Early Draft: Do Not Cite or Circulate without Permission

[NOTE: This is a very early draft of a work in progress, and an incomplete one at that. You’ll see some texts in brackets, which are primarily notes for me, but it’ll give you a sense of the content of those sections. This is a smaller version of a broader book project “On Cognitive Liberty” that I’m writing. Forgive the brevity and incompleteness of this early draft, but it’s a great time for me to workshop the concept with you.]

THE COSTS OF CHANGING OUR MINDS

Nita A. Farahany*

INTRODUCTION ........................................................................................................2
I. CHANGING YOUR “MIND” .................................................................................7
II. AVOIDING PAIN AND SUFFERING.................................................................11
    A. Bodily” pain and “mental distress” .........................................................11
    B. Avoidable Consequences........................................................................12
    C. Mitigating Emotional Distress.................................................................15
    D. Conscientious Objections to Care ..........................................................21
III. VALUING THE UNMITIGATED MIND.........................................................24
IV. COGNITIVE LIBERTY IN MODERN LEGAL DEBATES .........................30
    A. Accessing the Mind ..................................................................................30
        a. Passwords and Employers ..................................................................30
        b. Absolute Judicial Deliberative Privilege ...........................................30
    B. Changing the Mind ...................................................................................30
        a. Forceible Competency .........................................................................30
        b. Confronting Erased Memories ..........................................................30
CONCLUSION .........................................................................................................30

* Professor of Law & Philosophy, Duke University; BA, Dartmouth College; MA, JD, Ph.D., Duke University; ALM, Harvard University. Member,
INTRODUCTION

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

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

Most people would agree that society should allow or perhaps even enable a rape victim to have the choice to mitigate the lasting psychological trauma of her assault. But how should the legal system regard a decision by her to refuse the drug? Had she been stabbed during a robbery instead of being raped, we would consider it perverse for her to refuse reasonable medical treatment of her

¹ Cassandra Willyard, Remembered for Forgetting, 18 Nature 482, 483 (2012).
² Cristina M. Alberini, Long-term Memories: The Good, the Bad, and the Ugly, Cerebrum 3 (October 2010).
³ Cristina M. Alberini, Long-term Memories: The Good, the Bad, and the Ugly, Cerebrum 3 (October 2010) (“Memory consolidation requires the activation of molecular and cellular pathways, including those involved in stress, cell survival, cell-to-cell communication, and the release of several neurotransmitters (chemicals released in the brain to transmit signals across cells.”)
The Costs of Changing Our Minds

wounds. And in a tort suit against the robber, a judge or jury would limit her damages because of her negligent treatment of her own injuries. Is her refusal to take propranol analogous? Or is there some value to remembering her attack more clearly? Could, for example, altering her memory render her an ineffective witness in the prosecution of the crime? Perhaps the police could take her statement the moment before she ingests propranolol. But would the use of her statement, which she has later partially forgotten, violate the alleged perpetrator’s constitutional right to confront witnesses against him? Moreover, would she be better off remembering and then transcending her assault? Writers, public figures, artists and more speak openly about how overcoming a pivotal adversity in their lives has enabled them to reach a new consciousness, to gain new insight, or to achieve new courage. Do these stories of transcendence impact how the law should consider her refusal? Moreover, could blunting her suffering have the paradoxical effect of diminishing societal outrage to and condemnation of rape?

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

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

Pain and suffering are the “invisible” injuries that a person suffers—the fright, anxiety, shock, humiliation, indignity, terror, or loss of enjoyment of life that a tort victim suffers because of the civil wrongdoing of another. While no sum of money can ever restore the peace of mind disturbed by physical injury to the body or humiliation endured, these compensatory damages “give to the injured person some pecuniary return for what he has suffered or is likely to suffer.” These damages also reflect societal “disapproval of the harm caused by the tortfeasor,” and “promote loss avoidance goals [of the tort system] by sending a fuller deterrent signal.”

Scholars recognize the pivotal role that the doctrine of avoidable consequences plays in the award of damages for ordinary physical injuries, but have remained practically silent about its relevance in the mitigation of “invisible” emotional damages. Perhaps they don’t see a distinction between ordinary physical injuries and the invisible ones of pain and suffering. Or, perhaps they have approached it as a purely legal matter, without considering or understanding the broader scientific and philosophical context, and the deep ethical issues that underlie the divide. To date only one student note on the issue, plus a few law review articles considering the law and economic issues

---

4 Avoidable Consequences in Disability Insurance, Newark L. Rev. 8, 9-10.
6 Restatement (Second) of Torts § 903 cmt. a.; see also McDougal v. Garber, 536 N.E2d 372, 374-75 (N.Y. 1989) (“recovery for noneconomic losses such as pain and suffering and loss of enjoyment of life rest on the legal fiction that money damages can compensate for a victim’s injury . . . We accept this fiction, knowing that although money will neither ease the pain nor restore the victim’s abilities, this devise is as close as the law can come in its effort to right the wrong.”).
implicated have addressed the divide.\textsuperscript{9} Those articles overlook the role of cognitive liberty in the discussion. A few pages of another article makes mention of emerging memory-dampening techniques, but doesn’t offer any conclusions with respect to emotional distress damages.\textsuperscript{10}

Or, perhaps it has escaped scholarly attention because so few legal cases have squarely addressed the concern. Courts that have considered what measures, if any, a plaintiff must take to mitigate her own pain and suffering express deep ambivalence about the issue.\textsuperscript{11} In the several cases that have found a duty to mitigate emotional distress damages, they often stop short of finding the measures an individual employed to be \textit{insufficient} to have satisfied that duty.\textsuperscript{12} Other courts have intuited that something more is at stake—and have invoked concepts like self-determination and autonomy as reasons that the doctrine of avoidable consequences may not apply to pain and suffering.\textsuperscript{13}

Courts and scholars have not yet developed a satisfactory theoretical answer to mitigating ordinary pain and suffering. Advances like propranolol that offer a simple way to mitigate invisible injuries arising from emotional suffering—by literally changing one’s brain—pose a theoretical riddle several layers deeper. They require us to decide the boundaries of cognitive liberty and its implication for other areas of law such as whether choosing to forego memory mitigation should lessen recoverable damages in tort law.

The time has come for a systematic and thoroughgoing inquiry. Modern neuroscience and medicine have heralded stunning advances in our understanding of and ability to change the human experience—with meditation, psychotherapy, electrical stimulation,


\textsuperscript{10} Adam Kolber, \textit{Therapeutic Forgetting: The Legal and Ethical Implications of Memory Dampening}, 59 Vanderbilt L. Rev. 1561, 1592-95 (2006).

\textsuperscript{11} See Part II(x), infra.

\textsuperscript{12} See infra, pps.

\textsuperscript{13} See infra pp.
drugs, and more. These advances may enable individuals to understand—and to change—their conscious and subconscious experiences. Yet we have made almost no progress on deciding whether our legal regimes will encourage, or even oblige, individuals to alter their brains in such ways lest they be deemed to have wrongfully failed to lessen their own suffering.

The answer to this question bears on far more than just a legal rule governing the apportionment of damages in civil suits. It implicates an interest that is distinct from “liberty” in the ordinary sense, an interest that is only dimly recognized in the cases and the scholarship, an interest that is increasingly implicated by dramatic advances in modern science. This is an interest in “cognitive liberty.” This value appears (although often obliquely) throughout many modern legal debates. Consider, for example, current controversies about whether an employer can require as a condition of employment that employees provide their passwords to social media accounts which they store mentally but not in any other physical medium. Do employees have an interest in cognitive liberty to contractually barter with employers about such requirements? Or the doctrine of absolute judicial deliberative privilege, which protects the deliberative process a judge uses in decision-making from discovery by others. What is the source of this common-law tradition, and can it survive developments in modern neuroscience? What about forcibly medicating prisoners who lack competency to stand trial? Are there contexts in which their cognitive liberty trumps societal interests in bringing those individuals to justice? And what if the victim of a sexual assault provides a statement to the police and then dampens her memory? Can her statement be used in a criminal case against the perpetrator without running afoul of his rights under the Confrontation Clause of the U.S. Constitution?

Although this article focuses specifically on the legal obligations concerning mitigation of emotional pain and suffering, it also provides a critical foray into a much wider theoretical issue—the role of cognitive liberty in our legal system and in society. Part I puts the concern in context, explaining the extraordinary advances in modern medicine and neuroscience that enable us to quite literally change our minds. Part II explains the normative underpinnings of the avoidable consequences doctrine, and how it has been applied to emotional distress injuries in tort law. Part III discusses cognitive liberty as a consideration that should be explicitly considered in
mitigation of emotional distress damages. Finally, Part IV introduces the broader concept of cognitive liberty and its implications for modern legal debates.

I. CHANGING YOUR “MIND”

Do you remember where you were on September 11, 2001? Can you recall in vivid detail the events of that day, the emotions you experienced, the people you were with, and who you called first? Across the world many individuals remember the excruciating details of the 9/11 attacks even more strongly than they can remember what they ate for breakfast this morning or where they parked their car. This is because traumatic memories tend to be the strongest memories. The emotional content of a memory enhances the strength with which the memory is stored in the brain, and the degree to which it can be modified by intervention. Because they are so strongly encoded, traumatic memories often haunt the victim of the traumatic experience by being evoked by environmental stimuli weeks, months and even years after the event, leading to secondary effects of anxiety, stress, and sometimes post-traumatic stress disorder (PTSD). Memories do not immediately become permanent upon experiencing events in the world. The common wisdom held by scientists just a few decades ago was that our adult brains are static,

14 Dean G. Kilpatrick, Rape-Related PTSD: Issues and Interventions, 25 Psychiatric Times 50 (June 20, 2007) (The emotional charge of traumatic events cause the body to release stress hormones such as adrenaline or epinephrine, which may enhance memory consolidation and the strength of the memory itself. Because of the mechanism by which such memories are stored and the strength of their consolidation, pharmacological interventions that block the effect of stress hormones such as β-adrenergic antagonists like propranolol may reduce the strength or stability of these memories.)

15 Cristina M. Alberini, Long-term Memories: The Good, the Bad, and the Ugly, Cerebrum 6 (October 2010).

16 Cristina M. Alberini, Long-term Memories: The Good, the Bad, and the Ugly, Cerebrum 7 (October 2010) (“Recent studies report that 8 percent of Americans suffer from PTSD and about 15 percent of veterans experience multiple or all PTSD symptoms after returning from combat.” These conditions are often intractable, with only 20 to 30 percent of patients ever achieving full remission from the disorder.”)

fixed and immutable. By the 1970s, new research dramatically changed our understanding of the human brain. We now understand that the brain is plastic and changeable. And that the information such as memories stored therein change and are changeable over time.

Newly formed memories remain fragile and changeable as they are initially being stored in the brain. A computer, for example, stores information in random-access-memory (RAM) until a more stable copy is stored in erasable and programmable read-only memory of flash memory, systems that retains the contents of stored information even when the power to a computer is turned off. Similarly, the hippocampus in the brain can process and temporarily store a new memory before that memory is transferred and consolidated for long-term stored in the cortex of the brain. Particularly during this initial window of time that the memory is first in the brain’s “RAM” and has yet not been consolidated, it remains unstable. As the brain moves the memory from short-term to long-term storage, it synthesizes new proteins that strengthen the connections between neurons. After a day or two, the event has been etched into our minds. As a result, each time we recall an experience, it comes out of long-term storage and goes back into the short-term cache. From there, the memory is consolidated into long-term storage.

During the fragile period of memory consolidation, if brain activity is tampered with (such as through drug administration) then a long-term memory of the event might never form. A drug such as

21 Cassandra Willyard, Remembered for Forgetting, 18 Nature 482, 483 (April 2012).
22 Cassandra Willyard, Remembered for Forgetting, 18 Nature 482, 482 (April 2012).
23 Cristina M. Alberini, *Long-term Memories: The Good, the Bad, and the Ugly*, Cerebrum 3 (October 2010) (“Memory consolidation requires the activation of molecular and cellular pathways, including those involved in stress, cell survival,
The Costs of Changing Our Minds

propranolol (long used as a first-line drug therapy for cardiovascular care) may do precisely that by preventing noradrenaline from binding to its receptors in the amygdala. Several studies, for example, have confirmed that administering propranolol within six hours of a traumatic event substantially reduced post-traumatic stress disorder experienced by trauma victims. But even simple visuospatial tasks if performed during the critical period after a trauma can reduce the visual flashbacks that arise after exposure to upsetting trauma. One research team has shown that playing the videogame Tetris (a simple visuospatial task) substantially reduces the flashback symptoms of PTSD when played continuously up to 4 hours post-trauma.

With these novel interventions, we could choose to blunt ourselves from the emotional pain and suffering that accompanies the recall of traumatic experiences. This could be done in anticipation of a traumatic event—for example military personnel safeguarding their minds from the trauma witnessed daily on the battlefield—or after experiencing a traumatic event—such as a victim of sexual or other physical assault seeking to avoid recalling the trauma she endured.

Earlier memory modification techniques posed less significant quandaries than those of today. Electroconvulsive therapy (ECT) has long been used to impair the memory of patients. Entire memories from the days and weeks prior to ECT have been permanently degraded. And earlier drug interventions have been used to dampen or extinguish entire memories. The ingestion of alcohol and other mind-altering substances, for example, can cause blackouts that prevent conscious awareness and the formation of memories of cell-to-cell communication, and the release of several neurotransmitters (chemicals released in the brain to transmit signals across cells).

Dean G. Kilpatrick, Rape-Related PTSD: Issues and Interventions, 25 Psychiatric Times 50 (June 20, 2007) (In a randomized placebo-controlled 10-day trial of propranolol beginning 6 hours after a traumatic event, 30% in the placebo group and 18% in the propranolol group developed PTSD. A subsequent nonrandomized controlled trial of propranolol with survivors of motor vehicle accidents or victims of physical assault yielded similar results).


J-O Ottosson, Experimental studies of memory impairment after electroconvulsive therapy, 35 Acta Psychiatrica Scandinavica, 103 (1960) [READ]

experiences. These wholesale memory modification techniques bear on the broader value of cognitive liberty. But brain interventions of today are importantly different. They offer the possibility of selective forgetting, by disassociating the pain and suffering from the factual content of the experience itself. The fear and emotional memory of a traumatic event could be extinguished while the semantic or factual content is preserved.29

Consider the plot of the fictional movie *Eternal Sunshine of the Spotless Mind*. Actors Jim Carey and Kate Winslet play characters that present initially to the audience as two strangers on a train, inexplicably but immediately drawn to one another. We soon realize something is deeply amiss. Somehow, these two characters do know each other, but have each forgotten entirely their shared (and recently ended) two-year romantic relationship. How can this be? How can two people be intimately intertwined for years, and yet now fail to recognize one another? The fictional company Lacuna, Incorporated, holds the answer. To avoid the emotional trauma of a broken heart, they have each hired the company to selectively erase their memories of the relationship. This fictional form of selective memory erasure enabled them each to forget the existence of the other person. And to avoid the short and long-term pain emotional suffering of their failed romance.

Modern neuroscience has ushered in more discriminating and real ways to change our brains. Novel techniques enable us to dampen or eliminate the emotional charge and trauma of a memory while remembering the literal facts of the experience itself. In other words, it is possible to leave declarative memory—that is, the factual content associated with the memory—intact. But the emotional content associated with that memory is lessened or entirely extinguished.30

For our hypothetical rape victim, with propranolol she would recall the facts of the sexual assault that she endured, but not the emotional fear and trauma she suffered. PTSD is akin to reliving emotional trauma over and again anew each time a memory is evoked. Remembering facts alone is altogether different.

There are consequences to disaggregating emotions from facts. Reducing the emotional charge associated with a declarative memory

---

might weaken the strength of the declarative memory itself. The strength—and therefore the long-term accuracy—of memories are enhanced when emotional stimuli accompanying that memory is consolidated along with it, and diminished when it is extinguished. So over time the memory of that fateful day will simply fade for the rape victim, just as all memories eventually do.

Weakened declarative memory is just one of the consequences to changing our memories. Our individual identities and societal norms are challenged by these changes. The ability to selectively shape and change the brain opens Pandora’s Box of legal, ethical, and social concerns.

II. AVOIDING PAIN AND SUFFERING

A. Bodily” pain and “mental distress”

Tort compensation for ordinary “bodily” pain is distinct from the compensation for the “mental distress” that follows. Bodily pain is the pain an individual endures at the time of the accident. Mental or emotional distress refers to the pain that follows, such as the mental anguish, fear, or anxiety that results. This includes distress an individual suffers by witnessing the fatal injury of a loved one, or the loss of consortium or companionship of a loved one. For the rape victim who sues, the physical injuries she suffered at the time of the attack are separately compensable from the emotional distress that follows.

Courts have historically regarded emotional distress injuries with skepticism. Courts were loath to protect the peace of mind, in part because of difficulty in demonstrating its existence. Since the beginning of the twentieth century, however, U.S. courts have

---

recognized emotional distress damages for a wide array of actions, including deceit, invasion of privacy, defamation, malicious prosecution, false imprisonment, and more. Some commentators attribute the broadening of compensable damages to pressures the tort system faced during the industrial age. While “pure emotional distress” are still rarely heard, it’s quite common to permit recovery of emotional distress when other physical contact or injury has occurred. If one experiences mental distress along with ordinary physical pain they are entitled to recover for both past and reasonably probable future suffering.

Despite this broadening of recoverable damages, controversy ensues over the wisdom of awarding damages for pain and suffering in negligence cases. Such damages face scrutiny by courts and commentators because the value of the damages can be difficult to assess, are quite unpredictable, and can create problems with encouraging settlement or deterrence. What, for example, is the financial equivalent of PTSD following rape? But while financial compensation cannot ease pain or restore an injured plaintiff’s faculties, it can serve an important purpose of reifying social norms against the wrongdoing and in support of the plaintiff’s bodily integrity. Tort compensation for the emotional suffering following rape recognizes the enduring impact on victims, and expresses social condemnation of the act and its consequences.

B. Avoidable Consequences

Once liability is established and damages are at issue, the doctrine of avoidable consequences may apply. The doctrine of

---

40 Lars Noah, Comfortably Numb: Medicalizing (and Mitigating) Pain-And-Suffering Damages, 42 U. Mich. J.L. Reform 431, 440 (2008) (also noting the greater deterrent signal such damages offer, as well as compensation for attorneys to bring such claims).
The Costs of Changing Our Minds

avoidable consequences (sometimes inaptly called a “duty” to mitigate injuries) is a widely accepted principle in law that limits the amount of damages a plaintiff can recover for her injuries in a civil case.\footnote{Yehuda Adar, Comparative Negligence and Mitigation of Damages: Two Sister-Doctrines in Search of Reunion, 31 Quinnipiac L. Rev. 783, 792 (2013) (citing Restatement (Second) of Contracts § 350(1) (St. Paul, 1979); Restatement of Torts (Second) § 918(1)). Note also that despite the call in the Third Restatement of the Apportionment of Liability to abolish the mitigation of damages doctrine from tort law in the year 2000, this call has gone unheeded and unacknowledged by courts and commentators alike. Id. at 793-94.} Victims of tortious wrongdoing by another are awarded damages to restore them to the position they would otherwise have enjoyed absent the wrongdoing of another.\footnote{John C.P. Goldberg, Two Conceptions of Tort Damages: Fair v. Full Compensation, 55 DePaul L. Rev. 435, 435 (2005).} But the doctrine limits the damages a defendant will be made to pay for losses the plaintiff could reasonably have avoided following the defendant’s wrongdoing.\footnote{Harvey McGregor, MCGREGOR ON DAMAGES 235-236 (18th ed., 2009); 1 CHITTY ON CONTRACTS, 1478-1479 (Hugh G. Beale Gen. ed., 29th ed. 2004).}

This doctrine has normative underpinnings of promoting self-reliance and individualism. Some argue that avoidable injuries are not proximately caused by a defendant’s wrongdoing, but the more widely accepted rationale holds that individuals have a moral obligation to take action to ensure their injuries do not worsen.\footnote{Developments in the Law of Damages, 61 Harv. L. Rev. __, 131 (1947).} Society benefits from decreasing the costs of accidents, and injured individuals are often in the best position to mitigate their injuries.\footnote{Eugene Kontorovich, The Mitigation of Emotional Distress Damages, 68 U. Chi.L.Rev. 491, 496-97 (2001) (explaining that the doctrine reduces the moral hazard created by tort insurance that might otherwise incentivize a tort victim to allow her injuries to worsen for greater compensation).} The rules for awarding damages, therefore, are designed to discourage even those who have suffered loss at the hands of another from passively suffering those losses if they can be averted with reasonable effort.\footnote{Avoidable Consequences in Disability Insurance, Newark L. Rev. 8, 13-14; Yehuda Adar, Comparative Negligence and Mitigation of Damages: Two Sister-Doctrines in Search of Reunion, 31 Quinnipiac L. Rev. 783, 813 (2013).} This individualistic philosophy persists from what was the dominant legal throughout much of the nineteenth century.\footnote{Just as criminal law does not impose a duty upon individuals to rescue others, to encourage people to act in their own best interest, so too does tort law encourage self-reliance and self-interest.} Modern tort law embraces this philosophy by continuing to impose a
social duty on plaintiffs to make reasonable efforts to prevent the worsening of their injuries.48

The doctrine is not without limits. Individuals need only act reasonably to mitigate their damages, and are “not ordinarily required to surrender a right of substantial value in order to minimize loss.”49 Still, given its important economic function in tort law, courts apply the doctrine quite broadly.50

What constitutes reasonable effort, however, is often contested.51 A plaintiff isn’t required to go beyond what an average, prudent individual would do to minimize her injuries.52 As it pertains to ordinary physical injuries, courts weigh on a case-by-case basis the risks and benefits of a recommended treatment to assess the reasonableness of foregoing such treatments. Risks considered include the likelihood and severity of pain to be endured, the risks of further injury, the financial costs involved, the likelihood of successful treatment, and the risk of fatality imposed by the treatment.53 The victim must reasonably assess the risks in the injury she has suffered; look at reasonable ways to minimize these risks; and then determine how much is prudent to invest in preventive measures.54 When it comes to ordinary physical injuries, courts have applied these factors to decide, for example, that a plaintiff can

48 Yehuda Adar, Comparative Negligence and Mitigation of Damages: Two Sister-Doctrines in Search of Reunion, 31 Quinnipiac L. Rev. 783, 814 (2013)
53 See, e.g., Young v. American Export Ibrandsten Lines, Inc., 291 F.Supp. 447 (S.D.N.Y. 1968) (Looking at the risks of the surgical procedure, the physical condition of the plaintiff and deeming it unreasonable to refuse surgical treatment); Hayes v. U.S., 367 F.2d 340 (2d Cir. 1966) (finding it unreasonable to select the longer treatment rather than the shorter course of treatment, which would have involved pain and minor surgery, and reducing pain and suffering awards to make consistent with the shorter course of treatment); Collova v. Mutual Serv. Cas. Ins. Co. of St. Paul, Minn., 8 Wis.2d 535 (Wisc. 1959) (“No injured person is required to undergo surgery or treatment that is hazardous or unduly expensive but one injured by the wrong of another is obliged to exercise reasonable care to minimize damages.”); Rounds v. Rush Trucking Corp., 51 F.Supp.2d 374 (W.D.N.Y. 1999) (absent evidence medical treatment would have been superior to chiropractic manipulations used, award of damages found not excessive).
reasonably forego serious, major, or critical surgical interventions, or treatments unlikely to be effective. Do these same factors apply equally to the mitigation of invisible injuries like the emotional suffering and pain of rape? Does society similarly benefit from placing a social expectation upon victims to decrease their emotional suffering? Will choosing an unmitigated mind hereinafter result in lesser damages rewarded in civil cases?

C. Mitigating Emotional Distress

Commentators lament that courts inconsistently apply the doctrine of avoidable consequences to emotional distress damages. While mitigation of emotional distress injuries has been at issue in only a few reported cases, the resulting opinions show ambivalence toward its applicability.

In mitigation of emotional distress, courts count more “costs” a plaintiff would incur to mitigate emotional rather compared to ordinary physical injuries. Courts weigh the risks of pain, injury, or fatality to the plaintiff, financial costs, and likelihood of treatment success in assessing the reasonableness of options for mitigating physical injuries. The several courts that have addressed mitigation...
of emotional distress injuries have also considered the impact of a proposed treatment on the personality and dignity of the individual.\[60\]

Some of these courts analyze the mitigation of emotional distress injuries as different in kind from treatments of ordinary physical injuries. These treatments are necessarily directed at changing brain states intimately connected to personality, self-identity, and personal autonomy. And when courts weigh the impact on personality as a factor relevant to the reasonableness of mitigation, the more intrusive upon personality a method of treatment seems, the less likely courts will find the Plaintiff unreasonable in refusing to undertake it.

Consider, for example, an early case rejecting applying the doctrine of avoidable consequences to “treatments of the mind.” In Dohman v. Richard,\[61\] a Plaintiff, who had been negligently struck by a truck, suffered pain in the left leg, hip, head, neck, and testicles. Although his ordinary physical injuries were “not overly serious”, he suffered significant depression following the accident. He was initially treated with high doses of tranquilizers and antidepressants, but his physician testified at trial that he had no further hope for improvement of his mental condition with continued treatment of that kind.\[62\] So he recommended electroshock treatment for the Plaintiff, and gave it an 80-90% chance of improving his condition.\[63\] The

---

\[60\] E.g. Panion v. U.S., 385 F.Supp.2d 1071 (D. Hawai‘i 2005) (After plaintiff was sexually assaulted by a nurse while unable to defend herself in the hospital, she suffered debilitating psychological injuries including PTSD. She did not participate in a full regiment of counseling but she had an “understandable mistrust of medical personnel after she was assaulted in a hospital by a nurse.”); Pool v. City of Oakland, 728 P.2d 1161 (Cal. 1986) (finding a duty to mitigate emotional distress damages when police had wrongfully arrested him for passing counterfeit currency, but that defendant introduced no evidence that the suggested failure to mitigate—making a phone call from jail—would have reduced his time in jail and therefore emotional suffering that resulted.).

\[61\] 282 So.2d 789 (La. App. 1973)

\[62\] Dohmann v. Richard, 282 So.2d 789, 792 (La. App. 1973)

\[63\] Dohmann v. Richard, 282 So.2d 789, 793 (La. App. 1973)
defendant sought to limit Plaintiff’s for refusing the electroshock therapy. In rejecting the defendant’s claim, the court distinguished “treatment[s] of the mind” from treating other physical injuries:

“Plaintiff is not being asked to have a fractured bone placed in a cast, a hernia repaired, or any other conventional form of surgery. Instead it is proposed that he subject himself to electro-shock, a form of treatment designed to work a change in his personality.”

Citing the imposition upon Plaintiff’s personality and the societal stigma against mental disorders, the court was “not prepared to hold at this time that psychiatric therapy of this sort falls within the spirit, or the letter, of that line of jurisprudence which requires injured persons to mitigate their damages.”

Mitigation that would insult personal dignity has also been rejected. In *Carnival Cruise Lines, Inc. v. Goodin*, a wheelchair-bound individual had made arrangements to go on a four-day cruise. He had done so with assurances by Carnival Cruise Lines that it had wheelchair-accessible bathrooms and showers on board. In fact, not a single bathroom on the entire ship was wheelchair accessible. Plaintiff had to rely upon others to help him into and out of the bathrooms, causing him significant emotional distress and embarrassment. Because he felt so deeply humiliated by the situation, he refused to allow stewards onboard to assist him. In response to his suit against Carnival Cruise Lines, defendants argued that reasonable mitigation required that he accept such assistance. While seeming to accept that a plaintiff could have a duty to mitigate her emotional distress injuries, the court nevertheless focused on “the delicate

---

64 *Dohmann v. Richard*, 282 So.2d 789, 793 (La. App. 1973)
66 *Dohmann v. Richard*, 282 So.2d 789, 793 (La. App. 1973). Compare the more recent case of *Gottfried v. Illinois Central Railroad Co.*, 1995 WL 12478 (N.D. Ill. 1995), where the defendant argued Plaintiff had failed to mitigate his damages by refusing to undergo electric shock treatment as recommended by his treating psychiatrist. The court allowed the affirmative defense to go forward because while electroshock treatment may involve risks, “[W]e do not agree with the plaintiffs that [Plaintiff’s] refusal to undergo electric shock therapy is, as a matter of law, reasonable.” *Id.* at *2.
67 535 So.2d 98, 102 (Ala. 1988).
matter of [Plaintiff’s] dignity involved” to conclude that his refusal to accept assistance “was not unreasonable.”

Courts have also honored self-reliance over following conventional treatment options for addressing emotional distress. When a flight attendant who survived a commercial airline crash sued for emotional injuries, the court validated his choice to rely on self-help instead of antidepressant medication to mitigate his depression as consistent with his personality. Traumatized by what he witnessed after the crash—charred and decapitated bodies, bodies with missing body parts—he had also labored under the fear of his own probable death. Since the accident, Plaintiff made substantial efforts to regain a normal life, but he experienced depression and PTSD, irritability and anxiety, and an overall flat affect. He attended therapy for over two years, but experts opined he was unlikely to fully recover to his pre-accident self. Although defendant had refused taking antidepressant medication, the court found his refusal “not a wholly unreasonable choice.”:

“He has, instead, made major efforts in other ways and obviously declined the reliance on medication based on the same attitude of self-reliance and determination that have brought him thus far in his recovery. Therefore, the court does not find this personal choice to be a failure to mitigate damages under the present circumstances.”

Many courts have also allowed for a significant loophole unavailable in mitigation of physical injuries. Courts have repeatedly held that

74 In re Air Crash Disaster at Charlotte, North Carolina on July 2, 1994, 982 F.Supp. 1101 (D.S.C. 1997). Even in Title VII cases pertaining to statutory duties to mitigate loss of front pay by an employee, at least one court has recognized that a refusal to attend therapy and take medications is a reasonable choice, because “[i]t would be unreasonable for the Court to require Plaintiff to take medications that impair her cognitive ability.” Pollard v. E.I. Du Pont de Nemours, Inc., 338 F.Supp.2d 865, 879 (W.D. Tenn. 2003).
the emotional distress the Plaintiff suffered as a result of tortious wrongdoing could leave a Plaintiff unable or unwilling to seek care, which is not unreasonable under the circumstances.\textsuperscript{75}

By contrast to this expanded-factor approach taken by some courts, other courts have applied the doctrine of avoidable consequences indiscriminately to emotional distress or ordinary physical injuries. These courts embrace “treatments of the mind” as necessary to reasonably mitigate emotional distress injuries. In an employment discrimination case, for example, where on behalf of a class of plaintiffs the lead plaintiff alleged the defendant created a sexually hostile work environment, defendant sought to have her (and other plaintiffs’) damages reduced because they had failed to seek psychological counseling.\textsuperscript{76} Finding ample support for applying the doctrine of avoidable consequences to emotional distress damage,\textsuperscript{77} the court denied summary judgment by finding a genuine issue of material fact as to whether plaintiffs should have their damages reduced for failing to seek counseling.

\textsuperscript{75} E.g. Templeton v. Chicago & North Western Transp. Co., 257 Ill.App.3d 42 (App.Ct.II. 1993) (Finding a jury determination that plaintiff had not failed to mitigate his damages, when, inter alia, he refused to cooperate with a psychological treatment plan for depression, even though the expert physician believed that appropriate medication and psychotherapy would have cured his depression. His lack of insight into his own problems precluded him from seeking the treatment he needed.); Feld v. Merriam, 461 A.2d 225 (Super. Ct. Pa. 1983) (In a case concerning the rape of plaintiff at gunpoint, in front of her husband, the court rejected the defendant’s contention that the husband failed to mitigate his own damages by failing to seek professional counseling. The court found that because the rejection of psychiatric treatment was a manifestation of his emotional injuries, he was not precluded from recovering damages.) Stemple v. Bores, 2005 WL 4186814 (N.J. Super. App. Div. 2005) (finding that the jury should not have been instructed on the duty to mitigate emotional distress injuries. The emotional distress plaintiffs suffered as a result of defendant’s negligence led them to reject the needed counseling so there was no factual basis for having submitted the issue of mitigation to the jury).


\textsuperscript{77} EEOC v. Fred Meyer Stores, Inc., 954 F.Supp.2d 1104, 1114 (D. Oregon 2013), and cases cited therein. Only in Neal v. Director, Dist. of Columbia Dept. of Corrections, 1995 WL 517249, *15 (DDC 2005), (reducing plaintiffs damages for refusal to take antidepressants to mitigate her depression following injury); See also Petroci v. Transworld Systems, Inc., 2012 WL 5464597, *4 (W.D.N.Y. 2012) (applying the doctrine of avoidable consequences to emotional distress injuries by holding that defendants should be given the opportunity to determine through discovery in a FDCPA violation case whether plaintiff failed to mitigate her actual (not statutory) damages, by, for example, failing to seek medical or psychological counseling for her alleged emotional distress).
For these courts, whether the plaintiff forewent antidepressant medications, psychotherapy, or even electroshock treatment, was irrelevant if those treatments satisfied the traditional criteria used to assess the reasonableness of mitigation.\textsuperscript{78} By applying the same standard for reasonable mitigation, these courts have reduced plaintiffs’ damages for unreasonable failure to mitigate their emotional distress.\textsuperscript{79}

\textsuperscript{78} Maynard v. Ferno-Washington, 22 F.Supp.2d 1171 (E.D. Wash. 1998) (And when evidence was presented in a case where Plaintiff was injured by being thrown from an ambulance during the unloading of a patient, while acting as a volunteer Emergency Medical Technician, and suffered emotional distress, the court found there was a genuine issue of disputed fact as to whether she had failed to mitigate her own emotional distress injuries. In particular, “she failed to seek psychiatric intervention or the prescription of anti-depressants.”); Gottfried v. Illinois Central Railroad Co, 1995 WL 12478 (N.D. Ill. 1995) (while electroshock treatment may involve risks, “there is nothing before us regarding the nature of the proceeding…. [W]e do not agree with the plaintiffs that [Plaintiff’s] refusal to undergo electric shock therapy is, as a matter of law, reasonable.”); In Rodriguez v. James-Jackson, 111 P.3d 271 (Wash. App. Div. 1 2005), the trial court instructed the jury on mitigation of damages, when the Plaintiff who was injured in an automobile accident, refused to accept the diagnosis of depression, to undergo psychotherapy or take antidepressants to lessen her emotional pain and suffering. On appeal, the Plaintiff did not present as an issue and the court did not explore whether the doctrine applies to emotional distress injuries. Rather, the court held that the trial court’s instruction was not in error and that the jury’s reduction of 22% in damages because of plaintiff’s unreasonable refusal to cooperate with treatment was appropriate; Hetzel v. County of Prince William, 89 F.3d 169, 173 (4th Cir.1999) (reversing emotional distress award in a discrimination case as excessive because the plaintiff did not suffer noticeable physical injuries and never saw a doctor of a therapist for his claimed emotional distress).

\textsuperscript{79} In Skaria v. State, 442 N.Y.S.2d 838 (Ct. Claims NY 1981), When Mrs. Skaria was raped, she suffered severe emotional distress and became phobic of leaving the house. She lost her desire to resume sexual relations with her husband, and suffered from long-lasting emotional trauma, likely a form of PTSD. Because of her fears, she and her husband relocated from New York to Texas where she resumed work as a registered nurse. Following the initial rape, she was treated by a clinical psychologist for the severe emotional disorder and fear that prevented her from functioning properly. Although the psychologist advised her to continue her treatments when she went to Texas, less her condition become permanent. Mrs. Skaria did not seek treatment because she did not want anyone else to know about her rape. The court found she unreasonably failed to mitigate her emotional distress because had had an affirmative duty to seek out and follow a physician’s advise. The court found her desire to conceal her rape unreasonable. The court restricted its award of damages for any long-term suffering she experienced; Saad’s Healthcare Services v. Merhardt, 19 So.3d 847 (Ala. Civ. App. 2007) (Found that compensation benefits in a worker’s compensation claim should be suspended for 18-month period that plaintiff did not follow up with psychiatric treatment and medication for depression because it constituted a refusal for treatment and an unreasonable one.); Gomez v. American Empress Ltd., 189 F.3d 473 (9th Cir. 1999) (finding that the court appropriately reduced both economic and non-economic damages when plaintiff unreasonably failed to mitigate his damages, including
The Costs of Changing Our Minds

The diverging approach taken by courts leaves plaintiffs unable to anticipate what measures, if any, they must take to mitigate emotional distress. And it leaves open what social duties we impose upon tort victims who suffer from the wrongdoing of others. The time has come for a more thoroughgoing inquiry about the applicability of the doctrine of avoidable consequences to emotional distress injuries. And if the doctrine is applicable, whether courts should consider the impact that “treatments of the mind” may have on personality, dignity, and personal autonomy of plaintiffs in assessing the reasonableness of treatments that mitigate.

D. Conscientious Objections to Care

Courts have already had to grapple with the relevance of conscientious objections to care in cases involving the mitigation of ordinary physical injuries. Plaintiffs have invoked religious objections to treatment, conscientious objections to foregoing abortion in wrongful birth cases, or competing personal values in choosing to forego certain effective treatment alternatives. In such cases courts have struggled with whether to give weight to plaintiffs’ beliefs in assessing the reasonableness of their actions. In some cases, courts have instructed jurors the subjective preferences of an individual are irrelevant to reasonableness of mitigation, while in other cases jurors are instructed to weigh plaintiffs’ beliefs in assessing the reasonableness of their care of their injuries.

In cases addressing religious objections to medical treatment, such as refusal by a Jehovah’s Witnesses to accept blood transfusion even in life-threatening situations, courts have grappled with the

---

80 Medical Care, Freedom of Religion, and Mitigation of Damages, 97 Yale L.J. 1466, 1467 (1978).
81 Medical Care, Freedom of Religion, and Mitigation of Damages, 97 Yale L.J. 1466, 1467 (1978).
constitutional dimensions of their decisions. But the U.S. Supreme Court framed the issue more narrowly:

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

This would seem to suggest that a plaintiff is free to refuse treatments to honor their conscience, but doing so will result in a reduction of their damages by the amount an individual who reasonably mitigated would have suffered. The Court held that a jury could take into account religious beliefs, just as they can take into account other strong personal reasons for failure to take certain actions to mitigate damages, but will not enjoy a per se exception to the doctrine of avoidable consequences when they do so. Lower courts have since followed this approach, allowing juries to consider the plaintiff’s belief together with all other evidence in determining whether the plaintiff acted reasonably in caring for her injuries.

Might this approach work for exercising cognitive liberty?

In suits about wrongful birth of a child, arising for example from the negligent filling of a contraceptive prescription with a tranquilizer instead, courts grant a per se exception to avoidable consequences for

---

82 Medical Care, Freedom of Religion, and Mitigation of Damages, 97 Yale L.J. 1466, 1466 (1978).
85 Williams v. Bright, 230 A.D. 548, 551 (Sup. Ct. NY 1997) (Where Plaintiff refused to undergo surgery following an automobile accident that would have offered her the prospect of a near-normal life but would have entailed blood transfusions contrary to her beliefs as a Jehovah’s Witness, the court held that the jury could consider the Plaintiff’s believes as a factor in determining whether the Plaintiff “acted as a reasonable prudent person, under all the circumstances confronting her.”); Roszewicz v. NY City Health and Hospitals Corp., 656 N.Y.S. 2d 593, 595 (Sup. Ct. NY 1997) (explaining in dicta that if the case were about mitigation of damages, it would be proper to instruct the jury to ask if refusal of treatment was based on a sincerely held religious belief and if so to not reduce the damages by reason of the injured party’s refusal); Wilcut v. Innovative Warehousing, 247 S.W.3d 1 (Mo. Ct. App. 2008) (finding that a decision by an employee to refuse a blood transfusion based on sincerely held religious beliefs was not unreasonable in light of his beliefs, so his dependents were owed death benefits).
plaintiffs who choose to forego an abortion or adoption.\
\
Because abortion or adoption are deeply personal choices involving the exercise of conscience over reproductive decision-making, courts have near-universally held that defendants cannot use plaintiffs’ choice as a reason to reduce plaintiffs’ damages. Would a per se exception be more appropriate than a case-by-case approach to cognitive liberty?

In other contexts where plaintiffs exercise freedom of choice to value one set of interests over another, courts have found such choices reasonable as a matter of law. So, for example, when 14-year-old plaintiff Kevin Cannon chose to forego surgery with a predicted 93% success rate because it risked life-long impotence, the trial jury should not have been given a mitigation of damages instruction. An individual has a common-law right of self-

---


87 *Troppi v. Scarf*, 187 N.W.2d 511, 520 (Ct. App. Mich. 1971) (a personal choice that the Plaintiff may suffer more by the choice to abort is not an unreasonable refusal to mitigate damages, and the weighing of the psychological impact of giving the child up for adoption rather than rearing them cannot be used as the basis for reducing damages); see also *University of Arizona Health Sciences Center v. Superior Ct. of State Ins. And for Maricopa County*, 667 P.2d 1294 (Ariz. 1983) (parents in a wrongful pregnancy action cannot have their damages offset by not choosing abortion or adoption); *Smith v. Gore*, 728 S.W.2d 738, 751-52 (Tenn. 1987) (“In regard to the extent of damages, a number of courts have discussed the reasonableness of the alternatives to rearing, i.e., abortion or adoption, as part of the duty to mitigate damages. Generally, courts seem to have rejected consideration of these alternatives as part of the duty to mitigate. We think that not only would imposing these choices upon a plaintiff impermissibly infringe upon Constitutional rights to privacy in these matters, but the nature of these alternatives are so extreme as to be unreasonable, especially when the recoverable damages do not include the expenses of rearing the child.”); *Chaffee v. Seslar*, 751 N.E.2d 773 (Ct. App. Ind. 2001) (“We believe the requirement of considering an abortion or placing the child up for adoption [as a form of mitigation in a tort suit] is unreasonable. We see no reason why a parent who is threatened by future harm by a tortious act should subject herself to emotional or physical pain of a different kind in order to prevent future harm.”).

88 *Cannon v. New Jersey Bell Telephone*, 530 A.2d 345 (N.J. Super. 1987). Cannon was injured by a dangling telephone wire, which threw him off of his bicycle he was riding in a residential neighborhood. The seat of the bicycle landed on his groin area. He suffered an urethra bulbous stricture, which required periodic painful dilation of his urethra as treatment for the rest of his life. An urologist other than his treating physician recommended a surgical procedural known as a visual urethrotomy with a 93% success rate, which if successful would relieve his physician and future psychological trauma from the injury. But the surgery also carried with it the risk of lifetime of psychological or psychogenic impotence.
determination and to control his or her own body. Although freedom of choice does not require “the party responsible for the injury to pay greater damages,” the Plaintiff’s refusal was not unreasonable. An individual, particularly a 14-year-old boy, could reasonably choose to forego surgery rather than risk life-long impotence. Because weighing two competing values and choosing one over the other is not unreasonable, there was “no obligation to mitigate damages” and the defendant was not entitled to jury instruction on the issue. But should a jury have the ultimate power to decide which preferences are reasonable and which are not?

### III. Valuing the Unmitigated Mind

While courts and scholars have recognized the pivotal role the doctrine of avoidable consequences plays in the award of damages for ordinary physical injuries, little theoretical work has been done on its role in the award of damages for emotional distress. Often, treatments for ordinary physical injuries and invisible ones will differ on their impact on personality, dignity, and autonomy of an individual. While the effect of interventions on our conscious experience and bodies have been well considered and debate in philosophy and science, these differences remain poorly understood and considered for law.

More recently, in my own scholarship and the in the growing field of law and neuroscience, legal scholars have started to grapple anew with how an increasing understanding of (and ability to access and alter) the human experience will impact existing legal and social norms. With respect to ordinary physical pain and emotional suffering some scholars have used novel scientific advances to argue for collapsing the Cartesian dualism underlying much of western legal doctrine. In a 2008 article, for example, Professor Lars Noah argued that recent advances in treatment of emotional distress injuries favor equally applying the avoidable consequences doctrine to this category of damages. Other scholars have similarly looked at advances in psychiatric treatments to argue the avoidable

---

89 Cannon v. New Jersey Bell Telephone, 530 A.2d 345, 351 (N.J. Super. 1987)
consequences doctrine should apply equally to emotional distress injuries. In support of this approach, Professor Noah advanced his argument by focusing on favorable effects. First, the cost to mitigate the damages could provide a baseline from which to calculate noneconomic damages. Second, it would further encourage victims to take reasonable steps to reduce the severity of their emotional injuries, by rewarding mitigating efforts over persistent complaints of enduring pain. It might also improve clarity over the role of rewarding noneconomic damages by limiting it to the category of untreatable pain and suffering such as the loss of enjoyment of life or pain and suffering unresponsive to modern medical interventions.

I propose there is more at stake in whether damage reductions apply to emotional distress injuries than mere misattribution of the mind to metaphysics. Instead, the struggle underscored by the diverging court opinions and legal commentaries on this issue reflect a different interest that may be at stake when mitigating the mind. It reflects an intuition about an uncharted kind of liberty in law and in our lives—an interest in cognitive liberty.

A. On Cognitive Liberty

Cognitive liberty is a value that encompasses liberty over our own brains and experiences. It includes freedom of thought and rumination, freedom of self-access, self-alteration, and self-determination, and the right to consent to or refuse changes to our selves. Our growing ability to change our brains enables us to more

---

93 E.g. Kevin C. Klein & G. Nicole Hininger, Mitigation of Psychological Damages: An Economic Analysis of the Avoidable Consequences Doctrine and Its Applicability to Emotional Distress Injuries, 29 Okla. Cit. Univ. L.R. 405, 415 (2004) (reviewing new treatment options for depression and pain as evidence that the historic distinction between emotional distress and physical damages should be abandoned); Betsey J. Grey, Neuroscience and Emotional Harm in Tort Law: Rethinking the American Approach to Free-Standing Emotional Distress Claims 1, in 13 Law and Neuroscience: Current Legal Issues (Michael Freeman, ed., Oxford Scholarship Online 2011) (Using neuroscience to buttress her claim, arguing the historical distinction between physical and emotional distress claims should be abandoned in favor of a unitary view of damages).


precisely shape our own life experiences. The brain changes and can be changed, and the implications for human experience, personality, and collective memory are profound.

The brain has been called the “secular equivalent of the soul.”97 Our very experience of self coincides with brain physiology. Our genes, our environment—the foods we eat, our social interactions, the weather, our education, and so on—all influence our personalities and identities. Even Francis Crick, the co-founder of the double-helix structure of DNA that he called the “code for life,” acknowledged that our feelings, joys, aches, dreams, and wishes are reflected in the physiological activity of our brains.98

Cognitive liberty, a term I seek to define (but not a phrase I coined), encompasses our liberty interests over our brain that bundles freedom of thought, right to self-access, consent, and individual and societal balance of the costs and benefits of to cognitive interventions.

Freedom of thought can be thought of as the most basic and fundamental freedom underlying modern western democracy. “The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought.”99 Without the ability to think freely, freedom of speech, individuality, religion, conscience and all other human experiences have little meaning. Freedom of thought is recognized implicitly throughout many of our legal and constitutional protections, and is also a vital part of international human rights law. Article 18 of the Universal Declaration of Human Rights states:

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

John Stuart Mill gave one of the most eloquent defenses and explanations of freedom of thought in his essay On Liberty. He

cautioned against the imposition by society of tyranny of thought—trying to shape and control personal thought through societal use of legal norms and penalties and of “penetrating much more deeply into the details of life, and enslaving the soul itself.” He advocated for protection against the tendency of society to impose majority perspectives and viewpoints at the expense of freedom of thought. Our newfound ability to change and shape memories and experiences of emotional distress, and the freedom of thought and reflection that ensue, must be weighed against the social value of decreasing the costs of injuries. Cognitive liberty should encompass the freedom to preserve one’s mind as one sees fit, and not face social and legal norms that guide us against so doing.

Self-access is also crucial to the cultivation of our personalities and individuality. The pursuit of self-discovery is a pursuit of a lifetime, but that pursuit can be stymied if society limits individual access to self-discovery. Access to our brains is a fundamental form of self-access. New technologies from neuroscience uniquely enable us to access our memories, and self-experiences in ways never before possible. Without self-access, we lack self-awareness, and without self-awareness we lack individuality. Cognitive liberty includes within it the ability to access our own memories, our own experiences, and to decide how we wish to endure those experiences.

Consent to treatment, or consent to mitigation, requires a clear appreciation and understanding of the facts, and the implications and consequences of an action. Consent includes the right to decide what information is shared and what is not. What changes one will make and which changes one will refuse. Western bioethics and law requires that consent be obtained before an individual can be examined or treated. The ability to change our minds and have them changed should require our consent. That consent can take an explicit or implicit form—either expressed or inferred from the facts and circumstances of the specific situation. But consent cannot do all of the work in protecting cognitive liberty. While this does important work in protecting our bodily integrity and inviolate personality, it cannot stand alone to protect our cognitive liberty.

Cognitive liberty encompasses basic freedoms over our personalities and our brains but that interest is not unlimited. When

---

100 John Stuart Mill, *On Liberty*, Chapter III (Of Individuality, as one of the Elements of Well-being)
any part of a person's conduct affects prejudicially the interests of others, society has some jurisdiction over the conduct. So questions such as whether general welfare will or will not be promoted by interfering with it—or even refusing to make a defendant pay for that conduct—will become an issue open for discussion. In the case of mitigation of emotional distress, a plaintiff’s conduct effects the interests of persons other than himself. So there can be no perfect freedom to exercise cognitive liberty in this context.

B. The Value of the Unmitigated Mind

[Individual: Autonomy, preservation of memory, inviolate personality.
Societal: Norms against tortious wrongdoing; inhibition of social atrocities; reifying social approbation; preservation of evidence and social history]

C. Weighing the Reasonableness of Cognitive Liberty

There is a difference between choosing to leave the mind unmitigated and failing to investigate options to reduce one’s suffering. That a plaintiff chooses an unmitigated mind is not per se unreasonable, nor should it be a per se exception to the doctrine of avoidable consequences. But a reflected upon choice deciding between self-reliance, personal transcendence, or alternative forms of therapy can be reasonable exercise of cognitive liberty that a jury should be instructed to consider.

There is little theoretical justification for making any conscientious objection to care a per se exception to the doctrine of avoidable consequences. And scholars have advanced compelling arguments about the economic value of applying the doctrine to emotional distress injuries. But whether or not the doctrine applies merely begins, rather than satisfies the inquiry. How it applies and whether there are additional factors to consider must also be resolved.

Carving out a per se exception to mitigation of emotional distress injuries because of cognitive liberty would ignore the competing personal and societal interests at stake. It would improperly reward an individual who unwittingly and irresponsibly left their distress
untreated, and who took no responsibility for addressing their emotional suffering. This is precisely the type of behavior the doctrine is designed to protect against. By contrast, one could evaluate the risks and benefits of treatments—such as antidepressants, psychotherapy, or memory modification—and reasonably decide that such treatments would come at too high of a cost to their personality, self-identity and continuity of thought and personal history. It is precisely this type of reflective self-determination that has led some courts to decide as a matter of law that plaintiff’s efforts at mitigation were not unreasonable. And yet, like the unreflective plaintiff, unreflective courts have given little thought or weight to these values.

By explicitly recognizing the role of cognitive liberty in our lives and in our law, courts could draw on these intuitions to craft instructions that would enable juries to factor into reasonableness inquiries the efforts at mitigation a plaintiff has made. They could explicitly be guided to take into account whether a defendant knowingly chose self-reliance or memory preservation over other treatment options. That a rape victim chooses to live with her memories—both semantic and emotional—is not unreasonable choice if it best honors her experience and her personality. And it is not unreasonable for society to value personal choice when it reflects a personal weighing of different options for moving forward.

A pattern instruction could be fashioned that would explicitly account for cognitive liberty:

“If you find a health care provider advised the plaintiff to [submit to an operation] [(describe other treatment)], you would not necessarily conclude that plaintiff acted unreasonably in declining such [operation] [treatment]. In determining whether the plaintiff’s conduct was reasonable, you must consider all of the circumstances as they appeared to the plaintiff at the time he chose not to follow the health care provider’s advice. These may include [the financial condition of the plaintiff] [the degree of risk involved] [the amount of pain involved] [the chances for success] [the benefits to be obtained from the procedure] [the availability of alternate procedures] [whether (name applicable types of health care providers) agree upon themselves as to the advisability of the procedure] [the knowledge or lack of knowledge of the plaintiff] [and the plaintiff’s investigation into
and beliefs about whether the treatment would impact their cognitive liberty over their personality, personal autonomy, and freedom of thought.”]

IV. COGNITIVE LIBERTY IN MODERN LEGAL DEBATES

A. Accessing the Mind
   a. Passwords and Employers
   b. Absolute Judicial Deliberative Privilege

B. Changing the Mind
   a. Forcible Competency
   b. Confronting Erased Memories

CONCLUSION

Advances in neuroscience and medicine now offer simple way to mitigate invisible injuries by making changes to one’s brain. These changes—whether to brain chemistry, to memories, to our affect—impact our personalities, our experiences and our perceptions. But that we can change our brains in ways that reduce pain and suffering does not necessarily mean that our legal norms and rule should reward only those individuals who do so. Our ability to change our brains requires us to contemplate the bounds of whether and if so when we should be permitted or encouraged to do so. That inquiry requires us to decide and define the boundaries of cognitive liberty and its implication for law as far reaching as tort law to the forcible competency of prisoners.

This article offers a first step toward a systematic and thoroughgoing account of those boundaries. It suggests that our legal regimes have until now only dimly recognized an interest in cognitive liberty. And it offers a descriptive and normative account cognitive liberty, and why its explicit recognition should impact whether a plaintiff has reasonably mitigated her emotional distress injuries.

Part IV then builds on those insights to illustrate how an interest in cognitive liberty bears on far more than just a legal rule governing the apportionment of damages in civil suits. Cognitive liberty has implications for whether employers can require employees provide their passwords to social media accounts, which they store mentally.
but not in any other physical medium. And it better explains the doctrine of absolute judicial deliberative privilege, which protects the deliberative process a judge uses in decision-making from discovery by others. Cognitive liberty makes plain that forcibly medicating prisoners who lack competency to stand trial may sometimes occur in contexts where a prisoner’s cognitive liberty should trump societal interests in bringing that individual to justice. And it introduces some of the broader implications of memory dampening—including for constitutional interests such as the Confrontation Clause of the U.S. Constitution.