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The Physical-Emotional Distinction in Tort

Philip Petrov
Stanford University, California, USA
Email: petrovp@stanford.edu

Abstract

Several legal scholars have recently argued that U.S. tort law's physical-emotional distinction commits tort to the objectionable position of mind-body dualism, but they have not considered the distinction's role as an aid to judicial cognition and decision-making. Drawing primarily on the law of negligent infliction of emotional distress, this essay argues that tort's physical-emotional distinction is not a relic of mind-body dualism but a heuristic that judges have used to structure and simplify the difficult but unavoidable task of drawing lines between legally cognizable and non-cognizable harm. The analysis has at least three normative implications: (1) users of tort's physical-emotional distinction should clarify that they neither endorse dualism nor depreciate emotional harm; (2) because judicial expertise may not extend to the task of drawing lines between legally cognizable and non-cognizable harm, judicial performance in this area may be more adequate than critics suggest; and (3) although it may not be possible to determine the optimal way of drawing lines between legally cognizable and non-cognizable emotional harm, moral-philosophical tools such as Rawlsian and Scanlonian contractualism may be able to identify partial or *pro tanto* considerations for choosing among different ways of doing so.

Keywords: *heuristics; judicial decision-making; mind-body problem; negligent infliction of emotional distress; tort law*

Introduction

Tort law distinguishes between physical and emotional harm and generally makes it more difficult for plaintiffs to recover for the latter.[1] Several legal scholars have recently argued that tort's physical-emotional distinction commits tort to the objectionable position of mind-body dualism,[2] but they have not considered the distinction's role as an aid to judicial cognition and decision-making.[3] This essay argues that tort's physical-emotional distinction is not a relic of mind-body dualism but a heuristic[4] that judges, in their capacity as ordinary

1. This essay's analysis is limited to U.S. law, but the discussion aims to interest jurists and lawyers in any jurisdiction.
2. 'Mind-body dualism' does not have a standard definition. That said, it can be usefully understood as the view that the body is more real than is the mind, that the body and the mind can be sharply distinguished, or that the mind can exist independently of the body. Mind-body dualism can be usefully contrasted with 'mind-body monism,' which denies each of the preceding views.
3. See *infra* note 18.
4. 'Heuristic' does not have a standard definition. See e.g. Anuj K Shah & Daniel M Oppenheimer, "Heuristics Made Easy: An Effort-Reduction Framework" (2008) 134:2 Psychological Bulletin 207 at 207. This essay uses 'heuristic' to mean, roughly, a way of mentally representing or computing that enables a decision-maker to simplify a decision problem in a way that economizes on attention, effort, or time.

decision-makers, have used to structure and simplify the difficult but unavoidable task of drawing lines between harm that the judiciary should and should not recognize. Put differently, tort's physical-emotional distinction is an aid to thought that judges have used when drawing lines between legally cognizable and non-cognizable harm. Moreover, although the distinction is not an end-in-itself and should be replaced if a better alternative is available, it is, on balance, scientifically consilient and emotionally informed.

Understanding tort's physical-emotional distinction as a line-drawing heuristic is valuable because it partly explains the distinction's existence and persistence. Understanding the distinction in this way is also valuable for another, more general reason: it can enhance our understanding of judicial cognition and decision-making. More precisely, by studying how judges have used the physical-emotional distinction to draw lines between legally cognizable and non-cognizable harm, we can enhance our understanding of how these decision-makers mentally represent and compute the decision problems that their work presents to them, and in the course of addressing which they develop or modify the law.

Because judges must regularly adjudicate disputes between interested and often strategic parties—and because they must do this in the presence of attention, resource, and time constraints—they must draw lines between legally cognizable and non-cognizable harm. A judicial regime in which any setback that a person may experience constitutes a legally cognizable harm would be neither feasible nor acceptable. Consider a regime in which any of the following is sufficient to produce a trial in tort: (1) a student suing their teacher for not selecting them for an academic award; (2) a parent suing their child for not studying either law or medicine; and (3) a jazz saxophonist suing their drummer for not being sufficiently disciplined. Such a regime would, *inter alia*, over-burden the judiciary with non-compelling claims and over-burden people, in their capacity as ordinary social agents, with the near-constant prospect of liability. Because a judicial regime in which just any setback constitutes a legally cognizable harm is a non-starter, drawing lines between legally cognizable and non-cognizable harm is an unavoidable task—in the words of the Tennessee Supreme Court, a judicial "obligation."[5]

The task of drawing lines between legally cognizable and non-cognizable harm is not only unavoidable but also difficult. One way to understand this difficulty is in philosophical terms: it is difficult or impossible to produce a verbal definition of 'legally cognizable harm' that establishes a clear and uncontroversial line between events that do and do not belong in the underlying category. One may stipulate that the law should recognize, for instance, only 'serious' harm, only harm that violates a 'right,' only harm that impairs a person's ability to exercise a 'capability,' or only harm that impairs a person's 'autonomy.' However, these approaches would, I submit, ultimately re-create the basic

5. *Eskin v Bartee*, 262 SW (3d) 727 at 738 (Tenn Sup Ct 2008).

difficulty—defining 'legal cognizability'—at the more fine-grained level of defining 'seriousness,' 'right,' 'capability,' or 'autonomy.' Put differently, attempting to demarcate a category of 'legally cognizable harm' by appealing to such concepts ultimately re-locates vagueness from one set of words to another, leaving the basic difficulty intact.[6] This is one way to understand why it is difficult for judges—as it would be for any decision-maker—to draw lines between legally cognizable and non-cognizable harm. Moreover, the difficulty of this task does not significantly decline with education or training; it is difficult whether one is, for instance, a non-specialist, a philosopher, or a judge. As the Montana Supreme Court put it with respect to emotional harm in particular, "[d]etermination of compensable versus non-compensable emotional distress is inherently problematic."[7]

That drawing lines between legally cognizable and non-cognizable harm is difficult suggests that judges who must perform this task will, often automatically, adopt heuristics that ease the burden. The physical-emotional distinction is one such heuristic. It is a conceptual-analytical tool that judges have used to structure and simplify their thinking as they have worked to draw lines between harm that the judiciary should and should not recognize. Perhaps the simplest way to use the physical-emotional distinction as a line-drawing heuristic is by adopting the following rule: *if a harm is physical, recognize it; if it is emotional, do not do so*. Another way is by adopting a more subtle rule: *if a harm is physical, recognize it; if it is emotional, decide whether to recognize it by asking whether it stands in a sufficiently close relationship to a physical harm*. One may also use a third rule: *if a harm is physical, recognize it; if it is emotional, decide whether to recognize it by asking whether it satisfies some criterion—such as 'foreseeability,' 'reasonableness,' or 'seriousness'—that does not refer to the concept of physicality*. Despite these rules' differences, all of them are products of a cognitive process in which the physical-emotional distinction helps the decision-maker resolve the decision problem.

That tort's physical-emotional distinction is a heuristic does not mean that it is all-things-considered desirable. The distinction may prove to be all-things-considered undesirable (if, for instance, a better alternative is available). However, a proper evaluation of the distinction's benefits and costs should account, on the benefit side, for its heuristic value.

This essay has two parts. **Part I** argues that tort's physical-emotional distinction is not a relic of mind-body dualism but a heuristic that judges have used to structure and simplify the difficult but unavoidable task of drawing lines between

6. Some researchers would likely contest this argument. Gregory Keating, for instance, has argued that it is possible to demarcate a more-or-less clear and uncontroversial category of 'legally cognizable emotional harm' by differentiating between harm that does and does not impair a person's *autonomy*, understood in a particular way. See e.g. Gregory C Keating, "When Is Emotional Distress Harm?" in Stephen G A Pitel, Jason W Neyers & Erika Chamberlain, eds, *Tort Law: Challenging Orthodoxy* (Hart, 2013) 273 at 298-307.

7. *Johnson v Supersave Markets, Inc*, 686 P (2d) 209 at 212 (Mont Sup Ct 1984) [footnotes omitted] [*Johnson*].

legally cognizable and non-cognizable harm. **Part II** presents three normative implications of the analysis: (1) users of tort's physical-emotional distinction —such as judges, lawyers, and *Restatement* authors—should clarify that they neither endorse dualism nor depreciate emotional harm; (2) because judicial expertise may not extend to the task of drawing lines between legally cognizable and non-cognizable harm, judicial performance in this area may be more adequate than critics suggest; and (3) although it may not be possible to determine the optimal way of drawing lines between legally cognizable and non-cognizable emotional harm, moral-philosophical tools such as Rawlsian and Scanlonian contractualism may be able to identify partial or *pro tanto* considerations for choosing among different ways of doing so.

Before proceeding, it may be helpful to clarify the argument in at least two respects. First, in focusing on the cause of action of negligent infliction of emotional distress (hereafter, 'NIED'), this essay does not mean to discount the fact that tort allows recovery for emotional harm under a variety of causes of action, such as assault, defamation, and trespass.[8] The study of tort's treatment of emotional harm is broader than is the study of NIED. That said, NIED constitutes a particularly valuable opportunity to study how judges think about the legal cognizability of harm. Unlike, say, defamation—the legal elements of which tend to shift the adjudicator's attention to the *defendant's allegedly harmful behavior* —NIED tends to shift the adjudicator's attention to the *plaintiff's alleged harm*. The need to adjudicate NIED suits thus is particularly likely to present judges with the question of how to draw lines between legally cognizable and non-cognizable harm.

Secondly, in analyzing NIED in terms of harm, the essay does not mean to discount other ways of assessing the cause of action. One can analyze a NIED suit in terms of, *inter alia*, any of the four traditional elements of negligence: (1) duty, (2) breach, (3) causation, and (4) damage. Consider a suit in which plaintiff-office worker alleges NIED on the basis that they were trapped in defendant-management company's elevator for 30 minutes. One can analyze this suit in terms of *duty* (e.g., 'did defendant owe plaintiff a duty to refrain from causing emotional harm?'), *breach* (e.g., 'could defendant have foreseen that, by operating its elevator as it did, it would cause plaintiff emotional harm?'), *causation* (e.g., 'was defendant's operation of its elevator the proximate cause of plaintiff's emotional harm?'), and *damage* (e.g., 'is emotional harm resulting from being trapped in an elevator for 30 minutes legally cognizable?'). This essay relies primarily on the damage-based approach. The underlying rationale here is not that this approach is the only or even the best way of analyzing NIED suits.[9] It is that it can illuminate insights that are less visible from other perspectives.

8. Robert Rabin has developed this point in greater detail. See Robert L Rabin, "Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss" (2006) 55:2 DePaul L Rev 359 at 359-73.

9. Consider here Martha Chamallas's statement that, "I do not think there is one right way to analyze such a [NIED] case, even though we are more inclined these days to speak in terms

I. Tort's Physical-Emotional Distinction as a Judicial Heuristic

I.A Basic background

This brief stage-setting section rehearses a few elements of basic tort doctrine, relying, for convenience, on the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* (hereafter, 'the *Restatement*'). The *Restatement*, a partly prescriptive summary of tort law written by legal experts representing a non-governmental organization, is not legally binding or undisputed.[10] That said, a short overview of a few of its provisions efficiently indicates how tort distinguishes between physical and emotional harm, and how it generally makes it more difficult for plaintiffs to recover for the latter.

The *Restatement* distinguishes between 'physical harm' and 'emotional harm' (its very subtitle is "Liability for Physical and Emotional Harm"). It defines 'physical harm' as "the physical impairment of the human body ('bodily harm') or of real property or tangible personal property ('property damage')."[11] It defines 'emotional harm' as "impairment or injury to a person's emotional tranquility."[12] For the *Restatement*, then, bodily harm constitutes only a sub-set of physical harm. This is noteworthy because it suggests that, in distinguishing between physical and emotional harm, the *Restatement*'s intent is less to single out emotional harm and more to draw lines between harms that are more and less easily verifiable.

Like many other areas of law, tort generally makes it more difficult for plaintiffs to recover for emotional harm.[13] Although tort has been moving in the direction of liberalizing recovery for emotional harm since at least the late nineteenth century, it continues to impose special limits on recovery for this type of harm.[14] Section I.B below considers some of these limits in detail. For now, however, consider three of the limits as the *Restatement* describes them.

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of no duty or no cognizable type of harm." Martha Chamallas, "Removing Emotional Harm from the Core of Tort Law" (2001) 54:3 Vand L Rev 751 at 761.

10. For a discussion of the *Restatement*'s jointly descriptive-prescriptive nature, see e.g. Michael D Green & Olivier Moreteau, "Restating Tort Law: The American and European Styles" (2012) 3:3 J Eur Tort L 281 at 292-94. For a statement of concerns about the *Restatement*, see e.g. Nancy J Moore, "Restating Intentional Torts: Problems of Process and Substance in the ALI's Third Restatement of Torts" (2017) 10:2 J Tort L 1.

11. 1 *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 4 (2010) [1 *Restatement*].

12. 2 *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* § 45 (2012) [2 *Restatement*].

13. See e.g. Omri Ben-Shahar & Ariel Porat, "The Restoration Remedy in Private Law" (2018) 118:6 Colum L Rev 1901 at 1907-12 (contract law); Joi T Christoff, "Tax Free Damages: Trespassory Torts and Emotional Harms" (2019) 53:1 Akron L Rev 71 (tax law); Marissa C M Doran, "Lawsuits as Information: Prisons, Courts, and a Troika Model of Petition Harms" (2013) 122:4 Yale LJ 1024 (prison law); Emily F Suski, "Dark Sarcasm in the Classroom: The Failure of the Courts to Recognize Students' Severe Emotional Harm as Unconstitutional" (2014) 62:1 Clev St L Rev 125 (Fourteenth-Amendment law).

14. G Edward White has developed this point in greater detail. See G Edward White, *Tort Law in America: An Intellectual History* (Oxford University Press, 2003) at 104.

First, Section 5 of the *Restatement* ("Liability for Intentional Physical Harm") explains that, as one moves from physical to non-physical harm, a showing of intent to cause harm becomes less likely to suffice to state a claim:

> In cases involving physical harm, proof of intent provides a basic case for liability. . . . However, as the focus shifts from physical harm to other forms of harm, the intent to cause harm may be an important but not a sufficient condition for liability. For example, when the defendant intentionally causes the plaintiff to suffer the loss of prospective economic advantage, in order to secure recovery the plaintiff ordinarily must show that the defendant's conduct is not only intentional but also "improper" or wrongful by some measure other than the fact of the interference. When the defendant either intentionally or recklessly causes the plaintiff to suffer emotional harm, to justify a recovery the plaintiff must further establish that the defendant's conduct is "extreme and outrageous" and that the plaintiff's emotional harm is "severe."[15]

Interestingly, that the first of this section's two examples involves loss of prospective economic advantage suggests that the distinction in which the *Restatement* is interested here is 'physical-non-physical,' not 'physical-emotional.' A second way in which tort imposes special limits on recovery for emotional harm appears in the *Restatement*'s discussion of the cause of action of intentional infliction of emotional distress:

> An actor who by extreme and outrageous conduct intentionally or recklessly causes severe emotional harm to another is subject to liability for that emotional harm.[16]

This section limits liability to "severe" harm that results from "extreme and outrageous conduct." A third way in which tort limits recovery for emotional harm is visible in the *Restatement*'s discussion of NIED:

> An actor whose negligent conduct causes serious emotional harm to another is subject to liability to the other if the conduct:
>
> (a) places the other in danger of immediate bodily harm and the emotional harm results from the danger; or
> (b) occurs in the course of specified categories of activities, undertakings, or relationships in which negligent conduct is especially likely to cause serious emotional harm.[17]

This section limits liability by requiring that the harm be "serious" and that the defendant's behavior either (a) create a risk of physical harm, or (b) occur in an emotionally delicate context. Taken together, the preceding *Restatement* sections provide a snapshot of some of the ways in which the physical-emotional distinction shapes contemporary tort doctrine.

15. 1 *Restatement*, *supra* note 11 at § 5 cmt a (2010).
16. 2 *Restatement*, *supra* note 12 at § 46 (2012).
17. *Ibid* at § 47.

I.B Using tort's physical-emotional distinction to draw lines between legally cognizable and non-cognizable harm

Several legal scholars have recently criticized tort's physical-emotional distinction on the alleged basis that it commits tort to the objectionable position of mind-body dualism.[18] This section challenges this criticism. It argues that tort's physical-emotional distinction, far from being a relic of dualist or otherwise unscientific thinking, is a heuristic that judges have used to structure and simplify the difficult but unavoidable task of drawing lines between legally cognizable and non-cognizable harm.

Embedded in the work of recent critics of tort's physical-emotional distinction are several accurate observations, such as the following: (1) an emotional harm (e.g., chronic paranoia) can reduce a person's welfare more than does a physical harm (e.g., a bruise); (2) people often disagree about whether a given harm is better described as physical or as emotional; and (3) the physical-emotional distinction can be collapsed on the basis that emotional harms have neural or other physical substrates. It bears noting that these observations are basically *uncontroversially* correct. For example, if some people in the past believed that emotional harm was necessarily insignificant, very few or no informed people do so today. Moreover, contemporary courts as a whole understand that "[e]motional injury can be as severe and debilitating as physical harm,"[19] that "mental and emotional distress is just as 'real' as physical pain,"[20] and that "genuine mental illness constitutes real harm."[21]

At the core of the criticism that tort's physical-emotional distinction commits tort to dualism is the thought that, in distinguishing between the physical and the emotional, tort denies or under-states the fact that emotional harms have neural or other physical substrates and often affect the physical body, as when the experience of disgust corresponds to activity in the anterior insula, or when the experience of fear increases heart rate. The criticism that tort's physical-emotional

18. See e.g. Dov Fox & Alex Stein, "Dualism and Doctrine" (2015) 90:3 Ind LJ 975 at 987: "[t]hat our tort law so exceptionally limits compensation for emotional harm . . . reaffirms the distortionary impact of mind-body dualism on this doctrine"; Oscar S Gray, "Commentary [On Negligent Infliction of Emotional Distress]" (2009) 44 Wake Forest L Rev 1193 at 1193: "this 'emotional'/'physical' distinction casts a pall of apparent antiscience over our work and makes us appear obsolete from the outset"; Betsy J Grey, "The Future of Emotional Harm" (2015) 83:5 Fordham L Rev 2605 at 2608: "[w]hile courts continue to observe [tort's physical-emotional distinction], other areas have changed course"; Govind Persad, "Law, Science, and the Injured Mind" (2016) 67:4 Ala L Rev 1179 at 1210: "[t]he prominence of dualism during the development of tort doctrine indicates that tort law's underlying commitments regarding injuries involving the mind may well reflect the influence of dualism"; Geoffrey Christopher Rapp, "Defense Against Outrage and the Perils of Parasitic Torts" (2010) 45:1 Ga L Rev 107 at 190 (arguing that tort's physical-emotional distinction "runs counter to a strong scientific consensus challenging the legitimacy of the dichotomy between physical and emotional injury"). In recent years, at least, fewer legal scholars have defended the physical-emotional distinction. See e.g. Erica Goldberg, "Emotional Duties" (2015) 47:3 Conn L Rev 809.

19. *Schultz v Barberton Glass Co*, 447 NE (2d) 109 at 113 (Ohio Sup Ct 1983) [footnotes omitted].

20. *Berman v Allan*, 404 A (2d) 8 at 15 (NJ Sup Ct 1979).

21. *Harnicher v University of Utah Medical Center*, 962 P (2d) 67 at 71 (Utah Sup Ct 1998).

distinction commits tort to dualism is incorrect. Given that both courts[22] and legal scholars[23] have acknowledged the inter-relatedness between the mind and the body for decades, it is very unlikely that contemporary tort doctrine can be plausibly said to hew to dualism. Moreover, dualism often or usually co-occurs with rejection of a naturalistic view of the mind,[24] and there is no reason to suppose that tort practitioners are particularly likely to reject naturalism. A better reading of contemporary tort doctrine is that, although it recognizes that dualism is false, it preserves the physical-emotional distinction for reasons that are unrelated to any type of dualist motivation.

Consider, again, the *Restatement*. It explains that its definition of 'bodily harm' "is meant to preserve the *ordinary* distinction between bodily harm and emotional harm."[25] As the *Restatement*'s use of 'ordinary' suggests, its physical-emotional distinction is not intended to be scientific or metaphysical. Moreover, the *Restatement* recognizes that emotional harms have neural

22. See e.g. *Smith v Union Pacific Railroad Co*, 236 F (3d) 1168 at 1171 (10th Cir 2000): "[t]he practical reality is that it may be difficult to draw a distinction between a physical and emotional injury given that emotional injuries are often accompanied by physical changes"; *Doe v Unum Life Insurance Co of America*, 135 F Supp (3d) 237 at 238 (Southern District NY Dist Ct 2015): "plaintiff's mental conditions may have physical components or biological bases"; *Moore v Continental Casualty Co*, 746 A (2d) 1252 at 1256-57 (Conn Sup Ct 2000): "we do not question the modern medical understanding of the interrelatedness of the mind and body"; *Rosman v Trans World Airlines, Inc*, 34 NY (2d) 385 at 396-97 (NY Ct App 1974): "[in] its ordinary usage, the term 'bodily' suggests opposition to 'mental.' This traditional dualism may or may not reflect the actual physiological structure of the human organism; it may be that fright and emotional distress are as much 'bodily', in the sense of 'physiological', as a broken leg. But the relationship between 'mind' and 'body'—a stubborn problem in human thought—is not the question before us nor one we would presume to decide. Rather, in seeking to apply the treaty's terms to the facts before us, we ask whether the treaty's use of the word 'bodily,' in its ordinary meaning, can fairly be said to include 'mental.'"; *Landreth v Reed*, 570 SW (2d) 486 at 489 (Tex Civ App 1978): "it has been increasingly evident in recent years that in many cases it is difficult, if not impossible, to distinguish between strictly mental and strictly physical ailments, because they each may manifest themselves by symptoms relating to the other."

23. See e.g. Herbert F Goodrich, "Emotional Disturbance as Legal Damage" (1922) 20:5 Mich L Rev 497 at 501: "it may be broadly stated that an emotion as a purely mental thing does not exist. It always has a physical side."; Robert I Gordon, "Mental Distress in Psychological Research" (1969) 21:4 Baylor L Rev 520 at 525: "all acute emotional experiences involve physical change"; Fowler V Harper & Mary Coate McNeely, "A Re-Examination of the Basis for Liability for Emotional Distress" (1938) 1938:3 Wis L Rev 426 at 426: "[i]t is true, of course, that all emotional disturbances are at the same time physiological so that the distinction between emotional distress and physical harm, as usually drawn by the courts, may not be strictly scientific. And yet, for the practical business of the law, it is well taken." [footnotes omitted]; William L Prosser, "Intentional Infliction of Mental Suffering: A New Tort" (1939) 37:6 Mich L Rev 874 at 876: "[m]edical science has long recognized that not only fright and shock, but also anxiety, grief, rage and shame, are in themselves 'physical' injuries, producing well marked changes in the body, and symptoms of major importance which are readily visible to the professional eye" [footnotes omitted]; Lawrence Vold, "Tort Recovery for Intentional Infliction of Emotional Distress" (1939) 18:2 Neb L Bull 222 at 223: "[s]cientific information now available has made the physical fact abundantly clear that such distressful emotions as anger and fear have a physical counterpart in the functioning of the tissues of the living human body."

24. Some evidence that dualism and rejection of naturalism tend to co-occur comes from efforts by researchers in philosophy to show that "a Christian need not be a mind/body dualist." Lynne Rudder Baker, "Need a Christian Be a Mind/Body Dualist?" (1995) 12:4 Faith & Philosophy 489 at 498.

25. 1 *Restatement*, *supra* note 11 at § 4 cmt b (2010) [emphasis added].

substrates, as in its remark that, "if the defendant's negligent conduct (for example, negligent driving) frightens the plaintiff (for example, a pedestrian crossing the street), the *harm to the plaintiff's nerve centers* caused by this fear does not constitute bodily harm" as the *Restatement* defines the latter.[26] More generally, that tort distinguishes between the physical and the emotional does not warrant the conclusion that it denies monism, if only because an area of law can use an idea for instrumental purposes without thereby deeming the idea correct in a metaphysical sense.

Moreover, the criticism that tort hews to dualism is, in a well-defined sense, too easy. It is easy to find in any substantial body of legal doctrine ideas that do not withstand scrutiny from one or another technical perspective, to criticize the doctrine for including the ideas, and to do so without providing an account of why the doctrine should adhere to the relevant technical perspective. For example, some researchers in philosophy hold that 'emotion' is not a meaningfully unified category, and that in the future more sophisticated models of the mind will probably dispense with it.[27] On the basis of this technical perspective, one can criticize tort not only for drawing the physical-emotional distinction but also for, at a more basic level, using the concept of emotion at all. Like the criticism that tort draws the physical-emotional distinction, the criticism that it uses the concept of emotion would face the following problem: it is not clear why the fact that some specialists in fields outside of law find the concept of emotion unsupportable warrants the conclusion that *tort* should abandon the concept.[28]

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The remainder of this section argues that a better explanation of tort's physical-emotional distinction is that it helps judges draw lines between legally cognizable and non-cognizable harm.

Because judges must regularly adjudicate disputes between interested and often strategic parties—and because they must do this in the presence of attention, resource, and time constraints—they must draw lines between legally cognizable and non-cognizable harm. The physical-emotional distinction has at least three features that make it a useful tool for judges who face this task. First, it is easily understandable and widely understood. Although people often disagree about whether a given harm (e.g., a headache) is better described as physical or as emotional, nearly every adult can and does encode a meaningful and salient difference between, say, impairment of a person's arm and impairment of their self-esteem.[29] As one California court put it, "it cannot be denied that [from the

26. *Ibid* [emphasis added].
27. See e.g. Paul E Griffiths, *What Emotions Really Are: The Problem of Psychological Categories* (University of Chicago Press, 1997) at 228-47.
28. Consider here Francis Shen's statement that, "[e]ven if the neuroscience and medical communities come to view all mental phenomena as instantiated in the brain, it does not mean that the law must follow." Francis X Shen, "Mind, Body, and the Criminal Law" (2013) 97:6 Minn L Rev 2036 at 2098.
29. Francis Shen has reported an experiment in which subjects disagree about whether a headache is a "bodily injury." *Ibid* at 2077.

perspective of ordinary language] there is a difference between a pinched nerve and one which has been a conduit for an emotionally traumatic experience based on fright."[30] One way to appreciate the understandability of the physical-emotional distinction is in terms of what some researchers in psychology call the 'prototype theory of categorization.'[31] A corollary of this theory is that, even in the presence of a large number of border-line cases, as long as people can reliably differentiate between the mentally represented prototypes of *x* and of *y*, they can easily understand both (1) that there is a distinction between *x* and *y*, and (2) the features on the basis of which the distinction rests. For example, people can easily understand that there is a distinction between 'furniture' and 'decoration' and what the distinction is about, and they can do this notwithstanding the existence of a large number of border-line cases, such as 'lamp,' 'rug,' and 'vase.' In this regard, what is true for the furniture-decoration distinction is true for the physical-emotional distinction as well. At any rate, that the physical-emotional distinction is easily and widely understood means that it is accessible to people both with and without legal training. The physical-emotional distinction is ecumenical and secular, not sectarian or mysterious. This in turn means that judges in a democratic polity can appeal to it in explaining or justifying their decisions without thereby running afoul of what some researchers in political philosophy call the 'public reason' constraint.[32]

A second and closely related feature of the physical-emotional distinction that makes it a useful tool for judges who must draw lines between legally cognizable and non-cognizable harm is that the distinction may be cognitively intuitive. Consider one reported finding that supports this hypothesis. At least two research teams in developmental psychology have reported that the capacity to perceive emotional harm as morally wrong requires more ontogenetic development than does the capacity to perceive physical harm as morally wrong.[33] This reported finding means that young children develop the ability to encode physical harm (e.g., 'Mary hit William') as morally wrong before they develop the ability to encode emotional harm (e.g., 'Mary humiliated William') in this way. A corollary of this finding is that it is cognitively easier for people—including adults—to perceive physical harm (relative to emotional harm) as requiring redress, even where the difference in cognitive difficulty is small. Put differently, people perceive physical harms (relative to emotional harms) as more prototypical members of the category 'moral wrong'; physical harms are moral wrongs

30. *Lawson v Management Activities, Inc*, 69 Cal App (4th) 652 at 665 (Cal Ct App 1999).

31. See e.g. Diederik Aerts et al, "Generalizing Prototype Theory: A Formal Quantum Framework" (2016) 7 Frontiers in Psychology 1 at 1-2.

32. See e.g. John Thrasher & Kevin Vallier, "The Fragility of Consensus: Public Reason, Diversity, and Stability" (2015) 23:4 Eur J Phil 933 at 933.

33. See Isobel A Heck, Jessica Bregant & Katherine D Kinzler, "'There Are No Band-Aids for Emotions': The Development of Thinking About Emotional Harm" (2021) 57:6 Developmental Psychology 913 at 921; Judith G Smetana & Courtney L Ball, "Heterogeneity in Children's Developing Moral Judgments About Different Types of Harm" (2019) 55:6 Developmental Psychology 1150 at 1159.

par excellence.[34] The greater cognitive ease of perceiving physical harm (relative to emotional harm) as morally wrong suggests that the physical-emotional distinction is cognitively intuitive.

Thirdly, the physical-emotional distinction happens to correlate with another and, for judges, more important distinction: that between easier- and harder-to-verify harm (here, 'verification' means something such as 'objective corroboration'). To be sure, some harms that both ordinary language and tort tend to classify as physical (e.g., chronic back pain) are often hard to verify, whereas some harms that they tend to classify as emotional (e.g., catatonia) are often easy to verify. However, *on average*, traditional physical harm is easier to verify than is traditional emotional harm. As the *Restatement* puts it, "emotional harm is less objectively verifiable than physical harm and therefore easier for an individual to feign, to exaggerate, or to imagine."[35] This means that judges can use the physical-emotional distinction as a proxy for the distinction between easier- and harder-to-verify harm. Many courts have described the physical-emotional distinction as a proxy in this sense, explaining that what determines judicial classification of a harm as physical versus emotional is not where the harm falls along a mind-body continuum but the degree to which it is verifiable.[36] Consider, for instance, the Maryland Supreme Court's statement that, in the context of limitations on recovery for NIED, "the term 'physical' is not used in its ordinary dictionary sense. Instead, it is used to represent that the injury for which recovery is sought is capable of objective determination."[37]

In summary, at least three features of the physical-emotional distinction make it a useful tool for judges who must draw lines between legally cognizable and

34. One way to test this hypothesis is by asking people in different cultures spontaneously to list examples of morally objectionable harm. The hypothesis predicts that respondents would produce physical harms more quickly and more often than they would produce emotional harms.

35. 2 *Restatement*, *supra* note 12, ch 8 scope note at 132 (2012).

36. See e.g. *Petition of United States*, 418 F (2d) 264 at 269 (1st Cir 1969): "[t]he term 'physical' is not used in its ordinary sense for purposes of applying the 'physical consequences' rule. Rather, the word is used to indicate that the condition or illness for which recovery is sought must be one susceptible of objective determination."; *D'Ambra v United States*, 396 F Supp 1180 at 1183 (RI Dist Ct 1973): "[i]t . . . is the objective manifestation of the injury which is crucial, not whether the injury is, in conventional terms, physical or mental"; *Hunt v Mercy Medical Center*, 710 A (2d) 362 at 366 (Md Ct Spec App 1998): "[a] compensable 'physical injury' may be demonstrated simply by evidence of a distressed mental state. Therefore, although we may casually characterize a purported injury as being either physical or emotional in nature . . . the distinction is merely descriptive and not of legal significance. The doctrinally correct position is that an emotional injury (such as mental anguish or emotional distress) may come within the ambit of the 'physical injury' rule by virtue of its outward manifestations. The only limitation on recovery for an emotional injury, imposed to guard against feigned claims, is that the injury must be 'capable of objective determination.'" [footnotes omitted]; *Sullivan v Boston Gas Co*, 605 NE (2d) 805 at 809 (Mass Supp Jud Ct 1993) [*Sullivan*]: "[i]n order to satisfy [the 'physical manifestation' rule], plaintiffs must provide an objective corroboration of the emotional distress alleged" [footnotes omitted]; *Corso v Merrill*, 406 A (2d) 300 (NH Sup Ct 1979) at 307: "we cannot hold as a matter of law that no physical consequences are claimed in [plaintiffs'] amended counts. The complaints allege that the plaintiffs suffered from depression. At trial the plaintiffs may be able to prove through the testimony of medical witnesses that their psychic injury was susceptible to objective medical determination." [footnotes omitted].

37. *Vance v Vance*, 408 A (2d) 728 at 733-34 (Md Ct App 1979) [footnotes omitted].

non-cognizable harm: (1) it is easily understandable and widely understood; (2) it may be cognitively intuitive; and (3) it is a proxy for the distinction between easier- and harder-to-verify harm.

Showing that the physical-emotional distinction is a useful tool for judges who must draw lines between legally cognizable and non-cognizable harm is not the same as showing that judges have in fact used the distinction for this purpose. To see that judges have in fact used the physical-emotional distinction as a heuristic in this sense, it is helpful to consider case law. The following discussion focuses on case law pertaining to the 'direct-victim' variant of NIED.[38]

Consider four of the limits on recovery for emotional harm that courts either imposed in the past or continue to impose today.[39] It can be helpful to understand these limits as exceptions to a default rule prohibiting recovery for emotional harm.

- **the 'physical injury' rule**: recovery for emotional harm may be allowed if defendant negligently causes plaintiff physical harm and the emotional harm accompanies the physical harm.
  - Example: In *Homans v Boston Elevated Railway*,[40] plaintiff was riding in defendant's street-car when, due to an accident caused by defendant's negligence, plaintiff was thrown against a seat. Plaintiff also experienced 'nervous shock' due to the accident. The court allowed recovery for the nervous shock on account of plaintiff's collision with the seat.
- **the 'physical impact' rule**: recovery for emotional harm may be allowed if, in negligently causing plaintiff the emotional harm, defendant makes physical contact with plaintiff.
  - Example: In *Porter v Delaware, Lackawanna, and Western Railroad Co*,[41] plaintiff was walking in the street when, due to an accident caused by defendant's negligence, defendant's railway bridge collapsed. Plaintiff

38. In the direct-victim variant, the plaintiff alleges that the defendant's negligent conduct caused the plaintiff to suffer emotional harm, but *not* that the emotional harm stemmed from the plaintiff's perception of physical harm to a third party. For example, where a driver negligently almost hits a pedestrian, causing severe anxiety in the pedestrian, the pedestrian's claim of NIED against the driver is a direct-victim claim. By contrast, in the 'bystander' variant, the plaintiff alleges that the emotional harm stemmed from the plaintiff's perception of physical harm to a third party. For example, where a driver negligently hits a child, and where the child's father sees the accident and experiences severe anxiety as a result, the father's claim of NIED against the driver is a bystander claim. That said, the legal community does not have a standard formulation of the difference between direct-victim and bystander situations, and the relationship between the two has generated confusion. See e.g. *Burgess v Superior Court*, 831 P (2d) 1197 at 1199-1201 (Cal Sup Ct 1992). Moreover, some cases generate fact patterns that put significant pressure on the direct-victim-bystander distinction. See e.g. *Jarrett v Jones*, 258 SW (3d) 442 at 448 (Mo Sup Ct 2008) (holding that a plaintiff-truck driver who collided with a car, left his truck to check on the car's occupants, and observed a dead child in the car was a direct victim, and not a bystander).

39. The following formulations are stylizations; in reality, different courts define the relevant limits differently. For example, Georgia courts around 2000 fused the 'physical injury' and 'physical impact' rules. See e.g. *Lee v State Farm Mutual Insurance Co*, 533 SE (2d) 82 at 84 (Ga Sup Ct 2000).

40. 62 NE 737 (Mass Sup Jud Ct 1902).

41. 63 A 860 (NJ Sup Ct 1906).

experienced nervous shock due to the accident. The accident also scattered dust, some of which entered plaintiff's eyes. The court allowed recovery for the nervous shock on account of plaintiff's physical contact with the dust.

- **the 'physical manifestation' rule**: recovery for emotional harm may be allowed if defendant negligently causes plaintiff the emotional harm and the emotional harm has a physical manifestation.
  - Example: In *Brown v Matthews Mortuary, Inc*,[42] defendant-mortuary lost the ashes of plaintiff-widow's late husband and gave her the ashes of a stranger instead. Plaintiff later learned of the mistake. The court noted that plaintiff's resulting headaches, sleep problems, and stomach pains would qualify as "physical manifestations" sufficient to state a claim of NIED.[43]
- **the 'zone-of-danger' rule**: recovery for emotional harm may be allowed if, in negligently causing plaintiff the emotional harm, defendant places plaintiff in immediate danger of physical harm and causes plaintiff to fear for their safety.
  - Example: In *Norfolk Southern Railway Co v Everett*,[44] a train that plaintiff-engineer was driving derailed due to defendant-railway company's negligence. The court held that plaintiff's claim of NIED survived summary judgment because, although the accident had not caused plaintiff physical harm, it had placed him in immediate danger of physical harm and caused him to fear for his safety.

For exposition, I will call these four rules the 'traditional' rules. This appellation is appropriate because, although each of these rules remains in force in at least one U.S. jurisdiction today, U.S. courts have been gradually moving away from them for decades.[45] That said, the traditional rules are far from extinct. For example, the *Restatement* endorsed the 'zone-of-danger' rule in 2012,[46] and, in 2015, five states used the 'physical impact' rule.[47] As many courts have explained, the primary purpose of these rules is to provide judges with confidence that the relevant claim of emotional harm is genuine and serious, as opposed to feigned or trivial.[48] As the Tennessee Supreme Court put it with respect to the

42. 801 P (2d) 37 (Idaho Sup Ct 1990).
43. *Ibid* at 44.
44. 682 SE (2d) 621 (Ga Ct App 2009).
45. See e.g. *Taylor v Baptist Medical Center, Inc*, 400 So (2d) 369 at 374 (Ala Sup Ct 1981) [*Taylor*] (rejecting the 'physical injury' rule); *Dillon v Legg*, 441 P (2d) 912 at 925 (Cal Sup Ct 1968) [*Dillon*] (rejecting the 'zone-of-danger' rule); *Corgan v Muehling*, 574 NE (2d) 602 at 606-07, 609 (Ill Sup Ct 1991) (rejecting the 'physical manifestation' rule); *Johnson v Ruark Obstetrics and Gynecology Associates, PA*, 395 SE (2d) 85 at 97 (NC Sup Ct 1990) [*Johnson v Ruark*] (rejecting the 'physical injury,' 'physical impact,' and 'physical manifestation' rules); *Camper v Minor*, 915 SW (2d) 437 at 446 (Tenn Sup Ct 1996) (rejecting the 'physical injury' and 'physical manifestation' rules).
46. See 2 *Restatement*, *supra* note 12 at § 47(b) (2012).
47. See Stephan Krejci, "Is General Negligence the New Exception to the Florida Impact Rule?" (2015) 10:2 Fla A & M U L Rev 267 at 269.
48. See e.g. *Keck v Jackson*, 593 P (2d) 668 at 669-70 (Ariz Sup Ct 1979): "[d]amages for emotional disturbance alone are too speculative"; *St Louis, I M & S Ry Co v Taylor*, 104 SW 551 at 552-53 (Ark Sup Ct 1907): "[t]he reason that mental suffering, unaccompanied by physical injury, is not considered as an element of recoverable damages is that it is deemed to be too remote, uncertain, and difficult of ascertainment" [footnotes omitted]; *Orlo v*

'physical injury' rule in particular, the rule "served to objectify the inquiry; it assured that the plaintiff's allegations of emotional injury were grounded in an independently verifiable event."[49]

This section does not seek to add to the literature about the traditional rules' history,[50] justifiability,[51] or fit with general negligence doctrine.[52] Instead, it considers the rules' conceptual structure, as well as what this structure can reveal about how and why judges created them.

Examining the traditional rules together helps illuminate at least three of their features. First, from a conceptual-structural perspective, all of the traditional rules operate in a similar way: they in effect define the concept of legally cognizable emotional harm by reference to the concept of physical harm. Moreover, in each of the traditional rules, the physical-emotional distinction operates recursively: it operates once to delineate a class of harms that require special limitation (namely, emotional harms), and it then operates a second time to set the limitation.

Secondly, despite the traditional rules' obvious susceptibility to generating both false positives and false negatives, they are a rational response to the problem of drawing lines between legally cognizable and non-cognizable harm. The traditional rules are susceptible to generating false positives because not every emotional harm that satisfies the relevant rule is worthy of legal recognition, and they are susceptible to generating false negatives because not every emotional harm that fails to satisfy the relevant rule is unworthy thereof. However, despite the traditional rules' susceptibility to generating wrong results, they are not irrational. As long as one accepts the reasonable assumption that, on average, an emotional harm that is indexed to a physical harm is more compelling than one that is not, the rules do, on balance, serve the function of differentiating between emotional harm that is and is not compelling. Consider, for instance, the 'zone-of-danger' rule, according to which recovery for emotional harm may be allowed if, in negligently causing the plaintiff the emotional harm, the defendant

Connecticut Co, 21 A (2d) 402 at 405 (Conn Super Ct 1941): "[t]he real basis for the requirement that there shall be a contemporaneous bodily injury or battery, is that this guarantees the reality of the damage claimed" [footnotes omitted]; *Rodrigues v State*, 472 P (2d) 509 at 519 (Hawaii Sup Ct 1970): "the interest in freedom from the negligent infliction of mental distress has in fact been protected whenever the courts were persuaded that the dangers of fraudulent claims and undue liability of the defendant were outweighed by assurances of genuine and serious mental distress. In drawing exceptions to the rule of no recovery, the courts have found such assurances in an accompanying physical injury or impact, host cause of action, or special factual pattern." [footnotes omitted]; *Hendren v Arkansas City*, 252 P 218 at 219 (Kan Sup Ct 1927): "a simulated but groundless claim of mental pain and suffering is so easy to make and hard to disprove, or to measure in damages if genuine, that the law will seldom permit an award therefor apart from a related physical injury" [footnotes omitted].

49. *Carroll v Sisters of Saint Francis Health Services, Inc*, 868 SW (2d) 585 at 593 (Tenn Sup Ct 1993).

50. See e.g. Robert J Rhee, "A Principled Solution for Negligent Infliction of Emotional Distress Claims" (2004) 36 Ariz St LJ 805 at 817-18.

51. See e.g. Alvan Brody, "Negligently Inflicted Psychic Injuries: A Return to Reason" (1961) 7:2 Villanova L Rev 232.

52. See e.g. Gregory C Keating, "Is Negligent Infliction of Emotional Distress a Freestanding Tort?" (2009) 44 Wake Forest L Rev 1131 at 1157-69.

places the plaintiff in immediate danger of physical harm and causes the plaintiff to fear for their safety. As long as one accepts the reasonable assumption that, on average, an emotional harm that is indexed to the fear of physical harm is more compelling than an emotional harm that does not have this feature, the zone-of-danger rule does, on balance, serve the function of differentiating between emotional harm that is and is not compelling. Many post-1970 courts[53]—as well as some earlier courts[54]—have described the traditional rules as 'arbitrary' or 'artificial.' The truth-value of this description is complex: the traditional rules *are* arbitrary and artificial—but not *entirely* so.[55] They are arbitrary and artificial insofar as the presence of a connection to physicality—a physical nexus—does not guarantee that the relevant emotional harm is compelling (and, conversely, insofar as the lack of such a connection does not guarantee that the emotional harm is not compelling). However, they are *not* arbitrary or artificial insofar as, on balance, they are non-random and rational strategies for advancing a highly intelligible goal.[56]

Thirdly, examining the traditional rules together helps generate hypotheses about the cognitive-psychological processes by which judges created them. Consider two such hypotheses, which I call 'association' and 'cognitive miser,' respectively. According to the association hypothesis, in creating the traditional rules, judges were using simple associative thinking. More precisely, judges were accustomed to treating physical harm as legally cognizable, so they adopted the strategy of treating as legally cognizable *that emotional harm that they could associate with physical harm*. One implication of the association hypothesis is that there is at least one well-defined sense in which the traditional rules are *common-sensical*. According to the cognitive miser hypothesis, judges creating the traditional rules were economizing on cognitive resources. More precisely, instead of determining whether a given emotional harm is legally cognizable by asking the more difficult question of (e.g.) whether the harm *ought* to qualify for judicial redress, judges did so by asking the easier question of whether the harm stands in a certain type of relation to a physical harm. One implication of the cognitive miser hypothesis is that there is at least one well-defined sense in which the traditional rules are a *default* solution to the problem of drawing

53. See e.g. *Gammon v Osteopathic Hospital of Maine, Inc*, 534 A (2d) 1282 at 1283 (Me Sup Jud Ct 1987) [*Gammon*]: "more or less arbitrary requirements"; *Bass v Nooney Co*, 646 SW (2d) 765 at 771 (Mo Sup Ct 1983) [*Bass*]: "arbitrary, artificial rule[s]"; *James v Lieb*, 375 NW (2d) 109 at 114 (Neb Sup Ct 1985): "the artificial boundaries of recovery drawn by the 'zone of danger' rule"; *St Elizabeth Hospital v Garrard*, 730 SW (2d) 649 at 651, n2 (Tex Sup Ct 1987) [*St Elizabeth*]: "artificial barriers"; *Bowen v Lumbermens Mutual Casualty Co*, 517 NW (2d) 432 at 442 (Wis Sup Ct 1994) [*Bowen*]: "artificial, vague, and inconsistent rules."

54. See e.g. *Waube v Warrington*, 258 NW 497 at 501 (Wis Sup Ct 1935): "arbitrary boundary."

55. For a similar argument about the 'zone-of-danger' rule in particular, see e.g. Richard N Pearson, "Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules" (1982) 34:4 U Fla L Rev 477 at 485.

56. For a similar argument about the 'zone-of-danger' rule in particular, see e.g. Julie A Davies, "Direct Actions for Emotional Harm: Is Compromise Possible?" (1992) 67:1 Wash L Rev 1 at 20-22.

lines between legally cognizable and non-cognizable emotional harm. Although these two hypotheses are testable, they are obviously speculative, and I will not do more than outline them here. My goal here is only to suggest that treating the traditional rules as a group helps identify interesting and experimentally tractable questions about judicial cognition and decision-making.

The foregoing analysis argued, *inter alia*, that the traditional rules are an unsurprising response to the problem of drawing lines between legally cognizable and non-cognizable harm. One way to support this argument is by showing that decision-makers *other than judges* have used the traditional rules for similar purposes. An episode from British military history seems to provide evidence in this regard. During the First World War, as soldiers began to report 'shell shock,' the British military faced the problem of drawing lines between claims that it would deem compelling (which it sometimes called 'wounds' or 'shell shock W') and those that it would deem non-compelling ('sickness' or 'shell shock S').[57] One of the ways in which the British military responded to this problem was by adopting the following rule: a soldier reporting shell shock might be deemed 'wounded'—and thus eligible for a military pension—if his shell shock was connected to a discrete, identifiable shell explosion.[58] Note that this rule seems to have been very similar to tort's 'physical impact' and 'zone-of-danger' rules: a soldier whose shell shock is linked to a discrete shell explosion is more likely to have been physically touched (satisfying 'physical impact') and physically endangered (satisfying 'zone-of-danger') by the explosion. Like U.S. courts applying the traditional rules, the British military seems to have used the presence of a physical nexus as a heuristic for drawing lines between cognizable and non-cognizable emotional harm. Presumably, the decision-makers who adopted this rule were not primarily lawyers.[59] This episode suggests that the traditional rules, rather than being an idiosyncratic creature of the judiciary, are tools that various types of decision-makers may use to structure and simplify a difficult line-drawing task.

In summary, the traditional rules represent an effort by judges to use the physical-emotional distinction as a heuristic for drawing lines between legally cognizable and non-cognizable harm.

* * *

Beginning around the 1970s, courts in many U.S. states began to break away from the traditional rules.[60] More precisely, courts began to draw lines between legally cognizable and non-cognizable emotional harm without defining cognizable emotional harm in terms of physical harm. It is difficult to generalize about how courts did this, because the relevant doctrinal developments differed from state to state. Moreover, in some states, the high court was not always clear

57. See Ben Shephard, *A War of Nerves: Soldiers and Psychiatrists in the Twentieth Century* (Harvard University Press, 2000) at 28-29.
58. *Ibid* at 29.
59. *Ibid* at 28-29.
60. See *supra* note 45.

or consistent about its position, creating confusion at the bar.[61] As the North Carolina Supreme Court remarked in 1990, "[w]e perceive no single clear doctrine to which it can be said that a majority of states adhere" in the area of NIED.[62]

Just as courts had adopted more than one traditional rule, so they adopted more than one approach for breaking away from the traditional rules. A brief discussion of four post-1970 high court decisions—in California, Montana, Massachusetts, and Kentucky, respectively—conveys the diversity of approaches that courts took in this regard.

California. In *Molien v Kaiser Foundation Hospitals*, a doctor mistakenly diagnosed a wife with syphilis and told her to inform her husband of the diagnosis so that the husband could test himself for the disease.[63] Although neither the wife nor the husband had in fact contracted syphilis, in what appears to have been an Ibsen-like misfortune,[64] the diagnosis in effect ruined the marriage. The husband sued the doctor for NIED. The California Supreme Court held that a plaintiff may be able to recover for NIED absent a showing of a physical nexus if the emotional harm was (1) "foreseeable," (2) "serious," and (3) "objectively verifiable."[65] In *Molien*, in other words, instead of defining legally cognizable emotional harm in terms of physical harm (as the traditional rules do), the Court defined it as emotional harm that is foreseeable, serious, and objectively verifiable.

Montana. In *Johnson v Supersave Markets*, a man inadvertently issued a bad check to a store.[66] Although he subsequently re-paid the debt, the store failed to notify the local prosecutor that he had done so, causing the man to be detained for about two hours. The man sued the store for NIED. The Montana Supreme Court held that a plaintiff may be able to recover for NIED absent a showing of a physical nexus if the emotional harm (1) invaded "a legally protected interest" of the plaintiff and (2) caused "a significant [but not necessarily physical] impact upon the person of plaintiff."[67] In *Johnson*, in other words, instead of defining legally cognizable emotional harm in terms of physical harm, the Court defined it as emotional harm that invades a legal interest of the plaintiff and significantly affects the plaintiff's welfare.

Massachusetts. Until 1993, Massachusetts used the 'physical manifestation' rule:

> [A] plaintiff in order to recover for negligently inflicted emotional distress must prove the following: (1) negligence; (2) emotional distress; (3) causation; (4) *physical harm manifested by objective symptomatology*; and (5) that a

61. For example, the Texas Supreme Court endorsed NIED as a stand-alone tort in 1987, see *St Elizabeth*, *supra* note 53; but reversed course in 1993, see *Boyles v Kerr*, 855 SW (2d) 593 at 595-96 (Tex Sup Ct 1993).
62. *Johnson v Ruark, supra* note 45 at 89.
63. 616 P (2d) 813 (Cal Sup Ct 1980) [*Molien*].
64. One of Ibsen's most emotionally meaningful plays, *Ghosts*, considers the effect of syphilis on a family's understanding of itself. See Henrik Ibsen, *Ghosts: A Family Drama in Three Acts* (W H Baker, 1890).
65. *Molien*, *supra* note 63 at 821.
66. See *Johnson*, *supra* note 7.
67. *Ibid* at 213.

> reasonable person would have suffered emotional distress under the circumstances of the case.[68]

Element (4) is a version of the 'physical manifestation' rule. In 1993, in *Sullivan v Boston Gas*,[69] the Massachusetts Supreme Judicial Court re-interpreted element (4) to rid it of reference to the concept of physicality:

> In order to satisfy [element (4)], plaintiffs must provide an objective corroboration of the emotional distress alleged. . . . Expert medical testimony may be needed to make this showing. *Medical experts, however, need not have observed an actual, external sign of physical deterioration*.[70]

Thus, after 1993, Massachusetts plaintiffs were potentially able to recover for NIED absent a showing of a physical nexus if the emotional harm was (1) 'objectively corroborated' and (2) 'reasonable.'[71]

Kentucky. In *Osborne v Keeney*,[72] the plaintiff was inside of her house when a pilot flying a small plane crash-landed into her roof. The collision did not produce a physical contact with the plaintiff. The plaintiff sued for NIED, and the defendant moved for a directed verdict on the alleged basis that plaintiff had failed to satisfy Kentucky's 'physical impact' rule. The trial court denied the motion, determining that the *noise of the collision* had constituted a 'physical impact.' Noting that the trial court had found it necessary to finesse the 'physical impact' rule, the Kentucky Supreme Court rejected the rule altogether. It determined that a plaintiff may be able to recover for NIED absent a showing of a physical nexus if the emotional harm was (1) "severe" and (2) supported by "expert medical or scientific proof."[73]

In summary, the four preceding high court decisions provide a sense of the diversity of ways in which, beginning around the 1970s, courts in many states began to replace the traditional rules with other tools for drawing lines between legally cognizable and non-cognizable emotional harm.

For exposition, I will call rules such as those of *Molien*, *Johnson*, *Sullivan*, and *Osborne* 'non-traditional' rules. From a legal-doctrinal perspective, many of the non-traditional rules are what Dan Dobbs has called "ordinary negligence-foreseeability" rules, in that they treat NIED claims as more-or-less ordinary negligence claims.[74] For present purposes, however, a different aspect of these rules is more relevant: they do not refer to the concept of physical harm.

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68. *Payton v Abbott Labs*, 437 NE (2d) 171 at 181 (Mass Sup Jud Ct 1982) [emphasis added, footnotes omitted].
69. See *Sullivan*, *supra* note 36.
70. *Ibid* at 810 [emphasis added, footnotes omitted].
71. Interestingly, the *Sullivan* court explained that 'physical' meant something such as 'subject to objective corroboration,' not 'distinct from "mental."' *Ibid* at 809-10.
72. 399 SW (3d) 1 (Ky Sup Ct 2012) [*Osborne*].
73. *Ibid* at 17-18.
74. Dan B Dobbs, "Undertakings and Special Relationships in Claims for Negligent Infliction of Emotional Distress" (2008) 50:1 Ariz L Rev 49 at 52.

Consider three features of the non-traditional rules. First, although they do not index legally cognizable emotional harm to physical harm, they continue to use the physical-emotional distinction as a line-drawing heuristic. They continue, in other words, to limit recovery for emotional harm in ways that they do not limit recovery for physical harm. This suggests that judges as a whole differentiate between (1) indexing legally cognizable emotional harm to physical harm, and (2) applying special limits to recovery for emotional harm.

Secondly, and relatedly, the non-traditional rules demonstrate a simple but perhaps non-obvious conceptual point: a judge can use the physical-emotional distinction as a heuristic for drawing lines between legally cognizable and non-cognizable harm without thereby defining cognizable emotional harm in terms of physical harm. This point, which may seem pedantic, matters, if only for rhetorical reasons. Where judges define legally cognizable emotional harm in terms of physical harm, as in the traditional rules, they risk creating the impression that they deem emotional harm second-class. This is because the traditional rules risk creating the impression that emotional harm is legally cognizable only insofar as it resembles physical harm. In this regard, the non-traditional rules are different. Because they define legally cognizable emotional harm in terms of 'agnostic' concepts such as 'corroboration,' 'foreseeability,' and 'severity'—concepts that are largely orthogonal to the physical-emotional distinction—they are less likely to create the perception that tort depreciates emotional harm.

Thirdly, the process by which judges moved from the traditional to the non-traditional rules exemplifies judicial *learning*. More precisely, judges made this transition partly because they had learned—on the basis of first-, second-, and third-hand experience—that the traditional rules were flawed in their ability to draw satisfactory lines between compelling and non-compelling emotional harm.[75] It can be helpful to schematize the transition from the traditional to the non-traditional rules as a one-step move. At *time one*, judges created the traditional rules partly because they hoped that these rules would allow for bright-line determination of whether a given emotional harm is legally cognizable. Consider, for instance, the 'physical impact' rule. Upon a casual reading, it is easy to suppose that this rule reliably allows for bright-line determination—that an emotional harm either does or does not result from an event in the course of which the defendant made physical contact with the plaintiff. As one Oregon court put it, "[t]he impact rule seems to us to reflect the best policy option. The line it provides is clear."[76] However, over time, as litigation brought an ever-larger store of fact patterns to judges' attention, they gradually learned that the 'physical impact' rule would not reliably allow for bright-line treatment. Where defendant-hospital erroneously diagnoses plaintiff-patient with HIV, is

75. One source of first-hand experience was judges' exposure to relevant legal cases, one source of second-hand experience was judges' exposure to other judges with exposure to relevant cases, and one source of third-hand experience was judges' exposure to legal scholarship authored by writers with second-hand experience.

76. *Saechao v Matsakoun*, 717 P (2d) 165 at 169 (Or Ct App 1986).

the jab by which the hospital drew blood from the patient an 'impact' for purposes of the 'physical impact' test?[77] Where plaintiff-restaurant patron bites into a chicken salad that contains an unwrapped condom, is the contact between plaintiff's mouth and the salad an 'impact'?[78] Where a robber enters a suite in defendant-hotel and nudges plaintiff-hotel guest into the bathroom so that he is better able to search the living room for valuables, is the nudge an 'impact'?[79] The answers to questions such as these are not immediately obvious. Thus, at *time two*, judges began to move away from the traditional rules and toward the non-traditional ones. This transition can be usefully understood as an instance of a generic human learning process. Human learning often takes the form of creating an action rule, subsequently encountering previously unforeseen situations in which the rule's performance falls short of the agent's aspiration level, and then modifying the rule in light of the new situations. Judges encounter many opportunities to perceive an action rule's inadequacy, because their work brings them into regular contact with what the Massachusetts Supreme Judicial Court has called "the infinite variety of new patterns of human activity."[80]

For one source of evidence that judges' move from the traditional to the non-traditional rules exemplifies learning, consider how judges themselves have explained why they made the transition.

> The supposed beauty of the impact rule is that it draws a bright line for determining when a plaintiff is entitled to recover for emotional injuries. At first blush, this may make sense and seem to counterbalance the feared possibility of subjectivity in finding emotional injury. But, in practice, what constitutes a sufficient impact for purposes of liability is not an easy determination for courts. . . . In reality, the bright line of impact establishing liability is not so bright.[81]

> The impact rule was viewed as a bright line. However, fact situations inevitably arose that did not satisfy the requirements of the impact rule even though justice seemed to call for compensation . . . . [T]he rule proved unsatisfactory because it barred plaintiffs from recovering even when they could establish a causal link between the defendant's negligence and the plaintiff's emotional injury.[82]

> Our prior decisions . . . demonstrate the frailty of supposed lines of demarcation [i.e., the traditional rules] when they are subjected to judicial scrutiny in the context of varying fact patterns.[83]

> [E]xperience showed more and more clearly the unfairness and inequity of the impact rule.[84]

77. For this fact pattern, see *RJ v Humana of Florida, Inc*, 652 So (2d) 360 (Fla Sup Ct 1995).
78. For this fact pattern, see *Chambley v Apple Restaurants, Inc*, 504 SE (2d) 551 (Ga Ct App 1998).
79. For this fact pattern, see *Ruttger Hotel Corp v Wagner*, 691 So (2d) 1177 (Fla Ct App 1977).
80. *Sullivan, supra* note 36 at 808.
81. *Osborne*, *supra* note 72 at 15-16 [footnotes omitted].
82. *Bowen*, *supra* note 53 at 437 [footnotes omitted].
83. *Gammon*, *supra* note 53 at 1284-85.
84. *Bass*, *supra* note 53 at 769.

> These exceptions to the general rule [i.e., the traditional rules] . . . have not proved to be the panacea anticipated . . . . [T]he traditional approach to the tort of emotional distress has proven, at best, cumbersome.[85]

As these statements suggest, judges who broke away from the traditional rules did so partly because they had learned the rules' flaws. Consider, in this regard, *Dillon v Legg*, which is perhaps the best-known twentieth-century NIED decision.[86] *Dillon* involved the following tragedy. A mother and two of her daughters, Cheryl and Erin, were crossing a street when a driver hit and killed Erin. Both Cheryl and the mother sued the driver in the bystander variant of NIED, on the basis of the emotional harm that they suffered when they saw what happened to Erin. The trial court applied the 'zone-of-danger' rule and sustained Cheryl's claim but dismissed the mother's, because, unlike Cheryl, the mother had been standing too far from the car to have been physically endangered by it. The California Supreme Court used *Dillon* to reject the 'zone-of-danger' rule, noting the obvious awkwardness of allowing only Cheryl, and not also the mother, the opportunity to recover. The California Supreme Court's decision-making in *Dillon* suggests that, sometimes, judges reject a rule when and because they encounter a previously unimagined fact pattern that dramatically increases the salience of the rule's flaws. As the California Supreme Court put it in *Dillon*, "[t]he instant case exposes the hopeless artificiality of the zone-of-danger rule."[87] *Dillon* dramatically shifted judges' attention to this rule's flaws by presenting a fact pattern that is unusual and thus difficult to imagine before the fact, and to which the rule gives an obviously awkward answer. Judges working before *Dillon* had not been exposed to the suit's dramatic demonstration of the rule's awkwardness. That a previously unimagined fact pattern can dramatically increase the salience of a rule's flaws is obvious, but it raises at least two non-trivial points. First, present-day legal commentators may need to exert effort to perceive that historically earlier judges did not have access to the store of fact patterns with which today's commentators are acquainted. More generally, in evaluating the performance of historically earlier decision-makers, it can be easy to over-look that they did not know all that we know today and thus to over-attribute their decision-making to dispositional factors (this over-attribution may be an instance of what some psychologists call the "fundamental attribution error").[88] Secondly, judges may need to exert effort to avoid being unduly influenced by recency effects, as when a particularly salient fact pattern causes a judge to exchange one rule for another that is equally or more flawed but whose flaws are not presently salient.

* * *

The foregoing analysis provides an account of why judges adopted the traditional rules, why many judges later became dissatisfied with them, and why many of the

85. *Sacco v High Country Independent Press, Inc*, 896 P (2d) 411 at 418-24 (Mont Sup Ct 1995).
86. See *Dillon*, *supra* note 45.
87. *Ibid* at 915.
88. Lee Ross, "The Intuitive Psychologist and His Shortcomings: Distortions in the Attribution Process" (1977) 10 Advances in Experimental Social Psychology 173 at 183.

later judges subsequently replaced the traditional rules with the non-traditional ones. This account is schematic and abstracts from much doctrinal, historical, and sociological detail. However, it suffices to sustain the contention that, both before and after the 1970s, far from being invested in dualism, judges used the physical-emotional distinction as a common-sense tool to help them draw lines between legally cognizable and non-cognizable harm. In using the traditional rules, judges identified legally cognizable emotional harm with emotional harm that stands in a sufficiently close relationship to physical harm. In using the non-traditional rules, judges identified it with emotional harm that satisfies criteria that do not refer to the concept of physicality. In both cases, judges used the physical-emotional distinction as a heuristic to structure and simplify a difficult line-drawing task.

Before turning to some of the normative implications of the foregoing analysis, I would like briefly to consider the relationship between neuro-imaging (e.g., CT, fMRI, PET) evidence and claims of emotional harm. If and when neuro-imaging technology reaches the point at which emotional harm is just as verifiable as is physical harm, then one of tort's important reasons for distinguishing between the two will dissolve. At the same time, pointing to the mere *possibility* that neuro-imaging technology may someday reach this point is not likely to undermine tort's physical-emotional distinction. Unless and until neuro-imaging technology is able to close the verifiability gap between physical and emotional harm—something that it cannot do at present—most courts will continue to find the physical-emotional distinction useful in drawing lines between legally cognizable and non-cognizable harm.[89]

II. Normative Implications

II.A Users of tort's physical-emotional distinction should clarify that they neither endorse dualism nor depreciate emotional harm

Users of tort's physical-emotional distinction—such as judges, lawyers, and *Restatement* authors—may find it useful to clarify that, in distinguishing between

89. Legal scholars who have studied research in neuro-imaging believe that, although brain imaging technology may be able reliably to evidence emotional harm in the future, it cannot do so at present. See e.g. Peter A Alces, *The Moral Conflict of Law and Neuroscience* (University of Chicago Press, 2018) at 122: "[b]rain scans may enable us to see the scars left by emotional trauma. . . . Once administrative hurdles are overcome, once we can be as certain of emotional injury as we are now of some physical injuries, doctrinal barriers to recovery for the negligent infliction of emotional distress should fall." [footnotes omitted]; Joseph J Avery, "Picking and Choosing: Inconsistent Use of Neuroscientific Legal Evidence" (2017) 81:3 Alb L Rev 941 at 968: "[s]oon, if not now in some limited instances, we will have evidence of mental suffering that approximates the evidentiary value of a bruise, a scrape, or some other outward marking of physical damage"; Jennifer A Chandler, "The Impact of Biological Psychiatry on the Law: Evidence, Blame, and Social Solidarity" (2017) 54:3 Alta L Rev 831 at 834-35: "[a]t present, it is not clear if or when [fMRI] research will furnish evidence of mental states like pain, deception, or memory that will satisfy tests of evidentiary admissibility"; Adam J Kolber, "Will There Be a Neurolaw Revolution?" (2014) 89:2 Ind LJ 807 at 834: "[neuro-imaging] technologies could someday help us more accurately assess emotional pain in court"; A C Pustilnik, "Imaging Brains, Changing Minds: How Pain Neuroimaging Can Inform the Law" (2015) 66:5 Ala L Rev 1099 at 1107: "[n]euroimaging is *not* a pain-o-meter and is not suitable as individual proof of pain" [emphasis in original].

the physical and the emotional, they neither endorse dualism nor depreciate emotional harm. The *Restatement*, for instance, makes some statements that suggest that it understands the physical-emotional distinction as a heuristic, but it is not as explicit as it can be in this regard.[90] *Restatement* authors may consider making more explicit that they do not endorse dualism and that they know well that the boundary between the physical and the emotional is fuzzy and collapsible. They may also clarify that, in drawing the physical-emotional distinction, they hold that physical harm and emotional harm differ not *in every case* but only *on average*. *Restatement* authors may also explain that the document's use of the physical-emotional distinction is wholly compatible with the recognition that emotional harm can severely reduce a person's welfare.

At issue here are, *inter alia*, perceptions of the *Restatement*'s sophistication. Critics of the *Restatement* have argued that its use of the physical-emotional distinction impugns its consilience with science, and it is in the interest of *Restatement* authors to void this argument.[91] One way in which they may be able to do this is by emphasizing that the *Restatement*'s physical-emotional distinction amounts to an intentionally idiosyncratic use of an ordinary-language distinction. More generally, critics have argued that, in using the physical-emotional distinction, tort disregards "the importance of mental health to our lives."[92] The many legal professionals who use the physical-emotional distinction while being highly cognizant of the importance of mental health need not, and should not, leave this criticism unrebutted.

II.B Because judicial expertise may not extend to the task of drawing lines between legally cognizable and non-cognizable harm, judicial performance in this area may be more adequate than critics suggest

The problem of drawing lines between legally cognizable and non-cognizable harm raises a question about the proper normative standard by which to evaluate judges' performance in the area of NIED. Consider two perspectives that one may adopt in this regard. From one perspective, judges have performed poorly, producing limitations on the legal cognizability of emotional harm that are arbitrary, incoherent, or unprincipled. From the other perspective, judges have performed satisfactorily, producing limitations that, given the nature of the task, do an adequate job of distinguishing between compelling and non-compelling emotional harm. Which of such perspectives one adopts depends partly on what normative standard one applies.

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90. See 1 *Restatement*, *supra* note 11 at § 4 cmt b (2010): "bodily harm usually provides objective evidence of its existence and extent while the existence and severity of emotional harm is usually dependent upon the report of the person suffering it or symptoms that are capable of manipulation or multiple explanations"; 2 *Restatement*, *supra* note 12 at § 131 (2012): "emotional harm is less objectively verifiable than physical harm and therefore easier for an individual to feign, to exaggerate, or to imagine."

91. See *supra* note 18.

92. David DePianto, "The Hedonic Impact of 'Stand-Alone' Emotional Harms—An Analysis of Survey Data" (2012) 36 Law & Psychol Rev 115 at 122.

In evaluating judges' performance in general (i.e., beyond the area of NIED), it can be helpful to distinguish between problems in which judicial expertise—the particular expertise that judges command in their capacity as judges—is more and less likely to provide judges with an advantage over non-specialists or lay-persons. Because expertise is domain-specific (one cannot be an expert *across the board*), it is always relevant to ask whether a specialist's expertise extends to a given problem. Judges' expertise is probably more likely to provide them with an advantage in problem solving that requires, for instance, knowledge of the law, exposure to currents in academic research, or computational ability. For example, a judge should be better able than is a non-specialist to quickly understand the meaning of 'a high court's reversal of an appellate court's reversal of a trial court's denial of a motion to dismiss a complaint'—a task in which performance benefits from both knowledge of the law and computational ability. By contrast, judges' expertise may be less likely to advantage them in problem solving that requires, for instance, over-riding the influence of strong occurrent emotions or of morally irrelevant numerical anchors.[93]

I suggest that the problem of drawing lines between legally cognizable and non-cognizable harm is one in which judges have less—rather than more—of an advantage over non-specialists. Put differently, this is a problem-domain in which judicial expertise makes only a limited difference to performance. This type of line-drawing is difficult largely because people—be they judges or ordinary citizens—do not tend to store in long-term memory well-formed prototypes of the concept 'legally cognizable harm.' Thus, judges who must draw lines between harm that the judiciary should and should not recognize face at least two challenges. The first challenge is to verbally define 'legally cognizable harm' (e.g., 'a harm is legally cognizable if it impairs one or more of a person's capabilities'). The second challenge is to produce a definition that other judges can understand and apply. To consider the preceding example, the benefit of defining 'legally cognizable harm' in terms of 'capabilities' is minimal if other judges are not clear what the first judge means by a 'capability.' It may be helpful to understand the first challenge as involving the creation of a *standard*, and the second as involving the creation of a *justiciable* standard.

The foregoing helps us understand why, where the task is to draw lines between legally cognizable and non-cognizable harm, judges have relied on a tool that is as simple as is the physical-emotional distinction. This tool is not uninteresting on account of its simplicity; on the contrary, its simplicity is among the reasons why it is notable. Where the task is to draw lines between legally cognizable and non-cognizable harm, judges have adopted simple solutions partly because complex ones are hard to find or not available.

93. See e.g. Andrew J Wistrich, Jeffrey J Rachlinski & Chris Guthrie, "Heart Versus Head: Do Judges Follow the Law or Follow Their Feelings?" (2015) 93 Tex L Rev 855; Birte Englich, Thomas Mussweiler & Fritz Strack, "Playing Dice With Criminal Sentences: The Influence of Irrelevant Anchors on Experts' Judicial Decision Making" (2006) 32:2 Personality & Social Psychology Bulletin 188.

The possibility that complex solutions to this problem are not available bears on the question of what normative standard one should adopt in evaluating judges' performance in the area of NIED. If simple solutions are the only ones available in this problem-domain, then the better conclusion may be that judges have performed satisfactorily there. It may be unrealistic to expect judges to generate sophisticated solutions in a problem-domain in which such solutions may not exist.

II.C Although it may not be possible to determine the optimal way of drawing lines between legally cognizable and non-cognizable emotional harm, moral-philosophical tools such as Rawlsian and Scanlonian contractualism may be able to identify partial or pro tanto considerations for choosing among different ways of doing so

In the background of this essay's analysis is a relatively basic question in legal design: what limits should tort impose on the legal cognizability of emotional harm? Consider, again, some of the relevant options. In principle, at least, tort can use a traditional or a non-traditional rule. Figure 1 lists the eight rules that this essay has discussed in this regard. As noted above, this list is not comprehensive.[94] That said, taken together, the eight rules listed in Figure 1 provide a useful sense of the range of options that are available to courts imposing limits on the legal cognizability of emotional harm. How can one choose among rules such as those listed in Figure 1?

The Introduction suggested that it may not be possible to use conceptual analysis to demarcate a category of 'legally cognizable emotional harm' that is both clear and uncontroversial. This philosophical point has a legal-doctrinal corollary: on the basis of the language or text of a rule, it may not be possible reliably to predict which emotional harms the rule will and will not recognize. Consider, for instance, the *Sullivan* rule, which uses the concepts of objective corroboration and reasonableness. Suppose that a court applies the *Sullivan* rule to a plaintiff-office worker's claim that they suffered emotional harm due to being trapped in defendant-management company's elevator for 30 minutes. Suppose also that the plaintiff introduces the testimony of a treating clinical psychologist that, as a result of this incident, the plaintiff experienced a debilitating anxiety attack. The language of the *Sullivan* rule does not reveal whether this claim is legally cognizable: it is not obvious whether it is reasonable to experience a debilitating anxiety attack due to being trapped in an elevator for 30 minutes; nor is it obvious whether the testimony of a treating clinical psychologist constitutes objective corroboration (among other things, whether a *treating* mental health professional can be relied on to provide objective testimony is a contested question in clinical

94. Courts have used other rules as well. See e.g. *Marlene F v Affiliated Psychiatric Medical Clinic, Inc*, 770 P (2d) 278 at 282 (Cal Sup Ct 1989): "[d]amages for severe emotional distress . . . are recoverable in a negligence action when they result from the breach of a duty owed the plaintiff that is assumed by the defendant or imposed on the defendant as a matter of law, or that arises out of a relationship between the two."

Figure 1. Eight Competing Rules for Limiting the Legal Cognizability of Emotional Harm

Rule name	Rule description
'physical injury'	emotional harm cognizable if defendant negligently causes plaintiff physical harm and the emotional harm accompanies the physical harm
'physical impact'	emotional harm cognizable if, in negligently causing plaintiff the emotional harm, defendant makes physical contact with plaintiff
'physical manifestation'	emotional harm cognizable if defendant negligently causes plaintiff the emotional harm and the emotional harm has a physical manifestation
'zone-of-danger'	emotional harm cognizable if, in negligently causing plaintiff the emotional harm, defendant places plaintiff in immediate danger of physical harm and causes plaintiff to fear for their safety
'*Molien*'	emotional harm cognizable if defendant negligently causes plaintiff the emotional harm and the emotional harm is (1) foreseeable, (2) serious, and (3) objectively verifiable
'*Johnson*'	emotional harm cognizable if defendant negligently causes plaintiff the emotional harm and the emotional harm (1) invades a legal interest of the plaintiff and (2) significantly affects the plaintiff's welfare
'*Sullivan*'	emotional harm cognizable if defendant negligently causes plaintiff the emotional harm and the emotional harm is (1) objectively corroborated and (2) reasonable
'*Osborne*'	emotional harm cognizable if defendant negligently causes plaintiff the emotional harm and the emotional harm is (1) severe and (2) supported by expert medical or scientific proof

psychology).[95] To know which emotional harms the *Sullivan* rule categorizes as legally cognizable, one must, it seems, await judges' interpretations and applications of the rule—interpretations and applications that are difficult or impossible to predict in advance. This example involving the *Sullivan* rule generalizes to other rules for imposing limits on the legal cognizability of emotional harm.

95. See e.g. Michael Finch, Catherine Guthrie & Carol Henderson, "Expert Testimony on Psychological Injury: Procedural and Evidentiary Issues" (2008) 1:1 Psychological Injury & Law 20 at 26.

The example suggests that it may not be possible meaningfully to choose among the rules on conceptual or *a priori* grounds.

In principle, at least, one option that is available to researchers who doubt the ability of conceptual analysis to demarcate a category of 'legally cognizable emotional harm' is to turn to the 'social values' approach that some or many contemporary policy-makers favor.[96] Theoretically, one can use a social values approach such as the following to determine what limits tort should impose on the legal cognizability of emotional harm. First, create a list of all possible emotional harms. Next, elicit the public's judgment about which of the listed emotional harms are compelling and which are non-compelling. Then, for every possible rule, determine how the rule would classify each of the emotional harms. Add a value of '1' for every compelling emotional harm that the rule would recognize, and subtract a value of '1' for every non-compelling emotional harm that it would recognize. Finally, choose the rule with the largest total value; this rule is the optimal rule—the rule that best draws the line between compelling and non-compelling emotional harm.

I take it as obvious (and I assume that the reader does as well) that this approach is infeasible on account of administrative, epistemic, and methodological difficulties. The infeasibility of the social values approach suggests that we do not know, in any rigorous sense of 'know,' which rule is best. This means that disagreements among legal scholars about how tort should limit recovery for emotional harm must, by necessity, involve guesses, hunches, or intuitions. More generally, nobody is in a position confidently to determine what is the optimal solution to the problem of drawing lines between legally cognizable and non-cognizable emotional harm.

Although it may not be possible to determine the optimal way of drawing lines between legally cognizable and non-cognizable emotional harm, certain moral-philosophical tools may be able to identify partial or *pro tanto* considerations for choosing among different ways of doing so. Consider, briefly, two such tools, both of which I draw from normative moral and political philosophy: *Rawlsian* and *Scanlonian contractualism*.[97]

One way to apply Rawlsian contractualism to the emotional harm question is as follows. Suppose that the members of a polity are deprived of information about variables such as their personality traits, the types of social environments in which they are likely to operate, and the probability that they will be plaintiffs or defendants in lawsuits involving claims of emotional harm. Deprived of such information about themselves, what rule for drawing lines between legally cognizable and non-cognizable emotional harm will these people choose? Answering this question is one way to apply the Rawlsian approach to the emotional harm

96. See e.g. Jennifer A Whitty & Peter Littlejohns, "Social values and health priority setting in Australia: An analysis applied to the context of health technology assessment" (2015) 119:2 Health Policy 127.

97. See John Rawls, *A Theory of Justice* (Belknap Press, 1971); T M Scanlon, *What We Owe to Each Other* (Harvard University Press, 1998).

question. I am skeptical of the Rawlsian approach on, *inter alia*, the ground that it is usually impossible to determine what policies, rules, or states of affairs hypothetical contracting parties would choose. That said, researchers who are more convinced of the determinacy of the Rawlsian approach may find it valuable to apply the approach to NIED in particular and to legal design more generally.[98]

Consider, now, one way to apply Scanlonian contractualism to the emotional harm question. A judicial regime in which some but not all emotional harms are legally cognizable will produce at least two types of 'losers': (1) defendants who sincerely believe that they must defend against claims of non-compelling emotional harm, and (2) plaintiffs who sincerely believe that the regime has failed to recognize their compelling emotional harm. Those in group (1) will have the good-faith complaint that they have been unjustifiably hauled into court, and those in group (2) will have the good-faith complaint that they have been unjustifiably deprived of their day in court. To determine what rule for drawing lines between legally cognizable and non-cognizable emotional harm tort should choose, one can ask the following question: what is the most morally attractive explanation or rationalization that tort can give to people in groups (1) and (2) about why it has put them in a 'losing' position? If tort uses one of the traditional rules, then it must tell the unhappy defendants that the reason why they have been hauled into court is that the regime has determined that the plaintiff's claim has a physical nexus (one can conduct an analogous analysis with respect to the unhappy plaintiffs). By contrast, if tort uses one of the non-traditional rules—say, the *Sullivan* rule—then it must tell the unhappy defendants that the reason for their trouble is that the system has determined that the plaintiff's claim is objectively corroborated and reasonable. By considering which of these explanations is normative-morally superior—and perhaps even by polling unhappy plaintiffs and unhappy defendants about which explanation they would prefer to receive—it may be possible to make progress in determining which rule tort should use to draw lines between legally cognizable and non-cognizable emotional harm.

Moral-philosophical tools such as Rawlsian and Scanlonian contractualism have non-trivial limitations, one of which is that they can identity only partial or *pro tanto*—and not complete or all-things-considered—considerations in favor of choosing one rule over others. For example, the preceding Scanlonian-contractualist approach would be open to the counter that, although it accounts for *plaintiffs'* and *defendants'* interests, it fails to account for those of *judges* or of *elected legislators*. This means that, although these moral-philosophical tools can identify discrete considerations in favor of choosing one rule over others, they cannot identify all that one would need to consider in order comprehensively to determine where to draw the line between legally cognizable and non-cognizable emotional harm. With respect to this recalcitrant problem, 'good enough' may be the best that any judicial regime can do.

98. For an application of Rawlsian contractualism to NIED, see Peter A Bell, "The Bell Tolls: Toward Full Tort Recovery for Psychic Injury" (1984) 36:3 U Fla L Rev 333 at 342-43.

Conclusion

Several legal scholars have recently argued that tort law's physical-emotional distinction commits tort to the objectionable position of mind-body dualism, but they have not considered the distinction's role as an aid to judicial cognition and decision-making. Drawing primarily on the law of negligent infliction of emotional distress, this essay has argued that tort's physical-emotional distinction is not a relic of mind-body dualism but a heuristic that judges have used to structure and simplify the difficult but unavoidable task of drawing lines between legally cognizable and non-cognizable harm. The analysis has at least three normative implications: (1) users of tort's physical-emotional distinction should clarify that they neither endorse dualism nor depreciate emotional harm; (2) because judicial expertise may not extend to the task of drawing lines between legally cognizable and non-cognizable harm, judicial performance in this area may be more adequate than critics suggest; and (3) although it may not be possible to determine the optimal way of drawing lines between legally cognizable and non-cognizable emotional harm, moral-philosophical tools such as Rawlsian and Scanlonian contractualism may be able to identify partial or *pro tanto* considerations for choosing among different ways of doing so.

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Philip Petrov is an attorney and a PhD candidate in the Department of Political Science at Stanford University. Email: petrovp@stanford.edu