

William & Mary Journal of Race, Gender, and Social Justice

Volume 26 26 (2019-2020)

Issue 1 *First Amendment: Marketplace Morass:
Free Speech Jurisprudence and Its Interactions
with Social Justice*

Article 5

November 2019

The Effects of Rejecting Mind-Body Dualism on U.S. Law

Matthew W. Lawrence

Follow this and additional works at: <https://scholarship.law.wm.edu/wmjowl>



Part of the [First Amendment Commons](#), [Law and Philosophy Commons](#), and the [Law and Race Commons](#)

Repository Citation

Matthew W. Lawrence, *The Effects of Rejecting Mind-Body Dualism on U.S. Law*, 26 Wm. & Mary J. Women & L. 77 (2019), <https://scholarship.law.wm.edu/wmjowl/vol26/iss1/5>

Copyright c 2020 by the authors. This article is brought to you by the William & Mary Law School Scholarship Repository.

<https://scholarship.law.wm.edu/wmjowl>

THE EFFECTS OF REJECTING MIND-BODY DUALISM ON U.S. LAW

MATTHEW W. LAWRENCE*

ABSTRACT

While neuroscience continues to make it clearer that mental processes, effects, disorders, and states can be described through physical observation, the metaphysical notion of mind-body dualism still pervades the U.S. legal system. In this Article, I discuss many areas where mind-body dualism holds fast, and others where mind-body dualism has already been explicitly or impliedly rejected. I argue that in most areas, the dualist distinction would have little to no impact on the values the law already describes. However, I argue that rejecting dualism would have an impact on fundamental rights analyses. First Amendment free speech rights, fundamental rights, and substantive due process doctrine, and particularly as related to the negative rights of children and their parents' rights to raise them, change when seen as involving indelible physical processes. Discussing some relevant Constitutional doctrines, I explain what changes to the analysis follow as a matter of logic, while also discussing normative considerations that would arise. Assuming that dualism is false, I conclude that certain types of now-protected speech and expression would need to be reconsidered because of their potential to physically harm listeners and cause harm generally throughout society. I argue that children should be provided with a robust set of certain negative freedoms due to the physical and sometimes permanent changes that occur in young brains subject to, for example, racist or anti-LGBTQ ideology. When seen as more than merely mental, some of the speech currently protected in the U.S. presents a public health issue that needs to be addressed at the most fundamental level.

INTRODUCTION

I. DUALISM AS A HISTORICAL AND LEGAL PRINCIPLE

II. AREAS WHERE THE LAW ALREADY REJECTS DUALISM

* Solo practicing attorney in Hattiesburg, MS, PhD Candidate in Psychology: Brain & Behavior at the University of Southern Mississippi, and Master of Arts in Philosophy from San Francisco State University. A special thanks to the members of the *Journal of Race, Gender, and Social Justice* for their thorough and excellent job editing and formatting this work. And I must express my endless gratitude to my daughter, Zoey Lynn, and the rest of my friends, family, and colleagues for entertaining hours of inquisition about mind-body dualism and the law.

- A. *Standards Relating to Relevant Evidence*
 - 1. *In General*
 - 2. *Insanity Defense*
 - B. *Voluntary Manslaughter*
 - C. *Unprotected Speech*
- III. WHEN DUALISM PREVAILS: WHERE IT MATTERS AND WHERE IT DOES NOT
- A. *Mens Rea*
 - 1. *Categories of Blame*
 - 2. *Forming Intent*
 - B. *Mental Versus Physical Tort Damages*
 - C. *Testimonial Versus Bodily Evidence*
 - D. *First Amendment Free Speech Doctrine*
 - 1. *Dualism and Protected Speech in General*
 - 2. *Detailing the Problem*
 - 3. *Speech and the First Amendment*
 - 4. *Parental Rights Under the Constitution*
 - 5. *Specifying the Physical Harm of Racist Ideology*
 - 6. *The Right to Be Free from the Physical Harms of Racist Ideology*
 - 7. *Counter-Argument from Religious Freedom*
- CONCLUSION

INTRODUCTION

Mind-body dualism (“dualism”) is the belief that there is a categorical difference between the physical body and the mind.¹ Prevailing ancient thinkers in Western Civilization up through Modernity posited the mind and the body as existing in different conceptual dimensions, where the processes of the mind were not caused by or, in some cases, even related to those of the body or the physical stuff in the world.²

1. Neeta Mehta, *Mind-Body Dualism: A Critique from a Health Perspective*, 9 MENS SANA MONOGRAPH 202, 202 (Jan. 2011).

2. See e.g., ARISTOTLE, 1 THE COMPLETE WORKS: ON THE SOUL bk. 656 (edited by Johnathan Barnes 1984) (“Now given that there are bodies of such and such a kind, viz. having life, the soul cannot be a body, for the body is the subject or matter, not what is attributed to it.”); 7 AUGUSTINE, *The Confessions of Saint Augustine bk. III*, in AUGUSTINE: CONFESSIONS AND ENCHIRIDION 61, 67–68 (Albert C. Outler trans., 1955) (“The bodies themselves are more certain than the images, yet even these thou art not. Thou art not even the soul, which is the life of bodies; and, clearly, the life of the body is better than the body itself.”); Rene Descartes, *Meditations on First Philosophy* 28, in THE PHILOSOPHICAL WORKS OF DESCARTES 1, 28 (Elizabeth S. Haldane trans., Cambridge Univ. Press 1911) (c. 1641 C.E.) (“And although possibly (or rather certainly, as I shall say in a moment) I possess a body with which I am very intimately conjoined, yet because, on the one side, I have a clear and distinct idea of myself inasmuch as I am only a thinking and unextended thing, and as, on the other, I possess a distinct idea of body, inasmuch as it is only an extended and

Historically, people who followed traditional Abrahamic religious faiths generally believed in this brand of dualism, where the soul, god, heaven, and hell persist in a realm outside of the body and are not subject to the laws of physics or empirical observation.³ Recently, some proponents of Abrahamic faiths have argued against mind-body dualism in light of the discoveries of neuroscience.⁴ Those discoveries also inform my view.

Most contemporary philosophers who subscribe to mind-body dualism hold that mental processes are, in fact, caused by physical processes, but that the mind remains outside of the reach of observable, physical analysis.⁵ In this contemporary iteration, naturalistic dualism, the quality of mental experience is beyond the reach of physical explanatory power.⁶ According to naturalistic dualism, while many specific phenomena that make up mental function can be and have been readily described by empirical observation, the totality of qualities making up subjective experience are such that quantitative analysis is unable to adequately explain them at this time.⁷ This so-called “hard problem of consciousness” poses difficult epistemic and other philosophical questions for those who argue in favor of a non-dualist conception of the mind and consciousness.⁸ Here, since this Article simply assumes that dualism is false and that the physical, observable

unthinking thing, it is certain that this I [that is to say, my soul by which I am what I am], is entirely and absolutely distinct from my body, and can exist without it.”); 1 JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* bk. 1, at 91 (1823) (“[T]hat whatever ideas the mind can receive and contemplate without the help of the body . . . it is reasonable to think-retain without the help of the body too. If not, then the soul, gets little advantage by thinking.”); PLATO, *PHAEDRUS* 30–31 (Alexander Nehamas & Paul Woodruff trans., 1995) (“To describe what the soul actually is would require a very long account, altogether a task for a god in every way; but to say what it is like is humanly possible and takes less time. So let us do the second in our speech. Let us then liken the soul to the natural union of a team of winged horses and their charioteer.”)

3. HELEN DE CRUZ & JOHAN DE SMEDT, *A NATURAL HISTORY OF NATURAL THEOLOGY: THE COGNITIVE SCIENCE OF THEOLOGY AND PHILOSOPHY OF RELIGION* 44 (Cambridge Univ. Press 2015).

4. NANCEY MURPHY, *BODIES AND SOULS, OR SPIRITED BODIES?* 3–5 (Cambridge Univ. Press 2006).

5. *E.g.*, Tomas Bogardus, *Undefeated Dualism*, 165 *PHIL. STUD.* 445, 445 (2013); David J. Chalmers, *Facing Up to the Problem of Consciousness*, 2 *J. CONSCIOUSNESS STUD.* 200 (1995); Thomas Nagel, *What Is It Like to Be a Bat?*, 83 *PHIL. REV.* 435, 435–36 (Oct. 1974).

6. Because common sense tells us that there are physical bodies, and because there is intellectual pressure towards producing a unified view of the world, one could say that materialist monism is the “default option”. Discussion about dualism, therefore, tends to start from the assumption of the reality of the physical world, and then to consider arguments for why the mind cannot be treated as simply part of that world.

Howard Robinson, *Dualism*, *STAN. ENCYC. PHIL.* (Feb. 29, 2016), <https://plato.stanford.edu/entries/dualism> [<https://perma.cc/6EKE-N8VZ>].

7. *See* Chalmers, *supra* note 5, at 202–03.

8. *See id.* at 201.

world is all there is, it is sufficient to describe this problem without solving it. I describe the problem merely to help frame the issue, not to delve into the philosophical debate.

In contrast to dualism, mind-body monism (“monism”) is the idea that there is only one thing or one substance that underlies all things.⁹ Typically, monists posit that everything is physical, although avowed monist and Dutch philosopher Baruch Spinoza posited that only God really existed.¹⁰ Monists typically hold that, while humans are able to conceptualize different things within the Universe, we do so somewhat arbitrarily.¹¹ For instance, the difference between the Earth and the Sun is obvious, but at the same time, they are a part of the exact same system. That we define them separately is a matter of conceptual distinction. Depending on the conceptual level of analysis, they are either the same or different. This illustrates, under a monist perspective, there may only be an arbitrary distinction between the mind and the body.¹²

To reject dualism seems to infer that monism is true, but the more accurate inference is that physicalism is true.¹³ Physicalism is the idea that all things are physical in their causes and essences.¹⁴ Ancient schools of thought such as Epicureanism, Stoicism, and many contemporary philosophers, especially those using scientific explanations to underpin their theories, posit physicalism.¹⁵ However, dualism is present throughout the U.S. legal system in various ways.¹⁶ For example, damages bars and limitations on “merely” mental tortious harm, compelling testimony versus bodily evidence, the idea that *mens rea* requirements are only mental in nature, and the free expression of ideas are some areas where mind-body dualism prevails.¹⁷ I am interested in how the law would, could, and should change if dualism is false.

An antecedent assumption necessary for the sake of this argument is that the law could possibly develop without the assumption

9. See Robinson, *supra* note 6.

10. “Since God is the only possible substance, it is impossible for any other substance besides God to exist.” Samuel Newlands, *Spinoza’s Modal Metaphysics*, STAN. ENCYC. PHIL. (Sept. 14, 2018), <https://plato.stanford.edu/entries/spinoza-modal/#Sub> [<https://perma.cc/M3JN-H285>] (last visited Nov. 4, 2019).

11. See *Monism*, THE BASICS OF PHIL., https://www.philosophybasics.com/branch_monism.html [<https://perma.cc/6NKA-NZKC>].

12. See Komala B. Patil, *Two Schools of Thought in Philosophy—Dualism vs. Monism*, PSYCHOLOGENIE (Mar. 26, 2018), <https://psychologenie.com/dualism-vs-monism-in-philosophy> [<https://perma.cc/64SK-3DMA>].

13. See Tim Crane, *Dualism, Monism, Physicalism*, 1 MIND & SOC’Y 73, 73 (2000).

14. See *id.* at 76.

15. Daniel Stoljar, *Physicalism*, NOTRE DAME PHIL. REV. (June 27, 2012), <https://ndpr.nd.edu/news/physicalism> [<https://perma.cc/VJQ7-YWR9>].

16. See Dov Fox & Alex Stein, *Dualism and Doctrine*, 90 IND. L.J. 975, 977 (2015).

17. See *id.*

that dualism is true. I think this is a safe assumption because dualism is a complication of what could be thought of as a simpler problem. Specifically, dualism requires acknowledging the physical world plus an unobservable “mental” construction of what some other worldly set of concepts are like.¹⁸ Howard Robinson describes this succinctly in an article in the Stanford Encyclopedia of Philosophy, “Dualism.”

Because common sense tells us that there are physical bodies, and because there is intellectual pressure towards producing a unified view of the world, one could say that materialist monism is the ‘default option’. Discussion about dualism, therefore, tends to start from the assumption of the reality of the physical world, and then to consider arguments for why the mind cannot be treated as simply part of that world.¹⁹

Many dualists assume that concepts like the mind and consciousness can be explained through deductive reasoning even though they lie outside of our perception.²⁰ Since dualist mental concepts are, by their very nature, not explainable as part of the observable world²¹—even if dualism is true and there are negative consequences of rejecting it in this world or in the other dimension in which the dualist concepts of the mind are purported to exist—humans are capable of both having laws and not subscribing to dualism at the same time. It is sufficient to say that it is possible to have a legal system without endorsing dualism.

In this Article, I assume that dualism is false, and ask: so what? How does the dualist approach lead to different ethical considerations and, therefore, legal standards? While it is interesting to ponder what the law would be like had it developed *ex nihilo*, I will take today’s standards as they are and consider what would happen if the U.S. legal system explicitly recognized that dualism is false in every case. I will not argue here that dualism is wrong,²² nor do I attempt to show that dualist attitudes lead to bad outcomes like neglect of

18. See Robinson, *supra* note 6.

19. See *id.*

20. See *id.*

21. See *id.*

22. Though it should become clear that I think applying dualistic notions is contradictory and wrong in the discussion below surrounding the First Amendment. Compare with Fox & Stein, *supra* note 16, at 975 (“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.”).

bodily health.²³ Instead, I argue what the consequences are for the U.S. legal system if dualism is recognized to be false and a unified, physicalist picture of bodies and minds was adopted. While the scope of this Article is limited, I will address specific areas that elucidate principles that would follow from a strictly physical approach to mental phenomena.

In Part I, I explain the history of dualism in U.S. legal thought. In Part II, I discuss implicit rejections of dualism in the law, namely in evidentiary standards, the concept of involuntary manslaughter, and in specific areas of speech law. In Part III, I address the areas where dualism currently appears in the law and analyze how these areas are affected upon rejecting dualism. The categories addressed in Part III are: (a) *mens rea*, both broadly and specifically regarding intent, (b) mental versus physical tort damages, (c) testimonial versus bodily/physical evidence, and (d) free association, speech and expression doctrine, specifically related to child-rearing, where the focus is especially on the way rejecting dualism should affect the freedom parents have to teach children racist ideologies. In addressing each of these areas, I provide some closing remarks meant to touch on some of the normative issues that arise.

Others who have addressed this issue by taking up the broad topics of free will, responsibility, blameworthiness, and action,²⁴ but I will begin my analyses from discreet topics within legal doctrine that are affected by dualist notions and work my way to the broader implications that each present. The reasons for this method are simple. The first is practical. Precedent is extremely important in the U.S. legal system, so any changes that might come to legal doctrine would and, arguably, should be informed by the existing laws and their justifications and not necessarily informed by a particular conception of consciousness, free will, blameworthiness, action, etc. Second, as will become clear, accepting that dualism is false does not entail rejecting any of those broader notions outright, nor does it follow that many of the legal rules on the books are necessarily problematic just because the phenomenon they attach to are understood to be physical.

This Article is about the notion of mind-body dualism as a concept, how that concept informs the law, and how the law would change if it was rejected in favor of a physicalist understanding of the world. It is not about the epistemic value of neuroscience or the body of scientific knowledge surrounding the brain. In some cases, neuroscience

23. See Matthias Forstmann et al., “The Mind is Willing but the Flesh is Weak”: The Effects of Mind-Body Dualism on Health Behavior, 23 PSYCHOL. SCI. 1239, 1244 (2012).

24. See, e.g., GEORGE P. FLETCHER, THE GRAMMAR OF CRIMINAL LAW: AMERICAN, COMPARATIVE, INTERNATIONAL 10–11 (2007); Stephen J. Morse, *Criminal Responsibility and the Disappearing Person*, 28 CARDOZO L. REV. 2545, 2545 (2007).

provides data that undermines an established legal value, rule, or standard, but even where the concept of dualism does not bear on the legal values underlying doctrine, neuroscience is and will continue to provide important answers.²⁵ While I employ various lessons and theories from neuroscience to explain my arguments, this Article is not about how neuroscience bears on the law. It is about how rejecting mind-body dualism as a concept bears on the law.

I. DUALISM AS A HISTORICAL AND LEGAL PRINCIPLE

In one of his most famous lines, French philosopher and reformed psychologist Michel Foucault declared “the soul is the prison of the body.”²⁶ This declaration flies in the face of conventional wisdom.²⁷ The body actually holds back the soul, right? Isn’t that obvious? Our souls (“minds”) are able to construct elaborate plans and imagine impossible creatures.²⁸ The physical body restrains us from these plans, and the limits of the physical world set the parameters of possible creatures²⁹ . . . right? Well, yes and no.³⁰ Foucault was not saying that humans could do anything *but for* the mind holding us back.³¹ He was saying that the mind is the thing that is manipulated by the devices of discipline and that the mind constructs prisons for the body it occupies.³² The mind is the player that creates and adopts rules of

25. [T]here are four types of situations in which neuroscience may be of assistance: (1) data indicating that the folk-psychological assumption underlying a legal rule is incorrect, (2) data suggesting the need for new or reformed legal doctrine, (3) evidence that helps adjudicate an individual case, and (4) data that help efficient adjudication or administration of criminal justice.

Stephen J. Morse, *The Promise of Neuroscience for Law: Hope or Hype?*, in PALGRAVE HANDBOOK OF PHILOSOPHY AND PUBLIC POLICY 77, 90 (David Boonin, ed. 2018).

26. MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 30 (Alan Sheridan trans., 1975).

27. See Christian Irigaray, *Soma Sema: The Body as a Prison for the Soul*.

28. See, e.g., Corey Plante, *The Monster in ‘A Quiet Place’ Has Super-Hearing for a Terrifying Reason*, INVERSE (Apr. 13, 2018), <https://www.inverse.com/article/43674-a-quiet-place-monster-origins-alien-invasion> [<https://perma.cc/X79H-QJRD>].

29. See James Gallagher, *Ultimate Limit of Human Endurance Found*, BBC (June 6, 2019), <https://www.bbc.com/news/health-48527798> [<https://perma.cc/2FJA-JXEC>].

30. See *id.*; see also FOUCAULT, *supra* note 26, at 29.

31. See FOUCAULT, *supra* note 26, at 29.

32. It would be wrong to say that the soul is an illusion, or an ideological effect. On the contrary, it exists, it has a reality, it is produced permanently around, on, within the body by the functioning of a power that is exercised on those punished—and, in a more general way, on those one supervises, trains and corrects, over madmen, children at home and at school, the colonized, over those who are stuck at a machine and supervised for the rest of their lives. This is the historical reality of this soul, which, unlike the soul represented by Christian theology, is not born in sin and subject to punishment, but is born rather out of methods of punishment, supervision and constraint.

Id.

conduct.³³ The human mind developed guillotines, gallows, garrotes, guns, grammar, golf, and Geneva Conventions.³⁴ The various systems of discipline, both stark and insidious, for better or worse, manipulate human bodies to conform and for human minds to want to conform.³⁵ Like all things Foucault, this was not a metaphysical claim about the essential nature of humans.³⁶ It is a description of how the classical world developed sets of instructions and disciplines that work to control the human population.³⁷ Through this inversion of conventional wisdom, Foucault recognized that mass, systemic physiological manipulation of the human mental process has been under way for centuries.³⁸ Although Foucault posited a dualist notion of the soul as a non-corporeal entity, he also recognized that these processes were physical in nature, or rather that they had physical consequences, and were not merely ethereal concepts of mental manipulation.³⁹

Foucault did not recognize or have access to the more in-depth explanations developed by neuroscience over the past several decades that affirm his genealogical explanations about how we learn, can be controlled, and form habits.⁴⁰ Scientists have developed detailed, though incomplete, biological and chemical explanations of physical operations of the brain that give rise to mental phenomena.⁴¹ This is not to say that neuroscience has all the answers, and there are many normative issues that simply cannot be solved using descriptive

33. *Id.* at 30.

34. For other notable human inventions, see Evan Andrews, *11 Innovations That Changed History*, HISTORY, <https://www.history.com/news/11-innovations-that-changed-history> [<https://perma.cc/5RAT-XJFF>] (last updated Aug. 29, 2019).

35. See FOUCAULT, *supra* note 26, at 137–38.

36. Foucault expressly rejected the notion that humans have an essential nature. NOAM CHOMSKY & MICHEL FOUCAULT, *THE CHOMSKY-FOUCAULT DEBATE: ON HUMAN NATURE* 5–7 (2006).

37. See FOUCAULT, *supra* note 26, at 137–38.

38. These methods, which made possible the meticulous control of the operations of the body, which assured the constant subjection of its forces and imposed upon them a relation of docility-utility, might be called “disciplines”. Many disciplinary methods had long been in existence—in monasteries, armies, workshops. But in the course of the seventeenth and eighteenth centuries the disciplines became general formulas of domination.

Id. at 137.

39. “The classical age discovered the body as object and target of power. It is easy enough to find signs of the attention then paid to the body—to the body that is manipulated, shaped, trained, which obeys, responds, becomes skillful and increases its forces.” *Id.* at 136.

40. For a rather thorough and robust review of these findings and more, see ROBERT M. SAPOLSKY, *BEHAVE: THE BIOLOGY OF HUMANS AT OUR BEST AND WORST* (Penguin Press 2017).

41. See generally ERIC R. KANDEL, *THE DISORDERED MIND: WHAT UNUSUAL BRAINS TELL US ABOUT OURSELVES* (2018).

methods.⁴² But one thing is certain: the idea that mental processes, at least the processes important to the law, are not physical is unsupported by evidence.⁴³ To put it more plainly, there is no mental process that scientists have discovered that the cause of that process is something other than physical.⁴⁴ Still, there are many who argue in favor of types of dualism, mainly where pertinent to consciousness, the will, and determinism.⁴⁵ Regardless of the science or the debates within philosophy that continually edge toward rejecting mind-body dualism, the United States legal system expressly, if inconsistently, endorses dualism.⁴⁶ This makes perfect sense for a system that grew out of the cultural roots of Western Civilization.⁴⁷

The Western World has widely endorsed dualism for millennia.⁴⁸ The thinking human is separated conceptually from the body by the soul, will, god, and consciousness in Western law with few exceptions.⁴⁹ Dualism is endorsed in some form or another by Plato, Aristotle, Augustine, Descartes, and Locke.⁵⁰ The Christian faith that was key in developing the English common law that gave birth to the U.S. legal system followed in this tradition.⁵¹ The religious underpinnings of dualism are hard to overstate in the Abrahamic traditions.⁵² The spiritual dimension of these faiths long depended on separating the body and the soul.⁵³ Although the U.S. Constitution was expressly written with the rejection of sanctioned religion

42. “There is no experiment, even in principle, to indicate that humans *should* behave in one way or another.” Morse, *supra* note 25, at 79 (emphasis in original).

43. See Lawrence E. Williams et al., *The Scaffolded Mind: Higher Mental Processes are Grounded in Early Experience of the Physical World*, 39 EUR. J. SOC. PSYCHOL. 1257, 1257 (Dec. 1. 2009).

44. See Natalie F. Banner, *Mental Disorders are Not Brain Disorders*, 19 J. EVALUATION IN CLINICAL PRAC. 509, 510 (May 21, 2013).

45. *E.g.*, De Cruz, *supra* note 3.

46. See Fox & Stein, *supra* note 16, at 976–80.

47. See Robinson, *supra* note 6.

48. See *id.*

49. I analyze some of these implicit exceptions below. *Infra* Part III.

50. See *supra* note 2.

51. “The eternal principles of natural religion are part of the common law; the essential principles of revealed religion are part of the common law; so that any person reviling, subverting or ridiculing them, may be prosecuted at common law.” LORD CAMPBELL adds in a note: “This, I think, is the true sense of the oft-repeated maxim, that ‘Christianity is part and parcel of the common law of England.’”

A. H. Wintersteen, *Christianity and the Common Law*, 38 U. PA. L. REV. 273, 276 (1890); see Yuri Stoyanov, *Religious Dualism and the Abrahamic Religions*, OXFORD HANDBOOK OF THE ABRAHAMIC RELIGIONS 405, 410 (Oct. 2015).

52. Stoyanov, *supra* note 51, at 410.

53. J. Guyse, D.D., *The Death of the Body, and Separate State of Souls*, BIBLE HUB, https://biblehub.com/sermons/auth/guyse/the_death_of_the_body_and_separate_state_of_souls.htm [<https://perma.cc/L668-SNRM>].

in mind,⁵⁴ the pervasiveness of the metaphysical notion of mind-body dualism persisted.⁵⁵ While I think that the dualist position is indefensible against a mounting pile of evidence with no evidence to contradict, it would be a delusion to think that the position is going to be abandoned overnight. It has been and continues to be a cornerstone of Western jurisprudence and, maybe more importantly, the cultural and historical roots of Western Civilization.⁵⁶ Setting aside whether such a paradigm shift is possible, desirable, or the correct position, I turn to the issue at hand: how would rejecting dualism impact the U.S. legal system?

II. AREAS WHERE THE LAW ALREADY REJECTS DUALISM

A. *Standards Relating to Relevant Evidence*

1. *In General*

Federal evidence rules, which have been mostly adopted by the states as either a matter of statute or constitutional mandate handed down from the Supreme Court, do not allow for evidence that has no objective foundation to enter into the record for consideration.⁵⁷ For instance, people who have no observable contact or provable expertise with the matters at hand or the defendant cannot testify at trial.⁵⁸ Only people with actual knowledge that is relevant to the issue at hand are allowed to testify.⁵⁹ This includes laypersons with personal knowledge of the persons involved or the facts at issue.⁶⁰ While experts are allowed to testify upon certification by the court, they

54. Believing with you that religion is a matter which lies solely between Man & his God, that he owes account to none other for his faith or his worship, that the legitimate powers of government reach actions only, & not opinions, I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should “make no law respecting an establishment of religion, or prohibiting the free exercise thereof,” thus building a wall of separation between Church & State.

Letter from Thomas Jefferson to the Danbury Baptists (Jan 1. 1802), 57 LIBR. OF CONG. INFO. BULL. (June 1998). See also Thomas Jefferson, *Whether Christianity Is Part of the Common Law?*, in REPORTS OF CASES DETERMINED IN THE GENERAL COURT OF VIRGINIA FROM 1730, TO 1740; AND FROM 1768, TO 1772 (1829), reprinted in 1 THE WORKS OF THOMAS JEFFERSON 459, 463 (Paul L. Ford ed., 1904–1905).

55. See Fox & Stein, *supra* note 16, at 978–79.

56. *Id.*

57. David L. Faigman, *The Law’s Scientific Revolution: Reflections and Ruminations on the Law’s Use of Experts in Year Seven of the Revolution*, 57 WASH. & LEE L. REV. 661, 664–65 (2000).

58. FED. R. EVID. 602, 702; see also FED. R. EVID. 602 advisory committee’s notes; FED. R. EVID. 702 advisory committee’s notes.

59. *Id.*

60. FED. R. EVID. 602.

are allowed to testify only as to the objective aspects—science, methodology, etc.—of the relevant facts.⁶¹ Laypersons, when giving allowable testimony about a defendant’s character for example, are allowed to testify to their personal understanding of the character of the person on trial and to the person’s reputation in the community.⁶² The individual’s subjective understanding of the individual in question is admissible as evidence only after laying a foundation that shows that the witness has interacted with the person whose character is being questioned at trial in the past.⁶³ A witness who had no past dealings with a person and just thought that someone looked like the type of person who was trustworthy, prone to violence, etc. should not be allowed to testify as to a person’s character.⁶⁴ However, a person may testify to the character of another based on their reputation in a community if the reputation is known through experience.⁶⁵

How does this bear on the question of mind-body dualism? It illustrates that in evidentiary standards, non-observable, merely mental phenomena are not allowed. For instance, forming an opinion about a person based solely around concepts regarding that person’s identity has been rejected in regard to evidence standards.⁶⁶ “All people aren’t trustworthy” is a conceptual belief that might underpin the belief that “Tyler, a particular tall person, is not trustworthy.” This is an operation that is grounded not based upon some physical characteristic or “in fact” experience that someone has, it is an operation merely of concepts. While people can testify to their subjective impressions on certain topics, if someone gives testimony that depends upon witnessing a particular event but that person is later shown to not have been there or actually to have no observable knowledge of the event, their testimony should be stricken from the record, could give rise to a mistrial,⁶⁷ and the person could possibly be charged with perjury for testifying to the truth of any matter the person does not believe to be true.⁶⁸

61. FED. R. EVID. 703. (“An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.”).

62. See FED. R. EVID. 405, 701.

63. *Id.*

64. See FED. R. EVID. 405. See also 701 advisory committee’s notes.

65. See FED. R. EVID. 405. See also 19 AM. JUR. 2D *Evidence* § 369 (2019).

66. See FED. R. EVID. 404(a)(1).

67. See, e.g., *State v. Everybodytalksabout*, 39 P.3d 294, 297 (Wash. 2002).

68. False testimony must be given willfully to fulfill perjury *mens rea* requirements. See 18 U.S.C.A. § 1621 (1994).

Further, expert witnesses cannot testify to unknowable, other worldly phenomenon, like to the status of a person's soul or whether they have achieved the required merits necessary to get into heaven.⁶⁹ On the other hand, a clergyperson could testify to the standards and doctrine within their faith.⁷⁰ For example, if it is relevant whether someone needs to attend a particular seminary to don the cloth of a particular faith, a seasoned clergyperson of that faith would be a fitting person to give expert testimony.⁷¹ That particular requirement to become a clergyperson is objective, and the clergyperson would know based on their occupation and experience.⁷² Furthermore, imagine that the question in a civil trial is whether or not someone who was denied a position in the clergy was illegally discriminated against due to their race. Imagine further that the standards for becoming a clergyperson of that particular faith included the following: "[t]he candidate must display that their soul is healthy and has reached a level of enlightenment as determined by the superior clergyperson." Now, you have "superior clergyperson" on the stand and ask them "in your opinion, had the plaintiff reached the required level of enlightenment?" Their answer is allowed in as relevant evidence because whether the clergyperson holds a particular opinion is a matter of objective fact and is relevant to the issue of whether the person met the requirements.⁷³ Of course, it is rather easy for someone to lie about such a fact, but it is an objective fact, nonetheless, whether the superior clergyperson is of a particular opinion about someone's soul.⁷⁴ You could not ask the clergyperson if the plaintiff had, as a matter of fact, a healthy soul or had, as a matter of fact, reached the required level of enlightenment.⁷⁵ In addition to being irrelevant, the opposing counsel should object on the grounds that it is merely speculation and that the clergyperson lacks personal knowledge.⁷⁶ Whatever their level of expertise in the clergy, no person has access to that sort of information, and it will not be allowed in court.⁷⁷ Courts do not accept evidence that is not possibly knowable as an objective matter.⁷⁸ Whether an individual holds an opinion is this type of knowable objective matter.⁷⁹

69. See FED. R. EVID. 702, 703.

70. See FED. R. EVID. 702 advisory committee's notes.

71. *Id.*

72. *Id.*

73. See FED. R. EVID. 702 advisory committee's notes.

74. *Id.*

75. See FED. R. EVID. 702, 703.

76. The question is also improper as it is character evidence barred by evidence rules with some exceptions. See FED. R. EVID. 404, 405, 602, 702, 703.

77. See FED. R. EVID. 702, 703.

78. *Id.*

79. See FED. R. EVID. 702 advisory committee's notes.

Courts also do not accept pseudoscientific testimony when it comes to fact-based inquisition.⁸⁰ The schools of objective science propound theories that can be falsified, proven, disproven, tested, and questioned.⁸¹ That is to say that they could possibly be shown to be false.⁸² Pseudosciences, while sometimes useful, are, by definition, not falsifiable or testable.⁸³ Astrology, for example, could never be proven to be false.⁸⁴ At the same time, all of the phenomenon relating to a human's life path and tendencies can possibly be explained using astrological methods.⁸⁵ Those methods could never be argued to lead to what is false or true.⁸⁶ The explanations of astrology apply a somewhat consistent set of post-hoc explanations that plausibly relate physical phenomenon with extra-terrestrial alignment and positioning.⁸⁷ This sort of pseudoscience has no place in the U.S. court system.

Pseudoscience and divine explanations of events and people might feel as though they "have some truth to them."⁸⁸ And they very well may. But this is not the sort of truth that makes up the facts in court that are triable as a matter of law.⁸⁹ The type of truth that the court allows is of the sort that could be proven to be false.⁹⁰ If something true can be proven to be false, it has a truth value of either 1 or 0.⁹¹ If something could always be reasoned to be true and never possibly proven false, it has a truth value of 1, and therefore has no probative value as to whether a particular event actually happened.⁹² The

80. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589–90 (1993).

81. See Martyn Shuttleworth & Lyndsay T. Wilson, *Karl Popper's Basic Scientific Principle*, EXPLORABLE (Sept. 21, 2008), <https://explorable.com/falsifiability> [<https://perma.cc/9NCM-SM68>].

82. See *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 593 (1993); see also Shuttleworth & Wilson, *supra* note 81.

83. See *Criterion of Falsifiability*, ENCYC. BRITANNICA (Feb. 24, 2016), <https://www.britannica.com/topic/criterion-of-falsifiability> [<https://perma.cc/U3US-H4S4>].

84. *Id.*

85. Julie Beck, *The New Age of Astrology*, ATLANTIC (Jan. 16, 2018), <https://www.theatlantic.com/health/archive/2018/01/the-new-age-of-astrology/550034> [<https://perma.cc/HX2R-LJRK>].

86. See Doron Menashe, *Is Judicial Proof of Facts a Form of Scientific Explanation? A Preliminary Investigation of Clinical Legal Method*, 12 INT'L J. EVIDENCE & PROOF 32, 38–39 (2008).

87. See *id.*

88. See, e.g., Paul R. Thagard, *Why Astrology Is a Pseudoscience*, 1 PHIL. SCI. ASS'N 223, 225–26 (1978).

89. See Menashe, *supra* note 86.

90. See D. H. Kaye, *On "Falsification" and "Falsifiability": The First Daubert Factor and the Philosophy of Science*, 45 JURIMETRICS 473, 480 (2005).

91. See *Types of Statements: Some Useful Definitions*, LOY. UNIV., <http://people.loyno.edu/~folve/typesofstatements.html> [<https://perma.cc/BBP5-W9DP>]; see also Vern R. Walker, *A Default-Logic Paradigm for Legal Fact-Finding*, 47 JURIMETRICS 193, 209 (2007).

92. *Id.*

scientific method renders conclusions that can be verified, tested, and questioned.⁹³ Where it does not, no conclusion should be reached.⁹⁴

In the realm of evidence, U.S. law has rejected the notion that there is something other than the physical, observable world for purposes of trial.⁹⁵ Even the oath taken by witnesses to tell the truth, the whole truth, and nothing but the truth is meant to “impress that duty on the witness’s conscience.”⁹⁶ In other words, the person needs to actually know the seriousness of their truthful testimony.⁹⁷ Whether anyone but that person can actually know such a fact is beside the point. The point of evidence law is to introduce possibly knowable phenomena into the record in a way that aids the trier of fact in understanding the case.⁹⁸ Since dualism necessarily posits the mind as outside the realm of physical or knowable observation,⁹⁹ evidence law has de facto rejected it.

2. *Insanity Defense*

The insanity defense is properly invoked where a person has no ability to recognize the weight of their actions and is an area where the law implies a physicalist approach to the mind, particularly through the evidentiary demands of proving it.¹⁰⁰ Though it can be invoked for any crime, the focus here will be on murder. While there are slightly different variations in the law depending on jurisdiction, the insanity defense is a complete defense to murder and voids culpability.¹⁰¹ After John Hinckley attempted to kill President Reagan, shooting him and three others, he successfully proved that he was insane by, among other things, introducing a CT scan that showed his brain was abnormal in a way that made him susceptible to schizophrenia.¹⁰² In the fallout from this high profile case and the Supreme

93. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993).

94. Hanne Andersen & Brian Hepburn, *Scientific Method*, STAN. ENCYC. OF PHIL. (Nov. 13, 2015), <https://plato.stanford.edu/entries/scientific-method/#SciMetCouRoo> [<https://perma.cc/SX7S-E88D>].

95. See FED. R. EVID. 701(a), 702, 703, 901.

96. See FED. R. EVID. 603.

97. See MICHAEL H. GRAHAM, 4 HANDBOOK OF FED. EVIDENCE § 603:1 (8th ed. 2018).

98. See FED. R. EVID. 102.

99. See Descartes, *supra* note 2.

100. See *Insanity*, 2 CRIM. L. DEF. § 173 (2019).

101. *Id.*

102. See Laura A. Kiernan, *Hinckley Judge Reverses Himself, Admits Pictures of Defendant’s Brain*, WASH. POST (June 2, 1982), <https://www.washingtonpost.com/archive/politics/1982/06/02/hinckley-judge-reverses-himself-admits-pictures-of-defendants-brain/3bec96a2-ceab-4ac9-a73e-5aff2febb3b5> [<https://perma.cc/MUU9-3W57>]; Natalie Jacewicz, *After Hinckley, States Tightened Use of the Insanity Plea*, NPR (July 28, 2016, 10:20 AM), <https://www.npr.org/sections/health-shots/2016/07/28/486607183/after-hinckley-states-tightened-use-of-the-insanity-plea> [<https://perma.cc/C2SR-UGYX>].

Court's decision in *Jones v. United States*,¹⁰³ dozens of states changed their standards for insanity cases to make it more difficult to prove.¹⁰⁴

Physical evidence of mental states and disease pathology is given substantial weight in court.¹⁰⁵ Functional Magnetic Radiation Imaging (fMRI) has been used to prove mental states, even in murder trial sentencing,¹⁰⁶ though there are doubts surrounding how reliably this evidence is interpreted or understood by jurors or judges.¹⁰⁷ A concern is that the lack of data about base rates in the population and lack of control groups to compare defendants to will cause juries, who are typically not very scientifically savvy, to place too much weight on scientific methods and analysis.¹⁰⁸ While some methods are more dubious than others, states consistently demand objective standards for proving insanity defenses.¹⁰⁹ The particular legal tests, though varied, uniformly demand psychiatric evaluations and expert testimony showing that the person's condition is or was, at the time of the crime, manifest through objective evidence.¹¹⁰ There is good reason for this. The mental processes that matter in the law are the ones that can be tested or observed objectively.¹¹¹ These processes are expressed as "memory, attention, processing speed, reasoning, judgment, . . . problem-solving, spatial, and language functions."¹¹² While issues persist in getting the correct formula for how to qualify witnesses, the testimony they will give, and how juries will understand the information that experts relay,¹¹³ the heart of evidence law is to

103. *Jones v. United States*, 463 U.S. 354, 370 (1984) (holding that a criminal defendant who proves insanity may be held without violating due process until the defendant regains sanity or is not a danger to themselves or society).

104. See Jacewicz, *supra* note 102.

105. See Corey Hill Allen & Eyal Aharoni, *Brain Scan Evidence in Criminal Sentencing: A Blessing and a Curse*, THE CONVERSATION (Apr. 2, 2019, 6:40 AM), <https://theconversation.com/brain-scan-evidence-in-criminal-sentencing-a-blessing-and-a-curse-113088> [<https://perma.cc/H6D9-S6JZ>].

106. See Greg Miller, *fMRI Evidence Used in Murder Sentencing*, SCIENCE (Nov. 23, 2009, 5:45 PM), <https://www.sciencemag.org/news/2009/11/fmri-evidence-used-murder-sentencing> [<https://perma.cc/K2FF-DM4Z>].

107. See Emily R. Murphy & Teneille R. Brown, *Through a Scanner Darkly: Functional Neuroimaging as Evidence of a Criminal Defendant's Past Mental States*, 62 STAN. L. REV. 1119, 1181–93 (2010).

108. *Id.* at 1179–80.

109. See, e.g., *Zettlemoyer v. Fulcomer*, 923 F.2d 284, 295 (3d Cir. 1991) (holding that "Pennsylvania case law now establishes that, to prove diminished capacity, only expert testimony on how the mental disorder affected the cognitive functions necessary to form the specific intent is relevant and admissible").

110. See generally AAPL Practice Guidelines for Forensic Psychiatric Evaluation of Defendants Raising the Insanity Defense, 42 J. AM. ACAD. PSYCHIATRY & L. S3, S8, S21–22, S30, S32 (Nov. 2014).

111. See *id.*

112. Philip D. Harvey, *Clinical Applications of Neuropsychological Assessment*, 14 DIALOGUES IN CLINICAL NEUROSCIENCE 91, 91 (2012).

113. See David Faigman et al., *Gatekeeping Science: Using the Structure of Scientific*

get to the truth in a way that is reliable and testable, and proving insanity defenses further shows this.¹¹⁴

Lay witnesses may testify to behavior that matches the behavior of someone who is legally insane, but they may not testify as to whether, in their non-expert opinion the behavior is of the type that qualifies as “insane.”¹¹⁵ While posing the question, “did you think that the defendant was able to perceive the wrongness of their actions?” to a layperson with personal knowledge about a defendant is allowable,¹¹⁶ asking “do you think that the defendant was suffering from a manifestation of [debilitating disease]” is not, because laypersons have no special training to identify the objective signs of particular diseases and pathologies.¹¹⁷ A person is going to have a hard time proving insanity unless substantial objective evidence indicates it.¹¹⁸

Further, criminal evidence rules do not allow for priests, fortune tellers, or metaphysicians to sit as expert witnesses to opine on the presence or absence of insanity when there is no observable, physical evidence available.¹¹⁹ Physical manifestations of brain disorders are reliably detectable by trained professionals who practice science.¹²⁰ Physical acts may be observed by lay persons as evidence.¹²¹ People who are experts on mental states and laypeople who actually witnessed “insane” behavior are allowed to testify, but not in the same capacity.¹²² People who specialize in the notions outside of the observable realm are not allowed to testify to pseudoscientific or divine understandings.¹²³ Whether the standards are correct—and at the very least—this practice is an implicit rejection of dualist notions of the mind and body.

B. Voluntary Manslaughter

This is an area of the law where the line between the mental and physical is substantially blurred. Manslaughter can be invoked

Research to Distinguish Between Admissibility and Weight in Expert Testimony, 110 NW. U. L. REV. 859, 862–63 (2016).

114. See FED. R. EVID. 102.

115. See FED. R. EVID. 701; see also FED. R. EVID. 701 advisory committee’s notes on 2000 amendments.

116. *Id.*

117. See FED. R. EVID. 702.

118. See 18 U.S.C.A. § 17 (1986).

119. See *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 151 (1999); *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579, 589–90 (1993); see also *supra* note 69.

120. The “biological approach to the mind” is detailed and developed using the neuropathology of mental disorders in a recent book by Nobel Prize winning neuropsychologist, Eric Kandel. See KANDEL, *supra* note 41, at 4.

121. See *Insanity*, *supra* note 100.

122. *Id.*

123. See *Kumho Tire Co.*, 526 U.S. at 151; *Daubert*, 509 U.S. at 589–90; see also *supra* note 69.

as a defense to murder where an intentional homicide is provoked by something that has “the natural tendency . . . to produce . . . a state of mind . . . with the [same] certainty that physical effects follow from physical causes.”¹²⁴ Federal law defines manslaughter as “unlawful killing of a human being without malice . . . [u]pon a sudden quarrel or heat of passion.”¹²⁵

This principle dates back centuries.¹²⁶ While the language is careful here to maintain the mind-body bifurcation,¹²⁷ neuroscience can explain the process that takes place when someone perceives an upsetting situation and then acts upon that situation, without what the law calls “forethought”, versus when the person premeditates their decision.¹²⁸ Perception of the event sets into motion physical processes that make way for reactions, sometimes uncontrollable overreactions.¹²⁹ When a particular brain’s regions associated with aggression are damaged through injury, overreactions can become the norm for that person¹³⁰ and are found in some notoriously violent individuals.¹³¹ Voluntary manslaughter doctrine defines some situations as so provocative or upsetting that even “reasonable” persons—with brain functions within the range deemed normal—are driven to violence and do not deserve the full weight of capital punishment.¹³² While the law does not expressly state that the process it

124. *Maher v. People*, 10 Mich. 212, 220 (1862) (emphasis omitted).

125. 18 U.S.C.A. § 1112 (2008).

126. Joshua Dressler, *Rethinking Heat of Passion: A Defense in Search of a Rationale*, 73 J. CRIM. L. & CRIMINOLOGY 421, 421–22 (1982).

127. [A] homicide which would otherwise be murder is committed under the influence of extreme *mental or emotional* disturbance for which there is reasonable explanation or excuse. The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.

MODEL PENAL CODE § 210.3(b) (AM. LAW INST., Proposed Official Draft 1962) (emphasis added).

128. SAPOLSKY, *supra* note 40, at 54. *See generally* J. Peters et al., *Induction of Fear Extinction with Hippocampal-Infralimbic BDNF*, 328 SCIENCE 1288 (2010).

129. *See* SAPOLSKY, *supra* note 40, at 31.

130. *See* JOHN M. HARLOW, *Recovery, in* PASSAGE OF AN IRON BAR THROUGH THE HEAD 1, 13–14 (1869) (Employers “regarded him as the most efficient and capable foreman . . . considered the change in his mind so marked that they could not give him his place again He is fitful, irreverent, indulging at times in the grossest profanity (which was not previously his custom), manifesting but little deference for his fellows, impatient of restraint or advice when it conflicts with his desires A child in his intellectual capacity and manifestations, he has the animal passions of a strong man . . . [H]is mind was radically changed, so decidedly that his friends and acquaintances said he was ‘no longer Gage.’”).

131. *See* Constance Holden, *Fuss Over a Terrorist’s Brain*, 298 SCIENCE 1551, 1551 (2002).

132. “An unlawful killing without adequate provocation is murder; but if the defendant killed under provocation so serious as to produce that response in a reasonable person, the crime will ordinarily be manslaughter.” 1 Witkin, CAL. CRIM. L. 4TH § 231(1) (2019).

allows for is physical, it is.¹³³ The perception of some event causes manifest, physical changes in the brain that the person who commits the killing are purported to not be able to control.¹³⁴ If a person who was able to stop and control them went ahead and killed the person anyway, they would be guilty of premeditated murder, not manslaughter.¹³⁵ The law accounts for this process that is observed to be, and is in fact, physical even where it is described as mental.¹³⁶

The mental aspect of the description of manslaughter adds little value. There would be no substantial difference if the law said that the acts that can provoke a manslaughter-type killing must be of the sort that give rise to impulse-driven neurotransmission that produces uncontrollable rage.¹³⁷ There is little debate that the sort of impulsivity accounted for by manslaughter doctrine, especially as reaction to fear or grave offense, involves a neural process originating in a part of the brain where we lack control.¹³⁸

There is still plenty of mystery why some people within the neurocognitive range deemed normal will, for example, kill their spouse after catching them cheating while others do not.¹³⁹ Most people will get upset, but not commit the killing. Does this mean that they have more self-control? Maybe for some, but it seems more likely that a panoply of factors weighs on whether someone commits a manslaughter killing when faced with a potentially manslaughter-invoking situation.¹⁴⁰ The person who commits voluntary manslaughter has a momentary, justified diminished capacity to control their actions because physical impulses are driving their actions.¹⁴¹ Even though their killings are treated as partially justified as a result of the “natural” state of mind, they are far from the norm.¹⁴² It is possible that understanding both the impulsive reactions and the controlled reactions as manifesting from different physical processes would help sort out this confusing and somewhat inconsistent application of the law.

133. See SAPOLSKY, *supra* note 40, at 31.

134. *Id.* at 31–33.

135. See MODEL PENAL CODE §§ 210.2, 210.3 (AM. LAW INST., Proposed Official Draft 1962).

136. *Id.*

137. See MODEL PENAL CODE § 210.3 (AM. LAW INST., Proposed Official Draft 1962).

138. See SAPOLSKY, *supra* note 40, at 31–33.

139. See Stanton E. Samenow, *Are We All Susceptible to Crimes of Passion?*, PSYCHOL. TODAY (Aug. 19, 2014), <https://www.psychologytoday.com/us/blog/inside-the-criminal-mind/201408/are-we-all-susceptible-crimes-passion> [<https://perma.cc/XB4V-Q7CU>].

140. *Id.*

141. See SAPOLSKY, *supra* note 40, at 31–33.

142. See Samenow, *supra* note 139.

C. *Unprotected Speech*

There are several types of speech that are not protected under First Amendment doctrine.¹⁴³

In this section, I discuss the types of speech that are not protected, specifically because they are considered to constitute actions, not merely expressions of ideas or mental states.¹⁴⁴ There are other areas where free speech may be curtailed by the government, such as those involving sexual obscenity and commercial speech,¹⁴⁵ that are not discussed. It is sufficient here to point out the speech that constitutes action to show that dualism has been rejected in these areas.

Some statements are criminal acts themselves.¹⁴⁶ Imagine someone tells you to go to the woods tomorrow at noon to get \$100; so you go to the woods to get the money. Instead, you get murdered by a friend of the person who told you to go to the woods. The person who told you to go did so knowing you would be murdered. The two people planned the murder. The person who told you to go to the woods did not commit the murder, but that person is guilty of murder through accomplice liability.¹⁴⁷ Although the person did nothing more than speak, the person is still a murderer.¹⁴⁸ Even if you did not get murdered because there had been a detective who was on to the culprits and nabbed them as they met up to plan the attack hours before meeting you for the murder, they could still be convicted of conspiracy to commit murder.¹⁴⁹ Just telling you to meet in the woods is enough to constitute an “overt act” towards committing a murder that is sufficient for a conspiracy conviction.¹⁵⁰ Other examples of statements that can give rise to criminal charges on their own include perjury and those that make up an element of larceny by trick or fraud.¹⁵¹ Perjury is further discussed in Part III. Generally, material misrepresentations are not protected speech and are actionable under criminal, tort, contract, and administrative law, among other areas.¹⁵²

143. See *Schenck v. United States*, 249 U.S. 47, 50 (1919).

144. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

145. See Iona Sharma & Sicheng Zhou, *Obscenity and the First Amendment*, CORNELL U.L.SCH., https://courses2.cit.cornell.edu/sociallaw/student_projects/ObsecenityFirstAmendment.htm [<http://perma.cc/C9F7-4X4T>] (last visited Nov. 4, 2019).

146. See 18 U.S.C. § 373 (1994).

147. See, e.g., *Waddington v. Sarausad*, 555 U.S. 179, 185 (2009).

148. *Id.*

149. See *Conspiracy*, *infra* note 213.

150. See 18 U.S.C.A. § 1117 (1994).

151. See 18 U.S.C.A. § 1621 (1994).

152. See *Fraudulent Misrepresentation*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/fraudulent_misrepresentation [<http://perma.cc/N5TW-CAXR>] (last visited Nov. 4, 2019).

Some other statements, that are not protected, must be accompanied by actions or potential actions of other people.¹⁵³ Fighting words,¹⁵⁴ incitement of imminent lawlessness,¹⁵⁵ and true threats¹⁵⁶ are not, on their own, unprotected speech.¹⁵⁷ But where they present actual and imminent threats of violence or other definable harms, they can lead to criminal charges.¹⁵⁸ The classic example by Justice Holmes of shouting fire in a crowded theater¹⁵⁹ displays the logic behind these unprotected categories. If someone yells fire in a theater, the “natural” response is to cause the people in the theater to rush out, trampling each other, leading to personal injuries and possible death.¹⁶⁰ That type of speech leading to arrest is contingent upon specific circumstances.¹⁶¹ Yelling fire in your bedroom on the top floor of an otherwise empty mansion leads to no harm and is, therefore, not criminally actionable.¹⁶²

Fighting words are not protected speech.¹⁶³ For example, if you yell a racial slur in someone’s face and get punched, the person that punched you might be protected from criminal punishment in a similar way that people who kill their spouses when they catch them cheating could avoid a murder charge.¹⁶⁴ While undoubtedly speech, certain racial and otherwise offensive words themselves constitute actions similar to the action inducing a perception that leads to manslaughter.¹⁶⁵ In contrast, if someone yells a politically charged statement that could be taken as racist as opposed to directing their racist slur at a particular person, the person who made the statement would be protected by the criminal law and have all civil

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

154. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (stating that words “which by their very utterance inflict injury or tend to incite an immediate breach of the peace”).

155. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (describing speech that “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

156. *Virginia v. Black*, 538 U.S. 343, 344 (2003) (Scalia, J., concurring) (explaining that “[t]rue threats’ . . . encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . [t]he speaker need not actually intend to carry out the threat”).

157. See *Schenck*, 249 U.S. at 52.

158. *Chaplinsky*, 315 U.S. at 573.

159. See *Schenck*, 249 U.S. at 52.

160. *Id.*

161. *Id.*

162. *Id.*

163. *Chaplinsky*, 315 U.S. at 571–72.

164. See Sara J. Berman, *What is Manslaughter? What Is Murder vs. Manslaughter?*, NOLO, <https://www.nolo.com/legal-encyclopedia/homicide-murder-manslaughter-32637-2.html> [<http://perma.cc/ZEV4-93GA>] (last visited Nov. 4, 2019).

165. *Id.*

remedies against anyone who punches them, because they were exercising a protected speech right.¹⁶⁶ If this seems mushy and hard to delineate, it is. More on protected speech that causes harm follows in Part III below on free speech and tort damages, respectively.

Another controversial category of unprotected speech is that which provokes imminent lawless activity, where the lawless activity is likely to happen.¹⁶⁷ Laws quelling speech of this type have been especially controversial, though upheld where the speech threatens the operations of the government, particularly during wartime.¹⁶⁸ A more common punishment of speech under this doctrine is where someone incites a riot or breach of the peace.¹⁶⁹

True threats are also not protected.¹⁷⁰ The key to a threat being actionable is that it is made by someone able to carry it out, although intent is not required.¹⁷¹ The justification for this doctrine is that people should be protected from the fear of violence, and that threats increase the likelihood that the violent act will be carried out.¹⁷² People under a true threat justifiably take actions and make plans to avoid the outcome of the threat.¹⁷³

What do these categories of speech have in common that make them unworthy of protection? In general, they all have an effect on people that hear them.¹⁷⁴ Rather, they have particular effects.¹⁷⁵ The words do things.¹⁷⁶ But plenty of protected speech can have profound impacts on people.¹⁷⁷ Another way to express what binds these categories of speech is that they manifest physically in the world. Not only is there an incursion into the mental space of the listener, but they result in consistent physical changes to the hearers.¹⁷⁸ People who hear these unprotected words have justifiable “gut” reactions

166. See *Hate Speech*, FIRE (Mar. 28, 2019), <https://www.thefire.org/issues/hate-speech> [<http://perma.cc/6BQ8-TXV4>].

167. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

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

169. Kimberly Wimbush, *Inciting to Riot*, 53A AM. JUR. 2D § 20 (2019).

170. *Virginia v. Black*, 538 U.S. 343, 344 (2003) (Scalia, J., concurring).

171. *Id.*

172. *Id.* at 359–60.

173. See *Understanding the Stress Response*, HARV. HEALTH PUB. (Mar. 2011), <https://www.health.harvard.edu/staying-healthy/understanding-the-stress-response> [<http://perma.cc/JE53-V5DU>].

174. See Lisa F. Barrett, *When Is Speech Violent?*, N.Y. TIMES (July 14, 2017), <https://www.nytimes.com/2017/07/14/opinion/sunday/when-is-speech-violence.html> [<https://perma.cc/588X-5G5D>].

175. See *id.*

176. For an introduction to philosophy of language surrounding the ability of words to constitute actions, see generally J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1955).

177. See Michael Hyatt, *How Our Words Impact Others* (July 22, 2016), <https://michaelhyatt.com/how-our-words-impact-others> [<http://perma.cc/T4BB-JBHT>].

178. See Barrett, *supra* note 174.

that arise as a natural consequence from these utterances.¹⁷⁹ While the law does not define what is going on in this physical way, it describes a physical change in hearers that is caused by the words.¹⁸⁰ The words do, or rather, should be expected to do something. Other areas of speech that are protected against governmental suppression are seen as impacting only the mental aspects of the hearers.¹⁸¹ However, some protected speech has profound impacts on the hearers.¹⁸² Some protected speech leads to imminent lawless action.¹⁸³ Some protected speech poses a true threat.¹⁸⁴ Drawing the line around particular categories appears to be exceedingly arbitrary. As I discuss in Part III, rejecting the dualist distinction present in free speech doctrine helps to clarify the confusing justifications for curtailing some speech and not others. The question should be “how does the speech impact the hearer?”, not “does the speech impact the hearer?”

III. WHEN DUALISM PREVAILS: WHERE IT MATTERS AND WHERE IT DOES NOT

A. Mens Rea

1. *Categories of Blame*

Law is supposed to reflect the values of society.¹⁸⁵ Many of the values expressed through the law have almost nothing to do with whether or not dualism is true, even when they appear to on the surface. Rejecting dualism might appear to greatly affect *mens rea* requirements for different criminal charges, but I argue that it does not necessarily change anything. While epistemic questions, such as how we know whether someone in fact had a particular mental state when committing an act, are already impacted by neuroscientific technology and expert testimony,¹⁸⁶ the values expressed by different *mens rea* requirements that indicate different offenses do not appear to be affected by rejecting dualism.¹⁸⁷ It is possible that neuroscientific

179. See *Hearing Hate Speech Primes the Brain For Hateful Actions*, NEUROSCIENCE NEWS (Jan. 12, 2019), <https://neurosciencenews.com/neuroscience-hate-speech-10514> [<http://perma.cc/4N9A-MAS3>].

180. *Id.*

181. See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 457–61 (2011).

182. See Barrett, *supra* note 174.

183. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

184. *Virginia v. Black*, 538 U.S. 343, 344 (2003) (Scalia, J., concurring).

185. See *Law and Society*, BRIDGE, <https://cyber.harvard.edu/bridge/LawSociety/essay1.htm> [<http://perma.cc/267Q-ZML7>] (last visited Nov. 4, 2019).

186. See Murphy & Brown, *supra* note 107, at 1188.

187. This is a different issue than whether or not someone can choose a certain mental

methods could serve as evidence to prove a mental state, but the underlying question of what mental state a person had when committing an act would remain.¹⁸⁸ If someone kills another with malice aforethought, whether you are a monist or a dualist does not seem to bear, *per se*, on whether you think they are guilty of first degree murder.¹⁸⁹ Similarly, a physicalist and a dualist can both reasonably think that someone who commits a homicide in the heat of passion should be convicted of the lesser charge of voluntary manslaughter.¹⁹⁰ The value that is expressed has to do with the mental state of the actor and the degree to which that person's actions reflected that their mind—physical or not—operated in such a way as to meet the requisite standards.¹⁹¹

What about choice? Can someone choose if their body is their mind? Wouldn't determinism follow directly from physicalism? I will not go too far down this rabbit hole, but some cursory comments should suffice to delineate my project from these concerns. In general, choice is a separate, conceptually more fundamental issue that is affected substantially by the notion of dualism.¹⁹² The mind has been conceived of throughout the Western world as somewhat of a captain, piloting the ship of the body around its existential ocean.¹⁹³ If the mind is instead conceived of as an integral part of the body, who is the captain? Physicalist responses to these questions range from accepting that choice is a spurious notion to denying that the concept of choice is even related to adhering to physicalism.¹⁹⁴ In any case, physicalism and choice can coexist—for the purposes of legal doctrine—even if they are not compatible in “the final analysis.” In fact, legal doctrine based on consequences for actions infers that choice exists.¹⁹⁵ The

state in the first place or whether someone can be blameworthy in a physicalist world. It seems obvious that someone's physical brain state could be such that in one instance we consider them to be choosing and in another instance they are not choosing. Even physical explanations can include choosing. The values that we ascribe to those physical explanations could change based on a particular view of choice, but they do not necessarily need to change as a matter of logic or course just because we reject the notion of dualism.

188. *See id.*

189. *See* Howard J. Curtis, *Malice Aforethought, In Definition of Murder*, 19 YALE L.J. 639, 639 (1910).

190. *See* Berman, *supra* note 164.

191. *Id.*

192. *See* Maia Szalavitz, *Making Choices: How Your Brain Decides*, TIME (Sept. 4, 2012), <http://healthland.time.com/2012/09/04/making-choices-how-your-brain-decides> [<http://perma.cc/7HC4-MGX9>].

193. *Id.*

194. *See* Bill Pratt, *Is Free Will Possible for the Physicalist?*, TOUGH QUESTIONS ANSWERED (Apr. 25, 2012), <https://www.toughquestionsanswered.org/2012/04/25/is-free-will-possible-for-the-physicalist> [<http://perma.cc/VD7B-95F3>].

195. *See Model Penal Code's Mens Rea*, L. SHELF, <https://lawshelf.com/courseware/entry/model-penal-codes-mens-rea> [<http://perma.cc/HQ46-PEEZ>] (last visited Nov. 4, 2019).

question of choice qua choice is a topic for those who are not dealing with the current legal paradigm.

In sum, *mens rea* categories exist as valuations of particular mental states regarding particular actions,¹⁹⁶ and those mental states being physical in nature do not necessarily alter their existence or weight.

2. *Forming Intent*

Distinct from *mens rea* classification is the epistemic question of how to know, understand, and decide whether a person had the requisite mental state that is expressed by *mens rea* doctrine. A key distinction is when intent forms.¹⁹⁷ In “Dualism and Doctrine,” Dov Fox and Alex Stein argue that criminal *mens rea* requirements emphasizing “the defendant’s *subjective* mental state marks a radical departure from the objective culpability paradigm that dominated criminal law for centuries.”¹⁹⁸ In contrast, the *objective culpability standard* presumes intent from the proven action and places the burden on the defendant to raise defenses, proving that they did not have the requisite intent to be convicted of the crime.¹⁹⁹ Under this standard, a person who commits an act is presumed to have intended the “ordinary consequences” of the act.²⁰⁰ Fox and Stein conclude that the objective culpability standard should return, because the “epistemic weakness” of subjective culpability leaves juries guessing and imputing mental states onto defendants.²⁰¹ They argue that the underlying issue with the subjective *mens rea* standard is that it employs a dualist notion that separates a person’s mental state from their actions.²⁰² Instead of treating the subject’s mental state as if it is separate from their action, they argue that mental states are “embedded in and realized by the conduct they drive.”²⁰³ Further, they posit that, because the act itself is the best evidence of the intention of the actor, that criminal intent should “be treated as fundamentally different from a person’s desires, plans, and designs.”²⁰⁴ Under the subjective *mens rea* standard, they argue that mind and body exist as separate entities and will lead to consistent mistakes by triers of

196. *See id.*

197. *See* Fox & Stein, *supra* note 16, at 1005.

198. *Id.* at 1000 (emphasis added).

199. *Id.* at 1000–01.

200. *Id.* at 1001.

201. *Id.* at 1002.

202. *Id.*

203. Fox & Stein, *supra* note 16, at 1003.

204. *Id.* at 1002.

fact.²⁰⁵ While I agree with Stein and Fox that dualism is ill-equipped to handle legal issues such as these, I do not agree with their analysis about the consequences of dualistic rejection.²⁰⁶

First, if their desire is to increase the accuracy of triers of fact in finding intent, forbidding juries to consider plans and designs to prove intent will increase errors, not reduce them. By insisting the jury presume intent from the act and nothing else, juries will have less information available to make an initial decision.²⁰⁷ It stands to reason that less information will lead to less accurate decisions.²⁰⁸ However, Fox and Stein argue that the additional information is quite simply the wrong information to rely on.²⁰⁹ This reply both begs the question and is a red herring that actually has nothing to do with dualism or intent. It has to do with whether mental processes that happen before or after the act are capable of defining the act itself.²¹⁰ Their argument seems to imply that prior mental states, for instance, evidence of directed planning, cannot inform on whether someone has the intention to commit an act that they do commit.²¹¹ This position is untenable.

Think back to the example of someone telling you to meet them in the woods to get murdered. Under Fox and Stein's view, the act of lying to someone in preparation of someone else murdering them the next day does not constitute a criminal act, because "a person cannot be convicted for his desires, aspirations, or plans alone."²¹² At best, this displays a misappropriation of the normative dimensions at play here. The fact that the person who tells you to go to the woods could have a change of mind and not want you to be murdered at the very time you are being murdered presents a dispositive blow to the view propounded by Fox and Stein. That person could be convicted of murder even though the person did not act at all to murder and merely planned it.²¹³ The only evidence of their guilt in the conspiratorial murder would be preparation and planning.²¹⁴ If the murder they planned takes place even after they decided that they did not want to do it, they are still liable for the

205. *Id.*

206. *Id.* at 1002–05.

207. *Id.* at 1002–03.

208. *Id.* at 1005–06.

209. Fox & Stein, *supra* note 16, at 1005–06.

210. *Id.* at 1005.

211. *Id.*

212. *Id.* at 1003.

213. See *Conspiracy*, JUSTIA, <https://www.justia.com/criminal/offenses/inchoate-crimes/conspiracy> [<http://perma.cc/YU99-7YQP>] (last visited Nov. 4, 2019).

214. *Id.*

murder, even though they did not have any intent to commit the crime when it happened.²¹⁵ Their intent to commit a murder is satisfied by their planning alone.²¹⁶

There is a further issue with their view. By allowing that mental states can only be inferred from an action, Fox and Stein actually commit themselves to dualism.²¹⁷ Specifically, they infer that the planning that goes into a crime is a temporally displaced moment where the mental state is apparently independent of the body.²¹⁸ How can it be that only the mental state that is required for the action in question is imbedded in the action? Did the previous mental states not leave an impression on the actor up to that point? This seems to result from a confusion about the causation of actions. A thought you had this morning can impact your actions tonight, even if you do not realize it.²¹⁹ The idea that the prior mental state is somehow only embedded in a person's brain for the moment they are thinking it, and in congress with whatever action the person is taking at the moment, posits mental states as separate entities that exist only for a moment and then fleetingly leave the body, as if they never existed and are no longer bound up in future actions.²²⁰ This is not an issue that Fox and Stein take up in their paper, so I will not speculate as to what their response might be. But it demonstrates confusion in their reasoning. There is another more compelling reason to reject the view.

Finally, the view that only completing an action aligns with mental states, and intention does not comport to evidence, is completely opposed to intuitions about actions.²²¹ Simply put, one does not have to complete an action to intend it.²²² Actions such as moving a limb, dunking a basketball, or driving across town and murdering your stepmother in your sleep,²²³ and mental processes such as intending to do any of those things, though all physical in nature,

215. *Id.*

216. *Id.*

217. See Fox & Stein, *supra* note 16, at 1003.

218. See *id.* at 1002.

219. See Nancy P. Rothbard, *How Your Morning Mood Affects Your Whole Workday*, HARV. BUS. REV. (July 21, 2016), <https://hbr.org/2016/07/how-your-morning-mood-affects-your-whole-workday> [<http://perma.cc/4HTA-UXVZ>].

220. See Stevan Yalowitz, *Anomalous Monism*, STAN. ENCYC. PHIL. (Sept. 6, 2019), <https://plato.stanford.edu/entries/anomalous-monism/#MenCau> [<http://perma.cc/VJ5Z-XLKY>].

221. Fox & Stein, *supra* note 16, at 1000.

222. See *The Elements of 'Attempt' and the Possible Penalties*, BERRY L., <https://jsberrylaw.com/blog/attempt-to-commit-a-crime-and-the-possible-penalties> [<http://perma.cc/7CAR-7S8E>] (last visited Nov. 4, 2019).

223. See *R. v. Kenneth James Parks*, [1992] S.C.R. 871 (Can.).

are distinguishable.²²⁴ Understanding that mental processes that make up desires, plans, and intentions are physical in nature does not mean that those things are necessarily embedded in some actions while others are not, nor is there any safe inference to be made about an action containing a particular mental state at all.²²⁵ For example, think about dunking a basketball. The first time someone dunks a basketball, it probably takes a lot of physical and mental energy to do so. As the person dunks and dunks and dunks, the repetition leads to less mental energy being expended as the person conditions their body to perform the action through habit.²²⁶ Over time, dunking the ball when the situation calls for it requires little or no active intention. We see players in sports who go through moments where they are “clicking on all cylinders,” “unconscious,” or “in the zone.”²²⁷ This phenomenon known as “flow state” has been described in psychology across cultures.²²⁸ It is an automatic process when the situation presents itself, not one in which the actor is premeditating their actions.²²⁹ When Michael Jordan hit six three-pointers in the first half of a game in the 1992 NBA finals, he looked over to the announcer’s table and shrugged his shoulders, turning his hands up in the most ‘I have no idea what’s going on right now’ moment in the history of sports.²³⁰ Jordan himself was “surprised” at how well he shot the ball from downtown during the game, but his shooting was “automatic” that night.²³¹ There is little question that his mental state aligned with his action, but did he have the type of intention we think of when we say premeditation? I would argue that his mental state was closer to that of someone who acts in the heat of passion, responding automatically to perceived stimuli.²³² When LeBron James made the game-winning block on Andre Iguodala to secure the 2016

224. See *supra* note 195.

225. See Janet A. Young & Michelle D. Pain, *The Zone: Evidence of a Universal Phenomenon for Athletes Across Sports*, 1 *ATHLETIC INSIGHT* 21, 22 (Nov. 1999).

226. See *id.* at 21.

227. See *id.* at 21–22.

228. See *id.*

229. See *id.* at 21.

230. See Aaron Dodson, *On this Day in NBA Finals History: Michael Jordan’s ‘Shrug Game,’* *THE UNDEFEATED* (June 3, 2017), <https://theundefeated.com/features/nba-finals-history-michael-jordan-shrug-game> [<https://perma.cc/ZXL9-HHEJ>].

231. *Id.*

232. See *Habit Formation*, *PSYCHOL. TODAY*, <https://www.psychologytoday.com/us/basics/habit-formation> [<http://perma.cc/7HJV-UB6Z>] (last visited Nov. 4, 2019). To be clear, the best players are those with high mental capacity and cognitive ability. But their skills are conditioned through habit, not by simply thinking their way through a particular action. Getting to a place where certain skills that are highly cognitively demanding—like creative passing and playmaking—are present takes conditioning a mind that has the underlying potential to be conditioned into making those plays.

NBA Championship, he did not stop and contemplate the necessary steps to carry out the act.²³³ He just did it. This does not mean that LeBron did not intend to block that shot. He clearly did. But his action was automatic to the situation because of his prior intentions to habituate himself.²³⁴ There was no deliberation in the moment. His preparing and planning his whole life to reach that ultimate point of blocking that shot manifested in the action that secured the victory.²³⁵ Those prior plans, habituation, and preparation are evidence of his intention, even if he had failed to make the play.²³⁶ That sort of evidence would be necessary to show that he had premeditated such an action, because the actual mental state in the window of when the play took place does not reflect such premeditation.²³⁷ LeBron's life is one of intention. He intends to win the NBA Championship by putting in an insane amount of work both on and off the court outside of the actual game.²³⁸ But he did not have the specific intent to block that particular shot, that in fact matches purposeful *mens rea*, if only the mental state at the time of the action counts.²³⁹ The act flowed directly and automatically from the situation, the way that voluntary manslaughter does.²⁴⁰ Does this mean he should not be found guilty of, if you will, murdering the Warriors' title hopes?²⁴¹ I think not. By trying to separate a person's actions from their prior mental states—desires, plans, and preparations—Fox and Stein wind up with a temporally displaced moment of action that confuses the concept of intention.²⁴²

Their analysis would produce—in the “correct” result—that the flow state produces intentional actions, because they assume that

233. See Alex Myers, *LeBron James' "The Block" Turns 3, and It's as Spectacular as Ever*, GOLF DIGEST (June 19, 2019), <https://www.golfdigest.com/story/lebron-james-the-block-turns-3-and-its-as-spectacular-as-ever> [<http://perma.cc/CVF4-NAEW>].

234. See *Habit Formation*, *supra* note 232.

235. See Myers, *supra* note 233.

236. See *Habit Formation*, *supra* note 232.

237. See *Premeditation Law and Legal Definition*, US LEGAL, <https://definitions.uslegal.com/p/premeditation> [<http://perma.cc/8Y5Q-JY9N>] (last visited Nov. 4, 2019). I want to be clear that this analysis does not mean that the brain is not working during such an action. It is, and at a high level. It is just not actively contemplating and deliberating actions in the way that the law defines premeditation.

238. See *Day in the Life: LeBron James*, OWAVES (June 16, 2016), <https://owaves.com/day-plans/day-life-lebron-james> [<http://perma.cc/B4RR-MTML>].

239. See Myers, *supra* note 233.

240. See Berman, *supra* note 164.

241. A Golden State fan would likely point out that video evidence proves that the play should have been called illegal goaltending on LeBron. Therefore, not only did LeBron kill the Warriors title hopes, he wrongfully killed them. See *LeBron James Historic Block on Andre Iguodala From All Angles*, NBA, <https://www.nba.com/video/channels/playoffs/finals/2016/06/22/lebron-james-big-block-on-iggy-game7.nba> [<https://perma.cc/PGR8-9Z5H>] (last visited Nov. 4, 2019).

242. Fox & Stein, *supra* note 16, at 1002.

the mental state that is required can be inferred directly from the action.²⁴³ However, the correctness of their analysis would be based on a presumption that is not always true and would produce consistent errors. These errors are evidence that undermine the foundational principle of assumed innocence and guilt beyond a reasonable doubt.²⁴⁴ If you presume someone who has committed an action has the required *mens rea*, then it is foisted upon the defendant to produce reasonable doubt and bear the burden of persuasion.²⁴⁵ This is a reversal of the underpinnings of legal protections for criminal defendants.²⁴⁶ Ultimately, I do not think dualism necessarily bears on intention or how we think about *mens rea* in a significant way as pertaining to the values that the current doctrine describes. Plans, preparations, and desires can all be understood as physical while also being understood as important epistemic tools for knowing whether intent exists.²⁴⁷

B. Mental Versus Physical Tort Damages

Tort law damages doctrine maintains a stark distinction between mental and physical harms.²⁴⁸ In *Snyder v. Phelps*, the Supreme Court of the United States set aside a jury verdict awarding damages to a grieving father against the Westboro Baptist Church because members of the church hurled deeply hurtful insults and displayed offensive, malicious signs toward the family as they attended the funeral of the son, who was a Marine killed in the Iraq War.²⁴⁹ Throughout the opinion and dissent, the court refers to the emotional injuries suffered by the plaintiff, but at no point does the court entertain the notion that those injuries could be physical in nature.²⁵⁰ The Supreme Court upheld the lower court's vacation of the jury award on First Amendment grounds, stating "that any distress occasioned by Westboro's picketing turned on the content and viewpoint of the message conveyed."²⁵¹ If the signs had been friendly and the message was one of love, the Court reasoned, there would have been no grounds for liability.²⁵² The Court held that even speech that "inflict[s] great

243. *Id.* at 980.

244. *Id.* at 1001.

245. *Id.*

246. *Id.*

247. See *Premeditation Law and Legal Definition*, *supra* note 237.

248. See *Tort Law: Liability for Emotional Distress Torts*, L. SHELF, <https://lawshelf.com/videos/entry/emotional-distress-torts> [<http://perma.cc/U7QA-RU4U>] (last visited Nov. 4, 2019).

249. *Snyder v. Phelps*, 562 U.S. 443, 457–59 (2011).

250. *Id.* at 449–51.

251. *Id.* at 457.

252. *Id.* at 449–57.

pain” will not subject the speaker to liability when it is spoken on a matter of public importance, because to do so would be to punish the speaker, and that violates the First Amendment.²⁵³ What would the Court have held if they had analyzed the harm to the father as a physical harm exacted upon his already vulnerable brain due to the tragic death of his son? Could the plaintiff use expert testimony to prove that the harm was physical and not “merely” mental?

In *Metro-North Commuter Railroad Co. v. Buckley*, the Court held that physical contact with a substance known to cause cancer does not provide sufficient grounds to recover for emotional distress caused by the fear of potentially getting cancer.²⁵⁴ Even Justice Ginsburg’s dissenting opinion in *Buckley*, which would allow for recovery in such a circumstance, does not characterize the psychological harms as physical, although the opinion states that it can be shown through objective evidence that the emotional harm exists.²⁵⁵ Would that case have come out differently if the harm was seen as emanating from physical causes in and involving the physical body?

Outside of tort damages, the Social Security Act defines physical and mental impairments separately, referring to psychiatrists/psychologists to determine mental impairments and physicians to determine physical impairments.²⁵⁶ Would this change if dualism was rejected? In each of these cases, I doubt that the values involved would be changed much, if at all, but the arguments in favor of awarding damages to plaintiffs whose injuries are merely mental could change. Namely, plaintiff’s attorneys could potentially argue and prove that the harms are physical using expert testimony.

The harms classified as mental in tort law are now known to have some physical characteristics in the brain where and when they do, in fact, exist.²⁵⁷ Many of these phenomena can be observed.²⁵⁸ However, up until the latter half of the twentieth century, psychiatric—mental—disorders were viewed as fundamentally different than neurological disorders.²⁵⁹ “Because psychiatric and addictive disorders did not produce obvious damage in the brain” that could be seen during autopsy, these disorders were understood as “under the individual’s control.”²⁶⁰ On the other hand, neurological disorders were classified as physical impairments that altered the ability of the individual to

253. *Id.* at 460–61.

254. *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 427–30 (1997) (Ginsburg, J. concurring in part).

255. *Id.* at 445.

256. 42 U.S.C. § 421(h) (2019).

257. See PETER ALCES, *THE MORAL CONFLICT OF LAW AND NEUROSCIENCE* 103 (2018).

258. *Id.* at 122.

259. KANDEL, *supra* note 41, at 20–21.

260. *Id.* at 21.

control their actions.²⁶¹ Today, there is increasingly wide belief that there is no essential difference in psychiatric and neurological disorders, and that they all stem from physical substrates.²⁶²

The current status of the law is generally informed by the older view of psychiatric and neurological bifurcation, and seems to turn on whether the source of the harm can be readily, obviously identified by the trier of fact.²⁶³ For instance, if someone's personality changes due to a blunt force trauma to the head, that blunt force trauma and the physical impact on the mind informs the trier of fact where the harm came from.²⁶⁴ Blunt force trauma to the head that causes such harm also often results in permanent damage, so there is often little that can be done to correct the personality changes.²⁶⁵ In contrast, if someone becomes depressed after being abusively accosted during their son's funeral, the source of that harm is more in doubt. The abusive speech contributes to the anguish felt by the father, and it might meet the standard for proximate cause given the right argument.²⁶⁶ But there are various causes of developing suicidal thoughts in such a situation.²⁶⁷ "Our individual experiences and behavior are rooted in the interaction of genes and environment that shapes our brains."²⁶⁸ Because of the various contributing factors, proving causation in tort law is still going to pose a difficult task for plaintiffs with mental harms, even if they can be couched in a physical framework.²⁶⁹

Another reason that the values in the current bifurcated scheme make sense is that many mental harms are surmountable in ways that something like traumatic brain injury is not.²⁷⁰ Catastrophic structural injury to the brain is often permanent, if not degenerative.²⁷¹ On the other hand, depression, anxiety, addiction,

261. *Id.*

262. *Id.* at 31 ("As research into the brain and mind advances, it appears increasingly likely that there are actually no profound differences between neurological and psychiatric illness and that as we understand them better, more and more similarities will emerge.")

263. See Daniel W. Shuman, *Viewpoint*, 90 JUDICATURE 248, 248–50 (2007).

264. See Eva Hvingelby, *Frontal Lobe Head Trauma Effects and Treatment*, VERYWELLHEALTH, <https://www.verywellhealth.com/frontal-lobe-head-trauma-1720020> [https://perma.cc/M22C-XNLJ] (last updated May 14, 2019).

265. See Helen M. Bramlett & W. Dalton Dietrich, *Long-Term Consequences of Traumatic Brain Injury: Current Status of Potential Mechanisms of Injury and Neurological Outcomes*, 32 J. NEUROTRAUMA 1834, 1834 (2015).

266. See RESTATEMENT (SECOND) OF TORTS § 312 (AM. LAW INST. 1965).

267. See RESTATEMENT (SECOND) OF TORTS § 445 cmt. a (AM. LAW INST. 1965).

268. KANDEL, *supra* note 41, at 31.

269. See John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 MARQ. L. REV. 789, 838 (2007).

270. See J. Stanley McQuade, *The Eggshell Skull Rule and Related Problems in Recovery for Mental Harm in the Law of Torts*, 24 CAMPBELL L. REV. 1, 35 (2001).

271. See *Traumatic Brain Injury*, MAYO CLINIC, <https://www.mayoclinic.org/diseases>

post-traumatic stress disorder, etc. are most often treatable through cognitive behavioral therapy, medication, and other more traditional means such as exercise, meditation, and finding a job that is fulfilling.²⁷² Most people recover from “merely” mental harms caused by a traumatic event.²⁷³ While all of these conditions can be observed and described as physical in nature, they are significantly different than a traumatic brain injury.²⁷⁴ The plasticity of undamaged structural regions of the brain associated with emotional well-being, along with the manipulability of the associated processes by pharmaceutical intervention, gives hope that psychological harms associated with verbal abuse or witnessing and taking on the burden of traumatic events can be overcome.²⁷⁵ The dualistic distinction in tort law seems to clumsily reflect this reality.

In practice, plaintiffs’ attorneys who are faced with a limit or bar on merely mental damages can potentially make a compelling argument that none of the traditional mental harms are merely mental.²⁷⁶ If it can be shown that such harms are physical—for example that depression has physical causation whether or not the primary or original source is identifiable—and that the physical pathology of it is quite readily observable through neuroscientific methods, the bar on mental damage recoveries could be broken.²⁷⁷ However, it seems likely that courts would determine this to be a semantic point, and that the countervailing reasons for not allowing mental damages, namely the provability and recoverability factors discussed above, prevail and the precedent holds. But this is clearly speculation on my part. In Section III.D below, I develop a specific type of harm that is considered to be merely mental that should, for superseding reasons, give rise to a fundamental protection under the First Amendment. However, for ordinary tort damages, the case is out on whether the law should change its consideration of mental and physical

-conditions/traumatic-brain-injury/symptoms-causes/syc-20378557 [https://perma.cc/P9NB-VSFH].

272. See JONATHAN HAIDT, *THE HAPPINESS HYPOTHESIS: FINDING MODERN TRUTH IN ANCIENT WISDOM* 90–92 (2006).

273. See *Post-Traumatic Stress Disorder*, NAT’L INST. HEALTH & MED., <https://www.nimh.nih.gov/health/topics/post-traumatic-stress-disorder-ptsd/index.shtml> [https://perma.cc/JE99-JD72] (last visited Nov. 4, 2019).

274. See Theodore A. Henderson, *TBI and PTSD Appear Similar But Treatments Must Differ*, BEHAVIORAL (Nov. 7, 2016), <https://www.psychcongress.com/article/tbi-and-ptsd-appear-similar-treatments-must-differ> [https://perma.cc/RG5H-F6TL].

275. See Zoe Reyes, *The Roles Neuroplasticity and EMDR Play in Healing from Childhood Trauma*, PSYCHCENTRAL (Oct. 8, 2018), <https://psychcentral.com/lib/the-roles-neuroplasticity-and-emdr-play-in-healing-from-childhood-trauma> [https://perma.cc/G6E9-K44C].

276. See Candice E. Renka, *The Presumed Eggshell Plaintiff Rule: Determining Liability When Mental Harm Accompanies Physical Injury*, 29 T. JEFFERSON L. REV. 289, 310–11 (2007).

277. *Id.*

harms.²⁷⁸ Abolishing the dualistic notions that underpin the language of the law does not logically entail that the categories of physical and mental harms themselves should be wiped off the books.

C. Testimonial Versus Bodily Evidence

The fundamental question in this section is “if they are both physical, is there a difference between testimonial evidence and evidence derived from a person’s body through empirical observation?” In *Schmerber v. California*, the Supreme Court held that, while compulsion of testimonial evidence found in the mind is not allowed under the Fifth Amendment, “real or physical evidence” may be compelled from the body, including blood.²⁷⁹ This is another issue Fox and Stein take issue with stating “the doctrinal distinction between testimonial and physical evidence . . . collapses like the dualist divide of mind and body that it presupposes.”²⁸⁰ They reason that “compelling a suspect’s self-incriminating words and gestures subjects him to no more painful a decision than the compulsion of his bodily samples or markings.”²⁸¹ I disagree with their reasoning.

Just because two things are physical does not mean that the values involved are identical. This is especially true when it comes to testimonial evidence and the justifications against compelling self-incrimination.²⁸² As Justice Brennan explained in the plurality opinion in *Pennsylvania v. Muniz*, the Fifth Amendment privilege against self-incrimination “reflects our fierce unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt.”²⁸³ Fox and Stein claim “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 . . . [not only testimonial evidence] subjects a criminal suspect to a psychologically painful decision.”²⁸⁴ While it is true that deciding whether to allow samples of one’s body to be taken can be agonizing, it is categorically different from testimonial evidence.²⁸⁵

Analyzing the three factors in the “cruel trilemma” should make this clear. First, while it is possible to construe self-accusation to be present in the compulsion of bodily evidence, the type of accusation

278. See Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. ST. L. J. 805, 806–07 (2004).

279. *Schmerber v. California*, 384 U.S. 757, 760, 764 (1966).

280. Fox & Stein, *supra* note 16, at 998.

281. *Id.*

282. See *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972).

283. *Pennsylvania v. Muniz*, 496 U.S. 582, 596 (1990) (internal citations omitted).

284. Fox & Stein, *supra* note 16, at 997.

285. See FED. R. EVID. 701; see also FED. R. EVID. 701 advisory committee’s notes on 2000 amendments.

is different.²⁸⁶ Bodily evidence can be taken without a normally functioning person even knowing about it.²⁸⁷ Testimonial cannot.²⁸⁸ If someone is in a public space and a picture is taken of them that reveals a tattoo on their chest, that picture reveals bodily evidence.²⁸⁹ But it was not compelled from them, and it is certainly not compelled in the way testimonial evidence would be.²⁹⁰ A blood sample can be taken from an unconscious person suspected of drunk driving, and whether such a sample was derived in violation of the Fourth Amendment is a live issue depending on specific facts.²⁹¹ Whether the sample is testimonial is not a live issue any more than whether the blood that is found at the scene of a crime is testimonial.²⁹² It is not.²⁹³ The constitutional issue present in the compulsion of bodily evidence is the degree to which the state may invade someone's body to collect otherwise knowable information.²⁹⁴

Second, perjury is not even possible when the evidence provided is objective physical evidence, such as a DNA test.²⁹⁵ The results of the test could be misleading, but there is no ability to lie about them by the defendant.²⁹⁶ There is potential for the person whose bodily evidence is being compelled to provide a sample that is not from their body. This is fraudulent behavior, but it is not exactly the same as committing perjury or lying using testimony.²⁹⁷ The issue here is one of objective physical evidence. How to know someone gave a fake sample is much different than how to know someone gave false testimony.²⁹⁸ One depends on the reliability of taking the proper sample, whereas testimony relies on the person speaking honestly.²⁹⁹ This is a substantial difference between testimonial and bodily evidence.

Finally, contempt can—like in the instance of refusing to testify—be applied to those who refuse to give bodily samples in certain situations, but the ability of the government to apply penalties for refusing to give up bodily evidence differs depending on the type

286. See *United States v. Hubbell*, 530 U.S. 27, 35 (2000).

287. See *Mitchell v. Wisconsin*, No. 18-6210, slip op. at 19 (S. Ct. June 27, 2019).

288. See U.S. CONST. amend. V.

289. See *People v. Slavin*, 807 N.E. 2d 259, 260 (N.Y. 2004).

290. *Id.* at 262–64.

291. *People v. Arredondo*, 371 P.3d 240 (Cal. 2016) (wherein the California Supreme Court decided if the blood sample was impliedly consented to and is therefore allowed into evidence as a reasonable search and seizure).

292. *Crawford v. Washington*, 541 U.S. 36, 51 (2004).

293. See *Schmerber v. California*, 384 U.S. 757, 761 (1966).

294. *Id.* at 770.

295. See 18 U.S.C. § 1621(1)–(2) (1994).

296. *Id.*

297. See 18 U.S.C. § 1028(a)(1), (b)(7)(A)–(B) (2016).

298. See 18 U.S.C. § 1621(1)–(2) (1994).

299. *Id.*

of evidence and the situation.³⁰⁰ For example, information about a person's height is far different from their DNA. In another example, the Supreme Court recently held that, in the absence of a warrant, criminal contempt penalties can be applied to drunk driving suspects who refuse to give breath tests but not for people who refuse blood tests, where only civil penalties are allowed.³⁰¹ However, the Court's reasoning relied on the difference in the intrusiveness of the test, not on whether or not the bodily evidence was testimonial.³⁰² This makes sense, because the interests of the government to protect people from driving under the influence and the interests of the individual's privacy are what are at stake, not the interests involved in self-incriminating testimony.³⁰³ Blood contains a bounty of hidden information about a person, and once it is obtained and tested, there is not much question as to the information being conveyed, if it is in fact the defendant's blood.³⁰⁴ This brings up the next reason Fox and Stein's obliteration of the testimonial/physical distinction is wrong: epistemic value.

Testimonial evidence, when compelled from a defendant, is more likely to contain factual errors.³⁰⁵ This is a central reason that forced confessions are not admissible in court: their lack of accuracy.³⁰⁶ This issue does not come up in bodily evidence compulsion unless the sample is not the sample it is thought to be. There can be a mistake about whether the correct bodily sample is being used, but the mistake is identifiable and correctable in a way that testimonial evidence is not.³⁰⁷ You do not need to torture someone to get them to admit they are a particular blood type or have a certain color hair. You just need to take the correct samples. There is no willful act by

300. See FED. R. CRIM. P. 42(a)(3); *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2183–84 (2016).

301. See *Birchfield*, 136 S. Ct. at 2183–84.

302. *Id.* at 2184 (“Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great. We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.”).

303. *Id.* at 2178.

304. See Maura Dolan & Jason Felch, *Ruling Allows ‘Rarity’ Statistic in DNA Cases*, L.A. TIMES (June 17, 2008, 12:00 AM), <https://www.latimes.com/archives/la-xpm-2008-jun-17-me-dna17-story.html> [<https://perma.cc/M9EQ-8L67>].

305. See *Arizona v. Fulminante*, 499 U.S. 279, 296 (1991).

306. See *Payne v. Arkansas*, 356 U.S. 560, 568 (1958).

307. See Greg Hurley, *The Trouble with Eyewitness Identification Testimony in Criminal Cases*, NCSC (2017), <https://www.ncsc.org/sitecore/content/microsites/trends/home/Monthly-Trends-Articles/2017/The-Trouble-with-Eyewitness-Identification-Testimony-in-Criminal-Cases.aspx> [<https://perma.cc/U63T-XT2N>].

the person the sample is derived from that determines the truth or falsity of the information if a sample does in fact come from that person.³⁰⁸ Conversely, there is a willful act required that results in the truth value of a testimonial statement.³⁰⁹ Bodily samples are different in character because they can be taken against the will of the person giving the information and are verifiable against objective references, such as samples found on a crime scene or derived from surveillance footage.³¹⁰ The contents of someone's recollection or factual representation of their involvement in some act is categorically different, even if they are both physical in essence.³¹¹

D. First Amendment Free Speech Doctrine

“The only purpose for which power can be rightfully exercised over any member of a civilised community, against [the person's] will, is to prevent harm to others.”³¹²

1. Dualism and Protected Speech in General

The First Amendment is about protecting mental processes against government impediment and control.³¹³ Freedom of association, religion, and speech and from government intervention are concepts that entail the individual's ability to shape the individual's own mind.³¹⁴ In this section, the question is: “If the ideas and mechanisms that allow for the expression of ideas derive from physical functions, how would the law change?” The way that mental processes are characterized metaphysically is essential to understanding how the processes should be protected under the law.³¹⁵ If the processes of the mind are not physical—if they exist in a non-observable dimension

308. See *Breithaupt v. Abram*, Warden, 352 U.S. 432, 439 (1957).

309. See 18 U.S.C. § 1621(1)–(2) (1994).

310. See Jonathan Jones, *Forensic Tools: What's Reliable and What's Not-So-Scientific*, PBS (Apr. 17, 2012), <https://www.pbs.org/wgbh/frontline/article/forensic-tools-whats-reliable-and-whats-not-so-scientific> [<https://perma.cc/X6JA-4V63>].

311. See Hal Arkowitz & Scott O. Lilienfeld, *Why Science Tells Us Not to Rely on Eyewitness Accounts*, SCI. AM. (Jan. 1, 2010), <https://www.scientificamerican.com/article/do-the-eyes-have-it> [<https://perma.cc/4C84-BMUU>].

312. JOHN STUART MILL, ON LIBERTY 13 (Batoche Books 2001) (1859).

313. See JAMES MADISON, MEMORIAL AND REMONSTRANCE AGAINST RELIGIOUS ASSESSMENTS, ¶ 1 (1785) (“[T]he opinions of men, depending only on the evidence contemplated by their own minds, cannot follow the dictates of other men.”); see also *Everson v. Board of Ed.*, 330 U.S. 1, 8 (1947) (“These words of the First Amendment reflected in the minds of early Americans a vivid mental picture of conditions and practices which they fervently wished to stamp out in order to preserve liberty for themselves and for their posterity.”).

314. See MADISON, *supra* note 313, ¶ 1.

315. See Anita Bowles, *Courting Research: Psychology and Law Go Hand-in-Hand*, ASS'N PSYCHOL. SCI. (Jan. 26, 2005), <https://www.psychologicalscience.org/observer/courting-research-psychology-and-law-go-hand-in-hand> [<https://perma.cc/3ELA-L3RD>].

so to speak—the analysis surrounding them could survive in the current framework. But if they are physical in nature, I argue that the analysis must change.

It is helpful to compare this issue with *mens rea*. As opposed to the criminal *mens rea* issues discussed before, which are about the values ascribed to various mental states at the time of another act, the subject of First Amendment doctrine is the ‘mental’ process itself as it is happening.³¹⁶ The doctrine surrounding the First Amendment defines how people can use that process without running into legal troubles, and how they can and should be protected from entities, like the government, who might wish to impose particular mental states on them.³¹⁷

Current First Amendment doctrine relies on the bifurcation of mental and physical harms to justify protections in many areas.³¹⁸ Propagandist racism,³¹⁹ marketing and advertising,³²⁰ and hate speech³²¹ broadly find refuge in the First Amendment. However, there is precedent that indicates that defaming entire groups of people, such as religious people³²² or racial groups,³²³ can be sanctioned by state action that restricts certain types of speech.³²⁴

Commercial speech that affects children also provides an example of how public health can override First Amendment rights.³²⁵ For example, tobacco advertising is restricted to certain types of mediums due to tobacco’s addictive qualities and the effects of advertising on enticing young people to use tobacco.³²⁶ Further, public health and safety is commonly used as a justification for exceptions from other

316. See *Model Penal Code’s Mens Rea*, *supra* note 195.

317. *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969).

318. See David S. Han, *The Mechanics of First Amendment Audience Analysis*, 55 WM. & MARY L. REV. 1647, 1651 (2014).

319. *Brandenburg*, 395 U.S. at 445–48.

320. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of New York*, 447 U.S. 557, 564 (1980) (holding that unless a commercial advertisement is misleading or promoting unlawful activity that it is still afforded substantial protections from government regulation).

321. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 393–94 (1992) (striking down laws that curtailed both fighting words and protected speech as overly broad).

322. *Chaplinsky v. New Hampshire*, 315 U.S., 568, 569–74 (1942) (validating that the use of defamatory language towards entire groups, in this case those involved in organized religion, can justify criminal charges for breach of the peace under the fighting words doctrine).

323. *Beauharnais v. Illinois*, 343 U.S. 250, 251, 258–66 (1952) (upholding a law that banned depicting “depravity, criminality, unchastity, or lack of virtue of a class of citizens of any race, color, creed, or religion”).

324. See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964).

325. See Nicole DiGiuse, *Protecting Children? The Evolution of the First Amendment: A Historical Timeline of Children and Their Access to Pornography and Violence*, 33 PACE L. REV. 462, 466–77 (2013).

326. Family Smoking Prevention and Tobacco Control Act of 2009, Pub. L. No. 111-131, §§ 2(3), 2(5), 2(31) and 2(49), 123 Stat. 1776, 1777–1781 (2009).

individual protections.³²⁷ For example, mandatory vaccinations,³²⁸ the right to not self-incriminate,³²⁹ terrorism,³³⁰ driver sobriety tests,³³¹ and gun laws³³² are all areas where public safety is invoked to promulgate protective policies involving fundamental rights.³³³ First Amendment doctrine is foundational to the ability of people to exercise their autonomy and foster discussion in the marketplace of ideas.³³⁴ This is why it is so crucial to understand when ideas restrict the ability of someone to be autonomous, and to take part in fostering a more just and verdant society. By understanding how the functions of the brain are impacted in childhood, it becomes apparent that some now-protected speech works to undermine the purpose of the First Amendment.³³⁵ Therefore, the doctrine should be refined, specified, and reformed. While this doctrinal shift is potentially drastic, I focus on one phenomenon in particular.

As a foil for this discussion, I analyze the practice of indoctrinating children with racist ideology. Certain types of racist teaching actually cause, and can be proven to cause, physical, biological changes that harm the listener.³³⁶ I argue that this presents a public health

327. See Ronald Bayer, *The Continuing Tensions Between Individual Rights and Public Health*, 8 EMBO REP. 1099 (2007).

328. *Jacobson v. Massachusetts*, 197 U.S. 11, 19 (1905) (upholding the state mandatory vaccination law for school children).

329. *New York v. Quarles*, 467 U.S. 649, 657–58, 663 (1984) (holding that the evidentiary exclusionary rule does not apply when interests of public safety justify not reading *Miranda* rights. The Court cites some examples of things that give rise to justifying a warrantless search where a gun might be present in the interests of “public safety: an accomplice might make use of it, a customer or employee might later come upon it.” The Court offers no definition of public safety. Concurring in judgment, Justice O’Connor expresses concern over the vagueness of this exception. “[A] ‘public safety’ exception unnecessarily blurs the edges of the clear line heretofore established and makes *Miranda*’s requirements more difficult to understand.”).

330. *Boumediene v. Bush*, 553 U.S. 723, 783, 793–95 (2008) (denying federal courts jurisdiction over Habeas Corpus actions involving “enemy combatants” who pose a threat to national security).

331. *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2185 (2016) (upholding implied consent laws that mandate drivers to submit to breathalyzers under the threat of criminal sanctions, while also striking down implied consent laws that impose criminal sanctions for refusing a blood draw).

332. *United States v. Miller*, 307 U.S. 174, 178 (1939) (upholding a ban of unlicensed sawed-off shotguns under the National Firearms Act, reasoning that possession of such weapons was a threat to public safety and not reasonably related to ensuring a well-regulated militia).

333. See Bayer, *supra* note 327, at 1099.

334. See Brian Miller, *There’s No Need To Compel Speech. The Marketplace of Ideas Is Working*, FORBES (Dec. 4, 2017, 3:44 PM), <https://www.forbes.com/sites/briankmiller/2017/12/04/theres-no-need-to-compel-speech-the-marketplace-of-ideas-is-working/#728e2a254e68> [<https://perma.cc/7524-NPND>].

335. See Jedediah Britton-Purdy, *The Bosses’ Constitution*, THE NATION (Sept. 12, 2018), <https://www.thenation.com/article/the-bosses-constitution> [<https://perma.cc/VST6-AMRA>].

336. See Barrett, *supra* note 174.

crisis, and understanding the problem as a physiological conditioning that leads to identifiable harms helps to overcome the individual liberty interests wrapped up in parental rights to teach racist doctrine to their children.

2. *Detailing the Problem*

The issue that I identify is not settled science.³³⁷ I am not claiming that the phenomenon I describe is like a physics equation that has been incorporated into the body of knowledge in a particular discipline the way that, for example, Einstein's theory of relativity has.³³⁸ At the same time, the physical theory I describe is a viable explanation for why racism exists and continues to cause harm throughout cultures all over the world. The theory I am explaining is falsifiable. It can be tested and shown to be false or shown to likely be true through further evidence and study. In a nutshell, this is the problem:

Racism is a self-perpetuating phenomenon in which young humans are taught to react to other races with fear, disgust, and/or hatred. While there is no latent racism present in the neural circuitry of infant or toddler humans, the autonomic system of humans has evolved in such a way that it is adaptable and can be taught to fear and show disgust to certain things. Humans are taught racism; it is not an inborn, inherent phenomenon. *But for* being exposed to racist teaching and conditioning, there would be no racist ideology present in the brain of a human child. When people teach and condition racism into their children, they produce the problems associated with racism. Racism causes various health disparities, conditions, and risks. *But for* racism, many health problems, conditions, and risks would likely not exist and in particular, people who belong to oppressed racial groups would not be at increased risk for certain diseases, poverty, incarceration, or early death. In the U.S., there is a long history of racist stratification that permeates society to the point to where even children who are not taught to be actively racist are conditioned to react physiologically to people of different races in a negative way that causes them stress and anxiety. For these reasons, teaching racist ideology presents a public health crisis both for the children who are taught racism and for the members of society who are subject to the remnants of racism that wield their power throughout the

337. See Kelefa Sanneh, *The Fight to Redefine Racism*, THE NEW YORKER (Aug. 19, 2019), <https://www.newyorker.com/magazine/2019/08/19/the-fight-to-redefine-racism> [<https://perma.cc/K44F-879T>].

338. See Brian Greene, *The Theory of Relativity, Then and Now*, SMITHSONIAN MAG. (Oct. 2015), <https://www.smithsonianmag.com/innovation/theory-of-relativity-then-and-now-180956622> [<https://perma.cc/2EMR-QSX9>].

social narrative of U.S. culture. Actively seeking to eliminate racism is, therefore, similar to vaccinating children from polio, instituting basic nutritional standards for children, and curtailing the advertising of tobacco. Racism is a public health crisis, and it is caused by speech and ideology that normally is protected by the First Amendment. The speech that is used to propagate racism in certain contexts is not merely speech, rather, like other unprotected categories of speech, it *does* something to the hearer. When the hearer is a child and the speaker is a parent, the trust relationship causes the children to begin to adopt the ideology, thus the child is conditioned to have automatic reactions to persons of other races. These reactions are out of the child's control. Once a person has been conditioned to react physiologically to people of different races, it might be impossible to ever remove the reactions completely, but there are some methods such as playful exposure to people of other races that are successful in mitigating the damage caused by the teaching of racist ideology.

By recognizing speech as having physical causes and effects, as opposed to *merely* mental ones, it should follow that children, who are captives of their parents' speech, should be afforded protections in particular areas where harms are present. Here, I take up racist speech and explain that it should not be protected by the First or Fourteenth Amendments in the context of child-rearing due to the inherent right of the child to be free from physical harm. Regardless of this argument, the pragmatic, normative question would remain: what should we do about it, exactly? In the conclusion, I will raise a few possibilities, but I will not be arguing that parents should be arrested and jailed.

3. *Speech and the First Amendment*

Fighting words,³³⁹ inciting a riot,³⁴⁰ and, in one sense, simple assault³⁴¹ are “non-physical” speech acts that are not protected under free speech doctrine.³⁴² Harassing grieving parents at their child's funeral by directing anti-LGBTQ³⁴³ slurs and religious judgments at

339. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

340. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

341. MODEL PENAL CODE § 211.1(1) (AM. LAW INST. 2018) (“Simple Assault. A person is guilty of assault if he: . . . (c) attempts by physical menace to put another in fear of imminent serious bodily injury.”); see *Virginia v. Black*, 538 U.S. 343, 344 (2002) (providing a similar definition of “true threats”).

342. *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part) (“Those few categories of speech that the government can regulate or punish—for instance, fraud, defamation, or incitement—are well established within our constitutional tradition.”).

343. Lesbian, Bisexual, Gay, Transsexual, Queer/Questioning, Intersex, Asexual, Plus others.

them is protected when the subject of the speech is a matter of public concern done in a public forum.³⁴⁴ I am positing one area where courts have said little but where there appears to be a very clear right under the First and Fourteenth Amendment: to teach one's children racist doctrine. I focus on this area because rejecting dualism would bear heavily on it. This is specifically because neurological science shows that this sort of teaching causes physical changes in the brains of young people and affects behavior.³⁴⁵ In a society such as ours, which is laden with biased stereotyping and generalization, even subliminal auditory cues affect the brain's reaction to other races.³⁴⁶ This shows that racist attitudes and group classification are so ubiquitous that almost everyone's autonomic neural process are affected by them.³⁴⁷ To eliminate this self-realizing and self-perpetuated race-based conditioning, starting at the inception of such racist ideas into the society is not only the right thing for the individual who is taught to be racist but paramount to mitigating the broad-sweeping indoctrination and insidious racial bias that prevails in our culture. A recent intersectional study shows that preschool children of all races studied have a significant bias against black boys in particular.³⁴⁸ This prevailing racist indoctrination presents a public health issue that is deadly serious.³⁴⁹

Why racism specifically? There are other areas of arguably harmful indoctrination, but racism has been roundly rejected as a viable doctrine in the public sphere.³⁵⁰ In contrast, LGBTQ discrimination has been less rejected as a matter of public concern, though it is arguably more harmful for the individual who is subjected to it.³⁵¹ LGBTQ issues are unfortunately still considered to be matters of public debate, so I choose racism to exemplify the analytic changes

344. *Snyder v. Phelps*, 562 U.S. 443, 460 (2011).

345. See Bradley D. Mattan et al., *The Social Neuroscience of Race-Based and Status-Based Prejudice*, 24 *CURRENT OPINION IN PSYCHOL.* 27, 27 (2018) ("Consistent with this view, greater childhood interracial contact diminishes amygdala response to familiar (vs. unfamiliar) Black faces.").

346. See Chad E. Forbes et al., *Negative Stereotype Activation Alters Interaction Between Neural Correlates of Arousal, Inhibition and Cognitive Control*, 7 *SOC. COGNITIVE & AFFECTIVE NEUROSCIENCE* 771, 771, 774 (2012).

347. See Mattan et al., *supra* note 345, at 27–29.

348. Danielle R. Perszyk, et al., *Bias at the Intersection of Race and Gender: Evidence from Preschool-Aged Children*, 22 *DEVELOPMENTAL SCI.* e12788 (2019).

349. Bruce G. Link & Jo Phelan, *Social Conditions as Fundamental Causes of Disease*, 35 *J. HEALTH & SOC. BEHAV.* 80, 82 (1995).

350. UNESCO, *Racism*, THE UNESCO COURIER (Oct. 1960), <https://en.unesco.org/courier/october-1960> [<http://perma.cc/R7G8-LWZP>].

351. Suicide rates among LGBTQIA+ individuals are remarkably higher than any other group. See Laura Kann et al., *Sexual Identity, Sex of Sexual Contacts, and Health-Related Behaviors Among Students in Grades 9–12—United States and Selected Sites, 2015*, 65 *SURVEILLANCE SUMMARIES* 1, 19–21 (2016).

forced by understanding mental phenomena as physical, since there is broad agreement in the public sphere that racism needs to be eliminated.³⁵² Even when the methods to do so are struck down, the purpose of diversifying society racially and eliminating racism are widely uncontroversial.³⁵³ If we understand that teaching racism physically alters and, therefore, harms the brains of children, the Constitution provides little protection for the parents, and the government would be able to intervene to protect the children.³⁵⁴ However, it is paramount that these protections are not simply read as being left up to a State's discretion. If left up to individual States to promulgate rules protecting children, many if not most children in states that do not create protections could be out of luck. For this reason, I argue that children should have a fundamental right defined by a clear liberty interest protected federally by the First Amendment right to expression. This protection is firmly couched in the principle of freedom from harm in the quote preceding this section.³⁵⁵

The particular policies suggested to protect children from their parents' racism would need to survive strict scrutiny review, since they would impinge upon a fundamental right to raise children³⁵⁶ and would be content-based restriction on free speech and the expression of ideas.³⁵⁷ I argue that strict scrutiny would be met based on a

352. I am deeply sympathetic and fully entrenched in the plight of LGBTQIA+ persons, but for my current purposes, I am attempting to keep the examples as uncontroversial as possible as not to exacerbate the controversial nature of impinging upon parental rights and free speech.

353. *See, e.g.*, *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 722, 725, 747–48 (2007) (finding a compelling interest in reducing racial disparity even while holding that a school desegregation plan could not rely on race of the students alone); *see also* 52 U.S.C.A. § 10301; Civil Rights Act of 1964, P.L. 88-352 (“A[n act t]o enforce the constitutional right to vote, to confer jurisdiction upon the district courts of the United States [of America] to provide injunctive relief against discrimination in public accommodations, to authorize the Attorney General to institute suits to protect constitutional rights in public facilities and public education, to extend the Commission on Civil Rights, to prevent discrimination in federally assisted programs, to establish a Commission on Equal Employment Opportunity, and for other purposes.”).

354. *See Mattan et al.*, *supra* note 345, at 27.

355. *See supra* notes 87–88 and accompanying text.

356. *Troxel v. Granville*, 530 U.S. 57, 65 (2000) (“The Fourteenth Amendment provides that no State shall ‘deprive any person of life, liberty, or property, without due process of law.’ We have long recognized that the Amendment’s Due Process Clause, like its Fifth Amendment counterpart, ‘guarantees more than fair process.’ The Clause also includes a substantive component that ‘provides heightened protection against government interference with certain fundamental rights and liberty interests.’ The liberty interest at issue in this case—the interest of parents in the care, custody, and control of their children—is perhaps the oldest of the fundamental liberty interests recognized by this Court.”) (citations omitted).

357. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2216 (2015) (“Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”).

compelling interest, the necessity to protect children from neurologically harmful speech that impacts both the individual and the society that allows racism to persist even after it has been roundly rejected. First, what rights do parents have over their children?

4. Parental Rights Under the Constitution

The statist notion that governmental power should supersede parental authority in *all* cases because *some* parents abuse and neglect children is repugnant to American tradition. Nonetheless, we have recognized that a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.³⁵⁸

The right of parents to control the upbringing of their children without interference from the state is well established under the Due Process Clause of the Fourteenth Amendment³⁵⁹ as well as under fundamental rights analysis.³⁶⁰ There is a presumption that children's best interests are served by being in the custody of their biological parents.³⁶¹ Parents, like all citizens, enjoy the right to free speech and expression. But these rights are not absolute.³⁶² The Supreme Court has determined that states may intervene when health of the child is in danger, whether mental or physical.³⁶³

If mental harms can already be protected, why would rejecting dualism matter? First, the mental health protections are fairly weak as they only extend into severe abuse and neglect.³⁶⁴ Second, physical battery and harms of a physical nature are recognized in every State as grounds for removing custody of a child from a parent, although such extreme measures are likely not necessary or productive to eliminate racism from society.³⁶⁵ By understanding these harms as physical, understanding racist teaching as *doing something*, the ability

358. *Parham v. J.R.*, 442 U.S. 584, 603 (1979) (emphasis in original) (citations omitted).

359. *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510, 510, 518 (1925).

360. *Troxel*, 530 U.S. at 66.

361. *Parham*, 442 U.S. at 602 ("More important, historically it has recognized that natural bonds of affection lead parents to act in the best interests of their children.").

362. *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part); *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942).

363. *Parham*, 442 U.S. at 603; *Prince v. Massachusetts*, 321 U.S. 158, 166–67 (1943).

364. See Victor I. Vieth, *The Mutilation of a Child's Spirit: A Call for a New Approach to Termination of Parental Rights in Cases of Child Abuse*, 20 WM. MITCHELL L. REV. 727, 747, 751–53 (1994).

365. See *Determining the Best Interests of the Child*, CHILD WELFARE INFORMATION GATEWAY (2016), <https://childwelfare.gov/topics/systemwide/law-policies/statutes/best-interest> [<http://perma.cc/AZ56-FV57>].

to protect children falls clearly under the purview of the government. This is why understanding mental phenomenon as physical is so crucial.

5. *Specifying the Physical Harm of Racist Ideology*

There are no defining moral characteristics of people of particular races. I assume this fact. When a parent teaches a child that all people of a group are bad (for example, that people of race (x) are disgusting sexually or inherently violent) the child is being conditioned to have instant, unconscious reactions when faced with people of those races. Not only is the teaching of such doctrine a material misrepresentation of how things are, the child also does not have the ability to simply escape the impacts of such doctrine by willing it in the moment. Over time, when the habit is understood and reinforced, this conditioning produces an automatic reaction upon encountering a person of race (x).³⁶⁶ Racist teaching and conditioning produces racists. And in so doing, racist parents condition children to make reliable errors in judgment about the members of a particular race based on arbitrary characteristics ascribed to the race.³⁶⁷ For children who are subjected to racist doctrine in the home, especially from the start, the neural circuitry that informs our autonomic neural system to respond to perceptions with fear and disgust is being habituated to produce those very phenomena.³⁶⁸

This coercion *gets in the way* of a person's ability to make decisions. If the human brain is conditioned to incorrectly perceive the world in a framework that posits race (which is an arbitrary category to begin with) as giving rise to particular moral facts about a person, when the person encounters a person of the target race, the erroneous assumption hinders the racially conditioned person's ability to connect with and relate to people and thus the environment around them in a coherent way.³⁶⁹ Some theories suggest methodology that could help understand how decision making neural pathways are interrupted when conditioned to think in racist and sexually oppressive ways.³⁷⁰ Racist teaching produces bad decision makers. When

366. See Junhua Dang et al., *A New Account of the Conditioning Bias to Out-Groups*, FRONTIERS IN PSYCH. (Feb. 24, 2015), <https://www.frontiersin.org/articles/10.3389/fpsyg.2015.00197/full> [<http://perma.cc/37C2-K99W>].

367. See Brooke Emery, *The Upbringing of a Creature: The Scope of a Parent's Right to Teach Children to Hate*, 4 THE MOD. AM. 60, 61–62 (2008).

368. Dang et al., *supra* note 366.

369. See Andreas Olsson et al., *The Role of Social Groups in the Persistence of Learned Fear*, 309 SCIENCE 785, 786 (2005).

370. See PAUL W. GLIMCHER, FOUNDATIONS OF NEUROECONOMIC ANALYSIS 380 (2011).

those making these consistently erroneous, racist assessments stop and think about their decisions, the racist person is left responding to the feeling of fear or disgust that they have been conditioned to feel.³⁷¹ The racist does not respond to the actual person being assessed, and so there is a disconnect between the perception and the output of the decision.³⁷²

There is a worse result of racist ideology being taught to children than simply making bad value judgments. In contrast to the bad decision maker who contemplates and then decides, the trigger happy racist is responding to this ancient part of the neural system, associated with automatic reactions to fear.³⁷³ By teaching racism, the part of the neural system primed evolutionarily to respond to fear³⁷⁴ has been conditioned to incite protective tasks when confronted with a person of the target race.³⁷⁵ However, the state of humans inherently is to trust and cooperate, while learned behaviors such as racism “inject[] . . . distrust and vigilance into social decision making.”³⁷⁶ When a racist police officer shoots an unarmed black man, that racist officer will not be lying if he *thinks* that he had a *reasonable* fear.³⁷⁷ By perceiving danger as a matter of ideological conditioning, a racist officer is not lying when the officer testifies that they perceived a threat from the black victim. While there was not much thinking going on, the racist cop’s instinct is to fear. This type of fear is learned and conditioned through ideology.³⁷⁸ It is not based on any fact that actually adheres consistently or in a way that is testable in the world. And this fear manifests as a part of a physical process.

Racist ideology also impacts people who are not taught to be actively racist but who are subject to the systems of racism and the societal perceptions and perpetual falsehoods that are engrained in social narratives about different races.³⁷⁹ Summarizing, racist ideology presents three distinct harms. First, it is harmful to the individual as a matter of getting in the way of their ability to perceive the

371. See Olsson et al., *supra* note 369, at 787.

372. See *id.* at 785–87.

373. Joseph E. LeDoux, *Emotion: Clues from the Brain*, 46 ANN. REV. PSYCH. 209, 228 (1995).

374. See SAPOLSKY, *supra* note 40, at 34.

375. *Id.* at 86.

376. *Id.* at 39 (“In other words, the default state is to trust, and what the amygdala does is learn vigilance and distrust.”).

377. *Id.* at 87.

378. See Emery, *supra* note 367, at 61–62.

379. See generally Tom Head, *The Definition of Institutional Racism: The History and Implications of Institutional Racism*, THOUGHTCO. (July 16, 2019), <https://www.thoughtco.com/what-is-institutional-racism-721594> [<http://perma.cc/YMA9-S4QF>].

world in a coherent way.³⁸⁰ Second, it is harmful to the individual because it creates general anxiety for the individual in a multiracial and multicultural world.³⁸¹ Third, and most importantly, it creates danger for people of a target race when a racist is in a position of power within the society.³⁸² Further, people are being, *en masse*, passively conditioned due to racist symbolism and categorization based on historic institutional racism.³⁸³

Note: Race, for the purposes herein, is meant to be understood as a classification that is not related to any normative fact about the person but rather one that indicates some perceived label based on color, external feature, place of origin, or labeling related to language, symbolized religion, or ethnic characteristic.³⁸⁴ For example, if a person who opposes immigration by people from Central America to the United States teaches their child that people who speak Spanish are speaking to Diablo and are evil, this is a racist lesson based on the arbitrary feature of the language being spoken. There is, in reality, no moral fact associated with the fact that someone is speaking Spanish. If someone tells their child that Jews are evil and to treat their Jewish classmates with distrust and antipathy, this is an arbitrary, racist lesson based on the religious symbolism of a family identifying as a particular religion. Nothing about being born into any religious faith or ethnicity suggests normative values about a particular person. This does not mean that the logical content of the person's speech or the religion practiced by a person is not to be understood as producing a normatively laden field that is subject to criticism. Of course the things people say and the religions they actually practice can be problematic and subject to criticism. But any religion that millions of people associate with is going to have a wide berth of types in it. The same holds in regards to language being spoken, while obviously language is more modal and less normative than religion. It is an important point to assess the difference between religious labeling and religious practice. Various practices fall under the banner of any religious label. But the label itself, especially when so broadly described as "Jewish," "Muslim," "Christian," "Hindu," or any broadly described faith followed by millions or billions of people contains little information about the specific beliefs or practice of any

380. See Emery, *supra* note 367, at 61, 64.

381. *Id.* at 61–62.

382. See SAPOLSKY, *supra* note 40, at 87.

383. Head, *supra* note 379.

384. See generally Erin Blakemore, *Race and Ethnicity: How Are They Different?*, NAT'L GEOGRAPHIC (Feb. 22, 2019), <https://www.nationalgeographic.com/culture/topics/reference/race-ethnicity> [<http://perma.cc/48YT-82FK>].

given person.³⁸⁵ Symbolically understood, religion cannot be coherently understood to inherently give rise to normative criticism on its own, and even those who subscribe to a particular faith will have different interpretations and personal relationships with the religion. Similarly, though more clearly, the fact that someone is from a particular place, has a particular skin or hair color, speaks a language, or the like without any other known fact cannot coherently give rise to a moral judgment about that person. This is the concept of race as understood in this Article.

6. The Right to Be Free from the Physical Harms of Racist Ideology

Children have not enjoyed a robust level of autonomy in relation to their parents' methods of child-rearing. Freedom from physical abuse for children is clear, however.³⁸⁶ Given this, does it follow that children must be protected from the physical conditioning of being taught racist ideology? Or, conversely, is this exactly the sort of thing that should be protected as a matter of parental right? Something in the middle? To suggest that parents should not be able to manipulate the physical processes of their children's minds at all would be absurd. Dietary choices,³⁸⁷ religious practice,³⁸⁸ and choosing to teach children a musical instrument³⁸⁹ are all examples of decisions that have conditioning effects on children's minds. However, parental freedom in those areas only extends so far.³⁹⁰ Parents cannot make dietary choices such as beer or feeding a child only half the amount of nutrition the child needs. Teaching a child that God instructs them to try to murder their teacher every day is not an acceptable practice, especially if it leads to the child attempting such treachery. Forcing a child to practice an instrument to the point of blood pouring from their fingers and the child developing debilitating detachment and malnourishment from too much practice is unacceptable by current standards.

385. See Victoria S. Harrison, *The Pragmatics of Defining Religion in a Multi-Cultural World*, INT'L J. PHIL. RELIGION 133, 133 (2006).

386. See *Parham v. J.R.*, 442 U.S. 584, 603 (1979).

387. See Leann L. Birch & Jennifer O. Fisher, *Development of Eating Behaviors Among Children and Adolescents*, PEDIATRICS 539, 542 (1998).

388. See Hannah Newton, *The Sick Child in Early Modern England, 1580–1720*, 38 ENDEAVOUR 122, 128 (2014).

389. See Ewa A. Miendlarzewska & Wiebke J. Trost, *How Musical Training Affects Cognitive Development: Rhythm, Reward and Other Modulating Variables*, FRONTIERS IN NEUROSCIENCE (Jan. 20, 2014), <https://www.frontiersin.org/articles/10.3389/fnins.2013.00279/full> [<http://perma.cc/T969-28QQ>].

390. See, e.g., *Newmark v. Williams*, 588 A.2d 1108, 1116 (Del. 1991).

Is teaching a child racism like one of these practices and thus easily incorporated into the existing set of protections that exist for children? I think that it is. It is more like those than the religious practices of, for example, teaching a child to be respectful to people, giving alms to the poor, and keeping one's vices in check.³⁹¹ These practices are found in many religious faiths, and they do not constitute harm in the way that teaching racist ideology, which is also a belief many derive from some religious faiths, does.³⁹² Instead of classifying the conditioning of bad ideologies in with other abusive practices, constructing the right might benefit from its own foundations and analysis. Even if the harms caused by racist conditioning are physical, they are also content based, not merely about a harmful or already illegal practice or process. What would the fundamental right to a freedom from this unique type of harm look like for children? Would we wind up in the same place we found the status of mental tort harms that were understood as not being *merely* mental where the pre-existing reasons for the distinction between mental and physical make a lot of sense? The analysis should begin with what we know about the underlying interests on either side and the purposes behind protecting those interests. Here, the interest of the parent to teach their children as they see fit is pitted against the child's freedom to not be taught racism. What purposes do these interests serve exactly?

On the side of the parent, there is a free speech interest and an interest in the rearing of one's child in the best way they see fit. Free speech as a doctrine serves two overarching purposes that need to be addressed here.³⁹³ One, the ability for ideas, even and especially fringe ideas, to enter the realm of public debate, thus adding to the complexity and robustness of discourse.³⁹⁴ There are some ideas that are low value speech that do not receive robust protection.³⁹⁵ While problems drawing the line between speech that has no value and speech that should be protected is always going to be difficult, there are extremes that can help define the boundaries of our analysis. I offer a couple of extremes for purposes of analysis.

391. See generally *Why Give? Religious Roots of Charity*, HARV. DIVINITY SCH. (Nov. 26, 2018), <https://hds.harvard.edu/news/2013/12/13/why-give-religious-roots-charity#> [<http://perma.cc/L2SY-QK5Z>].

392. See, e.g., *id.*; Deborah L. Hall et al., *Why Don't We Practice What We Preach? A Meta-Analytic Review of Religious Racism*, 14 PERSONALITY & SOC. PSYCH. REV. 126, 127 (2010).

393. See KATHLEEN SULLIVAN & NOAH FELDMAN, FIRST AMENDMENT LAW 5–6 (6th ed. 2016).

394. See *id.*

395. See Victoria L. Killion, THE FIRST AMENDMENT: CATEGORIES OF SPEECH (Congressional Research Service 2019).

At one extreme, it seems obvious that teaching children to participate in criminal activity is unacceptable. On the other hand, it seems obvious that teaching children that the law is not correct in some way and should be changed is acceptable, particularly if the parent enforces that following the flawed law is prudent. Taking these, we start out with two categorically different teachings. Now, how are they different? Or, to frame the question more clearly, what are the defining characteristics that make these different lessons fall into their respective categories of acceptable and not acceptable behavior? I argue that the consequences of the lessons tell the story. Teaching a child to commit a criminal act sets that child up for failure. If a parent teaches a child that stealing is the only way that the child will ever get their favorite candy, that they should want the candy, and that the child should steal the candy because they want it, the parent conditions the child to break the law and that, in fact, breaking the law is good. Breaking the law tends to get people in trouble. If someone develops the habit of breaking a law, that person is habituated into a way of life that will likely lead them to running into legal troubles. To teach a child to act in a particular way is different than discussing with and teaching a child to understand how the law itself is arguably incorrect, which positions a child to understand how they can relate to legal standards even if they do not agree.

The case of a parent teaching racist ideology is remarkably different. Their lessons are not about the law and how it needs to change. The racist parent is teaching the child, falsely, that there is some indelible quality present in persons of a particular race.³⁹⁶ There is no argument being made about the political system or the possibility of changing the law. Instead, it is a morally laden metaphysical claim that conditions a false belief into a child's theory of mind.³⁹⁷ For this reason, the first overarching purpose of free speech doctrine, to introduce a broad base of ideas to the public, is not being served. It is more similar in deception to telling a person to meet in the woods in a murder conspiracy. However, if racism has been conditioned into people through often nefarious cultural misunderstandings, which I think it certainly has, the "true believer" is not culpable for having the belief. And so participating in the process by which racism takes hold of the young mind should likely not have the required intent to give rise to criminal charges. And given the state of our current prison system,³⁹⁸ the outcomes involved in taking

396. See Lawrence A. Hirschfeld, *Children's Developing Conceptions of Race*, in *HANDBOOK OF RACE, RACISM, AND THE DEVELOPING CHILD* 37, 42 (John Wiley & Sons, Inc., 2008).

397. See generally *id.*

398. Wendy Sawyer & Peter Wagner, *Mass Incarceration: The Whole Pie 2019*, PRISON

such measures to rid our society of racism likely bear against the idea of criminal culpability for conditioning a child to react in racist ways to persons of other races.

On the other hand, an individual speaker has an interest in being free from encumbrance and fear of attack on their ideas by the State. That the State may not intervene into a person's mental processes, their ideas, is a deeply protected interest.³⁹⁹ But it also has its limits.⁴⁰⁰ In the case of the racist parent, I argue that the limit has been reached because of the physical effects that can be observed by the impact of such teaching on a child. If the issue was merely that an individual or group of individuals who have reached the age of majority wish to band together to form a coalition to promote racism, my argument would not adhere. But here, there is a distinct difference. The child does not have any freedom to just walk away and in most cases does not even have the chance to rebuke their parent if they disagree. When there is a vulnerable hearer involved, the argument applies and the doctrinal approach changes. In the case at issue, the child is a *captive audience* and should be considered as such.⁴⁰¹ What is a captive audience exactly and do children fall under this category based on existing doctrine?

People do not have unfettered freedom to bombard others with speech against their will.⁴⁰² Falsely imprisoning people to inculcate them with political propaganda is clearly not okay. Conversely, teaching racist propaganda in a public forum to consenting adults⁴⁰³ and wearing potentially offensive jackets even where people who might be offended are required to be⁴⁰⁴ are examples of protected speech

POLICY INITIATIVE (Mar. 19, 2019), <https://www.prisonpolicy.org/reports/pie2019.html> [<http://perma.cc/K2KL-FQ4S>].

399. Sherry F. Colb, *How the Government May, and May Not, Punish People's Thoughts and Words*, VERDICT JUSTIA (May 2, 2012), <https://verdict.justia.com/2012/05/02/how-the-government-may-and-may-not-punish-peoples-thoughts-and-words> [<http://perma.cc/4RB5-UVKJ>].

400. *Id.*

401. See LINDA J. GOTTLIEB, *THE PARENTAL ALIENATION SYNDROME: A FAMILY THERAPY AND COLLABORATIVE SYSTEMS APPROACH TO AMELIORATION* 210 (Charles C. Thomas 2012).

402. Patrick M. Garry, *Captive Audience*, THE FIRST AMENDMENT ENCYCLOPEDIA, <https://www.mtsu.edu/first-amendment/article/895/captive-audience> [<http://perma.cc/6CDA-575P>].

403. See *Brandenburg v. Ohio*, 395 U.S. 444, 448–49 (1969) (striking down an Act that “punishes persons who ‘advocate or teach the duty, necessity, or propriety’ of violence ‘as a means of accomplishing industrial or political reform’; or who publish or circulate or display any book or paper containing such advocacy; or who ‘justify’ the commission of violent acts ‘with intent to exemplify, spread or advocate the propriety of the doctrines of criminal syndicalism’; or who ‘voluntarily assemble’ with a group formed ‘to teach or advocate the doctrines of criminal syndicalism.’”).

404. See *Cohen v. California*, 403 U.S. 15, 21–22 (1971) (“In this regard, persons confronted with Cohen’s jacket [in a courthouse] were in a quite different posture than, say, those subjected to the raucous emissions of sound trucks blaring outside their residences. Those in the Los Angeles courthouse could effectively avoid further bombardment of

not subject to state sanction. However, speech that subjects people to unwanted messages when in the home can be sanctioned and curtailed.⁴⁰⁵ While the home is the quintessential example of where people have the right to be protected from speech by the state, the Supreme Court has said that the captive audience doctrine should only protect hearers when “substantial privacy interests are being invaded in an essentially intolerable manner.”⁴⁰⁶ The fear is that extending the right for the state to curtail speech any further can “empower a majority to silence dissidents simply as a matter of personal predilections.”⁴⁰⁷ In the case of hearing racist teachings in the home, it is the very relationship natural to the home that is at question. Because the two share a home, the child’s freedom and the parent’s freedom in that very home are at issue. Furthermore, children generally do not have freedom of association over their parents’ wishes except in rare cases, and even where they do, they rely on others to invoke the rights for them.⁴⁰⁸ This may seem to cut against the case of children having a superseding negative freedom from harmful racist speech. But when understood in relation to the captive audience doctrine, it supports their neural autonomy.

The very fact that children are not free to leave their home via freedom of association rights means that they are being forced by the state to remain in the home in a way that an adult in a similar situation is not.⁴⁰⁹ Imagine a spouse or a roommate who attempts to coerce housemates with racist speech. While there might be no practical way to leave the situation immediately and be considerably better to endure than the alternatives, a fundamental autonomy right exists for an adult in that situation to leave the home. Children should be understood to be the most extremely captive audiences

their sensibilities simply by averting their eyes. And, while it may be that one has a more substantial claim to a recognizable privacy interest when walking through a courthouse corridor than, for example, strolling through Central Park, surely it is nothing like the interest in being free from unwanted expression in the confines of *one’s own home*.”) (emphasis added).

405. See, e.g., *Rowan v. U.S. Post Office Dep’t*, 397 U.S. 728, 737 (1970) (upholding a law that allows citizens to stop the post office from delivering advertisements, thus undermining the senders’ claimed right to communicate); *Kovacs v. Cooper*, 336 U.S. 77, 87 (1949) (“It is an extravagant extension of due process to say that because of it a city cannot forbid talking on the streets through a loud speaker in a loud and raucous tone. Surely such an ordinance does not violate our people’s ‘concept of ordered liberty’ so as to require federal intervention to protect a citizen from the action of his own local government.”).

406. *Cohen*, 403 U.S. at 21.

407. *Id.*

408. See Kimberley Brownlee, *Freedom of Association: It’s Not What You Think*, 35 OXFORD J. LEGAL STUD. 267, 274–75 (2015).

409. See Constantine Theophilopoulos, *The Privilege Against Self-Incrimination and the Distinction Between Testimonial and Non-Testimonial Evidence*, 127 S. AFRICAN L.J. 107, 120–22 (2010).

allowed by current standards. If the captive audience doctrine exists at all, it should exist to protect those who have the least autonomy. Children cannot divert their eyes or walk out when confronted with racist teaching the way they could when confronted with an offensive jacket in public or the way an adult could when faced with the same at home. Since they are bound in such stark ways under other, more fundamental doctrines like parental association rights, their physical neurological well-being is appropriately analyzed as a captive audience. When the rights are balanced against each other, I argue that the child's interest is the only one that should weigh at all, because in the instance of racist teaching, it is the child's brain, a physical entity, that is being harmed in substantial ways.

No countervailing liberty interest in the freedom to speak one's mind outweighs another person's right to not be forced to develop physical reactions to erroneously proscribed environmental stimuli such as those tracking race. By understanding the physically coercive process happening when a person's autonomic system is primed to be racist, it allows us to place the phenomenon alongside other physical abuses such as hitting, nutrition deprivation, and conditioning criminal ideology that manifests in criminal behavior. If seen through a dualist lens, however, the child's right to be free from racist teaching is likely to be cast in a metaphysical light that leaves it protected only as *merely* mental. By understanding racist teaching as a neuro-conditioning process that is categorically and conceptually physical, the harm children experience when taught to be racist is properly understood as a physical harm that warrants State intervention to avoid.

7. Counter-Argument from Religious Freedom

People who couch their racist beliefs and teachings in religious freedom might counter that by allowing the state to intervene into their child-rearing practices, their religious beliefs are being decided for them and that the state is in so doing endorsing religious practice. While it is true that the government may not endorse particular religious faiths, this argument would actually bear in the other direction if analyzed properly.⁴¹⁰ If the racist teaching causes physical harm, then to consider the right to exact that type of physical harm as being privileged or special in ways that *merely* mental harms are requires positing a dualist distinction between the mind and the body. To do so requires the state to make a philosophical choice about

410. See *Establishment Clause*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/establishment_clause [http://perma.cc/TKB8-KE3F] (last visited Nov. 4, 2019).

the nature of the mind, and that type of choice is a broad sweeping, faith-based choice that smells a lot like a religious endorsement. The argument that state action to intervene into a physically abusive situation is an impingement upon religious freedom tantamount to an endorsement of religion makes an ironic error in logic. Since the claim relies on the state endorsing a particular view of the mind that cannot be justified by empirical observation, it begs the state to make a faith-based assertion that is itself closer to religious belief endorsement than to carefully analyze and organize the physical impacts of people's conduct. Either these impacts are observable, or they are not. Merely hypothetical harms, like merely hypothetical or quasi-scientific methods of analysis, should not matter when it comes to the law. The reason is the same as one of the reasons that teaching racist doctrines is so bad. Relying on unfalsifiable, quasi-sound methods of discovery produces consistent errors. For this reason, things that are not subject to logical or empirical proof are not subjects into which the state ought to interject. Legal standards should not be subject to assumptions bound up in equally speculative notions. The *thing that we cannot prove* is that which the notion of dualism relies upon for support. Things that can be proven are important in the face of the law. Things that cannot are fun to speculate about, but they should not serve as cornerstones for the legal system. The observable proof of the harmful effects of racism are not in dispute.⁴¹¹ The impacts of teaching racism are well documented and can be accurately understood as physical from the point at which racist concepts are conditioned into malleable young minds. If dualism is rejected, the way racist doctrine affects the mind of a child is properly seen as similar to material misrepresentations, unprotected hate speech, yelling fire in a theater, the event that leads to an onset of manslaughter, assault, and defamation. All of these types of speech acts *do* things. They do not merely exist in a mental realm where their outcomes are not predictably realized.

CONCLUSION

In this Article, I explained how mind-body dualism impacts the law, and how accepting physicalist notions of the mind would impact the values bound up in legal doctrine. For many areas of the law

411. See David E. Broockman, *Distorted Communication, Unequal Representation: Constituents Communicate Less to Representatives Not of Their Race*, 58 AM. J. POL. SCI. 307, 317 (2014); Brea L. Perry et al., *Racial and Gender Discrimination in the Stress Process: Implications for African American Women's Health and Well-Being*, 56 SOC. PERSP. 25, 36, 39; *Physiological & Psychological Impact of Racism and Discrimination for African-Americans*, AMERICAN PSYCHOLOGICAL ASSOCIATION, <https://www.apa.org/pi/oema/resources/ethnicity-health/racism-stress.aspx> [<http://perma.cc/BJS4-259R>] (last visited Nov. 4, 2019).

where mind-body dualism has been prevalent, a physicalist picture would have little or no impact on the law. For instance, *mens rea* requirements are not necessarily valued differently because they are physical in nature. Tort law maintains some good reasons for the mental/physical harm distinction, but new arguments utilizing neuroscience to explain that mental harms are not *merely* mental are potentially available to overcome limitations on recovery for mental harms. Bodily versus testimonial evidence, even when both seen as physical in nature, still maintain a distinction in kind that the law supports notwithstanding metaphysical unification. Conversely, in First Amendment doctrine, a wave of change seems to be in order. I argued here that in the case of a parent's right to teach a child racist doctrine, no First Amendment or fundamental rights protections should override the child's right to be free from the harm of racist indoctrination. The question that seems to follow from this is "what should be done?" How could parents who teach their children racism and bigotry be stopped? How could racism as an idea be mitigated or eliminated from society? This is an impossible question to answer completely. People usually do not realize that they are racist, and most of us have racial biases, even when we try to correct them.⁴¹² Even decades after the Civil Rights Movement has compelled legislation⁴¹³ and forced the courts⁴¹⁴ to raise consciousness surrounding the seriousness of racial prejudice, it persists. The hope is that as the society grows more diverse, things will continue to improve. But with recent regressions in hate crime violence⁴¹⁵ and racist political speech reemerging in public discourse,⁴¹⁶ our culture seems to be in a sort of malaise when it comes to continuing racial progress to the point of justice. By imploring political leaders and policy experts to take up this issue, there can be more directed legislative and administrative action to confront racism as a public health issue that can and should be treated like a disease.

412. See Jennifer L. Eberhardt et al., *Seeing Black: Race, Crime, and Visual Processing*, 87 J. PERSONALITY & SOC. PSYCHOL. 876, 876 (2004). See generally MAHZARIN BANAJI & ANTHONY GREENWALD, *BLINDSPOT: HIDDEN BIASES OF GOOD PEOPLE* xii–xiii (Delacorte Press, 2013).

413. See Harold A. McDougall, *For Critical Race Practitioners: Race, Racism and American Law*, 46 HOW. L.J. 1, 19–20, 39 (2002).

414. *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017) ("The duty to confront racial animus in the justice system is not the legislature's alone. Time and again, this Court has been called upon to enforce the Constitution's guarantee against state-sponsored racial discrimination in the jury system."); *Brown v. Bd. of Educ.*, 347 U.S. 483, 483 (1954).

415. There were more than 1000 more hate crime incidents in 2017 than in 2016. Compare FBI, *Hate Crime Statistics 2017, Table 1*, FBI (2017), <https://ucr.fbi.gov/hate-crime/2017/tables/table-1.xls> [<http://perma.cc/MUU9-3W57>] with FBI, *Hate Crime Statistics 2016, Table 1*, FBI (2016), <https://ucr.fbi.gov/hate-crime/2016/tables/table-1> [<http://perma.cc/8PHQ-TY9L>].

416. Jessie Daniels, *The Algorithmic Rise of the "Alt-Right,"* 17 CONTEXTS 60, 61 (2018).

The same model of consciousness raising seen around the Civil Rights Movement, though woefully incomplete, can be hoped for in the LGBTQ movement. But it could be even more difficult to overcome. I was not around during the pre-Civil Rights era, so I cannot attest to how reactive people were at the suggestion of civil rights for Blacks. But I have witnessed the reactions of people who vehemently reject that LGBTQ people have equal rights. I have also seen the Supreme Court treat LGBTQ rights as if they do not matter as much as racial equality.⁴¹⁷ Presently, the issue seems to be treated as if it has a different character than racial protections. Maybe it does, and arguably that character of the harm of anti-LGBTQ ideology is even worse or on par with our racism problem.⁴¹⁸

There is also Constitutional doctrine to consider. Since limiting a parent's right to teach their kids to be racist bigots would affect a fundamental right to parent, substantive due process considerations, the right to free speech, and religious freedom, any regulation passed to correct it would have to survive strict scrutiny.⁴¹⁹ This

417. See *Masterpiece Cakeshop v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719, 1723, 1725–27, 1752 (2018).

418. In addition to the well documented extermination by the state of LGBTQIA persons, the harms of teaching children such hateful ideology are clear. Specific to the child, the physical harm of anti-LGBTQIA ideology is in a way contingent upon the child, and in another, universal to all children. The more egregious harm, where a child who is LGBTQIA is taught to hate themselves, is contingent on the fact of that child's sexual identity. It is well-documented that the rates of psychological disorders are higher in the LGBTQIA community than in the general population. See generally *Lesbian/Gay/Bisexual/Transgender Communities and Mental Health*, MENTAL HEALTH AMERICA, <https://www.mentalhealthamerica.net/lgbt-mental-health> [<http://perma.cc/PJ8X-TXQL>]. This indicates that these children are already more susceptible to psychological health problems, whether due to environmental factors or genetic dispositions. See Ronald C. Kessler et al., *Prevalence, Persistence, and Sociodemographic Correlates of DSM-IV Disorders in the National Comorbidity Survey Replication Adolescent Supplement*, 69 ARCH. GEN. PSYCHIATRY 372, 372, 376–78 (2012). Many processes of psychological problems have been physically identified and observed, and I have assumed that there is no important distinction between the mental and the physical for the sake of this argument. See Helen S. Mayberg, *Targeted Electrode-Based Modulation of Neural Circuits for Depression*, 119 J. CLIN. INVEST. 717, 717–18 (2009). Stigma has been documented as a major driver of psychological disorders. See Mark L. Hatzenbuehler et al., *Stigma as a Fundamental Cause of Population Health Inequalities*, 103 AM. J. PUB. HEALTH 813, 813, 816 (2013). If the person a child looks up to the most, or at least is the most influential person in their life, for better or worse, is teaching the child to hate who they are, this can have devastating effects on the child and lead to psychological health issues. These issues have physically traceable pathologies. Furthermore, the entire neurological reward center of the person is being conditioned in such a way as to make their long term well-being less likely. See generally Caitlin Ryan, *Helping Families Support Their Lesbian, Gay, Bisexual, and Transgender (LGBT) Children*, GEO. U. CTR. FOR CHILD & HUMAN DEV. 3–4 (Fall/Winter 2009). That is to say, the way in which the child is conditioned to value things ideally will affect the way in which they are able to enjoy things later in life.

419. Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1268–69 (2007).

means that the regulation would have to serve a compelling government interest and be necessary to do so and be done in the least restrictive way possible.⁴²⁰

So what would a fundamental negative right against the bad ideas of one's parents look like and how would it be enforced? First, the right would best be grounded in the First Amendment. There are a couple of reasons for this. The rights afforded under the First Amendment have been guaranteed great protections, and that protection is only being increased.⁴²¹ While fundamental rights analysis is also available, the specific doctrine of freedom of expression naturally extends into this area.⁴²² The parent's right to speak and the child's right to expression will be on an equal footing to begin the balancing analysis.

Second, enforcement could, like in *Brown v. Board of Education*, come in a variety of ways that are specifically tailored to the most egregious situations but to also provide widespread programming to eliminate implicit biases that do not appear to be egregious but that have perpetually insidious outcomes.⁴²³ Taking into account the fact that children separated from their families have on average worse outcomes than those who are not,⁴²⁴ the government should deal with this on a case by case basis, employing a) literature distribution, b) family counseling, c) logic and critical thinking for children, and d) general incentives for people who overcome their biases.

Neither the harms nor the cause of racism are always obvious.⁴²⁵ By understanding racism in a physicalist framework, it is understood properly as a serious and widespread health problem. We could and should treat racism as if it is a disease instead of treating it as if it is privileged and protected ideology. While the dangers of an

420. *Id.*

421. See Nat'l Inst. of Family and Life Advocates v. Becerra, 138 S. Ct. 2361, 2371, 2378 (2018). *But see* Justice Kagan describing how the First Amendment is being weaponized, expanded in a very troubling way to protect ideological resistance to legitimate state regulation. Janus v. American Fed'n of State, Cty. & Mun. Emp., 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) ("And maybe most alarming, the majority has chosen the winners by turning the First Amendment into a sword, and using it against workaday economic and regulatory policy.").

422. See Larry Alexander, *Freedom of Expression*, in ENCYCLOPEDIA OF MODERN POLITICAL THOUGHT 304, 304–06 (Gregory Claeys ed., 2013).

423. See Cindy Long, *The Far-Reaching Effects of Implicit Bias in the Classroom*, NEATODAY (Jan. 26, 2016, 1:20 PM), <http://neatoday.org/2016/01/26/implicit-bias-in-the-classroom> [<http://perma.cc/H4DB-SA5J>].

424. Kimberly Howard et al., *Early Mother-Child Separation, Parenting, and Child Well-Being in Early Head Start Families*, 13 ATTACHMENT & HUM. DEV. 5, 21 (2011).

425. MICHEL FOUCAULT, SOCIETY MUST BE DEFENDED 256 (1997) (discussing racism in the context of the right of a racist government to control life up to the point of killing "[w]hen I say 'killing,' I obviously do not mean simply murder as such, but also every form of indirect murder: the fact of exposing someone to death, increasing the risk of death for some people, or, quite simply, political death, expulsion, rejection, and so on").

overreaching state should always be on our minds, the overreach in this case is the broad reach of ingrained racism throughout society, which is endorsed by the democratic state and pervades our system. The institutions of government perpetuate this engrained ideology as long as it remains in the automatic processes of the common citizen and within the societal narrative. Preventing the spread and continuation of racism should be undertaken at the most fundamental levels and stopped in its tracks before it can affect the minds of young people. By recognizing the physiological harms that are racist ideological teaching and conditioning, society can defend itself from racism by appropriate means and in a way that furthers our collective interest in the free exchange of ideas and maximizing personal autonomy.