abortion or adoption); Chaffee v. Seslar, 751 N.E.2d 773, 788 (Ind. Ct. App. 2001) ("We believe the

Even choices between competing values that involve procreation are often excepted, although not with the same absolute terms. When a fourteen-year-old plaintiff chose to forgo a surgery with a 93% success rate but a risk of life-long impotence, the Supreme Court of New Jersey held that the trial jury should not have been instructed on the doctrine of avoidable consequences.[106] Instead, it affirmed that individuals have a common law right to self-determination and control over their own bodies.[107] Any individual, and in particular a fourteen-year-old boy, could reasonably choose to forgo surgery rather than risk life-long impotence, so the defendant was not entitled to jury instruction on the issue.[108]

In all of these cases, courts intuit that something different is at stake, but there is little consistency to guide other courts or litigants about what is driving that difference. What is lacking is a proper philosophical lens through which to view and resolve this theoretical puzzle. The diverging approaches taken by courts even within the same jurisdiction leave plaintiffs unable to anticipate what measures, if any, they must take to mitigate emotional distress. The case-by-case approach leaves the entirety of the decision in the hands of juries about when it is reasonable or not to undergo a wide variety of treatments aimed at the mind. And still unresolved is what social duties we impose upon tort victims who suffer emotionally from the wrongdoing of others.

There is indeed more at stake in whether damage reductions should apply to emotional distress injuries in tort law.[109] Treatments differ in their impact upon personality, identity, dignity, and the privacy of individuals.[110] This interest is

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requirement of considering an abortion or placing the child up for adoption [as a form of mitigation in a tort suit] is unreasonable. We see no reason why a parent who is threatened by future harm by a tortious act should subject herself to emotional or physical pain of a different kind in order to prevent future harm."); Smith v. Gore, 728 S.W.2d 738, 751–52 (Tenn. 1987) ("In regard to the extent of damages, a number of courts have discussed the reasonableness of the alternatives to rearing, i.e., abortion or adoption, as part of the duty to mitigate damages. Generally, courts seem to have rejected consideration of these alternatives as part of the duty to mitigate. We think that not only would imposing these choices upon a plaintiff impermissibly infringe upon Constitutional rights to privacy in these matters, but the nature of these alternatives are so extreme as to be unreasonable, especially when the recoverable damages do not include the expenses of rearing the child.").

[106] *See* Cannon v. N.J. Bell Tel., 530 A.2d 345, 346, 348, 352 (N.J. Super. Ct. App. Div. 1987). Cannon was injured by a dangling telephone wire, which threw him off of his bicycle in a residential neighborhood. *Id.* at 346. The seat of the bicycle landed on his groin area. *Id.* He suffered an urethra bulbous stricture, which required periodic painful dilation of his urethra as treatment for the rest of his life. *Id.* at 348. An urologist other than his treating physician recommended a surgical procedural known as a visual urethrotomy with a 93% success rate, which, if successful, would relieve his physician and future psychological trauma from the injury. *Id.* But the surgery also carried with it the risk of lifetime of psychological or psychogenic impotence. *Id.*

[107] *Id.* at 351.

[108] *Id.* at 352.

[109] Kontorovich recognizes the impact on autonomy and privacy concerns with psychiatric mitigation while "willpower mitigation" would be difficult to administrate. Kontorovich, *supra* note 48, at 507–13.

[110] *Id.* at 509–10 (noting that the side effects of psychiatric mitigation are upon the "mind and mood of the

not captured by "reasonableness" or autonomy alone. Instead, it is captured by an uncharted kind of liberty in law and in our lives—an interest in cognitive liberty.

III. THE RIGHT TO COGNITIVE LIBERTY

Cognitive liberty, herein defined, is an interest that ought to be considered when evaluating the reasonableness of a plaintiff's refusal or failure to mitigate their emotional distress injuries. Once defined, it becomes possible to apply to once-difficult questions in tort law about the applicability of the doctrine of avoidable consequences to emotional distress injuries. And it can then shed light on many existing riddles across law.

A. Defining Cognitive Liberty

The right to self-determination over our brains and mental experiences—the right to cognitive liberty—has not yet been articulated in any legal case, but courts and scholars have intuited its existence.[111] Although this short Article does not explore all of the facets of cognitive liberty, its contours must be established to understand its role in tort law.

Cognitive liberty encompasses freedom of thought and rumination, the right to self-access and self-alteration, and to consent to or refuse changes to our brains and our mental experiences.[112] Like all individual interests, it is not absolute, but must be balanced against the societal costs it introduces.

When any part of a person's conduct affects prejudicially the interests of others, society has some jurisdiction over the conduct. A plaintiff's exercise of her cognitive liberty to preserve her memories of her experiences can impact the

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patient" and therefore impact autonomy and that mitigation would become part of the public record).

[111] *See infra* Part III.C. *See generally* J. Braxton Craven, Jr., *Personhood: The Right To Be Let Alone*, 1976 DUKE L.J. 699 (1976) (discussing the right to personhood); Paul A. Freund, Annual Dinner Address (May 23, 1975), *in* 52 AM. LAW INST. ANN. MEETING SPEECHES 31, 42–43 (1975) ("The theme of personhood is . . .emerging. It has been groping, I think, for a rubric. Sometimes it is called privacy, inaptly it would seem to me; autonomy perhaps, though that seems too dangerously broad. But the idea is that of personhood in the sense of those attributes of an individual which are irreducible in his selfhood. We all know the agonizing judgments that have had to be made and that will have to be made in such diverse areas as abortion and the death penalty, which it seems to me are aspects of this issue of personhood. In the future, this issue is likely to loom ever larger as we see advances in the biomedical sciences that will lead to genetic engineering and the kinds of precise behavior control that will test our conceptions of individual responsibility and individuality.").

[112] *See, e.g.*, Stanley v. Georgia, 394 U.S. 557, 566 (1969) ("Whatever the power of the state to control public dissemination of ideas inimical to the public morality, it cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts.").

interests of defendants and society. Consequently, there are limits to how it can and should apply in tort law. And yet, cognitive liberty is so fundamental to all other freedoms we enjoy that we ought to incorporate strong legal norms that preserve rather than undermine it.

Cognitive liberty secures authority to individuals over actions essential to their self-determination.[113] Self-determination requires the autonomy to control one's own destiny, the competence to do so, and relatedness or connection to others.[114] Through self-determination, individuals can make and remake themselves in relation to others.[115] Self-determination must include deciding when and how one will alter their own memories and affective experiences.

Like other laws or norms, tort law acts as controlled motivation over individuals (in contrast to autonomous motivation that arises internally or from external sources with which an individual identifies their sense of self). That controlled motivation can serve useful societal functions, but it comes at a cost to individual freedom. A legal norm that reduces damages for refusing to change one's own mental experiences undermines self-determination.

Cognitive liberty secures freedom of individual thought. John Stuart Mill cautioned against tyranny of thought imposed by society—of trying to shape and control personal thought through societal use of legal norms and penalties such as tort law.[116] Courts, too, often note that freedom of thought is the scaffold upon which all other freedoms rely.[117] Thoughts arise in our brains as ideas, ruminations, reactions, reflections, and in images, music, memories, and more.

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[113] Jane Dryden, *Autonomy*, INTERNET ENCYCLOPEDIA OF PHIL., https://www.iep.utm.edu/autonomy (last visited Aug. 14, 2019).

[114] RICHARD M. RYAN & EDWARD L. DECI, SELF-DETERMINATION THEORY: BASIC PSYCHOLOGICAL NEEDS IN MOTIVATION, DEVELOPMENT, AND WELLNESS (2017).

[115] *See generally* Anne Donchin, *Autonomy and Interdependence: Quandaries in Genetic Decision Making*, *in* RELATIONAL AUTONOMY: FEMINIST PERSPECTIVES ON AUTONOMY, AGENCY, AND THE SOCIAL SELF 236–58 (Catriona Mackenzie & Natalie Stoljar eds., 2000).

[116] JOHN STUART MILL, ON LIBERTY 22–79 (Henry Regnery Co. 1955) (1859).

[117] *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002) (noting that the speech protections of the First Amendment "are most in danger when the government seeks to control thought," because "[t]he right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought"); Palko v. Connecticut, 302 U.S. 319, 326–27 (1937) ("[F]reedom of thought . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of this truth can be traced in our history, political and legal."); Olmstead v. United States, 277 U.S. 438, 478 (1927) (Brandeis, J., dissenting) ("The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.").

Thoughts—discrete events in our minds—allow us to create our autobiographical self-narrative and interweave the story of who we are.

Advanced technology will soon enable our mental processes to be accessed by others.[118] When that happens, in the absence of cognitive liberty, would anyone dare have a politically dissident thought—or even an unusually creative one? The fear of reprisal, censorship, embarrassment, or even retaliation by others could have a terrifying and chilling effect on individual thought. A legal norm in tort law that would deem as unreasonable a refusal to modify one's memories, thoughts, and emotional reaction to past experiences is precisely the kind of tyranny of thought we should safeguard against.

Cognitive liberty secures to individuals the right to access their own brains and the authority to preserve or alter the thoughts, memories, and experiences contained therein. Self-access and control over self-alteration are crucial to the cultivation of our personality and individuality.[119] New technologies from neuroscience uniquely enable us to access and alter our memories and experiences in ways never before possible.

Without self-access, we lack self-awareness, and without self-awareness, we lack the ability to create and maintain our narrative self-identity. Applying the doctrine of avoidable consequences to emotional distress injuries would create an inducement to tort victims to self-alter their mental experiences and would cast a choice to preserve one's memories and emotional experiences as an unreasonable action.

Such a norm would also be at odds with the right of individuals to freely consent to or refuse treatment, including those that would mitigate one's emotional injuries. Tort law can have a subtle and not-so-subtle coercive effect on individuals.[120] The ability to change our minds and have them changed requires our consent. That consent can take an explicit or implicit form—either expressed or inferred from the facts and circumstances of the specific situation. Cognitive liberty embraces consent as a fundamental part of self-determination over our brains. Consent requires a clear appreciation and understanding of the

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[118] Although discussion of brain access is beyond the scope of this Article, access and decoding of brain content is discussed at length in Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351 (2012) and Nita A. Farahany, *Searching Secrets*, 160 U. PENN. L. REV. 1239 (2012); *see also* Nita Farahany, *When Technology Can Read Our Minds, How Will We Protect Our Privacy?*, TED (Nov. 27, 2018), https://www.ted.com/talks/nita_farahany_when_technology_can_read_minds_how_will_we_protect_our_privacy?language=en.

[119] JOHN STUART MILL, ON LIBERTY 52–69 (Batoche Books 2001) (1859).

[120] *See* Jules L. Coleman, *The Structure of Tort Law*, 97 YALE L.J. 1233, 1246 (1988) (book review).

facts, and the implications and consequences of available treatment options. That includes the right to decide what information is shared with others and what is not and what changes one will make and which changes one will refuse.

In short, the right to cognitive liberty is essential to all other legal rights and is threatened by a legal norm in tort law that would condemn as unreasonable a choice to preserve one's memories and mental experiences.

B. Applying Cognitive Liberty to Tort Law

By explicitly recognizing the role of cognitive liberty in our lives and law, courts and legislators could craft a more deliberate two-tiered approach to applying the doctrine of avoidable consequences to emotional distress damages in tort law. As described in detail below, courts could and should decide that certain treatments would violate a plaintiff's cognitive liberty as a matter of law and would therefore be legally unreasonable as a form of mitigation. For other treatments, its impact on cognitive liberty will be less clear, so a case-by-case determination with clear instructions to juries will be more appropriate. This two-tiered approach to addressing the impact of a treatment would allow this area of law to co-evolve with emerging technology.

First, when a defendant raises the issue of failed mitigation by pointing to the plaintiff's forgone emotional distress treatment, when relevant a plaintiff ought to raise the violation of their cognitive liberty as a reason they chose to forgo treatment. The court should then evaluate whether, as a matter of law, such a treatment would impact self-identity and therefore clearly violate the plaintiff's cognitive liberty. If so, the court should decide as a matter of law that choosing to forgo such a treatment was not unreasonable.

If the proposed treatment is not per se unreasonable, but instead a kind that would enable an individual to facilitate self-healing without altering their core identity, a court should then submit the issue to the jury to decide the reasonableness of choosing to forgo the potential treatment,[121] with instructions about the definition, role, and relevance of cognitive liberty as an interest. Jurors would be asked to balance the individual interests in cognitive liberty, and the degree to which the mitigating treatment runs afoul of that interest, against the societal interest of putting self-care in the hands of the plaintiff to lessen their own suffering over time.

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[121] Much like the cases on conscientious objection to care, discussed *infra* Part II.C.iii.

Under this approach, treatments that would erase the affective experience of an event would be unreasonable as a matter of law.[122] That a rape victim, a witness or sufferer of trauma, or a combatant of war chooses to live with their memories—both factual and emotional—should not be regarded as an unreasonable choice if it best honors their experience and personality. Embodying legal norms in tort law that would honor their preservation of memory, rather than condemning them to erase and ignore their life experiences, better reflects and celebrates the human condition. It is not unreasonable for society to value personal choices when those choices reflect a critical aspect of self-identity.

By contrast, some treatments that less clearly impact cognitive liberty—like some ordinary forms of psychological counseling or "talk therapy"—should be evaluated by the jury on a case-by-case basis to determine whether one ought reasonably to submit to such treatments to address and ultimately alleviate their own suffering. In these cases, in making its determination of reasonableness, the jury would consider whether the proposed treatment negatively impacts plaintiff's interest in cognitive liberty, as well as the ordinary risks and benefits of the proposed treatment.

Through this two-tiered approach, society (through its jurors) would begin to demarcate the more nuanced contours of cognitive liberty by deciding on a case-by-case basis whether treatments that are not clearly identity-changing (and therefore unreasonable as a matter of law) may still negatively impact cognitive liberty. Plaintiff would request a jury instruction that explicitly accounts for cognitive liberty in such cases along the following lines:

> If you find a health care provider advised the plaintiff to submit to an operation or any other treatment, you would not necessarily conclude that plaintiff acted unreasonably in declining such an operation or treatment.
>
> In determining whether the plaintiff's conduct was reasonable, you must consider all of the circumstances as they appeared to the plaintiff at the time he chose not to follow the health care provider's advice. These may include:
>
> - The financial condition of the plaintiff
> - The degree of risk involved

[122] Scholars have advanced compelling arguments about the economic value of applying the doctrine of avoidable consequences to emotional distress injuries. But these economic values are insufficient to overcome the implications for individuals and society as technology develops that society will condemn their choice to leave their minds technologically unaltered.

- The amount of pain involved
- The chances for success
- The benefits to be obtained from the procedure
- The availability of alternate procedures
- Whether health care providers agree among themselves as to the advisability of the procedure
- The knowledge or lack of knowledge of the plaintiff
- The plaintiff's investigation into and beliefs about whether the treatment would impact their interest in cognitive liberty

> Cognitive liberty is the right to self-determination over our own brains and mental experiences. It encompasses freedom of thought and rumination, the right to self-access and self-alteration, and to consent to or refuse changes to our brains and our mental experiences. Like all individual interests, it is not absolute, but must be balanced against the societal costs it introduces. You must decide if plaintiff reasonably believed the treatment would negatively impact their cognitive liberty, and if so, find that the plaintiff did not unreasonably decline such treatment.

This approach enables society to grapple with both the straightforward and the difficult cases for invoking cognitive liberty to respect the competing personal and societal interests at stake.

An individual who unwittingly and irresponsibly leaves their emotional well-being untreated, or who takes no responsibility for addressing their emotional well-being *ex ante*, would still face a limitation on the award of their emotional damages. And in the case of suffering a tortious wrongdoing *ex post*, a plaintiff could evaluate the risks and benefits of treatments—such as antidepressants, psychotherapy, or memory modification—and reasonably decide, without risk of social condemnation, that such treatments would come at too high of a cost to their personality, self-identity, and continuity of thought and personal history.

It is precisely this type of reflective self-determination that has led some courts to decide, as a matter of law, that plaintiff's efforts at mitigation were not unreasonable. But courts have given little coherence to the principles underlying these choices. The *ex post* analysis should explicitly rely upon the right to cognitive liberty as the reason that forgoing such identity-altering treatments is not unreasonable. We should at the same time enable juries to help shape the contours of cognitive liberty by deciding which treatments, while not clearly identity-altering, are still the kind of treatments that run afoul of cognitive liberty. To be clear, jurors would not and should not assess the reasonableness of a plaintiff's interest in cognitive liberty, but rather whether a plaintiff's belief

about a less clear identity-changing treatment impacted the plaintiff's interest in cognitive liberty. This step-wise approach will enable us, over time, to develop a coherent body of tort law that is responsive both to novel developments in science and our social understanding of cognitive liberty across law.

Tort law "reflects a judgment that the maintenance of one's emotional well-being in the face of adversity is something for which a plaintiff ordinarily must take responsibility."[123] Requiring individuals to have a certain degree of fortitude and resilience in facing the possibilities of emotional insult in life is different than expecting, *after* they have suffered from a cognizable injury, to limit their recovery based on whether they choose to dampen their emotional suffering that follows. A norm of self-reliance and emotional fortitude should not encompass an expectation that individuals use novel scientific developments to blunt themselves *ex ante* against emotional insults.[124] And it most certainly should not require that *ex post* individuals be labeled as unreasonable for forgoing treatments that would alter their self-identity.

C. The Role of Cognitive Liberty Across Law

The current doctrine of mitigation of emotional distress injuries becomes more intelligible when approached through the lens of cognitive liberty. When the court in *Dohman*[125] rejected electroshock therapy as a form of mitigation that the plaintiff ought to have undergone, it did so because electroshock would have "work[ed] a change in his personality."[126] Changes to personality are at odds with cognitive liberty, and the court was implicitly recognizing the limits of the doctrine in light of cognitive liberty. Electroshock therapy changes areas of the brain that are essential to how people feel, learn, and respond to positive and negative environmental factors.[127] It does so by changing the structural integrity and functional connectivity in the brain.[128] While effective for some individuals with severe depression, common side effects include some degree of both transient and pervasive amnesia, and on very rare occasions heart attacks, stroke,

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123 Goldberg & Zipursky, *supra* note 8, at 1683.

124 If courts or scholars were to argue that even *ex ante* individuals have a duty to use modern neuroscience to safeguard against emotional insults by blunting their reactions to those insults, then cognitive liberty would be at issue *ex ante* as well.

125 *See infra* Part II.A.

126 Dohmann v. Richard, 282 So. 2d 789, 793 (La. Ct. App. 1973).

127 Shantanu H. Joshi et al., *Structural Plasticity of the Hippocampus and Amygdala Induced by Electroconvulsive Therapy in Major Depression*, 79 BIOLOGICAL PSYCHIATRY 282, 287 (2016).

128 Antoni Kubicki et al., *Variations in Hippocampal White Matter Diffusivity Differentiate Response to Electroconvulsive Therapy in Major Depression*, 211 BIOLOGICAL PSYCHIATRY: COGNITIVE NEUROSCIENCE & NEUROIMAGING 300, 301 (2019).

and even death.[129] Courts ought to follow the *Dohman* court's approach, but do so because electroshock therapy violates trauma victims' cognitive liberty.

The seemingly puzzling distinction another court drew between in deciding that a plaintiff reasonably mitigated his emotional distress by attending psychological counseling but forgoing antidepressant medications[130] also makes sense through a lens of cognitive liberty. Antidepressant medications change the neurochemistry underlying affective experiences, and commonly cause emotional blunting in individuals. Psychological counseling, by contrast, is usually geared toward enabling individuals to face and cope with their life experiences rather than blunt or ablate them.

Even some inapposite cases where courts have found plaintiffs unreasonable for failing to mitigate their emotional distress injuries become more coherent through the two-tiered lens of cognitive liberty. Cases like *EEOC v. Fred Meyer Stores, Inc.*,[131] in which the plaintiff alleged that the defendant created a sexually hostile work environment and had her damages reduced for failing to seek psychological counseling, seemed odd at first. But it now makes sense where the issue was the reasonableness of forgoing psychological counseling. Many, if not most, forms of psychological counseling may alleviate suffering without creating a discontinuity of self, and are therefore the kinds of treatment a judge ought to submit to the jury to resolve. But a better outcome in these cases would be to instruct the jury to also weigh the impact on cognitive liberty when evaluating the risks and benefits of a forgone treatment.

Other cases would come out differently, such as when courts have submitted to the jury to decide whether a plaintiff ought to have taken antidepressant medications[132] or submitted to electroshock therapy.[133] Cognitive liberty would enable courts to more easily distinguish between therapeutic treatments designed to work a change in the personality, memory, or individual affect, versus treatments that by design help individuals incorporate their experiences and memories into their self-identity.

Looking beyond tort law, cognitive liberty may be implicitly lurking behind other legal doctrines where making its presence known could enable greater coherence and reasoning. Judicial deliberative privilege may be one such area.

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129 Richard D. Weiner, *Ethical Considerations with Electroconvulsive Therapy*, 5 VIRTUAL MENTOR 352, 352 (2003).

130 *See In re* Air Crash Disaster at Charlotte, N.C. on July 2, 1994, 982 F. Supp. 1101, 1112 (D.S.C. 1997).

131 Alberini, *supra* note 2.

132 *See* Maynard v. Ferno-Washington, Inc., 22 F. Supp. 2d 1171, 1176 (E.D. Wash. 1998).

133 *See* Gottfried v. Ill. Cent. R.R. Co., No. 94 C 5249, 1995 WL 12478, at *2 (N.D. Ill. Jan. 10, 1995).

This seemingly obscure doctrine of evidentiary law has long been implicitly recognized in law as securing to judges confidentiality for their judicial communications and deliberations.[134] The procedural safeguards that are in place already grant life tenure to federal judges without the risk of capricious removal from office, so the privilege cannot be understood merely as a safeguard to separation of powers.[135]

In 2012, the Massachusetts Supreme Judicial Court explicitly recognized an absolute right to judicial deliberative privilege, finding it "deeply rooted in our common-law and constitutional jurisprudence and in the precedents of the United States Supreme Court and the courts of our sister States."[136] The absolute privilege protects a "judge's mental impressions and thought processes in reaching a judicial decision, whether harbored internally or memorialized in other nonpublic materials."[137] The court recognized an absolute but narrowly tailored privilege that excludes "a judge's memory of nondeliberative events in connection with cases in which the judge participated," and other biases or external influences that are "outside the protected sphere of the judge's internal deliberations."[138] The privilege ensures the finality of judicial decision-making, the quality and integrity of their decision-making, and the independence and impartiality of the judiciary from other branches of government.[139]

Considering the privilege anew from the lens of cognitive liberty, the mental thought processes of judges would also be protected. Cognitive liberty would give the theoretical core one could draw upon to help resolve the growing divide between courts concerning the contours of the privilege, including whether it is absolute or qualified.[140]

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[134] Kevin C. Milne, Note, *The Doctrine of Judicial Privilege: The Historical and Constitutional Basis Supporting A Privilege for The Federal Judiciary*, 44 WASH. & LEE L. REV. 213, 213 (1987); *see also* Grant v. Shalala, 989 F.2d 1332, 1344–45 (3d Cir. 1993) (noting the difficulty with being able to decide cases on the evidence alone if thought processes are subject to scrutiny); Thomas v. Page, 837 N.E.2d 483, 490–91 (Ill. Ct. App. 2005); *In re* Enforcement of Subpoena, 972 N.E.2d 1022, 1026 (Mass. 2012); *In re* Cohen's Estate, 174 N.Y.S. 427, 428–29 (Sup. Ct. 1919); Leber v. Stretton, 928 A.2d 262, 270 (Pa. Super. Ct. 2007); State *ex rel.* Kaufman v. Zakaib, 535 S.E.2d 727, 735 (W. Va. 2000). In *United States v. Morgan*, the Court drew the analogy between the decision-making process of the Secretary of Agriculture to that of a judge, stating that "[s]uch an examination of a judge would be destructive of judicial responsibility." 313 U.S. 409, 422 (1941).

[135] *See* Milne, *supra* note 134, at 214 n.7, 217–18.

[136] *In re* Enforcement of Subpoena, 972 N.E.2d at 1026.

[137] *Id.* at 1033.

[138] *Id.*

[139] *Id.* at 1028–31.

[140] The Massachusetts Supreme Judicial Court, the Supreme Court of Appeals of West Virginia, and the Illinois Appellate Court find the privilege absolute but narrow. *See id.* at 1033; Thomas v. Page, 937 N.E.2d 483, 493 (Ill. Ct. App. 2005); State *ex rel.* Kaufman v. Zakaib, 535 S.E.2d 727, 736 (W. Va. 2000).

Cognitive liberty, like other liberties, is not absolute but ought to be balanced against other societal interests at stake. Deliberative privilege enables judges to think freely, speak frankly, and withstand the pressure of public opinion in rendering their decisions.[141] If it is qualified, a party seeking to pierce the privilege ought to have to show "the importance of the information sought and the difficulty of obtaining it from other sources . . ."[142] If the privilege is rooted in cognitive liberty, the burden on a party seeking to pierce the privilege ought to be quite high—but not unyielding. The privilege should be tailored[143] consistent with its risks and benefits to society.

Cognitive liberty may also provide insights about the legitimacy of forcibly medicating prisoners to restore their competency. The Louisiana Supreme Court has found it unconstitutional to render a prisoner competent to be executed because it violates their "privacy and personhood," is an "unjustified invasion of [] brain and body," and "mind and thoughts."[144] The Eighth Circuit, by contrast, believes that doing so serves the legitimate purposes of "prison security or medical need," and that it is even permissible to forcibly medicate a prisoner who has a set execution date.[145] In *Sell v. United States*, the United States Supreme Court introduced a four-factor test for deciding if it is constitutional to forcibly medicate a prisoner to restore their competency to stand trial.[146] Courts have applied the *Sell* factors for purposes of forcibly medicating a prisoner to be sentenced as well.[147]

Forcibly medicating individuals runs afoul of cognitive liberty. Overriding individual consent and one's interest in self-determination is deeply troubling. And yet, the analysis does not end there. This is a more difficult case because at issue is *restoring* a person to competency which could be seen as *restoring* one's obscured identity and personality. As a first-blush analysis of this challenging

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141 *See* Milne, *supra* note 134, at 232.

142 Harris v. Goins, No. 6: 15-151-DCR, 2016 WL 4501466, at *3 (E.D. Ky. Aug. 26, 2016).

143 *See, e.g.*, State *ex rel.* Veskrna v. Steel, 894 N.W.2d 788, 803 (Neb. 2017) (finding the proper constitutional balance between judicial privilege and workable government to require the privilege be absolute but narrowly tailored).

144 State v. Perry, 610 So. 2d 746, 755 (La. 1992); *see also* Singleton v. State, 437 S.E.2d 53, 61 (S.C. 1993) ("We hold that the South Carolina Constitutional right of privacy would be violated if the State were to sanction forced medication solely to facilitate execution.").

145 Singleton v. Norris, 319 F.3d 1018, 1026–27 (8th Cir. 2003).

146 539 U.S. 166, 180–81 (2003) (holding that (1) a court must find important governmental interests at stake; (2) the court must conclude that forcibly medicating a defendant significantly advances the interest of ensuring a fair trial for a defendant; (3) the court must find that involuntarily medicating the defendant is necessary to that interest and that less invasive treatments will not yield substantially similar results; (4) and that it is medically appropriate to administer drugs).

147 United States v. Baldovinos, 434 F.3d 233, 240–41 (4th Cir. 2006).

issue, I would posit that one's interest in their own mental experiences and personality will be weaker when one's self-identity is already discontinuous due to mental illness. The interests in safeguarding prison guards and other prisoners from mentally ill inmates, or rendering an individual competent to assist in their own defense, may in some instances outweigh a weakened but violated interest in cognitive liberty. Notice, however, how bringing cognitive liberty into the foray allows us to take the analysis one layer deeper and begin to address the root concerns at issue.

Even our preference for silence-lovers over noisemakers in zoning law, the alienability of the mind in copyright law, and whether individuals can be forced to give passwords stored only in their minds will implicate cognitive liberty. And how will we come to regard the testimony of a rape victim who alters her memory through drugs or devices after giving her preserved testimony? Will her preserved testimony violate the perpetrator's rights to confront the witness under the Confrontation Clause of the Sixth Amendment?[148]

We will gain new insights into how to resolve each of these existing riddles in law through the lens of cognitive liberty. And we will bring greater coherence across our many legal doctrines implicated by making explicit the interest in cognitive liberty at stake. While these are subjects of future scholarship and case law, already we can see that cognitive liberty implicitly undergirds so much of our existing law. By making it explicit and defining its contours, many puzzling doctrines can have a common sensibility.

In tort law, specifically, there is even more to learn from whether the doctrine of avoidable consequences applies to emotional distress injuries: One ought not face the cruel dilemma of choosing between suffering the emotional consequences of a tortious wrongdoing or the emotional consequences of changing one's mind. Our legal norms ought to treat the unmitigated mind as reasonable.

CONCLUSION

Advances in neuroscience and medicine now offer easier ways to mitigate invisible injuries by making changes to one's brain. These changes—whether to brain chemistry, memories, or affect—impact our personalities, experiences, and perceptions. But that we *can* change our brains in ways that reduce pain and

[148] *But see* United States v. Owens, 484 U.S. 554, 562–64 (1988) (holding that the admission of a prior, out-of-court identification statement of a witness who suffered memory loss and could not explain the basis of the identification did not violate the Confrontation Clause).

suffering does not necessarily mean that our legal norms and rules should reward only those individuals who do so. Our ability to change our brains requires us to contemplate the bounds of whether and, if so, when we should be permitted or encouraged to do so. That inquiry requires us to decide and define the boundaries of cognitive liberty and its implications for law, ranging from tort law to the forcible competency of prisoners.

This Article offers a first step toward a systematic and thoroughgoing account of those boundaries. It suggests that our legal regimes have until now only dimly recognized an interest in cognitive liberty. And it offers a descriptive and normative account of cognitive liberty, and why its explicit recognition should impact judgments about whether a plaintiff has reasonably mitigated her emotional distress injuries. It offers a two-tiered approach to doing so, with treatments that clearly impact self-identity being per se reasonable for a plaintiff to forgo, and with other less clear treatments being submitted to a jury to weigh the treatment's impact on cognitive liberty versus societal interests in decreasing the costs of accidents.

Preserving individual and social memory are fundamental to freedom of thought, to the right to self-access and self-alteration, and to the right to consent to or refuse treatment. Combined, these interests are the interests in cognitive liberty, a fundamental interest essential to individual and social flourishing.

Cognitive liberty has far broader implications for law. It may help us unravel some of the most difficult conundrums in law, such as whether the government or employers can require individuals or employees to provide their passwords to social media accounts, which they store mentally but not in any other physical medium. Cognitive liberty better explains doctrines like absolute judicial deliberative privilege, which protects the deliberative process a judge uses in decision-making from discovery by others. Cognitive liberty makes plain that forcibly medicating prisoners who lack competency to stand trial may sometimes occur in contexts where a prisoner's cognitive liberty should trump societal interests in bringing that individual to justice. And it introduces some of the broader implications of memory modification—including the potential need to reexamine our current understanding of what it means to confront a witness under the Confrontation Clause of the U.S. Constitution.

While this Article leaves some of these difficult cases for future work to resolve, by laying down the principles of cognitive liberty in this article and

applying it to this first case—the doctrine of avoidable consequences in tort law—it introduces the role of cognitive liberty in law and in our lives. And it invites us to begin to understand its critical role in law as technology fundamentally alters our relationship to our minds and, ultimately, ourselves.