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Tax Free Damages: Trespassory Torts and Emotional Harms

Joi T. Christoff

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TAX FREE DAMAGES: TRESPASSORY TORTS AND EMOTIONAL HARMS

*Joi T. Christoff**

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I. INTRODUCTION

For decades before 1996, damages awarded for personal injuries were not taxable.¹ The Internal Revenue Code had excluded from taxable income damages awarded for “personal injuries or sickness.”² In 1996, however, Congress amended § 104(a)(2) so that the exclusion applied only to “personal *physical* injuries or *physical* sickness.”³ The amendment further specified that “emotional distress shall not be treated as a physical injury or physical sickness.”⁴

Thus, after decades of settled law, Congress created the need to distinguish, for tax purposes, between injuries that are “physical” and those that are not—a line that is difficult to draw. Additionally, it declared that “emotional distress” is not “physical”—despite scientific research establishing the strong connection between emotional and physical aspects of human health.⁵ Further, by giving disfavored tax treatment to damages for emotional distress, as distinguished from damages for

1. “From the beginning of tax time, awards or settlement proceeds for personal injuries have been excluded from taxation.” *Perez v. Comm’r*, 144 T.C. 51, 59 (2015) (citing Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1057, 1066 (1919)).

2. I.R.C. § 22(b)(5) (1939) (current version at I.R.C. § 104(a)(2) (2018)).

3. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838.

4. I.R.C. § 104(a)(2) (2000).

5. *See, e.g.,* Brian Vastag, *Decade of Work Shows Depression Is Physical*, 287 JAMA 1787, 1787 (2002).

physical injuries, it acted against the trend in tort law, which has long accepted that emotional harm is as legitimate as physical harm. This division between taxable emotional distress damages and nontaxable emotional distress damages—hinging on the definition of “physical injuries”—is highlighted in the context of sexual harassment cases.

Sexual harassment victims are often awarded emotional distress damages and thus often pay taxes on their awards, even though claims involving unwanted sexual advances and contact seem incontrovertibly and inherently physical. At what point is the abuse sufficiently “physical” under the Internal Revenue Code that the victim will not be taxed on the award? The prevailing interpretation of “physical” requires observable bodily harm, such as a cut or a bruise.⁶ In other words, the damages are taxed if sexual harassment causes anxiety and depression, insomnia, headaches, and stomach problems. Damages are not taxed, though, if the sexual harassment is memorialized with a bruise.

This Article proposes a conception of the “personal physical injury” exclusion that does not require observable bodily harm. The § 104 exclusion has historically been interpreted by reference to tort principles. And tort law has long recognized the legitimacy of emotional distress arising from invasions of physical interests that do not cause bodily harm, even when it would not recognize emotional distress in other contexts. The personal physical injury exclusion should be interpreted to recognize the inherently physical nature of some torts, particularly the trespassory torts of battery and false imprisonment, which protect against invasions of a person’s physical autonomy, security, and liberty. Thus, emotional distress suffered as a result of these inherently physical torts is attributable to a personal physical injury and should be excluded.

Part I below provides a brief history of, and the purported rationale for, the personal injury exclusion and an overview of the criticisms of the 1996 amendment. Part II illustrates the current state of the personal physical injury exclusion with several hypotheticals, including application of the infamous Bruise Ruling. Part III sets out and fully explains this Article’s proposal: that the “personal physical injury” exclusion of § 104(a)(2) should be interpreted consistently with tort principles such that emotional distress damages attributable to intentional invasions into a person’s physical autonomy, security, and liberty should be excluded from taxable income regardless of whether the tortfeasor memorializes the event with a bruise. Part IV shows that the legislative history of the amendment indicates that Congress did not set out to change

6. See *infra* Part II.C.

80 years of tax law by taxing emotional distress damages attributable to these physical invasions identified in Part III. Part V highlights, in support of this Article's argument, a sex abuse case in which the IRS was willing to assume § 104(a)(2) "personal physical injuries."

II. BRIEF HISTORY AND RATIONALE OF THE PERSONAL INJURY EXCLUSION

An exclusion for damages recovered for personal injuries was first codified in 1919.⁷ Several rationales have been offered in support of the long-standing exclusion. The primary justification for excluding from taxable income damages awarded for personal injuries is the idea that these kinds of recoveries merely restore the plaintiff to the same position he would have been in without the personal injury. The plaintiff has merely recovered "human capital," and he has not recognized any gain.⁸ The exclusion might, alternatively, be based on compassion for the victim,⁹ or the idea that the government should not benefit from the misfortune of its citizens.¹⁰ It has also been proposed that the exclusion is justified because the taxpayer's injury—and accession to wealth—is involuntary.¹¹ He surely would have rather avoided the physical injury—and the damages—and it would be unduly harsh to tax him for a recovery he would have rather avoided.¹²

While, historically, it was generally understood that the personal injury exclusion applied to both physical and non-physical injuries,¹³ the exclusion was primarily utilized to exclude damages for physical injuries and only a few nonphysical injuries such as defamation and loss of

7. Revenue Act of 1918, ch. 18, § 213(b)(6), 40 Stat. 1057, 1066 (1919).

8. *O'Gilvie v. United States*, 519 U.S. 79, 86 (1996) (describing the purpose of I.R.C. § 104(a) as excluding "those damages that, making up for a loss, seek to make a victim whole, or, speaking very loosely, 'return the victim's personal or financial capital.'"). This rationale, as all the others, has been questioned. *See, e.g.*, Douglas A. Kahn, *Compensatory and Punitive Damages for a Personal Injury: To Tax or Not to Tax?*, 2 FLA. TAX REV. 327, 343 (1995); Joseph M. Dodge, *Taxes and Torts*, 77 CORNELL L. REV. 143, 152–53 (1992).

9. J. Martin Burke & Michael K. Friel, *Tax Treatment of Employment-Related Personal Injury Awards: The Need for Limits*, 50 MONT. L. REV. 13, 43 (1989).

10. Kahn, *supra* note 8, at 349.

11. *Id.* at 347–48.

12. *Id.*

13. *See United States v. Burke*, 504 U.S. 229, 236 n.6 (1992) ("Although the IRS briefly interpreted § 104(a)(2)'s statutory predecessor, § 213(b)(6) of the Revenue Act of 1918, 40 Stat. 1066, to restrict the scope of personal injuries to physical injuries, . . . the courts and the IRS long since have recognized that § 104(a)(2)'s reference to 'personal injuries' encompasses, in accord with common judicial parlance and conceptions, nonphysical injuries to the individual, such as those affecting emotions, reputation, or character, as well.").

consortium.¹⁴ In the 1980s and 90s, courts began interpreting the statute much more broadly, though, extending it to more cases that did not relate to physical injuries. For example, it was held that damages were excluded from taxable income for deprivation of the right to free speech,¹⁵ for injuries to professional reputation,¹⁶ wrongful discharge,¹⁷ and violation of the ADEA.¹⁸

As a result of the expanded interpretation of the exclusion to encompass all manner of damages—an exclusion that was seen to have “careened out of control with respect to nonphysical personal injuries”¹⁹—the IRS sought to modify § 104(a)(2) to limit the exclusion to damages for personal *physical* injuries, rather than just personal injuries.²⁰

A. *The 1996 Modification—“Physical” Injury and Sickness*

In 1996, Congress radically changed the personal injury exclusion by § 1605 of the Small Business Job Protection Act of 1996 entitled: “Repeal of Exclusion for Punitive Damages and for Damages Not Attributable to Physical Injuries or Sickness.”²¹ Revised § 104(a)(2), and the current version thereof, reads:

14. Burke & Friel, *supra* note 9, at 39–41.

15. Bent v. Comm’r, 87 T.C. 236, 249 (1986), *aff’d*, 835 F.2d 67 (3d Cir. 1988).

16. See Miller v. Comm’r, 93 T.C. 330, 335 (1989); Threlkeld v. Comm’r, 848 F.2d 81, 82 (6th Cir. 1988).

17. Byrne v. Comm’r, 883 F.2d 211, 216 (3d Cir. 1989).

18. Schleier v. Comm’r, 26 F.3d 1119, 1119 (5th Cir. 1994), *rev’d*, 515 U.S. 323 (1995).

19. J. Martin Burke & Michael K. Friel, *Getting Physical: Excluding Personal Injury Awards Under the New Section 104(a)(2)*, 58 MONT. L. REV. 167, 167 (1997). It is interesting to note that this is not the only context in which the meaning of “personal injury” has been so difficult. There are three recognized approaches to interpreting “personal injury” in § 1328(a)(4) of the Bankruptcy Code, which excludes from discharge debts owed due to “personal injury” inflicted by the debtor. A “narrow approach requires a physical injury to the individual”; a “middle approach reads “personal injury” to include some non-physical injuries such as defamation, sexual harassment, age discrimination, and emotional distress, but not business or financial injuries; and a “broad approach includes business and financial injuries if they are defined as a personal injury tort under non-bankruptcy law.” *In re Bailey*, 555 B.R. 557, 561 (Bankr. N. D. Miss. 2016).

20. Congress attempted, unsuccessfully, in 1989 to limit the exclusion for “personal injuries and sickness” to cases involving *physical* injuries and sickness. H.R. 3299, 101st Cong. § 11641 (1989). While that amendment did not pass, what did pass was an amendment that nonetheless treated damages related to nonphysical injuries less favorably than damages related to nonphysical injury, but only with respect to punitive damages. Omnibus Budget Reconciliation Act of 1989, Pub. L. No. 101-239, § 7641(a), 103 Stat. 2106, 2379 (amending I.R.C. § 104(a)(2)). Thus, the amendment only strengthened the argument that, pre-1996, the “personal injury” exclusion covered both physical and nonphysical injuries. See Morgan L. Holcomb, *Tax Anxiety*, 14 FLA. TAX REV. 77, 87 (2013).

21. Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605, 110 Stat. 1755, 1838.

(a) [G]ross income does not include—

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as period payments) on account of personal physical injuries or physical sickness;

For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness.”²²

Thus, where pre-1996 the exclusion had been for damages received on account of “personal injuries or sickness,” after the 1996 modification, the exclusion now applies only to “personal *physical* injuries or *physical* sickness.” Further, all punitive damages are taxed post-1996, even if received on account of physical injuries or physical sickness, with one very narrow exception.²³

Significantly, where compensatory damages are received on account of “personal physical injuries,” the entire amount is excludable. That is, lost wages—if received on account of personal physical injury—are excluded even though they are a substitute for otherwise taxable income.²⁴ And damages for emotional distress—if received on account of personal physical injuries—are excluded, despite the statute’s declaration that “emotional distress shall not be treated as a physical injury.”²⁵

Thus, whether a plaintiff’s damage award is received “on account of personal physical injuries,” is a critical point. A determination that damages are received “on account of personal physical injuries” is a watershed²⁶ determination bestowing tax-free status on all compensatory damages flowing therefrom that would otherwise be taxable. What, then, is the definition of “personal physical injuries,” as distinct from a

22. I.R.C. § 104(a)(2) (2018).

23. Punitive damages in a wrongful death action are excluded from taxable income if state law provides that only punitive damages may be awarded in a wrongful death action. *See* H.R. Rep. No. 104-737, at 301 (1996), *as reprinted in* 1996 U.S.C.C.A.N. 1677, 1793.

24. The broad principle that damage recoveries ought to be given the tax character of the item for which they are intended to substitute breaks down in the context of physical injury recoveries. *See* ROBERT W. WOOD, *TAXATION OF DAMAGE AWARDS AND SETTLEMENT PAYMENTS 2–4* (2012 Supp., 4th ed. 2009). Wages would have been taxable; thus, application of that general principal would lead to the conclusion that damages for lost wages would be taxable.

25. Treas. Reg. § 1.104-1(c) (as amended in 2012) (“Emotional distress is not considered a physical injury or physical sickness. However, damages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2).”).

26. Robert W. Wood, *Are False Imprisonment Recoveries Taxable?*, TAX NOTES, April 21, 2008, at 279 (noting the “watershed” nature of physicality determination stating: “Once one crosses the threshold of physicality, all damages flowing from the physical event, including emotional distress damages, also become excludable.”).

“personal injury,” under § 104(a)(2)? It is rather easy to determine that, by adding the word “physical,” Congress wanted to curtail the exclusion. But to what degree? The distinction has been the subject of much criticism and confusion. The subject of even more criticism and confusion is the modification’s treatment of damages awarded for emotional distress since the modification declared that “emotional distress” is not a physical injury or physical sickness.

B. *Criticisms, Confusion, and Calls for Reform*

The idea that damages awarded for physical injuries are taxed differently from damages awarded for emotional distress has been subject to much criticism. As many have pointed out, the hypothesized rationales for not taxing damages compensating victims for their physical injuries also hold true in the context of damages to compensate victims for their emotional injuries.²⁷ Additionally, the idea that emotional suffering is not “physical” is contrary to modern scientific research that establishes the strong connection between emotional and physical aspects of human health.²⁸ Treating emotional harm as somehow less real or worthy of compensation than physical harm is also counter to the decades long trend in tort law.²⁹

The criticisms have spawned calls for reform that are wide ranging—some arguing to tax more damage awards and some arguing to tax fewer damage awards. One proposal is to make all damages received as a substitute for lost income taxable, whether related to emotional or physical harm, eliminating the distinction between “physical injuries and physical sickness” and “emotional distress.”³⁰ Another proposal is to tax nearly all damages, including those received on account of physical injuries, and to inform juries of the tax consequences so that appropriate

27. E.g., Ronald H. Jensen, *When are Damages Tax Free?: The Elusive Meaning of Physical Injury*, 10 PITT. TAX REV. 87, 130 (2013).

28. See, e.g., Richard E. Gardner III, *Mind Over Matter?: The Historical Search for Meaningful Parity Between Mental and Physical Health Care Coverage*, 49 EMORY L.J. 675, 675 (2000) (“[A]dvances [in] modern brain science and neuropsychology . . . suggest[] that a distinction between the physical and the mental is, in many circumstances, spurious.”). Congress has recognized that mental illnesses are physical illnesses, at least in the context of insurance. See Christopher Wright, *Taxation of Personal Injury Awards, Addressing the Mind/Body Dualism that Plagues 104(a)(2) of the Tax Code*, 60 CATH. U. L. REV. 211, 234–35 (2010) (noting that, by passing the Paul Wellstone and Pete Domenici Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA) and requiring insurance companies to treat mental illness no differently than traditional physical illness, Congress indicated its understanding the mental illness is physical illness).

29. See *infra* Part III.

30. Jensen, *supra* note 27, at 134–35.

adjustments may be made.³¹ The National Taxpayer Advocate has proposed that damages for emotional distress should be excluded the same as damages for physical injuries, pointing out that the issue of taxation of damages “spurs litigation every year.”³²

The issue addressed in this Article—the meaning of “personal physical injuries”—is only one component of the confusion arising from the § 104(a)(2) exclusion.³³ It is not always the “personal physical injury” phrase of the statute that is problematic for the taxpayer seeking to exclude a damage award from taxable income; instead, it is often the “on account of” part of the statute that is fatal to the taxpayer.³⁴ The proposal of this Article is related specifically to the meaning of “personal physical injuries.”

The 1996 modification addressed in this Article is not new, and neither are the criticisms or proposals for reform. Different from previous proposals, though, this Article proposes a conception of the “personal physical injury” exclusion that, without modification of the statute or revision of the regulations, will bring back into the exclusion at least some damage awards for emotional distress. By interpreting “personal physical injury” to refer to the tort concept of “physical injury,” the exclusion will include (and render tax free) damages awarded for emotional distress suffered by victims of battery, assault, and false imprisonment, regardless of whether the perpetrator memorializes their tort with a bruise or a cut.

III. CURRENT STATUS OF THE PERSONAL PHYSICAL INJURY EXCLUSION AND ILLUSTRATIONS

Section 104(a)(2) currently reads as follows:

31. Holcomb, *supra* note 20, at 80.

32. Nat'l Taxpayer Advocate, 2009 Annual Report to Congress 351–57 (2009), http://www.irs.gov/pub/irs-utl/2_09_tas_arc_vol_1_lr.pdf [https://perma.cc/7CEN-P6TR]; *see also* Nat'l Taxpayer Advocate, 2008 Annual Report to Congress 472 (2008), https://www.irs.gov/pub/tas/08_tas_arc_mli.pdf [https://perma.cc/2VM6-EE7N] (“Taxation of damage awards spurs litigation every year.”).

33. *See* Holcomb, *supra* note 20, at 97–99 (explaining that, in addition to problems of interpreting “personal physical injury” and the “on account of” requirement, plaintiffs face other problems, in particular problems with allocation of the damage award).

34. *E.g.*, Hansen v. Comm’r, 97 T.C.M. 1447, at *6 (2009). (the complaint and the agreement did not specify that the settlement was on account of the physical injuries); Nield v. Comm’r, T.C. Summ. Op. 2002-12, at *8 (Aug. 27, 2002) (court did not find credible taxpayer’s evidence that damages were awarded “on account of” the physical injuries, as allegations were lacking in the complaint and the settlement agreement); Mummy v. Comm’r, T.C. Summ. Op. 2005-122, at *5 (Aug. 24, 2005) (“the document, however, does not contain any language which specifically states that the amount paid was to settle the harassment claim, the emotional stress claim, or the assault and battery.”).

(a) [G]ross income does not include—

(2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as period payments) on account of personal physical injuries or physical sickness;

For purposes of paragraph (2), emotional distress shall not be treated as a physical injury or physical sickness.”³⁵

Although the language of the statute might appear to mean that damages awarded for emotional distress are taxable, that is an oversimplification. The legislative history and the relevant regulations explain that damages awarded for emotional distress may also be excluded from income (even though, according to the last sentence in the above quoted statutory language, they are not in and of themselves “personal physical injuries”) if the emotional distress damages are “attributable to” a physical injury or sickness.³⁶

The legislative history of the Act (the House Report) states: “Because all damages received on account of physical injury or physical sickness are excludable from gross income, the exclusion from gross income applies to any damages received based on a claim of emotional distress that is attributable to a physical injury or physical sickness.”³⁷ Treasury Regulation 1.104-1, finally updated in 2012 to address the then-sixteen-year-old amendment, reiterated the position of the House Report that, although emotional distress is not a “physical injury or physical sickness,” certain damages for emotional distress may be excluded.³⁸ Pursuant to Treasury Regulation 1.104-1: “[D]amages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2).”³⁹

A. *The Personal Physical Injury Exclusion Illustrated—Two Lawyers*

The following hypotheticals⁴⁰ illustrate the differing tax treatment of, on one hand, emotional distress damages arising from a classic personal injury case for which § 104(a)(2) traditionally (before and after the 1996 modification) provided an exclusion and, on the other hand, emotional distress damages arising from a “personal injury” that were

35. I.R.C. § 104(a) (2018).

36. See *infra* Part VI.B’s discussion of the flawed logic in this language.

37. H.R. Rep. No. 104-737, at 300–01, as reprinted in 1996 U.S.C.C.A.N. 1677, 1792–93.

38. Treas. Reg. § 1.104-1(c) (as amended in 2012).

39. *Id.*

40. These hypotheticals are adapted from Burke & Friel, *supra* note 19, at 182–87.

once excluded by § 104(a)(2) but are no longer excluded as a result of the “physical” qualifier added in 1996.

Lawyer 1 (negligence resulting in observable bodily harm)—Lawyer 1 is a successful solo practitioner and is seriously injured in an automobile accident. He brings a negligence action against the driver who caused the accident. Lawyer 1 is awarded damages for the following: (1) pain and suffering; (2) past and future medical expenses; (3) lost income as a result of being unable to practice law; (4) emotional distress as a result of being unable to practice; and (5) physical ailments, e.g., headaches, vomiting, loss of appetite and sleeplessness, resulting from the emotional distress. All compensatory damages awarded to Lawyer 1 are excludable under § 104(a)(2)—both before and after the 1996 modification.

Specifically focusing on the emotional distress aspect of the award, those would be excluded under the post-1996 “personal physical injury” exclusion. Even though Congress specifically provided in the statute that emotional distress is not considered a physical injury or sickness for purposes of § 104(a)(2),⁴¹ because the emotional distress is “attributable to a physical injury,” it is excludable. The legislative history of the statute⁴² and Treasury Regulation 1.104-1⁴³ make clear that, because all damages received on account of physical injury or physical sickness are excludable, the exclusion applies to any damages received based on a claim of emotional distress that is attributable to a physical injury or physical sickness.

Lawyer 2 (wrongful termination)—Lawyer 2 is wrongfully terminated by his employer. He suffers emotional distress and even associated physical ailments, such as headaches, vomiting, loss of appetite, and sleeplessness. He is under constant care of a physician or even hospitalized for a period. He brings a claim against his employer and is awarded damages for the following: (1) lost wages; (2) emotional distress; and (3) the physical ailments resulting from his emotional distress.

Because Lawyer 2’s claim did not have its origin in a personal *physical* injury, the post-1996 § 104(a)(2) personal *physical* injury

41. I.R.C. § 104(a)(2) (2018) (“emotional distress shall not be treated as a physical injury or physical sickness.”).

42. H.R. Rep. No. 104-737, at 300–01, *as reprinted in* 1996 U.S.C.C.A.N. 1677, 1792–93 (“Because all damages received on account of physical injury or physical sickness are excludable from gross income, the exclusion from gross income applies to any damages received based on a claim of emotional distress that is attributable to a physical injury or physical sickness.”).

43. Treas. Reg. § 1.104-1(c) (as amended in 2012) (“Emotional distress is not considered a physical injury or physical sickness. However, damages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2).”).

exclusion is inapplicable. He will be able to exclude damages awarded to compensate for medical expenses incurred, even though they were related to emotional distress. However, he will not be entitled to exclude any other aspect of the award, even any award for physical symptoms of his emotional distress.

Under the pre-1996 “personal injury” exclusion, Lawyer 2 may have been able to successfully argue that the wrongful termination was a “personal injury” and thus all damages were excluded.⁴⁴ However, after the 1996 modification, Lawyer 2 clearly has no legitimate argument that the wrongful termination was or caused a “personal *physical* injury” under modified § 104(a)(2).

Lawyer 2 might attempt to argue, somewhat differently, that the emotional distress resulting from the wrongful termination *is itself* a personal physical injury. He might argue that there is no medical or scientific difference between the mental suffering and physical suffering. But Congress has foreclosed that argument by the plain language of the statute. As mentioned previously, Congress specifically provided in § 104(a)(2) that emotional distress is not considered a physical injury or sickness for purposes of § 104(a)(2).⁴⁵ As a result, Lawyer 2, although suffering emotional distress and even associated physical ailments such as headaches, vomiting, loss of appetite, and sleeplessness, has no basis for excluding the award for emotional distress and its related physical symptoms. The fact that Lawyer 2 is under constant care of a physician or even hospitalized for a period would not change the result (although, as noted above, Lawyer 2 may exclude recovery of medical expenses not previously deducted).

There are a multitude of real world cases in which taxpayers suffered physically but paid taxes on awards that compensated them for that physical suffering because their physical suffering was caused by emotional distress, but that emotional distress was not caused by a “physical injury.”⁴⁶ For example, in *Lindsey v. C.I.R.*, the taxpayer experienced hypertension and stress-related symptoms, including periodic impotency, insomnia, fatigue, occasional indigestion, and urinary incontinence as a result of a business dispute.⁴⁷ Those physical problems

44. See, e.g., *Bent v. Comm’r*, 835 F.2d 67, 68 (3d Cir. 1987) (demonstrating that, pre-1996, personal injuries damages excluded from taxable income under § 104(a)(2) included mental pain and suffering, such as that suffered by the schoolteacher after his employment contract was not renewed).

45. I.R.C. § 104(a) (2018).

46. Or, at least they did not prove it, or the complaint or settlement agreement did not adequately connect the emotional distress to a physical injury.

47. *Lindsey v. Comm’r*, 422 F.3d 684, 688–89 (8th Cir. 2005).

were caused by emotional distress rather than “personal physical injuries or physical sickness,” and thus were not excluded under § 104(a)(2).⁴⁸

There are several good arguments that the damages compensating Lawyer 2 for his emotional distress should not be taxed if damages compensating Lawyer 1 for his emotional distress are not taxed. Similarly treated taxpayers should be treated similarly. And the emotional distress experienced by Lawyer 2 is no less real than that suffered by Lawyer 1. For tax purposes, however, Congress has chosen to ignore Lawyer 2’s mental suffering with little to no rationale for the differing treatment.

The purpose for providing the above hypotheticals here is not to make that broader argument that all awards for emotional distress should be taxed the same. Instead, the purpose of the above two hypotheticals is simply to illustrate the different treatment of emotional distress damages where the underlying claims are easily labeled “physical”—in the case of the car accident—and not physical—in the case of wrongful termination. While the question of whether damages for emotional distress arising from *nonphysical* injuries should be taxed if damages arising from *physical* injuries are tax free may be difficult, it is at least easy to distinguish between the *physical* nature of the car wreck claim and the *nonphysical* nature of the wrongful termination claim.

The disparate tax treatment of emotional distress damages is more puzzling where the line between “physical” and “nonphysical” is less clear, such as in sexual harassment cases. The difficulty of distinguishing between a physical injury and a nonphysical injury can be demonstrated by the following additional hypotheticals.

B. *Three Law Clerks*

Consider the following hypotheticals involving three law clerks working for, and inappropriately touched by, the same horrible boss:⁴⁹

Law Clerk 1 (punch in the nose)—Boss has a particularly bad day and punches Law Clerk 1 in the nose. Law Clerk 1 misses several days of work, incurs medical bills, endures pain and suffering, and experiences emotional distress, which manifests itself physically in the form of nausea and insomnia. He brings an action for common law battery and is awarded damages to compensate him for all of the above harms, including his emotional distress.

Law Clerk 2 (fondling with a bruise)—Boss also regularly engages in a pattern of sexual harassment toward the female law clerks, including

48. *Id.*

49. These hypotheticals are in part adapted from Holcomb, *supra* note 20, at 78–80.

making lewd comments and fondling them against their wills. The fondling of Law Clerk 2 results in a slight bruise to Law Clerk 2. Although the bruise clears up in a few days, Law Clerk 2 experiences emotional distress arising from the incident and her feelings of humiliation, degradation, shame, and embarrassment persist. Law Clerk 2 brings an action for common law battery and is awarded compensatory damages, including damages for emotional distress.

Law Clerk 3 (fondling with no bruise)—Boss likewise sexually harasses Law Clerk 3 in exactly the same way in which he harassed Law Clerk 2—making lewd comments and fondling her against her will. However, his fondling of Law Clerk 2 does not (for whatever reason) result in a bruise or any other observable mark on her body memorializing the traumatic event. Law Clerk 3 also experiences emotional distress arising from the incident. And her feelings of humiliation, degradation, shame, and embarrassment also persist. Law Clerk 3, like Law Clerk 2, also brings an action for common law battery and is awarded compensatory damages, including damages for emotional distress.

Each of the three law clerks has a common law claim for battery.⁵⁰ Each is awarded damages to compensate him or her for the emotional distress resulting from the battery. The § 104(a)(2) personal physical injury exclusion will exclude from taxable income the damages awarded for the emotional distress of Law Clerk 1 and Law Clerk 2. However, the personal injury exclusion will not apply to the damages awarded to Law Clerk 3; her award is fully⁵¹ taxable. She will be taxed like Lawyer 2 who was wrongfully terminated.

It is difficult to understand why emotional distress resulting from a “bruise-free” sexual battery is taxed like emotional distress resulting from wrongful termination. Shouldn’t it be taxed like emotional distress resulting from other instances of sexual battery (or from a car wreck or a punch in the nose)? Sexual battery, car accidents, and punches in the nose are all physical—being fired is not. But such is the result of “the Bruise Ruling” discussed in the following section.

50. These plaintiffs will undoubtedly also have many other valid claims. This Article addresses only the question of whether the damages awarded on account of the common law tort claims by themselves should be excluded from income. *See, e.g.*, Wood, *supra* note 26, at 279–82 (focusing only on whether awards for false imprisonment should be excluded from taxable income while recognizing the wide variety of ancillary claims that might be asserted by a wrongfully incarcerated individual, such as claims under 28 U.S.C. § 1983, The Innocence Protection Act of 2004, and state legislation). Of course, allocation of the damage award between and among all claims the taxpayer plaintiff asserts is a critical issue. *See, e.g.*, Holcomb, *supra* note 20, at 99.

51. With the caveat that, if she is awarded medical expenses, even those related to emotional distress are excluded to the extent not previously deducted.

C. *The Bruise Ruling*

In a 2000 Private Letter Ruling, which has come to be referred to as “The Bruise Ruling,” the IRS concluded that damages awarded to compensate for unwanted physical contact (that is, a battery) without “observable bodily harm” does not constitute “personal physical injuries or physical sickness” for purposes of § 104(a)(2).⁵² According to the Bruise Ruling, the key test in identifying excludable versus taxable damages is whether there is observable bodily harm, such as a bruise.⁵³

The Letter Ruling was issued in response to a woman who was ultimately sexually assaulted by her employer after she had endured less extreme incidents of sexual inappropriateness for a period. She ultimately quit and filed suit alleging sexual harassment, battery, and intentional infliction of emotional distress. The case was settled, but there was no express allocation of damages in the settlement agreement. The IRS concluded that the damages awarded for unwanted physical contact *without* observable bodily harm were not received on account of personal physical injuries or sickness and were therefore taxable. On the other hand, damages awarded for pain, suffering, and emotional distress *after* she suffered an *observable* physical injury were excludable under § 104(a)(2) because those damages were attributable to physical injuries.

The Letter Ruling identifies three separate periods and treats each a bit differently for tax purposes:

Period A—The Period Prior to the First Pain Incident: During this period, the woman’s employer began a “slow progression of attempts to make sexual contact with [the woman]” and also made several “suggestive and lewd remarks.” The employer also “physically touched” the woman during this period. However, the contacts during this period did not result in any “observable bodily harm such as cuts or bruises the woman’s body, nor did they cause extreme pain to the woman.”

52. I.R.S. Priv. Ltr. Rul. 200041022 (Oct. 13, 2000), at *5. A letter ruling is a response from the IRS to a written request by a taxpayer asking for guidance on how the IRS will treat a particular set of facts. It is binding on the IRS with respect to the taxpayer who requested the Private Letter Ruling, and may not be used by other taxpayers. However, they are often relied upon because they provide an indication of how the IRS might interpret the Code under a given set of facts. *See, e.g.*, *Byrne v. Comm’r*, 84 T.C.M (CCH) 704, 710 n.14 (2002) (“Although private letter rulings are not precedent, . . . they do reveal the interpretation put upon the statute by the agency charged with the responsibility of administering the revenue laws.”).

53. I.R.S. Priv. Ltr. Rul. 200041022 (Oct. 13, 2000), at *4. Most cases that purported to address the personal physical injury exclusion reach their holdings because, they conclude, the taxpayers failed to demonstrate that the damages were awarded “on account of” purported personal physical injuries, rather than because the injuries did not meet the definition of “personal physical injuries.” *See, e.g.*, authorities cited *supra* note 34. The bruise ruling, though, does reach that question.

Period B—The Period Beginning with the First Pain Incident and leading up to the First Physical Injury: Some time after Period A, the employer did assault the woman, causing her “extreme pain.” And, after the First Pain Incident, the woman began to have headaches and digestive problems, although doctors could not find anything physically wrong with her. The woman did not assert in her request to the IRS that those problems were due to the First Pain Incident or to events prior to the First Pain Incident.

Period C—The Period Beginning with the First Physical Injury: On an even later date, the employer assaulted the woman again. This time, the employer cut and bit her. The IRS referred to this incident as the “First Physical Injury.” The employer later physically and sexually assaulted the woman, cutting her in one incident. As result of yet “another series of” assaults, the woman suffered skin discoloration, swelling, and extreme pain for which she sought medical treatment.

In determining whether damages awarded to the woman were excludable as being on account of “personal physical injuries” under § 104(a)(2), the Private Letter Ruling (“PLR”) first searched for a definition of “personal physical injuries.” The PLR recognized that § 104(a)(2) does not define “personal physical injury,” nor does its legislative history. Thus, the PLR turned to Black’s Law Dictionary for some semblance of a definition. Black’s Law Dictionary’s definition of “physical injury” was “bodily harm or hurt, excluding mental distress, fright, or emotional disturbance.”⁵⁴ Based on that definition, the PLR concluded that “we believe that direct unwanted or uninvited physical contacts resulting in observable bodily harms such as bruises, cuts, swelling, and bleeding are personal physical injuries under 104(a)(2).”

Applying that definition to Periods A and C only, the PLR concluded as follows:

Period A: Any damages received for events occurring before the First Pain Incident were not “personal physical injuries” under § 104(a)(2). During that period, the unwanted physical contact did not result in any observable harms to the woman, nor did it cause the woman pain.⁵⁵

54. I.R.S. Priv. Ltr. Rul. 200041022 (Oct. 13, 2000), at *4 (quoting *physical injury*, BLACK’S LAW DICTIONARY (rev. 4th ed. 1968)). *Black’s* has revised its definition. See *physical injury*, BLACK’S LAW DICTIONARY (10th ed. 2014) (“bodily injury. Physical damage to a person’s body. — Also termed personal injury; personal bodily injury; physical injury.”).

55. I.R.S. Priv. Ltr. Rul. 200041022 (Oct. 13, 2000), at *2–6. A did not argue that any medical treatment she received after the First Pain Incident were related to the period prior to the First Pain Incident. In short, for that period, there was no observable harm, pain, or medical expenses. Presumably, the fact that she did not incur medical expenses was relevant to determining whether

Period C: Any damages received for the period beginning with the First Physical Injury were “personal physical injuries” under §104(a)(2). The woman suffered “physical injuries”—now defined by the Private Letter Ruling as “direct unwanted or invited physical contacts resulting in observable bodily harms such as bruises, cuts, swelling and bleeding”—beginning with the First Physical Injury.⁵⁶

Period B: As to physical contact that causes pain but no observable bodily harm, the PLR seems to leave open the possibility that physical pain can constitute physical injury without observable mementos. But the PLR made no decision in the instant case. The PLR explained that “Because the perception of pain is essentially subjective, it is a factual matter. Therefore, pursuant to § 7.01 of Internal Revenue Procedure 2000-1,⁵⁷ we cannot rule whether damages properly allocable to the First Pain Incident (a physical contact that did not manifest itself in the form of a cut bruise, or other similar bodily harm) were received on account of personal physical injuries or physical sickness.”⁵⁸

Thus, in the IRS’s view,⁵⁹ where there is an observable injury, all damages flowing from that injury, including emotional distress, are excludable. Once a plaintiff crosses that threshold, all damages flowing from the physical event, including emotional distress damages, are excluded. Of course, particularly in the case of sexual harassment, which often involves lengthy periods, identifying the “watershed”⁶⁰ moment where the observable bodily harm occurs, marking the point in time at which damages are excluded, is a difficult problem of proof and allocation.⁶¹

there were any excludable medical expense reimbursement damages for that period, as opposed to the medical expenses being an indication that she had suffered some “physical” injury.

56. *Id.* at *5. Her punitive damages were, of course, taxable under §104(a)(2).

57. Section 7.01 of Rev. Proc. 2000-1 provides that the Service does not have discretion to issue letter rulings if a problem is factual in nature. Rev. Proc. 2000-1 I.R.B. 5 (“Under what circumstances does the Service have discretion to issue letter rulings and determination letters? . . . Ordinarily not in certain areas because of factual nature of the problem.”).

58. I.R.S. Priv. Ltr. Rul. 200041022 (Oct. 13, 2000), at *5.

59. It is true that, in some instances, the tax court is willing to apply a more lenient standard than the “cutting, bruising, or swelling” standard of the IRS. *See* Benjamin T. Cory, Note, Amos v. Commissioner: *The Ambiguous and Ever-Changing Definition of What Constitutes a Personal Physical Injury Under Internal Revenue Code Section 104(a)(2)*, 66 MONT. L. REV. 247, 262 (2005). Nevertheless, the meaning of “personal physical injury” needs clarification.

60. Wood, *supra* note 26, at 285 (noting the “watershed” nature of physicality determination).

61. *See, e.g.,* Prasil v. Comm’r, 85 T.C.M. (CCH) 1124, 1129 (2003) (holding that a sexual harassment award was fully taxable).

D. Three Law Clerks—Effect Under Bruise Ruling

Returning to the three hypothetical law clerks and application of the bruise ruling to those victims: Under § 104(a)(2), in order for damages for emotional distress to be excluded from taxable income, the emotional distress must be attributed to a “personal physical injury.” And, according to the Bruise Ruling, an injury is a “personal physical injury” only if there is an observable bodily harm.

Thus, for tax purposes, the emotional distress of Law Clerk 2—who was groped and bruised—is treated just like the emotional distress of Lawyer 1, the car accident victim, and Law Clerk 2, the punch in the nose victim. That emotional distress is attributable to a “physical injury” and thus damages to compensate those plaintiffs for that emotional distress are excluded from taxable income.

In contrast, the emotional distress of Law Clerk 3 (although she suffered the same sexual harassment and “groping” as Law Clerk 2) is treated as the emotional distress of Lawyer 2 who was wrongfully terminated from employment.

It seems illogical to treat the emotional distress of one of the sexual assault victims like the emotional distress of the wrongful termination plaintiff simply because her assault was not memorialized with a bruise or a cut. It seems inherently more logical to treat the emotional distress of *both* sexual assault victims the same. Both should be treated like the emotional distress of the car accident victim and the punch-in-the-nose victim. The sexual assault that does not leave a bruise is not inherently less “physical” than a groping that does leave a bruise. Any sexual assault, groping, or fondling is inherently physical. And one can imagine some kind of groping that would be much more physical (and much more traumatic) than a groping that does leave a bruise.

At least one scholar has similarly argued that some things are “inherently and incontrovertibly physical, whether or not they leave lasting outward scars.”⁶² Based on that premise, he has argued that damages awards for false imprisonment should not be subject to taxation.⁶³ Robert Wood writes: “It is hard to imagine a more obvious degree of physicality than being physically confined behind bars. Even if

62. Wood, *supra* note 26, at 285.

63. Robert H. Wood, *Why False Imprisonment Recoveries Should Not Be Taxable*, 123 TAX NOTES, June 8, 2009, at 1217. The Sixth Circuit in *Stadnyk v. Commissioner*, however, has held that they are not. 367 F. App’x 586, 587–89 (6th Cir. 2010). In *Stadnyk*, the taxpayer was wrongfully accused of writing a bad check and was falsely imprisoned. She was arrested and handcuffed and confined to a cell, which seem to have certainly impacted her physically. Nonetheless, the court determined that there was no physical injury and thus no §104(a)(2) exclusion.

no bruises or broken bones befall the plaintiff while behind bars, it seems axiomatically physical to be physically confined.”⁶⁴ The same is true for unwanted and uninvited physical contact with the body.⁶⁵

This Article proposes an understanding of § 104(a)(2) “personal physical injuries” that is consistent with the idea that some torts are inherently physical. The following section attempts to concretize the proposition that some torts are inherently physical. Even without a bruise to memorialize the occasion, some torts are sufficiently physical to fall within the “personal physical injury” exclusion.

IV. DAMAGES AWARDED FOR EMOTIONAL DISTRESS ATTRIBUTABLE TO AN INVASION INTO PERSONAL AUTONOMY, PHYSICAL SECURITY, OR PHYSICAL LIBERTY SHOULD BE EXCLUDED FROM TAXABLE INCOME UNDER § 104(A)(2), EVEN WITHOUT OBSERVABLE BODILY HARM.

Tort law has long protected against invasions into personal autonomy, physical security, and physical liberty.⁶⁶ Invasions into those interests are “physical injuries.” Tort law distinguishes between an injury and the harms caused by that injury. For example, a physical injury might cause bodily harm and emotional harm. But the harm is a distinct concept from the injury. For these physical injuries—invasions into personal autonomy, physical security, and physical liberty—the plaintiff is not required to show harm.⁶⁷ It is presumed. Those plaintiffs are not required to show bodily harm. And they can recover for emotional harm without proving it. Tort law has always acknowledged emotional harm arising from these physical invasions.

In contrast, when a plaintiff alleges emotional harm arising from invasion of a *nonphysical* interest, tort law is much more skeptical of his claim. Thus, tort law treats emotional harm somewhat like § 104(a)(2) treats emotional distress in that it distinguishes between emotional harm arising from a physical injury and emotional harm arising from a nonphysical injury. The personal physical injury exclusion of § 104(a)(2) should, as tort law does, consider the type of injury that is the source of emotional harm. But, it should also, as tort law does, treat invasions into

64. Robert H. Wood, *Should False Imprisonment Damages Be Taxable?*, 81 N.Y. ST. B.J. 38, 38 (2009).

65. Wood, *supra* note 26, at 285 (stating that sex abuse, sexual assault, and rape surely fit the category of things that are inherently and incontrovertibly physical whether or not they leave outward scars).

66. *Infra* Part III.B.2.; DOBBS ET AL., *THE LAW OF TORTS* § 3 (2d ed.).

67. *Infra* Part III.B.1.

personal autonomy, physical security, and physical liberty as a “physical injury.” It should not require observable bodily harm; tort law never has.⁶⁸

This Article will hereinafter refer to the invasions of the above three interests as “injuries,” as does the Restatement.⁶⁹ Thus, this Article will use the terms “physical injuries,” “emotional injuries,” and “economic injuries.” To distinguish between this tort concept of physical injury—an invasion into an interest in autonomy, physical security, and physical liberty—and the § 104(a)(2) term “physical injury,” this Article will designate where references are to “§ 104(a)(2) physical injury.” Without such a designation, this Article is referring to the tort concept of “physical injury”—an invasion into a person’s interest in autonomy, physical security, and physical liberty.

As demonstrated in Part A below, the meaning of the § 104 personal injury exclusion has always drawn on tort principles. Section B explains the difference between a tort “injury” and a tort “harm” and the type of tort. Section C demonstrates that tort law treats emotional harm differently depending on the type of injury causing the emotional harm. Section D explains the ultimate proposition: that the “personal physical injury” exclusion of § 104(a)(2) should be interpreted consistently with the ancient understanding that tort law protects against intentional physical injuries to the person regardless of bodily harm. Thus, although damages awarded to compensate for emotional harm flowing from *emotional or economic injuries* are not excluded from taxable income under § 104(a)(2), emotional harm flowing from all *physical injuries* should be excluded under § 104(a)(2).

A. *Interpretations of the § 104(a)(2) exclusion have historically drawn on tort law principles.*

The IRS and the Supreme Court have looked to tort law in interpreting the Code’s personal injury exclusion. The Supreme Court recognized in *United States v. Burke*⁷⁰ that the IRS has “linked identification of a personal injury for purposes of 104(a)(2) to traditional tort principles.”⁷¹ *United States v. Burke* involved a Title VII action in

68. *Infra* Part III.C.

69. *Infra* note 93.

70. *United States v. Burke*, 504 U.S. 229 (1992).

71. *Id.* at 234 (citing 26 C.F.R. § 1.104-1(c) (1991)). The *Burke* Court also quoted the Tax Court’s explanation in *Threlkeld v. Comm’r*, 87 T.C. 1294, 1305 (1986), *aff’d*, 848 F.2d 81 (6th Cir. 1988), that “[t]he essential element of an exclusion under section 104(a)(2) is that the income involved must derive from some sort of tort claim As a result, common law tort law concepts are helpful in deciding whether a taxpayer is being compensated for a ‘personal injury.’” *Burke*, 504 U.S. at 234.

which the complainants alleged that their employer had discriminated against them on the basis of sex in determining salaries.⁷² They sought injunctive relief and backpay for all affected female employees.⁷³ The female employees argued that the backpay they received should be excluded from gross income under § 104(a)(2) as “damages received . . . on account of personal injuries or sickness.”⁷⁴ The Supreme Court granted certiorari to address the question of whether Title VII backpay awards should be excluded from gross income under that language of § 104(a)(2).⁷⁵

The majority opinion recognized at the outset that neither the text of the statute nor its legislative history offers any explanation of the term “personal injuries.”⁷⁶ It thus turned to the relevant IRS regulation that demonstrated that the IRS had, since at least 1960, “linked identification of a personal injury for purposes of 104(a)(2) to traditional tort principles.”⁷⁷ The Court quoted Treasury Regulation 1.104-1(c), which read as follows: “The term ‘damages received (whether by suit or agreement)’ means an amount received . . . through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered in lieu of such prosecution.”⁷⁸ Based on the treasury regulation, the Court determined that, to decide whether the § 104(a)(2) personal injury exclusion applied, one must look to the nature of the claim underlying the damages and determine whether the claim seeks redress for a tort-like personal injury.⁷⁹

The Treasury Regulation the Court relied upon in *Burke* was modified in 2012—many years after the 1996 modification of § 104(a)(2).⁸⁰ The 2012 Regulation eliminates the tort-type right test,⁸¹ but

72. *Burke*, 504 U.S. at 231–32.

73. *Id.*

74. *Id.*

75. *Id.* at 233.

76. *Id.* at 234.

77. *Id.*

78. *Id.* (quoting 26 C.F.R. § 1.104-1(c) (1991)).

79. *Id.* The next question, then, was how to determine whether a claim is for a “tort-like personal injury.” The Court found critical, to identifying a tort claim, whether the claim provides for a broad range of remedies, such as “lost wages, medical expenses, and diminished future earning capacity” and also “emotional distress and pain and suffering.” Having decided that whether a claim is for a tort or tort-like injury depends on whether the claim allows for a broad range of remedies as traditionally available for tort claims, the Court examined the basis for the plaintiffs’ back pay claim—Title VII. Because Title VII did not allow the plaintiffs to recover for such a broad range of remedies, such as emotional distress, the Court concluded that the injury the plaintiffs suffered were not “personal injuries” under the §104(a)(2) and thus were not excluded.

80. Treas. Reg. § 1.104-1(c)(1) (2012).

81. *See id.*

the IRS reiterated that the personal injury exclusion—physical or not, but particularly if it is physical—is rooted in tort concepts.⁸² In the IRS’s view, the tort-type right test was necessary only to distinguish tort claims from contract claims and thus exclude only damages for tort claims.⁸³ Second, in the IRS’s view, adding the word “physical” to the exclusion rendered the distinction between personal injury (tort) claims and contract claims is no longer necessary.⁸⁴ Ostensibly, if a claim is for personal physical injury, it is by definition a tort claim and not a contract claim. The exclusion should be interpreted consistent with tort principles.

B. Tort law distinguishes between “injury” and “harm.”

1. A Tort “Injury” Distinguished from a Tort “Harm”

The Restatement (Second) of Torts distinguishes between “injury” and “harm.” “Injury” refers to “the invasion of any legally protected interest of another.”⁸⁵ “Harm” refers to “the existence of loss or detriment in fact of any kind to a person resulting from any cause.”⁸⁶

The term “harm,” unqualified, is very broad. Examples of “harm” include an alteration or change in one’s person; an alteration of change in physical things; and the detriment resulting to a person from acts or conditions that impair his physical, emotional, or aesthetic wellbeing, his pecuniary advantage, intangible rights, reputation, or other legally recognized interests.⁸⁷ The Restatements often qualify the term “harm” with terms like “bodily harm,” “physical harm,” and “pecuniary harm.”⁸⁸

To distinguish between “injury” and “harm,” it may be useful to conceive of a (somewhat) chronological chain of events: tortious act, injury, harm, then damages. First, the defendant acts (or fails to act) tortiously. Second, as a result of the defendant’s tortious act, the plaintiff suffers an injury—a violation of his legally protected interest. Third, the

82. T.D. 9573, 77 Fed. Reg. 3106, 3107 (Jan. 23, 2012).

83. *Id.*

84. *Id.*

85. The word “injury” is used throughout the Restatement of this Subject to denote the invasion of any legally protected interest of another. RESTATEMENT (SECOND) OF TORTS § 7(1) (AM. L. INST., 1965).

86. The word “harm” is used throughout the Restatement of this Subject to denote the existence of loss or detriment in fact of any kind to a person resulting from any cause. *Id.* § 7(2).

87. *Id.* § 7, cmt. b.

88. *Id.* § 7(2).

plaintiff may suffer “harm” as a result of the injury. Lastly, the plaintiff is awarded “damages”⁸⁹ to compensate for his harm.

As an illustration to distinguish between the four “events,” consider the tort of trespass to land. First, the defendant acts tortiously by intentionally entering the land of the plaintiff without permission. Second, the injury suffered by the plaintiff is the invasion of his interest in exclusive possession of the land. What “harm”—actual loss or detriment—does the plaintiff suffer? And what “damages” will the plaintiff be awarded for his harm?

Say that the trespass to land involves the defendant riding his bicycle into the plaintiff’s lawn and ruining his garden. The plaintiff has suffered actual loss or detriment to his property—that is, he has suffered harm. Thus, he can recover damages to compensate him for that harm.

But say that the trespass to land results in no actual loss or detriment—not a blade of grass is bent. That plaintiff can nonetheless maintain a claim for trespass—even without showing any “harm”—any loss or detriment. This is because, for the tort of trespass to land and certain other torts, as will be discussed further below, the plaintiff’s harm is presumed. The defendant’s tortious act and the plaintiff’s “injury” are sufficient for the plaintiff to maintain a claim;⁹⁰ no proof of harm is required.⁹¹

For purposes of this Article, the points to be derived from the above illustration regarding trespass to land are as follows: First, an “injury”—an invasion of a legally protected interest—is distinct from the “harm” that might flow from that injury. Second, for some tort “injuries,” tort law will presume that “harm” results simply because of the nature of the injury.

2. Three Categories of Tort Injuries

Tort law protects against invasions of at least three broad categories of legal interests.⁹² That is, the types of tort injuries can be categorized into one of the following three categories—physical injuries, intangible

89. The word “damages” is used throughout the Restatement of this Subject to denote a sum of money awarded to a person injured by the tort of another. *Id.* § 12(A).

90. *See id.* § 7, cmt. (a).

91. *Id.* Such a plaintiff will not be awarded any compensatory damages, as there is no harm for which to compensate him. He might, however, be awarded nominal damages and an injunction against further trespass.

92. DOBBS, *supra* note 66, § 3.

injuries, and economic injuries.⁹³ The following section considers those three types of injuries in support of the penultimate point of this Article that the § 104(a)(2) personal physical injury exclusion should be interpreted to include damages for emotional distress (emotional harm) flowing from these “physical injuries.”

Physical Injuries—Invasions of Physical Interests

Tort law protects against invasions to a person’s interest in his or her “primary autonomy, physical security, and physical liberty.”⁹⁴ This category protects against physical interference with either the plaintiff’s person or property,⁹⁵ and these interests are afforded the greatest protection by the law.⁹⁶ The trespassory torts—trespass to land, harmful battery, offensive battery, assault, and false imprisonment⁹⁷—protect against these type of invasions. The tort of negligence also provides redress for physical invasion.⁹⁸

Intangible Injuries—Invasions of Emotional and Other Intangible Interests

Although more reluctantly, tort law also protects against invasions to a person’s intangible interests such as emotional security, privacy, and reputation.⁹⁹ Claims for violation of the right of privacy, defamation, and slander seek redress for this type of invasion;¹⁰⁰ these might be called dignitary torts.¹⁰¹ Claims for negligent infliction of emotional distress and intentional infliction of emotional distress also seek redress for these types of invasions,¹⁰² but courts are even more reluctant to impose liability for a violation of the interest in emotional security without a physical interference with personal or property (a “physical injury” discussed in

93. An invasion of an interest is a tort “injury.” See RESTATEMENT (SECOND) OF TORTS § 7(1) (AM. L. INST., 1965).

94. DOBBS, *supra* note 66, § 3.

95. *Id.*

96. See RESTATEMENT (SECOND) OF TORTS ch. 2, intro. note (AM. L. INST., 1965).

97. DOBBS, *supra* note 66, § 28.

98. *Id.* § 3.

99. *Id.* (“When it comes to intangible harm without physical interference or physical harm, courts are much more reluctant to impose tort liability.”)

100. *Id.*

101. Offensive battery and assault might also be labeled as “dignitary torts” in that they involve “legally cognizable invasions of rights that stand independent of both physical and economic harms, that is, invasions of human dignity in the sense of human worth” such as when a battery is “interference with the plaintiff’s autonomy, her right to prevent unconsented-to touchings.” That dignitary tort label should be distinguished from freestanding dignitary torts that involve no physical invasion or direct threat of it, such as defamation or invasion of privacy. See *id.* § 514.

102. *Id.*

the preceding paragraph) or violation of a specific right such as the right to reputation or the right to privacy.¹⁰³

Economic Injuries—Invasions of Economic Interests

Third, tort law sometimes protects invasions of the interests in economic security and opportunity.¹⁰⁴ An example would be a defendant “negligently block[ing] access to the plaintiff’s retail store, without trespassing or harming the property itself,” such that customers cannot reach the store.¹⁰⁵ Fraud is another example.¹⁰⁶ Just as courts are more reluctant to protect interest in emotional security absent some physical interference with person or property, courts—at least in the realm of tort law, as distinguished from contract law—are also reluctant to protect invasions of economic interests.¹⁰⁷

3. Harms Arising from Those Tort Injuries

Different types of “harms”—for example, bodily, economic, or emotional—might arise from the different types of tort injuries. For example, consider that *any* of the above types of tort *injuries* can cause economic *harm*. A physical injury like a punch in the nose or trespass to land can result in economic harm such as lost wages, medical bills, or repair costs.¹⁰⁸ An intangible injury such as defamation or fraud can also result in economic harm such as lost income. An economic injury such as interference with a business relationship can result in economic harm such as lost income. The important point here is that economic *injury* is distinct from an economic *harm* caused by an economic injury (or by an emotional injury or a physical injury).¹⁰⁹

Understanding that economic harm is a different concept from *economic injury* should make it easier to understand a critical point for this Article—that *emotional injury* is different from *emotional harm*. That is important, for purposes of this Article, because this Article argues that, although damages awarded to compensate for emotional harm flowing from *emotional or economic injuries* are not excluded from taxable under

103. *Id.*

104. *See id.*

105. *Id.* § 605.

106. *Id.* § 606.

107. *Id.*

108. *Id.* § 605 (“Any kind of tort can cause financial harm. . . . [H]owever, the economic harm is not itself the tort.”).

109. *See id.*

§ 104(a)(2), emotional harm flowing from *physical injuries* should be excluded under § 104(a)(2).¹¹⁰

Other terms that need clarification before proceeding further are “physical harm” and “bodily harm.”¹¹¹ The term “physical harm” in the Restatement (Second) denotes the physical impairment of the human body, but it also includes physical impairment of land or chattel.¹¹² “Bodily harm,” is a more specific type of “physical harm.” “Bodily harm” is defined by the Restatement (Second) as “any physical impairment of the condition of another’s body, or physical pain or illness.”¹¹³

What is “emotional harm?” The Restatement (Second) uses the terms “emotional distress” and “emotional disturbance” without defining either.¹¹⁴ The Restatement does indicate, though, that emotional disturbance is distinct from bodily harm. “The minute disturbance of the nerve centers caused by fear, shock, or other emotions does not constitute bodily harm.”¹¹⁵ It also recognizes that such emotional disturbances may *cause* bodily harm.¹¹⁶ This Article will hereinafter use the term “emotional harm” in a precise way that distinguishes the concept of “harm” from “injury,” as explained above, and distinguishes “emotional” harm from bodily or pecuniary harm.

C. Tort law treats emotional harm arising from a physical injury differently from emotional harm arising from an emotional or economic injury.

This section explains that tort law treats emotional harm differently depending on the type of injury causing the emotional harm. The personal

110. This may read like a reiteration of what the legislative history and regulations already say. But, it is different in that the term “physical injury” here is much broader than those interpretations of “personal physical injury.” See *infra* Part IV.

111. The Restatements often qualify the term “harm” with terms like “bodily harm,” “physical harm,” and “pecuniary harm.” RESTATEMENT (SECOND) OF TORTS § 7(2) (AM. L. INST., 1965).

112. *Id.* § 7 cmts.

113. *Id.* § 15. The comments to the Restatement explain that there is an impairment “if the structure or function of any part of the other’s body is altered to any extent even though the alteration causes no other harm.” Section 104(a)(2)’s concept of “physical injury” seems to be more in line with the Restatement “bodily harm” than the much broader Restatement term “physical harm.”

114. See *id.* § 46–48 (“emotional distress”); *id.* § 436, 456 (“emotional disturbance”).

115. *Id.* § 15, cmt. (b).

116. I.R.C. § 104(a)(2) also recognizes that emotional harm can cause bodily harm, but it does not include within the exclusion bodily harm that result from emotional harm. It has been argued that at least some physical manifestations of emotional distress should be treated as physical illness and thus excluded. Wood, *supra* note 26, at 283 (“some physical consequences [of emotional distress] must be viewed as serious enough to constitute physical injury or physical sickness [under § 104(a)(2)].”).

physical injury exclusion of § 104(a)(2) should, as tort law does, consider the type of injury that is the source of emotional harm. In addition, it should, as tort law does, treat all emotional harm flowing from personal injuries the same, regardless of whether bodily harm also results from the personal injury. Although damages awarded to compensate for emotional harm flowing from *emotional or economic injuries* are not excluded from taxable income under § 104(a)(2), emotional harm flowing from all *physical injuries* should be excluded under § 104(a)(2).

Just as economic harm could flow from any type of injury, emotional harm could flow from any type of injury. First, emotional harm might flow from physical injury that also produces bodily harm, such as in the case of a classic battery or a negligent car accident. Second, emotional harm might flow from a physical injury that did not produce any bodily harm. Third, emotional harm might flow from an intangible or emotional injury, such as in a case for negligent or intentional infliction of emotional distress or libel. Fourth, emotional harm might also flow from a pecuniary injury such as fraud.

Emotional harms flowing from the third and fourth types of injuries are treated less favorably by tort law than emotional harms flowing from physical injuries. And it is these less favored emotional harms that are the emotional harms for which § 104(a)(2) does not provide an exclusion. It is relatively easy to conclude that by adding “physical,” Congress does not intend to tolerate an exclusion for damages awarded to compensate for emotional harms that might arise from economic injuries or even emotional or intangible injuries.¹¹⁷

The emotional harms resulting from physical injuries, though, should be excluded under § 104(a)(2). And it should not matter, with respect to intentional torts,¹¹⁸ whether that personal injury resulted in bodily harm. Nor should it matter whether bodily harm is observable.

It is axiomatic that, when a physical injury, such as a classic harmful contact¹¹⁹ battery, causes bodily harm and that bodily harm causes emotional harm, the plaintiff can recover for his emotional harm.¹²⁰ It is also well understood that even when a physical injury, such as an offensive battery or assault does *not* cause bodily harm, the plaintiff can

117. See *supra* Part IV.

118. A negligence claim requires proof of actual harm and so, in the context of a negligence claim, the arguments presented in this Article are less relevant.

119. “Harmful contact battery” is used here to distinguish from an “offensive contact” battery.

120. See DOBBS, *supra* note 66, § 382 (“The first and most common kind of emotional distress recovery occurs when emotional distress is merely an item of damages resulting from some other tort such as battery.”).

recover for his emotional harm.¹²¹ Tort law treats an offensive sexual groping, offensive spitting, or false imprisonment just as legitimate as a claim for a punch in the nose.¹²² When a defendant has intentionally¹²³ and tortiously invaded the plaintiff's right to autonomy, physical security, or physical liberty, the plaintiff can recover for all harms resulting from the injury, including emotional harm resulting therefrom.¹²⁴ Courts have had no difficulty recognizing emotional harm suffered as a result of such an intentional physical invasion, regardless of bodily harm.

In addition, the plaintiff's harm is presumed in such cases.¹²⁵ The plaintiff need not establish *any* harm. The invasion alone is sufficient to support a claim; these "trespassory" torts are regarded as "harmful in themselves."¹²⁶

For example, battery, one of the oldest torts, provides legal redress for "the least touching of another" according to Blackstone.¹²⁷ Every man's person is sacred, and no other has a right to meddle with it.¹²⁸ To make a case for battery, the plaintiff must merely show that the

121. RESTATEMENT (FIRST) OF TORTS § 14 cmt. (a) (AM. L. INST. 1934) ("A contact which causes no bodily harm may be actionable as a violation of the right to freedom from the intentional infliction of offensive bodily contacts."); DOBBS, *supra* note 66, § 47 ("When the trespassory tort causes no physical harm, the traditional tort rule is that the plaintiff can nevertheless recover substantial as distinct from nominal damages. The idea is loosely linked to the idea of mental distress, but no actual proof of mental distress is required. The invasion of the plaintiff's rights is regarded as a harm in itself and subject to an award of damages. If the plaintiff suffers emotional distress as a result of any of these torts, even without physical harm, she is entitled to recover for that emotional distress as a separate element of damages.").

122. *E.g.*, Deana Pollard Sacks, *Intentional Sex Torts*, 77 *FORDHAM L. REV.* 1051, 1075–76 (2008) ("Dignitary harm is presumed to flow from interference with bodily autonomy, because the right to bodily autonomy is considered integral to self determination and therefore is fiercely protected.").

123. The tort of negligence also provides redress for physical invasion, but a plaintiff in a negligence case must prove harm in order to recover. Once a plaintiff has proven bodily harm resulting from a negligent physical invasion, though, he can recover for any other harms flowing therefrom, including emotional harm. DOBBS, *supra* note 66, § 120 (contrasting negligence with the trespassory torts: "[n]o matter how offended or distressed the plaintiff might be when the defendant drives at 100 mph in a school zone, the defendant is not liable for negligence if he causes no harm. What counts as actual harm may be debated . . . but the underlying rule that harm is required has not been doubted.").

124. *See id.* § 48 ("When the defendant causes emotional distress by inflicting an unconsented-to and unjustified touching, or by inflicting any trespassory tort, the plaintiff can claim emotional distress damages resulting from that tort, without proving the elements of tort called intentional infliction of emotional distress.").

125. *Id.* § 28 ("All of these torts are actionable even if the plaintiff has no proven physical harm. Perhaps courts assume that the plaintiff suing for a trespassory tort has some kind of emotional harm, but if so, the plaintiff is not required to prove it.").

126. *See id.* § 47 ("The invasion of the plaintiff's rights is regarded as a harm in itself . . .").

127. WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAW OF ENGLAND*, Book 3, Ch. 8 (1765–1769) (stating that the tort of battery "prohibits the first and lowest stage of it.").

128. *Id.*

defendant's intentional act resulted in an offensive touching of the plaintiff's person or something so closely associated with the plaintiff as to make the touching tantamount to a physical invasion of the plaintiff's person.¹²⁹ “[T]he essence of the plaintiff's grievance consists in the offense to the dignity involved in the unpermitted and intentional invasion of the inviolability of his person and not in any physical harm done to his body. . . .”¹³⁰ For that reason, it is not even necessary that the plaintiff's actual body be disturbed.¹³¹ It is the physical invasion that is important, not whether the plaintiff suffered bodily versus emotional harm.¹³²

The tort of assault likewise involves an invasion of a physical interest and allows recovery for emotional harm regardless of bodily harm.¹³³ But the emotional harm suffered by an assault victim is not the type of “emotional harm” the law has been skeptical of or reluctant to address.¹³⁴ The tort has been recognized at least since 1348 in *I. de S. and Wife v. W. De S.*, in which the court ruled that emotional harm alone, even without any accompanying bodily harm, is itself an injury for which the law, through the tort of assault, will grant recovery to a plaintiff.¹³⁵ Similarly, the tort of false imprisonment protects against invasions in physical autonomy and for emotional harm regardless of bodily harm.¹³⁶

The important point here is that a plaintiff asserting a claim for battery, assault, or false imprisonment has asserted invasion of a physical interest—a physical injury to the person.¹³⁷ And those plaintiffs have never been required to allege or prove bodily harm. They certainly have not been required to prove any observable bodily harm. As long as the

129. RESTATEMENT (SECOND) OF TORTS § 18 (AM LAW INST., 1965).

130. *Id.*

131. *See id.*

132. Goldberg & Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 938–39 (2010).

133. DOBBS, *supra* note 66, § 382 (“The tort of assault . . . involves nothing more than a threat of immediate use of force that puts the plaintiff in reasonable apprehension of an unconsented-to bodily touching. By definition, no physical harm is required. The recovery for assault is a recovery for that unpleasant apprehension, a species of emotional distress.”).

134. *E.g.*, Raess v. Doescher, 883 N.E.2d 790, 793–99 (Ind. 2008) (affirming jury award of \$325,000 for assault, even where jury rejected plaintiff's intentional infliction of emotional distress claim; plaintiff presented evidence that his major depressive disorder, anxiety and panic disorder was caused by defendant's assault).

135. *I de S et ux. v. W de S*, Y.B.Lib.Ass. folio 99, placitum 60 (Assizes 1348).

136. DOBBS, *supra* note 66, § 382.

137. Trespass to land also protects against a physical invasion of a different sort—an invasion of the plaintiff's interest in exclusive possession of the land. This Article does not attempt to suggest that emotional harms arising from claims to trespass to land (or any other trespass to property tort) should be excluded.

tortious conduct is intentional,¹³⁸ it matters not whether the injury causes bodily harm because the interest protected is against a physical invasion, the most fiercely protected interest.

D. The personal physical injury exclusion of § 104(a)(2) should, as tort law does, treat all emotional harm flowing from personal injuries the same, regardless of whether bodily harm also results from the personal injury.

The “personal physical injury” exclusion of § 104(a)(2) should be interpreted consistently with the ancient understanding that tort law protects against intentional¹³⁹ physical injuries to the person regardless of bodily harm. In its treatment of emotional harm, the personal physical injury exclusion of § 104(a)(2) should, as tort law, consider the type of injury that is the source of emotional harm. In addition, it should, as tort law does, treat all emotional harm flowing from personal injuries the same, regardless of whether bodily harm also results from the personal injury. Although damages awarded to compensate for emotional harm flowing from *emotional or economic injuries* are not excluded from taxable income under § 104(a)(2), emotional harm flowing from all *physical injuries* should be excluded under § 104(a)(2). In other words, the “physical” qualifier of § 104(a)(2) should be interpreted to draw a line between the first category of injuries—physical injuries—and the second and third categories of injuries. With the 1996 “physical” qualifier and the declaration that emotional distress is not physical injury, Congress did not intend to tax emotional harms arising from tort physical injuries, such as a sexual assault, but instead intended to target emotional harms arising from emotional, intangible, and economic injuries, such as in cases of defamation and employment discrimination.

138. Within the first category of injuries, the Restatement Second does treat the interest in freedom from harmful bodily contacts (harmful contact battery) somewhat more favorably in that that interest is protected against both negligent and intentional invasions, whereas the others are protected only against intentional invasions. So long as the tortious conduct is intentional, though, the plaintiff has a claim whether or not the contact causes bodily harm. *See* RESTATEMENT (SECOND) OF TORTS § 15 (AM LAW INST., 1965).

139. The first category of protected interests are also addressed by the tort of negligence. A claim for negligent physical invasion is distinguishable from a claim asserting an intentional invasion in that the negligence claim will require proof of actual harm, whereas the intentional tort claim will not. This Article does not make any argument that, where the harm is other than bodily, emotional harms should be excluded. Where the negligently inflicted harm is bodily, even the current prevailing interpretation of § 104(a)(2) will allow exclusion of damages awarded for emotional harms arising from the bodily harm. Thus, in sum, this Article will not any further address damages for emotional harms resulting from negligence claims.

That interpretation would eliminate the need to distinguish even further between bodily harms that are observable and those that are not. It would avoid the rather absurd result of the Bruise Ruling¹⁴⁰ that required the victim of offensive battery, likely assault, and likely common law harmful battery to prove her harm with a bruise. It would give the same tax treatment to the emotional distress damages awarded to Law Clerk 2 and Law Clerk 3—both of whom were sexually assaulted by their boss. And, as explained in the following Part, it would still tax damages for emotional harm that Congress actually sought to tax with the 1996 amendment.

E. Semantics

Interpreting “personal physical injury” and “emotional distress” under § 104(a)(2) as referring to tort injuries, as distinguished from tort harms, reconciles what otherwise seems to be a flawed syllogism in the statute and its legislative history.

Section 104(a)(2) excludes from income “damages received on account of personal physical injuries.”¹⁴¹ It then states that “emotional distress shall not be treated as a physical injury or physical sickness.”¹⁴² Focusing on that statutory language alone, it would logically follow that damages received on account of emotional distress are not excluded.

But, despite that logical syllogism, emotional distress damages often *are* excluded, according to both legislative history and the regulations.¹⁴³ They are excluded if awarded “on account of a physical injury,”¹⁴⁴ although they are not considered a physical injury. How can it be that emotional distress is not a physical injury but at the same time can be attributable to a physical injury. This seems illogical.

It does make sense, though, if one considers the differing concepts of a tort injury and a tort harm and applies the concept of emotional injury to the code language and the concept of emotional harm to the legislative history and regulations. Assume that the term “emotional distress” in the

140. *See supra* Part III(C).

141. I.R.C. § 104(a)(2) (2018).

142. *Id.*

143. H.R. Rep. No. 104-737, at 301 (1996) (“Because all damages received on account of physical injury or physical sickness are excludable from gross income, the exclusion from gross income applies to any damages received based on a claim of emotional distress that is attributable to a physical injury or physical sickness.”); Treas. Reg. § 1.104-1(c) (as amended in 2012) (“Emotional distress is not considered a physical injury or physical sickness. However, damages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2).”).

144. *Id.*

§ 104(a)(2) language “emotional distress shall not be treated as a physical injury” refers to emotional injury, not emotional harm. Assume that the history and regulation reference to “emotional distress” refers to emotional harm, not emotional injury.

Logically this makes sense: Damages received on account of personal physical injuries (tort personal physical injuries) are excluded, per § 104(a)(2). And, per the legislative history and the regulation, that exclusion for personal physical injuries includes emotional *harms* (which they label “emotional distress”) attributable to those personal physical injuries. But, pursuant to the language of § 104(a)(2), damages received on account of *emotional injuries* (which they also label “emotional distress”) are not.

V. THE LEGISLATIVE HISTORY OF THE AMENDMENT INDICATES THAT ITS PURPOSE WAS TO REMOVE FROM THE EXCLUSION DAMAGES AWARDED TO COMPENSATE FOR INTANGIBLE, EMOTIONAL, AND PECUNIARY INJURIES, NOT THE “PHYSICAL INJURIES” EXPLAINED ABOVE.

The legislative history of the 1996 amendment supports this Article’s suggestion that § 104(a)(2)’s “personal physical injury” can be interpreted as the tort concept of physical injury to the person, and thus, damages awarded to compensate for emotional harms flowing therefrom are excluded from taxable income, regardless of any preceding bodily harm, such as in a case of sexual assault that leaves less than a bruise. The legislative history indicates that, in narrowing “personal injury” to “personal *physical* injury,” the purpose was to remove from the exclusion damages awarded to compensate for intangible and pecuniary injuries, including emotional harm flowing therefrom and physical manifestations of that emotional harm. The legislative history provides no indication that there was a desire to tax emotional distress damages arising from physical injuries (as this Article uses that term), such as a sexual assault that leaves less than a bruise.

First, it is important to note that Congress did not set out to tax all emotional distress damages. Damages received for emotional distress are sometimes excluded under § 104(a)(2). The exclusion does apply to damages received based on a claim of emotional distress that is “attributable to” a physical injury or physical sickness.¹⁴⁵ Furthermore, a

145. The legislative history of the Act (the House Report), states: “Because all damages received on account of physical injury or physical sickness are excludable from gross income, the exclusion from gross income applies to any damages received based on a claim of emotional distress that is

plaintiff can sometimes exclude emotional distress damages from income even if the plaintiff is not the person who suffered the physical injury to which the emotional distress can be attributed.¹⁴⁶ Damages for emotional distress arising from loss of consortium and wrongful death are excluded because they originated in a physical injury.¹⁴⁷ In addition, damages that reimburse for medical expenses related to emotional distress are excluded.¹⁴⁸ The target of the amendment, then, was not emotional distress damages.

Instead, the goal of the amendment was to tax damages that are intended to compensate for lost wages but that are *dressed up as* damages for physical injuries in an attempt to be tax free “personal physical injuries.” The modification was largely in response to plaintiffs in employment lawsuits who would seek to allocate most of their damages to emotional distress, which was then arguably excluded as a 104(a)(2) “personal injury,” even though a significant portion of their claim was for lost wages.¹⁴⁹ The Committee Report states:

Courts have interpreted the exclusion from gross income of damages received on account of personal injury or sickness broadly in some cases to cover awards for personal injury that do not relate to a physical injury or sickness. For example, some courts have held that the exclusion applies to damages in cases involving certain forms of employment

attributable to a physical injury or physical sickness.” H.R. Rep. No. 104-737, at 300–01 (1996), *as reprinted in* 1996 U.S.C.A.N. 1677, 1792–93. *See also* Treas. Reg. § 1.104-1(c) (as amended in 2012) (“Emotional distress is not considered a physical injury or physical sickness. However, damages for emotional distress attributable to a physical injury or physical sickness are excluded from income under section 104(a)(2).”).

146. H.R. Rep. No. 104-737 reads:

If an action has its origin in a physical injury or physical sickness, then all damages (other than punitive damages) that flow therefrom are treated as payments received on account of physical injury or physical sickness whether or not the recipient of the damages is the injured party. For example, damages other than punitive damages) received by an individual on account of a claim for loss of consortium due to the physical injury or physical sickness of such individual’s spouse are excluded from gross income. In addition, damages (other than punitive damages) received on account of a claim of wrongful death continue to be excluded from taxable income as under present law. H.R. Rep. No. 104-737, 301 (1996).

147. *Id.*

148. I.R.C. § 104(a)(2) (2018) (“The precedent sentence [which declares that emotional distress shall not be treated as a physical injury or physical sickness] shall not apply to an amount of damages not in excess of the amount paid for medical care . . . attributable to emotional distress.”).

149. Wood, *supra* note 26, at 283.

discrimination and injury to reputation where there is no physical injury or sickness.¹⁵⁰

In the section of the Committee Report entitled “Reasons for Change,” the report offers that damages received on a claim not involving physical injury or physical sickness “are *generally* to compensate the claimant for lost profits or lost wages that would otherwise be included in taxable income.”¹⁵¹ Those claims were the target of the amendment. Why, then, specifically address emotional distress?

In order to accomplish the goal of removing from the exclusion damages that are “generally” intended to compensate for lost wages, but which crafty plaintiffs might characterize as “physical injuries,” it was necessary to specifically address emotional distress. Congress may have been concerned that, if the exclusion continued to apply to emotional distress, —that is, if emotional distress itself was considered a “physical injury,” — employment discrimination plaintiffs (and the like) would attempt to characterize most or all of their damages as being for emotional distress, and therefore tax exempt, rather than for taxable income replacement.¹⁵² Thus, Congress specified that “physical injury” does not include emotional distress and further stated that the term emotional distress includes physical symptoms (e.g., insomnia, headaches, stomach disorders) which may result from such emotional distress.¹⁵³

Neither the code nor the legislative history defines “physical injury.” But the Committee distinguished between, on the one hand, awards that

150. H.R. Rep. No. 104-737, at 300–01 (1996), as reprinted in 1996 U.S.C.C.A.N. 1677, 1792–93.

151. *Id.* (emphasis added). The Report also referenced two then-recently decided Supreme Court cases as examples of types of claims targeted: *Comm’r v. Schleier*, and *United States v. Burke*. The issue in *Schleier* was whether the taxpayer could exclude from taxable income backpay and liquidated damages under the Age Discrimination in Employment Act of 1967. *Comm’r v. Schleier*, 515 U.S. 323, 324–25 (1995). The issue in *Burke* was whether the plaintiffs could exclude damages awarded in a Title VII action alleged that their employer had discriminated against them on the basis of sex in determining salaries. *United States v. Burke*, 504 U.S. 229, 230 (1992).

152. See *Burke & Friel*, *supra* note 19, at 184–85 (“One can only surmise that Congress recognized that if emotional distress constituted a physical injury for purposes of § 104(a)(2), the congressional purpose of negating an exclusion for damages on account of dignitary torts like employment discrimination would be largely thwarted. For example, in virtually every case of employment discrimination, a victim could be expected to argue that she suffered emotional distress as a result of the employer’s actions and was suing the employer to recover for that injury. But for the amendment language denying physical injury or physical sickness status to emotional distress, the taxpayer’s action would come within the exclusionary rule of amended § 104(a)(2).”).

153. Wood, *supra* note 26, at 283 (asserting that the 1996 modification was in response to what Congress and the IRS viewed as abuses by plaintiffs in employment lawsuits who would seek to allocate most of their recoveries to emotional distress even though a significant portion of their claim was for lost wages).

do relate to a physical injury or sickness and, on the other hand, awards that involve employment discrimination and injury to reputation. For the former, damages for emotional distress are excluded under § 104(a)(2). For the latter, however, damages for emotional distress are taxed because they, generally, are intended to compensate for lost wages.

A claim for assault, offensive battery, or false imprisonment is not generally intended to compensate for lost wages or income like a claim for employment discrimination or injury to reputation. Thus, those claims are not the target of the 1996 amendment. There is nothing in the code or the legislative history to so indicate.

The House Report further states that “the taxation of damages received in cases not involving a physical injury or physical sickness should not depend on the type of claim made.”¹⁵⁴ Thus, if a case does not redress a personal physical injury, there need not be any further inquiry into the type of claim in order to determine whether the damages are excluded under § 104(a)(2). They are taxable. If a case *does* redress a personal physical injury, though, there is likewise no need to further inquire into the type of claim. The damages awarded to compensate for any harms suffered as a result should be excluded from taxable income under § 104(a)(2).

VI. IRS NOD TO THE CONCEPT THAT SOME TORTS ARE INHERENTLY PHYSICAL

In a 2007 Memorandum, the IRS was willing to assume § 104(a)(2) “personal physical injuries” in a sex abuse case without evidence proving that there were ever any observable bruises, cuts, or the like.¹⁵⁵ When the man was a minor in the care of Entity A, Entity A’s employee caused “physical injury” to the him through a tort.¹⁵⁶ Entity A made payments to the man to settle the tort claims.¹⁵⁷ Although many years had passed, the man “continue[d] to struggle with the trauma resulting from” the tort.¹⁵⁸ Because of the passage of time and because he was a minor at the time the tort occurred, the man would “have difficult establishing the extent of the physical injuries.”¹⁵⁹

154. H.R. Rep. No. 104-737, at 300–01 (1996).

155. I.R.S. Gen. Couns. Mem. 200809001 at *2 (Nov. 27, 2007). It may be worth nothing that the author, Michael J. Montemurro, also authored the Bruise Ruling.

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

The IRS was willing to presume that man had been compensated for personal physical injuries and held that all damages for emotional distress were attributable to those personal physical injuries and thus excludable under § 104(a)(2). “Under these circumstances, it is reasonable for the Service to presume that the settlement compensated [the man] for personal physical injuries, and that all damages for emotional distress were attributable to the physical injuries.”¹⁶⁰

What circumstances made the presumptions necessary to conclude that all of these damages were for emotional distress that is excludable under § 104(a)(2) as attributable to physical injuries? His minority? The passage of time? Both? Because it was, under those facts, “difficult to establish the extent of the physical injuries?” The memorandum does not say.

It was reasonable to make that presumption in that case of sex abuse, as in any other, because such a plaintiff has suffered an invasion of the plaintiff’s interest in primary autonomy, physical security, and physical liberty—a “physical injury” as tort law understands that concept. It is also reasonable to make that presumption in any case in which the plaintiff proves all elements of battery, offensive or harmful; false imprisonment;¹⁶¹ or assault because, by definition, that plaintiff has suffered a physical injury in that the defendant has invaded the plaintiff’s interest in primary autonomy, physical security, and physical liberty. These torts are, by their very nature, physical. It is difficult to deny that this is true in cases of battery, whether or not it leaves a bruise. It seems disingenuous to argue that an inappropriate, unwanted, sexual contact is not “physical” simply because it does not leave a bruise.¹⁶²

VII. CONCLUSION

The personal physical injury exclusion of § 104(a)(2) should, as tort law does, consider the type of injury that is the source of emotional harm and, more specifically, treat all emotional harm flowing from personal injuries the same, regardless of whether bodily harm also results from the personal injury. Although damages awarded to compensate for emotional harm flowing from *emotional or economic injuries* are not excluded from

160. *Id.*

161. Wood, *supra* note 26, at 285 (“If one is deprived of one’s personal liberty, if one is confined unlawfully behind bars, is that not by its very nature physical? . . . [W]ouldn’t being confined in a jail cell (unlawfully) *always* be physical?”).

162. *Id.* (“Some things are inherently and incontrovertibly physical, whether or not they leave lasting outward scars. Sex abuse surely fits this category, as does rape or other sexual assault.”).

taxable income under § 104(a)(2), emotional harm flowing from all *physical injuries* should be excluded under § 104(a)(2).