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I THINK, THEREFORE I AM; I FEEL, THEREFORE I AM TAXED: DÉSCARTES, TORT REFORM, AND THE CIVIL RIGHTS TAX RELIEF ACT*

LAURA SPITZ**

[A] society's choice of a system of taxation speaks volumes about what that society values and believes.¹

[I]mposing a tax—any tax—is both powerful and manipulative.²

I. INTRODUCTION

I want to thank you for including me today, especially as everything I don't know about U.S. tort law could fill several large textbooks, and almost everything I do know, I learned from watching re-runs of *Judging Amy*³ and *The Practice*.⁴ As you will have seen from even a casual glance at the Symposium poster, I come at our topic today from the perspective of tax law. I have been interested for some time in how tax law and the tort system work together in the context of noneconomic, nonphysical, personal injury claims⁵ (such as unlawful discrimination or intentional infliction of emotional distress) to produce and perpetuate stereotypes “and habitual ways of thinking about and valuing nondominant groups in our society.”⁶

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1. Sharon C. Nantell, *A Cultural Perspective on American Tax Policy*, 2 CHAP. L. REV. 33, 35 (1999).

2. *Id.* at 36.

3. *Judging Amy* (Twentieth Century Fox Film Corporation & CBS Worldwide Inc. 1999–2005).

4. *The Practice* (ABC, Inc. 1997–2003).

5. There have been several articles written in the last ten years about the tax treatment of nonphysical personal injury damages, including the attorneys' fees portion of those awards. *See, e.g.*, J. Martin Burke, *Getting Physical: Excluding Personal Injury Awards Under the New Section 104(A)(2)*, 58 MONT. L. REV. 167 (1997); Patrick E. Hobbs, *The Personal Injury Exclusion: Congress Gets Physical but Leaves the Exclusion Emotionally Distressed*, 76 NEB. L. REV. 51 (1997); Brent B. Nicholson, *Recent Developments Concerning the Taxation of Damages Under Section 104(A)(2) of the Internal Revenue Code*, 61 ALB. L. REV. 215 (1997); Donald J. Zahn, *Personal Injury Exclusion: Is the Slashing of Wrists Necessary?*, 13 AKRON TAX. J. 129 (1997); Karen B. Brown, *Not Color- or Gender-Neutral: New Tax Treatment of Employment Discrimination Damages*, 7 S. CAL. REV. L. & WOMEN'S STUD. 223 (1998); F. Philip Manns, Jr., *Restoring Tortiously Damaged Human Capital Tax-Free Under Internal Revenue Code Section 104(a)(2)'s New Physical Injury Requirement*, 46 BUFF. L. REV. 347 (1998); Mark S. Floyd, *Discrimination Damages: Controlling the Tax Consequences for the Plaintiff*, 45 NO. 1 PRAC. LAW. 37 (1999); Laura Sager & Stephen Cohen, *How the Income Tax Undermines Civil Rights Laws*, 73 S. CAL. L. REV. 1075 (2000); Mark J. Wolff, *Sex, Race, and Age: Double Discrimination in Torts and Tax*, 78 WASH. U. L.Q. 1341 (2000); Gregg D. Polsky, *A Correct Analysis of the Tax Treatment of Contingent Attorney's Fee Arrangements: Enough with the Fruit and the Trees*, 37 GA. L. REV. 57 (2002) [hereinafter Polsky, *A Correct Analysis*]; Jennifer S. Neumann, *The Discrimination Created by the Tax Treatment of Attorney's Fees in Federal Civil Rights Cases*, 51 U. KAN. L. REV. 595 (2003); Marisa J. Mead, *Taxing the Victims: Compensatory Damage Awards and Attorneys' Fees in Sexual Harassment Lawsuits*, 11 J.L. & POL'Y 801 (2003); Sharon Reece, *Lemonade from Lemons: The Solution to Taxation of the Contingent Fee Portion of Damage Awards*, 37 CREIGHTON L. REV. 305 (2004); Gregg D. Polsky & Stephen F. Befort, *Employment Discrimination Remedies and Tax Gross Ups*, 90 IOWA L. REV. 67 (2004); Gregg D. Polsky, *The Contingent Attorney's Fee Tax Trap: Ethical, Fiduciary Duty, & Malpractice Implications*, 23 VA. TAX REV. 615 (2004) [hereinafter Polsky, *The Contingent Attorney's Fee*].

6. Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 467 (1998) [hereinafter Chamallas, *The Architecture of Bias*].

In the last twenty-five years, feminists and critical race scholars have begun to document the normative, class-based,⁷ racialized,⁸ and gendered⁹ nature of U.S. tort law,¹⁰ especially so-called "tort reform."¹¹ Their analyses reveal that initiatives with adverse consequences for women, children, people living in poverty, people of color, and other minorities include caps for noneconomic loss¹² and punitive¹³

7. See, e.g., Troy L. Cady, *Disadvantaging the Disadvantaged: The Discriminatory Effects of Punitive Damage Caps*, 25 HOFSTRA L. REV. 1005 n.3 (1997).

8. "[M]inority men continue to receive significantly lower damage awards than white men in personal injury and wrongful death suits," confirming that "a higher value is placed upon the lives of white men and that injuries suffered by this group are worth more than injuries suffered by other less privileged groups in society." Chamallas, *The Architecture of Bias*, *supra* note 6, at 464-65; see also Frank M. McClellan, *The Dark Side of Tort Reform: Searching for Racial Justice*, 48 RUTGERS L. REV. 761 (1996).

9. Over time tort law has tended "to produce and reproduce gender disparities both in the types of legally recognized injuries and in the value placed on certain losses." Chamallas, *The Architecture of Bias*, *supra* note 6, at 469.

10. See, e.g., Lucinda M. Finley, *Breaking Women's Silence in Law: The Dilemma of the Gendered Nature of Legal Reasoning*, 64 NOTRE DAME L. REV. 886 (1989); Lucinda M. Finley, *A Break in the Silence: Including Women's Issues in a Torts Course*, 1 YALE J.L. & FEMINISM 41 (1989); Lucinda M. Finley, *Female Trouble: The Implications of Tort Reform for Women*, 64 TENN. L. REV. 847 (1997) [hereinafter Finley, *Female Trouble*]; Lucinda Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263 (2004) [hereinafter Finley, *Hidden Victims*]; Leslie Bender, *Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (1990); Leslie Bender, *An Overview of Feminist Torts Scholarship*, 78 CORNELL L. REV. 575 (1993); Leslie Bender, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993); Leslie Bender, *Tort Law's Role as a Tool for Social Justice Struggle*, 37 WASHBURN L.J. 249 (1998); Anita Bernstein, *Restatement (Third) of Torts: General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367 (2001); Martha Chamallas & Linda K. Kerber, *Women, Mothers, and the Law of Fear: A History*, 88 MICH. L. REV. 814 (1990); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73 (1994); Martha Chamallas, *Importing Feminist Theories to Change Tort Law*, 11 WIS. WOMEN'S L.J. 389 (1997); Chamallas, *The Architecture of Bias*, *supra* note 6; Martha Chamallas, *Removing Emotional Harm From the Core of Tort Law*, 54 VAND. L. REV. 751 (2001); Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747 (2001); Margo Schlanger, *Teaching Torts: Gender Matters: Teaching a Reasonable Woman Standard in Personal Injury Law*, 45 ST. LOUIS U. L.J. 769 (2001); Jean C. Love, *Discriminatory Speech and the Tort of Intentional Infliction of Emotional Distress*, 47 WASH. & LEE L. REV. 123 (1990). For an early account of non-physical personal injury claims in the absence of a physical injury, see Peter Bell, *The Bell Tolls: Towards Full Tort Recovery for Psychic Injury*, 36 U. FLA. L. REV. 333 (1984). For an account of nonphysical personal injury claims in the context of prison litigation "reform," see James E. Robertson, *Psychological Injury and the Prison Litigation Reform Act: A "Not Exactly," Equal Protection Analysis*, 37 HARV. J. ON LEGIS. 105 (2000); Karen M. Klotz, *The Price of Civil Rights: The Prison Litigation Reform Act's Attorney's Fee-Cap Provision as a Violation of Equal Protection of the Laws*, 73 TEMP. L. REV. 759 (2000).

11. Finley, *Female Trouble*, *supra* note 10; Finley, *Hidden Victims*, *supra* note 10; McClellan, *supra* note 8. One of the central weaknesses of contemporary tort reform is that it is aimed at reducing claims rather than injuries. Professor Finley makes this point with respect to products liability reform:

Legislators no longer attribute the problem confronting our legal system to the number of accidents, harmful products or insufficiently tested drugs and devices adversely affecting public health and individual well-being; rather, they now attribute the problem to the excessive number of claims brought by injured people.

Finley, *Female Trouble*, *supra* note 10, at 848; see also Finley, *Hidden Victims*, *supra* note 10.

12. Professor Finley has demonstrated that noneconomic loss damage caps adversely affect women:

I have conducted empirical research from several states on how juries in medical malpractice and other tort suits allocate their damage awards between economic loss and noneconomic loss damages. I then compared cases in which men are the victims and cases in which women are the victims. This research demonstrates that while overall men tend to recover greater total damages, juries consistently award women more in noneconomic loss damages than men, and that the noneconomic portion of women's total damage awards is significantly greater than the percentage of men's tort recoveries attributable to noneconomic damages. Consequently, any cap on noneconomic loss damages will deprive women of a much greater proportion and amount of a jury award than men.

damages, the legislative extension of immunities for what would otherwise be tortious conduct,¹⁴ proposed rule revisions on class-action lawsuits,¹⁵ the judicial (re)interpretation of causation in the context of toxic torts,¹⁶ and the Bush Administration's near-hysterical campaign to convince voters that the high cost of medical malpractice insurance premiums can be visited on frivolous claims, unethical lawyers, and out-of-control juries,¹⁷ rather than some combination of a hard insurance market, inflation, and the number of tortfeasors.¹⁸

As with the tort system, there are innumerable ways in which the Tax Code¹⁹ works to the disadvantage of women and minorities. Important work has already begun on exposing and analyzing these provisions.²⁰ Beverly Moran and William

Finley, *Hidden Victims*, *supra* note 10, at 1266; *see also* University of Buffalo News Service, *Caps on Non-Economic Loss Damages Would Unfairly Penalize Women, Minorities, Elderly*, July 18, 2004, available at <http://buffalo.edu/news/fast-execute.cgi/article-print-page.html?article=63340009> (last visited Mar. 31, 2005) (on file with author). *But see* Adam Liptak, *Go Ahead. Test a Lawyer's Ingenuity. Try to Limit Damages*, N.Y. TIMES, Mar. 6, 2005 (reporting Catherine Sharkey's recent study analyzing jury verdicts in 1992, 1996, and 2001 in twenty-two states, in which she concluded that "non-economic damages caps have no statistically significant effect on the size of overall compensatory jury verdicts or final judgments"). Sharkey's findings will be published by N.Y.U. Press in May 2005. Her findings should be used with caution, however; there are a variety of reasons that might explain the findings. For example, it may be that caps influence the types of cases brought on behalf of plaintiffs. *Id.*

13. *See* Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995); Cady, *supra* note 7.

14. This includes products liability limitations, particularly in the pharmaceuticals context, as well as assumption of risk in the context of ski resorts and air travel.

15. *See* John F. Harris, *Senate Takes up Class-Action Restrictions*, WASH. POST, Feb. 8, 2005; John F. Harris, *Class-Action Bill near Enactment*, WASH. POST, Feb. 11, 2005; Stephen Labaton, *Senate Approves Measure to Curb Big Class Actions*, N.Y. TIMES, Feb. 11, 2005. Mr. Labaton reports that

[t]he measure would prohibit state courts from hearing many kinds of cases they now consider, transferring them to federal courts. Experts say many cases will wind up not being brought because federal judges have been constrained by a series of legal precedents from considering large class actions that involve varying laws of different states.

Id. According to Mr. Bush, these changes further his goal of "keep[ing] America the best place in the world to do business." *Id.* Consumer rights groups fear it makes the United States an increasingly dangerous place to be a consumer.

16. *See* ANN SCALES, ACTIVE INGREDIENTS: LAWYERING, FEMINISM, AND LEGAL THEORY ch. 3 (forthcoming 2005) (manuscript on file with author).

17. Finley, *Hidden Victims*, *supra* note 10, at 1267-80; Finley, *Female Trouble*, *supra* note 10, at 848; University of Buffalo News Service, *supra* note 12; *see also* Transcript: *GOP Legislative Agenda: Frist Outlines Republican Priorities for 109th Congress*, WASH. POST, Jan. 24, 2005; Transcript: *President Bush's News Conference*, WASH. POST, Jan. 26, 2005.

18. Colorado's damages cap provisions begin with the following statement:

The general assembly finds, determines, and declares [just to be clear!] that awards in civil actions for noneconomic losses or injuries often unduly burden the economic, commercial, and personal welfare of persons in this state; therefore, for the protection of the public peace [????], health, and welfare, the general assembly enacts this section placing monetary limitations on such damages for noneconomic losses or injuries.

COLO. REV. STAT. § 13-21-102.5(1) (West 2003). It seems to me that a case could be made that awards for *economic* losses often unduly burden tortfeasors as well, but of course economic loss damages have been "relatively immune from attack by the proponents of tort reform." Finley, *Hidden Victims*, *supra* note 10, at 1280. It also seems to me that if an injury is determined by a properly instructed jury to be X, where X is extremely high, the problem might be the seriousness of the injury, not the jury. Again, Professor Finley knows more about this than I; *see* Finley, *Hidden Victims*, *supra* note 10, and Finley, *Female Trouble*, *supra* note 10.

19. I.R.C. §§ 1-100 (2000).

20. *See, e.g.,* Nantell, *supra* note 1; EDWARD J. McCAFFERY, *TAXING WOMEN* (1997); Edward J. McCaffery, *Slouching Towards Equality: Gender Discrimination, Market Efficiency, and Social Change*, 103 YALE L.J. 595 (1993); Marjorie E. Kornhauser, *Love, Money, and the IRS: Family, Income-Sharing, and the Joint Income Tax*

Whitford, for example, demonstrate how gift taxes, the mortgage interest deduction, IRAs, and the tax treatment of employer-provided health insurance plans can discriminate against African Americans;²¹ Patricia Cain has written about the privileging of heterosexual married couples in the Tax Code,²² and several scholars—Karen Brown²³ and Mary Louise Fellows²⁴ among them—have documented the ways in which several gender-neutral tax provisions adversely affect women in the United States.²⁵

My interest in all of this is the intersection of tax law and tort law in the context of personal injury damages. In particular, I am interested in section 104(a)(2) of the Internal Revenue Code²⁶ and the Civil Rights Tax Relief Act of 2004,²⁷ which together provide for the taxation of damages awarded on account of nonphysical

Return, 45 HASTINGS L.J. 63 (1993); Marjorie Kornhauser, *A Legislator Named Sue: Re-Imagining the Income Tax*, 5 J. GENDER RACE & JUST. 289 (2002); Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751 (1996); Beverly I. Moran, *Exploring the Mysteries: Can We Ever Know Anything About Race and Tax?*, 76 N.C. L. REV. 1629 (1998) [hereinafter Moran, *Exploring the Mysteries*]; Beverly Moran, *Setting an Agenda for the Study of Tax and Black Culture*, 21 U. ARK. LITTLE ROCK L. REV. 779 (1999) [hereinafter Moran, *Setting an Agenda*]; Beverly I. Moran, *From Urinal to Manicure: Challenges to the Scholarship of Tax and Gender*, 15 WIS. WOMEN'S L.J. 221 (2000); Lisa M. Colone, *Taxing Housework...with a Deeper Purpose*, 21 VA. TAX REV. 417 (2002); Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115 (2000); Kari Smoker, *Internal Revenue Service Restructuring and Reform Act of 1998: Expanded Relief for Innocent Spouses—at What Cost? A Feminist Perspective*, 60 OHIO ST. L. J. 2045 (1999); Nancy E. Shurtz, *Critical Tax Theory: Still Not Taken Seriously*, 76 N.C. L. REV. 1837 (1998); Lisa Philipps, *Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization*, 63 LAW & CONTEMP. PROBS., Autumn 2000, at 111; Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001 (1996); Nancy C. Staudt, *The Theory and Practice of Taxing Difference*, 65 U. CHI. L. REV. 653 (1998); Nancy C. Staudt, *Taxation and Gendered Citizenship*, 6 S. CAL. REV. L. & WOMEN'S STUD. 533 (1997); Carolyn C. Jones, *Taxes and Peace: A Case Study of Taxing Women*, 6 S. CAL. REV. L. & WOMEN'S STUD. 361 (1997); Carolyn C. Jones, *Mapping Tax Narratives*, 73 TUL. L. REV. 653 (1998) [hereinafter Jones, *Mapping Tax Narratives*]; *Taxing Women: Thoughts on a Gendered Economy—Symposium*, 6 S. CAL. REV. L. & WOMEN'S STUD. (1997). See also the collection of articles published in TAXING AMERICA (Karen B. Brown & Mary Louise Fellows eds., 1996). Early work studying the gendered aspects of tax law includes Grace Blumberg, *Sexism in the Code: A Comparative Study of Income Taxation of Working Wives and Mothers*, 21 BUFF. L. REV. 49 (1971); Aline Quester, *Women's Behavior and the Tax Code*, 59 SOC. SCI. QUARTERLY 665 (1979); and Pamela B. Gann, *Abandoning Marital Status as a Factor in Allocating Income Tax Burdens*, 59 TEX. L. REV. 1 (1980).

21. Moran & Whitford, *supra* note 20; see also Dorothy A. Brown, *The Marriage Bonus/Penalty in Black and White*, in TAXING AMERICA, *supra* note 20, at 45; Dorothy A. Brown, *Race, Class, and Gender Essentialism in Tax Literature: The Joint Return*, 54 WASH. & LEE L. REV. 1469 (1997); John A. Powell, *How Government Tax and Housing Policies Have Racially Segregated America*, in TAXING AMERICA, *supra* note 20, at 80; Moran, *Exploring the Mysteries*, *supra* note 20; Moran, *Setting an Agenda*, *supra* note 20; Jones, *Mapping Tax Narratives*, *supra* note 20.

22. See, e.g., Patricia A. Cain, *Taxing Lesbians*, 6 S. CAL. REV. L. & WOMEN'S STUD. 471 (1997); Patricia A. Cain, *Heterosexual Privilege and the Internal Revenue Code*, 34 U.S.F. L. REV. 465 (2000); Patricia A. Cain, *Death Taxes: A Critique from the Margin*, 48 CLEV. ST. L. REV. 677 (2000); Patricia A. Cain, *Dependency, Taxes, and Alternative Families*, 5 J. GENDER RACE & JUST. 267 (2002); see also Nancy J. Knauer, *Heteronormativity and Federal Tax Policy*, 101 W. VA. L. REV. 129 (1998).

23. See, e.g., Brown, *supra* note 5; TAXING AMERICA, *supra* note 20.

24. See, e.g., Mary Louise Fellows, *Rocking the Tax Code: A Case Study of Employment-Related Child-Care Expenditures*, 10 YALE J.L. & FEMINISM 307 (1998); TAXING AMERICA, *supra* note 20.

25. It seems clear that "gender-neutral" tax-cuts under the Bush Administration work to the disadvantage of the poorest Americans, a group made up disproportionately of women, children, and minorities. There have been hundreds of editorials on this subject in the last four years; as just one example, see Paul Krugman, *Bush's Class-War Budget*, N.Y. TIMES, Feb. 11, 2005.

26. 26 U.S.C. § 104(a)(2) (2000).

27. Enacted as part of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 1(a), 118 Stat. 1418 (2004).

personal injuries.²⁸ As some of you know, the Tax Code generally excludes from income all damages (except punitive damages) flowing from a physical personal injury,²⁹ but taxes as income all damages flowing from a nonphysical personal injury.³⁰

I am going to start today with some discussion about the historical and philosophical origins of two assumptions underpinning the tort system and our conceptions of noneconomic harm: namely, that it makes sense to talk about physical and nonphysical personal injury as distinct categories, and that physical injury is somehow more important, more legitimate, and more real than nonphysical personal injury. That discussion leads me, like others, to question the legal distinction between physical and nonphysical harm, at least for the purposes of tax policy.

I will move from that discussion to a summary of the tax treatment of personal injury damages in the United States. Thinking about tax in the context of noneconomic, nonphysical harm is important: tax law, like tort law, signals “what our society values and deems worth protecting.”³¹ I will conclude with a brief discussion of the new Civil Rights Tax Relief Act of 2004³²—signed into law by President Bush as part of the American Jobs Creation Act³³ last October—and why it does not go nearly far enough to address the problems created by the tax treatment of nonphysical personal injury damage awards.

II. THE (DIS)EMBODIED MIND: I THINK, THEREFORE I AM; I FEEL, THEREFORE I AM TAXED

It seems that as a species we have been obsessed with the relationship between our minds and our bodies from time infinitum. I oversimplify, but theories accounting for this relationship divide into roughly three categories. Body and mind are two parts or dual aspects of a single, larger, fundamental whole (monism); body and mind are merely two among many different and overlapping sorts of things or categories of things making up many different “wholes” (pluralism); or body and mind are two fundamental, distinctly different entities that make up the single domain “human being” (dualism). It is the mind-body *dualism* that gives us so much trouble with respect to the taxation of personal injury damages.

28. When I say nonphysical personal injury claims, I mean traditional tort suits (including common law and statutory claims), as well as civil rights, sexual harassment, and other discrimination claims.

29. This includes damages for lost income, as well as nonphysical personal injuries damages flowing from the physical injury, but it does not include punitive damage awards. Regardless of the underlying injury, punitive damages are included in gross income, 26 U.S.C. § 104(a)(2), and when I refer to personal injury damages throughout this article, I do not mean punitive damages unless stated otherwise.

30. This includes physical symptoms of the nonphysical injury, as well as any economic damages including lost income. In other words, provided the primary or initial injury is nonphysical, everything that flows from it is taxable. See *infra* Part IV.

31. Finley, *Hidden Victims*, *supra* note 10, at 1279. Professor Finley uses this phrase in the context of noneconomic loss damages: “Noneconomic loss damages, no less than economic loss damages, are the tort system’s way of signaling what our society values and deems worth protecting. A society that regards only the wage earning and medical bill paying aspects of life worth defending would be a diminished and impoverished society.” *Id.*

32. Enacted as part of the American Jobs Creation Act of 2004, Pub. L. No. 108-357, § 1(a), 118 Stat. 1418 (2004).

33. *Id.*

While the mind-body dualism can trace its origins in Western thought as far back as the Greeks, it is Rene Descartes,³⁴ a seventeenth century French rationalist, with whom we credit the “systematic account of the mind/body relationship.”³⁵ Descartes’ radical dualism(s) “entrenched the oppositions between reason and passion, freedom and bondage, and the mind and the body.”³⁶ He is perhaps most famously known for the expression, “I think, therefore I am.”³⁷

In thinking about or responding to the assertion of a mind-body dualism, philosophers have developed theories like interactionism,³⁸ double aspect theory,³⁹ psychophysical parallelism,⁴⁰ materialism,⁴¹ immaterialism,⁴² and

34. Descartes was a French mathematician, philosopher, and physiologist born in 1596. For a succinct summary of his life, see ROBERT H. WOZNAK, *MIND AND BODY: RENE DESCARTES TO WILLIAM JAMES*, available at <http://serendip.brynmawr.edu/Mind/> (last visited Mar. 31, 2005). If you are interested in reading Descartes, a terrific place to start is DESCARTES, *PHILOSOPHICAL WRITINGS* (Elizabeth Anscombe & Peter Thomas Geach trans. & eds., 1954).

35. See WOZNAK, *supra* note 34.

36. See Moira Gatens, *Modern Rationalism*, in *A COMPANION TO FEMINIST PHILOSOPHY* 21, 22 (Alison M. Jagger & Iris Marion Young eds., 2000) [hereinafter Gatens, *Modern Rationalism*].

37. “Cogito ergo sum.” Elizabeth Johnston, *Persistent Dualisms or the Furniture of the Universe*, *INVESTIGATING MINDS* (1997) (quoting Descartes), available at http://pages.slc.edu/~ebj/IM_97/Lecture1/L1.html (last visited Feb. 10, 2005).

38. Interactionism suggests that the mind is distinct from the body, and that the two causally interact. Interestingly, Descartes believed that the mind made contact with the body at the pineal gland. Johnston, *supra* note 37; see also WOZNAK, *supra* note 34; BRYN MAWR COLLEGE, *SERENDIP* (1995), originally published in 1992 at Bethesda, Maryland, and Washington, DC, by the National Library of Medicine and the American Psychological Association. A concise and informative definition of “interactionism” can be found in *The Stanford Encyclopedia of Philosophy*, under “dualism.” Howard Robinson, *Dualism*, in *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (Edward N. Zalta ed., Fall 2003 ed.), available at <http://plato.stanford.edu/archives/fall2003/entries/dualism/> (last visited Feb. 12, 2005) [hereinafter Robinson, *Dualism*]. Like other seventeenth, eighteenth, and nineteenth century theories attempting to explain the workings of our minds and bodies, interactionism arose as an attempt to deal with the metaphysical complexities of the Cartesian impasse. A concise definition of Cartesian skepticism can be found at Pete Mandik, *Skepticism, Cartesian*, in *DICTIONARY OF PHILOSOPHY OF MIND*, available at <http://artsci.wustl.edu/~philos/MindDict/cartesianskepticism.html> (last updated May 11, 2004). See also G.N.A. VESEY, *THE EMBODIED MIND* 11 (1965):

One must either acknowledge that it is beyond one’s powers to understand how body and mind are united, how they interact, or, if one claims to have any understanding, attribute it, not to philosophical insight, but having learnt the lessons of “ordinary life and conversation.” This is the Cartesian Impasse....

39. As a direct challenge to interactionism, double-aspect theory suggests that the mind and body are not distinct substances, but instead two aspects of a single whole. Most famously, Benedictus de Spinoza believed that human beings are conceived “as part of a unitary, dynamic and interconnected whole.” Gatens, *Modern Rationalism*, *supra* note 36, at 26. Unlike Descartes, “Spinoza conceive[d] of the human body as a relatively complex individual, which is open to, and in constant interchange with, its environment.” *Id.* at 26. From this perspective, one cannot talk about a sexless soul attached to a sexed body. *Id.* at 27; see also Moira Gatens, *Towards a Feminist Philosophy of the Body*, in *CROSSING BOUNDARIES: FEMINISTS AND THE CRITIQUE OF KNOWLEDGES* (Barbara Caine, E.A. Grosz & Marie de Lepervanche eds., 1988); Genevieve Lloyd, *Women as Other: Sex, Gender and Subjectivity*, in *AUSTRALIAN FEMINIST STUDIES* 10 (1989); WOZNAK, *supra* note 34.

40. Parallelists believe that our minds and bodies are so dissimilar that it makes no sense to talk about them as “interacting” or causally related. Instead, the most that can be said is that events between our minds and our bodies are correlated. “That they should behave as if they were interacting would seem to be a bizarre coincidence.” Robinson, *Dualism*, *supra* note 38, pt. 3.3. Gottfried Wilhelm Leibnitz adapted this theory to argue that the harmonious correlation can be explained by the fact that our minds and our bodies exist in a harmony “that has been pre-established by God from the moment of creation.” WOZNAK, *supra* note 34, pt. 2. Professor Gatens sees Leibnitz’ theory as one that holds promise for “imaginative future feminist explorations of alternative, non-dualistic ontologies.” Gatens, *Modern Rationalism*, *supra* note 36, at 29. In Leibnitz’s world, “progress and change result from the forces inherent to nature rather than from the domination and exploitation of nature by culture.” *Id.*

41. Wozniak describes materialism as follows:

epiphenomenalism.⁴³ These are big words, I know, but we don't have to be philosophers to be familiar with the ways in which this issue presents itself in our daily lives. For example, you have probably asked or been asked or heard someone ask questions such as: Does your soul leave your body when you die? Do we have an "essence" that is somehow severable from our "physical" selves? Can we die from a broken heart?⁴⁴ Is it a "sin" to think "bad" thoughts, if one doesn't act on them?⁴⁵ As lawyers, you or one of your colleagues is likely to have dealt with a living will, which often leaves directions about whether someone wants to "live" if she is "brain-dead." Indeed, the Florida Supreme Court had to consider the relationship between mind and body in its recent decision about whether a Florida statute, giving the Governor authority to issue a one-time stay preventing doctors from "pulling the plug" on a woman in a "persistent vegetative state," was unconstitutional.⁴⁶ As athletes or coaches or teachers or parents, you are likely to

Materialism, which dates back to antiquity, holds that matter is fundamental. Whatever else may exist, if it exists, it depends on matter. In its most extreme version, materialism completely denies the existence of mental events.... In a less extreme form, materialism makes mental events causally dependent on bodily events, but does not deny their existence. This was the view offered a century after Descartes by Julien Offray de la Mettrie (1709–1751).

WOZNIAK, *supra* note 34, pt. 3; see also William Ramsey, *Eliminative Materialism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Fall 2003 ed.), available at <http://plato.stanford.edu/archives/fall2003/entries/materialism-eliminative/> (last visited Feb. 1, 2005).

42. Immaterialism denies any distinction between the body and the mind. What we think of as the body "is merely the perception of mind." WOZNIAK, *supra* note 34, pt. 3. Like other theories addressing themselves to these issues, immaterialist denials of a distinction between mind and body take many forms, but they are perhaps best represented by the work of George Berkeley (1685–1753) in his A TREATISE CONCERNING THE PRINCIPLES OF HUMAN KNOWLEDGE, cited in WOZNIAK, *supra* note 34, and described more fully in Lisa Downing, *George Berkeley*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2004 ed.), available at <http://plato.stanford.edu/archives/win2004/entries/berkeley/> (last visited Jan. 29, 2005).

43. The first modern articulation of epiphenomenalism is attributed to Shadworth Holloway Hodgson, THE THEORY OF PRACTICE (1870), cited in WOZNIAK, *supra* note 34, pt. 4. Epiphenomenalism is the view that mental events (or feelings or thoughts) are caused by actual physical or molecular changes in the brain, but they have no causal effect on the body/brain. William Robinson, *Epiphenomenalism*, in THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., Winter 2004 ed.), available at <http://plato.stanford.edu/archives/win2004/entries/epiphenomenalism/> (last visited Mar. 29, 2005).

Comparing mental states to the colors laid on the surface of a stone mosaic and neural events to the supporting stones, Hodgson asserted that just as the stones are held in place by one another and not by the colors they support, events in the nervous system form an autonomous chain independent of accompanying mental states. Mental states are present only as "epiphenomena," incapable of reflecting back to affect the nervous system.

This view was subsequently taken up, popularized, and placed within an evolutionary framework by Thomas Henry Huxley....

WOZNIAK, *supra* note 34, pt. 4; see also Howard Robinson, *Dualism*, *supra* note 38, pt. 3.2.

44. Apparently, we can. See Rob Stein, *Study Suggests You Can Die of a Broken Heart*, WASH. POST, Feb. 10, 2005; Denise Grady, *Sudden Stress Breaks Hearts, a Study Shows*, N.Y. TIMES, Feb. 10, 2005. Interestingly, nearly all the victims were female. *Id.*

45. Some Christians, for example, believe that lesbians and gay men cannot help their thoughts and feelings and should not be judged for having them; these same lesbians and gay men "sin," however, if they commit a "homosexual act."

46. *Bush v. Schiavo*, 885 So. 2d 321, 323 (Fla. 2004), cert. denied, 125 S. Ct. 1086 (2005). "Terri's law," which authorized the Governor of Florida to issue a one-time stay to prevent the withholding of nutrition and hydration from a patient in a persistent vegetative state, violated the separation of powers doctrine. That case attracted the interest of Congress as well. See Abby Goodnough & Carl Hulse, *Feeding-Tube Case Roils Washington and Florida*, N.Y. TIMES, Mar. 18, 2005; Robin Toner & Carl Hulse, *Congress Ready to Approve Bill in Schiavo Case*, N.Y. TIMES, Mar. 20, 2005; Carl Hulse & David D. Kirkpatrick, *Congress Passes and Bush Signs Schiavo Measure*, N.Y. TIMES, Mar. 21, 2005. For a brief legal history of the case, see The Jurist, *Schiavo Right*

have had discussions about will-power: the mental or emotional force that apparently allows us to “overcome” our bodies if we just set our “minds” to it. Almost no area of our lives remains immune from questions about the supposed oppositional relationship between our minds and our bodies. This is true for law as well.⁴⁷

There are three points I want to make about the mind-body dualism for the purposes of my presentation today. First, Descartes believed that in order to attain knowledge or reason, one had to detach one’s essential self—or mind—from one’s passionate and irrational self—or body. In Descartes’ view, passion was quite literally “disqualified” from “supplying any constructive content to human knowledge.”⁴⁸ This rational mind/irrational body dichotomy will sound familiar to some of you; it has had a tremendous influence on our understanding of gender stereotypes.

Whereas [before Descartes], women were conceived on a continuum of rationality—as less rational than men—[after Descartes] they...[came] to be conceived as having souls or minds identical to men. Sexual difference [was] thus located in bodily difference. However, maleness does not carry the same metaphorical or symbolic associations with body, nature, and passion. Historically, embodiment has been conceived as especially associated with women. Reason, understood as involving a transcendence of the bodily, is thus conceptually at odds with what women have come to symbolize.... Reason thus [has come] to represent the transcendence of a feminized corporeality.⁴⁹

So, while it may seem that Descartes’ valuing of the mind over the body might have led to a greater valuing of mental and emotional injuries over “merely” physical injuries, instead it led to a highly gendered valuing of reason (men) over emotion (women). Men became associated with the rational mind, women with the irrational body. Over time, that oppositional association came to simply be: men are rational; women are irrational; men are reasonable; women are emotional. Therefore, men’s injuries are reasonable and compensable; women’s injuries are unreasonable, if not imaginary.⁵⁰

Second, although Descartes’ understanding of reason, and the capacity for reason, rested on an apparently gender-, race-, and class-neutral understanding of the “mind,” in fact very few men and even fewer women would have had the

to Die Case, at <http://jurist.law.pitt.edu/hottopics/schiavo.php> (last visited Mar. 31, 2005).

47. Most criminal law convictions, for example, require both a particular mental state (*mens rea*) and an overt act (*actus reus*). That is a policy choice and says something about us as a society. It also means that criminal courts regularly engage in deciding what is mental and what is physical. Family law courts have historically punished physical abuse to a greater degree than mental abuse. First Amendment jurisprudence regularly engages in deciding whether and in what circumstances actions are speech. Tort remedies often require determinations of fact about whether injuries are physical or nonphysical.

48. Gatens, *Modern Rationalism*, *supra* note 36, at 22.

49. *Id.* at 23 (summarizing GENEVIEVE LLOYD, *THE MAN OF REASON: “MALE” AND “FEMALE” IN WESTERN PHILOSOPHY* (1984) [hereinafter LLOYD, *THE MAN OF REASON*]; Genevieve Lloyd, *Maleness, Metaphor and the Crisis of Reason, in A MIND OF ONE’S OWN: FEMINIST ESSAYS ON REASON AND OBJECTIVITY* 69–83 (Louise Antony & Charlotte Witt eds., 1993)).

50. For a wonderful account of how men’s injuries are more highly valued and compensated, at least in the Australian context, see Reg Graycar, *Sex, Golf and Stereotypes: Measuring, Valuing and Imagining the Body in Court*, 10 *TORTS L.J.* 1 (2002).

opportunity to learn or practice the method presented by Descartes as “necessary to the cultivation of truth and virtue.”⁵¹ In other words, accessing the ability to be reasonable and virtuous was limited to a small class of privileged men. This privileging of some men as potentially “reasonable” is not to be underestimated. When we talk in just a minute about the taxation of personal injury damages, you will see traces of this in the valuing of injuries associated with some men over the injuries associated with women and male minorities (that is, everyone else).⁵²

Finally, I told you all that so I could tell you this: it doesn’t matter, or it shouldn’t matter. I do believe that in challenging social or legal norms it is important to understand as much as possible from where they came. We have *learned* to think about rationality, reason, neutrality, and injury in gender- and race- and class-specific ways. Descartes and other rationalists contributed to this, and thinking about how we learned about the things we “know” is critical to thinking about how we might unlearn them. Many of the arguments in favor of the status quo rely, in some measure, on the coherence of the mind-body dualism.

But having said all that, I think the actual substance of these philosophical theories is completely beside the point in tort law and in tax law. We *cannot win* the philosophical debate because there is no *one* demonstrably correct answer, and we cannot live with the current dualist default that is daily deployed on behalf of the powerful few. As with physics, where it is now commonly accepted that light behaves like a wave when it’s measured as a wave and like a particle when it’s measured as a particle,⁵³ we “know” that the materialists and immaterialists, phenomenologists and epiphenomenologists, monists and dualists and pluralists are all right or sometimes right or arguably right (or impossible to prove wrong) depending on how we measure their theses. But the law need not and should not weigh in on the debate. The harm of nonphysical personal injury does not pose an abstract or nuanced question about the make-up of the universe;⁵⁴ it is neither subtle nor mysterious. It is real, and decisions about whether to recognize and value it are not a matter of philosophy, but policy.

Mindful of the underlying philosophical conversation and the manner in which it intersects with and furthers misogyny and racism, it is far more important that we go back to first legal principles and think through our approaches to tort and tax in the context of compensating victims. What are our goals, and how can we best achieve them? “[T]oward what end is this activity directed?”⁵⁵

51. Gatens, *supra* note 39, at 23 (summarizing LLOYD, *THE MAN OF REASON*, *supra* note 49); Janna Thompson, *Women and the High Priests of Reason*, in *RADICAL PHILOSOPHY* 34 (1983).

52. In the tort context, this valuing is documented by Chamallas, Finley, Graycar, and others. See *supra* notes 6–10, 50.

53. This is true even though light cannot “be” both a wave and a particle.

54. Professor MacKinnon makes a similar point about feminist legal theory being grounded in the gendered (and real) harms experienced by women more generally. See Catharine A. MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 698–700 (2000).

55. L.L. Fuller & William R. Perdue, Jr., *The Reliance Interest in Contract Damages: I*, 46 YALE L.J. 52 (1936–37).

III. THE TAX TREATMENT OF PERSONAL INJURIES: PUTTING THE VERTICAL AND HORIZONTAL BACK IN EQUITY

The activity to which I refer, of course, is the tax system. I'm going to start this part of my talk with a short, sort of "Tax 101" lesson. I apologize if it's too basic for those of you familiar with these aspects of federal income tax law, but I'm told that the remainder of my talk makes no sense without it.

1. In the United States, income tax is theoretically concerned with two sorts of equities: vertical and horizontal.
2. Vertical equity concerns itself with the "vertical" allocation of tax burdens among taxpayers, imposing higher taxes on those with the ability to pay more (a sort of substantive or redistributive equality).⁵⁶ The theory is "based on the premise that a person's greater ability to pay makes it 'fair' to require that person to bear a larger portion of the country's overall revenue needs."⁵⁷ This is commonly known as progressive taxation.
3. Horizontal equity seeks to tax similarly-situated taxpayers similarly (a sort of formal equality). Theoretically, "all persons who earn essentially the same amount of income in a given year should be obligated to pay the same amount in taxes."⁵⁸
4. Tax analysts and scholars use horizontal and vertical equity to measure the fairness, effectiveness, and desirability of tax measures, including the federal income tax.
5. Federal income tax is imposed annually on a net figure known as "taxable income."⁵⁹
6. "Taxable income" is "gross income," less certain authorized deductions.⁶⁰
7. "Gross income" is defined as "all income *from whatever source derived*."⁶¹
8. The Supreme Court has told us that "all income" means *all income*—that is, *any* increase or "accessions to wealth, clearly realized, and over which" a taxpayer has control.⁶² It is much broader, for example, than our everyday understanding of income as "wages" or "profits."
9. Damages paid on account of personal injury fall within the breadth of "all income from whatever source derived" unless specifically exempt.
10. Section 104(a)(2) of the Code provides that "gross income *does not include*...the amount of any damages (other than punitive damages)⁶³ received (whether by suit or agreement and whether as lump sums or as

56. See 26 U.S.C. § 1 (2000). For a discussion about the concept of vertical equity in the context of government funding, see James E. Ryan & Thomas Saunders, *Foreward to Symposium of School Finance Litigation: Emerging Trends or New Dead Ends?*, 22 YALE L. & POL'Y REV. 463, 465, 468–72 (2004).

57. Hale E. Sheppard, *Perpetuation of the Foreign Earned Income Exclusion: U.S. International Tax Policy, Political Reality, and the Necessity of Understanding How the Two Intertwine*, 37 VAND. J. TRANSNAT'L L. 727, 734 (2004).

58. *Id.* (citing CHARLES H. GUSTAFSON ET AL., TAXATION OF INTERNATIONAL TRANSACTIONS 23 (2d ed. 2001)).

59. JAMES FREELAND ET AL., FUNDAMENTALS OF FEDERAL INCOME TAXATION (CASES AND MATERIALS) 48 (11th ed. 2000).

60. *Id.*

61. 26 U.S.C. § 61 (2000) (emphasis added).

62. See *Comm'r v. Glenshaw Glass Co.*, 348 U.S. 426, 429–32 (1955).

63. As mentioned above, punitive damages are taxed as income regardless of the category of underlying personal injury.

periodic payments) on account of personal physical injuries or physical sickness⁶⁴ arising out of a tort or tort-like claim.⁶⁵

11. In other words, once those two criteria are satisfied—there is a physical injury or sickness and the claim is tort or tort-like—all compensatory damages flowing from that injury are excluded from gross income,⁶⁶ or tax-free to the plaintiff, whether they are on account of economic or non-economic loss, physical or nonphysical loss.⁶⁷
12. On the other hand, if the personal injury is nonphysical (such as emotional distress,⁶⁸ mental anguish, loss of reputation, et cetera), all damages flowing from that injury, whether they are on account of economic or noneconomic loss, physical or nonphysical harm, are taxed as income to the plaintiff.⁶⁹ This is true even if a plaintiff develops physical symptoms as a result of a nonphysical injury.⁷⁰

I'm going to illustrate these points by reference to specific examples, but first I want to provide you with some statutory history.

Section 104(a)(2) was first enacted in 1918.⁷¹ From 1918 until 1996, it simply excluded from gross income “damages on account of personal injury.”⁷² The insertion of the word “physical,” as limiting the kinds of personal injuries protected by the section, happened as part of the Small Business Job Protection Act of 1996.⁷³ A careful reading of congressional reports and hearings in the years leading up to the amendment offers little in the way of explanation for that amendment. The Conference Report from the House of Representatives contained this reference:

Courts have interpreted the exclusion from gross income of damages received on account of personal injury or sickness broadly in some cases to cover awards for personal injury that do not relate to a physical injury or sickness. For example, some courts have held that the exclusion applies to damages in cases involving certain forms of employment discrimination and injury to reputation where there is no physical injury or sickness. The damages received in these

64. 26 U.S.C. § 104(a)(2) (2000) (emphasis added).

65. For a discussion about the requirement that they be tort or tort-like, see Douglas K. Chapman, *No Pain—No Gain? Should Personal Injury Damages Keep Their Tax Exempt Status?*, 9 U. ARK. LITTLE ROCK L. REV. 407, 410–11 (1986–87).

66. This is true except with respect to punitive damages, of course. See *supra* note 29.

67. See H.R. CONF. REP. NO. 104-737, at 301 (1996), reprinted in 1996 U.S.C.A.N. 1077, 1793: “Because all damages received on account of physical injury or physical illness are excluded from gross income, the exclusion from gross income applies to any damages received based on a claim of emotional distress that is attributable to a physical injury or physical sickness.”

68. *But see* 26 U.S.C. § 104(a) (2000): “[D]amages not in excess of the amount paid for medical care...attributable to emotional distress” are not included in gross income. In other words, if a plaintiff incurs actual out-of-pocket medical expenses as a result of an emotional distress injury, any damages awarded up to that amount are not included in the calculation of gross income.

69. 26 U.S.C. § 104(a) (2000).

70. See H.R. CONF. REP. NO. 104-737, *supra* note 67, at 301 n.56: “It is intended that the term emotional distress includes symptoms (e.g., insomnia, headaches, stomach disorders) which may result from such emotional distress.”

71. The original version of 26 U.S.C. § 104(a)(2) (1994) (current version at 26 U.S.C. § 104(a) (2000)) exempted from gross income “[t]he amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness.”

72. See 26 U.S.C. § 104 (2000), Historical and Statutory Notes.

73. Small Business Job Protection Act of 1996, Pub. L. No. 104-188 § 1605(a)–(c), 110 Stat. 1755.

cases generally consist of back pay and other awards intended to compensate the claimant for lost wages or lost profits.⁷⁴

I could find no other congressional reference attempting to explain the amendment.⁷⁵ But here's what I think we can surmise from that quote:

- (a) Congress was apparently surprised that the words "personal injury" might include nonphysical personal injury (even though it had been interpreted to include nonphysical personal injury since at least 1927⁷⁶);
- (b) Congress allegedly believed that nonphysical personal injuries were *more*, not *less*, likely to include economic damages, and in particular lost wages or profits (of course, if Congress were really concerned about this, it would have made more sense to leave personal injury as it was, and add a provision providing for the taxation of that portion of damage awards representing back-pay, front-pay, or other lost income);
- (c) Congress was well aware of the fact that inserting the word "physical" before "personal injury" would mean that discrimination damages would be taxed; but
- (d) Congress did not explicitly consider the effect of the change on other non-physical personal injury tort damages (or if it did, it did it behind closed doors).

You may remember that it was not until 1991 that the Civil Rights Act⁷⁷ was amended to give claimants (1) the right to a jury trial and (2) expanded remedies, including compensatory damages⁷⁸ (such as pain and suffering, humiliation, embarrassment, and emotional distress), for sex and age discrimination. Almost immediately upon the extension of remedies in Civil Rights Act and nonphysical harm cases, the Republican Congress first attempted (and twice failed) to amend section 104(a)(2) to limit the exclusion from gross income to *physical* injury damages. I am suspicious of this coincidence. Congress was eventually successful in 1996 by burying the amendment in an act increasing the minimum wage (among other things), thus making it very difficult for President Clinton to veto.⁷⁹ Given this country's long history with discrimination, it does not seem a stretch to suggest that

74. H.R. CONF. REP. NO. 104-737, *supra* note 67, at 300.

75. Karen Brown has written that, despite the existence of some evidence that Congress viewed the amendment as a way to simplify the taxation of employment discrimination damages, simplification alone does not explain the amendment. Brown, *supra* note 5, at 258-59.

76. *Hawkins v. Comm'r*, 1927 W.L. 1082, 6 B.T.A. 1023 (personal injury included nonphysical personal injury); Chapman, *supra* note 65, at 411.

77. 42 U.S.C. § 1981a (2000).

78. *Id.*; see also John M. Husband & Jude Biggs, *The Civil Rights Act of 1991: Expanding Remedies in Employment Discrimination Cases*, 21 COLO. LAW. 881 (1992). Key changes included:

- (a) compensatory and punitive damages—previously available only to racial and ethnic minorities—for victims of intentional discrimination based on sex, religion or disability;
- (b) provision for jury trials where a plaintiff claims compensatory or punitive damages;
- (c) changes in the burden of proof required in disparate impact cases; and
- (d) an expansion of 42 U.S.C. § 1981 to include claims of racial discrimination in the form of on-the-job harassment and discharge.

Id. at 881 & n.2 (citing Pub. L. No. 102-166, 105 Stat. 1071 (1991)).

79. Small Business Job Protection Act § 1605(a)-(c).

the amendment was made precisely to limit the benefit and effectiveness of the newly extended Civil Rights Act remedies.⁸⁰

Section 104(a)(2) is easier to understand in the context of specific examples, so let's move to that.

- (a) Suppose A was physically injured in an automobile accident as a result of the negligence of another motorist. His physical injuries were not serious—he sprained his wrist and broke one finger—and he fully recovered. Let's say his pain and suffering for those injuries were worth \$5,000. But his *mental anguish* was relatively severe, worth perhaps \$100,000. He is a concert pianist and while his finger was healing, he was very anxious about his career; even though it all turned out fine, newspapers had been printing stories suggesting he would never be as good again, and his long-time lover left him. His lost wages were \$500,000 (he was a well-paid pianist).

By operation of Section 104(a)(2), his entire award of \$605,000 (including lost wages) would be excluded from gross income (or tax free), because he was physically injured in the accident. Let's assume that, in the year of his award, he earned \$50,000 as a store manager at The Gap (his finger was not well enough to play the piano yet), so that his total "accession[] to wealth, clearly realized, and over which" he arguably had control⁸¹ for that year was \$655,000. Because of Section 104(a)(2), however, his "gross income" was \$50,000. He probably paid between \$10,000 and \$13,000 in federal income tax (depending of course on his deductions), leaving him with at least \$642,000 (before paying any state income tax).

Assuming A owed his lawyers a contingency fee of approximately \$200,000 (that is, one third), he would have been left with approximately \$440,000.

- (b) Suppose B, on the other hand, was sexually harassed by a man from her apartment building over the course of eight months; he verbally harassed her, left her degrading notes, followed her, and hung sexually explicit pictures on her front door.⁸² She was frightened, humiliated, and found herself unable to work. As a result, she developed physical symptoms, including headaches, stomachaches, insomnia, a bleeding ulcer, and other signs of anxiety, including weight loss.⁸³ She spent some time in the

80. That is not to say that everyone in Congress is or was motivated by animus with respect to civil rights claims. Clearly, different congresspeople were motivated for different reasons in voting for or against the Small Business Job Protection Act of 1996. I am suggesting, however, that the architects of the section 104(a)(2) amendment were motivated by a desire to protect business from employee and other claims, and that they knew full well that the effect of this amendment would be to tax and thereby discourage nonphysical personal injury claims.

81. *Glenshaw Glass Co.*, 348 U.S. at 431; see *supra* note 62 and accompanying text.

82. In New Mexico, sexual harassment may constitute the tort of "intentional infliction of emotional distress" outside the employment discrimination context. See *Phifer v. Herbert*, 115 N.M. 135, 848 P.2d 5 (Ct. App. 1993), *overruled on other grounds by Spectron Dev. Lab. v. Am. Hollow Boring Co.*, 1997-NMCA-025, 936 P.2d 852; Annotation, *Modern Status of Intentional Infliction of Mental Distress as Independent Tort*; "Outrage," 38 A.L.R. 4th § 3, at 998 (1985).

83. Section 104(a) tells us that, for the purposes of section 104(a)(2), "emotional distress shall not be treated as a physical injury or physical sickness." 26 U.S.C. § 104(a).

hospital,⁸⁴ and she felt unable as a result to continue with her job. Let's assume she stated a claim in tort and the jury awarded her \$605,000 in personal injury damages (\$100,000 for the nonphysical injury, \$405,000 for the pain and suffering associated with her physical symptoms,⁸⁵ and \$100,000 for lost income).

Like A, she earned \$50,000 in the year of her award, bringing her total "income" for that year to \$655,000. Unlike A, her gross income was exactly that: \$655,000. She probably paid at least \$230,000 in combined federal and state income taxes (or approximately 35%).

This brings her total down to \$425,000, before paying her attorneys and any state income taxes. Let's assume that, like A, she owed her lawyers \$200,000 in contingency fees (I'm going to come back to the issue of taxation and contingency fee awards in a moment), so that in this scenario B would be left with \$225,000 (compared to A's \$440,000).

Let's add another fact: B lives in Colorado, where noneconomic damages are capped at \$250,000 (except in unusual circumstances).⁸⁶ So, let's assume the judge entered a judgment notwithstanding the verdict of \$350,000 (\$250,000 pain and suffering, \$100,000 lost income). All other things being equal, B would still be in the highest tax bracket; assuming she earned \$50,000 in the year of the award, she would pay combined federal and state income tax of approximately \$140,000. Assuming she owed her lawyer a one-third contingency fee of approximately \$115,000, she would be left with \$135,000—less than one third of A's net gain in roughly similar circumstances.⁸⁷ In our example, a noneconomic damages cap of \$250,000 would make no difference to A.

84. Note that she is entitled to deduct from gross income the "amount of damages not in excess of the amount paid for medical care...attributable to emotional distress." 26 U.S.C. § 104(a).

85. I am somewhat artificially dividing the pain and suffering damages for the purposes of our discussion. In actuality, juries do not usually categorize damages this way, unless they are asked to by statutes imposing damages caps.

86. I am talking in my example about a tort or tort-like claim. In Colorado, for example, COLO. REV. STAT. ANN. § 13-21-102.5(3)(a) (West 2004) provides:

In any civil action other than medical malpractice actions in which damages for noneconomic loss or injury may be awarded, the total of such damages shall not exceed the sum of two hundred fifty thousand dollars, unless the court finds justification by clear and convincing evidence therefor. In no case shall the amount of noneconomic loss or injury damages exceed five hundred thousand dollars. The damages for noneconomic loss or injury in a medical malpractice action shall not exceed the limitations on noneconomic loss or injury specified in section 13-64-302.

But for intentional employment discrimination under 42 U.S.C. § 2000e-5(g) (2000), the damages cap for future economic loss, "emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses," and punitive damages is \$50,000 when a respondent has more than 14, but fewer than 101 employees. That number goes up to \$100,000 when a respondent has more than 100, but fewer than 201 employees; \$200,000 when a respondent has more than 200, but fewer than 501 employees; and \$300,000 when a respondent has more than 500 employees. 42 U.S.C. § 1981a(b)(3) (2000).

87. In fact, in many cases the AMT has meant that B's tax liability may well exceed her portion of the award after attorney's fees. See Polsky, *The Contingent Attorney's Fee*, *supra* note 5, at 616.

Note also that in the damages cap scenario, B's lawyer received \$115,000, while A's lawyer received \$200,000.

Okay, what will hopefully be obvious from this very brief (but highly illuminative!) tax lesson is this: Section 104(a)(2) raises both vertical and horizontal equity questions. With respect to horizontal equity—that is, the notion that similarly-situated taxpayers be taxed similarly—clearly Section 104(a)(2) taxes personal injury claimants differently, not based on the amount of damages (that is, accession to wealth); not based on the types of all damages awarded⁸⁸ (that is, economic or noneconomic, physical or nonphysical); not based on whether the accession to wealth is “clearly realized” (as it obviously is in both A's and B's cases); but based on the nature or category of the underlying injury—the first domino, so to speak. This just makes no sense, not even in Descartes' view of the world (although that doesn't let him off the hook!).

In addition to the differential tax treatment of personal injury damages, there is another horizontal equity question on the facts of our example. You will remember that A and B each earned \$50,000 from employment income in the year of their respective awards. Because A's gross income was just that—\$50,000—A would be in a different tax bracket than B, whose gross income included her award. This means that not only would B be taxed on her personal injury damages, but that her \$50,000 employment income would be taxed at a higher marginal rate than A's \$50,000 employment income (even though they earned the exact same amount at work).

The vertical equity implications are slightly more complex, and we don't have time today to fully explore them, but suffice it to say that if: (1) it's true that women, children, and minorities are more likely to suffer torts for which noneconomic, nonphysical personal injury damages are awarded;⁸⁹ (2) noneconomic, nonphysical personal injuries tend to be more difficult to prove and less well compensated;⁹⁰ and (3) these same types of damages are increasingly capped and/or unavailable;⁹¹ then (4) an argument could be made that by taxing these damages (and not taxing physical personal injury awards), Section 104(a)(2) is not only *not progressive*, it is *regressive*—and it is gendered and racialized. The people who are least able to pay are arguably required to pay more. This has both tangible and intangible consequences. They pay more in tax; they are *discouraged* by the Tax Code from bringing civil rights and other nonphysical personal injury claims.⁹² And the message they receive is that their injuries—if not themselves—are less important, less real, and less valuable.⁹³

Finally, these adverse effects are compounded by the fact that where there is a significant damages cap, plaintiffs have more difficulty finding counsel.⁹⁴ Certainly,

88. This is true provided, of course, that the underlying injury is physical.

89. Finley, *Hidden Victims*, *supra* note 10, at 1265–66.

90. *Id.* at 1269–70.

91. *Id.* at 1271–72.

92. For constitutional purposes, it should be irrelevant whether or not Congress intended this result, although I think a case for intent could be made.

93. See Nantell, *supra* note 1, at 67–68.

94. See University of Buffalo News Service, *supra* note 12 (citing Finley's research for the proposition that

as between A's case and B's case, many counsel would be more likely to take A's case: arguably a similar amount of work, almost twice the fee. And plaintiffs' lawyers unfamiliar with the tax implications of Section 104(a)(2) and the new Civil Rights Tax Relief Act of 2004 (which we are about to discuss) might be even more reluctant to take a nonphysical loss case.⁹⁵

IV. CIVIL RIGHTS TAX RELIEF ACT: NOT REALLY

It was not long after Section 104(a)(2) was amended in 1996 to limit the exclusion to "physical personal injury and sickness" that a veritable panoply of unjust results began to make themselves known. In addition to the examples just discussed, other problems included:

1. The simultaneous operation of amended Section 104(a)(2) and the Alternative Minimum Tax (AMT) provisions of the Tax Code often required successful nonphysical personal injury plaintiffs to pay income tax on the attorneys' fee portion of their awards, even if the award had been paid directly to their lawyers—that is, on money plaintiffs never possessed⁹⁶ and on which their lawyers would also pay income tax. Explaining the Alternative Minimum Tax provisions for calculating taxable income is beyond the scope of this presentation,⁹⁷ so you will just have to trust me on this. But thinking back to our earlier example, you will remember that A paid no tax on any portion of his award, attorneys' fees included. B, on the other hand, paid tax on her entire award, attorneys' fees included. So, if B's \$605,000 award was deposited into her attorneys' trust account, from which the attorneys deducted a \$200,000 contingency fee and then wrote a check to B for \$405,000, B would still have to include the entire \$605,000 in her gross income for federal income tax purposes. In laypeople's terms, we say that she paid her lawyers with "after-tax" dollars. Her lawyers would then have to include that \$200,000 (less allowable deductions, et cetera) in their taxable income.
2. The simultaneous operation of amended Section 104(a)(2), the AMT, and the types of relief commonly awarded in civil rights cases (such as injunctions or nominal damages for pain and suffering) resulted in cases where the amounts owed by successful plaintiffs to their lawyers and the

"[c]aps on non-economic damages...make it more difficult for victims to find legal representation."). Apparently, "[l]awyers are less willing to bring suits acknowledged to be meritorious unless they cross a certain threshold of economic loss damages...no matter how devastating the injury and how compelling the proof of negligence or medical error." *Id.*

95. At least one commentator has argued that the taxation of contingency attorneys' fees in the hands of the plaintiff raises "very significant ethical, fiduciary duty and malpractice issues for lawyers handling these sorts of claims." Polsky, *The Contingent Attorney's Fee*, *supra* note 5, at 637. Trial lawyers, he argues, have an ethical duty to advise their clients about the tax consequences of employment and civil rights lawsuits. *Id.*

96. Thinking back to the Supreme Court's test for "income"—any accession in wealth, clearly realized, over which a taxpayer has control—it seems to me that this arguably offends the requirement that it be within the taxpayer's "control." See *supra* note 61 and accompanying text.

97. I.R.C. §§ 55–59 (2000). For an explanation of the Alternative Minimum Tax (AMT), see Beverly Moran, *Stargazing: The Alternative Minimum Tax for Individuals and Future Tax Reform*, 69 OR. L. REV. 223, 226–40 (1990). For an explanation of how it results in plaintiffs paying tax on the contingency fee portion of their damage awards, see Mead, *supra* note 5, 830–35; Neumann, *supra* note 5, at 609–11; Polsky, *A Correct Analysis*, *supra* note 5, at 59–67; Polsky, *The Contingent Attorney's Fee*, *supra* note 5, at 618–20; Polsky & Befort, *supra* note 5, at 78–90; Reece, *supra* note 5, at 306–08.

U.S. Treasury together exceeded the amount of the actual award.⁹⁸ Suppose C is awarded nominal damages for race discrimination, let's say \$10,000. It is complicated litigation (but worth it to C, because he also got his job back), and his attorney's fees are \$100,000. He is awarded his attorney's fees, bringing his total award to \$110,000. In the year of the award, C earns \$25,000 from employment income, bringing his total gross income for that year to \$135,000. Whereas C would normally be in one of the lowest tax brackets with an annual income of \$25,000, his income of \$135,000 puts him in a much higher bracket. He might pay as much as 35% combined federal and state income tax, or \$47,250. That would bring C's debt for attorney's fees and taxes to \$147,250 (on income of \$135,000).

3. Because damages have to be included in gross income in the year of receipt (this is still true), lump sum lost-income damage awards put plaintiffs in higher tax brackets than they would otherwise be. In the case of physical personal injury awards, the lost income portion of the damages is tax-free, so it doesn't matter to the plaintiff that an award for lost income is made as a lump sum. In the case of nonphysical personal injury awards—which are taxable—a lump sum lost-income award would put a plaintiff in a much higher tax bracket than she would otherwise be in the year of the award, meaning that she is taxed at a higher rate on lost income than she would have been taxed on that income had she received that money over several years in the usual course. Not only that, of course, but as I mentioned above, it affects the tax rate payable on income from other sources as well.⁹⁹
4. Finally, the well-documented hierarchies of tort law were not only reinforced, but perpetuated. That is, it became clear that Section 104(a)(2) not only reflected entrenched bias, but created it anew.

In 2001, when I first became interested in the intersection of tax policy and tort damages, two proposed amendments to Section 104(a)(2) had been referred to House and Senate Committees for consideration. One amendment would have simply deleted the word “physical” from amended Section 104(a)(2) and redefined “personal injuries” to include “emotional distress,” putting all personal injury plaintiffs in the same position regardless of whether their injuries were physical or nonphysical.¹⁰⁰

The other proposed amendment, called the Civil Rights Tax Relief Act of 2001,¹⁰¹ would have excluded from gross income (a) the noneconomic loss portion of unlawful discrimination awards and (b) the attorneys' fee portion of the award. In addition, (c) it would have allowed plaintiffs to average awards for front-pay and back-pay over the number of years for which they were being compensated,¹⁰² thus addressing at least some of the concerns just mentioned. Even so, I was preparing

98. See David L. Hudson, Jr., *Singling Out Double Taxation*, 3 A.B.A. J. EREPORT 42 (2004).

99. Some courts have awarded gross-ups in order to remove or address these bunching problems. See Polsky & Befort, *supra* note 5, at 94–98.

100. H.R. 878, 107th Cong. § 1(a) (2001).

101. See Civil Rights Tax Relief Act of 2001, H.R. 840, 107th Cong. (2001); Civil Rights Tax Relief Act of 2003, H.R. 1155, 108th Cong. (2003).

102. Civil Rights Tax Relief Act of 2001, H.R. 840, 107th Cong. (2001).

to write an article describing why that Civil Rights Tax Relief Act was inadequate. Only unlawful discrimination claims were included (all other nonphysical personal injury awards would still be taxed in their entirety, and it therefore left vertical equity problems unanswered); even unlawful discrimination awards would still be treated differently than physical personal injury awards (leaving several horizontal equity issues); and the mind-body/reason-passion dualities were left firmly in place, reinforcing the devaluation of nonphysical personal injuries (and the people who suffer them).

In the middle of my writing *that* article, however, Congress enacted a much reduced version—the Civil Rights Tax Relief Act of 2004¹⁰³—dealing only with the taxation of attorneys' fees for unlawful discrimination claims. Other than excluding the attorneys' fee portion of unlawful discrimination awards from gross income, the remainder of Section 104(a)(2) remains intact. Although the Act bears the same name as earlier proposals, it is obviously nowhere near as extensive and should not be confused with earlier versions.

We don't have time today to discuss all of the problems with the new Act, but suffice it to say that its primary failings include the fact that (1) it retains the distinction between physical and non-physical personal injuries for the purposes of differential tax treatment (that is, the use of a tort standard to determine the tax treatment of recovery), (2) it penalizes unlawful discrimination and other nonphysical tort plaintiffs by failing to address all but one of the concerns discussed above,¹⁰⁴ and (3) it leaves the group most empowered to push for change—lawyers—with the impression that no further changes are necessary.¹⁰⁵

V. CONCLUSION

In the present political climate, I am not surprised at the state of the law. I am not surprised that no adequate amendment has been proposed. I am not surprised that women and minorities bear the costs. Last night, Professor Occhialino¹⁰⁶ asked me what I would like to see happen. The critical aspect of my work is to say, lawyers need to inform themselves about the tax consequences of their choices and their clients' choices in the context of nonphysical personal injury loss. The Civil Rights Tax Relief Act of 2004 does not go nearly far enough to redress the inequities

103. See *supra* note 27.

104. By contrast, "employers are under-taxed" or rewarded. Brown, *supra* note 5, at 264.

The cost incurred by the employer in discriminating, measured in part by the recoveries of workers who pursue their claims, are deductible. Given the strong anti-discrimination policies expressed in society and the law, a deduction for expenses connected to discriminatory conduct seems a reward. The Code ignores those policies and sanctions a deduction for any expense, short of a fine or penalty, related to business activity even if it violates strong public policy. The Code thus provides no incentive to treat all workers fairly.

Id. (footnotes omitted).

105. Prior to the enactment of the new act, Professor Polsky had opined, "Perhaps if the trial lawyers began to appreciate their duties to advise their clients fully of the [tax] trap, as well as their potential exposure to liability, these lawyers might be motivated to use their political clout to encourage Congress to fix the AMT trap." Polsky, *The Contingent Attorney's Fee*, *supra* note 5, at 638.

106. Professor of Law, University of New Mexico School of Law. See <http://lawschool.unm.edu/faculty/occhialino/index.htm> (last visited Feb. 19, 2005); M.E. Occhialino, *Examining the Spectrum of Noneconomic Harm: An Introduction*, 35 N.M. L. REV. 391 (2005).

created by Section 104(a)(2). I realize that the “tax implications of nonphysical personal injury loss for plaintiffs” is not a sexy topic, like “double taxation” or “tort reform,” but it is critical to consider if we are committed to horizontal and vertical equity—in both tax law and society at large.

What else can we do? Challenge the constitutionality of Section 104(a)(2) as violating equal protection clauses (particularly under state constitutions with strong equal rights amendments, such as New Mexico);¹⁰⁷ when we lose, challenge it again. Testify before legislatures. Do empirical research and make it widely available. Represent nonphysical personal injury plaintiffs on a *pro bono* basis. Appreciate that the breadth of tort reform includes other areas of law, and be mindful of that when challenging tort reform measures. There are surely other ideas, of course, but my point is: Section 104(a)(2) and the Civil Rights Tax Relief Act of 2004 leave us in the rationalist mind-body quagmire for no rational or fair purpose.

107. N.M. CONST. art. II, § 18. State income tax is usually calculated by reference to federal income tax calculations, so section 104(a)(2) could arguably violate a state constitution, even though it is federal legislation.