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SELF-ALTERING INJURY: THE HIDDEN HARMS OF HEDONIC ADAPTATION

Sean Hannon Williams†

Several scholars have recently suggested that under one plausible measure of harm—the happiness of the victim—severe disabilities cause little or no long-term harm. This is because victims adapt and recover much, if not all, of their preinjury happiness. Yet most people have a powerful and enduring intuition that severe injuries, like paraplegia, cause substantial harm. Legal scholars have tried to salvage this intuitive notion of harm, and they have turned to a single philosophical tradition to do so: the capabilities approach. Unfortunately, this approach is likely to introduce contested questions of value and can provide only an incomplete account of harm. This Article offers an alternative defense that has substantial descriptive support in psychological studies and disability research. The core of the argument is simple: the process of adapting to severe injuries increases happiness, but does so at a cost. That cost is self-alteration. Adaptation often requires substantial adjustments to the victim's goals and ideals. These goals and ideals are a central aspect of self-identity; in an important way, they constitute who we are. What happiness research misses, then, is that the source of one's happiness matters. And it matters because some sources of happiness shape our self-identity in such a way that changing them changes us.

INTRODUCTION ............................................. 536
I. HEDONIC ADAPTATION’S INFLUENCE ON TORT DAMAGES... 539
   A. Overview of Hedonic Adaptation ............................. 539
   B. The Relationship Between Hedonic Adaptation and Hedonic Damages ............................ 543
II. SALVAGING HARM: THE CAPABILITIES APPROACH .......... 545
   A. The Puzzle .............................................. 545
   B. Welfare and Harm ....................................... 546
   C. The Capabilities Approach and Its Limitations ............ 548
III. SALVAGING HARM: SELF-ALTERING INJURY ............... 554
   A. The Self ................................................. 554
   B. Self-Alteration ........................................... 556
      1. Disability Research and Altered Selves ................. 557
         a. Traumatic Head Injury ............................... 557

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b. Physical Impairments .......................... 560
2. Further Research on Self-Alteration .................. 563
3. The Relationship Between Hedonic Adaptation and Self-Alteration .................. 566

C. Forced Self-Alteration Is a Harm .................. 568
1. Harm as the Disruption of a Coherent Life Narrative .................................. 568
2. Harm as a Constraint on Autonomy ................. 573

D. Implications for Tort Damages .................. 580

CONCLUSION ................................................... 582

I was murdered in France last summer. . . . I am not the same person who set off singing, on that sunny Fourth of July in the French countryside. I left her in a rocky creek bed at the bottom of a ravine. I had to in order to survive.¹

INTRODUCTION

Recent happiness research has threatened to upend many of the ways that we evaluate harm within tort law. Disabled individuals learn to adapt to their new situation and are often just as happy postdisability as they were predisability. This process—called hedonic adaptation—suggests that one prominent component of tort damages, loss of enjoyment of life, should often yield no award. Simply put, if victims are similarly happy pre- and postinjury, then they have not lost any enjoyment of life.

In response to this provocative claim, several scholars have sought to broaden the definition of harm such that a person with fewer capabilities after an injury is harmed even though he experiences no decrease in happiness.² This position—rooted in Amartya Sen and Martha Nussbaum’s capabilities approach to welfare—argues that welfare should not be defined solely in terms of subjective measures of

² Cass R. Sunstein, Illusory Losses, 37 J. LEGAL STUD. S157, S176, S178 (2008) (arguing that the legal system can award damages to one that loses a capability on the basis of something aside from hedonic loss); Peter A. Ubel & George Loewenstein, Pain and Suffering Awards: They Shouldn’t Be (Just) About Pain and Suffering, 37 J. LEGAL STUD. S195, S206 (2008) (noting that because “there are dimensions of richness of experience and complexity and sophistication of thought that have value over and above simple happiness,” it cannot be the only measure of harm); Rick Swedloff & Peter H. Huang, Tort Damages and the New Science of Happiness 37 (Mar. 2, 2009) (unpublished manuscript), available at http://works.bepress.com/peter_huang/1 (noting that “[i]n addition to, or quite possibly even completely besides, the presence of positive affect and the absence of negative affect, people want additional desiderata”); see Samuel R. Bagenstos & Margo Schlanger, Hedonic Damages, Hedonic Adaptation, and Disability, 60 Vand. L. Rev. 745, 760 (2007) (arguing that the view that disability limits the ability to enjoy life does not reflect how most people with disabilities actually feel).
happiness. Rather, welfare consists in the freedoms and opportunities that an individual possesses. These freedoms and opportunities are called capabilities. Therefore, “[t]hose who are able to run, or to have sexual experiences, are better off than those who lack these capabilities, even if the difference cannot be picked up in hedonic terms.”

The capabilities approach has two core limitations when applied in this context. First, it requires determinations of which physical capabilities are fundamental to leading a truly human life. This is likely to create substantial disagreement and be ultimately unresolvable. Second, it provides poor guidance on the magnitude of harms. This weakness stems from the fact that it captures some, but not all, of our intuitions about harm. Head injuries, for example, commonly alter the victim’s personality. Yet the capabilities approach can only recognize these changes as harms indirectly, when these changes result in lowered capabilities. From the perspective of the preinjury victim, however, personality changes are almost always harms. Because the capabilities approach does not recognize the harms of personality changes per se, it is unlikely to provide good guidance about the magnitude of the harms created by severe disabilities.

This Article outlines a theory of harm that recognizes that some injuries change a victim’s ideals, goals, and preferences, and that these changes are harms from the perspective of the preinjury victim. The process of adapting to severe injuries increases happiness, but does so at a cost. Some of the things that make us happy, especially those that make us proud, are constitutive of our self-identity. If we change the sources of our happiness and pride, we have changed ourselves. If we are forced to change the sources of our happiness and pride against our will, then we are harmed. Some injuries can force us to undergo these changes because they require us to choose between two unpleasant fates: either we maintain our original ideals and goals and risk falling short of them, or we alter the ideals and goals that, at least in part, made us who we were. In either case there is a harm, but a hedonic account of welfare can only detect the former. The concept of a forced alteration of the self fills this gap.

The notion that some injuries result in forced alterations of the self comports with many common-sense intuitions that show up routinely in autobiographical accounts of disability and in empirical studies of trauma. Quantitative research into the process of adapting to traumatic events highlights the transformative nature of this adaptive process. “Although the person who existed prior to the injury continues to exist, such traumatic loss transforms individuals in an irreversible manner, meaning that the former self cannot be fully

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3 Sunstein, supra note 2, at 178.
recaptured." Severe injuries or chronic illness can cause a "loss of self" that leads to a "changed person." This talk helps define the harms that can occur through the adaptive process. Some of our ideals, goals, and even preferences shape our self-identity in such a way that changing them changes us. For ease of exposition, this Article will refer to injuries that cause forced alterations of the self as self-altering injuries.

The concept of self-altering injury avoids the two key limitations of the capabilities approach. First, it relies on a less capacious and less controversial account of the good. More specifically, it relies on the value of one form of autonomy: self-determination. Self-determination involves being the author of one's own ideals and goals, rather than a mere conduit for the commitments of others. Self-altering injuries interfere with self-determination and are therefore readily cognizable as harms. Second, the concept of self-altering injury can identify and value the unique harms that stem from forced changes to one's ideals and goals, rather than value them only indirectly through their effects on capabilities.

The relationship between hedonic adaptation and self-alteration implies that, to the extent that hedonic adaptation puts downward pressure on tort awards, the concept of self-altering injury puts a corresponding upward pressure on those awards. Therefore, hedonic adaptation, standing alone, does not show that juries systematically overcompensate victims for severe disability.

The concept of self-altering injury is useful regardless of whether hedonic adaptation is a robust phenomenon, and regardless of whether happiness research measures anything useful. Hedonic adaptation works, in part, through a process of self-alteration. But self-alteration can occur in the absence of hedonic adaptation. Head injuries are the quintessential example. So even readers who are suspicious of happiness research should be open to the concept of self-altering injury. Ultimately, the goals of this Article are to open up a conversation about forced alterations of the self, provide an initial account of the harm resulting from self-alteration that is grounded in both intuition and theory, and argue that tort law should recognize these harms.

Part I of this Article describes hedonic adaptation and illustrates its potential effects on damage awards in tort cases. Part II introduces the capabilities approach and explains its limitations. Part III describes and defends the concept of a self-altering injury.
I

HEDONIC ADAPTATION'S INFLUENCE ON TORT DAMAGES

In the context of tort law, hedonic adaptation refers to the process of reducing the emotional effects of a stable injury. Hedonic adaptation suggests that under one plausible measure of harm—the happiness of the victim—most torts cause little or no long-term harm. This psychological phenomenon has threatened to upend many of the ways that we evaluate harm and has the potential to radically alter tort damages.

A. Overview of Hedonic Adaptation

In the last five years, legal scholars have increasingly explored the implications of the psychology of happiness. The vast literature on happiness has yielded two major findings. First, many major life events have only a temporary effect on self-reported happiness. Second, people do not predict that they or others would adapt to major life events. Instead, they erroneously predict that major life events have lasting effects on happiness. Several recent articles have offered comprehensive reviews of this literature; a brief overview will suffice here.

Many seemingly major life events have negligible effects on happiness after one or two years. People have psychological immune sys-

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5 Ubel & Loewenstein, supra note 2, at S198.
6 See infra Part I.A.
7 See, e.g., John Bronsteen, Christopher Buccafusco & Jonathan Masur, Happiness and Punishment, 76 U. CHI. L. REV. 1037, 1038 (2009) [hereinafter Happiness and Punishment] (studying how adaptation to prison makes it difficult to fashion appropriate sentences); John Bronsteen, Christopher Buccafusco & Jonathan S. Masur, Hedonic Adaptation and the Settlement of Civil Lawsuits, 108 COLUM. L. REV. 1516, 1516 (2008) [hereinafter Bronsteen et al., Hedonic Adaptation and the Settlement of Civil Lawsuits] (noting the recent "emergence of an interdisciplinary group of psychologists, economists, and public policy analysts devoted to the study of happiness"); Sunstein, supra note 2, at S150 (noting the "emerging literature attempting to measure hedonic effects"); Ubel & Loewenstein, supra note 2; see also Bagenstos & Schlanger, supra note 2, at 746 (noting that the concept of adaptive preferences has played an important role in several fields over the past twenty-five years); Thomas D. Griffith, Progressive Taxation and Happiness, 45 B.C. L. REV. 1363, 1365 (2004) (analyzing how research on happiness can inform income redistribution); Swedloff & Huang, supra note 2, at 2 (noting the emergence of "legal hedonists" who argue that new data on happiness requires changes to existing legal institutions).
8 For a basic summary of the literature, see Bronsteen et al., Hedonic Adaptation and the Settlement of Civil Lawsuits, supra note 7, at 1522–26, and Shane Frederick & George Loewenstein, Hedonic Adaptation, in WELL-BEING: THE FOUNDATIONS OF HEDONIC PSYCHOLOGY 302, 311–14 (Daniel Kahneman et al. eds., 1999).
9 These events will almost certainly have immediate, if fleeting, emotional effects. Colette Hillebrand Duggan & Marcel Dijkers, Quality of Life After Spinal Cord Injury: A Qualitative Study, 46 REHABILITATION PSYCHOL. 3, 23 (2001) (reporting that the suicide rate for those with spinal cord injuries is three to five times higher than the general population, with most suicides occurring within a few years of the initial injury); Brett Smith & Andrew C. Sparkes, Men, Sport, and Spinal Cord Injury: An Analysis of Metaphors and Narrative Types, 19
tems that prevent major life traumas such as quadriplegia, paraplegia, amputation, severe burns, and kidney disease from having lasting effects on their happiness. Philip Brickman, Dan Coates, and Ronnie Janoff-Bulman first suggested this process of hedonic adaptation. They found that lottery winners were no happier than nonlottery winners and that paraplegics were not nearly as unhappy as they predicted. Many studies find absolutely no difference in happiness measures between people with disabilities and control groups of people without disabilities. Even when hedonic adaptation does not fully restore one's preinjury level of happiness, it substantially mitigates hedonic losses. One recent longitudinal study in Britain provided one of the most conservative estimates of hedonic adaptation. It found that people tend to experience a sharp drop in

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10 See generally Daniel T. Gilbert et al., Immune Neglect: A Source of Durability Bias in Affective Forecasting, 75 J. PERSONALITY & SOC. PSYCHOL. 617 (1998) (noting that individuals neglect their psychological immune systems when making predictions about the duration of their affective reactions to negative events).


13 See Vida L. Tyc, Psychosocial Adaptation of Children and Adolescents with Limb Deficiencies: A Review, 12 CLINICAL PSYCHOL. REV. 275, 275 (1992) (noting that "the available literature suggests that pediatric amputees report minimal psychosocial distress, achieve good functional outcomes, and adapt well to their disability").

14 See David R. Patterson et al., Psychological Effects of Severe Burn Injuries, 115 PSYCHOL. BULL. 362, 364 (1993) (arguing that "most people seem to undergo emotional adjustment to burn injuries relatively well").

15 See Jason Riis et al., Ignorance of Hedonic Adaptation to Hemodialysis: A Study Using Ecological Momentary Assessment, 134 J. EXPERIMENTAL PSYCHOL. 3, 7 (2005) (finding that hemodialysis patients adapt to their condition).

16 Additionally, failing to obtain tenure appears to have no long-term hedonic impact. Gilbert et al., supra note 10, at 623-24.

17 Philip Brickman et al., Lottery Winners and Accident Victims: Is Happiness Relative?, 36 J. PERSONALITY & SOC. PSYCHOL. 917, 926 (1978) (suggesting that individuals overestimate the duration of feeling generated by an event).

18 Id. at 920-22.

19 See, e.g., Fátima de N. Abrantes-Pais et al., Psychological or Physiological: Why Are Tetraplegic Patients Content?, 69 NEUROLOGY 261, 261 (2007) (finding that persons with spinal cord injuries report being overall content); Olga Horgan & Malcolm MacLachlan, Psychosocial Adjustment to Lower-Limb Amputation: A Review, 26 DISABILITY & REHABILITATION 837, 839 (2004) (finding that while rates of depression in people with an amputation are high between the first and second years following amputation, rates decrease after this period to what is found in the general population); Riis et al., supra note 15, at 7 (finding no difference in moods between dialysis patients and control patients).
happiness just after the onset of a disability, but that happiness levels rebound by 30% to 50% thereafter. Even this degree of adaptation is likely to surprise many and can support the argument that tort awards are currently too high.

The various measures of happiness used in this research appear to be reliable. Regardless of whether happiness is measured with a single life-satisfaction question, or multiple times each day using a specialized palm pilot, studies routinely find evidence of hedonic adaptation. Happiness measures also correlate sensibly with less conscious indicators of happiness, such as smiling. Although measuring happiness is not free of methodological difficulty, these measurements appear to reliably capture at least one dimension of well-being. A full accounting of whether happiness research is methodologically sound, and produces results that are ethically relevant, is beyond the scope of this Article. This Article will instead assume that happiness research provides at least some information that is useful for determining harm. The opposite conclusion—that happiness is entirely irrelevant to determining harm—is implausible.

Hedonic adaptation is common but not universal. Some injuries are more difficult to adapt to, and some people adapt more than others. People rarely adapt to chronic pain and degenerative conditions such as rheumatoid arthritis and multiple sclerosis. But many

20 Andrew J. Oswald & Nattavudh Powdthavee, Does Happiness Adapt? A Longitudinal Study of Disability with Implications for Economists and Judges, 92 J. PUB. ECON. 1061, 1066 (2008) (noting that level of happiness falls abruptly in the year of injury). This Article adopts the social model of disability. Under this model, the bare physical alteration of the body that accompanies an injury is called an impairment. When the victim’s surrounding environment does not accommodate the impairment, the interaction of the impairment and the environment creates a disability. For further discussions on these concepts, see Michael Oliver, The Politics of Disablement: A Sociological Approach 11 (1990).


22 See Ubel & Loewenstein, supra note 2, at $200.


24 For a concise defense of happiness research, see Ubel & Loewenstein, supra note 2, at $199–$202. For several concerns about the importance of happiness research, see generally Martha C. Nussbaum, Who Is the Happy Warrior? Philosophy Poses Questions to Psychology, 37 J. LEGAL STUD. 81 (2008).

25 See Richard F. Antonak & Hanoch Livneh, Psychosocial Adapation to Disability and Its Investigation Among Persons with Multiple Sclerosis, 40 SOC. SCI. MED. 1099, 1105 (1995) (noting that reactions of anxiety, depression, and irritability are common during the period when symptoms of multiple sclerosis become apparent, followed by a period of acceptance, followed by a period of "pronounced and prolonged disintegration"); Craig A. Smith & Kenneth A. Wallston, Adaptation in Patients with Chronic Rheumatoid Arthritis: Application of a General Model, 11 HEALTH PSYCHOL. 151, 151 (1992) (noting that rheumatoid arthritis has been "linked to poor adjustment").
people do adapt to stable and severe injuries. A host of environmental and personality factors contribute to the speed and completeness of this adaptive process. Some people adapt so completely that they would refuse a cure even if it were free and riskless. Others are willing to pay high prices for cures.

Although hedonic adaption is extremely common, people rarely predict that it will occur. People erroneously predict that positive events such as obtaining tenure and moving to California will have a long-term positive impact on their happiness. People also erroneously predict that negative life events such as paraplegia, kidney disease, colostomy, and breast cancer will drastically lower their

26 See Dylan M. Smith et al., Health, Wealth, and Happiness: Financial Resources Buffer Subjective Well-Being After the Onset of a Disability, 16 PSYCHOL. SCI. 663, 665 (2005) (finding that wealth buffers against the detrimental effects of disability, but that the gap narrows over time).

27 See Elizabeth Kendall & Deborah J. Terry, Psychosocial Adjustment Following Closed Head Injury: A Model for Understanding Individual Differences and Predicting Outcome, 6 NEUROPSYCHOL. REHABILITATION 101, 115–16 (1996) (noting that “self-esteem and control expectancies may play a role in the facilitation of adjustment after CHI”).

28 See Nancy Weinberg, Physically Disabled People Assess the Quality of Their Lives, 45 REHABILITATION LITERATURE 12, 14 (1984) (finding that, out of thirty patients who were interviewed, two would refuse a free riskless cure, and three were “hesitant”).

29 See Dylan M. Smith et al., Misremembering Colostomies? Former Patients Give Lower Utility Ratings Than Do Current Patients, 25 HEALTH PSYCHOL. 688, 691 (2006) (finding that current colostomy patients were willing to give up, on average, 15% of their remaining life years to reverse the colostomy).

30 Daniel T. Gilbert & Timothy D. Wilson, Prospection: Experiencing the Future, 317 SCIENCE 1351, 1353 (2007) (“The tendency to underestimate how quickly we will adapt to a wide range of pleasurable and painful events is probably the most commonly observed error in research on hedonic prediction.” (citation omitted)).

31 Gilbert et al., supra note 10, at 623–24.


33 Although victims of spinal cord injuries have persistently lower quality of life ratings than the general population, James Middleton et al., Relationship Between Quality of Life and Self-Efficacy in Persons with Spinal Cord Injuries, 88 ARCHIVES PHYSICAL MED. & REHABILITATION 1643, 1643 (2007), people appear to exaggerate the negative effect of spinal cord injuries on quality of life. See Peter A. Ubel et al., Disability and Sunshine: Can Hedonic Predictions Be Improved by Drawing Attention to Focusing Illusions or Emotional Adaptation?, 11 J. EXPERIMENTAL PSYCHOL.: APPLIED 111, 117–18 (2005) (finding that subjects predicted low quality of life after paraplegia, but that these rating increased when subjects were explicitly asked to consider how they might adapt to the disability).

34 See David L. Sackett & George W. Torrance, The Utility of Different Health States as Perceived by the General Public, 31 J. CHRONIC DISEASES 697, 702 (1978) (finding that individuals already on a home dialysis program rated their daily health state utility higher than individuals predicted their daily health state utility would be if on dialysis).


quality of life.\footnote{See generally Sackett & Torrance, supra note 34, at 702; Ubel et al., supra note 33, at 120 (noting that “people predict that their quality of life with various disabilities would be lower than the quality of life actually reported by people who have those disabilities”); Peter A. Ubel et al., Misimagining the Unimaginable: The Disability Paradox and Health Care Decision Making, 24 HEALTH PSYCHOL. S57, S57 (2005) (noting that people “mispredict the impact that circumstances will have on their well-being and quality of life”).} It is not just healthy people who incorrectly predict the hedonic impact of injury. Studies indicate that patients who are experiencing health problems have a strong preference to return to their healthy state, even when their happiness levels have already adapted to their condition:

In a number of studies, we not only asked healthy people how happy they would be if they were sick but also asked people with illness or disabilities to estimate how happy they would be if they were healthy. Invariably, we found that patients believe they would be substantially happier if they were healthy—indeed, they typically predict an increase in happiness equal to the decrease in happiness predicted by healthy people if they were sick. . . . \footnote{Ubel & Loewenstein, supra note 2, at 752.} Both groups agreed that they would be substantially happier if healthy than on dialysis, although no such pattern was observed in their self-reported levels of happiness.\footnote{Wilson et al., supra note 36, at 1045.}

Even doctors mispredict the hedonic impact of injury on their patients.\footnote{Bagenstos & Schlanger, supra note 2, at 752–53.} Lawyers in tort suits capitalize on these erroneous predictions and routinely argue that the victim’s disability will permanently prevent them from enjoying life.\footnote{Table 10.1: Schindler Elevator Corp. v. Anderson, 78 S.W.3d 392, 412 (Tex. App. 2001), review granted, judgment vacated, (May 22, 2003); Bagenstos & Schlanger, supra note 2, at 755 (“In many cases upholding hedonic damages awards, judges seem to have concluded explicitly that the mere fact of disability, without more, necessarily limits life’s enjoyment.”).} Judges too, appear to believe that disability creates lasting harm, even when faced with direct victim testimony that “I can do all the things I used to do.”

### B. The Relationship Between Hedonic Adaptation and Hedonic Damages

enjoyment. The purpose of these damages is to compensate tort victims for limitations "on the injured person's ability to participate in and derive pleasure from the normal activities of daily life, or for the individual's inability to pursue his talents, recreational interests, hobbies, or avocations."\textsuperscript{43} Samuel Bagenstos and Margo Schlanger surveyed the case law and found that courts often presume that disabilities permanently decrease a victim's enjoyment of life.\textsuperscript{44} Because courts tend to talk about these damages as compensation for losses of enjoyment, they are commonly called hedonic damages.\textsuperscript{45}

Hedonic adaptation undermines the assumption that the postinjury victim does not enjoy life as much as she previously did. Bagenstos and Schlanger have argued that, if a victim is just as happy one year after her injury as she was just before, then she has not permanently lost any enjoyment of life.\textsuperscript{46} Instead, she has only suffered a temporary decrease in enjoyment that quickly rebounds to preinjury levels. Accordingly, they have argued for abolishing hedonic damages.\textsuperscript{47} To the extent that: (1) damages for "loss of enjoyment of life" are intended to compensate victims for permanent hedonic losses; (2) hedonic adaptation is complete; and (3) the temporary disruption in enjoyment can be compensated under other categories of damages or is negligible, Bagenstos and Schlanger's conclusion is correct. Bagenstos and Schlanger have assumed a strong version of hedonic adaptation, where happiness fully recovers from all injuries. Yet even if hedonic adaptation were incomplete, their argument would still imply that current jury awards for lost enjoyment of life are too high. Regardless of whether one adopts the most aggressive or most conservative estimates of hedonic adaptation, it is likely that jurors are systematically awarding excessive amounts for lost enjoyment of life.

\textsuperscript{43} Boan, 541 S.E.2d at 244. Other descriptions of these damages include: "disabilities that include the basic mechanical body functions of walking, climbing, feeding oneself and so on," McGarry v. Horlacher, 775 N.E.2d 865, 877–78 (Ohio Ct. App. 2002), "the ability to enjoy the occupation of your choice, activities of daily living, social leisure activities and internal well-being," Smith v. Ingersoll–Rand Co., 214 F.3d 1235, 1245–46 (10th Cir. 2000) (quotations omitted), and the joy from "going on a first date, reading, debating politics, the sense of taste, recreational activities, and family activities." Kansas City S. Ry. Co. v. Johnson, 798 So. 2d 374, 381 (Miss. 2001).


\textsuperscript{45} See, e.g., Bagenstos & Schlanger, supra note 2, at 748; Schwartz & Silverman, supra note 42, at 1039.

\textsuperscript{46} See Bagenstos & Schlanger, supra note 2, at 797.

\textsuperscript{47} Id.
Rejecting hedonic damages does not mean that disability goes uncompensated. Bagenstos and Schlanger expressly reserve judgment about what they term “disability damages.” Id. These damages compensate for the disability itself, rather than the hedonic effects of the disability. Id. Although they do not provide a definition of disability damages, and indeed do not even discuss them at any length, this category of damages appears to reflect the intuition that lost abilities should be compensable even when they do not affect overall happiness levels. Courts have provided recovery for loss of limb, cognitive impairments, and impaired abilities to engage in sports, among others. Id. At first glance these might appear to reflect disability damages. Unfortunately, these courts do not appear to distinguish between hedonic damages and disability damages. Id. Instead, they conflate the two categories by assuming that all disabilities have a large negative impact on happiness. Therefore, it is impossible to tell whether these cases are motivated by an independent concept of disability damages.

II

SALVAGING HARM: THE CAPABILITIES APPROACH

When faced with strong evidence of hedonic adaptation, several behavioral economists and legal scholars have nonetheless resisted the idea that severe disability causes no lasting harm. They have uniformly turned to a single philosophical tradition—the capabilities approach—in order to salvage lay intuitions of harm.

A. The Puzzle

In two recent articles in the Journal of Legal Studies, Peter Ubel and George Loewenstein as well as Cass Sunstein pursue similar lines of reasoning. They argue that hedonic adaptation should not revolutionize tort law. They first argue that hedonic adaptation is a robust phenomenon; therefore, most injuries do not have a lasting effect on levels of happiness. They then argue against a purely hedonic account of welfare. Ubel and Loewenstein present their argument as a puzzle: even after being convinced that major injuries will not affect long-term happiness, the authors remain convinced that many tort vic-

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48 Id. at 751.
49 Id.
50 Id. at 757 n.49 (collecting cases).
51 Sunstein, supra note 2, at S180 (“A key question, which a reading of the cases cannot answer, is whether the decisions are animated by some kind of hedonic judgment error or instead an intuitive but sensible judgment about capabilities.”).
tims sustain substantial harm. They seek to resolve this puzzle by arguing that harm should not be defined solely by happiness.

B. Welfare and Harm

This Article defines harm as a welfare setback. Welfare is not a self-defining concept. There are three major accounts of welfare—hedonic, preference-based, and objective-good accounts. Jeremy Bentham advocated a hedonic definition of welfare and argued that welfare is entirely constituted by subjective experiences of pleasure and pain. Most happiness research adopts Bentham's definition. Under the hedonic account of welfare, hedonic adaptation substantially reduces the harm caused by tortious injury.

One plausible way to salvage harm is to move to a preference-based account of welfare. On this account, people are better off when their preferences are satisfied. Ubel and Loewenstein admit that they have enduring preferences against disability despite believing that hedonic adaptation is a robust phenomenon. Even patients who have experienced the disability, and have hedonically adapted to it, have strong preferences to return to healthy states. In one well-replicated study, colostomy patients were willing, on average, to give up 15% of their remaining lifespan for a cure. These patients are about as happy as control groups, suggesting that they had very strong preferences for hedonically indistinguishable outcomes. If welfare

52 See Ubel & Loewenstein, supra note 2, at S205.
53 See id. at S205-07.
55 See id. at 1292; see also MATTHEW D. ADLER & ERIC A. POSNER, NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS 29 (2006) (discussing major accounts of welfare).
56 Jeremy Bentham, An Introduction to the Principles of Morals and Legislation, in JOHN STUART MILL, UTILITARIANISM, ON LIBERTY, ESSAY ON BENTHAM 33, 34 (Mary Warnock ed. 1962) (“By utility is meant that property in any object, whereby it tends to produce benefit, advantage, pleasure, good, or happiness . . . [or] to prevent the happening of mischief, pain, evil, or unhappiness . . . .”).
58 See Mark C. Murphy, The Simple Desire-Fulfillment Theory, 33 NoCs 247, 247 (1999) (noting that “[a]ccording to the desire-fulfillment, or DF, theory, an agent’s well-being is constituted by the obtaining of states of affairs that are desired by that agent”).
59 See Ubel & Loewenstein, supra note 2, at S205.
60 See Smith et al., supra note 29, at 690, 691. For a broader discussion of these studies, see Ubel & Loewenstein, supra note 2, at S202-04.
61 Smith et al., supra note 29, at 692 (finding that: current patients, community members, and former patients who had their colostomies reversed, all exhibited similar levels of life satisfaction; that patients and former patients reported similar moods and quality of life; and that patients only exhibited slightly lower quality of life scores than community
is defined as preference satisfaction, then these patients are suffering a welfare setback and therefore a harm.

Although it has initial appeal, the preference-based account of welfare does not necessarily support intuitions about harm and disability. Most preference-based accounts of welfare seek to "launder" preferences to ensure that they are well informed. A fleeting preference for death that quickly evaporates, for example, is not well informed. Welfare is only created by satisfying well-informed preferences; satisfying ill-informed preferences does not count. Surprisingly, victims' preferences to return to their preinjury states might not be well informed. Their enduring and powerful preferences to avoid disability may be based on equally enduring and powerful misperceptions. Both patients and nonpatients have preferences for healthy states. Both populations agree that healthy people are happier. However, both populations are wrong because they ignore hedonic adaptation. At first blush, it appears that we should trust the people who have experienced both healthy and nonhealthy states. Yet there is reason to distrust their assessments. Not only do patients and nonpatients agree that healthy states produce more happiness, they also agree on the amount of happiness that health produces. This suggests that both populations are using the same simple (and erroneous) heuristic to assess the hedonic effects of health states. Therefore, it is not clear that enduring preferences to avoid disability are well informed.

members); see also Riis et al., supra note 15, at 7 (finding that hemodialysis patients "do not appear to be much, if at all, less happy than people who do not have kidney disease").

See Adler, supra note 54, at 1305 ("Indeed, many preferentialists now stipulate that the preferences which ground welfare must be fully informed.") (quotations omitted); Dan Brock, Quality of Life Measures in Health Care and Medical Ethics, in The Quality of Life 95, 97 n.5 (Martha Nussbaum & Amartya Sen eds., 1993) ("Virtually all discussions of desire or preference satisfaction theories of the good contain some provision for correcting preferences.").

See Adler, supra note 54, at 1305.

See, e.g., Riis et al., supra note 15, at 7, 8 ("Both patients and controls . . . predicted that the difference in mood experienced under health versus illness would be large."); Smith et al., supra note, 29 at 691 (finding that both patients and nonpatients were willing to give up remaining life-years to avoid living with a colostomy).

Riis et al., supra note 15, at 7.

Id. at 7–8 (noting that "patients are themselves not aware of the extent to which they have adapted to their condition").

See Ubel & Loewenstein supra note 2, at S203–04 (noting that patients and healthy persons made similar errors in predicting the impact of disability on happiness).

Similar heuristics influence a wide array of predicted and remembered pain and pleasure. These schemas dominate predictions, and play a large role in memory as well. The reality of an experience is not irrelevant to the memory of it, but there is a large literature showing pervasive effects of these heuristics on memories of pain and pleasure. See, e.g., Timothy D. Wilson et al., "How Happy Was I, Anyway?" A Retrospective Impact Bias, 21 Soc. Cognition 421, 431–33 (2003).
For these reasons, Ubel and Loewenstein do not shift to a preference-based account of welfare. However, they do not ignore patient preferences either. They argue that the existence of enduring preferences to avoid disability should motivate a more searching inquiry into whether disability causes harm, and whether those who conflate harm with decreases in happiness have an unnecessarily impoverished view of harm. Patient preferences, while not dispositive, deserve special weight because they persist even after people experience both healthy and unhealthy states, and even after people come to understand hedonic adaptation. Ubel and Loewenstein argue that "people legitimately care about more than just the pain and suffering that results from an injury" and that "happiness is not the only thing that matters in life." To defend this conclusion, they draw on one prominent objective-good account of welfare—the capabilities approach—and use it to illustrate the type of harm that remains even after complete hedonic adaptation.

C. The Capabilities Approach and Its Limitations

The capabilities approach was designed to deal with the following problem: a preference-based or hedonic definition of welfare could lead to the conclusion that a wealthy and accomplished person and a routinely degraded slave might have equally good lives. This would be true if they each exhibited the same level of happiness, and satisfied their preferences to a similar degree. The slave might exhibit surprisingly high levels of happiness if she has learned to adapt her preferences to her situation and find pleasure in the smallest of things. Amartya Sen questions whether we can really conclude that these two people are equally well off: "Can we possibly believe that [the slave] is doing well just because he is happy and satisfied? Can the living standard of a person be high if the life that he or she leads is

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69 Ubel & Loewenstein, supra note 2, at S204-05.
70 MARTHA C. NUSSBAUM, WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH 152-61 (2000) (arguing that philosophers should use common preferences as a heuristic to determine what is good and noting preferences for a state of world are especially diagnostic when the holder of these preferences has experienced all relevant states of the world).
71 Ubel & Loewenstein, supra note 2, at S195.
72 Id. at S205.
73 Id. at S206.
74 See NUSSBAUM, supra note 70, at 8, 114 (noting that an approach based on capabilities rejects an approach based on preferences because it conducts a critique of "the many ways in which habit, fear, low expectations, and unjust background conditions deform people's choices and even their wishes for their own lives").
75 AMARTYA SEN, COMMODITIES AND CAPABILITIES 21 (1985) ("A person who is ill-fed, undernourished, unsheltered and ill can still be high up in the scale of happiness or desire-fulfilment [sic] if he or she has learned to have 'realistic' desires and to take pleasure in small mercies.").
full of deprivation?" Sen and Martha Nussbaum have offered a competing, objective-good, account of welfare called the capabilities approach that aims to address this problem.

Under the capabilities approach, welfare is a multidimensional concept that includes some set of capabilities that are each central to leading a truly human life. A capability is the opportunity and freedom to obtain "such elementary things as being adequately nourished, being in good health, avoiding escapable morbidity and premature mortality, etc., to more complex achievements such as being happy, having self-respect, taking part in the life of the community, and so on." Serious injuries are classic examples of events that might hinder one or more fundamental capabilities. Although there is a robust debate about which capabilities are fundamental, there is likely to be some consensus as well. Martha Nussbaum has provided a list of ten capabilities that she argues are each important in a large number of reasonable ethical doctrines. These include:

1. Life;
2. Bodily health;
3. Bodily integrity (including the ability to move freely from place to place, and be free from physical assault);
4. Senses, imagination, and thought (including the ability to reason, to express oneself, to seek pleasure, and to avoid pain);
5. Emotions;
6. Practical reason (being able to reflect about and ultimately choose a conception of the good);
7. Affiliation (being able to experience love and friendship);
8. Concern for nature and other species (being able to have concern for plants, animals, and nature);

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77 See Martha C. Nussbaum, Frontiers of Justice: Disability, Nationality, Species Membership 73 (2006) (noting that "[p]eople adjust their preferences to what they think they can achieve, and also to what their society tells them a suitable achievement is for someone like them").
78 See Nussbaum, supra note 70, at 72–74 (noting that "we may judge that the absence of capability for a central function is so acute that the person is not really a human being at all, or any longer").
79 See Martha Nussbaum & Amartya Sen, Introduction to The Quality of Life, supra note 62, at 1, 5, 10.
81 Nussbaum, supra note 77, at 79, 304–05 (noting that there is likely to be an "overlapping consensus" on these capabilities); Robert Erikson, Descriptions of Inequality: The Swedish Approach to Welfare Research, in The Quality of Life, supra note 62, at 67, 74 ("The . . . components [of well-being] do not constitute a self-evident choice, but similar lists of the essential areas relevant to . . . living look very much the same the world over.").
9. Play;
10. Control over one's political and physical environment.\(^8^2\)

Two aspects of the capabilities approach hinder its applicability in the context of measuring the harm that results from disabilities. First, Nussbaum’s list only partially avoids problems that confront all objective-good accounts of welfare. More specifically, the process of defining which physical abilities are central to leading a truly human life is likely to lead to contested issues of value that are difficult to resolve. Second, the capabilities approach is likely to give poor guidance as to the proper magnitude of harms stemming from self-altering injuries.

Nussbaum’s list of fundamental capabilities partially avoids the problems of other objective-good accounts of welfare. Objective-good theories face one central criticism, which Ronald Dworkin nicely captures: “[M]y life cannot be better for me in virtue of some feature or component I think has no value.”\(^8^3\) For example, it is hard to say that someone is better off for listening to opera if she is indifferent to opera or, more pointedly, if she actively hates listening to opera. Therefore, it is hard to defend the claim that listening to opera is an objective good. The capabilities approach does not claim that opera, or indeed any specific actions or ways of being, improves welfare. Instead, the capabilities approach focuses on opportunities and freedoms.\(^8^4\) The capabilities approach claims that people are better off if they have the freedom to listen to opera (or not) and the educational opportunities that might foster an appreciation for opera. Although this approach still imposes a conception of the good (capabilities are held to improve welfare regardless of whether people derive pleasure from them and regardless of whether they have a preference for them), it is a conception of the good that is likely to garner more widespread support. One can value the freedom to listen to all musical genres without valuing the act of listening to each and every one of them. Ultimately, Nussbaum’s focus on capabilities responds to Dworkin’s concern by making an empirical claim: the vast majority of people value freedoms and opportunities, even if they disagree about the most valuable way to actualize these freedoms.\(^8^5\)

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84 See Nussbaum & Sen, supra note 79, at 3, 10.

85 Nussbaum believes that this consensus is rooted in common intuitions about human dignity and human flourishing. See Nussbaum, supra note 70, at 76, 83, 101 ("The account of the central capabilities is based on an intuitively powerful idea of truly human functioning that has roots in many different traditions and is independent of any particular metaphysical or religious view.").
Nussbaum’s list still encounters some of the problems of other objective-good accounts. As a general rule, having more opportunities is good and increases well-being. But Nussbaum rightly limits her focus to those opportunities that have a particularly large impact on well-being. That is, she limits her list to opportunities that “can be convincingly argued to be of central importance in any human life.”

It is not clear that all elements of her list meet these criteria. For example, Nussbaum readily admits that “[b]eing able to live with concern for . . . animals, plants, and the world of nature” is the most controversial element of her list, and may not develop the necessary overlapping consensus. This does not give us reason to reject the other elements of the list, so it is important to look more closely at other elements such as “bodily integrity,” the element that is most obviously implicated in cases of physical disability.

Nussbaum expresses her list at a high level of generality, and she acknowledges the need to concretize it in order to provide clear policy guidance. But this process is likely to reintroduce Dworkin’s concerns. Consider Cass Sunstein’s quite plausible claim that: “Those who are able to run, or to have sexual experiences, are better off than those who lack these capabilities, even if the difference cannot be picked up in hedonic terms.” Sunstein does not simply claim that these capabilities make people slightly or infinitesimally better off; rather, he asserts that they make people at least noticeably better off. To be perfectly consistent with the capabilities approach, we would have to make the further claim that these capabilities are “central elements of truly human functioning.”

This claim, while plausible, can plausibly be denied. Running is not central to human flourishing. Far from it, it is actively despised by millions of people. It is therefore unlikely that the ability to run even contributes noticeably to well-being. Although a much closer call, it is not even clear that sexual intercourse is central to human flourishing. It is certainly one method of deriving physical pleasure and bonding with others. But there are other methods for accomplishing each of these goals. The process of

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87 Nussbaum, supra note 70, at 74.
88 Id. at 80.
89 See id. at 80 n.85.
90 See id. at 105 (acknowledging the need to concretize her list in order for it to be relevant to policy decisions); Sunstein, supra note 2, at S176 n.7 (discussing disability as a loss in capabilities and noting that the more concrete and ordinary sense of capabilities “belongs in the same general family” as Nussbaum’s more abstract definition of capabilities).
91 Sunstein, supra note 2, at S178.
92 See Nussbaum, supra note 70, at 74.
concretizing Nussbaum’s list to account for physical impairments, therefore, reintroduces some of the contested questions of value that plague objective-good accounts.\(^9\)

The notion of self-altering injury is also rooted in an objective-good account, but it requires adoption of only one, hopefully less controversial, objective good: the freedom to maintain the set of ideals, goals, and preferences that people take to define who they are and who they want to be. Part III.C.2 lays out a full defense below. For now, it is sufficient to clarify my claim without defending it. The notion of self-altering injury relies on a less capacious and less controversial account of the good than does the capabilities approach.

The capabilities approach also appears ill suited to capture some of our intuitions of harm. Severe head injuries often cause changes to a person’s temperament that are severe enough for relatives to claim that the victim’s personality has changed.\(^9\) From the perspective of the preinjury victim, drastic alterations in personality are almost assuredly a harm. Yet the capabilities approach can only recognize these personality changes as harms if they alter the victim’s capabilities. For example, if the injury led the victim to be more aggressive and less empathetic, then the injury caused harm by reducing the victim’s capability to form lasting friendships.\(^9\) But what if the injury caused the victim to be more social and more empathetic? Oliver Sacks described one patient whose neurosyphilis stimulated portions of her brain and caused her to become more energetic and sociable.\(^9\) These changes increased the victim’s freedom to form meaningful relationships, and could therefore constitute an improvement under the capabilities approach. But it is not clear that such changes are invariably improvements from the perspective of the predisease “victim.” At the very least, we would want to know whether the predisease self valued her previous tastes for social interaction.\(^9\) This particular patient

\(^9\) Nussbaum is well aware of this, and notes items on her list will be construed differently in different societies. See id. at 77. Therefore, the contested issues of value that appear when we try to concretize her list problematize the use of the capabilities approach in the context of tortious loss of physical capabilities, but do not problematize the capabilities approach generally.

\(^94\) See infra Part III.B.1.

\(^95\) This determination requires a conceptual baseline, which will most often be the capabilities of the average person. See Ani B. Satz, A Jurisprudence of Dysfunction: On the Role of “Normal Species Functioning” in Disability Analysis, 6 Yale J. Health Pol’y L. & Ethics 221, 224 (2006) (advocating that the Supreme Court should consider “normal species functioning” when deciding eligibility for protection under the Americans with Disabilities Act).


\(^97\) Matthys Synofzik & Thomas E. Schlaeffer, Stimulating Personality: Ethical Criteria for Deep Brain Stimulation in Psychiatric Patients and for Enhancement Purposes, 3 Biotechnology J. 1511, 1514 (2008) ("[T]he ethically decisive question is not whether [brain surgery] alters personality or not, but whether it does so in a good or bad way from the patient's
was pleased with her elevated mood, but also expressed a desire that it not be elevated further. This suggests that not all capabilities-enhancing changes will be welcome.

These cases are assuredly rare, but they point to an important limitation of the capabilities approach—it cannot give a correct measure of damages if it is not focused on the correct harms. In cases of extreme personality change, the capabilities approach might focus on losses in one’s ability to make friends. However, the magnitude of this harm may be far different from the magnitude of the harm associated with a complete loss of one’s former personality. The notion of self-altering injury, by contrast, can recognize that forced personality changes constitute harms, and value them directly.

The next section describes and defends the concept of a self-altering injury. Such injuries can be categorized as harms if they sufficiently alter the victim’s ideals, goals, and preferences. The concept of self-altering injury is not a complete theory of harm. It therefore supplements hedonic accounts of harm, preference-based accounts of harm, and accounts of harm rooted in the capabilities approach. Yet this dimension of harm is likely to be large and has not yet been recognized.

very own perspective.” (emphasis omitted)). Consider one patient who received deep brain stimulation (DBS)—a process that involves the implantation of a pacemaker into the brain to help control electrical storms that cause tremors associated with Parkinson’s disease. Prior to the procedure, this patient hid her condition from workmates and reported being very committed to work: “As long as I have my work, I still exist; the day I cannot go to work, it will be as if the curtain came down on my life.” M. Schüpbach et al., Neurosurgery in Parkinson Disease: A Distressed Mind in a Repaired Body?, 66 Neurology 1811, 1812 (2006). After the surgery, her symptoms disappeared. Yet she now wanted to tell others about her condition and did not go back to work. When asked why she did not return to work, she simply said: “I... prefer to spend my time doing other things.” Id. It is not clear whether these changes resulted from DBS itself, or instead from the radical lifestyle changes that she underwent when her symptoms disappeared entirely. However, given how little we know about DBS, Synofzik & Schlaepfer, supra, at 1516 (noting that the “long-term cognitive, emotional and behavioral effects of psychiatric DBS are still largely unknown”), and given its invasiveness, it is certainly plausible that DBS itself had a role in altering what this patient valued. A recent conference on bioethics and personal identity further supports the contention that DBS might plausibly alter values. This conference was organized around four fictional case studies, one of which included a mild-mannered republican patient who underwent DBS and later became a gregarious democrat. See David M. Blass, Case Studies, in PERSONAL IDENTITY AND FRACtURED SELVES 50, 59 (Debra J.H. Matthews et al. eds., 2009).

Below, this Article will briefly lay out the argument that the concept of self-altering injury can be integrated into the capabilities approach, as an element of Practical Reason. If this is correct, then the limitations described above are not attributable to the capabilities approach itself, but rather to applications of the capabilities approach that focus too narrowly on the physical consequences of impairment. The main thrust of this Article, however, is to develop the concept of self-altering injury independently from the capabilities approach.
III
SALVAGING HARM: SELF-ALTERING INJURY

A. The Self

In order to begin the process of describing self-altering injuries, it is useful to start with a discussion of the self. The concept of self is not easy to define, and has spawned a tremendous amount of philosophical debate. Nonetheless, we can make some progress here by looking at notions of autonomy. Autonomy is a protean term, but one core aspect of it is self-determination. And the prefix "self" means much the same thing in the term self-determination as it does in the term self-altering injury. A person is self-determined to the extent that she is the author of her own ideals, goals and preferences. To see the value of self-determination, consider its opposite. A person who is not self-determined is merely a conduit for the ideals, goals, and preferences of others or of her culture. She takes no part in deciding the course of her life, or in shaping her conception of the good. This person is an automaton, and an automaton is not a self. The concept of the self, therefore, is deeply connected to one's conception of what is good and worthwhile in life.

In a very real sense, we are our ideals, goals, and preferences. But ideals, goals, and preferences do not all occupy the same weighty role in defining the self. Ideals are more central to what makes us who we are than, for example, our goals of learning new languages or our preferences of ice cream flavors. Our ideals constitute the type of person we want to be and the ultimate goods that we strive toward. Our choice among potential ideals—of how we want to live—is a large part of what makes us who we are. It is akin to what Harry G. Frankfurt has called "second-order desires," which are desires about one's own set of desires. Second-order desires include, for example, the desire to be a better person or a more patient parent. Gerald Dworkin argues that "[b]y exercising such a capacity [for second-order desires], persons define their nature, give meaning and coherence to their lives, and take responsibility for the kind of person they are." Similarly, Frankfurt has argued that a person's second-order desires are what

100 See DAVID DEGRAZIA, HUMAN IDENTITY AND BIOETHICS 1-10 (2005).
101 See id. at 33-34.
102 See id. at 33-34.
103 See id. at 33-34.
104 See id. at 33-34.
105 See id. at 33-34.
106 See id. at 33-34.
107 See id. at 33-34.
108 See id. at 33-34.
109 See id. at 33-34.
110 See id. at 33-34.
111 See id. at 33-34.
112 See id. at 33-34.
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131 See id. at 33-34.
132 See id. at 33-34.
133 See id. at 33-34.
134 See id. at 33-34.
135 See id. at 33-34.
136 See id. at 33-34.
137 See id. at 33-34.
138 See id. at 33-34.
139 See id. at 33-34.
140 See id. at 33-34.
makes her human.\textsuperscript{105} In his discussions on integrity, Bernard Williams noted that some ideals are identity conferring in that “unless I am propelled forward by [them], it is unclear why I should go on at all.”\textsuperscript{106} Here the language of identity is an alternative to the language of the self: each term refers to a set of important values or commitments by which we choose to live our lives.

Although one’s ideals are particularly likely to be identity conferring, people may also strongly identify with their goals, preferences, or activities. For some, running marathons defines who they are. For others, making partner in a law firm may be an identity-conferring goal. While ideals are quintessentially associated with one’s core identity or self, activities or goals can be similarly identity conferring, at least for some people.\textsuperscript{107}

This view of the self dovetails nicely with narrative accounts of the self. Charles Taylor, for example, argues that our notion of the self is deeply intertwined with notions of the good.\textsuperscript{108} A self, as we use that term, is a being who has a value system that allows her to make qualitative distinctions between what is better and what is worse.\textsuperscript{109} Taylor refers to these value systems as frameworks.\textsuperscript{110} These frameworks provide the yardstick that people use to judge whether their lives are going well, and whether anything in life has any meaning.\textsuperscript{111}

The concept of self is closely aligned with the concept of an identity.\textsuperscript{112} When we ask ourselves “who am I?” we are not generally asking about our name, address, or even physical features. We are asking about our frameworks.

To know who I am is a species of knowing where I stand. My identity is defined by the commitments and identifications which provide the frame or horizon within which I can try to determine from case to case what is good, or valuable, or what ought to be done, or what I endorse or oppose. In other words, it is the horizon within which I am capable of taking a stand.\textsuperscript{113}

\textsuperscript{105} Frankfurt, \textit{supra} note 103, at 11 (discussing second-order volitions as a specific type of what I refer to above as a second-order desire).

\textsuperscript{106} Bernard Williams, \textit{Moral Luck} 12–14 (1981).

\textsuperscript{107} Marya Schechtman, \textit{The Constitution of Selves} 77 (1996) (“[A]ll of the characteristics that are part of a person’s history are presumed to contribute to making up her identity. Some, however, play a more central role than others and are more truly expressive of who she is.”).


\textsuperscript{109} See id. at 30, 32.

\textsuperscript{110} \textit{Id.} at 19.

\textsuperscript{111} See id. at 21.

\textsuperscript{112} See id. at 28.

\textsuperscript{113} \textit{Id.} at 27.
Frameworks are not an optional set of beliefs that selves may or may not have. To understand the foundational importance of frameworks, it is again useful to think of a self without any. For this being, nothing in life can have any meaning or significance, nothing can be worth doing, and the notion of "making sense" of one's life becomes incoherent.\textsuperscript{114} Even a pure, coldly calculating utilitarian has a framework. This pure utilitarian has a clear sense of what is good and what is worth pursuing.\textsuperscript{115} That good is maximizing aggregate welfare. A being entirely without a framework would be outside of what we call persons or selves. We would judge such a being as deeply damaged and pathological.\textsuperscript{116}

The concept of a self, therefore, is intimately tied to conceptions of the good. A self is a being who has (however rough and incomplete) a conception of the good. This Article describes these frameworks as one's ideals, and thus—in a very real sense—we are our ideals.

B. Self-Alteration

A range of traumatic events can disrupt one's preferences, goals, and even one's ideals. These changes may sometimes simply be the result of gaining a new perspective. On this account, traumatic events simply provide information that was unavailable before, and people consciously alter their preferences, goals, and ideals in light of their new information. This account does a poor job of describing both how people predict trauma to affect them and how they respond to actual trauma. The effects of trauma on one's preferences, goals, and ideals are often far less deliberative. Severe permanent disabilities, for example, can increase the difficulty of satisfying some former preferences, achieving some former goals, and living up to some former ideals. The process of hedonically adapting to disabilities is the process of revising these former commitments. Such adaptation is largely an unconscious process,\textsuperscript{117} and can happen even when the former commitments were central to one's preinjury identity.

\textsuperscript{114} Id. at 18–19 (noting that without a framework "nothing is worth doing, the fear is of a terrifying emptiness, a kind of vertigo, or even a fracturing of our world").

\textsuperscript{115} See id. at 51.

\textsuperscript{116} Id. ("[T]he portrait of an agent free from all frameworks . . . spells for us a person in the grip of an appalling identity crisis. . . . [A] person without a framework altogether would be outside our space of interlocution; he wouldn't have a stand in the space where the rest of us are. We would see this as pathological.").

1. Disability Research and Altered Selves

The easiest cases to conceptualize as self-altering concern cognitive impairments stemming from head injury. But physical impairments can also be self-altering because the process of adapting to these impairments can be transformative of the things that make us who we are—our ideals, goals, and preferences.

a. Traumatic Head Injury

Head injuries often cause personality changes severe enough to justify the conclusion that, post injury, the victim is not completely the same person. “[T]he most serious long term morbidity after head injury is psychological” rather than physical.\textsuperscript{118} Head injuries often cause increased aggression, moodiness, depression, anxiety, and violent behavior.\textsuperscript{119} They are associated with reduced social interactions, increased friction with friends, and increased risk of divorce.\textsuperscript{120} In one study, researchers interviewed a relative of people who had experienced head injury. Eighty-four percent of these relatives indicated that the victim had an impaired ability to understand social situations and feel empathy for others.\textsuperscript{121}

Victims of head injury change in much more fundamental ways as well. In another study of severe head injury, one of the victim’s relatives (often a spouse or parent) was asked to “report any changes in the patient which had emerged after injury, and which were still present.”\textsuperscript{122} Researchers first asked these questions one year after the injury and again five years after the injury.\textsuperscript{123} One year after the injury, 60% of these relatives reported that the victim had undergone a “[p]ersonality change.”\textsuperscript{124} A greater percentage reported that the victim showed increases in irritability (67%) and a bad temper (64%), while others reported increases in depression (51%), rapid mood changes (57%), anxiety (57%), and even threats of violence (15%).\textsuperscript{125} These are serious changes in personality traits that most would identify as fundamental to identity. When a mild-mannered person becomes anti-social, aggressive, and moody, it becomes difficult to claim

\textsuperscript{118} N. Brooks et al., \textit{The Five Year Outcome of Severe Blunt Head Injury: A Relative’s View}, 49 J. NEUROLOGY, NEUROSURGERY, & PSYCHIATRY 764, 764 (1986).
\textsuperscript{119} \textit{Id.} at 765; Kendall & Terry, supra note 27, at 103, 104.
\textsuperscript{120} Kendall & Terry, supra note 27, at 102–05.
\textsuperscript{121} \textit{Id.} at 105 (citing Nils R. Varney & Lynette Menefee, \textit{Psychosocial and Executive Deficits Following Closed Head Injury: Implications for Orbital Frontal Cortex}, 8 J. HEAD TRAUMA REHABILITATION 32, 35 (1993)). Although not all head-injury victims will undergo these personality changes, many will. \textit{Id.} at 105, 115 (suggesting that this heterogeneity is due to differing personality traits and levels of social support).
\textsuperscript{122} Brooks et al., \textit{supra} note 118, at 765 (emphasis omitted).
\textsuperscript{123} \textit{Id.} at 767.
\textsuperscript{124} \textit{Id.} at 765 tbl.2.
\textsuperscript{125} \textit{Id.}
that she is the same person. After another four years, personality changes were even more common. At this time, 74% of relatives indicated that the victim’s personality had changed.126

Many of the personality changes that head injuries cause can be readily conceptualized as losses under the capabilities approach. The most common personality changes—depression, aggression, and lack of empathy—result in social impairments. The ability to create and maintain human relationships is a fundamental capability.127 Therefore, many of these victims will be made worse off by the injury.

Yet there is something incomplete about applying the capabilities approach here. Under this approach, if the victim becomes more social after the injury, he would be better off for it. This may make sense sometimes, especially if prior to the injury the victim wanted to be more social.128 But what if, preinjury, the victim had alienated others because he held strong beliefs that he aggressively fought for? Suppose a head injury caused Rahm Emanuel and Bill O’Reilly to get along with both Republicans and Democrats alike. Could we really say that they are better off postinjury? Can we really say that Bill O’Reilly is better off being kind and gentle, even if he begins to donate money to causes that he previously held in contempt, such as President Obama’s health care plan? It is more natural here to say that he has changed. The new Bill may be happier than the old, and he may have more capabilities, but the preinjury Bill is not happier and enjoying these greater capabilities. That person is, at least in part, gone.129

More importantly, the above example again shows that if we use the capabilities approach to estimate the magnitude of harms stemming from head injuries, we are likely to be misled. It is not clear that the degree of personality change will always correlate well with the degree of capability-reducing personality change. Yet this correlation would have to be very strong to justify using the capabilities approach to estimate the harms caused to Bill O’Reilly in the above example. This problem stems from the fact that the capabilities approach recognizes an incomplete set of harms. The concept of self-altering injury,

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126 Id.
127 See Nussbaum, supra note 82, at 41–42.
128 See Sacks, supra note 96, at 141 (reporting on a patient who enjoyed the elevated moods that her neurosyphilis created, and wished to live within this phase of the disease rather than seek a cure that would return her to her original state).
129 This critique of the capabilities approach mirrors John Christman’s critique of subjective welfare. He argues that happiness and preference satisfaction are inadequate measures of well-being because people can be made better off by forcibly altering their preferences. This "leave[s] totally out... the special relation that obtains between a person and that person’s set of (autonomous) preferences." John Christman, Introduction to The Inner Citadel: Essays on Individual Autonomy 3, 17 (John Christman ed., 1989) (emphasis in original).
by contrast, can recognize personality changes as harms per se and value them accordingly.

The concept of a self-altering injury also explains why impairments of cognitive ability are harms. Ubel and Loewenstein argue that if an injury turns someone into a "happy simpleton," she has suffered a reduction in welfare even if she becomes happier.¹³⁰ "[T]here are dimensions of richness of experience and complexity and sophistication of thought that have value over and above simple happiness."¹³¹ Sunstein makes a similar argument regarding education: "[E]ducation as such contributes to a richer life. Even if well-educated people do not seem happier according to a hedonometer, their enjoyments are more numerous and qualitatively distinct; . . . education is valuable whatever its effects on utility . . . ."¹³² John Stuart Mill perhaps said it best: "It is better to be a human being dissatisfied than a pig satisfied."¹³³

Mill’s concept of higher pleasures invites criticisms of elitism.¹³⁴ Yet to the extent that we are dealing with tort law, these criticisms can be avoided. Mill is attempting to answer the question: what makes one person better off than another? Tort law does not need to answer this question. Instead, it must only answer a different and narrower one: Is someone worse off if forced to transform into a happy simpleton or a pig? This can be answered without recourse to Mills’ higher virtues. Humans are not pigs. If a person’s cognitive capacities were reduced to that of a pig, that person would no longer exist. They would be (at least mostly) dead. Similarly, pigs are not humans. If a pig were transformed into a human, the pig would be dead—it would lose all that made it a pig (e.g., a love of mud and the rich aroma of rotting corn). These types of cognitive transformations destroy much of what gives content to the idea of a self. The concept of self-altering injury, then, does not require any comparative judgments about the quality of life of pigs and humans. Similarly, it does not require any comparative judgments about the quality of life of pre- and postdisability victims. Richard Abel has argued that "[p]rofound injury, like

¹³⁰ See Ubel & Loewenstein, supra note 2, at S207–08.
¹³¹ Id. at S206.
¹³² Sunstein, supra note 2, at S179.
¹³³ JOHN STUART MILL, UTILITARIANISM 10 (George Sher ed., Hackett Publ’g 1979) (1861). Compare Mill’s view to Bentham’s: "Prejudice apart, the game of push-pin [a simple child’s game] is of equal value with the arts and sciences of music and poetry. If the game of push-pin furnish more pleasure, it is more valuable than either." JEREMY BENThAM, The Rationale of Reward, in 2 The WORKS OF JEREMY BENThAM 189, 253 (John Bowring ed., London, Simpkin, Marshall & Co. 1843).
serious illness, transforms lives" and that although “no one would choose to suffer the transformation, those different lives are just that—different, neither better nor worse.” Yet this does not mean that transformative injuries do not harm their victims. People are not indifferent about undergoing these forms of transformation, nor should they be.

Injuries that cause cognitive deficits are self-altering in the same way as head injuries that cause aggression and antisocial behavior. The self-altering aspect of head injury, then, helps clarify the nonhedonic aspects of harm in these cases.

b. Physical Impairments

The concept of self-altering injury also helps to illuminate the harms caused by physical injuries that lead to such outcomes as amputation, paraplegia, and chronic illness. Although these injuries do not affect cognition and emotion in the same direct way that a head injury might, they nonetheless have substantial psychological impact. “The study of trauma does not lead to the conclusion that the self can be identified with the body, but it does show how the body and one’s perception of it are nonetheless essential components of the self.”

There is a large literature detailing how people adapt to these traumas. This literature confirms that there is a great deal of hedonic adaptation. Yet it also highlights the transformative nature of this adaptive process, and often does so with language that supports the idea of self-altering injury. “Although the person who existed prior to the injury continues to exist, such traumatic loss transforms individuals in an irreversible manner, meaning that the former self cannot be fully recaptured.” One prevalent model describes the process of adaptation as a negotiation of a new self-concept: A recently impaired person’s self-concept swings (sometimes wildly) between “predisability” and “postdisability” selves. Researchers speak of severe inju-

136 Brison, supra note 1, at 46.
137 See supra Part I.A.
138 Kendall & Buys, supra note 4, at 17 (citation omitted).
ries or chronic illness as causing a "loss of self"\textsuperscript{140} or "biographical disruption"\textsuperscript{141} that leads to a "changed person."\textsuperscript{142} Victims must go through a process of "reintegrating the self"\textsuperscript{143} to "reconstruct . . . their changed selves."\textsuperscript{144}

When disability scholars talk of a predisability and postdisability self, they are using "self" as shorthand to refer to a collection of characteristics of the victim that we generally hold out as important for personal identity. Talk of the postdisability self underscores the fact that large changes in personal characteristics to which selves attach great value often accompany disability. Understood in this way, disability scholars overwhelmingly argue that disabilities are self-altering.

Self-reports from disabled people confirm that adjusting to new bodily limitations can sometimes be self-altering. For example, one chronically ill patient stated: "I have no idea who I would be, in a way, if I hadn't become diabetic . . . Just to have to internalize this regime must have made a great difference to my personality, I think."\textsuperscript{145} S. Kay Toombs, an emeritus philosophy professor, mirrors these sentiments when she describes her experience with multiple sclerosis:

When I see myself on a home video, I experience a sense of puzzlement. I catch myself wondering not so much whether the body projected on the screen is my body but, rather, if the person in the video is really me . . . . [I]f I see old pictures of myself when I was walking, or leaning on a cane, I find it hard to remember how it was to be that person, or, even who I was when I moved like that.\textsuperscript{146}

\textsuperscript{140} Nick Watson, \textit{Well, I Know This is Going to Sound Very Strange to You, but I Don't See Myself as a Disabled Person: Identity and Disability}, 17 \textit{Disability \\& Soc'}\textsuperscript{y} 509, 512-13 (2002) ("People who have an impairment or chronic condition . . . suffer a loss of self and go through a process during which they negotiate their lives in such a way as to be as ordinary as possible and so retain some contact with desired life-worlds."). Consistent with the predictions of hedonic adaptation, these changes are often evaluated positively: "[H]ad it not been for my heart attack—I'm grateful it happened now, cause it changed my life considerably and so [I] have a lack of words [to describe it]. Yeah, I thank my heart attack for that. In one way I'm grateful." Kathy Charmaz, \textit{Identity Dilemmas of Chronically Ill Men}, 55 \textit{Soc. Q} 269, 275 (1994) (conducting qualitative interviews with twenty men and eighty women, all with chronic illnesses).


\textsuperscript{145} Charmaz, supra note 140, at 276 (emphasis omitted).

To be sure, not all patients will exhibit such alienation from their past selves. As one paraplegic noted, "I'm the same person that I was before the accident except that now I have to get around a little bit differently." Like almost all areas of human experience, there is heterogeneity in how people experience severe injury. Although not all people will have a crisis of self-identity, many will. And although not all people will alter their ideals, goals, and preferences, many will. The dramatic language of disability researchers combined with autobiographical accounts of altered values suggest that these crises will often lead to a redefinition of one's ideals, goals, and preferences.

The process of adapting to disability often changes ideals, goals, and preferences that were central to the victim's construction of herself. "All the things I thought were really important before, I now find were not." Qualitative research into the process of adaptation "suggests that people who make a good adjustment to the sudden onset of impairment are those who are able to redefine their values, [and] broaden the range of things that are cherished."

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147 Patricia J. Manns & Karen E. Chad, Components of Quality of Life for Persons with a Quadriplegic and Paraplegic Spinal Cord Injury, 11 QUALITATIVE HEALTH RES. 795, 802 (2001); see also Ernest A. Hirsch, Starting Over 164–65 (1977) ("Whatever changes have occurred in me do not touch the core of my 'self,' which has remained pretty much the same. As far as other people are concerned, I think I've remained much as always. Although I realize some changes have occurred, I feel a continuity with the past and have no difficulty recognizing myself as myself, and neither does anyone else."); K. Whalley Hammell, Quality of Life Among People with High Spinal Cord Injury Living in the Community, 42 SPINAL CORD 607, 612 (2004) ("The person you were pre-injury is the person you are going to be post-injury—with different values . . . ."); id. at 613 ("I don't really look at myself any different.").

148 See Kendall & Buys, supra note 4, at 18 ("Research has also indicated that there is significant variation both within and across individuals in the speed and quality with which individuals move through the adjustment process." (citation omitted)); Hanoch Livneh, Sheri M. Lott & Richard F. Antonak, Patterns of Psychosocial Adaptation to Chronic Illness and Disability: A Cluster Analytic Approach, 9 PSYCHOL. HEALTH & MED. 411, 423 (2004) (describing heterogeneity in coping and adaptation to spinal cord injury).

149 Some may instead find that a disability does not substantially affect their ideals and goals.

150 Much disability research focuses on the effects that disabilities have on general mood (e.g., causing depression, anxiety, or aggressiveness), as opposed to cataloging the specific changes in commitments that may have occurred. See, e.g., Kendall & Terry, supra note 27, at 102–05 (noting that studies have demonstrated that closed head injury can "have devastating consequences across a range of psychosocial domains"). Because self-alteration is arguably more harmful when one's ideals change, future research should focus on the types of commitments that are altered by disability, and thereby more rigorously test the assertion above that disability can lead to altered ideals and goals.

151 Christine Carpenter, The Experience of Spinal Cord Injury: The Individual's Perspective—Implications for Rehabilitation Practice, 74 PHYSICAL THERAPY 614, 622 (1994); see also Hammell, supra note 143, at 133 ("By letting go of some 'I ams' (such as 'I am an athlete') and developing others (such as 'I am a father'), a sense of self-worth was enhanced."); Hammell, supra note 147, at 612 ("The person you were pre-injury is the person you are going to be post-injury—with different values . . . .").

152 Hammell, supra note 143, at 135.
2011] 563

SELF-ALTERING INJURY

Self-altering injury—such as financial instability, divorce, unemployment, and social isolation further suggest that many people who suffer impairments will also be forced to alter how they value such basic things as independence, friendship, and sex.

2. Further Research on Self-Alteration

One set of recent studies examined subjects’ responses to hypothetical psychological traumas. These studies suggest that even in the absence of physical harms, traumatic events have the potential to be self-altering. These studies use the term disconnectedness to describe what this Article refers to as self-alteration. This term is derived from the philosophical work of Derek Parfit. Therefore, this section will start with a brief overview of Parfit’s arguments about the nature of the self.

According to Parfit, people persist through time only as a matter of degree. Therefore, the question of whether my future self will be “me” cannot be definitively answered. Parfit uses the term connectedness to describe this spectrum of similarity. Parfit discusses a number of hypothetical examples, most of which look like imaginative science fiction scenarios. For example, he asks what we would

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1 See Olga Horgan & Malcolm MacLachlan, Psychosocial Adjustment to Lower-Limb Amputation: A Review, 26 DISABILITY & REHABILITATION 837, 840 (2004) (collecting studies and concluding that “many people without disabilities ignore those with disabilities for fear of saying the wrong thing or because of experiencing general anxiety and unease in their presence”); id. (“[A]lmost half of the participants visited friends and relatives less frequently since their amputation and that approximately two-thirds were less likely to go to the cinema, theatre, sport events, library, dances, and shows.” (citing H. Burger & C. Marineck, The Life Style of Young Persons After Lower Limb Amputation Caused by Injury, 21 PROSTHETICS & ORTHOTICS INT’L 35, 36 (1997)); Michael Kelly, Self, Identity and Radical Surgery, 14 SOC. HEALTH & ILLNESS 390, 404–06 (1992) (reporting interviews with people needing colostomy bags that showed that many believed their disability made sexual relationships more difficult); see also Duggan & Dijkers, supra note 9, at 15 (reporting on cascade effects of injury, which include fears of sexual rejection); Livneh et al., supra note 148, at 415 (reporting that patients who suffer spinal cord injuries have high subjective well-being in a number of areas, but low subjective well-being in employment, sex, and financial situations).


155 See id. at 50 (describing the concept of psychological connectedness).


157 See id. at 239–43.

158 Id. at 206, 277, 313. A clarifications is in order. Parfit uses the term Relation R to discuss the ways in which people persist through time only as a matter of degree. Id. at 262. Parfit identifies two constitutive parts of Relation R: connectedness and continuity. Id. Continuity consists in “overlapping chains” of connectedness. Id. at 206. This article focuses on connectedness rather than continuity because continuity is a function of connectedness, and because Parfit’s most relevant discussions involve connectedness. See also David W. Shoemaker, Disintegrated Persons and Distributive Principles, 15 RATIO 58, 75 (2002) (“[O]f the two relations in Relation R we may plausibly believe that psychological connectedness is by far the more important.”).
conclude about personal identity if we could implant new memories, new personality traits, new values, and new cells into people. If we slowly replaced your cells with new cells, and simultaneously replaced your memories, values, and personality traits with those of Greta Garbo, when would you cease to be you? At the beginning of the procedure, all of the touchstones that we would look to in order to determine identity suggest that you are unchanged, but at the end of the potentially lengthy procedure, all of these touchstones suggest that you no longer exist, and that instead Greta Garbo has been reincarnated. This reduces the plausibility of claiming that the patient is always—in a deep and perfect sense—the same person. It is more plausible that the unfortunate patient persists through time only as a matter of degree.

Parfit is making a metaphysical claim that people are not constant through time. Because many of our intuitions about moral responsibility, self-interest, and survival are rooted in erroneous metaphysical claims, Parfit argues that these intuitions are likely to be misleading.

Parfit's metaphysical claims, and their purported normative implications, have spawned a great deal of philosophical debate. The purpose of this Article is not to review these debates.

This Article (and the research discussed below) uses the concept of connectedness metaphorically rather than metaphysically. Even taken as a metaphor, Parfit's Greta Garbo example illustrates the importance we attach to our personality traits and values and helps highlight the intuition that we can be harmed if traumatic events disrupt these values and personality traits.

Traumatic events have a large and immediate impact on connectedness. Subjects in one set of studies were asked to "think of the characteristics that make you the person you are—your personality, temperament, likes and dislikes, beliefs, values, ambitions, goals, ideals—and rate the degree of connectedness between the person you expect to be in the future compared to the person you are now . . ." These subjects were then asked to consider vignettes illustrating the life course of several fictional students. In each vignette, a fictional student would experience life changes ten, twenty, and thirty years into the future. Some life changes were minor:

- "[D]evelop an acute sensitivity to pollen and . . . move to Arizona";

159 Parfit, supra note 156, at 237.
160 Id. at 323–30.
161 Id.
162 For a useful collection of essays illustrating this debate, see generally Personal Identity (Raymond Martin & John Baressi eds., 2003).
163 Bartels & Rips, supra note 154, at 52.
164 Id. at 57–58.
• “[D]evelop an affinity for rice-based dishes”; or
• “[L]eave [his or] her job for the same position (and salary) at another employer.”

Other life changes were more momentous:

• “[R]eturn home after 12 months of private contracting work in a war-torn region . . . where [he or she] saw terrifying and atrocious events unfold”;
• “[R]eturn safely and in good health from a vacation in South America where [he or she] had been kidnapped and imprisoned as a political hostage for 6 months”;
• “[B]uried by an avalanche during a skiing trip but will be rescued by the ski patrol and remain totally unharmed”; or
• “[R]ecieve a diagnosis of pancreatic cancer but, soon after, will be completely symptom-free and learn that the initial test results were incorrect . . .”

Subjects were then asked to rate the degree of connectedness between the fictional student today, and the fictional student in fifteen, twenty-five, and thirty-five years. When the vignettes described one of the small changes, subjects reported high degrees of connectedness. When the vignettes described large changes, subjects reported low degrees of connectedness.

This research also provided evidence that these measures of connectedness were meaningful. In addition to rating the fictitious students' connectedness with their future selves, the subjects made a series of investing decisions. They were instructed to make these decisions as if they were the fictional character. When subjects predicted steep declines in connectedness at some future time, they preferred to shift rewards to the pretrauma period. They became less willing to sacrifice pretrauma money for posttrauma money. The various small life changes that fictional students would experience had no effect on investment choices. These patterns remained

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165 *Id.* at 68.
166 *Id.; see also id.* at 61.
167 *Id.* at 58.
168 *See id.* at 59–60.
169 *Id.*
170 *Id.* at 58.
171 *Id.*
172 *Id.* at 64 ("When people anticipate an important change that might weaken the psychological bonds between their present and future selves, they want upcoming desirable events to happen before the change occurs.").
173 *Id.*
174 In addition to studying traumatic events, this study also asked subjects to consider a fictional student who would undergo a "religious conversion—will be introduced into a new faith and will find spiritual fulfillment in [his or her] God," *id.* at 68, and would "find out that he was adopted." *Id.* at 61. Subjects treated these conditions much like they did the other large life events: kidnapping, witnessing war, avalanches, and erroneous cancer
even after controlling for anticipated changes in the fictional student's marginal utility of money and perceived likelihood that future payoffs would actually occur.  

In a companion study, the authors also found the same pattern when subjects were asked to choose how many vacation days to allocate to the pre- and posttrauma time period. The choice of when to assign vacation days was affected by the large life changes, but not affected by the small life changes. When subjects anticipated a large life event, they tended to shift vacation days to the pretrauma time period. Similarly, subjects tended to shift extra work days to the posttrauma period.

Taken together these results support the notion that trauma can lead people to feel deeply alienated from their pretrauma selves. When subjects considered the possibility that the "the characteristics that make you the person you are" will change based on some traumatic event, they did not merely lament the possible change. Instead, they appeared not to fully recognize the resulting persons as fully themselves. They were hesitant to take on burdens to benefit this resulting person, and eager to benefit their current selves even if it meant shifting burdens to their future selves. The degree of alienation was so great, therefore, that it affected subjects' basic concept of self-interest.

This evidence is far from dispositive. Much work remains to be done in corroborating the above findings and expanding them to different populations. But the research is intriguingly suggestive. It lends support for the descriptive claim that traumatic events change "the characteristics that make you the person you are—your personality, temperament, likes and dislikes, beliefs, values, ambitions, goals, [and] ideals."  

3. The Relationship Between Hedonic Adaptation and Self-Alteration

The set of injuries that are self-altering is likely to overlap with the set of injuries that might produce damages for loss of enjoyment of life. And the degree of self-alteration is likely to be a function of the

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175 Id. at 60–61.
176 Id. at 62–63.
177 Id. at 63.
178 Id.
179 Id.
180 Id. at 52.
degree of hedonic adaptation. Every adult has goals. When they meet these goals, they feel pride. Every adult has ideals. If they do not live up to these ideals, they feel guilt and disappointment. Every adult has preferences. When they satisfy these preferences, they become happy. Disabilities of greater severity disrupt these goals, ideals, and preferences to a larger degree; they create more significant constraints on leading the same life that a victim led prior to the disability. As discussed above, this normally creates significant psychological distress. The process of hedonic adaptation ameliorates this distress, but it does so at a cost. That cost is self-alteration. In the words of one paralysis patient:

It was more like those things not only didn't matter any more, they wouldn't have mattered even if I could still have done them. I didn't need to be able to do them—or to mourn their loss—in order to maintain some image of myself.

Adaptation often “works by transforming what one values and enjoys.” To the extent that at least some goals, ideals and preferences can be said to be fundamental aspects of an individual's self-identity, then adaptation will alter this identity. The postdisability self will not be fully connected to the predisability self. Therefore, hedonic adaptation is at least partially dependent on self-alteration.

On any given metric of the good, this change may be for the better or for the worse. Regardless, the transformation is almost certainly a harm from the perspective of the predisability self. Hedonic adaptation does not take account of the fact that the sources of happiness have changed for many tort victims. Yet exercising some autonomous control over these sources of happiness, especially the sources of our

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181 This Article focuses solely on people who have ideals and goals that constitute an ongoing life project. I refer to these people simply as "adults." The concept of self-alteration would have to be altered to accommodate injuries to children, who probably do not have set ideals or goals. It is also possible that the phenomenon of hedonic adaptation works differently in children than in adults.

182 See Menzel et al., supra note 142, at 2151 (“Realizing that a disease or disability is likely to be chronic, people may adjust their activities. . . . People may adjust not only the activities they select to pursue their goals, but the content and direction of the goals themselves. Their basic interests can change. A paraplegic, for example, may develop an interest in music to replace a previous interest in physical activity.”).

183 See supra notes 25–36 and accompanying text.

184 Bagenstos & Schlanger supra note 2, at 764 (citing Carolyn L. Vash, The Psychology of Disability, 22 REHABILITATION PSYCHOL. 145, 153 (1975), as reprinted in CAROLYN L. VASH & NANCY M. CREWE, PSYCHOLOGY OF DISABILITY 160 (2d ed. 2004)).

185 Id. at 768.

186 Menzel et al., supra note 142, at 2151 (“The primary meaning of ‘adapt’ appropriate for the present context of disability and chronic illness is ‘to adjust oneself to new or changed circumstances.’ This can be articulated even more specifically as changing ‘oneself so that one’s behavior, attitudes, etc. will conform to new . . . circumstances.’ . . . [T]he primary focus of adaptation is on a change in the adapting agent . . . .” (citations omitted)).
pride, is constitutive of our self-identity. If we change the sources of our happiness and pride, we have changed ourselves. If we are forced to alter these aspects of ourselves against our will, then we are harmed. We can be forced to alter ourselves because severe disability can require a choice between two unpleasant fates. We can either maintain our original ideals and risk not living up to them, or we can give up the ideals that, at least in part, made us who we were. A newly disabled parent, for example, may have to adjust her ideals of being a perfect caregiver and accept ideals that allow her to receive care as well.

Hedonic measures cannot detect these changes. Hedonic adaptation research misses the fact that the source of one's happiness matters. And it matters because some sources of happiness are intimately tied into self-identity.

C. Forced Self-Alteration Is a Harm

This Article offers a different solution to Ubel and Loewenstein's puzzle:\textsuperscript{187} potential tort victims are harmed because their personal identity does not emerge from the injury fully intact. The harm stemming from this alteration can be expressed in terms of connectedness, "narrativity," or constraints on autonomy: victims are harmed because they are not fully connected to the person that adapts to the injury, they cannot tell a coherent narrative that preserves the unity of their lives, or because disabilities constrain their ability to choose and maintain a set of ideals, goals, and preferences. These various explanations of the harm all pick up on a commonsense observation: some of our psychological characteristics are so fundamental to our identity that changing them changes us.

1. Harm as the Disruption of a Coherent Life Narrative

One of the most popular accounts of the self among philosophers, psychologists, and anthropologists is the "narrative" account of the self.\textsuperscript{188} These accounts suggest that people can change over time and that these changes are relevant to a host of normative conclusions, including determinations of harm.

Alasdair MacIntyre argues that we understand ourselves only in terms of self-stories that link together the disparate events in our lives.

\textsuperscript{187} See Ubel and Loewenstein, supra note 2, at S205. Even after being convinced that major injuries will not affect their long-term happiness, Ubel and Loewenstein remain convinced that many tort victims sustain substantial harm. They seek to resolve this puzzle by arguing that harm should not be defined solely by happiness and should instead account for lost capabilities.

into a story or narrative. He begins by arguing that we cannot understand humans, and humans cannot understand themselves, without understanding their actions. The only way to make human action intelligible is within a temporal context that accounts for the reasons that gave rise to the action. To illustrate this, MacIntyre asks how we might respond to the question, "What is he doing?" We could answer this question with a single word such as "digging," but this would hardly exhaust the information that we sought in asking our question. When we ask, "What is he doing?" we are most often seeking information that will allow us to make sense of the action. In order to make sense of human actions, we need to understand the actor's intentions. For example, someone may be "digging" in order to "find treasure" in order to "become rich." Another may be "digging" in order to "find treasure" in order to "solve a great historical mystery." These two sets of intentions paint different pictures of the action and the actors, and the differences stem from different long-term objectives. Notice that this information about intention gives our explanation directionality. We are constructing a story that orients toward an end. Even with an understanding of where the story is going, our ability to make sense of an action will be incomplete without an understanding of its history and context. We use the medium of stories to combine this historical information with information on the intent of the actor in order to make sense of actions. In short, we make sense of actions by placing them within a temporally extended narrative that has a beginning, middle, and end. We use this narrative form to make the actions of others, and ourselves, intelligible. Our self-narratives provide unity to our lives by organizing their disparate events into coherent stories that involve movement toward (or away from) some goal or good. MacIntyre refers to this unifying narrative as a "quest" to work out our what we value in life and to find our place within that conception of value.

\[190\] See id. at 194-96.
\[191\] See id.
\[192\] Id. at 192.
\[193\] See id. at 192, 194-95.
\[194\] See id. at 192-93.
\[195\] See id. at 193 ("[B]ehaviour is only characterised adequately when we know what the longer and longest-term intentions invoked are . . . .").
\[196\] See id. at 200-01 ("There is no present which is not informed by some image of some future and an image of the future which always presents itself in the form of a telos . . . towards which we are either moving or failing to move in the present.").
\[197\] See id. at 199 ("The notion of a history is as fundamental a notion as the notion of an action. Each requires the other.").
\[198\] See id. at 203-04.
\[199\] Id.
Charles Taylor has also argued that we make sense of ourselves only through narratives. As discussed in more detail above, he has argued that we cannot conceive of a person who has no framework of values. Such a person would have no way to give meaning to any of her life; no act would be worth doing. This person would at best be highly damaged and pathological. When we refer to selves or persons, therefore, we are necessarily referring to beings with (however rough and contradictory) conceptions of the good. If someone has a conception of the good, then by definition, she cannot be indifferent to whether her life is heading toward that good or away from it. Thus, selves necessarily develop a temporal understanding of how their life has unfolded so far and whether their life is heading toward the good or away from it. The only way to gain this temporal understanding is by constructing a self-narrative that links disparate events in one's life into a coherent story that has a beginning, middle, and end.

Self-narratives are endemic. "The connection between past and present is a fundamental component of human experience. . . . [O]ur drive to understand ourselves in terms of our past is the basic scaffolding of our psychological lives." Instead of seeing our lives as a jumbled collection of unrelated experiences, we organize this collection into a story. This story relates individual experiences to one another, and creates patterns within a set of remembered actions, emotions, and thoughts.

The narrative view allows for selves to change over time to greater and lesser degrees. Self-narratives are constantly changing because

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200 See supra notes 108-11 and accompanying text.
201 See TAYLOR, supra note 108, at 31.
202 Id. at 31.
203 See id. at 47.
204 Id. at 46-47.
205 See id. at 47.
206 HARDCASTLE, supra note 188, at 30 ("[W]e are driven to tell narratives . . . . This is something we cannot help but do, for it is the only way we have of understanding ourselves."); see also DANIEL C. DENNETT, CONSCIOUSNESS EXPLAINED 418 (1991); TAYLOR, supra note 108, at 48; John Barresi, On Becoming a Person, 12 PHILOS. PSYCHOL. 79, 91 (1999) ("From a phenomenological perspective, it does not matter whether this self that we attribute identity to through time is metaphysically real or mere psychological fiction, what matters is that it is essential to our phenomenology of self . . . .").
207 Arguably, evolutionary pressures have hardwired these tendencies into all humans. See Shaun Gallagher, Philosophical Conceptions of the Self: Implications for Cognitive Science, 4 TRENDS COGNITIVE SCI. 14, 19 (2000) ("[W]e cannot prevent ourselves from 'inventing' our selves. We are hardwired to become language users, and once we are caught up in the web of language and begin spinning our own stories, we are not totally in control of the product."); see also DENNETT, supra note 206, at 10-11.
narratives seek to provide a coherent story. When someone learns something new about herself, this new information may or may not fit well with her existing narrative. If it does not fit well, she may seek to reinterpret the new information in a way that is consistent with her existing narrative. But if this is not possible, she may have to alter her narrative. Although self-narratives are active creations, to call them "fiction" is to understate their importance under the narrative view. These narratives provide the necessary means through which we understand ourselves as agents.

Although self-narratives evolve over time, the thought of forced changes in their self-narrative rightly distresses people. Again consider Parfit's Greta Garbo hypothetical. Here, we recoil against the possibility that we would lose our ideals and goals. We recoil further from the thought that another person's ideals and goals will replace our own. Consider another example, offered by David DeGrazia: "Suppose one is presented with a choice between dying soon or surviving with the capacity to experience and act . . . [B]ut [with] such severe memory loss that one would be unable to remember the previous day, . . . [or] plan more than a few minutes into the future." Many people would think the term “surviving” in DeGrazia's example is merely technical. Something very important is lost. This person has lost the ability to hold long-term ideals and goals. These ideals and goals gave our self-narrative its directionality and allowed us to judge whether our lives had value. Without these ideals and goals, life could not have meaning.

When someone complains . . . that his or her life is meaningless, he or she is often and perhaps characteristically complaining that the narrative of their life has become unintelligible to them, that it lacks any point, any movement toward a climax or a telos. Hence the point of doing any one thing rather than another at crucial junctures in their lives seems to such a person to have been lost.

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208 Schechtman, supra note 107, at 98; Catriona Mackenzie, Personal Identity, Narrative Integration, and Embodiment, in Embodiment and Agency 100, 107 (Sue Campbell et al. eds., 2009).

209 One scholar uses the example of a woman who thinks of herself as ugly, but then begins to evaluate the evidence in the mirror. See Roy Schafer, Retelling a Life 10 (1992).

210 Daniel C. Dennett, The Self as a Center of Narrative Gravity, in Self and Consciousness: Multiple Perspectives 103, 106-07 (Frank S. Kessel et al. eds., 1992) (noting that the concept of a self that is created through narrative is similar to abstract concepts in physics like centers of gravity—both are fictions, but both are extremely useful in trying to understand the object of study). For discussions of the constraints that culture puts on an individual’s self-narrative, see DeGrazia, supra note 100, at 84-86, Schafer, supra note 209, at 53-55, and Schechtman, supra note 107, at 95.

211 See supra notes 157-59 and accompanying text.

212 DeGrazia, supra note 100, at 80.

213 MacIntyre, supra note 189, at 202.
In summary, this person has lost the ability to join the discrete events in her life into a coherent temporally extended story. This example suggests that people assign intrinsic value to their self-narratives, and wish to retain as much control as possible over how they unfold.214

Under the narrative view of identity that MacIntyre and Taylor espouse, disruptions to one's self-narrative can constitute harms. Disabilities often create such disruptions. They often disrupt people's ideals and goals and leave them without a clear vision of where their life is heading. Such disruptions hinder the creation of a coherent and unified life narrative. As S. Kay Toombs illustrated above, severe disability can sometimes prevent one from seeing one's life as a coherent whole.215 Disability threatens to create an enduring disconnect between predisability lives and postdisability lives. Marya Schechtman, another proponent of the narrative view of self, has summed up these arguments in this way:

We often describe . . . people as having 'lost their identities,' say that they 'are no longer the same person,' that 'the person we knew is gone,' and so on. My suggestion is that these statements need not be considered entirely metaphorical. . . . [W]hat the addict, prisoner of war, or abused spouse is being robbed of is, in a very real sense, his or her life.216

Large changes in one's physical capacities are particularly likely to require large changes to one's self-narrative or create breaks in one's unified life story. Some narrative theorists claim that all humans understand themselves, at least in part, as their physical body.217 Our perceptions and engagement with the world are structured through our bodies.218 Because our self-narratives arise within this embodied context, it should not be surprising that bodily capacities form the "background conditions for the ongoing unity and intelligibility of our lives."219 Because injuries that decrease physical capacities disrupt a foundational aspect of self-narratives, we should expect that these injuries will be particularly harmful because they will be particularly disruptive to one's self-narrative.220

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214 See DeGrazia, supra note 100, at 80–82, 89, 107.
215 See supra note 146 and accompanying text.
216 Schechtman, supra note 107, at 88 (emphasis in original).
217 Mackenzie, supra note 208, at 114 ("[A] condition of possibility of this narrative is that we have an integrated . . . conception of ourselves as embodied agents.").
218 See id. at 116.
219 Id. at 118.
220 Howard Brody, Stories of Sickness 2 (2003) ("[T]he appearance of the sickness marks a radical redirection of the trajectory of the life story.").
2. Harm as a Constraint on Autonomy

One way that we exercise autonomy is to choose our own ideals and goals. For ease of exposition, this section will refer to these collectively as one’s “commitments.” We are inevitably constrained in the choice of our commitments by social forces. These endemic constraints are not harms from the point of view of tort law. Yet some additional constraints on the choice and maintenance of commitments can constitute harms. Disabilities can create these types of additional constraints.

The term autonomy has multiple meanings. Joel Feinberg identifies four main uses of the term: the capacity to govern oneself, the accomplishment of self-governance to a greater or lesser degree, an ideal that values such self-governance, or sovereignty over oneself. The conceptual core of all of these meanings is arguably the notion of self-determination. People are self-determined when they reflect upon and choose their commitments, and are not merely conduits for the commitments of their parents or their culture.

Another way to phrase this idea is that people choose their own commitments, or are the author of those commitments.

This Article is most concerned with autonomy as the achievement of self-determination, although it also argues that self-determination is

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221 See Dworkin, supra note 108, at 6 ("'[A]utonomy' is used in an exceedingly broad fashion. . . . About the only features held constant from one author to another are that autonomy is a feature of persons and that it is a desirable quality to have."); Feinberg, supra note 101, at 27-51 (1986) (describing four common meanings of "autonomy" and listing twelve sub-aspects of one of them). For another comprehensive account of autonomy, see generally The Inner Citadel: Essays on Individual Autonomy, supra note 129, passim. For a discussion of the closely related concept of freedom, see generally Tim Gray, Freedom (1991) (attempting to define freedom and the core meaning attendant to all of its different usages).

222 See Christman, supra note 129, at 3, 5-6 (suggesting that self-governance is the conceptual core of Feinberg’s list, and that self-determination is at the core of self-governance); see also Robert Young, Autonomy and the "Inner Self," in The Inner Citadel: Essays on Individual Autonomy, supra note 129, at 77, 78 ("[T]o exercise one’s freedom in such a way as to order one’s life according to a plan or conception which fully expresses one’s own choices . . . is the heart of our notion of autonomy.").

223 See Feinberg, supra note 101, at 33-35; see also Gray, supra note 221, at 52. In Richard Fallon’s terminology, self-determination is a descriptive rather than ascriptive sense of autonomy. See Richard H. Fallon, Jr., Two Senses of Autonomy, 46 Stan. L. Rev. 875, 877-78 (1994) (defining descriptive autonomy as “the extent to which they are meaningfully ‘self-governed’ in a universe shaped by causal forces”). “Descriptive autonomy gives us a warranted sense that our lives are at least partly of our own making, not the mere product of external forces. It also provides the foundation for pride and satisfaction in a life well-lived.” Id. at 899.

valuable. Self-determination can occur to a greater or lesser degree and is closely related to the concept of authenticity. A commitment is authentically one's own to the degree to which one identifies with it, takes ownership of it, endorses it, or adopts it for reasons of one's own. These different verbal formulations have slightly different implications for the concept of authenticity, but these differences are not relevant here. These formulations capture a rough intuition that one can author, at least partially, one's own commitments.

People are never fully self-determined or fully unconstrained authors of themselves. Ideals and goals do not spring from rational deliberation fully formed. We are born without language and without reason, which provide the basic tools for self-determination. Our earliest beliefs are implanted in us and not seriously questioned, and are therefore not authentically our own. But our capacity to reason and critically reflect on our ideals and goals normally increases with maturity. The movement from childhood to adulthood moves us closer to the ideal of self-determination. But even adults will never be fully (or perhaps even substantially) self-determined. The process of learning a particular language forms a foundation for our capacity for reason, but also constrains this capacity. Cultural forces continue to play a large and often unexamined role in setting our ideals

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226 Raz, supra note 225, at 372; Fallon, supra note 224, at 877 (arguing that descriptive autonomy is a matter of degree and depends in part on the number of options available). This Article sets aside the question of whether determinism undermines the possibility of free will and hence undermines self-determination. For a discussion of these issues and a defense of the possibility of self-determination, see DeGrazia, supra note 100, at 89–106.

227 Feinberg, supra note 101, at 33 ("A person is authentic to the extent that . . . [H]e can and does alter his convictions for reasons of his own . . ."); Gray, supra note 221, at 53.

228 For a brief overview of the potential differences between some of these formulations see Christman, supra note 129, at 6–7.

229 Raz, supra note 225, at 369 ("The autonomous person is a (part) author of his own life. The ideal of personal autonomy is the vision of people controlling, to some degree, their own destiny, fashioning it through successive decisions throughout their lives."); Gerald Dworkin, The Concept of Autonomy, in THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY, supra note 129, at 54, 60 ("It is only when a person identifies with the influences that motivate him, assimilates them to himself . . . that these influences are to be identified as 'his.'").

230 Feinberg, supra note 101, at 34.

231 See id. at 34–37.

232 Daniel R. Williams, Mitigation and the Capital Defendant Who Wants to Die: A Study in the Rhetoric of Autonomy and the Hidden Discourse of Collective Responsibility, 57 HASTINGS L.J. 693, 709 (2006) ("The healthy individual’s acquisition of greater and greater responsibility as he or she moves through adolescence into adulthood cultivates the capacity and the freedom to navigate through life, through the various institutional, social, political, circumstantial forces that are often beyond the individual’s immediate control. The sacredness of the navigation resides in the importance it bears in bringing thematic unity, coherence, and integrity to living.").

233 Cf. Gray, supra note 221, at 35 (noting that if a person were completely free to choose her own language, she would be unable to express herself); H. J. McCloskey, A Critique of the Ideals of Liberty, 74 MIND 483, 486–87 (1965) (describing liberty as noninterfer-
and goals. For instance, the freedom to become an advocate of murder, rape, and genocide is severely constrained in our society. Most of us instead make choices from a smaller set of options that are compatible with prevailing moral beliefs. Even within this smaller set, self-determination is constrained. For example, the pervasive socialization surrounding gender roles yields a qualified or restricted form of self-determination.

The existence of these constraints does not rob the concept of self-determination of meaning. We can still sensibly talk about people who are more self-determined than others—people who have settled on a set of ideals and goals in a more deliberative and self-reflective fashion. Although we cannot question all of our values at once (else we would have no fixed point from which to judge them), we can reevaluate values piecemeal and make progress toward identifying with or rejecting our commitments.

Autonomy, understood as self-determination, is an element of welfare. The idea of being able to author your own commitments is deeply ingrained in pretheoretic intuitions of the good life. Without self-determination, we would merely be conduits for the commitments of others or random causal processes beyond our control. To have any control over the direction of one’s life, one needs to have some role in authoring one’s commitments. Self-determination is so deeply rooted in our concept of the good that it has been used to justify...
foundational commitments such as freedom of speech and freedom of religion.\textsuperscript{240}

Authoring one’s commitments would be of little use without the freedom to maintain those commitments. Self-determination does not happen at one isolated time. It is a continual process of reflection that leads to the endorsement and rejection of commitments.\textsuperscript{241} The accomplishment of authoring one’s own commitments and the freedom to revise or maintain those commitments are necessarily related. Self-determination, therefore, requires that people have the freedom to maintain (or revise) their existing commitments.

Constraints on the freedom to maintain one’s commitments are harms.\textsuperscript{242} Just as one is never fully self-determined, one is never fully free to maintain one’s commitments. We can condemn some constraints on this freedom and sensibly refer to them as harms to the person so constrained. Not all constraints are as endemic as immaturity and basic processes of socialization. Some are more targeted, such as oppression, coercion, manipulation, and deception. These constraints are harms because they reduce the victim’s options and set back the victim’s pursuit of her preferences.\textsuperscript{243} Similarly, constraints

\textsuperscript{240} See John Gray, Liberalism 60 (1986); David A. J. Richards, Autonomy in Law, in The Inner Citadel: Essays on Individual Autonomy, supra note 129, at 246, 246; Gidon Sapir, Religion and State—A Fresh Theoretical Start, 75 Notre Dame L. Rev. 579, 609 (1999). Autonomy can also provide a reason to give preference-satisfaction moral weight; if preferences are not somehow your own, then it is less clear why it would be wrong or harmful to prevent you from satisfying them. See Christman, supra note 129, at 19.

\textsuperscript{241} Feinberg, supra note 101, at 35–37.

\textsuperscript{242} This Article does not take a position on whether constraints that only remove morally repugnant options can constitute harms. Raz qualified his valorization of autonomy by arguing that autonomy only contributes to well-being if it is used to pursue the good. Raz, supra note 225, at 381. Similarly, Nussbaum and Sen argue that capabilities to do evil are not valuable. See Nussbaum, supra note 70, at 83 (“Not all actual human abilities exert a moral claim [to be given the opportunity to develop], only the ones that have been evaluated as valuable from an ethical viewpoint. (The capacity for cruelty, for example, does not figure on the list [of fundamental capabilities].)"); id. at 81 (noting that capabilities are valuable when they are used to choose lives that people “have reason to value”); Sen, supra note 80, at 65 (noting that freedom is reduced by eliminating options that a people have “reasonably defendable” preferences for). This Article presumes that the vast majority of commitments that tort victims hold are not morally repugnant or evil. Raz, supra note 225, at 381 (“A moral theory which recognizes the value of autonomy inevitably upholds a pluralistic view. It admits the value of a large number of greatly differing pursuits among which individuals are free to choose.”). Therefore, constraints on maintaining these commitments can count as harms regardless of whether all or only some constraints on autonomy cause harm.

\textsuperscript{243} Raz, supra note 225, at 413 (“Depriving a person of opportunities or of the ability to use them is a way of causing him harm.”). Stephen Perry asks us to consider a Miss America contestant who is kidnapped and prevented from competing. See Stephen Perry, Harm, History, and Counterfactuals, 40 San Diego L. Rev. 1283, 1292–93 (2003). According to Perry, she is harmed because her kidnappers have robbed her of an opportunity to compete. Id. In Joel Feinberg’s terminology, she has been harmed because her interest in competing has been thwarted. Joel Feinberg, I The Moral Limits of the Criminal Law: Harm to Others 92–93 (1984). As an aside, this Article does not take a position on
on the freedom to maintain one's commitments are harms because they create a setback to one's interest in self-determination.

Again, head injury cases provide the simplest illustration of harmful constraints on one's opportunity to maintain one's commitments. As discussed above, head injuries often produce sudden and drastic changes in personality. The sudden and drastic nature of the changes strongly suggests that the changes are not the result of rational deliberation. Instead, these changes appear largely determined by the biology of the brain. If anything, the term "constraint" appears to underestimate the degree to which a head injury can reduce one's opportunity to maintain prior commitments. It might be more accurate to say that some of these injuries deterministically prevent the maintenance of prior commitments. Nonetheless, the more generalized concept of a constraint is sufficient to explain the harm in these cases.

Physical disabilities can create constraints on self-determination that have effects over and above those created by the endemic constraints of immaturity and socialization. Disabilities impose constraints on one's ability to exercise physical agency. This is certainly a harm. But as Part III.B.1 illustrated, this is not all they do. They can cause disruptions to the set of commitments with which the victim previously identified. Disabilities have the potential to make former ideals and goals more difficult to achieve. This can put severe pressure on these commitments and force people to modify them in often substantial ways. Seana Shiffrin defines harm as "the imposition of a state or condition that directly or indirectly obstructs, prevents, frustrates, or undoes an agent's . . . efforts to fashion a life . . . that is distinctively and authentically hers."244 This is exactly what the forced self-alterations that sometimes accompany disability do: they frustrate a victim's past efforts to fashion a life by disrupting the continued viability of her previous ideals and goals.

The fact that hedonic adaptation leads people to alter their commitments suggests that the constraints are severe. Constraints are matters of degree. As the costs of maintaining one's commitments increase, one's freedom to maintain those commitments becomes

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more constrained. This spectrum of constraints leads to line-drawing problems. Some constraints will be too small to be worth taking account of in tort law. But people do not abandon their authentic commitments easily. By definition, people have strong desires to maintain their authentic commitments. To identify with a commitment is to endorse and integrate it within one’s self-concept. To change it requires a change to this self-concept. Someone may want to be the type of person who travels the world on a whim, with minimal planning. Someone else may want to be the type of person who will never be reliant on others, and instead will be fiercely independent. Yet another person may want to be the type of person who earns a living by performing outdoor manual labor. Whatever the ideal, whatever the goal, these commitments constitute the yardsticks that they will use to judge whether their lives are going well or not. One cannot choose to identify with these commitments while simultaneously remaining neutral to whether they are worthy pursuits. Similarly, one cannot be neutral as to whether they should persist through time.

An analysis of the options open to many victims of severe disability confirms that the disabilities constrain their freedom to maintain their previous commitments. Such a victim can choose between two unpleasant fates. She can maintain her original ideals and risk falling short of them, or she can alter those ideals to better fit with what she perceives her new situation will allow her to accomplish. Maintaining one’s previous commitments can be extremely costly. Spinal cord injuries, for example, are often profoundly disruptive to the victim’s life in a way that calls into question whether, postinjury, they can lead a life that is worthy of living from the point of view of their preinjury commitments. Fifty percent of patients who have experienced a spinal cord injury report suicidal thoughts. Actual suicide rates after spinal cord injury are three to five times higher than similarly situated people without such injuries. In the words of one victim: “Before
the accident I was happy and life was good. The injury and everything that has happened since has choked any life and happiness out of me. I have nothing now . . . . Am nothing. . . . My life is in darkness. . . . I'm shattered." Without adaptation, this victim's life would remain in a constant state of darkness and disintegration. Resisting the process of adaptation would be an extremely costly choice. These costs create constraints that are sufficiently severe that many people choose to alter their commitments.

The process of hedonic adaptation also constrains the freedom to choose a new set of commitments. The process of hedonic adaptation is largely unconscious. "One of the hallmarks of the psychological immune system is that it seems to work best when no one is watching, and when its operations are explicitly scrutinized, it may cease functioning altogether." Nonetheless, tort victims exercise some conscious choice over how they adapt. For example, a person who must compromise her ideal of living independently can choose which of several types of assistance to seek out. A person who can no longer run marathons can choose which of several other pursuits will best fit her preinjury identity as an athlete. Thus, victims exhibit some authorship over their postinjury selves. The key to understanding the harms of self-altering injury, however, is to understand the set of options from which victims choose their new commitments. Although a victim has more options when deciding how to adapt than deciding whether to adapt, this exercise of agency is still constrained. We judge how well our lives are going at least partially based on how well we live up to our ideals, how much progress we are making toward our goals, and how much we are satisfying our preferences. The process of hedonic adaptation entails altering these commitments in such a way that we can continue to say that our lives are going well. One's choice of postinjury commitments is therefore constrained to the set of possible commitments that is consistent with such judgments. These constraints do violence to the idea of self-determination.

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248 Smith & Sparkes, supra note 9, at 619-20.
249 Gilbert et al., supra note 10, at 619. See generally Wilson, supra note 117, at 38-40 (explaining the "psychological immune system").
250 The preceding discussion should begin to show how the harms of self-altering injury could be integrated into the capabilities approach: the freedom or opportunity to maintain one's commitments is arguably a fundamental capability. Nussbaum lists Practical Reason as one of the two most important capabilities. Nussbaum, supra note 70, at 82. Practical Reason includes "[b]eing able to form a conception of the good and to engage in critical reflection about the planning of one's life." Id. at 79. The pressures of severe physical disability do not reduce one's capacity or ability to form a conception of the good, or reduce one's ability to critically reason. But Nussbaum uses her list to defend a minimal threshold of freedom that all people deserve. Id. at 86. Given her focus on threshold levels, it is not surprising that she phrases her explication of Practical Reason in terms of being "able" to form a conception of the good. It seems fair to suggest that scholars should interpret Practical Reason more broadly to encompass matters of degree. Thus one's free-
D. Implications for Tort Damages

The thrust of this Article has been to introduce and defend the concept of self-altering injury. A number of concerns will emerge if legislators ultimately decide that damages for self-altering injuries are appropriate. For example, we might ask whether it is better to measure self-altering injuries on a case-by-case basis, or instead make broad rules that apply to actuarial classes of persons and injuries. This concern is common to all aspects of tort damages, and other articles address the tradeoffs involved with these decisions. This section will therefore not address this issue. This section will also set aside for future work other pragmatic issues of implementation. This section will, however, briefly sketch the argument that self-altering injuries can trigger tort damages under deterrence theories. It will then argue that the phenomenon of hedonic adaptation, no matter how robust, cannot justify the conclusion that tort awards are systematically too high.

Once self-altering injuries are characterized as harms, the implications for deterrence theories are fairly straightforward. From an efficient deterrence perspective, the harms stemming from self-altering injuries should be reflected in damage awards. The tortfeasor should internalize harms in order to promote proper safety precautions. The tort system could force the tortfeasor to pay these damages to the government or to the victims themselves. To the extent that victims need additional incentives to sue tortfeasors, some or all of these payments should go to them regardless of whether these payments serve any compensatory function. Of course, the actual measure of damages under any deterrence theory will be a function of numerous fac-

One need not accept Nussbaum's list of fundamental capabilities, or accept the proposed interpretation of Practical Reason above, to accept the viability of self-altering injury. This explains why this Article has focused on developing the notion of self-altering injury separately from the capabilities approach. All that is required is the (hopefully unobjectionable) assertion that forced changes in one's commitments are harms.

This Article does not explore the implications of self-altering injuries for compensatory, corrective justice, and civil recourse theories of tort law. These issues are left for future work.

tors such as the incentives and abilities of the victim and the tortfeasor to take precautions. For purposes of this Section, however, it is sufficient to note that the efficient deterrence rationale gives us at least a prima facie reason to suspect that the tort system should award some amount of damages for self-altering injuries.

Even if deterrence is the sole basis for awarding damages for self-altering injuries, tort law should recognize claims for self-altering injury. Ex ante, we are not indifferent to whether we suffer self-altering injury. Nor should we be. Self-altering injuries constrain one's ability to maintain a set of commitments. These constraints are harms. If tort damages can reduce the incidence and severity of self-altering injuries by deterring risky conduct, then the tort system should force tortfeasors to internalize these harms by paying damages.

If we accept that self-altering injuries occur and that a tort system can recognize them, then two main implications follow. First, any tort system that seeks to properly account for harm should recognize self-altering injuries. The bulk of this Article has sought to define and defend the claim that self-altering injuries exist. This section has added to that claim by briefly sketching some thoughts as to why awarding damages for self-altering injuries is consistent with deterrence-based justifications for tort damages. There is much theoretical and pragmatic work that remains to be done to flesh out the details of how tort law should respond to self-altering injuries. Nonetheless, the concept of self-altering injury deserves the attention of tort scholars, and deserves serious consideration as a category of tort damages.

Second, and more concretely, the relationship between hedonic adaptation and self-alteration implies that to the extent that hedonic adaptation exerts downward pressure on tort awards, the concept of self-altering injury puts a corresponding upward pressure on those awards. Thus hedonic adaptation, standing alone, does not show that juries systematically overestimate the harms of severe disability. Indeed, any claims of over- or underpayment become more difficult to make because they require an assessment of both the degree to which victims adapt and the degree to which this adaptation causes self-alteration. As further research explores both hedonic adaptation and the concept of self-altering injury, we may develop a better sense of the relative magnitude of each of these forces. If the magnitude of harm that self-alteration generates is similar to the magnitude of the hedonic losses thereby avoided, then current jury awards may not be systematically biased by mispredictions of hedonic adaptation. In fact, these jury awards may be roughly accurate. But here, the question of magnitude is key, and unresolved. Current research supports only the following claim: the phenomenon of hedonic adaptation, no matter
how robust, cannot alone support the claim that tort awards are systematically too high.

**Conclusion**

Happiness research offers a powerful tool for analyzing the harms that result from disability. However, this tool illuminates only part of what matters for defining harm. Other legal scholars have sought to defend the nonhedonic aspects of harm by adopting the capabilities approach. This approach is incomplete. This Article provides another account of the nonhedonic aspects of harm—one that is rooted in the concept forced alterations of the self. In the context of debates on happiness research and tort damages, this notion of self-altering injury suggests that hedonic adaptation, standing alone, cannot support the claim that tort awards are likely to be too high. But it has much more far-reaching implications as well; the concept of self-altering injury is useful even apart from the issues surrounding happiness research and tort damages. Head injuries can cause forced alterations of the self whether or not the injury ever affects the victims' happiness. People do not hedonically adapt to chronic or degenerative diseases, yet these diseases too can cause alterations of the self. The concept of a forced alteration of the self is useful even beyond tort law. For example, it might be able to assist proponents of group rights. Here, it will be more natural to shift to the language of identity rather than selves. Thus, proponents of group rights could argue that groups should have the freedom to maintain their identity, and that forced alterations of the groups' identity can constitute group harms. These arguments are not pursued here. Rather this Article has used happiness research and tort law as a useful background through which to introduce and provide an initial defense of the claim that forced alterations of the self can constitute harms. This claim deserves the attention of tort scholars and deserves serious consideration as a category of tort damages.