

# Dualism and Doctrine

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*What kinds of harm among those that tortfeasors inflict are worthy of compensation? Which forms of self-incriminating evidence are privileged against government compulsion? What sorts of facts constitute a criminal defendant's intent? Existing doctrine pins the answer to all of these questions on whether the injury, facts, or evidence at stake are "mental" or "physical." The assumption that operations of the mind are meaningfully distinct from those of the body animates fundamental rules in our law.*

*A tort victim cannot recover for mental harm on its own because the law presumes that he is able to unfeel any suffering arising from his mind, in contrast to his bodily injuries over which he exercises no control. The Fifth Amendment forbids the government from forcing a suspect to reveal self-incriminating thoughts as a purportedly more egregious form of compulsion than is compelling no less incriminating evidence that comes from his body. Criminal law treats intentionality as a function of a defendant's thoughts altogether separate from the bodily movements that they drive into action.*

*This Article critically examines the entrenchment of mind-body dualism in the Supreme Court doctrines of harm, compulsion, and intentionality. It uses novel insights from neuroscience, psychology, and psychiatry to expose dualism as empirically flawed and conceptually bankrupt. We demonstrate how the fiction of dualism distorts the law and why the most plausible reasons for dualism's persistence cannot save it. We introduce an integrationist model of human action and experience that spells out the conditions under which to uproot dualism's pernicious influence within our legal system.*

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## INTRODUCTION

*“[T]he common law of torts does not permit recovery for negligently inflicted emotional distress unless the distress . . . accompanies a physical injury . . . [or is] suffered by a close relative who witnesses the physical injury of a negligence victim . . . .”*<sup>1</sup>

*“The distinction which has emerged . . . is that the [self-incrimination] privilege is a bar against compelling ‘communications’ or ‘testimony,’ but that compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate it.”*<sup>2</sup>

*“Petitioner’s jury was told that ‘[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.’ . . . [W]e hold the instruction given in this case unconstitutional.”*<sup>3</sup>

The Supreme Court’s foundational decisions in *Metro-North v. Buckley*,<sup>4</sup> *Schmerber v. California*,<sup>5</sup> and *Sandstrom v. Montana*<sup>6</sup> seem to have nothing in common. Their holdings, made decades apart, span political eras and legal domains that could hardly be more different.

*Buckley* held that federal workers are entitled to compensation for the bodily injuries they suffer but not for emotional distress on its own.<sup>7</sup> Its reason for making stand-alone, emotional harms ineligible for recovery was not just that it is harder to tell whether certain claims of depression or anxiety are real. The Court explained that even reliably provable mental anguish does not qualify as the kind of harm for which tort victims can recover.<sup>8</sup>

*Schmerber* is the Fifth Amendment case in which the Court limited the privilege against self-incrimination to “testimonial” but not “physical” evidence.<sup>9</sup> Police and prosecutors cannot force a suspect or defendant to reveal his thoughts or memories, the Court held, but they can compel his blood and any other samples or markings from his body.<sup>10</sup>

1. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 429–30 (1997) (emphasis in original).

2. *Schmerber v. California*, 384 U.S. 757, 764 (1966).

3. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979) (alteration in original) (emphasis omitted).

4. 521 U.S. 424 (1997).

5. 384 U.S. 757 (1966).

6. 442 U.S. 510 (1979).

7. 521 U.S. at 432–37 (explaining that mental anguish is not actionable apart from bodily injury).

8. *Id.* at 430–31 (exempting only fear of imminent death for a worker who narrowly escaped an accident).

9. 384 U.S. at 763–66 (holding that the self-incrimination right covers thoughts and memories but not “compulsion which makes a suspect or accused the source of ‘real or physical evidence’”).

10. *Id.* at 764–65.

*Sandstrom* made it unconstitutional for fact finders to be asked to assume that a defendant intends the ordinary consequences of his actions.<sup>11</sup> Those consequences should simply be considered along with other evidence of criminal intent, the Court held.<sup>12</sup> The expected outcomes of his actions, or bodily movements, cannot be presumed to manifest his state of mind.<sup>13</sup>

The doctrinal divergence among these decisions conceals the philosophy that unites them. *Schmerber*, *Sandstrom*, and *Buckley* stand on the same analytic foundation, too important to go unnoticed and unexamined. Exposing this shared infrastructure helps to reconceive and resolve enduring puzzles within doctrines of harm, compulsion, and intentionality.

All three of these decisions embrace mind-body dualism: the theory, credited to seventeenth-century philosopher Descartes, that the workings of the mind assume a form and significance distinct from the workings of the body.<sup>14</sup> *Buckley* assumes that a victim of negligence is able, as a general matter, to exercise his mind to unfeel or unthink whatever feelings or thoughts cause him to suffer. Our tort law accordingly presumes that he can control his mental anguish, a power that he lacks over his bodily injuries. *Schmerber*, by denying the state the power to compel his thoughts or memories when it is free to force evidence from his body, prescribes that a defendant or suspect should retain special control over just the contents of his mind. *Sandstrom*, for its part, singles out a defendant's mind as the manifestation of intent, knowledge, and other forms of criminal culpability that his bodily actions cannot in the same way fully reveal.

The dualism that these Supreme Court decisions adopt has important implications for the doctrines of harm, compulsion, and intentionality. *Buckley* limits the kinds of suffering for which a tort victim can recover. Its underlying assumption that he can soothe his mental anguish makes stand-alone emotional harm unworthy of compensation. *Schmerber* expands state power to investigate crime by affording a right to silence against attempts to coerce only testimonial, or mental, forms of evidence; bodily samples are unprotected. *Sandstrom* refuses to identify intent from the foreseeable results of a criminal defendant's actions. Instead, it requires that jurors derive the defendant's culpability exclusively from his state of mind and use all available evidence to determine what that mental state was.

What connects these landmark doctrines is that they all set the mind apart from the body. *Buckley* envisions the person as master of his mind, capable of willing away thoughts that cause him to suffer. *Schmerber* holds that a person's mental processes occupy a personal sphere deserving of special protection against state

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11. 442 U.S. at 522–24 (holding that any presumption that a criminal defendant intended to bring about the ordinary consequences of his actions violates his due process rights if it has “the effect of shifting the burden of persuasion to the defendant . . . that he lacked the requisite mental state”).

12. *Id.* at 521–23.

13. *Id.* at 523–24 (holding it unconstitutional for jurors to determine the defendant's intent by focusing only on his criminal act and not also on “additional facts not themselves establishing the element of intent”).

14. See JOHN COTTINGHAM, DESCARTES 119–34 (1986) (describing the Cartesian principle that human beings are composed of two elemental components—mind and body—that are two wholly distinct substances).

intrusion. *Sandstrom* too presupposes the primacy of mind by locating criminal intent in a person's thoughts rather than his deeds.

This Article critically examines the prominence of mind-body dualism in our legal system. Surprisingly, we are the first to investigate this general phenomenon. Other scholars who have noticed dualism's presence in our law have done so in passing and have limited their focus to specific laws and rules.<sup>15</sup> None has conducted a comprehensive examination of dualism's presence and impact on the common and constitutional law. We provide that systematic analysis for the first time here. We argue that the divorce of mind from body is a fiction that distorts the doctrines of harm, compulsion, and intentionality and that serves no redeeming value sufficient to justify its presence. This deconstruction gives rise to a constructive argument. We use insights from neuroscience, psychiatry, and psychology to develop an integrative model of mental and physical phenomena, and we apply this model to help resolve longstanding puzzles in our common and constitutional law jurisprudence.

It should come as little surprise that mind-body dualism has lost much of its influence in philosophy and has been widely rejected within psychiatry, psychology, and neuroscience. If mind and body are separate, after all, it is hard to understand how the physical changes in neural chemistry that result from anxiety drugs or brain damage, for example, routinely change how we feel or what we think, or how the mental changes caused by placebos or trauma, for instance, alter the operations of our bodies.<sup>16</sup> One need not discard belief in the soul or submit to crude empiricism to deny the picture of a shapeless mind that stands outside the body and controls it from another realm like a "Ghost in the Machine."<sup>17</sup> Mind and body are

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15. See, e.g., R.A. DUFF, INTENTION, AGENCY AND CRIMINAL LIABILITY: PHILOSOPHY OF ACTION AND THE CRIMINAL LAW 120–22, 130–34 (1990) (criticizing dualism in criminal law); SUSAN EASTON, THE CASE FOR THE RIGHT TO SILENCE 207–35 (2d ed. 1998) (arguing that dualism cannot justify limits on the self-incrimination right); Adam Benforado, *The Body of the Mind: Embodied Cognition, Law, and Justice*, 54 ST. LOUIS U. L.J. 1185, 1188 (2010) (“[O]ur laws and legal theories have not been immune to the power of the dualist conception.”); Dan L. Burk, *Feminism and Dualism in Intellectual Property*, 15 AM. U. J. GENDER SOC. POL’Y & L. 183, 185–91 (2007) (recognizing dualist assumptions in copyright and patent law); Peter Halewood, *Law’s Bodies: Disembodiment and the Structure of Liberal Property Rights*, 81 IOWA L. REV. 1331, 1336–40, 1347–49 (1996) (analyzing dualism in property); Nancy Levit, *Ethereal Torts*, 61 GEO. WASH. L. REV. 136, 191 (1992) (criticizing dualism in torts); Francis X. Shen, *Mind, Body, and the Criminal Law*, 98 MINN. L. REV. 2036, 2043–55 (2013) (identifying dualism in determinations of criminal harm); Laura Spitz, *I Think, Therefore I Am; I Feel, Therefore I Am Taxed: Descartes, Tort Reform, and the Civil Rights Tax Relief Act*, 35 N.M. L. REV. 429, 433–37 (2005) (decrying dualism in the rules for calculating taxable income); G. Christopher Wright, *Taxation of Personal Injury Awards: Addressing the Mind/Body Dualism That Plagues § 104(a)(2) of the Tax Code*, 60 CATH. U. L. REV. 211, 233–36 (2010) (noting how changes in law and medicine make the mind-body distinction moot when calculating taxable personal injury awards).

16. See MARIO BUNGE, THE MIND-BODY PROBLEM: A PSYCHOBIOLOGICAL APPROACH 18 (1980) (“Dualism cannot explain mental disease except as demonic possession or as escape of mind from body. If the body were an autonomous immaterial entity, then it should be immune to brain injury, drug action, and the like: it should be either healthy or sick from the start, or else susceptible only to the action of evil spirits.” (emphasis omitted)).

17. GILBERT RYLE, THE CONCEPT OF MIND 15–24 (1949) (criticizing dualism for

interconnected, especially so for the complex states of being and doing like harm, compulsion, and intentionality that tend to carry the greatest significance in law.<sup>18</sup>

Yet much of our doctrine, we show, treats mind and body as if they work and matter in critically different ways.<sup>19</sup> It is tempting to suppose that there must be good reason for dualism's pervasiveness in our laws—that the division between mind and body, even if it is not true, serves a useful pragmatic or expressive purpose. Our study suggests, however, that no such rationale can vindicate the prominent place of dualism in our legal tradition. We argue that dualism's pernicious influence should be uprooted by devising policies and rules that cast off its distorting metaphysics. We develop and defend a new understanding of mind and body as conceptually and normatively intertwined. We apply this integrative model to reform the important doctrines of harm, compulsion, and intentionality.

Specifically, with respect to the concept of harm in tort law, we argue that physical pain and mental anguish should be treated as the relevantly similar kinds of harm that they are. Both involve interactions between a person's brain and the other parts of his body. Just as physical pain can and often does overlap with emotional anguish, anxiety, or depression, so too these mental distresses can make a person ache, tire, and withdraw.<sup>20</sup> *Buckley* erred in singling out emotional harms as unworthy of compensation. The verifiable mental anguish that causes negligence victims to suffer should be actionable in tort law as a stand-alone harm.

Our constitutional criminal procedure should likewise realign mind and body in the limits it places on the government's power to compel self-incriminating evidence. Whether such evidence comes from a suspect's body (e.g., blood sample) or his mind (e.g., confession) should not affect the scope of the state's authority to force it from him. The physical as opposed to mental character of that evidence has no normative consequence in itself. What matters is that the government does not subject the suspect to procedures that violate his personal integrity or impose otherwise cruel or

presuming that acts of the body are caused by physical rules and processes wholly distinct from the autonomous, self-governing causes of mental acts); see also DANIEL C. DENNETT, *CONSCIOUSNESS EXPLAINED* 35 (1991) ("Dualism's embarrassment here is really simpler than the citation of presumed laws of physics suggests. It is the same incoherence that children notice—but tolerate happily in fantasy—in such fare as Casper the Friendly Ghost . . . . How can Casper both glide through walls and grab a falling towel? How can mind stuff both elude all physical measurement and control the body?" (emphasis omitted)).

18. This mind-body problem gives rise to a number of famous puzzles in the philosophy of mind. One is the "hard problem" of how to explain the way in which conscious sensations acquire attributes like colors and tastes. See generally David J. Chalmers, *Facing Up to the Problem of Consciousness*, 2 J. CONSCIOUSNESS STUD. 200 (1995). Another is the "explanatory gap" between brain and mental states, between neural networks and sensations like pain. See generally Joseph Levine, *Materialism and Qualia: The Explanatory Gap*, 64 PAC. PHIL. Q. 354 (1983). A third is how, if at all, we are able to make sense of the psychological experience of very different beings. See generally Thomas Nagel, *What Is It Like To Be a Bat?*, 83 PHIL. REV. 435 (1974).

19. See *infra* Parts II (harm), III (compulsion), IV (intentionality).

20. See generally, e.g., Gregg R. Henriques, *The Harmful Dysfunction Analysis and the Differentiation Between Mental Disorder and Disease*, 1 SCI. REV. MENTAL HEALTH PRAC. 157 (2002) (distinguishing biological and nonbiological disorders of mind and body that impair a person's mental and physiological functioning).

offensive consequences on him. This straightforward account disentangles *Schmerber*'s mindification of the Fifth Amendment.

Dualism's presence in the criminal law's concept of intentionality is less straightforward. Here, we argue that a defendant's intent and other legally significant states of mind should be determined by his actions and the normal consequences that follow from them. These actions, understood in the proper context, embody the way in which the defendant's brain moved the rest of his body based on inputs from both his body and outside environment. What we tend to think of as evidence of mental states alone is in fact evidence of mind and body working together. So we argue, counter to *Sandstrom*, that a defendant's intent is embedded in the action that his body carries out. He intends the natural result of that action unless it is forced from him through illness, duress, or accident.<sup>21</sup>

A word on methodology is in order. We adopt a bottom-up approach that takes the legal doctrine as it is and tries to make the best sense of the theory that it reflects. The law is a social practice, and its public meaning—while of course contestable—has nevertheless developed in ways that accept certain conceptual ideals and normative values as more plausible than others, even decisively so. Our project seeks to hold up an animating commitment in clear view so we can examine the role it plays in our doctrine. Subjecting the inner life of the law to critical appraisal in this way makes it possible to determine whether or not its analytic and moral content is worthy of embrace or whether those immanent commitments require reconsideration and reform.<sup>22</sup>

The Article unfolds in four Parts. Part I canvasses the philosophy and science of dualism. We emerge from this inquiry wielding an integrated account of the person as constituted by interlocking mental and physical phenomena. Parts II, III, and IV adopt this account to critique and rebuild the doctrines of harm, compulsion, and intentionality. We assess and reject the best reasons to abide dualism's influence on our legal system. This Article concludes by bringing the doctrinal and normative implications of our integrationist account full circle.

## I. MIND OVER BODY

What is the relationship between the human mind and human body? A widely accepted view regards them as different in fundamental ways.<sup>23</sup> The bones, joints, cartilage, and ligaments that make up the body and its movements and other

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21. Whether he is guilty is a separate question because an intentional and facially criminal action may be justified or excused as a matter of law.

22. See Ronald J. Allen & Brian Leiter, *Naturalized Epistemology and the Law of Evidence*, 87 VA. L. REV. 1491, 1494–99 (2001) (“viewing philosophical [legal] theorizing about knowledge as more than an a priori armchair exercise, but rather as continuous with and dependent upon empirical science”); Joshua Kleinfeld, *A Theory of Criminal Victimization*, 65 STAN. L. REV. 1087, 1151–52 (2013) (tracing to Hegel a “social-theoretic approach” that “takes law as a form of embodied ethical life . . . [that] philosophy can help bring to light and expose to question”).

23. See Athena Demertzi, Charlene Liew, Didier Ledoux, Marie-Aurélie Bruno, Michael Sharpe, Steven Laureys & Adam Zeman, *Dualism Persists in the Science of Mind*, 1157 ANNALS N.Y. ACAD. SCI. 1, 8 (2009) (revealing the prevalence of dualistic attitudes that emphasize separateness of mind and body).

operations are distinct in form and in function from the thoughts, feelings, intuitions, and perceptions that make up the mind and its phenomena.<sup>24</sup> The body has a tangible form whose functioning is subject to the laws of physics, whereas the mind is ethereal, its workings within our command.<sup>25</sup>

Mind-body dualism captures a constellation of philosophically nuanced theories about the relation between mind and body.<sup>26</sup> At the core ideal of all such dualisms is the conviction, commonly associated with René Descartes, that mental phenomena are meaningfully distinct from physical ones.<sup>27</sup> Descartes argued that people are made up of distinct substances: the physical substance of the body that has mass and takes up space, and the mental substance of the mind that does not.<sup>28</sup> These substances are so different, at least in this traditional Cartesian account of dualism, that they could even exist independently: the mind without the body (like a ghost) and the body without the mind (like a zombie).<sup>29</sup>

Despite its popular appeal, substance dualism and its disconnect of mind from body has been roundly discredited.<sup>30</sup> Take the case of Phineas Gage, the railroad worker who had an iron rod driven through his frontal lobe in an 1848 explosion.<sup>31</sup> An even-tempered man before the accident, he became intolerably stubborn, impulsive, and profane.<sup>32</sup> The effects on his behavior were so dramatic that his friends declared that “Gage . . . was no longer Gage.”<sup>33</sup> Contemporary science makes clear that a person’s mind and body interact together with his environment to produce

24. William D. Hart, *Dualism*, in *A COMPANION TO THE PHILOSOPHY OF MIND* 265, 265 (Samuel Guttenplan ed., 1994) (describing dualism as the view that body and mind are composed of profoundly separate substances).

25. Dualist thinking takes hold from an early age. Child psychologists argue that even babies perceive the world as divided into “physical things, which are governed by principles such as solidity and gravity, and immaterial minds, which are driven by emotions and goals.” PAUL BLOOM, *DESCARTES’ BABY: HOW THE SCIENCE OF CHILD DEVELOPMENT EXPLAINS WHAT MAKES US HUMAN*, at xiii (2004).

26. See Howard Robinson, *Dualism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., 2012), available at <http://plato.stanford.edu/archives/win2012/entries/dualism/> (distinguishing ontological dualisms—predicate, property, and substance—from interactionist ones like epiphenomenalism and parallelism).

27. See generally René Descartes, *Meditations on First Philosophy*, in 2 *THE PHILOSOPHICAL WRITINGS OF DESCARTES 1* (John Cottingham, Robert Stoothoff & Dugald Murdoch trans., 1984) (1641).

28. See *id.* at 53–54.

29. See generally Philip Goff, *Ghosts and Sparse Properties: Why Physicalists Have More To Fear from Ghosts than Zombies*, 81 *PHIL. & PHENOMENOLOGICAL RES.* 119 (2010) (canvassing the philosophical puzzles that the theoretical possibility of bodiless ghosts and mindless zombies pose for mind-body dualism).

30. See, e.g., AM. PSYCHIATRIC ASS’N, *DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS V*, at 309–10 (2013) (recognizing the impossibility of distinguishing in any principled way between mental and physical illness).

31. See generally JOHN FLEISCHMAN, *PHINEAS GAGE: A GRUESOME BUT TRUE STORY ABOUT BRAIN SCIENCE* (2002).

32. See *id.* at 38.

33. *Id.* at 2.

phenomena like personality and suffering.<sup>34</sup> This is why subjects placed under a hypnotic trance and told that they were being touched with hot metal developed burn blisters, even though it was just a pencil.<sup>35</sup>

The brain networks with the rest of the body through two principal regulatory circuits.<sup>36</sup> One is the bloodstream that carries biochemical signals from the brain to every muscle, joint, and internal organ, and from all those other parts of the body to the brain.<sup>37</sup> The other circuit is the nervous system that, through the sensory and motor peripheral nerves, also carries signals between the brain stem or the spinal cord and every other part of the body.<sup>38</sup> This organism that the brain and other parts of the body form together, in turn, interacts with its surroundings in the outside environment.<sup>39</sup> This interconnectedness of the mental and physical helps explain why most of the complex human phenomena that we care about in law and in life cannot be reduced to the mind or body alone.<sup>40</sup>

Only the integration of a person's mind, body, and environment can make sense of these intricate states of being and doing.<sup>41</sup> Wittgenstein put it best: "[O]nly of a living human being and what resembles (behaves like) a living human being can one say: it has sensations; it sees; is blind; hears; is deaf; is conscious or unconscious."<sup>42</sup> Nor can the mind—the Cartesian soul—be reduced to the brain in a way that could vindicate the dualist philosophy.<sup>43</sup> The workings of the brain are a necessary condition for thought, feeling, and knowledge, but not a sufficient one. Brain activity is of course required for these experiences. But it is the whole of the person who thinks, feels, and knows; it is not his neurochemistry alone.<sup>44</sup>

34. *See generally* 122 PROGRESS IN BRAIN RESEARCH: THE BIOLOGICAL BASIS FOR MIND BODY INTERACTIONS (E.A. Mayer & C.B. Saper eds., 2000).

35. *See* ERNEST R. HILGARD, HYPNOTIC SUSCEPTIBILITY 382 (1965).

36. *See* ANTONIO DAMASIO, DESCARTES' ERROR: EMOTION, REASON, AND THE HUMAN BRAIN 87 (Penguin Books 2005) (1994).

37. *See id.* at 87–89.

38. *See id.*

39. *Id.* at 88–90 (arguing that what we think of as mind is the formation of neural representations of stimuli in the brain that are manipulated through mental thought, physical behavior, and outside environment).

40. Such reductionism is what neuroscientist Max Bennett and philosopher Peter Hacker have called the "mereological fallacy." M.R. BENNETT & P.M.S. HACKER, PHILOSOPHICAL FOUNDATIONS OF NEUROSCIENCE 111 (2003).

41. *See* P.M.S. HACKER, HUMAN NATURE: THE CATEGORICAL FRAMEWORK 276–84, (2007) (criticizing dualism's false mind-body distinction for supposing that the indissociable, spatio-temporal continuum that is a person can be meaningfully separated into separate mental or physical parts or characteristics).

42. LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 281 (R. Rhees ed., G.E.M. Anscombe ed. & trans., 1953); *see also* ANTHONY J. KENNY, *The Homunculus Fallacy*, in THE LEGACY OF WITTGENSTEIN 125, 125 (1984).

43. *See* HACKER, *supra* note 41, at 233–56 (criticizing brain-body dualism and referring to it as the "crypto-Cartesian mind of cognitive neuroscience"); *see also* BENNETT & HACKER, *supra* note 40, at 231–35 (arguing that "current neuroscientific thought is covertly Cartesian" in that it "allocat[es] to the brain a multitude of the psychological functions that dualism allocated to the mind").

44. MICHAEL S. PARDO & DENNIS PATTERSON, MINDS, BRAINS, AND LAW: THE



Yet much in the doctrines of harm, compulsion, and intentionality assume, we will argue, that operations of the mind are distinct in critical conceptual, functional, and normative respects from bodily ones. When courts must determine what kinds of facts constitute criminal intent, what kinds of harms merit tort recovery, and what kinds of evidence are privileged against government compulsion, the question they ask is whether the harms are *physical* or *mental*. The Justices who decided *Buckley*, *Schmerber*, and *Sandstrom* need not have been self-conscious dualists for those opinions to reflect the estrangement of mind from body.<sup>45</sup> It is instead the public meaning of this core tenet of dualism that these doctrines represent.

Some readers might still think that the mind-body divide endorsed by the Supreme Court is a façade. Behind that façade, they might say, are the values and policies that the Court sought to promote by adopting dualism's words but not its metaphysics. This argument suggests two rationalizations for dualism's influence on the rules that these decisions fix in common and constitutional law. One of these rationalizations is expressive; the other is pragmatic. Neither justifies the preservation of dualist reasoning in our legal system.

First is the claim that dualism, however unsound as a matter of logic or empirics, serves an expressive function in the law by imparting cherished ideals on which the law relies.<sup>46</sup> For example, privileging mental evidence under the Fifth Amendment might promote the conviction that our minds merit special privacy protection as compared to our bodies.<sup>47</sup> Likewise, in torts, singling out physical harms for stand-alone recovery might shore up the belief that while our bodies are open to poking and prodding, our minds remain hidden from external observation.<sup>48</sup> Treating just mental harms as within our control might also preserve our self-conceptions as resilient creatures capable of withstanding the effects of life's trials and tribulations on our minds.<sup>49</sup> And holding a person unaccountable for an otherwise criminal action

CONCEPTUAL FOUNDATIONS OF LAW AND NEUROSCIENCE 44–46 (2013) (“People (not brains) think, believe, know, intend, and make decisions. Moreover, the presence of neurological activity is not *sufficient* for the attribution of these concepts to persons; it is not the measure of thinking, knowing, intending, or deciding.” (emphasis in original)).

45. See, e.g., RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 463 (1990) (rejecting dualism).

46. See Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1195–97 (1979) (arguing that judicial decisions should value social perception more than empirical accuracy); Peter J. Smith, *New Legal Fictions*, 95 GEO. L.J. 1435, 1478 (2007) (arguing that judges might “recognize that the law often serves an expressive function, and they cling to premises, either consciously or subconsciously, that will produce legal rules with positive expressive value”).

47. See Dov Fox, *The Right to Silence as Protecting Mental Control*, 42 AKRON L. REV. 763, 796–97 (2009) (“[O]ur thoughts are what anchor each of us as . . . [having the] uninterrupted autobiographical narrative . . . we tend to think of as most important about who we are.”).

48. See Adam J. Kolber, *The Experiential Future of the Law*, 60 EMORY L.J. 585, 622 (2011) (noting the longstanding view that “[t]he presence of a physical manifestation of distress . . . can serve only as a rough proxy for the severity of the distress”).

49. See Gregory C. Keating, *When Is Emotional Distress Harm?*, in *TORT LAW: CHALLENGING ORTHODOXY* 273, 276, 298, 300 (Stephen G.A. Pitel, Jason W. Neyers & Erika Chamberlain eds., 2013) (“Emotional distress differs from physical harm in a fundamental and categorical way. Our emotional reactions are mediated by our minds. Emotional injury may

that he carried out without a guilty mind reinforces our identity as moral agents capable of making free choices from among available courses of action.<sup>50</sup>

The best reason to sustain any such dualist belief would be that it facilitates decisions that are substantively correct.<sup>51</sup> But our analysis reveals that the fiction of dualism warps the rights and duties to which the doctrines of harm, compulsion, and intentionality give rise. Dualism helps to explain why the torts system scorns victims who suffer even serious and demonstrable emotional distress,<sup>52</sup> why self-incrimination doctrine underprotects suspects and defendants,<sup>53</sup> and why criminal law neglects the performative dimension of human action.<sup>54</sup> We will try to show that the costs of these distortions outweigh whatever offsetting value dualism promotes or whatever conflict it mediates.<sup>55</sup>

The second rationalization is less principled than it is practical. It underscores the costs of correcting dualism's place in our law. On this account, the law might draw distinctions between mind and body as an imperfect proxy that makes it easier for judges to resolve complex disputes or for citizens to understand confusing rules.<sup>56</sup> But even large gains in administrative efficiency cannot generally excuse the accumulation of substantive errors in the delivery of justice. A related justification is that expelling dualism from the doctrine would upset the settled expectations of those who count on the stability of law.<sup>57</sup> Notwithstanding the importance of *stare decisis*,<sup>58</sup> our legal system's reliance on dualism cannot be justified unless the costs of correction exceed the benefits of correcting it.<sup>59</sup>

thus be the product—not the negation—of our agency. Often, emotional reactions are much more subject than physical responses to our . . . wills and our control. We can teach ourselves to toughen up and not be so sensitive, and we can steel ourselves against even exceedingly unpleasant experiences.”)

50. See Saul Smilansky, *Free Will: From Nature to Illusion*, 101 PROC. ARISTOTELIAN SOC'Y 71, 88–94 (2001) (“[O]ur priority should be to live with the assumption of libertarian free will although there is no basis for this other than our very need to live with this assumption . . .”).

51. See LON L. FULLER, *LEGAL FICTIONS* 103–04 (1967) (defending fictions as a way to arrive at correct results).

52. See *infra* Part II.

53. See *infra* Part III.

54. See *infra* Part IV.

55. See generally Dan M. Kahan, *The Secret Ambition of Deterrence*, 113 HARV. L. REV. 413 (1999).

56. See generally David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731 (1987).

57. See generally Oona A. Hathaway, *Path Dependence in the Law: The Course and Pattern of Legal Change in a Common Law System*, 86 IOWA L. REV. 601 (2001).

58. See, e.g., *Barefoot v. Estelle*, 463 U.S. 880, 896–98 (1983) (rejecting social science findings casting doubt on predictions of future dangerousness on account of *stare decisis* considerations), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 102, 110 Stat. 1214, 1217, *as recognized in* *Slack v. McDaniel*, 529 U.S. 473 (2000).

59. See, e.g., Jeremy Waldron, *Stare Decisis and the Rule of Law: A Layered Approach*, 111 MICH. L. REV. 1, 5 (2012) (distinguishing “the justification for following the decision in a previous case” from “the justification for being cautious before one overturns an established precedent”).

We will argue that this showing cannot be made: the costs of our proposed reforms are more or less fixed.<sup>60</sup> By contrast, the distortions that dualism will generate into the future, if we allow it to stay, are boundless. We believe that the benefits of our reforms outweigh their costs. We make this case against mind-body dualism in the three Parts that follow. We expose, examine, and evaluate its entrenchment in the doctrines of harm, compulsion, and intentionality. This analysis spells out dualism's damage to our legal system as well as our proposal to replace its influence with our integrationist model of mind and body.

## II. HARM

A railroad pipefitter was among the “snowmen of Grand Central,” so called because the end of each workday had them covered with white insulation dust.<sup>61</sup> It was asbestos.<sup>62</sup> He exhibited no physical signs of cancer, but the latency period associated with asbestos-related diseases often keeps those exposed from manifesting symptoms for several years.<sup>63</sup> So the pipefitter gravely feared that his prolonged exposure would eventually cause a painful and fatal illness.<sup>64</sup> And he sued the railroad company for the negligent infliction of emotional distress.<sup>65</sup> The legal dispute reached the Supreme Court in *Metro-North v. Buckley*.<sup>66</sup>

The Court held that anxiety or despair is not, by itself, the kind of harm for which federal employees are entitled to compensation.<sup>67</sup> Unless their mental anguish is a byproduct of physical injury, employees cannot recover for exposure “to a substance that poses some future risk of disease and . . . causes emotional distress only because the worker learns that he may become ill after a substantial period of time.”<sup>68</sup> The majority explained that limiting claims for the negligent infliction of emotional distress prevents a “flood” of “trivial” litigation and the threat of “unlimited and unpredictable liability.”<sup>69</sup> The Court accordingly tried to justify the sharp line that it drew between physical and mental harms on the basis that it enables a “tort system that can distinguish between reliable and serious claims on the one hand, and unreliable and relatively trivial claims on the other.”<sup>70</sup>

*Buckley* makes too much of the generalization that “claims for emotional injury . . . are far less susceptible to objective medical proof than are their physical

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60. Importantly, we do not propose to revolutionize our system of torts by converting all kinds of mental discomfort into actionable damages. Under our proposal, emotional harms will merit recovery only when they are both evidenced and substantial. *See infra* note 124 and accompanying text.

61. *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 446 (1997).

62. *Id.* at 427.

63. *Id.*

64. *See id.*

65. *Id.*

66. *Id.* at 427–48.

67. *Id.* at 447.

68. *Id.* at 432.

69. *Id.* at 433 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994)).

70. *Id.* at 444.

counterparts.”<sup>71</sup> This generalization is also a product of misguided mind-body dualism. We argue in the pages ahead that it is a mistake to assume that the harms associated with a person’s mind cannot be reliably confirmed like bodily harms can. What we think of as emotional harms tend to manifest themselves externally in no less verifiable ways than do physical harms. Where a mental harm exhibits no external manifestations, it would not merit compensation under our approach. This is not, however, just because that particular harm is harder to prove. It is more so because its absence of external indications suggests that it is indeed trivial or transient. That a subset of such emotional harms are less serious does not justify making them all noncompensable on their own either for evidentiary reasons or across the board.

Yet tort doctrine broadly limits compensation that tortfeasors like the railroad company have to pay for the emotional kinds of suffering that they accidentally inflict on others. The lesson that *Buckley* drives into our tort law is that emotional suffering, however grievous or demonstrable, does not, on its own, qualify for compensation, even where modest or difficult-to-prove physical injury would. The result is that the bodily injuries that victims suffer are for the most part actionable in tort, but stand-alone emotional suffering is not.<sup>72</sup> This bodification of harm doctrine underlies the federal and most state systems of torts.<sup>73</sup> We will explore the doctrine’s distinction between mental and physical harms through the lens of five mechanisms that tort law uses to limit recovery for accidental injuries. These mechanisms are harm, duty, negligence, proximate cause, and evidentiary verification.

The first mechanism limits which *harms* are actionable: impairments and deprivations are in; hardships and lost opportunities are out.<sup>74</sup> The second mechanism narrows the scope of an actor’s *duty* to avoid harming others: such duty attaches only when an actor exposes others to a risk of sustaining harm or promises a person, expressly or impliedly, to keep him out of harm’s way.<sup>75</sup> The third mechanism caps the safeguards against *negligence*: to avoid liability for tort damages, the actor must take only those precautions that cost less than the expected harm given its probability and magnitude.<sup>76</sup> The fourth mechanism—*proximate cause*—absolves unforeseeable harms: tortfeasors need to compensate victims only for those harms that fall within the reasonably anticipated scope of risk created by the tortfeasor’s negligence.<sup>77</sup> The

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71. *Id.* at 434 (quoting *Gottshall*, 512 U.S. at 552).

72. See Keating, *supra* note 49, at 276 (“For the most part, tort law has taken harm to mean physical harm, and harm itself has been understood as impairment.”); *id.* at 298 (“Canonically, harm in the law of torts meant ‘physical harm’, in contradistinction both to pure economic loss and pure emotional harm.”).

73. See Levit, *supra* note 15, at 146 (“Compensable injuries still are, in large part, tied to either physical impacts, physical manifestations of injury, or other proxies for emotional distress.”).

74. See DAN B. DOBBS, *THE LAW OF TORTS* § 302, at 822–24, § 308, at 835–36 (2000) (attesting that courts are reluctant to allow recovery for stand-alone emotional distress).

75. See *id.* § 308, at 837 (underscoring contractual relationships and implicit undertakings as a basis for liability for stand-alone emotional harm).

76. *Id.* §§ 143–146, at 334–48 (articulating cost-benefit analysis underlying negligence decisions).

77. *Id.* §§ 180–181, at 443–47 (articulating scope-of-the-risk analysis under the proximate

fifth and most frequently overlooked mechanism to limit tort compensation—*evidentiary verification*—compels the dismissal of certain claims of liability when the plaintiff fails to provide specified forms of proof to verify his claim.<sup>78</sup>

These claim-screening mechanisms operate differently across various categories of cases. For example, in products liability and ultrahazardous activity cases that involve physical injury, our system puts to work two mechanisms out of five.<sup>79</sup> For other suits in which the plaintiff seeks recovery for personal injury or proprietary damage, it uses three or four mechanisms.<sup>80</sup> Sometimes, a mechanism is applied loosely; at other times, strictly.<sup>81</sup> There is only one category of cases in which all five mechanisms function at full capacity to clear away unwanted tort actions. This is the category of cases like *Buckley*—but extending far beyond just federal torts—in which plaintiffs seek compensation for mental or emotional harm including fear, shock, anxiety, grief, and distress.

That our tort law so exceptionally limits compensation for emotional harm in all of these five ways reaffirms the distortionary impact of mind-body dualism on this doctrine. We examine the operation of each mechanism in turn.<sup>82</sup>

First consider harm. Cases alleging emotional harm set an exceptionally high threshold for actionable harm. Emotional harm may qualify for compensation under existing law only if it is serious, lasting, and the product of a distressing episode in which the plaintiff was directly involved.<sup>83</sup> For example, a mother can recover compensation for the shock of witnessing her child die in a car crash.<sup>84</sup> Indirect involvement and transient anguish do not likewise qualify.<sup>85</sup> So a person in anguish

cause doctrine).

78. *Id.* § 308, at 837–38 (explaining the special evidentiary requirement for emotional distress claims).

79. *Id.* § 354, at 978–79 (plaintiff’s burden in an action for harm caused by a defective product includes neither proof of manufacturer’s duty and negligence nor special evidentiary requirements); *id.* § 347, at 952–54 (noting the same burden for a plaintiff’s harm caused by a defendant’s ultrahazardous activity).

80. For example, in order to win a medical malpractice suit, the plaintiff must show actionable harm, negligence, proximate cause, and special evidentiary verification (a merit certificate followed by expert testimony). The duty to take adequate precautions against the patient’s harm is deemed to be present in all doctor-patient relationships. *See* Alex Stein, *Toward a Theory of Medical Malpractice*, 97 IOWA L. REV. 1201, 1213–16 (2012).

81. This tradeoff is best illustrated by our laws of medical malpractice that contain heightened pleading and proof requirements with respect to physicians’ negligence alongside rules that make it easy for aggrieved plaintiffs to prove causation and damage. *See id.* at 1203, 1208.

82. These claim-screening mechanisms do not apply in actions involving *intentional* infliction of emotional distress by outrageous conduct. Our torts system seeks to depress outrageous behavior and therefore increases the wrongdoer’s prospect of paying for his misdeeds.

83. *See* DOBBS, *supra* note 74, § 309, at 839–40 (explaining zone-of-danger doctrine).

84. *See, e.g.,* *Portee v. Jaffee*, 417 A.2d 521, 526–28 (N.J. 1980) (allowing recovery under a similar set of facts).

85. *See, e.g.,* *Thing v. La Chusa*, 771 P.2d 814, 830 (Cal. 1989) (in bank) (holding that because a plaintiff mother “was not present at the scene of the accident in which her son was injured” and so “did not observe defendant’s conduct . . . she could not, therefore, establish a right to recover for the emotional distress she suffered when she subsequently learned of the accident and observed its consequences”).

from having observed an airplane crash on a neighboring property suffers no actionable harm.<sup>86</sup> He cannot recover, no matter how serious or clearly manifested his panic, shock, or distress. The harm mechanism limits mental as opposed to physical injuries accordingly, without regard to the seriousness of the victim's suffering and the reliability with which those injuries can be detected.

Next is duty. An actor's duty to refrain from causing emotional distress to another has a similarly limited scope.<sup>87</sup> This duty attaches only when the actor exposes another to a risk of sustaining imminent physical injury.<sup>88</sup> In that case, the victim's fear counts among the inventory of harms that the actor has a duty to avoid.<sup>89</sup> This inventory also includes any anguish and distress associated with the victim's physical injury.<sup>90</sup> In exceptional cases, actors assume a duty to avoid emotional harm when they have a special relationship with the victim.<sup>91</sup> An actor in such a relationship is presumed to instill reliance in the victim that he will take reasonable measures to protect him against emotional harm.<sup>92</sup> Providers of medical care, from psychiatrists to fertility clinics, have this special kind of relationship with their patients that obligates them to care about their patients' emotional well-being.<sup>93</sup>

Proof of actionable emotional harm and the requisite duty to prevent it are necessary but not sufficient conditions for entitlement to compensation. The defendant must also have acted negligently. This third mechanism requires the victim to show that the defendant could have prevented his emotional harm by taking precautions that are reasonable in the sense that they are less expensive than the expected harm to the victim.<sup>94</sup> The victim would easily make the required showing when his emotional harm results from physical injuries for which the defendant is responsible.<sup>95</sup> In the case of such "parasitic" emotional harm, the extra effort to avert the victim's emotional harm, on top of preventing his physical injury, is zero.<sup>96</sup> By

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86. See *Lawson v. Mgmt. Activities, Inc.*, 81 Cal. Rptr. 2d 745, 756 (Ct. App. 1999).

87. See, e.g., *Huggins v. Longs Drug Stores Cal., Inc.*, 862 P.2d 148, 151–54 (Cal. 1993) (in bank) (denying compensation for negligent infliction of emotional distress to parents of child who suffered drug overdose resulting from pharmacy error on the ground that the pharmacy owed parents no duty of care).

88. See DOBBS, *supra* note 74, § 309, at 839–40.

89. *Id.*

90. *Id.* § 377, at 1050–52.

91. *Id.* § 308, at 836.

92. See, e.g., *Shin v. Sunriver Preparatory Sch., Inc.*, 111 P.3d 762, 770 (Or. Ct. App. 2005) (holding that the special "relationship between an international homestay student and a school . . . gave rise to such a heightened duty on the part of the school to protect the student from emotional harm").

93. See, e.g., *Gammon v. Osteopathic Hosp. of Me., Inc.*, 534 A.2d 1282 (Me. 1987) (allowing claim for emotional distress after hospital negligently handed plaintiff a human leg in a bag he believed contained his recently deceased father's personal belongings); cf. Stein, *supra* note 80, at 1233 (noting that physicians often have a special duty to protect patients against emotional harm).

94. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (defining negligence as failure to take precautions that cost less than expected harm).

95. See DOBBS, *supra* note 74, § 302, at 822–23 (attesting that physically injured plaintiffs are always entitled to recover compensation for attendant, or "parasitic," emotional harm).

96. See *id.*

avoiding the victim's physical injury, the defendant would also have averted him from emotional harm.

The victim will not fare nearly as well in an action for emotional harm as a stand-alone injury. There, the victim would have to show that his emotional harm was reasonably preventable.<sup>97</sup> Return to the plane crash example. This time, assume that the witness falls into a full-blown depression. This victim, too, will be denied recovery because preventing such remote emotional harms is too onerous. Those harms may be serious but they are too rare to justify costly litigation, and they require airliners to add even more precautions to their efforts at avoiding crashes.<sup>98</sup>

Oddly, the rationale for this outcome does not apply with equal force to physical injuries. Compare the negligence rule for remote emotional harms with the "eggshell rule" that entitles plaintiffs with rare physical conditions—as uncommon as the collateral victim in our plane crash example—to recover full compensation for post-injury disabilities. In a leading eggshell case, for example, the defendant's negligent driving caused an accident victim, who at first exhibited just a bruised chest and fractured ankle, to die six days later from the aggravation of a latent and unforeseeable heart disease.<sup>99</sup> The Iowa Supreme Court held that the defendant had to take the victim in his delicate physical state and pay full compensation for his wrongful death.<sup>100</sup>

This eggshell rule is right to extend the torts system's protection to the most vulnerable members of our society. Prospective tortfeasors should take precautions that correspond to the average amount of harm associated with their activities. This average harm should reflect all kinds of tort victims, from the most frail to the most resilient. To exclude frail victims from the average-harm calculation would unduly diminish the appropriate level of precautions that prospective tortfeasors should take. But if this is so for those whose bodies are frail (like the rare plaintiff with an underlying heart condition), prospective tortfeasors should also have to account for similarly rare emotional harms. There is, in fact, no principled distinction between physically and emotionally fragile harms. Instead, however, our negligence doctrine has two faces. One face shows compassion for those who suffer physical injuries; the other disparages those who suffer from emotional harms.

The proximate-cause and verification mechanisms also screen claims of emotional but not physical harm.<sup>101</sup> The proximate-cause mechanism adjusts the rules that determine the scope of the risk for which the tortfeasor will pay when his action materializes into harm. Under these rules, he pays nothing for the harms that

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97. See, e.g., *Samaan v. St. Joseph Hosp.*, 670 F.3d 21, 38 (1st Cir. 2012) (denying recovery for negligently inflicted emotional distress due to plaintiff's failure to prove causation).

98. See, e.g., *Lawson v. Mgmt. Activities, Inc.*, 81 Cal. Rptr. 2d 745, 750–51 (Ct. App. 1999) ("Air crashes are inevitably going to be very expensive disasters. . . . Extending liability to those who suffer the emotional distress of several moments of fear just before the crash will merely dilute the pool of recovery, as well as make air transportation harder to insure.").

99. *Benn v. Thomas*, 512 N.W.2d 537 (Iowa 1994).

100. *Id.* at 539–40.

101. See Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1169–71 (2009) (explaining proximate-cause doctrine as limiting recovery for stand-alone emotional harm).

fall outside that scope even when he inflicts them on the victim.<sup>102</sup> Take the neighbor who allows a young boy who lives next door to play with his loaded rifle. The child's mother suffers emotional distress when she finds her son playing with the gun. Her emotional harm is nonredressable because it falls outside the scope of risks that make the neighbor negligent, namely those associated with bodily injury from shooting accidents. Because the mother's emotional distress does not originate from such an accident, the negligent neighbor goes scot-free.<sup>103</sup> By narrowing the scope of risk in this way, the rule permits tortfeasors to discount emotional harms.

The cramped scope of compensable risks has to do with more than the familiar fears of manipulation and malingering. The evidentiary verification mechanism singles out emotional harm as a cause of action that is prone to abuse and hence most suspect. Tort actions must generally be proved, like any other civil suit, by a preponderance of the evidence—that is, by *any evidence* that makes the plaintiff's allegations more probable than not.<sup>104</sup> Actions for emotional distress as a stand-alone harm are excluded from this general rule, however, and allowed to proceed to trial only when a plaintiff produces special verification evidence as required by law.<sup>105</sup>

This verification requirement varies from one jurisdiction to the next. Jurisdictions that take a more traditional approach require the plaintiff to produce “impact” evidence showing that the defendant's negligent action actually contacted his body.<sup>106</sup> Other jurisdictions, which form the majority, require evidence that the plaintiff was in the “zone of physical danger.”<sup>107</sup> This evidence must demonstrate that the defendant exposed the plaintiff to a serious and imminent risk of physical

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102. See DOBBS, *supra* note 74, §§ 180–181, at 443–47.

103. This example draws on RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. d, illus. 3 (2005)—an illustration featuring a hunter who hands his gun to a child. In that hypothetical case, the child drops the gun on her toe and breaks it, but the hunter still assumes no liability because the shooting risk that makes him negligent is unrelated to the child's harm. *Id.* The child's broken toe falls outside the scope of the tortious risk, *id.*, as does the mother's emotional distress in the example we give in the text.

104. See *Payne v. State Farm Mut. Auto. Ins. Co.*, 775 So. 2d 683, 685 (La. Ct. App. 2000) (“It is elementary tort law that the plaintiff bears the burden of proving by a preponderance of the evidence each element of his cause of action.”).

105. See, e.g., *Hoffmann-La Roche Inc. v. Zeltwanger*, 144 S.W.3d 438, 447–48 (Tex. 2004) (requiring “evidence of additional egregious, but wholly non-sexual, conduct in this case involving public humiliation, verbal oppression, physical threats, invasion of privacy, abuse of power, and mistreatment of an employee known to have been rendered susceptible to emotional distress”); see also DOBBS, *supra* note 74, § 308, at 836–39 (noting that plaintiffs can generally recover compensation for emotional distress on its own only when the suit is verified by evidence of direct impact or other objective proof).

106. See DOBBS, *supra* note 74, § 308, at 837 (discussing impact requirement); see also *Robb v. Pa. R.R.*, 210 A.2d 709, 710–15 (Del. 1965) (surveying existing impact requirements and substituting Delaware's impact requirement by prevalent “area of physical danger” standard).

107. See DOBBS, *supra* note 74, § 309, at 839–40. This was the rule in *Buckley* that rendered nonactionable the “physical contact” of asbestos exposure “that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill after a substantial period of time.” *Metro-North Commuter R.R. v. Buckley*, 521 U.S. 424, 432 (1997).



injury that made the plaintiff fear for his life or limb.<sup>108</sup> The remaining jurisdictions suffice with evidence (usually provided by experts like psychiatrists or psychologists) that shows the plaintiff's physical manifestations of the alleged emotional harm.<sup>109</sup> The verification requirement has just one exception that might be called "common knowledge."<sup>110</sup> When a plaintiff's emotional harm is common knowledge, he is allowed to proceed to trial even when he adduces no special evidence to verify his suit.<sup>111</sup> A classic example is the plaintiff who sustains emotional harm from witnessing his child killed or injured in an accident.<sup>112</sup>

Why is our torts system so restrictive with regard to redress for emotional harm? To answer this question, we must consider emotional harm against the goals of the claim-screening mechanisms. These mechanisms operate in order to prevent excessive liability for accidental harm.<sup>113</sup> Excessive liability is socially undesirable because it unfairly benefits plaintiffs at the defendants' expense and chills productive activities that expose actors to suits.<sup>114</sup> Emotional harm is thought to risk excessive liability for two reasons, one substantive and the other evidentiary. Arguably, a person can overcome emotional harm. He can use willpower to regain mental strength. Emotional harm is characteristically less debilitating, according to this argument, than the kind of physical illness, disability, and disfigurement that the person cannot undo. Unlike physical impairments, emotional harm is also more difficult to observe, and so it is more vulnerable to fabrication by the unscrupulous plaintiff.<sup>115</sup> Thus, the torts system allows recovery of compensation for emotional harm only in exceptional and well-evidenced cases. This is what the five claim-screening mechanisms do.

This policy in our torts system corresponds to its dualist thinking that treats mind and body as separate and distinct from each other. On this account, it is the body that defines a person's physical and emotional well-being. The body's exposure to the outside world makes the person especially vulnerable to physical forms of injury. His mind, by contrast, is unseen, insulated, and supreme. This doctrinal understanding, a prominent torts treatise makes clear, postulates that a normal and

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108. See DOBBS, *supra* note 74, § 309, at 839–40.

109. See *id.* § 308, at 837–38.

110. See John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 816–19 (2007) (describing the operation of this exception in Hawaii, New Jersey, North Carolina, Ohio, Oklahoma, Tennessee, Washington, and Wisconsin).

111. *Cf., e.g.,* *Portee v. Jaffee*, 417 A.2d 521, 526–28 (N.J. 1980) (awarding compensation for mental and emotional distress to mother who watched her seven-year-old son suffer and die while trapped in elevator).

112. *Id.*

113. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 878–81 (1998) (identifying prevention of excessive liability as one of the goals of the legal system).

114. See *id.* at 879 (“[I]f damages exceed harm, firms might be led to take socially excessive precautions.”).

115. *But see* Kolber, *supra* note 48, at 611–12 (discussing neurotechnologically advanced ways to measure pain distress that attend to its sensory, affective, and evaluative elements); Adam J. Kolber, *Will There Be a Neurolaw Revolution?*, 89 IND. L.J. 807, 831–35 (2014) (predicting that improved brain imaging for pain may relieve legal limitations in tort law on recovery for stand-alone emotional harm).

healthy person has willpower sufficient to exercise control over whatever thoughts and emotions cause him to suffer.<sup>116</sup> This distinctive willpower of the mind is eroded only by psychiatric disorders that impair the functioning of the person's brain.<sup>117</sup> Otherwise, a person can undo his mental anguish.<sup>118</sup>

But the interrelatedness of mind and body shows that humans are no better able to unthink bad thoughts, banish negative emotions, or self-establish peace of mind than they are to will their physical injuries healed.<sup>119</sup> Serious feelings of sadness, frustration, or worthlessness can cause physical symptoms including fatigue, loss of energy, reduced sex drive, excessive sleeping or insomnia, extreme weight loss or gain, crying spells, angry outbursts, back pain, and headaches.<sup>120</sup> Such experiences demonstrably impede the person's ability to work, to maintain fulfilling relationships, and to enjoy life in general. In extreme circumstances, they also can develop into full-blown major depression with ideation or actualization of suicide.<sup>121</sup> A plaintiff cannot control these harms, nor do they divide in any conceptually coherent or defensible way between the physical and mental.

The empirically correct view of emotional harm makes it indistinguishable from pain and suffering resulting from physical illnesses and injuries. As an experience of the body rather than the mind, emotional harm is qualitatively the same as physical illness or injury. Emotional harm is frequently as enduring and transient as physical injuries and illnesses. It differs from them only in terms of evidence. Emotional harm is generally unobservable from the outside, even by psychiatrists and psychologists.<sup>122</sup> It is usually evidenced by the patient's story, whereas physical illnesses and injuries are generally observable and often lie in plain view. Doctors can evaluate them even when their patient does not say a word. As we have explained, however, mental harms routinely have symptoms that are readily observable.<sup>123</sup> Nor are many physical injuries any more salient. Think of lower back pain or carpal tunnel syndrome. That they may or may not correspond to obvious inflammations or anomalies makes the epistemic distinction between mental and physical harm suspect.

As a normative matter, this evidentiary difference is the only factor that should affect the operation of our torts system. The system should stop its indiscriminate

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116. DOBBS, *supra* note 74, § 302, at 823 (“An injured person cannot heal a broken leg by acquiring a better attitude about it. But some persons cope with distress better than others; everyone suffers distress in some measure and most people learn to get over or at least to minimize distress over a period of time. Others nurse their distress and build it up. Even under a thin skull rule, the defendant probably should not be liable for the plaintiff's maladaptive attitudes about distress.”).

117. See DENNETT, *supra* note 17, at 27–29, 107–13.

118. See, e.g., DOBBS, *supra* note 74.

119. Cf. Keating, *supra* note 49, at 281 (“Emotional tranquility must be recognised as an interest worthy of protection in its own right.”).

120. See AARON T. BECK & BRAD A. ALFORD, DEPRESSION: CAUSES AND TREATMENT 12–38 (2d ed. 2009).

121. *Id.* at 57–63.

122. See generally Danya Glaser, *Emotional Abuse and Neglect (Psychological Maltreatment): A Conceptual Framework*, 26 CHILD ABUSE & NEGLECT 697 (2002) (noting that psychiatrists and psychologists struggle to recognize emotional abuse and neglect).

123. See *supra* notes 20, 119–21 and accompanying text.

screening of suits for emotional harm. All it should do is require that each plaintiff provide verifiable proof of his mental condition. In this way, every plaintiff would have to provide evidence identifying observable manifestations of his emotional and mental condition. These manifestations should relate to major life activities such as intimate relationships, recreation, and employment. The plaintiff would have to prove changes in his functioning along these dimensions following the infliction of the emotional harm.<sup>124</sup> Put simply, our torts system must adjust its burden-of-proof requirements with respect to emotional harm.

### III. COMPULSION

The incoherent distinction between the physical and mental infiltrates constitutional criminal procedure. There, this distinction governs the circumstances under which the government can compel citizens to surrender self-incriminating evidence. Consider two suspects, Bill and Joe, who police arrest upon a showing of probable cause. Police ask to take Bill's blood for DNA testing. Bill knows this evidence will out him as a criminal, so he denies permission to take his blood. In Joe's case, police ask him his whereabouts when the crime was committed. Joe knows that telling the truth will incriminate him, so he refuses to talk.

Under the current constitutional regime, if Bill refuses to give over the physical sample, prosecutors can use his refusal in court as evidence of his guilt.<sup>125</sup> Joe does far better: prosecutors cannot use his refusal to reveal his thoughts or memories as evidence of guilt.<sup>126</sup> The contents of his mind are privileged against compelled self-incrimination by the Fifth Amendment.<sup>127</sup> This Part critically examines this mindification of our compulsion doctrine.

The Fifth Amendment's Self-Incrimination Clause, as incorporated against the states, protects anyone who the government accuses of having committed a crime from being compelled "to be a witness against himself."<sup>128</sup> The Supreme Court has held that to be a "witness" under the Constitution means that a suspect or defendant

124. The California Supreme Court moved in this direction back in 1968 when it delivered its landmark decision in *Dillon v. Legg*, 441 P.2d 912, 917–25 (Cal. 1968) (in bank). Unfortunately, the Court decided to move away from *Dillon* and realign California law with dualist thinking in *Thing v. La Chusa*, 771 P.2d 814, 826 (Cal. 1989) (in bank). For a superb analysis of the *Dillon* decision, see generally Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513 (1985). New Jersey appears to be the only jurisdiction that still takes the normatively correct approach to emotional harm. See, e.g., *Falzone v. Busch*, 214 A.2d 12, 13–17 (N.J. 1965) (emotional distress actionable when negligence creates potential for physical harm to distressed victim); *Portee v. Jaffee*, 417 A.2d 521, 525 (N.J. 1980) ("Since *Falzone*, this Court's decisions have shown no hostility to the imposition of liability for negligently caused mental or emotional distress even without an attendant risk of physical harm.").

125. See *People v. Farnam*, 47 P.3d 988, 1022 (Cal. 2002) (holding that the defendant's "refusal to provide blood and hair samples" could be admitted as evidence to prove his guilt).

126. See, e.g., *Doyle v. Ohio*, 426 U.S. 610, 618 (1976) ("[S]ilence will carry no penalty . . .").

127. See *Schmerber v. California*, 384 U.S. 757, 763–66 (1966).

128. U.S. CONST. amend. V; see also *Malloy v. Hogan*, 378 U.S. 1, 8 (1964).

is forced to give police or prosecutors information that could help prove a criminal charge against oneself.<sup>129</sup>

This privilege against compelled self-incrimination—known as the right to remain silent or the right to silence—applies narrowly to protect only certain forms of evidence against seizure or transmission. Specifically, the right to silence proscribes “compulsion to extort communications” just from a suspect’s mind, as the Court first held in the 1910 case of *Holt v. United States*,<sup>130</sup> leaving open to compulsion all evidence obtained from a suspect’s body.<sup>131</sup>

*Holt* presented the question whether the prosecution could adduce into evidence at trial testimony that the shirt allegedly worn by a murder suspect fit the defendant after police had forced him to try it on.<sup>132</sup> The Court held that the testimony was admissible.<sup>133</sup> Justice Oliver Wendell Holmes, Jr. wrote for the majority that “the prohibition of compelling a man in a criminal court to be witness against himself is . . . not an exclusion of his body as evidence when it may be material.”<sup>134</sup> To suppose that the right to silence privileges, beyond just the accused’s “communications,” even observations to “compare his features with a photograph in proof,”<sup>135</sup> he explained, would be a patently “extravagant extension of the Fifth Amendment.”<sup>136</sup> *Holt* thus laid the groundwork for the dualist distinction that the Supreme Court would codify a half-century later in *Schmerber v. California*.<sup>137</sup>

At issue in *Schmerber* was whether the use of an involuntary blood test to prove a drunk driving charge violated the defendant’s right to silence.<sup>138</sup> The Court found no violation in the admission of the compelled blood test to establish the defendant’s guilt.<sup>139</sup> Writing for a 5–4 majority, Justice Brennan cleaved the universe of criminal evidence into the mental kind that the Self-Incrimination Clause privileges and the physical kind that it does not.<sup>140</sup> He wrote that “[t]he distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling . . . ‘testimony,’ but that compulsion which makes a suspect or accused the source of ‘real or physical evidence’ does not violate it.”<sup>141</sup>

The majority held that the state was allowed to take and test the suspect’s blood, and then use that analysis to prove that the suspect had been drinking, because the right to silence “protects an accused only from being compelled to . . . provide the

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129. See, e.g., *United States v. Hubbell*, 530 U.S. 27, 35–36 (2000); *Doe v. United States*, 487 U.S. 201, 210 (1988); *Estelle v. Smith*, 451 U.S. 454, 465–66 (1981); *United States v. Dionisio*, 410 U.S. 1, 5 (1973).

130. 218 U.S. 245, 253 (1910).

131. *Id.*

132. *Id.* at 252–53.

133. *Id.*

134. *Id.*

135. *Id.* at 253.

136. *Id.* at 252.

137. 384 U.S. 757 (1966).

138. See *id.* at 758–59.

139. See *id.* at 771–72.

140. See *id.* at 763–64.

141. *Id.* at 764.

State with evidence of a testimonial . . . nature . . .”<sup>142</sup> The physical character of the suspect’s blood “in no way implicated” those “testimonial capacities.”<sup>143</sup>

The physical-testimonial divide that *Schmerber* affixed at the heart of self-incrimination doctrine tracks the dualism of mind and body by protecting exclusively mental and not physical processes. Justice Brennan explained for the Court that the privileged category of testimonial evidence comprises “an accused’s communications, whatever form they might take . . .”<sup>144</sup> Whether verbal statement, written confession, or silent nod or wave, such testimonial evidence is protected when it is used to reveal the suspect’s thoughts, feelings, or memories.<sup>145</sup> The right to silence offers no protection for voice patterns, handwriting, or gestures when such evidence is used for identification purposes, rather than to disclose communicative content.<sup>146</sup> Nor does that right protect other kinds of physical evidence that come from the suspect’s body, like “fingerprinting, photographing, or measurements,” or bodily samples like blood.<sup>147</sup> Another drunk-driving case, *Pennsylvania v. Muniz*, makes plain the mind-body dualism that self-incrimination doctrine takes for granted when it protects testimonial but not physical evidence.<sup>148</sup> In *Muniz*, police arrested the defendant for driving under the influence and began interrogating him before having informed him of his right to silence.<sup>149</sup> When asked, “Do you know what the date was of your sixth birthday?” the defendant slurred, “No, I don’t.”<sup>150</sup> He argued that this response was protected under the Fifth Amendment.<sup>151</sup> A four-Justice plurality of the Supreme Court decided the question by dividing the defendant’s response into its testimonial and physical components, privileging the former and not the latter.

Justice Brennan held for the plurality that the substantive content of the defendant’s “no” was privileged as testimonial but that his body’s representation of that reply was not.<sup>152</sup> The defendant’s negative answer to the sixth-birthday question was covered by the right, the Court explained, because it required the testimonial use

142. *Id.* at 761.

143. *Id.* at 765 (arguing that neither the blood test nor its results involved “even a shadow of testimonial compulsion upon or enforced communication by the accused”).

144. *Id.* at 763–64.

145. *See id.* at 761 n.5.

146. *Gilbert v. California*, 388 U.S. 263, 266–67 (1967) (concluding that any compelled voice and handwriting sample that is used solely to measure the physical properties of a suspect’s spoken or written word, and not for the testimonial or communicative content of what was to be said, “like the voice or body itself, is an identifying physical characteristic outside [the Fifth Amendment’s] protection”); *United States v. Wade*, 388 U.S. 218, 219–24 (1967) (holding that compelling a suspect to try on “strips of tape such as allegedly worn by the robber” is unprotected “compulsion of the accused to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have[,]” and that compulsion to “utter words purportedly uttered by the robber” was not testimonial evidence either because the suspect’s voice was used only as “an identifying physical characteristic, not to speak his guilt”).

147. *Schmerber*, 384 U.S. at 764–65.

148. 496 U.S. 582 (1990).

149. *Id.* at 585–86.

150. *Id.*

151. *See id.* at 587.

152. *Id.* at 593–94.

of his mental state to “relate a factual assertion or disclose information.”<sup>153</sup> But the Fifth Amendment did not protect the “slurred nature of his speech,” by contrast, because it implicated only the “physical inability to articulate words in a clear manner due to the lack of muscular coordination of his tongue and mouth . . . .”<sup>154</sup> Self-incriminating thoughts and other mental states cannot be compelled, the Court made clear; but no less incriminating physical states can.<sup>155</sup>

The *Muniz* plurality, in its attempt to explain why only the defendant’s words but not his slurring were protected, betrayed the strained nature of the physical-testimonial dualism. Justice Brennan brushed under the carpet the irrefutable truth that the “impaired mental faculties” evidenced by the defendant’s muddled reply could “fairly be characterized as an aspect of his physiology . . . .”<sup>156</sup> The defendant’s hazy thinking and foggy memory were caused, just as his slurred speech was, by the established depressant influence of alcohol consumption on the central nervous system.<sup>157</sup> Conversely, evidence like a tattoo, usually categorized by the Court as physical, can be readily recharacterized as testimonial, as the Second Circuit recently did.<sup>158</sup> Forcing the defendant to communicate inarticulate speech that implicitly admits his drunk condition is no different from compelling a suspect to confess to a crime. Its false division of mind and body leaves the testimonial-physical distinction unable to do the normative work required of it.<sup>159</sup>

153. *Id.* at 589 (quoting *Doe v. United States*, 487 U.S. 201, 210 (1988)).

154. *Id.* at 590 (internal quotation marks omitted).

155. *Id.* at 589.

156. *Id.* at 593 (internal quotation marks omitted). “[H]ad the police [in *Schmerber*] instead asked the suspect directly whether his blood contained a high concentration of alcohol,” Justice Brennan insisted, “his affirmative response would have been testimonial even though it would have been used to draw the same inference concerning his physiology.” *Id.* Justice Brennan had indeed conceded in *Schmerber* that “[s]ome tests seemingly directed to obtain ‘physical evidence[]’ . . . may actually be directed to eliciting responses which are essentially testimonial.” *Schmerber v. California*, 384 U.S. 757, 764 (1966).

157. See generally Henri Begleiter & Arthur Platz, *The Effects of Alcohol on the Central Nervous System in Humans*, in 2 THE BIOLOGY OF ALCOHOLISM 293 (Benjamin Kissin & Henri Begleiter eds., 1972).

158. In *United States v. Greer*, 631 F.3d 608 (2d Cir. 2011), police used the defendant’s tattoo of the name “Tangela” to connect him to a rental agreement under the same name for a car in which illegal ammunition had been found. *Id.* at 611. He appealed his conviction, arguing that the state’s use of the tattoo violated his right against self-incrimination. *Id.* at 611–12. The Second Circuit held that the physical tattoo was nonetheless testimonial evidence because “[t]he government relied on the tattoo not as an ‘identifying physical characteristic’ but for the ‘content of what [was] written.’” *Id.* at 613 (alteration in original) (quoting *Gilbert v. California*, 388 U.S. 263, 266–67 (1967)).

159. Susan Easton has also criticized self-incrimination doctrine for its dualist foundations. See EASTON, *supra* note 15. But our critique is different from hers. We emphasize the emotional and physical harm that invasion by the government inflicts on a suspect or defendant. See *infra* notes 165–67 and accompanying text. Easton, by contrast, draws a continuum based on the communicative character of evidence ranging from most testimonial and least physical to most physical and least testimonial. See EASTON, *supra* note 15, at 218 (proposing to replace the physical-testimonial distinction with a continuum that extends from oral communication at one end to materials from a dead person at the other). Nita Farahany too has displaced the physical-testimonial distinction with a far more nuanced one. See Nita

Here is what the Supreme Court in *Muniz* identified as the normative justification for the Fifth Amendment privilege: it protects criminal suspects from being forced to make certain choices that would inflict psychological cruelty.<sup>160</sup> “At its core,” Justice Brennan explained, “the privilege reflects our fierce ‘unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt,’ that defined the operation of the Star Chamber, wherein suspects were forced to choose between revealing incriminating private thoughts and forsaking their oath by committing perjury.”<sup>161</sup> Physical evidence, on the other hand, does not “involve situations in which suspects were asked to communicate any personal beliefs or knowledge of facts, and therefore the suspects were not forced to choose between truthfully or falsely revealing their thoughts.”<sup>162</sup> With the testimonial sixth-birthday question, by contrast, the “inherently coercive environment created by the custodial interrogation” forced the defendant to lie or provide evidence of his own guilt.<sup>163</sup>

Yet nothing in this “cruel trilemma” justification against subjecting suspects to agonizing choices suggests that the right to silence should protect only testimonial but not physical evidence. The speaking, writing, nodding, and pointing that have been held to be “testimonial” are by no means the only kind of evidence that subjects a criminal suspect to a psychologically painful decision. It torments a person no less when he must choose between allowing the government to inspect self-incriminating bodily markings or extract physical samples, on the one hand, and, on the other, face punishment for refusing to give police that permission. That physical evidence removes a further decision that testimonial evidence triggers about whether lying is a distinction without a difference. This compulsion-versus-punishment dilemma is no less cruel than the trilemma that simply adds another unattractive threat of penalty for lying. The two otherwise identical suspects in our example, Bill and Joe—one asked to relinquish his blood, the other his thoughts—will be equally anguished by the decision whether to incriminate themselves and risk conviction or worse.<sup>164</sup>

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A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351, 366–99 (2012) (distinguishing among self-incriminating evidence that arises from identifying traits; evidence that arises without conscious processing; evidence that arises from memorialized photographs, papers, and memories; and evidence that arises from responses whether uttered silently or aloud). Easton and Farahany reject the binary distinction in a way that mindifies the privilege by making the “mental” part of evidence what matters most. Our focus on harmful consequences avoids this difficulty.

160. See *Muniz*, 496 U.S. at 595–96.

161. *Id.* at 596 (citations omitted).

162. *Id.* at 597–98.

163. *Id.* at 599.

164. The testimonial-physical divide in self-incrimination doctrine cannot be explained as a prophylactic against torture. *Contra* *Ullmann v. United States*, 350 U.S. 422, 428 (1956) (The privilege against self-incrimination “was aimed at a more far-reaching evil—a recurrence of the Inquisition and the Star Chamber, even if not in their stark brutality.”). This explanation espouses the same mind-body dualism that we criticize and endorses the old fallacious idea of *confessio est regina probationum* (confession is the queen of proofs). See PETER BROOKS, TROUBLING CONFESSIONS: SPEAKING GUILT IN LAW AND LITERATURE 9 (2000) (“Confession has for centuries been regarded as the ‘queen of proofs’ in the law: it is a statement from the lips of the person who should know best.”). The antitorture rationale is also underinclusive: privileging only testimonial forms of evidence leaves defendants vulnerable to torture for

Whether the state should be allowed to force suspects or defendants into such choices is a separate question and not an easy one. Its answer depends on a range of constitutional and normative commitments, such as the proper scope of individuals' protections against abuses of power by police or prosecutors in enforcing the criminal law. Whatever the answer to this question, however, it must be the same for both testimonial and physical forms of evidence. Compelling a suspect's self-incriminating words or gestures subjects him to no more painful a decision than the compulsion of his bodily samples or markings.

If protecting suspects from the cruel trilemma is in fact what justifies the privilege in the way that the Court claims that it does, then that justification renders the testimonial-physical distinction altogether irrelevant. When the government has a sufficiently strong reason to force a person to relinquish evidence that could be used to prove his guilt, this reason should be enough to justify forcing out testimonial and physical evidence alike. Conversely, when the government ought to be denied the power to compel a person to reveal self-incriminating information or materials, that person should be able to assert the Fifth Amendment privilege equally in relation to both forms of evidence.

Equally important are the consequences of a defendant's refusal to give the government a bodily sample. That the sample is not protected by the self-incrimination privilege does not under extant law authorize the state to forcibly extract it from the defendant's body (at least not unless such extraction also constitutes a reasonable search or seizure under the Fourth Amendment<sup>165</sup>). All the prosecution can do under such circumstances is ask the court to draw inferences of guilt from the defendant's refusal to surrender the sample.<sup>166</sup> These inferences are predicated on the defendant's implicit communication that the sample contains self-incriminating information that he wants to hide from police and prosecutors. This communication receives no Fifth Amendment protection, yet it is as testimonial as a person's express acknowledgment of guilt.<sup>167</sup>

The doctrinal distinction between testimonial and physical evidence thus collapses like the dualist divide of mind and body that it presupposes.<sup>168</sup> The

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physical evidence. Nor can the right's protection of only testimonial evidence be justified on the ground that it induces police to look for additional evidence, for federal and state law has long required that confessions be corroborated in order to obtain a conviction. *See* Alex Stein, *Constitutional Evidence Law*, 61 VAND. L. REV. 65, 118–19 (2008).

165. *See* *Schmerber v. California*, 384 U.S. 757, 767–71 (1966). Professor Michael Pardo has defended the physical-testimonial dichotomy on the ground that physical evidence brings into play reliable experts and factfinder observations whereas testimonial evidence passes the epistemic buck to suspects and defendants. *See generally* Michael S. Pardo, *Self-Incrimination and the Epistemology of Testimony*, 30 CARDOZO L. REV. 1023 (2008). This rationalization is novel and insightful. Yet, it lacks consequentialist appeal. Using a person as an epistemic authority against his interest causes him no intrinsic harm. Having his person invaded by the government, by contrast, does, and this kind of harm applies across both types of evidence, physical and testimonial.

166. *See* *People v. Farnam*, 47 P.3d 988, 1022 (Cal. 2002).

167. *See* Fox, *supra* note 47, at 796 (arguing that a suspect's thoughts do not "communicate information that his blood does not, nor [does] thinking require[] . . . communicative processes that bleeding does not").

168. This distinction can still promote an evidentiary policy that aims at protecting



Supreme Court should abolish the testimonial-physical dichotomy in its future Fifth Amendment jurisprudence. This dichotomy provides too fragile a footing to sustain our constitutional protections against oppressive criminal procedures. And it will continue to distort the outcomes of particular cases so long as it perpetuates the fallacy that mental and physical phenomena should receive an unequal protection against the heavy hand of state power.

#### IV. INTENTIONALITY

Criminal purpose. Mens rea. A guilty mind. The doctrine of subjective culpability first appeared in our criminal law in the nineteenth century.<sup>169</sup> By the middle of the twentieth century, the defendant's "guilty mind" was no longer questioned as a condition required to convict him of any serious crime.<sup>170</sup> Courts came to regard it "a sacred principle of criminal jurisprudence that the intention to commit the crime is the essence of the crime."<sup>171</sup>

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innocent defendants against erroneous convictions. Abolition of the right to silence would motivate guilty defendants to lie about their innocence and pool with innocent defendants. Fact finders would then disbelieve all defendants who claim to be innocent but lack airtight evidence to corroborate their claims, and would consequently convict more innocent defendants than under the current regime. Defendants requested by government to provide bodily samples or other physical evidence have no lying option. From a strictly evidentiary standpoint, their refusal to surrender physical evidence should therefore trigger adverse inferences. See Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 480 (2000). But even from an evidentiary standpoint, the system does not require the physical-testimonial distinction. All it needs to do to protect the innocent is make the beyond-a-reasonable-doubt standard even more stringent than it currently is. See *id.* at 470–74.

169. See Darryl K. Brown, *Criminal Law Reform and the Persistence of Strict Liability*, 62 DUKE L.J. 285, 290–91 (2012) (attesting that "Anglo-American criminal law has long moved on from the most restrictive understanding of . . . the 'unlawful act' theory, attributed to Sir Edward Coke and according to which the voluntary commission of any criminal conduct made one criminally liable for any resulting harm," noting that the Model Penal Code posits "that criminal liability requires that an actor be culpable—meaning he has intent, knowledge, or recklessness—as to each significant element of an offense[.]" and arguing that "the dominant view in contemporary courts regarding mens rea requirements lies between Coke's view at one end of the spectrum and the MPC position at the other" (emphasis omitted)); see also George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 472–73 (1976) (attesting that the nineteenth century criminal law was "a jumble of technical rules" that attached criminal liability "to all conduct conforming to a collective image of acting like a [criminal] and only to such conduct"). See generally Richard G. Singer, *The Resurgence of Mens Rea: III—The Rise and Fall of Strict Criminal Liability*, 30 B.C. L. REV. 337 (1989) (explaining that the ongoing shift from strict criminal liability and presumed guilt to a comprehensive mens rea requirement gained significant ground during the twentieth century).

170. This condition for conduct's criminalization was codified in the MODEL PENAL CODE § 2.02 (1962), which many states have adopted in one form or another. See Darryl K. Brown, *Federal Mens Rea Interpretation and the Limits of Culpability's Relevance*, 75 LAW & CONTEMP. PROBS. 109, 111 & n.10 (2012).

171. *Duncan v. State*, 26 Tenn. (7 Hum.) 148, 150 (1846); see also Stephen P. Garvey, *Authority, Ignorance, and the Guilty Mind*, 67 SMU L. REV. 545, 545–46 (2014) ("The act is not culpable unless the mind is guilty. Everyone knows that.").

No guilty mind, no crime.<sup>172</sup>

This has not always been so. The criminal law used to worry less about the state of mind that animated the defendant's action than it did about what could be gleaned from that act itself.<sup>173</sup> As George Fletcher famously showed in his influential treatise on *Rethinking Criminal Law*,<sup>174</sup> the doctrine's present emphasis on the defendant's *subjective* mental state marks a radical departure from the *objective* culpability paradigm that dominated criminal law for centuries.<sup>175</sup>

Under the old paradigm, a defendant was criminally liable when he performed an action that manifested, in the ordinary course of things, his purpose to harm a socially protected interest of life, limb, or property.<sup>176</sup> Then, if his action actually harmed that interest, he became liable for the completed crime.<sup>177</sup> If the interest emerged unscathed, he assumed liability for a preparatory crime such as attempt or conspiracy.<sup>178</sup> Altogether absent was any inquiry into whether the actor had a guilty mind.<sup>179</sup> Under this framework, courts determined the defendant's culpability by focusing on the final episode of the crime and its objective meaning.<sup>180</sup> This doctrine of objective culpability, as we call it, enjoyed a long and venerable standing in the criminal law.<sup>181</sup> We will argue that clarity about the integration of mind and body demands this doctrine's resurrection.

The Supreme Court's decision in *Sandstrom v. Montana*<sup>182</sup> played an important role in this evolution. *Sandstrom* jettisoned objective-culpability doctrine for a totality-of-the-evidence approach to identifying the actor's actual state of mind.<sup>183</sup> The case involved a young man who killed an elderly woman by hitting her head with a shovel and stabbing her.<sup>184</sup> He was charged with deliberate homicide.<sup>185</sup>

To obtain a deliberate-homicide conviction in Montana, the prosecution had to prove that the killing was purposeful.<sup>186</sup> Montana criminal law had long included a presumption that "a person intends the ordinary consequences of his voluntary

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172. See *Morissette v. United States*, 342 U.S. 246, 252 (1952) ("[C]ourts of various jurisdictions, and for the purposes of different offenses, have devised working formulae, if not scientific ones, for the instruction of juries around such terms as 'felonious intent,' 'criminal intent,' 'malice aforethought,' 'guilty knowledge,' 'fraudulent intent,' 'wilfulness,' 'scienter,' to denote guilty knowledge, or 'mens rea,' to signify an evil purpose or mental culpability. By use or combination of these various tokens, they have sought to protect those who were not *blameworthy in mind* from conviction of infamous common-law crimes." (emphasis added and omitted)).

173. See *Brown*, *supra* note 169; Fletcher, *supra* note 169.

174. GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* (1978).

175. Fletcher called this objective approach "manifest criminality." See *id.* at 115–18.

176. See *id.* at 116.

177. See *id.* at 116–17.

178. See *id.* at 115–16.

179. See *id.* at 117–18.

180. See *id.*

181. See *Brown*, *supra* note 169. See generally Fletcher, *supra* note 169.

182. 442 U.S. 510 (1979).

183. *Id.* at 521–24.

184. *State v. Sandstrom*, 580 P.2d 106, 107 (Mont. 1978), *rev'd*, 442 U.S. 510 (1979).

185. *Id.*

186. *Id.* at 109.

act.”<sup>187</sup> This presumption shifted to the defendant the burden of producing “some evidence that he did not intend the ordinary consequences of his voluntary acts” rather than requiring him to “disprove that he acted ‘purposely’ or ‘knowingly.’”<sup>188</sup> The trial court instructed the jury of this presumption, and the jury returned a guilty verdict.<sup>189</sup> The verdict was affirmed by the Montana Appellate Court.<sup>190</sup>

The Supreme Court reversed.<sup>191</sup> It held that Montana’s presumption of intent violated due process by giving jurors the impression that it shifted to the defendant the burden of disproving an element of the crime.<sup>192</sup> The Court explained that this appearance of burden shifting violates the due process requirement that the prosecution prove every element of a crime beyond a reasonable doubt.<sup>193</sup> The defendant’s conviction could stand only if the jury understood the presumption as no more than a permissive inference, the Court explained, and found him guilty on the totality of the evidence.<sup>194</sup> It ruled that the jurors’ assessment of the inculpatory evidence ought to have been unaffected by their regard for the presumption.<sup>195</sup>

Under this totality-of-the-evidence approach, a person’s intent has a subjective status independent of whether his action manifests the intent as an objective matter. A person’s words and actions do not themselves constitute criminal intent, but they serve as evidence of it.<sup>196</sup> “[I]ntent is an element of a criminal” offense that the *Sandstrom* Court held “cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from . . . [the] ‘ordinary consequences’ of [a] defendant’s [voluntary] action.”<sup>197</sup> The defendant’s intention to commit a crime cannot, on this account, simply be presumed from his having acted so as to bring about the criminally prohibited consequence in the normal course of events.<sup>198</sup> This approach also assigns no special status to the final episode of the alleged crime. That episode only provides important information about the defendant’s intent that fact finders must weigh together with other evidence.<sup>199</sup>

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187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 107.

191. *Sandstrom v. Montana*, 442 U.S. 510, 527 (1979).

192. *Id.* at 516–19.

193. *Id.*

194. *See id.* at 514–15, 525–27.

195. *Id.*

196. *See id.* at 523.

197. *Id.* at 523 (quotation marks omitted, citing *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 430 (1978)).

198. *See id.* at 524.

199. *See Francis v. Franklin*, 471 U.S. 307, 311–12, 319–24 (1985) (relying on *Sandstrom* to find a due process violation in a jury instruction stating that a “person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted. A person will not be presumed to act with criminal intention but the trier of facts, that is, the Jury, may find criminal intention upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the act for which the accused is prosecuted.”).

The doctrine of subjective culpability assumes that people's intentions are not theoretical or imputed, but real.<sup>200</sup> That we cannot see, hear, or touch such intentions makes them no less factually present in the world; they are just harder to ascertain. This epistemic weakness obliges fact finders to interpret the totality of the evidence. Fact finders must convict the defendant when this totality shows beyond a reasonable doubt that he possessed the requisite intent for the crime. Otherwise, they must acquit. By separating the defendant's objective actions from his subjective intent, these rules reject the notion that an actor's intent is embedded in his action. This rejection reinforces the dualist platform of subjective culpability and mindifies the doctrine of intentionality.<sup>201</sup> Moreover, it conflates a person's intent with related thinking activities that include desires, plans, and designs.

We believe that the doctrinal separation between intentionality and action is conceptually flawed and prone to create distortions in courts' criminal-liability decisions. We posit that criminal intent should be treated as fundamentally distinct from a person's desires, plans, and designs. When a person aspires or primes to do something, these states of the mind do not qualify as his intent.<sup>202</sup> Neither does believing that acting in a certain way would be good for him. Even when he decides to act and reflects on how to carry that action out, this is best described as planning rather than intending.<sup>203</sup>

Intention should be taken to be a person's self-command to carry out a certain action.<sup>204</sup> From a normative standpoint, this is the only mental state for which the person should be held criminally culpable when state of mind triggers a proscribed

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200. Fletcher aptly noted this connection:

[T]he fallacy of assuming that 'something happens' internally whenever one acts intentionally follows from assuming that because there is a word intention, it must name some particular thing. Thus legal theorists think of intention as a 'mental state' or a 'state of mind' that is present whenever one acts intentionally.

FLETCHER, *supra* note 174, at 451–52.

201. *See id.* at 118–19 (“This [subjective criminality] pattern of liability presupposes a notion of intending that treats intent as a dimension of experience totally distinct from external behavior. Intending is conceived as an event of consciousness, known to the person with the intent but not to others. Thus the relationship of intending to action is dualistic rather than monistic. The intent exists in the realm of the mind, the act in the realm of the body.”). Fletcher also criticizes the doctrine for subverting the interests that criminal law is supposed to promote. *See id.* For further criticism of this criminal law dualism, see Bruce Ledewitz, *Mr. Carroll's Mental State or What Is Meant by Intent*, 38 AM. CRIM. L. REV. 71, 74 (2001) (criticizing the adoption of mind-body dualism in criminal law for confusing the concept of criminal intent).

202. *See* G. E. M. ANSCOMBE, INTENTION 1 (2d ed. 1963) (noting serious conceptual problems in conflating different intentions for the future with intentional actions); GEORGE M. WILSON, THE INTENTIONALITY OF HUMAN ACTION 222–30 (rev. and enlarged ed. 1989) (explaining that there can be no “intention” when the actor is not yet doing anything).

203. *See* ANSCOMBE, *supra* note 202; *see also* WILSON, *supra* note 202, at 229–30 (explaining intentions for the future as “propositional attitudes” different from intentions in action); *id.* at 231–35 (explaining intentions in actions as part of the actions carried out by the person).

204. *See* ANSCOMBE, *supra* note 202, at 25, 41–42 (explaining that intention is present in the action's execution); WILSON, *supra* note 202, at 120–21 (unfolding an account of “intentions in action” that occur contemporaneously with the actor's actions and the consequences they bring about).

action. A person cannot be convicted for his desires, aspirations, or plans alone. For that simple reason, culpable operations of the brain are limited to those that make the person act in a prohibited way. Duff put it well in his *Intention, Agency, and Criminal Liability*: “[T]he intention is identical with, not something separate from, [the actor’s] observable action.”<sup>205</sup>

To be clear, we do not believe that mental states can be read from conduct automatically. Our position is that conduct is generally the best available evidence of mental states. This is because, save for instances of accident or insanity, mental states are embedded in and realized by the conduct they drive. This account of intentionality finds support in works by Fletcher,<sup>206</sup> Duff,<sup>207</sup> Anscombe,<sup>208</sup> Searle,<sup>209</sup> Wilson,<sup>210</sup> and Yaffe.<sup>211</sup> We argue that a person can realize states of mind through his actions. It is this realization of mental states in action that properly constitutes his intent, and this is how the law should define that concept.<sup>212</sup> *Sandstrom* erred in missing the interconnected workings of mind and body by defining intentionality in terms of mental state alone.

The law of subjective culpability fails to shake that doctrine’s dualist underpinnings.<sup>213</sup> Its mindification of mens rea supposes that a person can factually intend a crime without doing anything to implement his intent. He would not under such circumstances be guilty of the crime, but he would still be perceived as having intended to commit it. That a person could intend what he does not yet do runs into a serious conceptual difficulty. By cleaving intention from action, subjective-culpability doctrine divorces its taxonomy of criminal liability from the empirical reality. The doctrine attempts to bridge this rift with an ingenious conceptual apparatus that requires the prosecution to establish the simultaneity of a criminal action and the actor’s intent.<sup>214</sup> This requirement reunites mind and body in the legal domain while maintaining their separation as a factual matter.

205. DUFF, *supra* note 15, at 130.

206. FLETCHER, *supra* note 174; *see also supra* notes 200–01.

207. DUFF, *supra* note 15.

208. ANSCOMBE, *supra* note 202.

209. JOHN R. SEARLE, MAKING THE SOCIAL WORLD: THE STRUCTURE OF HUMAN CIVILIZATION 32–33 (2010) (distinguishing between plans, or “prior intentions,” which are absent from spontaneous action, and the “intentions-in-action” that all action requires, defined as “the psychological event that accompanies the bodily movement when I successfully perform an intentional action involving a bodily movement”).

210. WILSON, *supra* note 202.

211. Gideon Yaffe, *Conditional Intent and Mens Rea*, 10 LEGAL THEORY 273, 306 (2004) (“Conduct has evidential primacy in the assessment of mental state.”).

212. We thank Larry Alexander and the examples and arguments discussed in his recent article, Larry Alexander, *The Ontology of Consent*, 55 ANALYTIC PHIL. 102 (2014), for pressing us to clarify this pivotal point.

213. *See* FLETCHER, *supra* note 174, at 118–19.

214. *See* *Morrisette v. United States*, 342 U.S. 246, 251–52 (1952) (“Crime, as a compound concept, generally constituted only from concurrence of an evil-meaning mind with an evil-doing hand, was congenial to an intense individualism and took deep and early root in American soil.”); *see also* *People v. Mayberry*, 542 P.2d 1337, 1345 (Cal. 1975) (in bank) (holding that simultaneous act and intent are prerequisites for conviction).

Mind and body exist apart according to this view. To make the master a criminal, his mind must want what his body does. That this account comes close to a plausible relation between mind and body sometimes allows fact finders to correctly ascertain a defendant's intent. But fact finders will not always get his intent right under this dualistically distorted view. Consider a classic casebook hypothetical featuring a criminal, Clyde, who learns that his accomplice, Bonnie, is planning to cut a deal with the government. As part of that deal, she will provide evidence that will help the government to convict Clyde and send him to prison. Clyde decides to kill Bonnie. Armed with a gun and bristled with anger, he drives to her house. Clyde drives fast and fails to see to a pedestrian crossing the street. He runs over and kills the pedestrian, who turns out to be Bonnie. Is Clyde guilty of murder?

Under subjective-culpability doctrine, Clyde can be guilty only of vehicular homicide. With some stretch, he may also be found guilty of attempted murder. Clyde is not guilty of murder, however, because—so goes the argument—he did not intend to kill Bonnie when he carried out the particular action that killed her (the reckless driving). It stands to ask why exactly he did not have the requisite intent for murder given the subjectivist separation between intentionality and action. When Clyde ran over the pedestrian, he was preoccupied with the idea of killing Bonnie. Indeed, the reason that he did not pay enough attention to the road was precisely because his mind was filled with that murderous thought. To avoid finding Clyde guilty of murder, subjective-culpability doctrine must reason based on the conceptual disconnect between his intent to kill Bonnie (with the gun) and his action that actually brought about her killing (reckless driving).

In other words, the presence of Clyde's murderous thought at the same time he drove over Bonnie does not constitute his intention to kill her. Its presence at the crash was instead a mere coincidence that does not satisfy the subjective kind of intent that modern criminal doctrine requires to hold Clyde culpable for murdering Bonnie. To satisfy that requirement, the prosecution had to show that Clyde *minded* his specific act of killing Bonnie. It is true he was thinking of shooting her. But his homicidal act of reckless driving was itself *absentminded*. So despite his murderous thoughts, Clyde is not guilty of murder.

This refinement prevents subjective-culpability doctrine from falling apart. But it also commits the doctrine to the factually implausible idea that a person is guilty only when his mind drives his criminal act. This idea is factually implausible because it cannot sustain the professed separation of intention and action. If a person's mind and body are thus detached, how could his mind drive his action as a matter of empirical fact? This would require that a mental-physical connection enable his mind to infiltrate his body and make it act in the proscribed way.

To incorporate this integrationist account of the mind-body relation, subjective-culpability doctrine must abandon its dualist foundations. To avoid this unraveling, the doctrine could require conviction for only the simultaneous, rather than integrated, presence of guilty mind and act. But that would send Clyde to jail for murdering Bonnie even though he killed her by accident. This proposed reformulation cannot save subjective-culpability doctrine from the dualism that plagues it.<sup>215</sup>

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215. The same dualist fiction subverts the criminal law doctrine of "transferred intent,"

Nor can subjective-culpability doctrine dispose of dualism in a manner consistent with Supreme Court doctrine. If Clyde's state of mind when he killed Bonnie did not itself drive any homicidal action, then intent is a misnomer. Subjective culpability would do better to fasten a person's mental state to his accompanying action by distinguishing three operations of the mind: (1) willing and contemplating to kill a person, (2) making the body create an opportunity for the killing, and (3) driving the action that actually performs the homicide. These operations of the mind capture distinct episodes in the actor's mental life: planning, preparing, and acting. The actor's state of mind in the third episode is the only one that makes any difference in determining his criminal intent.<sup>216</sup>

The incorporation of any early mental states into the determination of intent confuses the question. Clyde has planned and desired to kill Bonnie, but he did not intend to do so. When he drove to her house with gun in hand, his mindwork—as related to the actions he contemporaneously carried out—included his preparation to kill and the creation of an opportunity for that killing. But the accident on the road—the final episode that resulted in Bonnie's death—foiled Clyde's murderous plan. So he did not commit murder. But the Supreme Court implicitly rejected this kind of reconceptualization when, in *Sandstrom*, it required that fact finders look beyond the natural consequences of a defendant's actions to consider the totality of the evidence.<sup>217</sup> Thus, subjective-culpability doctrine cannot easily align mind and body in determining intent. Focusing on the final criminal episode requires the doctrine to parse states of mind into “desires,” “plans,” and “intents” and to use the concept of intent only in conjunction with the intent-holder's action. This reconceptualization requires fact finders to use the final criminal episode as principal evidence for determining whether an alleged perpetrator acted intentionally. *Sandstrom*'s totality-of-the-evidence approach moves fact finders away from using that final episode, however, as principal evidence of intent or its absence. Instead, *Sandstrom* forces fact finders to process every element of the evidence without any presuppositions and accord each the weight that it deserves.<sup>218</sup>

This unstructured fact finding is susceptible to two types of error. First, fact finders might misconstrue the defendant's early plans or desires as his intent. Second, they might misinterpret the defendant's unplanned criminal action as unintentional. Both

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which provides that a person is guilty of the intended crime when he “acts with intent to harm B but misses B unintentionally and proximately causes the same intended harm to fall instead upon C.” Peter Westen, *The Significance of Transferred Intent*, 7 CRIM. L. & PHIL. 321, 322 (2013). The doctrine achieves this result by transferring the criminal's state of mind from B to C or, alternatively, by construing it as an intent to harm any person. *Id.* at 330–35. Our integrationist account of intent does not require this or any other fiction. Under this account, the criminal's act reveals his intent to harm C. The fact that the criminal originally *planned* (rather than *intended*) to harm B does not change this simple factual observation. All it does is prove that the criminal did not harm C by accident.

216. Cf. Yaffe, *supra* note 211, at 307 n.39 (“[I]n ascribing mental states to a person on the basis of his behavior, we minimize attributing changes of mind to the agent. That is, explanations that attribute consistent states of mind to the agent over time are to be preferred to explanations that attribute mental states to the agent at one time that are abandoned at another.”).

217. See *Sandstrom v. Montana*, 442 U.S. 510, 521–24 (1979).

218. *Id.*

errors will owe to the fact finders' failure to give the final criminal episode the weight it deserves. This episode is not just another piece of information that fact finders must consider together with other evidence in trying to reconstruct the defendant's state of mind. Rather, it embodies the requisite intent for the crime or lack thereof.

The landmark due process decision of *Martin v. Ohio* illustrates both.<sup>219</sup> There, a battered woman was charged with aggravated murder for killing her husband.<sup>220</sup> He had repeatedly attacked her and she decided that when he tried to hit her again she would use a gun, whether to scare him off or shoot him in the event that the assault became severe.<sup>221</sup> State and federal courts upheld her conviction by a jury that had been instructed to find her guilty unless her self-defense story was more probable than not.<sup>222</sup> The courts mistook her envisioning the possibility of shooting her husband as evidence of her intent to kill him. Her intent turns instead on the mindwork that accompanied the shooting. This act may have been driven by her desire to kill her husband or, alternatively, to injure him to avert the anticipated assault. Or she may have pulled the trigger to frighten him away. That only the first of these possibilities supported criminal intent reveals reasonable doubt as to this element of the crime. So the defendant should have been acquitted. Her credible claim to self-defense negated her intention to kill her husband when she pulled the trigger.<sup>223</sup>

A similar miscategorization of the facts can also lead to an erroneous acquittal. Consider a variation on the facts in *Martin*. Assume that the prosecution's evidence only covers the shooting. As in the actual case, the edited facts are open to three plausible interpretations: (1) the defendant intended to kill her violent husband, (2) she intended to injure him to avoid an assault, or (3) she intended only to scare

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219. 480 U.S. 228 (1987).

220. *Id.* at 230–31.

221. *See id.*

222. *See id.*; *see also* *Ohio v. Martin*, 488 N.E.2d 166, 167–69 (Ohio 1986). Under an Ohio statute, self-defense could be established only by a preponderance of the evidence. *Martin*, 480 U.S. at 230 (citing OHIO REV. CODE ANN. § 2901.05(A) (1982)). The defendant argued that the instruction violated her right to due process. *Id.* at 231. The Supreme Court upheld the Ohio statute because states are permitted to shift the burden of persuasion to a defendant in connection with any affirmative defense that does not overlap with an element of the crime. *Id.* at 233–34. Based on its prior precedent, the Court held that proof beyond a reasonable doubt is constitutionally mandated only in relation to the essential elements of the crime. *See id.* at 235 (citing *Patterson v. New York*, 432 U.S. 197, 202 (1977)). Under this precedent, affirmative defenses are not essential elements, but optional. *See id.* at 240–41 (Powell, J., dissenting) (“*Patterson* allowed burden shifting because evidence of an extreme emotional disturbance did not negate the mens rea of the underlying offense. After today’s decision, however, even if proof of the defense does negate an element of the offense, burden shifting still may be permitted because the jury can consider the defendant’s evidence when reaching its verdict.” (emphasis omitted)). A State’s prerogative not to grant these defenses in the first place allows it to recognize such a defense only when the defendant proves it by a preponderance of the evidence or even by a higher standard. *Id.* at 236. (reaffirming *Leland v. Oregon*, 343 U.S. 790 (1952), a decision that upheld the constitutionality of a statute that required defendants to prove the insanity defense beyond a reasonable doubt).

223. *See id.* at 235 (explaining that “the necessary mental state for aggravated murder under Ohio law is the specific purpose to take life pursuant to prior calculation and design” and that self-defense does not negate this specific intent).



her husband off. Because fact finders have no evidence showing the defendant's plan and preparation, they might reasonably decide that she killed her husband spontaneously—that is, without premeditation or malice aforethought. This decision would reduce the charges from murder to manslaughter.<sup>224</sup>

Moreover, the defendant might be able to avoid even the manslaughter conviction by asserting mistake or self-defense. All of this might be decided in the case of a defendant who actually intended to kill her husband during an outburst of mutual violence. A battered woman's attempt at resisting her victimization, anomalously, increases the probability of her murder conviction. This anomaly is a direct and inevitable consequence of the totality-of-the-evidence approach and the dualist metaphysics it presupposes.<sup>225</sup>

The doctrine of objective culpability fares better.<sup>226</sup> It captures empirical realities, realigns with common sense, and escapes flawed dualist premises. Objective-culpability doctrine conceives a person's mind and body as an integrated ensemble of mutually interactive biochemical and neural-regulatory circuits. The experiences of the mind make the person act by giving commands to his body. These mental experiences are in turn affected by the endocrine, immune, autonomic neural, and other inputs that his brain receives from his body as well as the surrounding environment.<sup>227</sup> The person's intent to act in a particular way is thus embedded in the act itself.<sup>228</sup> This act reveals the command from the person's brain that made him act the way he did.<sup>229</sup> So when a person's action is criminal, the mental command that triggered that act is criminal as well.<sup>230</sup> This command just *is* the intent that should determine the person's criminal culpability and punishment.

Incorporating this account of intent into objective-culpability doctrine avoids conceptual and factual anomalies. This critical insight makes it possible to see that the car accident caused by Clyde's reckless driving, for example, manifests not his intent to kill Bonnie but his desire to rush over to carry out his murderous plan. The indifference to the safety of other drivers and pedestrians that accompanied his desire to speed satisfies the offense of vehicular homicide. But it does not make Clyde a murderer.<sup>231</sup>

224. *Id.*

225. Some states fix this distortion by recognizing a limited "battered woman" defense. See Elizabeth M. Schneider, *Equal Rights to Trial for Women: Sex Bias in the Law of Self-Defense*, 15 HARV. C.R.-C.L. L. REV. 623, 631 (1980); Jeannie Suk, *The True Woman: Scenes from the Law of Self-Defense*, 31 HARV. J.L. & GENDER 237, 240–43 (2008); see also Cheryl A. Terrance, Karyn M. Plumm & Katlin J. Rhyner, *Expert Testimony in Cases Involving Battered Women Who Kill: Going Beyond the Battered Woman Syndrome*, 88 N.D. L. REV. 921, 926–35, 941–54 (2012) (describing extant recognition of "battered woman" defense and proposing law reform—tagged as "social agency"—that includes admission of expert testimony concerning "the passive and victimized aspects of women's experiences" that justify self-defense by lethal force).

226. See *supra* text accompanying notes 176–81.

227. Cf. Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 CARDOZO L. REV. 2545, 2555 (2007) (describing mind-brain dualism as "largely discredited").

228. Cf. *id.*

229. Cf. *id.*

230. See DUFF, *supra* note 15, at 120–22; FLETCHER, *supra* note 174, at 116.

231. Whether Clyde attempted murder depends on the state law's policy toward inchoate crimes. See Richard A. Bierschbach & Alex Stein, *Mediating Rules in Criminal Law*, 93 VA.

Under objective-culpability doctrine, fact finders who confront a case like *Martin v. Ohio* would be instructed to focus in particular on the final shooting scene. Specifically, they would be asked to adjudicate among plausible interpretations of the defendant's mental state in that scene. Because two of those interpretations would support the battered wife's innocence, the fact finders would be instructed to acquit upon finding reasonable doubt as to whether she acted intentionally or with malice aforethought. The court should of course permit the defendant to adduce potentially exonerating evidence.<sup>232</sup> But it should not allow the prosecutor to rely on the background evidence showing the defendant's preparation for her husband's assault as proof of murderous intent. Letting the prosecutor use the background evidence in this way would be prejudicial to the defendant because it seriously misleads the fact finders.<sup>233</sup> Even if it was relevant, it never should have been sufficient on its own to demonstrate that element of the criminal offense.

Objective culpability does more than evidence the actor's crime: it *constitutes* that crime as a matter of substantive law.<sup>234</sup> There are, however, important exceptions: A defendant who committed an objectively criminal act can still seek to exonerate himself by claiming that his action was an accident. The defendant would then have to produce evidence to substantiate this claim. If that evidence raises reasonable doubt as to whether the defendant acted intentionally, a factfinder would have to acquit.<sup>235</sup> By the same token, the defendant would be exonerated if his objectively criminal act was engaged in as self-defense, out of necessity, or under duress.<sup>236</sup> In exceptional cases in which mental disorder leaves a person unable to form intent, he should also be able to exonerate himself by providing appropriate evidence.<sup>237</sup>

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L. REV. 1197, 1234–41 (2007) (discussing criminal liability for preparation and attempts and its underlying policies).

232. See U.S. CONST. amend. VI (granting criminal defendants the right to “compulsory process”); *Holmes v. South Carolina*, 547 U.S. 319, 330 (2006) (ruling that the Compulsory Process Clause entitles defendant to present virtually any proof of innocence and that exculpatory evidence can only be excluded when it “has only a very weak logical connection to the central issues”).

233. Under such circumstances, courts should use FED. R. EVID. 403 or its state equivalent to suppress the evidence.

234. See FLETCHER, *supra* note 174, at 119. Professor Deborah Denno argues that acts are unreliable proxies of culpability and corresponding states of mind. Deborah W. Denno, *When Two Become One: Views on Fletcher's “Two Patterns of Criminality,”* 39 TULSA L. REV. 781, 797–800 (2004). We believe that acts are more reliable indicators of culpability than mental attitudes prior to acting. Moreover, the risk of error is present in all decisions regarding criminal liability, and the proof-beyond-a-reasonable-doubt requirement shields defendants against that risk to the extent feasible. See ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 172–78 (2005).

235. STEIN, *supra* note 234, at 178–80.

236. See FLETCHER, *supra* note 174, at 818–34, 864–75 (analyzing self-defense, duress, and necessity defenses and their underlying policies).

237. See *id.* at 835–46 (analyzing and justifying insanity defense). Whether he must show preponderance or just raise a reasonable doubt is a separate question that depends on the desired allocation of the risk of error. See STEIN, *supra* note 234, at 180–83 (arguing that reasonable doubt should be enough to allow defendants to benefit from self-defense and other justificatory defenses and that defendants should be required to establish excusatory defenses by a preponderance of the evidence).

Objective culpability presumes that a person intends the natural consequences of his actions.<sup>238</sup> This presumption has strong empirical support: when people see something or do something, they generally understand what they see and mean what they do.<sup>239</sup> For that simple reason, due process is not threatened by a doctrine that permits a rebuttable presumption of intent which shifts to the defendant the burden of raising reasonable doubt as to whether he acted intentionally. *Sandstrom*'s dualist lens warped its view of what intent really consists: the integrated workings of the mind and the body as one.

#### CONCLUSION

René Descartes famously declared that “except our own thoughts, there is nothing absolutely in our power . . . .”<sup>240</sup> This claim presciently captures the intuitions about individual responsibility, well-being, and dignity that pervade our doctrine today.

The dualist mantra that a person's mind alone lies within his command generates troubling conclusions of law: that a person's thoughts define how accountable he can be held for his actions, that a person can unfeel whatever emotions cause him to suffer, and that a person's freedom to think what he wills is the crucial part of his self that deserves special constitutional safeguard.

Correspondingly, the doctrine of criminal culpability requires that courts ascertain a defendant's intent through his thoughts rather than deeds;<sup>241</sup> tort doctrine holds that mental suffering is not worthy of compensation as a stand-alone harm;<sup>242</sup> and the Fifth Amendment forbids the government from forcing suspects or defendants to reveal their thoughts, while allowing it to compel bodily samples and other physical evidence.<sup>243</sup>

These doctrines of intentionality, harm, and compulsion proceed along the Cartesian assumption that our thoughts and feelings are separate and distinct from the operations of the body. Yet this widely held assumption reflects a deep delusion—conceptually flawed and empirically false—that distorts our laws in pernicious ways.

Contemporary neuroscience, psychology, and psychiatry make plain that our mental and physical lives interact with each other (and our environment). A person

238. See generally, e.g., Alex Stein, *Corrupt Intentions: Bribery, Unlawful Gratuity, and Honest-Services Fraud*, 75 *LAW & CONTEMP. PROBS.* 61 (2012) (arguing that any off-market transaction between a private person and a government official embodies the intent requisite for bribery, illegal gratuity, and honest-services fraud).

239. See Yaffe, *supra* note 211, at 282 (observing that “the only glue connecting one mental state to another is rationality; in the absence of rationality, almost any set of states can be found in a particular defendant's mind”); see also Amitai Etzioni, *How Rational We?*, 2 *SOC. F.* 1, 3–7 (1987) (surveying studies showing that people are habituated to properly understand their environment and adjust their means to chosen ends). See generally Alex Stein, *Are People Probabilistically Challenged?*, 111 *MICH. L. REV.* 855 (2013) (reviewing DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* (2011)) (vindicating ordinary people's common-sense reasoning against irrationality accusations raised by behavioral psychologists and economists).

240. RENÉ DESCARTES, *DISCOURSE ON THE METHOD AND THE MEDITATIONS* 26 (John Veitch trans., Cosimo 2008) (1637).

241. See *supra* notes 169–72 and accompanying text.

242. See *supra* notes 82–98 and accompanying text.

243. See *supra* notes 142–47 and accompanying text.

cannot be reduced to his mind or separated from his body. He is, inescapably, both at once. We have called on courts and legislatures to expel dualism from our doctrine in favor of this integrated vision of the ways in which people think and act. It is this vision that must guide the formation of our legal policies and rules.

We have argued that the criminal law should determine intent based on those experiences of the mind that make a person act by giving commands for movement that are embedded in his body and the outside environment. Tort law should treat mind and body in kind by making mental anguish, like physical injury, actionable as a stand-alone harm. Finally, our constitutional criminal procedure should limit the government's power to compel self-incriminating evidence based on what the compulsion does to the suspect or the defendant, and not on whether the evidence comes from his body or mind.

Displacing dualism with mind-body integrationism has far-reaching implications for the American legal system. Only by recognizing the folly in thinking that we exercise control over our thoughts alone can we correct the callous and untenable privileging of mind over body, or of body over mind in the doctrines of harm, compulsion, and intentionality.