

# ESSAY

## THE RESTORATION REMEDY IN PRIVATE LAW

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*One of the most perplexing problems in private law is when and how to compensate victims for emotional harm. This Essay proposes a novel way to accomplish this remedial goal—a restoration measure of damages. It solves the two fundamental problems of compensation for emotional harm—measurement and verification. Instead of measuring the emotional harm and awarding the aggrieved party money damages, this Essay proposes that defendants pay damages directly to restore the underlying interest, the impairment of which led to the emotional harm. And to solve the problem of verification—compensating only those who truly suffered the emotional harm—this Essay develops a sorting mechanism that separates sincere claimants from fakers, awarding the restoration measure of damages to account only for the harm suffered by the former. This Essay further demonstrates how the proposed restoration remedy would apply in important cases and discusses its relevance to additional remedial challenges in private law.*

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## INTRODUCTION

Private law does not eye claims of emotional harm generously.<sup>1</sup> It is deeply puzzling why. We live in a society in which emotional interests like dignity, privacy, personal fulfillment, and reputation are central to individual wellbeing, in which people are willing to pay nicely for emotional benefits, and in which many institutions are focused on advancing and protecting people's emotional concerns. Public law and private norms

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1. This Essay uses the term "emotional harm" broadly to refer to all types of harms that are not physical and pecuniary, without distinguishing different types of emotional harms. See John J. Kircher, *The Four Faces of Tort Law: Liability for Emotional Harm*, 90 *Marq. L. Rev.* 789, 838 (2007) (categorizing the role of emotional distress in different areas of tort law); Nancy Levit, *Ethereal Torts*, 61 *Geo. Wash. L. Rev.* 136, 140–46 (1992) (chronicling the growth of emotional distress liability); Douglas J. Whaley, *Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions*, 26 *Suffolk U. L. Rev.* 935, 940–46 (1992) (same).

show increasing respect for emotional interests, and yet private law is lagging behind.<sup>2</sup>

A primary reason for this misalignment is the absence of a conceptually coherent private law remedy for emotional harm. Deciding how to hold wrongdoers accountable for the emotional harms that their actions inflict on others presents one of the most perplexing challenges in private law. Unlike pecuniary or physical harms, emotional distress is difficult to verify and measure, and the remedial tools of private law—money damages or injunctions—are often ill-suited to redress it. Private law needs a new remedy to redress emotional harms that other areas of law regard as protection-worthy. This Essay aims to develop such a remedy, which we call “restoration.”

The notorious *Volkswagen* “dieselgate” case illustrates the hurdles in awarding damages for emotional harms. From 2009 to 2015, Volkswagen sold nearly 500,000 vehicles in the United States, which it branded as “clean diesel” and marketed as environmentally friendly.<sup>3</sup> In fact, these vehicles emitted toxic gases at high rates.<sup>4</sup> An antidetection “defeat device” built into the vehicles, which allowed the cars to pass regulatory emissions tests with flying colors, made this deception possible. Specifically, Volkswagen programmed this device to produce low-emission results when it sensed the vehicle was in an emission testing facility. Elsewhere, under normal driving circumstances, the device allowed the vehicle to release emissions at a higher rate.<sup>5</sup> Volkswagen brandished these “certified” low emissions to environmentally eager car buyers, hiding the fact that these vehicles emitted nitrogen oxides up to forty times over the permitted limit.<sup>6</sup>

Ultimately, the fraud was detected and litigation ensued. The price of the cars, new or used, dropped.<sup>7</sup> Aggrieved car owners joined hundreds of class action lawsuits alleging breach of contract and related

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2. See Restatement (Second) of Contracts § 353 cmt. a (Am. Law Inst. 1981) (“Damages for emotional disturbance are not ordinarily allowed.”); Whaley, *supra* note 1, at 940–47 (describing tort law and contract law suspicions toward emotional harms); Eugene Kontorovich, Comment, The Mitigation of Emotional Distress Damages, 68 U. Chi. L. Rev. 491, 493 (2001) (discussing how courts gradually began to recognize liability for emotional distress, and the resulting challenges).

3. See Order Granting Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealership Class Action Settlement at 2, In re Volkswagen “Clean Diesel” Mktg., Sales Practices, & Prods. Liab. Litig., No. 2671 CRM (JSC) (N.D. Cal. filed Oct. 25, 2016) [hereinafter *Volkswagen Settlement*], <https://www.cand.uscourts.gov/filelibrary/2867/Order-Granting-Final-Approval-of-Consumer-Sett.pdf> [<https://perma.cc/3EEV-9PLC>].

4. *Id.* (“In reality, these vehicles emit nitrogen oxides . . . at a factor of up to 40 times over the permitted limit.”).

5. *Id.*

6. *Id.*

7. See *id.* at 19 (explaining that the amount of cash each Class Member is to receive depends on the loss of value to the vehicle she owns).

causes of action.<sup>8</sup> These cases were consolidated into a single multidistrict litigation in a federal court in California and eventually settled.<sup>9</sup> The settlement awarded the class members damages for their pecuniary losses, measured by the decline in the cars' market value.<sup>10</sup>

Courts in breach of contract cases don't often grant damages for emotional harm,<sup>11</sup> but the *Volkswagen* settlement seemed to recognize the centrality of the buyers' environmental concerns by allowing for an additional recovery—a uniform payment of several thousand dollars for each car buyer.<sup>12</sup> This solution is problematic for two reasons. First, car owners who did not care about the environment suffered no emotional harm and yet were able to fake their way to recovery. We call this the problem of *verification*. Second, those who did suffer emotional harm received an arbitrary award that bore no measurable link to the gravity of their harm. We call this the problem of *measurement*.

To solve the verification and measurement problems of emotional damages, this Essay proposes a novel *restoration measure of damages* remedy ("restoration damages"). Under the proposed remedy, the wrongdoer is not required to compensate the emotionally aggrieved parties directly or undo the emotional harm. Instead, the wrongdoer has to restore the *underlying interest* that was impaired and gave rise to the emotional harm. The underlying interest is the aggrieved party's plan, agenda, values, or set of preferences that the wrongdoer was obligated to promote or protect. The court has to identify this interest and devise a remedy that enables the wrongdoer to restore it.

The *Volkswagen* case illustrates how restoration damages differ from emotional damages. Under the restoration remedy, Volkswagen would not be required to pay the buyers directly. Because the underlying interest is environmental, a court would order Volkswagen to pay for environmental improvements offsetting the emissions that its breach caused. For example, it could order Volkswagen to purchase and set aside carbon allowances equivalent to the pollutants emitted by each car. Buyers would thus experience a reprieve: Volkswagen's reduced emissions would precisely restore the environmental objective that led them to purchase the cars.

Restoration damages address the two fundamental challenges of compensation for emotional harm—measurement and verification—

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8. *Id.* at 2 ("Consumers nationwide filed hundreds of lawsuits after Volkswagen's use of the defeat device became public . . .").

9. See *id.* at 2–5.

10. *Id.* at 19.

11. See *infra* notes 19–20 and accompanying text.

12. Volkswagen Settlement, *supra* note 3, at 20 ("Restitution, which Class Members receive in addition to either a Buyback or Lease Termination or a Fix, provides additional monetary compensation.").

better than any other existing remedy.<sup>13</sup> The first major contribution of this Essay is to solve the problem of measurement. Restoration damages are not paid to the plaintiffs directly but are directed instead to restore the reparable underlying interest. Thus, they solve the problem of measurement because they do not require the impossible—the quantification and monetization of emotional harm. They do not need an “exchange rate” to translate agony into dollars.

The problem of verification is more difficult to solve. Unlike physical harms, claims of emotional harm are easy to fake and hard to verify. Because restoration damages provide meaningful redress only to sincere plaintiffs who truly suffered emotional distress, they are of no use to fakers. In our Volkswagen example, requiring the breaching seller to purchase carbon allowances provides a benefit only to “green” car buyers. Nevertheless, fakers may seek restoration damages strategically to bargain for high monetary settlements. While such Coasian bargaining would safeguard against wasteful investment in restoration, it would still lead to excessive compensation and deterrence. To that end, this Essay’s second major contribution is developing a general sorting mechanism that overcomes the faking problem. It describes how to design an election-of-remedy regime that awards restoration damages only to sincere claimants by screening away fakers with small cash bounties.<sup>14</sup> This regime would also allow defendants to invest less in inefficient restoration targeting plaintiffs who suffered only mild emotional harm.

In its simplest form, the sorting mechanism offers plaintiffs two choices: a restoration remedy paid directly to repair the underlying interest, or a “small” sum of money damages paid to the plaintiff’s pocket. Sincere plaintiffs would choose the first option because they truly care about the underlying interest; fakers would choose the second. In reality, the mechanism may have to be more complex and award more than a trivial bounty to some plaintiffs to account for varying degrees of concern for the underlying interest. This Essay discusses ways to mitigate this complexity.

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13. For a comparison of the restoration remedy with traditional damage remedies, see *infra* text accompanying notes 63–65. For a comparison with other remedial damages doctrines, see *infra* section II.E.

14. In a paper written at the same time as this Essay, Nathan Atkinson developed a self-selection mechanism to address a similar sorting problem. See Nathan Atkinson, *Designing Remedies to Compensate Plaintiffs for Unobservable Harms*, *Am. L. & Econ. Rev.* (forthcoming) (manuscript at 20–24), <https://academic.oup.com/aler/advance-article-pdf/doi/10.1093/aler/ahy007/25680584/ahy007.pdf> (on file with the *Columbia Law Review*). Atkinson’s sorting mechanism is related to a solution to the problem of strategic threats to use injunctions proposed in an earlier article. See Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 *U. Pa. L. Rev.* 45, 98–105 (1999). Unlike the mechanism developed in this Essay, which addresses the award of emotional damages, Atkinson’s mechanism focuses on a binary choice offered to the plaintiff between injunction (or specific performance) and damages when *ex post* negotiation is not allowed.

Of course, this sorting mechanism would work only if plaintiffs who select the restoration remedy are barred from settling postjudgment and releasing the defendant from the adjudged restoration obligation. And the power of fakers to strategically seek restoration damages may also lead to pretrial settlements that result in overcompensation. Thus, as this Essay discusses,<sup>15</sup> an additional ingredient for the success of the sorting mechanism is the prevention of such shadow deals around the restoration remedy.

The restoration remedy can be applied to protect various interests that, when violated, give rise to emotional rather than pecuniary harm. It is particularly suitable to circumstances that involve violations of religious, political, family, reputational, spiritual, or moral values.<sup>16</sup> For example, products are increasingly marketed with the promise that they conform to specific sets of values such as sustainability, organic production, animal welfare, religious standards, and political affiliation.<sup>17</sup> Each of these interests, when breached, can be restored via alternative methods, often with great precision. And while the restoration remedy is best suited to restoration of public-regarding interests, this Essay shows how it also works when the impaired interest is private in nature.<sup>18</sup>

The Essay proceeds as follows. Part I provides a brief overview of the inadequate treatment of emotional harms in contract and tort law. Part II introduces the restoration remedy as a novel way to redress emotional harm in general and in cases of harm to jointly consumed goods in particular. Part III illustrates the application of the new remedy and its advantages in the *Volkswagen* case. It also highlights the difficulties of implementation and shows how they could be overcome. Finally, Part IV discusses the social value of restoration damages, arguing that they achieve the remedial goals of compensation and deterrence at low administrative costs.

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15. See *infra* section II.C.

16. See *infra* section III.C (discussing how restoration damages would be appropriate in the *Volkswagen* case because Volkswagen marketed its vehicles as “green” and eco-friendly).

17. See, e.g., The Unstoppable Rise of Free-Range Eggs in Britain, *Economist* (Dec. 3, 2016), <https://www.economist.com/britain/2016/12/03/the-unstoppable-rise-of-free-range-eggs-in-britain> [<https://perma.cc/WM4N-PZE3>] (“These days, retailers crow about their pro-chicken credentials. Marks & Spencer, an upmarket chain, has a 100% free-range egg policy.”); Our Commitment to GMO Transparency, Whole Foods, <https://www.wholefoodsmarket.com/our-commitment-gmo-transparency> [<https://perma.cc/6WU9-PSXR>] (last visited Aug. 15, 2018) (“At Whole Foods Market, we believe you have the right to choose what’s in your food, and we are committed to GMO (genetically modified organism) transparency.”).

18. See *infra* text accompanying notes 106–107 (providing examples of private interests that could be served by restoration damages).

## I. RECOVERY FOR EMOTIONAL HARM IN PRIVATE LAW

This Essay aims to offer a novel solution for the compensation of emotional harms. The first step is to show that there is a problem. This Part identifies the problem: Emotional harms are currently undercompensated in private law. It surveys the rules for recovery of emotional harm under contract and tort law to illustrate that problem. These rules determine when—not how much—a plaintiff is entitled to recover and rarely impose liability for emotional harm. This Part also demonstrates that courts recognize the problem of undercompensation, yet they are presently unable to resolve it for mostly technical reasons that are rooted in measurement and verification hurdles.

A. *Contract Law*

1. *Contract Law's No-Emotional-Damages Rule.* — In common law, a breach of contract does not generally give rise to damages for the emotional harm it causes.<sup>19</sup> This rule is puzzling. The goal of contract remedies is to put the aggrieved party in as good a position as if the contract had not been breached. Courts generally recognize that, as an empirical matter, a breach of contract is an emotionally disturbing event. They are not shy to admit that the aggrieved party “might not be ‘made whole’ absent an award of mental distress damages.”<sup>20</sup> Yet, they do not generally award emotional damages.

One explanation often given for denying emotional damages is foreseeability: The breaching party did not know or have reason to know that breach would also cause consequential emotional harm.<sup>21</sup> This explanation is unsatisfying. Even courts that reject claims of emotional damages

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19. See, e.g., *Erlich v. Menezes*, 981 P.2d 978, 987, 989 (Cal. 1999) (holding that emotional damages are not available in a defective construction case); *Jankowski v. Mazzotta*, 152 N.W.2d 49, 50 (Mich. Ct. App. 1967) (“[C]ontractor’s breaches in ways which could be corrected . . . did not entitle owners to recover for mental anguish; owners could be fully compensated by allowing only for pecuniary losses.”); E. Allan Farnsworth, *Contracts* § 12.17, at 810 (4th ed. 2004) (explaining that a limitation “firmly rooted in tradition generally denies recovery for emotional disturbance . . . resulting from breach of contract”); 24 Samuel Williston & Richard A. Lord, *A Treatise on the Law of Contracts* § 64:7 (4th ed. 2002) (“Mental suffering caused by a breach of contract, although it may be a real injury, is not generally considered as a basis for compensation in contractual actions.”).

20. *Valentine v. Gen. Am. Credit, Inc.*, 362 N.W.2d 628, 629 (Mich. 1984).

21. See, e.g., *W. Union Tel. Co. v. Hogue*, 94 S.W. 924, 925 (Ark. 1906) (ruling that damages for mental anguish could not be recovered because the defendant had no notice that a failure to comply with the contract would cause mental suffering); *Johnson v. Quark Obstetrics & Gynecology Assocs.*, 395 S.E.2d 85, 93 (N.C. 1990) (noting that proximate causation and foreseeability are considerations in determining whether to impose liability for emotional distress in contractual cases).

recognize that “all breaches of contract do more or less” cause distress, “vexation[,] and annoyance.”<sup>22</sup>

A second and better justification for the no-emotional-damages rule is the speculative nature of emotional harms.<sup>23</sup> Contract law does not allow compensation for uncertain harm,<sup>24</sup> and emotional losses are uncertain and hard to verify and quantify. Yet it’s not clear why emotional damages should be barred entirely. If the magnitude of the harm varies greatly and cannot be proven with accuracy, some “average” measure of damages—or at the very least, some low-end measure that is unlikely to err on the side of overcompensation—should be awarded.

A third possible justification for denying emotional damages is their avoidability.<sup>25</sup> Compensated for the pecuniary loss from breach, the aggrieved party is able to purchase performance elsewhere, and the distress suffered due to nonperformance ought to be cured, rendering any additional emotional damages double compensation.<sup>26</sup> Thus, for example, rather than bemoan the mental anguish from a breached employment contract, the discharged employee is prompted to pursue mitigation strategies by seeking substitute employment. This justification, however, is limited to those cases in which the victim indeed could avoid the emotional harm.

A related justification is based on the parties’ *ex ante* will. Commentators have argued that the no-emotional-damages rule is the default rule that mimics the parties’ will at the time of contracting. Promisees prefer, under this view, to forgo emotional damages and save the premium they would otherwise have to pay, through a price adjustment, for this expanded breach insurance.<sup>27</sup> This claim is not based on any empirical grounds. It is based on the assumption that, in contrast to a pecuniary injury, an emotional injury does not increase an aggrieved

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22. *Stewart v. Rudner*, 84 N.W.2d 816, 824 (Mich. 1957) (quoting 1 J.G. Sutherland, *A Treatise on the Law of Damages* 156–57 (1882)); accord *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 54 (Mich. 1980) (“We recognize that breach of the insurance contract, as with almost any agreement, results in some annoyance and vexation.”).

23. See Restatement (Second) of Contracts § 353 cmt. a (Am. Law Inst. 1981) (“Damages for emotional disturbance . . . are often particularly difficult to establish and to measure.”).

24. *Id.* § 352 (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with [sic] reasonable certainty.”).

25. Cf. U.C.C. § 2-715(2)(a) (Am. Law. Inst. & Unif. Law Comm’n 2017) (providing that consequential damages are recoverable if they “could not reasonably be prevented by cover or otherwise”); Restatement (Second) of Contracts § 350 (“[D]amages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.”).

26. See, e.g., *Jerome v. Mich. Mut. Auto Ins. Co.*, 300 N.W.2d 371, 372 (Mich. Ct. App. 1980) (reversing the trial court’s award for mental anguish so as to avoid an “improper double recovery”).

27. See Samuel A. Rea, Jr., *Nonpecuniary Loss and Breach of Contract*, 11 J. Legal Stud. 35, 53 (1982).



party's marginal utility of money.<sup>28</sup> If so, it would be irrational to transfer money from the prebreach state to the postbreach state, especially if such transfer involves transaction and litigation costs.<sup>29</sup> The only anecdotal support for this conjecture is the apparent absence of demand for first-party insurance policies that cover emotional harms.<sup>30</sup>

This demand-for-insurance argument has a critical flaw when applied to contracts: It ignores deterrence. If emotional harm goes uncompensated, the breaching party does not internalize the entire negative impact of the breach and would take insufficient precautions to guarantee performance. Ultimately, the parties' rational ex ante interest is to have their contract governed by remedial rules that induce optimal performance incentives. Categorically excluding emotional damages undermines this interest.<sup>31</sup>

2. *Exceptions.* — Despite its general reluctance to award emotional damages, the common law has carved out narrow exceptions. These exceptions identify scenarios in which unavoidable emotional harm is particularly likely to result from a breach.<sup>32</sup> The most prominent exception is when the emotional harm accompanies some physical injury.<sup>33</sup> In addition, courts recognize a “narrow exception” when the contract “has elements of personality”—namely, “a contract meant to secure protection of personal interests.”<sup>34</sup> Contracts are found to have a “personal

28. See Steven Shavell, *Economic Analysis of Accident Law* 228–31 (1987) (explaining the marginal utility of money argument); Ariel Porat, *Economics of Remedies*, in 2 *The Oxford Handbook of Law and Economics: Private and Commercial Law* 308, 320–21 (Francesco Parisi ed. 2017) (same).

29. See Richard J. Zeckhauser, *Coverage for Catastrophic Illness*, 21 *Pub. Pol'y* 149, 151–56 (1973) (applying these principles to the question of how we should allocate resources to the treatment of catastrophic illness). For an attempt at a counterargument that victims might be willing to insure against nonpecuniary losses, see Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 *Harv. L. Rev.* 1785, 1896–914 (1995); see also Philip J. Cook & Daniel A. Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities*, 91 *Q.J. Econ.* 143, 143, 145–55 (1977) (developing a theoretical model concerning the demand for insurance and the value of increases in the level of protection for irreplaceable commodities, and finding that a rational individual will typically not fully insure an irreplaceable commodity, such as good health, and may even choose to bet against losing it). For an excellent survey of the literature and a novel experimental perspective, see generally Ronen Avraham, *Should Pain-and-Suffering Damages Be Abolished from Tort Law? More Experimental Evidence*, 55 *U. Toronto L.J.* 941 (2005).

30. See Rea, *supra* note 27, at 37–40 (arguing that there is no demand for first-party insurance policies for nonpecuniary losses).

31. See *id.*

32. Restatement (Second) of Contracts § 353 (Am. Law Inst. 1981) (“[B]reach is of such a kind that serious emotional disturbance was a particularly likely result.”).

33. See discussion *infra* section I.B.

34. *Valentine v. Gen. Am. Credit, Inc.*, 362 N.W.2d 628, 630–31 (Mich. 1984) (“Rather than look to the foreseeability of loss to determine the applicability of the exception, the courts have considered whether the contract ‘has elements of personality’ and whether the ‘damage suffered upon the breach of the agreement is capable of adequate

element,” as contrasted with the more common “commercial element,” when their primary purpose is not economic or patrimonial but to advance psychic satisfaction, secure relief from a particular emotional inconvenience or annoyance, or confer a particular emotional enjoyment.<sup>35</sup> The types of contracts recognized to have a “personal element” seem to be relics of an older era.<sup>36</sup> It is, for example, surprising that courts do not generally recognize employment contracts to have an “element of personality.”<sup>37</sup> Nevertheless, the “element of personality” doctrine is founded on a solid principle: Award emotional damages when the parties entered the contract in pursuit of the very same emotional interest that was eventually harmed.

While the “element of personality” test has been applied sparingly to award stand-alone emotional damages, a similar test is used more generously to assess damages from defective performance.<sup>38</sup> The plaintiffs in such cases are seeking money damages to undo nonconforming performances and redo projects as promised, even though the cost of repair might be significantly higher than the diminution in market value that the defect caused.<sup>39</sup> This divergence between the two measures of the

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compensation by reference to the [contract] terms . . . .” (first quoting *Stewart v. Rudner*, 84 N.W.2d 816, 824 (Mich. 1957); then quoting *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 63 (Mich. 1980)); see also *Kewin*, 295 N.W.2d at 63 (opining that emotional damages are available when the contracts breached are “concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude”).

35. See, e.g., *Valentine*, 362 N.W.2d at 631 (holding that emotional damages should not be awarded for the breach of an employment contract because the primary purpose of forming such contracts is economic, not personal).

36. Typical examples include tour package contracts, contracts to perform cosmetic surgeries, and contracts for providing services for weddings or funerals. See, e.g., *Hirst v. Elgin Metal Casket Co.*, 438 F. Supp. 906, 908 (D. Mont. 1977) (sale of a casket); *Lewis v. Holmes*, 34 So. 66, 68 (La. 1903) (wedding services); *Sullivan v. O’Connor* 296 N.E.2d 183, 189 (Mass. 1973) (cosmetic surgery); *Jarvis v. Swan Tours* [1972] EWCA (Civ) 8, [12] (Eng.) (tourism).

37. See, e.g., *Lyons v. Midwest Glazing, L.L.C.*, 235 F. Supp. 2d 1030, 1049 (N.D. Iowa 2002) (“Parties to an employment contract primarily exchange services for salary and benefits. Although employees may attach great personal and emotional significance to their employment, employment contracts principally serve an economic purpose.”); *Richmond v. Wyeth Labs. Div. of Am. Home Prods. Corp.*, 641 F. Supp. 483, 486 (W.D. Mich. 1986) (“The purpose [of an employment contract] is economic. With that rationale, it is unlikely that the Michigan courts would hold a breach of a Toussaint contract would be to recover damages for injury to person or property.”); *Valentine*, 362 N.W.2d at 631 (holding that an employment contract “is not entered into primarily to secure the protection of personal interests”).

38. See, e.g., *Jacob & Youngs, Inc. v. Kent*, 129 N.E. 889, 891 (N.Y. 1921) (“It is true that in most cases the cost of replacement is the measure. The owner is entitled to the money which will permit him to complete, unless the cost of completion is grossly and unfairly out of proportion to the good to be attained.” (citation omitted)).

39. See, e.g., *Groves v. John Wunder Co.*, 286 N.W. 235, 235–36 (Minn. 1939) (unfinished land reclamation); *Jacob & Youngs*, 129 N.E. at 890 (nonconforming pipes);

loss—the cost of repair versus the diminution in value—exists because the market does not assign a significant price differential to the completed performance.<sup>40</sup> The lower market valuation indicates that the value assigned by the plaintiff to the completion of the performance is subjective and emotional, and not widely shared by market participants. An example is when the plaintiff seeks to replace a new roof for the sole reason that it was installed in a different color tone than specified.<sup>41</sup>

Courts struggle to resolve the remedial dilemma about whether to protect “mere taste or preference, almost approaching whimsy.”<sup>42</sup> For example, they recognize that an “owner’s right to improve its property is not trammled by its small value”<sup>43</sup> but at the same time regard damages targeted to repair such property interests as wasteful. Courts sometimes try to resolve this tension by asking whether the in-kind completion is merely an *incidental* purpose of the contract<sup>44</sup> or whether it is of special value, so central that without it the goal of the contract for the plaintiff would be frustrated.<sup>45</sup> This test—whether the plaintiff had some personal goal not measured by the commercial value of the contract—is strikingly similar to the “personal” versus “commercial” interest test for emotional damages.<sup>46</sup> And yet in the context of defective performance, courts seem to protect the emotional harm more robustly. The reason for the differential application is probably the measurement problem: It is hard to measure pure emotional harm and award emotional damages as an add-on, whereas it is easy to measure the cost of repair necessary to avoid the emotional harm. In the defective performance cases, plaintiffs are asking for a money allowance to avoid rather than to compensate for mental anguish. In this context, courts find it easier to award compensation, which can be accurately measured as the amount needed to finish a job or restore a prebreach state. If this is indeed the reason for courts’ greater readiness to redress emotional grievances in defective performance

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*Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 111 (Okla. 1962) (unfinished land reclamation); *Plante v. Jacobs*, 103 N.W.2d 296, 297 (Wis. 1960) (misplaced wall).

40. See, e.g., *Plante*, 103 N.W.2d at 299 (“Expert witnesses for both parties, testifying as to the value of the house, agreed that the misplacement of the wall had no effect on the market price.”).

41. See *Gory Associated Indus. v. Jupiter Roofing & Sheet Metal, Inc.*, 358 So. 2d 93, 95 (Fla. Dist. Ct. App. 1978) (“If a proud householder . . . orders a new roof of red barrel tile and the roofer instead installs a purple one, money damages for the reduced value of his house may not be enough to offset the strident offense to aesthetic sensibilities . . .”)

42. *O.W. Grun Roofing & Constr. Co. v. Cope*, 529 S.W.2d 258, 262 (Tex. Civ. App. 1975).

43. *Groves*, 286 N.W. at 237.

44. *Peevyhouse*, 382 P.2d at 114.

45. See *City Sch. Dist. of Elmira v. McLane Constr. Co.*, 445 N.Y.S.2d 258, 260 (App. Div. 1981) (allowing recovery for the cost of repair because the aesthetic of the structure was important to the plaintiffs); *Landis v. William Fannin Builders, Inc.*, 951 N.E.2d 1078, 1089 (Ohio Ct. App. 2011) (same).

46. See *supra* notes 34–37 and accompanying text (describing the “personal” versus “commercial” interest test for emotional damages).

cases, we suspect that the restoration measure proposed in this Essay would encourage courts to expand liability for emotional harm.<sup>47</sup>

### B. *Tort Law*

Tort law permits recovery for emotional harms in more circumstances than contract law. Primarily, emotional distress is recoverable when it accompanies an injury that has a physical manifestation.<sup>48</sup> Emotional harm generated by a physical injury is relatively verifiable.<sup>49</sup> Thus, claims for emotional damages by victims of bodily injuries and their relatives—for loss of enjoyment of life or loss of consortium (companionship) respectively—are plausible.<sup>50</sup> Conversely, stand-alone emotional

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47. Another doctrine that indirectly depends on the presence of some emotional harm is the specific performance remedy. It is available primarily when the performance sought is unique, and damages are therefore difficult to ascertain so as to make the aggrieved party truly whole. See Restatement (Second) of Contracts § 359(1) (Am. Law Inst. 1981). The presence of an emotional interest that “induce[s] a strong sentimental attachment” typically renders damages inadequate. *Id.* § 360 cmt. b. When buyers attach idiosyncratic, emotional, hard-to-measure value to a contract, market-based damages would leave them undercompensated and unable to find a replacement that would restore that emotional value. See Anthony T. Kronman, *Specific Performance*, 45 U. Chi. L. Rev. 351, 362 (1978) (arguing that money damages may leave a promisee under- or overcompensated when the subject matter of a particular contract is unique and has no easily established market value).

Further, the presence of an emotional harm is relevant for the enforcement of liquidated damages. When emotional harm resulting from a breach is likely, courts tend to uphold liquidated damages instead of finding them overcompensatory and unenforceable. See U.C.C. § 2-718(1) (Am. Law Inst. & Unif. Law Comm’n 2017) (referring to “difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy” as reasons to enforce liquidated damages); Restatement (Second) of Contracts § 356 cmt. b (“The greater the difficulty either of proving that loss has occurred or of establishing its amount with the requisite certainty (see § 351), the easier it is to show that the amount fixed is reasonable.”). See generally Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 Colum. L. Rev. 554, 558–77 (1977) (analyzing the economics of liquidated damages).

48. See Restatement (Second) of Torts § 436A (Am. Law Inst. 1965); see also, e.g., *Tuttle v. Meyer Dairy Prods. Co.*, 138 N.E.2d 429, 429–30 (Ohio Ct. App. 1956) (stating that in the absence of any physical injury, a seller of food is not liable for “fright, apprehension[,] and mental anguish” suffered).

49. Cf. Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 45 cmt. a (Am. Law Inst. 2012) (“Usually the existence of bodily harm can be verified objectively while the existence and severity of emotional harm is ordinarily dependent on self-reporting.”).

50. See *id.* § 4 cmt. d (stating that plaintiffs can recover damages for emotional harm that stems from a physical injury); *id.* § 48 (providing that a third party can recover damages for emotional harm that results from witnessing the physical injury of a family member); see also Dan B. Dobbs et al., *Torts and Compensation: Personal Accountability and Social Responsibility for Injury* 581–90 (7th ed. 2013) [hereinafter *Dobbs, Torts and Compensation*] (noting that some states require that an emotional injury be medically diagnosable as an emotional disorder, while others allow recovery only when the defendant’s negligence caused the plaintiff a physical danger that led to the emotional harm).

harm, not accompanied by physical injury, is generally uncompensated under tort law unless intentionally inflicted.<sup>51</sup> Difficulties of proof, the risk of frivolous claims, and floodgate concerns are the main policy considerations underlying the no-emotional-damages rule.<sup>52</sup>

But there are exceptions. Some exceptions are general and baked into torts that are specifically designed to protect against nonpecuniary wrongs, such as libel,<sup>53</sup> assault,<sup>54</sup> false imprisonment,<sup>55</sup> and intentional infliction of emotional distress.<sup>56</sup> Another exception permits plaintiffs to

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For loss of consortium, see Restatement (Second) of Torts § 693 (“One who by reason of his tortious conduct is liable to one spouse for illness or other bodily harm is subject to liability to the other spouse for the resulting loss of the society and services of the first spouse . . .”).

51. See Restatement (Third) of Torts: Liab. for Physical and Emotional Harm § 46 cmt. h (“[A] plaintiff must prove that the defendant intended to cause severe emotional harm to the plaintiff . . .”); see also *Sullivan v. Bos. Gas Co.*, 605 N.E.2d 805, 811 (Mass. 1993) (requiring the injured victims to show objective evidence of their emotional distress to prove a negligent infliction of emotional distress claim).

52. See *Chizmar v. Mackie*, 896 P.2d 196, 201 (Alaska 1995) (“The basic assumption . . . is that emotional distress without physical injury is relatively trivial and easily feigned.”); *Eagle-Picher Indus. v. Cox*, 481 So. 2d 517, 529 (Fla. Dist. Ct. App. 1985) (explaining that “the physical injury requirement will insure that the claims permitted are only the most genuine”); *Coleman v. Humane Soc’y of Memphis*, No. W2012–02687–COA–R9–CV, 2014 WL 587010, at \*10–13 (Tenn. Ct. App. Feb. 14, 2014) (surveying cases that employed a higher standard of proof to mitigate the risk of frivolous negligent infliction of emotional distress claims); see also Dan B. Dobbs, *The Law of Torts* 823 (2000) [hereinafter *Dobbs, Law of Torts*] (arguing that emotional distress differs from one plaintiff to another and cannot easily be measured equally); Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 *Ariz. St. L.J.* 805, 831–32 (2004) (arguing that because emotional distress is hard to prove, courts are more wary of fraudulent and frivolous emotional claims). But see *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 810 (Cal. 1993) (“While we agree . . . that meaningful limits on the class of potential plaintiffs and clear guidelines for resolving disputes in advance of trial are necessary, imposing a physical injury requirement represents an inherently flawed and inferior means of attempting to achieve these goals.”). For a recent account of the categories of cases in which emotional harm is recoverable, see Robert L. Rabin, *Dov Fox on Reproductive Negligence: A Commentary*, 117 *Colum. L. Rev. Online* 228, 230–33 (2017), [https://columbialawreview.org/wp-content/uploads/2017/10/Rabin\\_Commentary-on-Reproductive-Negligence.pdf](https://columbialawreview.org/wp-content/uploads/2017/10/Rabin_Commentary-on-Reproductive-Negligence.pdf) [<https://perma.cc/A5XK-Y7CB>].

53. Restatement (Second) of Torts § 623 (“One who is liable to another for a libel or slander is liable also for emotional distress and bodily harm that is proved to have been caused by the defamatory publication.”).

54. *Id.* § 21.

55. *Id.* § 35.

56. In negligence cases, courts have also imposed liability for emotional harm when the harm resulted from injury to another or from loss of consortium. See *Thing v. La Chusa*, 771 P.2d 814, 815 (Cal. 1989) (holding that obtaining damages from emotional distress caused by observing the injury to another is possible when: (1) the plaintiff is closely related to the injured victim, (2) the plaintiff is present at the scene of the injury, and (3) as a result, the plaintiff suffers serious emotional distress); *Ferriter v. Daniel O’Connell’s Sons, Inc.*, 413 N.E.2d 690, 703 (Mass. 1980) (accepting a claim of loss of parental consortium); see also *Dobbs, Law of Torts*, *supra* note 52, at 825; *Dobbs, Torts and Compensation*, *supra* note 50, at 591–95.

secure injunctions against prospective tortious behavior, primarily in nuisance cases.<sup>57</sup> Here, rather than engage in the inaccurate exercise of redress ex post, the law allows an ex ante injunction.

Environmental statutes provide further recovery for emotional harms that arise from damage to the environment. For example, plaintiffs can recover for the “existence value” that reflects the psychological benefit from the mere knowledge that an environmental resource exists and will continue to exist.<sup>58</sup> Additionally, governmental trustees are permitted to sue polluters for damages to natural resources, including “nonuse” values that stand for emotional harm.<sup>59</sup> For example, under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), wrongdoers are liable for “damages for injury to, destruction of, or loss of” natural resources.<sup>60</sup> CERCLA also explicitly states: “The measure of damages . . . shall not be limited by the sums which can be used to restore or replace such resources.”<sup>61</sup> In the few decided cases, courts have awarded damages for aesthetic and existence values, which are both surrogates for types of emotional harm.<sup>62</sup>

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57. See Restatement (Second) of Torts § 933 cmt. b (mentioning nuisance as a tort that is frequently the subject of an injunction suit). For an extended review of injunctive relief in nuisance cases, see Dan B. Dobbs, *Law of Remedies: Damages, Equity, Restitution* 517–28 (2d ed. 1993). Professors Guido Calabresi and Douglas Melamed’s classic explanation for this exception suggested that injunctions protect the idiosyncratic values owners ascribe to their property better than damages. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 *Harv. L. Rev.* 1089, 1108 (1972) (“Taney may be sentimentally attached to his land. As a result, eminent domain may grossly undervalue what Taney would actually sell for, even if it sought to give him his true valuation of his tract.”); cf. *supra* note 47 (discussing specific performance).

58. See Note, *Existence-Value Standing*, 129 *Harv. L. Rev.* 775, 784 (2016) (discussing an early draft of legislation combating climate change, which includes a citizen-suit provision).

59. See, e.g., *Clean Water Act*, 33 U.S.C. §§ 1251–1387 (2012); *id.* § 1321(b)(7)(B)(ii) (providing that failure to comply with particular provisions of the Act “shall be subject to a civil penalty in an amount of up to \$25,000 per day of violation or an amount up to 3 times the costs incurred by the Oil Spill Liability Trust Fund as a result of such failure”); *Comprehensive Environmental Response, Compensation, and Liability Act*, 42 U.S.C. §§ 9601–9675 (2012); *id.* § 9651(c)(2) (“Such regulations shall identify the best available procedures to determine such damages, including both direct and indirect injury, destruction, or loss and shall take into consideration factors including, but not limited to, replacement value, use value, and ability of the ecosystem or resource to recover.”).

60. 42 U.S.C. § 9607 (a)(4)(C).

61. *Id.* § 9607(f).

62. See *Ohio v. U.S. Dep’t of the Interior*, 880 F.2d 432, 464 (D.C. Cir. 1989) (“Option and existence values may represent ‘passive’ use, but they nonetheless reflect utility derived by humans from a resource, and thus, *prima facie*, ought to be included in a damage assessment.”); Jeffrey C. Dobbins, Note, *The Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages*, 43 *Duke L.J.* 879, 911 (1994) (explaining the statutory and regulatory provisions that constitute the legal basis for such cases); Note, *supra* note 58, at 782–83 (summarizing the case law on this matter). Similar to contract law, tort law allows recovery for the costs of repairing a damaged property

## II. THE RESTORATION MEASURE OF DAMAGES

Our brief tour across private law's remedy doctrines in Part I showed that emotional harm is not often recoverable and receives inconsistent treatment. Technical verification and measurement difficulties rather than substantive concerns explain this remedial anomaly. If the obstacles for assessing recovery for emotional harm could be overcome, the make-whole principle could be better fulfilled. In this Part, we introduce the restoration remedy as a potential solution for these technical difficulties.

The restoration remedy aims at overcoming the verification and measurement problems. It consists of an order to pay money not directly to the plaintiff but instead to finance the actual in-kind reclamation of a close replacement. It seeks to finance a completed preservation of the pre-harm state for the benefit of the plaintiff.

Section II.A begins by presenting the technique of restoration. Section II.B then shows how restoration damages solve the problem of verification through an election-of-remedy sorting mechanism. Section II.C explains how renegotiation, settlements, and side deals could affect the restoration remedy, and section II.D discusses the restoration remedy's scope of application. Finally, section II.E distinguishes the restoration remedy from other remedies that feature some resemblance to it.

### A. *The Mechanics of Restoration Damages*

This section starts by introducing the mechanics of restoration damages, a new proposed remedy. The key ingredient of the remedy, presented in section II.A.1, is the "intermediate underlying interest." This is the interest whose impairment led to the emotional harm and that therefore must be the target of the make-whole valuation. Section II.A.2 then addresses some benchmark issues concerning the measurement of the underlying interest. It argues that, in many cases, it would be easier to measure the underlying interest than to measure the emotional harms suffered by the plaintiffs.

1. *The Intermediate Underlying Interest.* — Any violation of a right—contractual, proprietary, or bodily—hurts some underlying interest. At the most general level, a violation reduces the aggrieved party's utility and thus hurts the underlying interest of maximizing one's utility. At the most concrete level, a violation denies the aggrieved party's plan to derive specific benefits from an identified asset, or from her bodily integrity, and thus hurts the underlying interest associated with this precise plan.

Damage remedies adopt the most abstract concept of an underlying interest and aim to restore the aggrieved party's utility by awarding money

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even if those costs far exceed diminution in the property's objective value. *Supra* section I.A. This usually occurs when the damaged property has special nonmarket value and its destruction likely leads to emotional harm. See *In re September 11th Litig.*, 590 F. Supp. 2d 535, 542 (S.D.N.Y. 2008) (clarifying the specialty property rules).

sufficient to offset the reduction of utility caused by the violation.<sup>63</sup> In-kind remedies adopt the most concrete concept of an underlying interest and aim to restore the aggrieved party's specific use and enjoyment arising from an identified plan that was drawn prior to the violation.<sup>64</sup>

But the concept of an "underlying interest" as the target of remedial law's make-whole objective does not need to take one of these two polar manifestations. The aggrieved party's violated plan may have taken a specific manifestation, but it was selected in order to advance a more general personal agenda. This general agenda is more targeted than the abstract, tautological, all-encompassing "utility maximization." Often, it is the advancement of a specific intermediate value or preference, which could also be advanced by close substitutes.

Critical to the design of restoration damages is the conceptual and empirical existence of an intermediate underlying interest, which when violated by the defendant gives rise to the plaintiff's emotional harm. Conceptually, this interest is a person's organizing goal, which accounts for the emotional satisfaction from her specific choices and actions.<sup>65</sup> An underlying interest may be a taste, a value, a need or necessity, a sentiment or attachment, a political or religious preference, or an ideology. An underlying interest may be advanced—although not always and not perfectly—by various substitute courses of actions. If one course of action is thwarted, other efforts may be used to satisfy the underlying interest.

Consider a religious or political preference relating to one's diet that is manifested by a plan to eat only vegetarian food. A subversion of this plan, for example, by deceptively labeling a canned soup product prepared with meat stock as "vegetarian," impairs the deceived buyers' most general interest in maximizing utility as well as their most concrete

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63. See, e.g., Restatement (Second) of Contracts § 344 cmt. a (Am. Law Inst. 1981) ("Ordinarily, when a court concludes that there has been a breach of contract, it enforces the broken promise by protecting the expectation that the injured party had when he made the contract.").

64. See *id.* § 357 cmt. a ("An order of specific performance is intended to produce as nearly as is practicable the same effect that the performance due under a contract would have produced. It usually, therefore, orders a party to render the performance that he promised.").

65. See, e.g., Sarah Dadush, *Identity Harm*, 89 *U. Colo. L. Rev.* 863, 880–83 (2018) (discussing the rise of the "market for virtue" and the connection between consumers' choices and their core interests and values). See generally David Vogel, *The Market for Virtue* (2005) (chronicling the rise of conscious consumerism); Josée Johnston, *The Citizen-Consumer Hybrid: Ideological Tensions and the Case of Whole Foods Market*, 37 *Theory & Soc'y* 229, 239 (2008) (describing how activists have encouraged consumers to "think critically, buy more selectively, and seek out information on the environmental and social costs involved in their daily meals"); *Global Consumers Are Willing to Put Their Money Where Their Heart Is When It Comes to Goods and Services from Companies Committed to Social Responsibility*, Nielsen (June 17, 2014), <http://www.nielsen.com/us/en/press-room/2014/global-consumers-are-willing-to-put-their-money-where-their-heart-is.html> [<https://perma.cc/TGW3-6KMT>] ("Consumers around the world are saying loud and clear that a brand's social purpose is among the factors that influence purchase decisions.").



interest in eating a vegetarian soup. But this subversion is best viewed as a violation of an intermediate underlying interest generally relating to the reduction of meat consumption. This intermediate underlying interest may be the concern for animal welfare, namely the interest to protect some species of animals from slaughter; or environmental protection, namely the interest to protect the environment from harms caused by meat production; or one's physical health, namely the interest to avoid the adverse private or public health effects of meat consumption.<sup>66</sup>

Because the specific underlying interest may vary across people, its identification is an empirical challenge, which we address in section II.B below. Once identified, however, the presence of a known underlying interest makes it possible to design a remedy that would make that interest whole when impaired. In the absence of such an intermediate interest, the only in-kind remedy is a reversal of the concrete harm. When such a reversal is impossible, money damages aimed to undo the reduction in the aggrieved party's total utility are the only remaining remedy. But if an intermediate underlying interest exists and is identified, an in-kind remedy can be tailored to a reversal of the harm done to the underlying interest rather than to its actual concrete manifestation.

Claims for emotional harms are easy to fake and hard to verify. But plaintiffs' declarations about which intermediate underlying interest was damaged are not susceptible to the same verification problems. First, the interest declared by the plaintiff may be the same as the one touted by sellers luring people to buy a product. For instance, when sellers market coffee as "fair trade," they promise consumers that they take concern for the rights of marginalized workers and producers. When meat is sold as "halal," the concern for the religious preferences of buyers is central to the transaction. Such promises of "fair trade" and "halal" form a verifiable part of the basis of the bargain. Second, restoration damages could rely on a plaintiff's declaration as to which intermediate underlying interest was damaged even in the absence of corroborating precontractual statements by the seller. There is good reason to assume that the plaintiff would be sincere because she would like the true underlying interest to be restored. In the vegetarian food example, different victims could require different restoration avenues because of the variety of their underlying interests. In such cases, if the victims banded together in a collective action, restoration damages would be divided and distributed to different targets to repair different sources of emotional harms.

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66. See, e.g., Charlotte J.S. De Backer & Liselot Hudders, *From Meatless Mondays to Meatless Sundays: Motivations for Meat Reduction Among Vegetarians and Semi-vegetarians Who Mildly or Significantly Reduce Their Meat Intake*, 53 *Ecology Food & Nutrition* 639, 640 (2014) (exploring vegetarians' motives for reducing their meat consumption); Matthew B. Ruby, *Vegetarianism: A Blossoming Field of Study*, 58 *Appetite* 141, 142 (2012) (same).

Other ways to verify the underlying interest include employing representative surveys of like populations,<sup>67</sup> big data,<sup>68</sup> statistics,<sup>69</sup> and expert opinions.<sup>70</sup> In the vegetarian food example discussed above, plaintiffs and courts could use surveys and statistics to verify the number of buyers that are true vegetarians and evaluate the differing concerns motivating buyers' vegetarianism. Alternatively, in the near future, they might be able to analyze big data to gain insights into consumer preferences in general and the plaintiff class in particular.<sup>71</sup> Patterns in this information might provide direct evidence of consumer preferences and help predict the intensity of preferences of the specific individuals in the plaintiff class.

2. *Measuring Restoration.* — Even if courts accurately identify the underlying interest, a problem of measurement remains: How much should a court order a defendant to invest in the substitute in-kind restoration? Sometimes this problem can be trivial, as when the underlying interest is measured by a quantitative metric. For example, if the emotional loss arises from excessive pollution emissions, as in the *Volkswagen* case, an offsetting reduction of emissions elsewhere would achieve the correct restoration.<sup>72</sup> But at other times the problem is hard, as when the underlying interest is qualitative and not restorable by close substitutes. The loss of a loved one, property with deep sentimental

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67. For example, in the natural resources context, techniques include the revealed-preference technique, which uses the price of other goods and services to elicit people's demand for environmental resources. Another approach is the stated-preference technique, which uses survey methods in which hypothetical markets are created by way of structured questionnaires for respondents to express their preferences. See MacAlister Elliott & Partners Ltd. et al., *Study on the Valuation and Restoration of Biodiversity Damage for the Purpose of Environmental Liability* 4–10 (2001), [http://ec.europa.eu/environment/legal/liability/pdf/biodiversity\\_annexes.pdf](http://ec.europa.eu/environment/legal/liability/pdf/biodiversity_annexes.pdf) [<http://perma.cc/694J-DNRF>] (presenting the main economic approaches that are used to evaluate damages to natural resources). For criticism of the use of stated-preferences surveys to estimate damages, see W. Kip Viscusi, *Alternative Approaches to Valuing the Health Impacts of Accidents: Liability Law and Prospective Evaluations*, 46 *Law & Contemp. Probs.* 49, 58 (1983) (“The principal difficulty [with surveys] is that interviews may not elicit accurate responses because respondents have no incentive to give thoughtful or honest answers. As a result, the emphasis has been on analyzing the implicit trade-offs revealed in actual decisions.”).

68. Cf. Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data*, 112 *Mich. L. Rev.* 1417, 1434–40 (2014) (discussing the current use of big data by various industries).

69. For criticism of the use of statistics to estimate damages, see W. Kip Viscusi, *The Value of Life in Legal Contexts: Survey and Critique*, 2 *Am. L. & Econ. Rev.* 195, 214–18 (2000).

70. See Jonathan P. Vallano, *Psychological Injuries and Legal Decision Making in Civil Cases: What We Know and What We Do Not Know*, 6 *Psychol. Inj. & L.* 99, 100 (2013) (describing the role of expert testimony by mental health professionals in psychological injury claim cases).

71. See Porat & Strahilevitz, *supra* note 68, at 1440–50 (surveying possible applications of big data).

72. See *supra* notes 3–12 and accompanying text (introducing the *Volkswagen* case).

value, or a once-in-a-lifetime experience creates the greatest emotional harm but is the hardest to restore. In between the easy and the hard cases, there is a continuum of restorability. For example, if the emotional loss arises from the consumption of food that violates a religious dietary code, restoration damages could be paid for an offsetting religious promotion. But among the many ways to promote religious beliefs, which one should be chosen? (We are reminded of our own tradition's humorous quip, "ask two Jews, you'll get three opinions.") And even if the suitable avenue for religious promotion is identified, through plaintiffs' declarations or other methods noted above, how much restoration is enough?

The main measurement hurdle is the estimation of the intensity of the emotional harm. Even if the impaired interest is known, the degree and intensity of impairment may vary across people.<sup>73</sup> At times, courts might have information about the intensity of preferences by using the methods mentioned above<sup>74</sup> and could adjust the restoration measure accordingly. Other times, courts would have to use less sophisticated averages and approximations. This is a standard methodological challenge for any damage measure,<sup>75</sup> and standard solutions should apply to restoration damages.

As discussed below, despite these limitations, restoration damages would likely increase the total redress for emotional harms and the accuracy of compensation relative to existing remedies.<sup>76</sup> It is important to recall that the measurement of restoration is rarely more difficult than the measurement of the existing remedy of simple money damages for emotional harm. With money damages, courts similarly face the

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73. For example, in class action lawsuits, different class members commonly suffer different degrees of injury. Although the Federal Rules of Civil Procedure require commonality among putative class members, see Fed. R. Civ. P. 23(a)(2), variation in injury severity and damages does not necessarily prevent the certification of a class, see, e.g., *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 233 (7th Cir. 1983) ("It is very common for Rule 23(b)(3) class actions to involve differing damage awards for different class members."). But cf. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 349–50 (2011) ("Commonality requires the plaintiff to demonstrate that the class members have 'suffered the same injury.'" (quoting *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 157 (1982))).

74. See *supra* notes 67–70 and accompanying text.

75. Proxies and rough estimates are commonly used to measure uncertain pecuniary losses. For example, in calculating lost earnings, courts use approximations to establish a plaintiff's earning capacity and life expectancy. See, e.g., *Karpov v. Net Trucking, Inc.*, No. 1:06–CV–195–TLS, 2010 WL 5058538, at \*2 (N.D. Ind. Dec. 6, 2010) (using statistical tables to calculate the victim's lost earnings as a result of death); *Classic Coach, Inc. v. Johnson*, 823 So. 2d 517, 528 (Miss. 2002) ("[I]n cases brought for the wrongful death of a child . . . the deceased child's income would have been the equivalent of the national average as set forth by the United States Department of Labor."); Restatement (Second) of Torts § 924 cmt. e (Am. Law Inst. 1979) ("In the case of permanent injuries or injuries causing death, it is . . . permissible to use mortality tables and other evidence as to the average expectancy of a large number of persons.").

76. See *infra* section IV.A (explaining why restoration damages provide more accurate compensation than monetary damages).

challenges of evaluating the intensity of the emotional harm and setting an arbitrary exchange rate of harm to dollars.<sup>77</sup> We think that it is typically better to approximate the underlying interest and provide a rough restoration of it than to toss off a sum of money that “equals” the emotional harm. A rough approximation of a restoration remedy would surely improve upon one prevailing alternative—awarding no emotional damages at all. As discussed below, it will also improve upon money damages by weeding out fake claims.<sup>78</sup> In particular, even if courts overestimated restoration damages, defendants would be able, under the election scheme developed below, to mitigate its effects by offering plaintiffs money payments high enough to induce many of them to take the money and not insist on restoration.

Still, significant measurement problems might at times limit the application of restoration damages, or at the very least condition their application on plaintiffs’ success in proposing reliable methods of measurement. Thus, although restoration damages may not always be superior to the traditional remedies, they are certainly not inferior. And if restoration damages improve the accuracy of compensation in some of the cases, they deserve to be considered as a central remedy in private law’s arsenal.

#### B. *Election of Remedy*

Section II.A presented the first ingredient of restoration damages—the intermediate underlying interest aimed at solving the *measurement* problem. This section presents the second necessary ingredient to address the *verification* problem. To do so, it develops a novel sorting mechanism to screen out fake claims for emotional harm and distinguish the varying degrees of intensity of this harm. This section starts by presenting the problems the mechanism is designed to solve, then describes the mechanism through simple numerical examples, and finally discusses the preconditions to its effective implementation.

1. *The Problem.* — Section II.A argued that the restoration remedy addresses the problem of measurement of emotional harm. The restoration remedy does so by paying for in-kind substitution and thus rendering it unnecessary to measure the dollar equivalent of an emotional harm. But a second fundamental problem of verification looms, also due to the incommensurability of emotional harms. How do courts know that a party seeking restoration damages was truly emotionally distressed? If the harm is to a jointly consumed good, how can courts be certain that only plaintiffs who value it would be counted in calculating the necessary

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77. Contract law disfavors emotional damages in part because they are complicated to measure. See Restatement (Second) of Contracts § 353 cmt. a (Am. Law Inst. 1981) (“Damages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish and to measure.”).

78. See *infra* section II.B (developing a mechanism that screens out fake claims).

restoration? Furthermore, even if they were certain that a plaintiff suffered emotional harm, her harm might be too small to warrant costly restoration. How can such wasteful restoration be avoided?<sup>79</sup>

Return to the mislabeled-vegetarian-food example. All patrons were deceived, but only patrons with vegetarian preferences were emotionally harmed, and it is only their harms that need to be restored. What would stop other nonvegetarian customers from piling on fake claims of emotional harm? In particular, if the lawsuit is brought as a class action on behalf of all consumers who purchased the mislabeled product, how can the court determine who truly suffered harm to their underlying vegetarian interest, and separate them from those who bought the same product but suffered no or small emotional loss?<sup>80</sup> In litigation, the plaintiff would want to inflate the perceived emotional harm. And when the underlying interest is in a jointly consumed good, third parties to the litigation might offer side-payments to fakers to encourage them to ask for restoration.

Even in individual suits, parties not inflicted with emotional distress may want to mimic or exaggerate the claim of emotional harm because it would give them additional grounds for recovery. While fakers do not gain any benefit from the restoration remedy, they recognize, strategically, that the remedy is costly to the defendant. The value of restoration damages to fakers accrues from the opportunity to extract payments from the defendant in return for releasing her from the obligation to fund the remedy. Such a Coasian bargain safeguards against wasteful investment in restoration and thus solves any *ex post* inefficiency problem that many courts seem to be troubled by.<sup>81</sup> It would still be distortive to *ex ante* incentives, however, because compensation would be excessive.

We discuss below an analytically simple method to prevent strategic claiming by fakers: Prohibit postjudgment settlements and side-payments to third parties, thereby making the right of restoration inalienable.<sup>82</sup> If fakers can't sell back the restoration remedy, they will not seek it at the

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79. This last problem disappears if it is clear to the court that the cost of restoration is lower than all the plaintiffs' combined emotional harm.

80. See, e.g., *Block v. McDonald's Corp.*, No. 01 CH 9137, 2001 WL 36414155 (Ill. Cir. Ct. May 19, 2003), *aff'd*, 885 N.E.2d 574 (Ill. App. Ct. 2005). In the settlement agreement, the class members were defined as "all persons resident in the United States, including, but not limited to, vegetarians and Hindus, who: (i) have consumed food products from or at McDonald's Restaurants in the United States since July 23, 1990; and (ii) have concerns, objections, or dietary restrictions, whether ethical, moral, religious, philosophical, or health-related, with respect to the consumption of beef or meat . . . ." Settlement Agreement at 5, *Block*, No. 01 CH 9137, 2001 WL 36414155 [hereinafter *McDonald's Settlement*], <https://bergmontague.com/wp-content/uploads/2018/03/mcdonalds-settlement.pdf> [<http://perma.cc/53LR-KAPB>].

81. See, e.g., *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 112–13 (Okla. 1962) (discussing the economic waste concern of restoration damages).

82. *Infra* section II.C.

outset.<sup>83</sup> Notice that in such cases, it is enough to impose a small litigation cost on plaintiffs to weed out the fakers. The combination of restoration damages as the sole remedy for emotional harm and a small litigation cost on plaintiffs guarantees that only sincere plaintiffs recover.

But disposal of fake suits may not be achieved so easily if plaintiffs suffered even a modest quantum of emotional harm. We need a more robust method to separate sincere plaintiffs from the less sincere. There are probably evidentiary ways to address this problem of verification, but they may be costly and require individualized inquiry into preferences and behavior, defeating the utility of class actions. In aggregate suits, a court may recognize that some of the plaintiffs are sincere about their emotional loss claims, but it would be unmanageable to sort plaintiffs one by one and accomplish adequate compensation. In individual suits, courts might collect clues to adjudge the sincerity of emotional harm claims,<sup>84</sup> but this would complicate the litigation. Ultimately, an evidence-based verification mechanism is impractical, explaining why current doctrine prefers to resolve the emotional harm challenge by general categorization. We need an alternative to the evidence-based or categories-based mechanisms. The remainder of this section proposes a sorting, or screening, mechanism that induces plaintiffs, each individually aware of his or her intrinsic emotional harm, to self-select.<sup>85</sup>

2. *The Sorting Mechanism.* — Courts can use incentives to sort plaintiffs. To illustrate how an incentive-compatible mechanism works, section II.B.2.a first considers a simplified setting in which there are only two types of plaintiffs. Later, section II.B.2.b shows how the mechanism would work in sorting out plaintiffs when there are varying degrees of emotional injury.

a. *Two Types.* — A plaintiff claims to have suffered emotional harm, but the court cannot tell whether the claim is true. Assume that there are only two types of plaintiffs: “Sincere” and “Faker.” The Sincere suffered high emotional harm that an accurately measured restoration remedy would fully offset; the Faker suffered no emotional harm at all.

As with any sorting mechanism, the key is to offer all plaintiffs a menu of remedy choices that separates them. With two plaintiff types, only two

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83. The requirement of no postjudgment renegotiation would require courts to exercise additional monitoring. This Essay explains how this can be done. It further argues that in class actions comprising numerous victims, the defendant herself might find it in her best interest to refuse to renegotiate, even if allowed by law. See *infra* section II.C.1. (explaining how defendants will choose not to renegotiate after trial, knowing that breaching a promise not to renegotiate would be easily detectable by others).

84. See, e.g., Betsy J. Grey, *The Future of Emotional Harm*, 83 *Fordham L. Rev.* 2605, 2610–13 (2015) (arguing that in individual suits, courts are skeptical of emotional harm claims and pose high barriers for the claimants).

85. A formal working paper has separately developed a self-selection mechanism similar to the one developed in this Essay. See Atkinson, *supra* note 14 (addressing the problem of choice between damages and injunctions in private harm cases in contracts).

remedy options are needed. A Faker does not care about restoration damages and will choose a remedial option that contains the most money damages. The Sincere, by contrast, desires both restoration and money damages, and might choose a remedial option with less money but more restoration. With this in mind, the two remedial options that need to be offered are straightforward: (1) *restoration*, paid directly to repair in full the underlying interest of a Sincere; and (2) *money*, a “modest” unrestricted sum of cash paid to the plaintiff’s pocket.

A Sincere would choose Option One because she values restoration and because Option Two—with only a small sum of money in it—is not attractive enough relative to the value of restoration. A Faker would choose Option Two, no matter how small the sum of money in it, because Option One is worthless to her. In a sense, Option Two is designed as a bait for the sole purpose of smoking out the unharmed Fakers. By choosing the money damages, a Faker reveals her bluff and would be counted out from the restoration calculation. A Faker gets money for nothing—a modest amount of pecuniary recovery despite suffering no emotional harm. This is a standard inefficiency in any sorting equilibrium, a necessary evil to overcome the problem of incomplete information. But as long as the money damages in Option Two are small, this distortion is relatively benign.

Notice the importance of the inalienability condition. Once the plaintiff makes a remedial choice, it must not be renegotiated between the parties or else a Faker would also choose the costlier restoration remedy of Option One. If able to trade the remedy with the defendant or with a third party, a Faker would expect to extract a bounty greater than the modest sum in Option Two. As explained below,<sup>86</sup> the inalienability condition poses quite a challenge. It must stop not only *ex post* renegotiation of the remedy, but also various forms of *ex ante* agreements. As with any sorting mechanism, renegotiation may lead to its unraveling. Rendering the mechanism renegotiation-proof is a critical institutional challenge.

b. *More Than Two Types.* — How would the sorting mechanism change when there are more than two types of plaintiffs? Imagine that along with the Faker and the Sincere, there is now also a third type of plaintiff who suffered some mild emotional harm: an “Intermediate.” The Intermediate cares about the underlying interest and benefits from restoration, but less than the Sincere. This three-plaintiff setting presents a capsule for understanding how the sorting mechanism would work in reality, in which plaintiffs likely vary along a continuum.

This section shows that it is still possible to separate the different plaintiff types by offering a menu of remedial options that induces each type to choose a different option. But it also shows that a three-option

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86. See *infra* sections II.C.1, II.C.3 (discussing in detail why post-trial renegotiation and side deals could frustrate the effectiveness of the sorting mechanism proposed here).

menu might be more complex and less efficient than a two-option menu. In the two-type case, the inefficiency due to sorting amounts to a negligible bounty paid to the Faker. In the multitype setting, greater inefficiency would result because the Faker bounty would need to be significantly higher. This would inevitably involve significant overcompensation of some types of plaintiffs, resulting in overdeterrence for defendants. Because of these costs, full sorting would no longer be the right objective for a remedy scheme. It would be better, at least in the types of cases identified below, to set up a remedial menu that leads to some partial “pooling” so that different types of plaintiffs end up choosing the same remedy. We use a brief numerical illustration with simple algebra to draw out these general insights and explain their underlying intuition.

Consider the following scenario. The defendant caused harm to the environment that costs \$100 to restore. The court can order any mix of restoration (R) and money (M) damages to compensate the plaintiff. The plaintiff values, as V, the damages according to the following simple formula:

$$V = M + aR$$

The term “*a*” distinguishes the different types of plaintiffs. A Faker is identified by  $a = 0$ , namely, she values only the money damages. For her,  $V = M$ . The Sincere is identified by  $a = 1$ , and for her any combination of restoration and money damages is valued as  $V = M + R$ . In between, the Intermediate is distinguished by  $0 < a < 1$ . The court cannot observe  $a$ , and thus cannot tell the plaintiff’s type. Notice that a simple remedy of  $R = \$100$  would perfectly redress each type of plaintiff’s true emotional loss, but would also be prohibitively expensive, imposing costs on the defendant exceeding the harm caused.

To separate the three types of plaintiffs, the court may present a menu of three remedial options. As in the two-type case, the menu should include a pure restoration damages option that would be chosen by the Sincere, and perhaps a pure money damages option to sort out the Faker. In addition, the menu would now have to include a hybrid option for the Intermediate. To begin constructing such menu, consider the following options:

- (1) Restoration damages, no money:  $R = \$100$ ;  $M = 0$ ;
- (2) Hybrid damages:  $R = R_H$ ;  $M = M_H$ ;
- (3) Money damages, no restoration:  $R = 0$ ;  $M = M_H + 1$ .

Option One is intended to provide full restoration to the Sincere. Option Three is intended to attract the Faker as it provides the greatest money damages (hence the added \$1).<sup>87</sup> Option Two is intended to attract

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87. Option Three must offer slightly more cash than the next best cash option, Option Two; otherwise, Fakers would choose Option Two even though they derive no benefit from the costly restoration it offers.



only the Intermediate. For this design to succeed, two “incentive constraints” must be met:

$$\begin{aligned} \text{(S}^*) \quad & M_H + R_H \leq 100 \\ \text{(I}^*) \quad & M_H + aR_H \geq 100a \end{aligned}$$

Condition (S\*) guarantees that the Sincere would prefer the full restoration of Option One to the package of partial restoration and money offered under Option Two. Condition (I\*) guarantees that the Intermediate would prefer Option Two to Option One. By construction, the Faker, but no one else, prefers Option Three.

Assuming that the three types of plaintiffs are equally likely, the total cost of compensation to the defendant under this sorting scheme would be proportional to:

$$\text{Total Cost} = 100 + (R_H + M_H) + (M_H + 1)$$

We know, from condition (I\*), that

$$R_H \geq 100 - \frac{M_H}{a}$$

and thus that

$$\text{Total Cost} \geq 100 + \left(100 - \frac{M_H}{a} + M_H\right) + (M_H + 1),$$

which, after simplifying, can be written as:

$$\text{Total Cost} \geq 201 + \frac{2a-1}{a} M_H$$

Total cost of compensation depends on  $a$ , the intensity of the emotional harm to the Intermediate type. If  $a$  is high—here, if  $a > \frac{1}{2}$ —the total cost is minimized by  $M_H = 0$ , which from the two incentive conditions requires  $R_H = 100$ . In this case, Option Two—the hybrid option—becomes identical to Option One. The Sincere and the Intermediate types would be pooled into the same selection. The intuition is the following: The higher  $a$ , the greater the money component that needs to be added to Option Two for any reduction of its restoration component. But any such increase in the money payoff in Option Two has to be matched by an identical increase in the money payoff in Option Three since Option Three has to offer money damages at least equal to those offered by Option Two. For high enough levels of  $a$ , this added monetary cost is too burdensome, and the defendant would prefer to compensate the Intermediate type with full restoration and no money damages—that is, with Option One.<sup>88</sup>

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88. The cutoff level  $a > \frac{1}{2}$  is specific to this example, in which there are three plaintiff types that exist with equal likelihood.

The results flip if  $a \leq \frac{1}{2}$ . Now the total cost is minimized by  $M_H = 100a$ , namely the maximal level of  $M_H$  that is consistent (from the two incentive conditions) with non-negative  $R_H$ . Option Two, under this assumption, would not contain any restoration component (that is,  $R_H = 0$ ) because it provides such a high monetary component. Here, the Intermediate and the Faker types would be pooled into the same selection, which contains only a money component. The intuition is the following: With low  $a$ , giving restoration damages to the Intermediate achieves little savings in terms of reduced money damages in Option Two. It is therefore more effective to load Option Two with cash. Yet because the Intermediate can always select Option One and enjoy a payoff of  $100a$ , the minimum cash necessary in Option Two is  $100a$ . This would also be the money payment offered under Option Three, since both Two and Three contain no restoration.

To recap, while it is possible to offer a menu of remedies that leads to the full sorting of plaintiffs according to the intensity of the emotional harm suffered, such a scheme would lead to overcompensation. Those who have not been harmed would have to be offered significant monetary bounties, and the more variation there is across plaintiff types, the greater the overcompensation problem. Such overcompensation would undermine the compensatory goal—to compensate each plaintiff according to the true harm suffered—that rationalizes the restoration damage measure. It would also create excessive deterrence.<sup>89</sup> Instead, in order to maintain a level of compensation close to the actual harm suffered, and in order to guarantee that the Sincere receives full restoration damages, a menu of remedies must be offered so that some pooling occurs.

Under the optimal sorting menu identified earlier, Sinceres always receive full restoration damages and no money compensation. This sorting menu accomplishes the primary goal of the restoration damages regime—to correctly compensate those who suffered the alleged emotional harm. In addition, under the optimal sorting menu, Fakers always take some cash bounty and sort out, with no restoration ever ordered on their behalf. The only complication arises with Intermediates. Depending on the relative intensity of their intermediate emotional harm, they will either pool with the Sinceres or the Fakers. One way or another, such pooling creates overcompensation—either too much restoration (if they pool with the Sinceres) or too much monetary compensation (if they pool with the Fakers).

*c. Nonlinear Preferences.* — The discussion above assumed that plaintiffs' valuation of restoration and money damages exhibits a linear, or constant, substitution rate. In other words, for any type of plaintiff, one dollar of restoration is equivalent to  $a$  dollars of money, and the rate does

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89. The deterrence concern could be overcome by reducing all remedies by the same multiple. However, this would result in significant undercompensation of some plaintiffs, particularly Sinceres.

not change across levels of restoration. If, for example,  $a = \frac{1}{2}$ , the plaintiff values each additional \$100 of restoration as \$50 of money. This linearity reflects an assumption that restoration of the underlying interest has fixed marginal returns—that every additional increment of restoration is equally valuable. But what if this assumption is wrong? What if plaintiffs value the first dollars of restoration more than the last? In particular, if the first dollars of restoration address the most critical harm to the underlying interest, it is possible that each additional increment of restoration would have positive but diminishing value.

If plaintiffs have nonlinear preferences, the hybrid option of damages (Option Two) becomes more desirable. Consider a case in which full restoration would require restoration damages of \$100. Assume, now, that some Intermediates have nonlinear preferences. Specifically, imagine an Intermediate with average  $a = 0.6$ , but with a diminishing rate. For the first \$50 of restoration, this plaintiff has  $a = 0.8$ ; and for the second \$50 increment of restoration, the valuation falls to  $a = 0.4$ .

When  $a$  is fixed at 0.6, we saw above that the lowest-cost menu would have only two options: full restoration of \$100 and money damages of \$1. The Intermediate would pool with the Sincere and choose the restoration damages.<sup>90</sup> But now, a lower cost three-option menu is available for the defendant. For example, the defendant may offer the following three options:

- (1) Full restoration of \$100 and no money damages;
- (2) Restoration of \$50 and money damages of \$21;
- (3) Money damages of \$22.

A Sincere with  $a = 1$  would choose Option One, whereas a Faker with  $a = 0$  would choose Option Three. If the Intermediate had a fixed  $a = 0.6$ , she would pool with the Sincere and choose Option One. But with diminishing  $a$ , she is best off choosing Option Two. Under Option Two, because restoration is equal to \$50, the Intermediate would have  $a = 0.8$ , which would provide her with utility of  $0.8 \times \$50 + \$21 = \$61$ . This is more than the \$60 she can get under Option One. And this three-option menu reduces the cost to the defendant.<sup>91</sup>

Thus, with nonlinear preferences, the least-cost damages scheme involves finer separation of plaintiff types, with each type selecting a different combination in the menu of restoration and money options. Because some plaintiffs greatly value only partial restoration, such partial restoration remedial options, coupled with some money, become part of the least-cost restoration scheme. The analysis above demonstrates that

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90. Under the assumption that each type of plaintiff is equally likely to be present, the total cost to the defendant of this two-option menu would be  $\$100 + \$100 + 1 = \$201$ .

91. Under the assumption that each type of plaintiff is equally likely to be present, now the total cost to the defendant of the three-option menu would be  $\$100 + \$71 + 22 = \$193$ .

the optimal remedy structure must contain combinations of restoration and money. The next section discusses the feasibility and implementation of these seemingly complex schemes.

3. *Implementation.* — At this point, many readers may think that the construction of an election-of-remedy mechanism would be a daunting task for courts. We saw that even with only two types of plaintiffs, the design becomes quite complex, as courts have to determine the optimal bounty for nonsincere plaintiffs. In reality, plaintiffs vary along a continuum, further complicating the challenge. Moreover, adding to the complexity, plaintiffs' preferences for combinations of money and restoration may be nonlinear, which requires even more information to design a scheme that would compensate plaintiffs at the least cost.

It is unrealistic but unnecessary to expect courts to have the necessary information to construct the sorting mechanism. To simplify the implementation, courts do not need to design the entire remedial menu. It may be enough for courts to establish a single-option restoration remedy and let the defendant design, in its shadow, a more complete opt-out menu. Under this simplified scheme, the court could set one remedy for emotional harm—full restoration damages and no money damages. The defendant could then offer as many opt-out combinations as it wishes. The defendant might offer only one other option—for example, a small money award that would pool the Fakers and some Intermediates away from the restoration remedy. Or, the defendant may have better information about the distribution of the plaintiffs' preferences and thus offer different, perhaps more than two, remedial options. The advantage, of course, is to remove the burden of constructing the menu from the court and to place it on a party that has the right incentive to design it optimally. The defendant would naturally offer a menu of options that minimizes the total cost of liability. As long as full restoration is one of the options—and that is the only constraint the court must supervise—there is no risk that any plaintiff would be undercompensated. Under those circumstances, overcompensation and overdeterrence are the only concerns, and the defendant's efforts to mitigate this excess is desirable.<sup>92</sup>

While the court may delegate to the defendant the design of the menu of remedies, it should not delegate the determination of what the underlying interests are and what forms of in-kind restoration are adequate. The defendant would have an incentive to offer restoration of irrelevant interests, so as to channel plaintiffs to take the less costly money damage option in the menu. We discussed the possibility that plaintiffs might differ with respect to their injured underlying interests. In such scenarios, the court should identify several possible harmed interests and select the appropriate restoration for each. But, as

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92. See *infra* sections IV.A–.B (explaining that with the sorting mechanism proposed here, all plaintiffs will be either fully compensated or overcompensated, which might result in overdeterrence).

recognized above, such assessment tasks are not simple, and it is entirely possible that some emotional harms are so difficult to restore that they will have to be overlooked. But so long as the court feels comfortable that a particular restoration strategy is a plausible response to an *alleged* emotional harm, it should establish this strategy as the restoration damages option and allow parties to sort in or out of it. The critical simplification step is to leave the design of other remedial options, which include less (or no) restoration and some quantum of money damages, to the defendant.

### C. *Renegotiation, Settlements, and Side Deals*

The discussion so far examined the design of restoration damages in court. The previous section argued that a sorting mechanism could overcome strategic behavior by plaintiffs faking the magnitude of their emotional harm. But parties also interact outside of court and may negotiate around the restoration remedy and reach settlements. Parties negotiate pretrial settlements, of course, in the shadow of the court, and these settlements reflect hypothetical trial outcomes. But they also create new strategic opportunities that may affect the remedial outcomes. Moreover, renegotiation can take place after trial, when plaintiffs could try to sell their restoration rights to defendants after making their choices under the election-of-remedy scheme.

This section examines whether renegotiation and settlement outcomes continue to deliver the payoffs characterized above. Section II.C.1 considers post-trial renegotiations, asking how their dynamics might affect the sorting of plaintiffs. Section II.C.2 then looks at the far more common pretrial settlements and asks whether the restoration remedy's sorting of plaintiffs is reflected in those bargains. Finally, section II.C.3 discusses the potential effect of side payments offered to plaintiffs by third parties who have stakes in the litigation's outcome.

1. *Post-Trial Renegotiation.* — A key aspect of the restoration remedy is the separation of sincere and fake claims, which could be done through a sorting menu. But this desirable separation may be undermined by post-trial renegotiation. If plaintiffs expect to be able to renegotiate the remedy, Fakers would no longer take the money bounty. They would prefer to choose full restoration, which is always the most burdensome option for the defendant. Once this option is chosen, they would try to “extort” the defendant and extract large settlements for waiving the awarded restoration remedy. This possibility might suggest that it would be necessary for the law to bar postjudgment settlements in which the plaintiff, in return for a side payment, waives the right to restoration and releases the defendant from the obligation to restore.

Postjudgment waiver by plaintiffs of the restoration remedy is different from prejudgment waiver through the election-of-remedy mechanism. Even though plaintiffs can opt for money damages in court, they should not be allowed to do so in a post-trial settlement. The reason, in a

nutshell, is the greater bargaining power plaintiffs might enjoy post-trial. In court, when the judge supervises the bargain, it is easier for the defendant to make a take-it-or-leave-it offer, which would make it impossible for Fakers to hold the defendant up, particularly if they cannot later renegotiate the remedy.<sup>93</sup> Outside of court, any outcome is possible, including settlements that provide recovery greater than the loss. Fakers would be able to extract settlements that come closer to the cost restoration imposes on the defendant, rather than the emotional harm that they truly suffered.

But the risk of such postjudgment extortion should not be exaggerated. A defendant who suspects that the plaintiff derives low value from restoration would not be easily held up. In the same way that the defendant could induce plaintiffs to opt out in court, it could induce such opt out postjudgment by making take-it-or-leave-it offers from the same menu. Still, the likelihood of post-trial renegotiation not supervised by the court might encourage Fakers to act strategically in court and choose restoration damages in the hope of later selling them back. If so, and to the extent possible, postjudgment waivers of the remedy should be barred.

Prohibitions against postjudgment settlements could be easily enforced in class actions. There, it would be hard to hide side agreements from other litigants, the public eye, and the courts, and particularly from experienced class action objectors.<sup>94</sup> The court could simply prohibit such side deals and sanction violations by denying recovery altogether. Furthermore, even without a straightforward prohibition on such settlements, defendants might find it in their best interest to agree with the plaintiffs' attorneys not to renegotiate after trial, knowing that breaching such a promise would be easily detectable and costly.

2. *Pretrial Settlements.* — In general, pretrial settlements reflect the stakes at trial and help achieve the same expected remedial outcome with lower litigation costs.<sup>95</sup> But attorneys negotiate settlements, and the

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93. See William B. Rubenstein, *Finality in Class Action Litigation: Lessons from Habeas*, 82 N.Y.U. L. Rev. 790, 820–25 (2007) (exploring the ways in which courts can prevent class members from relitigating cases).

94. See, e.g., Ashby Jones, *A Litigator Fights Class-Action Suits*, Wall St. J. (Oct. 31, 2011), <https://www.wsj.com/Essays/SB10001424052970203554104577002190221107960> (on file with the *Columbia Law Review*) (describing the work of the prominent class-action objector Ted Frank); Class Action Fairness, Competitive Enter. Inst., <https://cei.org/issues/class-action-fairness> [<https://perma.cc/C9DG-DUXA>] (last visited Aug. 15, 2018) (describing the Center for Class Action Fairness at the Competitive Enterprise Institute, one of the leading objectors to class action settlements); see also Edward Brunet, *Class Action Objectors: Extortionist Free Riders or Fairness Guarantors*, 2003 U. Chi. Legal Forum 403, 416, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1337&context=ucf> [<https://perma.cc/VX7H-H5BA>] (explaining how, in some cases, experienced objectors bring value to the suit by functioning as watchdogs).

95. See Kathryn E. Spier, *Economics of Litigation*, in 5 *The New Palgrave Dictionary of Economics* 162, 162–64 (Steven N. Durlauf & Lawrence E. Blume eds., 2d ed. 2008)

structure of attorney's fees may shift the settlement outcome in systematic ways.<sup>96</sup> This concern is particularly relevant in class actions, in which attorneys alone make the remedial choices for the plaintiffs, attorneys' incentives drive the filing of lawsuits and the outcome of settlements, and the aggrieved parties have little active role to play.<sup>97</sup>

Before trial, the attorneys may agree with the defendants on the design of the remedy selection scheme based on the structure of the plaintiffs' attorney's fees. First, consider a fee contingent only on money damages and not on restoration damages. Obviously, the attorney would be tempted to settle for an award that maximizes total cash payments made to plaintiffs rather than one that provides any restoration. The defendant would be delighted to settle with the plaintiffs' attorney for such payment, avoiding the costlier restoration damages. This, of course, is not in the best interest of class members as a whole. Put differently, while the Sinceres in the class prefer the costlier restoration damages, both the defendant and the class attorney share a preference for money damages, thus leaving those plaintiffs undercompensated (and the defendant underdeterred). In the same spirit, the class action attorney and the defendant might agree on restoration avenues that are not fully compensatory and do not address the true underlying interest, potentially channeling plaintiffs that otherwise would have opted for restoration to elect the monetary damages option.

The reverse problem arises if the class action attorney's fees are contingent on the total costs of the remedy to the defendant. Here, the attorney would prefer a settlement that maximizes restoration damages over the (less costly) money damages, even if many or most members of the class would have chosen money damages. The attorney has the incentive to exaggerate the incidence and the magnitude of the emotional harm and to prevent opt out by Fakers. Notice that despite this distorted incentive, class members are compensated in full and the only ones not happy with full restoration are the Fakers, who lose the ability to extract money payments above their actual harms. Still, the collapse of the election-of-remedy scheme and the attorney's insistence on maximizing restoration would lead to inefficient settlements that cost the defendant too much.

If courts are attentive to these conflicts, they may seek independent evaluations to determine whether the restoration avenues agreed upon

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(discussing how "parties can avoid their litigation costs . . . and the risk premium associated with trials").

96. See, e.g., Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 *Notre Dame L. Rev.* 1377, 1390-91 (2000) (describing the problem with a "sweetheart" settlement, in which "the defendant and the class counsel have a joint incentive to negotiate a settlement that gives the class counsel a generous attorney's fee, but gives the class members less than the fair value of their claims").

97. See Theodore Eisenberg & Geoffrey P. Miller, Incentive Awards to Class Action Plaintiffs: An Empirical Study, 53 *UCLA L. Rev.* 1303, 1315-19 (2006) (exploring the incentive dynamics between class counsel, named plaintiffs, and unnamed plaintiffs in class action litigation).

in the settlement secure full compensation to plaintiffs. Alternatively, courts may restrict the means of calculating attorney's fees by awarding fees that reflect the success of accomplishing the dual goals of restoration and plaintiff choice.<sup>98</sup> Still, the addition of an agency problem in the representation of a diverse class complicates the impact of restoration damages on the different types of plaintiffs.<sup>99</sup> It is only weakly reassuring that this agency problem afflicts all private law remedies.<sup>100</sup>

Still, the dynamics of pretrial settlements with class action attorneys may sometimes simplify rather than complicate the award of *accurate* restoration damages. Instead of individualized choice by class members, the settlement could simply award all class members identical *proportional* restoration damages, reflecting the proportion of sincerely harmed plaintiffs. To illustrate, imagine a class that consists of 100 plaintiffs, each claiming emotional harm that would cost \$1,000 to repair via restoration damages for each sincere plaintiff. But not all plaintiffs are sincere. Assume that forty percent of the plaintiffs are sincere and the remaining sixty percent are fakers. At trial, an election-of-remedy menu might successfully separate the plaintiffs, with the forty sincere plaintiffs choosing a \$1,000 restoration damages option and the sixty fakers choosing a small cash bounty. In all, the defendant would pay \$40,000 for restoration plus a small additional sum of money damages. A settlement can do better: The plaintiffs' attorney and the defendant may agree to global restoration damages of \$40,000—forty percent of the total emotional damages claimed—reflecting the true proportion of sincere claims. The total amount of restoration under the settlement would equal the total

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98. Courts have designed two basic methods for calculating attorney's fees: the percentage-of-recovery method and the lodestar method. The percentage-of-recovery method is "generally favored in cases involving a common fund, and is designed to allow courts to award fees from the fund 'in a manner that rewards counsel for success and penalizes it for failure.'" *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 333 (3d Cir. 1998) (quoting *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 821 (3d Cir. 1995)). On the other hand, the lodestar method is "applied in statutory fee-shifting cases, and is designed to reward counsel for undertaking socially beneficial litigation in cases where the expected relief has a small enough monetary value that a percentage-of-recovery method would provide inadequate compensation." *Id.*

Regarding *cy pres* distributions in class action settlements, modern courts have expressed concern that when the "selection of *cy pres* beneficiaries is not tethered to the nature of the lawsuit and the interests of the silent class members, the selection process may answer to the whims and self interests of the parties, their counsel, or the court." *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1039 (9th Cir. 2011).

99. See Geoffrey P. Miller, *Conflicts of Interest in Class Action Litigation: An Inquiry into the Appropriate Standard*, 2003 U. Chi. Legal Forum 581, 581–82, <https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=1340&context=uclf> [<https://perma.cc/46HU-VFFH>] (explaining why class action litigation is particularly vulnerable to conflicts of interest between the class and class counsel and how standard approaches do not resolve these issues).

100. See generally Deborah A. DeMott, *The Lawyer as Agent*, 67 *Fordham L. Rev.* 301 (1998) (exploring a lawyer's various agency relationships and their legal consequences).



amount of restoration damages under the sorting mechanism at trial, but the bounty would be saved. Thus, in class actions alleging emotional harm from injury to a jointly consumed good, the recovery for emotional harm would be whole despite the absence of specific vindication—namely, the fact that restoration is not specifically earmarked to the suffering of any individual plaintiff.

3. *Side Deals.* — A different pretrial concern is the intervention of third parties who care about the underlying impaired interest and who might try to influence class members' choices under the restoration scheme. When the underlying impaired interest is a public good, third parties with the strongest preference in securing this interest are eager to have plaintiffs choose restoration damages over money damages and might pay them to do so. Fakers, and even Intermediates with moderate concern for the impaired interest, would welcome the opportunity for such side deals, as long as the side payments from the third party exceed the value of the cash or hybrid remedy they expect to get at trial.

Consider again the *Volkswagen* emissions case that involved harm to the environment, and imagine the impact of side deals.<sup>101</sup> Environmental groups might offer payments to plaintiffs who suffered small or no emotional harm and who are planning to choose a small monetary payment over the costlier restoration damages. The environmental groups would ask those plaintiffs to choose the restoration damages option in return for the side payments. The plaintiffs would ultimately receive the same, or even greater, cash compensation. But the defendant would end up paying more, after having to finance restoration damages to a larger fraction of the plaintiffs. As a result, these side deals would raise the level of damages beyond the harm caused to the legally recognized plaintiffs. Therefore, such side deals should be prohibited, and the restoration remedy should not be transferrable to third parties.

#### D. *Scope of Application*

Having now defined the main features of restoration damages, this section examines more precisely the remedy's scope of application. Restoration damages are suited to addressing injuries that are hard to measure and verify. They do so by identifying an intermediate underlying interest and establishing an election-of-remedy scheme. This Essay focuses on solving a prominent manifestation of this problem—claims for emotional damages. But elements of its proposed approach could be applied to other types of claims such as injunctions and specific performance,<sup>102</sup> environmental clean-up, and corrective advertising in unfair competition law. Giving a plaintiff the choice between an in-kind remedy and money would guarantee that the in-kind remedy is directed toward only those

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101. See *supra* notes 3–12 and accompanying text (introducing the *Volkswagen* case).

102. For an interesting application of the election-of-remedy mechanism, see Atkinson, *supra* note 14, at 20–24.

who truly value it. Furthermore, deploying the concept of intermediate underlying interest could help identify the most adequate in-kind result.

While the scope of application of restoration damages could stretch beyond emotional harms, it is equally important to recognize areas in which the restoration remedy would *not* be applicable in addressing emotional harms. The main limiting criterion could be the presence or absence of an intermediate underlying interest susceptible to various means of advancement. Many of the examples used so far involved such underlying interests. The environmental concerns of car buyers in the emissions example could be easily satisfied by paying to reduce pollution.<sup>103</sup> Likewise, when a seller warrants that food it sells is vegetarian, kosher, or fairly traded, it may achieve restoration and cater to its clientele's values by supporting animal welfare initiatives, paying for religious services, or contributing to fair trade causes.<sup>104</sup> There are many substitute channels to restore these interests, and while picking the right one is not always straightforward, it is a solvable problem.

There are, however, emotional harms that cannot be restored. For example, it is hard to identify a way to restore the emotional harm from the loss of sentimental memorabilia, and it is even harder to do so from the loss of a loved one. There are indirect ways, perhaps, to accomplish some relief for claimants—for example, through restoration damages directed at the commemoration of the loss or education to prevent such future losses. Still, the most straightforward applications of restoration damages are to remedy emotional harms that arise from the aggrieved parties' social or moral concerns. Such concerns often relate to a jointly consumed good like an interest in social justice or in the environment.<sup>105</sup> These applications also create social benefits that likely exceed the social value of private monetary damages because restoring jointly consumed goods derives benefits to third parties who value the same underlying interest.

Between the polar cases—the social harms that perfectly fit restoration damages and the private loss of a loved one that is irreparable—lies a continuum of settings in which restoration damages might work, albeit imperfectly. Emotional harms arising from the impairment of underlying private interests that have no communal aspect often fall into this intermediate category of imperfect fit. A consumer whose vacation trip was ruined

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103. See *supra* text accompanying notes 3–12 (describing the Volkswagen emissions example).

104. See *supra* note 66 and accompanying text (laying out the vegetarian example). For the argument that the law should recognize consumers' claims against sellers for violating these types of warranties, see Katya Assaf, *Capitalism vs. Freedom*, 38 *N.Y.U. Rev. L. & Soc. Change* 201, 261–65 (2014).

105. In a thoughtful new paper, Sarah Dadush refers to this category of injuries as “identity harms.” She develops a framework to make such harms recoverable under existing remedial doctrines and considers, in passing, a version of restoration damages. Dadush, *supra* note 65, at 924.

by the hotel's breach of contract<sup>106</sup> and a homeowner whose aesthetic enjoyment was diminished due to faulty construction both suffer emotional harm.<sup>107</sup> Standard monetary remedies, such as restitution of the hotel charge or damages for the diminution of the home's value, do not make the aggrieved party whole. But the underlying interests—a relaxing vacation or a tranquil home—are hard to restore because of the verification and measurement problems. Imperfect substitutes do exist, though. The hotel could buy the plaintiff a substitute trip, and the developer could remedy the construction, however costly these options are. Although these are simply different ways to compensate for expectation damages, they are founded on the logic of restoration damages: The way to make the aggrieved party whole is to undo the harm to the underlying interest. And the sorting mechanism developed above would allow the restoration remedy in these cases to sincere plaintiffs only.

#### E. *Doctrinal Similarities*

Like many novel concepts, the restoration remedy builds on ideas and practices that already exist in various pockets of law. This section traces the DNA of restoration damages in other remedial doctrines of private law, demonstrating the broad cross-substantive appeal of its underlying method. Spotting the flickers of the basic idea of restoration damages—of requiring wrongdoers to restore an intermediate underlying interest—helps broaden the damages' appeal and also provides a unified conceptual foundation to the below-discussed scattered, seemingly unrelated, remedies.

1. *Cy Pres Distributions in Class Actions*. — Class action recovery often faces the practical problem of identifying the class members and distributing damages to them, especially when the harm to each member of the class is small.<sup>108</sup> *Cy pres* distributions present a possible solution. These are settlement awards for the indirect benefit of the class, usually to third-party

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106. See *Dold v. Outrigger Hotel*, 501 P.2d 368, 371 (Haw. 1972) (determining that a hotel that refused accommodations to plaintiffs because it lacked available space and then transferred plaintiffs to a hotel of lesser quality did not owe additional punitive damages for breach of contract); Miles Brignall, *Holiday from Hell? How to Claim Compensation*, *Guardian* (Sept. 6, 2014), <https://www.theguardian.com/money/2014/sep/06/holiday-hell-compensation-claim-summer-break> [<https://perma.cc/KN3D-NYNF>] (explaining the challenges involved in valuing loss of enjoyment when making claims against vacation hotels).

107. See *B & M Homes, Inc. v. Hogan*, 376 So. 2d 667, 672 (Ala. 1979) (recognizing the mental anguish to future homeowners resulting from the breach of a building contract).

108. See, e.g., *Lane v. Facebook, Inc.*, 696 F.3d 811, 825 (9th Cir. 2012) (finding that “it would be ‘burdensome’ and inefficient to pay the . . . funds that remain after costs directly to the class because each class member’s recovery under a direct distribution would be *de minimis*” (quoting *Molski v. Gleich*, 318 F.3d 937, 955 (9th Cir. 2003))); *Klier v. Elf Atochem N. Am., Inc.*, 658 F.3d 468, 475 n.15 (5th Cir. 2011) (“In large class actions, substantial administrative costs attend the distribution of settlement funds. As the settlement funds are disbursed and the amount still available for distribution . . . declines, . . . the marginal cost of making an additional pro rata distribution to the class members exceeds the amount available for distribution.”).

recipients whose interests reasonably approximate those being pursued by the class.<sup>109</sup> Courts approve settlements that contain cy pres distributions only when individual distributions are not viable.<sup>110</sup> Cy pres, which is used quite sporadically, was not designed and is not used for repairing emotional harm. Rather, it seeks to resolve the problem of allocating settlement distributions.<sup>111</sup>

Like cy pres, restoration damages rely on the existence of an underlying impaired value targeted for restoration. But unlike cy pres, which directs the residual settlement not claimed by individuals toward societal goals, restoration damages compensate for the emotional harm. When a claim for emotional harm is made, individual monetary remedies are often viable. Thus, as a matter of current doctrine, cy pres would not be available. Yet it is precisely in this core case that restoration damages should be preferred to direct compensation.

Moreover, because the restoration damages scheme is designed primarily to redress emotional harms, it may also operate in private harm cases litigated as individual suits, when cy pres does not apply. A restoration damages scheme also has to deal with a problem that cy pres ignores: distinguishing sincere claimants from fakers. Unlike cy pres distributions,

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109. See generally Principles of the Law of Aggregate Litig. § 3.07 (Am. Law Inst. 2010) (“A court may approve a settlement that proposes a cy pres remedy even if such a remedy could not be ordered in a contested case . . . [unless] individual class members can be identified through reasonable effort.”). For examples of uses of cy pres, see *In re Holocaust Victim Assets Litig.*, 424 F.3d 132, 141–42 (2d Cir. 2005) (addressing victims of Nazi looting by approving an allocation of \$100 million to benefit Holocaust survivors); *Bruno v. Superior Court*, 179 Cal. Rptr. 342, 343 (Cal. Ct. App. 1981) (concerning allegations of unlawful fixing of milk prices in which the plaintiffs sought, inter alia, lowering of milk prices in the affected area); *McDonald’s Settlement*, supra note 80, at 9–10 (detailing a settlement in a class action suit alleging that McDonald’s mixed beef flavoring into its French fries despite claiming that the fries were vegetarian, in which McDonald’s agreed to: (1) apologize to all Hindu and vegetarian clients, and (2) pay \$10 million to specified nonprofit organizations); Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 Yale L.J. 1591, 1598 n.44, 1599 n.49, 1600 n.53 (1987) (giving case examples).

110. *In re Google Referrer Header Privacy Litig.*, 869 F.3d 737, 741 (9th Cir. 2017) (“To be sure, *cy pres*-only settlements are considered the exception, not the rule.”); see also *Klier*, 658 F.3d at 474–75 (explaining that direct distributions to class members are preferable because “[t]he settlement-fund proceeds, having been generated by the value of the class members’ claims . . . are the property of the class”).

111. The precise contours of the cy pres doctrine remain unsettled. For example, although courts agree that cy pres designations are appropriate only when (1) further distributions to class members are not feasible and (2) the cy pres designee bears some relationship to the original class, the extent of the necessary relationship is the subject of a circuit split. Compare *Nachshin v. AOL, LLC*, 663 F.3d 1034, 1036 (9th Cir. 2011) (explaining that “[t]he *cy pres* doctrine allows a court to distribute unclaimed or non-distributable portions of a class action settlement fund to the ‘next best’ class of beneficiaries”), with *In re Citigroup Inc. Sec. Litig.*, 199 F. Supp. 3d 845, 852 (S.D.N.Y. 2016) (refusing to adopt what the court considered to be the excessive “next best” standard, and instead adopting the “reasonably approximate” standard because it better preserves the court’s ability to oversee the administration and allocation of settlement funds).

which are awarded to the class as a whole, the restoration damages scheme must therefore involve the additional step of electing a remedy to screen types of plaintiffs.

Cy pres raises fundamental questions about the authority of courts to select nonlitigants as the recipients of court-awarded damages. Scholars have argued that “[a]warding ‘damages’ to an uninjured third party effectively transforms the court’s function into a fundamentally executive role, . . . presid[ing] over the administrative redistribution of wealth for social good. As a result, the practice violates both the constitutional separation of powers and the case or controversy requirement of Article III.”<sup>112</sup> Arguably, similar concerns could be raised against the restoration remedy proposed in this Essay.

Powerful as the constitutional challenge to cy pres may be, it likely does not extend to the restoration remedy. A crucial difference between the two remedies looms: Cy pres has no ambition to cure the harm suffered by the specific plaintiffs. It aims instead to bolster a set of values and interests related to that harm. The restoration remedy, in contrast, compensates for the direct harm—at least the emotional component of it—suffered by the standing plaintiffs. It does not intend to “redistribute[e] . . . wealth for social good” nor “transform[] the court’s function into a fundamentally executive role.”<sup>113</sup> Because the court must focus on curing the harm done to the plaintiff, its discretion is limited by the goal of restoring the underlying interest of that plaintiff.

2. *Societal Damages*. — In her seminal article *Punitive Damages as Societal Damages*, Professor Catherine Sharkey proposes a tort remedy that

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112. Martin H. Redish et al., *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 Fla. L. Rev. 617, 642 (2010); see also *Klier*, 658 F.3d at 480–82 (Jones, C.J., concurring) (expressing concern that cy pres distributions may violate Article III standing requirements and suggesting that courts avoid the problem by returning excess funds to the defendant); Robert E. Draba, Student Article, *Motorsports Merchandise: A Cy Pres Distribution Not Quite “as Near as Possible,”* 16 Loy. Consumer L. Rev. 121, 124 (2004) (expressing concerns about cy pres distributions to charitable organizations that do not advance interests closely related to those of the injured class members); John Goodlander, Note, *Cy Pres Settlements: Problems Associated with the Judiciary’s Role and Suggested Solutions*, 56 B.C. L. Rev. 733, 733–34 (2015) (identifying two potential legal problems with cy pres); Sam Yospe, Note, *Cy Pres Distributions in Class Action Settlements*, 2009 Colum. Bus. L. Rev. 1014, 1017 (arguing that discretion afforded to judges in making cy pres distributions often results in distributions that are arbitrary and unpredictable). Chief Justice Roberts acknowledged the questionable constitutional foundations of cy pres distributions in the statement respecting the denial of certiorari in *Marek v. Lane* and noted “fundamental concerns surrounding the use of such remedies in class action litigation, including when, if ever, such relief should be considered” and “what the respective roles of the judge and parties are in shaping a *cy pres* remedy.” 134 S. Ct. 8, 9 (2013). Justice Roberts suggested that “[i]n a suitable case, this Court may need to clarify the limits on the use of such remedies.” *Id.*

113. Redish et al., *supra* note 112, at 642.

resembles restoration damages.<sup>114</sup> Sharkey noticed that some courts award punitive damages but, to avoid overcompensating plaintiffs, direct some of the money to charities and other entities that promote societal goals related to the plaintiffs' impaired interests.<sup>115</sup> Sharkey's article thus proposes a new category of damages—"societal damages"—awarded as part of a private tort suit to nonplaintiffs.<sup>116</sup> These damages are awarded either to victims of the same wrongdoing who are not before the court,<sup>117</sup> or to the advancement of societal interests impaired by the wrongdoing.<sup>118</sup> In this manner, societal damages transform punitive damages that otherwise overcompensate their recipients into compensatory damages and thereby reach the larger penumbra of adversely affected parties and interests.<sup>119</sup>

The practice of directing some punitive damages to nonplaintiffs, and, more broadly, Sharkey's proposal for societal damages, could lead to the same results prescribed by restoration damages. Theoretically, both societal and restoration damages rely on the concept of an underlying impaired interest as the fundamental object of remedial concern. Both require damages to be paid not directly to the plaintiffs but instead to other parties. And, practically, both are ripe for application in situations in which the impairment is to jointly consumed goods. But the two remedies differ in three important dimensions.

First, a major goal and the most common application of societal damages is to compensate victims not before the courts in the traditional way of monetary compensation, often through funds.<sup>120</sup> In contrast, restoration damages apply an entirely different concept: The plaintiffs or others injured by the wrongdoing are not paid any money directly. They are made whole not via money damages but through the restoration of the impaired underlying interest that accounts for their emotional harm.

Second, societal damages address a different problem than restoration damages. They address tort injuries to a large diffuse group. Restoration damages, in contrast, address the problem of emotional harms in private law generally. They apply to private harms, breach of contract, and jointly consumed goods that are not societal, in addition to societal harms. But because they seek to repair emotional harm, they have to resolve challenges that societal damages can largely ignore: the problems of verification and measurement of the specific victims' harms. They must therefore contain a sorting mechanism.

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114. Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 *Yale L.J.* 347 (2003).

115. *Id.* at 372–75.

116. *Id.* at 389–91.

117. *Id.* at 404.

118. *Id.* at 391–402, 420–22.

119. *Id.* at 400–02.

120. *Id.* at 389–91.

Third, societal damages view “society” as the victim and seek to repair harms to the public even when there is no recognized harm to any individuals.<sup>121</sup> Accordingly, Sharkey proposes that damages be paid to the state or other entities to promote the interests of the public.<sup>122</sup> Restoration damages, in contrast, allow for societal application only as the aggregate sum of private harms. When no one suffers any harm, tangible or intangible, present or latent, there is no social harm. Therefore, restoration damages seek to compensate victims for their private, in particular, emotional harms.<sup>123</sup> These different goals translate into different means: Societal damages are directed to restore societal interests, whereas restoration damages compensate specific plaintiffs and restore *exactly* the underlying interests that gave rise to the plaintiffs’ emotional harms.

3. *Distributions to Charities in Criminal Proceedings.* — Courts have occasionally ordered criminal defendants to make direct payments to charities that support causes related to the interest injured by their crime. While judges’ authority to order such awards is controversial and may be limited by judicial codes of conduct,<sup>124</sup> there is some indication that if the charities chosen are directly related to the victims’ injured interests, the awards would be permitted.<sup>125</sup>

Courts are generally empowered by criminal restitution statutes to order cash payments to be made to the victims of the crime.<sup>126</sup> Because such payments can be directed only to actual victims, courts have sometimes adopted broad conceptions of the term “victim” under the statutes.<sup>127</sup> Such expansive interpretations allow payments to redress the

121. See *id.* at 413–14.

122. *Id.*

123. This Essay does not intend to enter the debate about whether some interests should be restored, even in the absence of private harms, such as in cases of environmental future harms. Rather, it seeks to explore how to compensate harms to actual victims that currently go uncompensated. For the debate over victimless torts, see Ariel Porat & Alex Stein, *Liability for Future Harm*, in *Perspectives on Causation* 221, 233–38 (Richard Goldberg ed., 2011) (supporting the creation of a negligence-based liability standard for risk of future illness even when potential victims suffer no present physical harm).

124. See, e.g., *In re Johnson*, 1 So. 3d 425, 436–38 (La. 2009) (affirming the state judiciary commission’s recommendation of disciplinary action against a judge who engaged in a pattern of ordering defendants in the drug court to pay fines to third-party charitable organizations that didn’t meet the requirements to receive such assessments).

125. See, e.g., *People v. Burleigh*, 727 P.2d 873, 874–75 (Colo. App. 1986) (requiring that a defendant who was found guilty of unlawful dispensing of a controlled substance not in the course of a professional practice make a \$5,000 contribution to a drug-treatment program).

126. See, e.g., Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A (2012) (requiring courts to order defendants convicted of certain offenses to pay restitution to victims).

127. See, e.g., *United States v. Brown*, 665 F.3d 1239, 1252–53 (11th Cir. 2011) (finding that victims of uncharged fraudulent transactions were “victims” under the Mandatory Victims Restitution Act); *United States v. Bryant*, 655 F.3d 232, 253 (3d Cir. 2011) (holding that a university qualified as a “victim” under the Mandatory Victims Restitution Act in the

harm to the underlying impaired interest in the same way that restoration damages do.

Finally, criminal cases brought by the federal government against large banks in the aftermath of the 2008 mortgage crisis routinely conditioned plea bargains and deferred prosecution agreements on defendants' agreement to pay third-party charitable organizations dedicated to affordable housing,<sup>128</sup> such as Habitat for Humanity and the National Urban League.<sup>129</sup> The practice might be regarded as controversial because some of the charities had concrete agendas that did not overlap with the populations directly harmed by the banks' actions. Indeed, the U.S. Attorney General eventually cut off the prosecutorial discretion to enter into such settlements and create restorative "slush fund[s]."<sup>130</sup> He explained that "[t]hese third-party organizations were neither victims nor parties to the lawsuits."<sup>131</sup>

These occasional forms of redress in criminal proceedings resemble the approach of restoration damages, even though they target a different problem than emotional harm. Judges and prosecutors are looking for ways to direct some of the defendants' wealth to restore the harm done to victims of crime or to other societal interests. Restitution awards aim, in part, to achieve personal restorations. And distributions to charities in

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prosecution of a senator for fraud and bribery); *United States v. Wright*, 496 F.3d 371, 380 (5th Cir. 2007) (allowing restitution to a victim injured by the same broad scheme, albeit not the one for which the defendant was convicted); *Dubois v. People*, 211 P.3d 41, 46 (Colo. 2009) (en banc) (authorizing restitution payments to the county government when a police officer responding to a radio call crashed on the way to the scene of a crime); cf. *State v. Silbaugh*, No. 2008-P-0059, 2009 WL 819372, at \*4 (Ohio Ct. App. Mar. 31, 2009) (finding that a trial court may order a defendant convicted of animal cruelty to pay restitution to the Animal Protection League when the defendant stipulated to the restitution order at the hearing). But see *United States v. Kones*, 77 F.3d 66, 70 (3d Cir. 1996) (finding that the Victim and Witness Protection Act of 1982 is "not so broad that it permits a district court to order restitution to anyone harmed by any activity of the defendant").

128. See, e.g., Press Release, U.S. Dep't of Justice, Bank of America to Pay \$16.65 Billion in Historic Justice Department Settlement for Financial Fraud Leading Up to and During the Financial Crisis (Aug. 21, 2014), <https://www.justice.gov/opa/pr/bank-america-pay-1665-billion-historic-justice-department-settlement-financial-fraud-leading> [<https://perma.cc/MJ8E-K8W9>]; Press Release, U.S. Dep't of Justice, Federal and State Partners Secure Record \$7 Billion Global Settlement with Citigroup for Misleading Investors About Securities Containing Toxic Mortgages (July 14, 2014), <https://www.justice.gov/opa/pr/justice-department-federal-and-state-partners-secure-record-7-billion-global-settlement> [<https://perma.cc/A83N-44ME>].

129. See Sari Horwitz, Sessions Prohibits Settlement Agreements that Donate Money to Outside Groups, *Wash. Post* (June 7, 2017), [https://www.washingtonpost.com/world/national-security/sessions-prohibits-settlement-agreements-that-donate-money-to-outside-groups/2017/06/06/c0b2e700-4b02-11e7-bc1b-fddbd8359dee\\_story.html](https://www.washingtonpost.com/world/national-security/sessions-prohibits-settlement-agreements-that-donate-money-to-outside-groups/2017/06/06/c0b2e700-4b02-11e7-bc1b-fddbd8359dee_story.html) (on file with the *Columbia Law Review*).

130. *Id.* (internal quotation marks omitted).

131. *Id.* (internal quotation marks omitted) (quoting a memo from Attorney General Jeff Sessions).



certain criminal cases are designed to repair the underlying interest injured by the defendant.

### III. APPLICATION: THE *VOLKSWAGEN* CASE RECONSIDERED

Part II argued that restoration damages address the measurement and verification problems of emotional harm, which Part I argued have significantly limited the availability of emotional recovery. Part III now offers a demonstration. Returning to the case that inspired this Essay—Volkswagen’s “dieselgate” emissions breach—this Part asks how a restoration damages regime would have resolved the dispute. It shows that the actual resolution of the case reflects some of the principles of restoration damages but in a manner that could be greatly improved.

#### A. *The Settlement*

Recall that the *Volkswagen* case<sup>132</sup> involved hundreds of thousands of cars that Volkswagen sold in the United States with the certified assurance that they were low emitters, even though it knew these vehicles emitted nitrogen oxides forty times over the permitted limit.<sup>133</sup> The numerous class actions were consolidated into a single multidistrict litigation.<sup>134</sup> Guided by a resourceful judge, the parties quickly reached a settlement. Under its main component, Volkswagen agreed to pay consumers up to \$10 billion in money damages, reflecting the decline in the cars’ market value.<sup>135</sup> In addition, it agreed to invest \$2 billion over ten years to promote the use of zero emissions vehicles and \$2.7 billion over three years to reduce the excess nitrogen oxides emissions.<sup>136</sup> Regarding the latter two components, the court indicated that “[t]hese efforts address the environmental damage caused by Eligible Vehicles.”<sup>137</sup> Aside from these private law settlements, Volkswagen entered into a plea agreement

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132. See *supra* notes 3–12 and accompanying text.

133. See *Volkswagen Settlement*, *supra* note 3, at 2.

134. The litigation also considered claims filed by federal and state government entities for violations of criminal and other public laws. The Environmental Protection Agency sued under Sections 204 and 205 of the Clean Air Act, 42 U.S.C. §§ 7523–7524 (2012). The Federal Trade Commission (FTC) sued under Section 13(b) of the Federal Trade Commission Act (FTC Act), 15 U.S.C. § 53(b) (2012), and alleged violations of Section 5(a) of the FTC Act, 15 U.S.C. § 45(a). Additionally, the State of California, on behalf of the People and the California Air Resources Board, sued for violations of the Consumer Financial Protection Act, 12 U.S.C. § 5536 (2012), and various California state laws. See *Volkswagen Settlement*, *supra* note 3, at 3–4 (demonstrating that the MDL combined all of these federal actions with the consumer class action).

135. This amount is based on the unrealistic assumption that all consumers will prefer the remedy most expensive for Volkswagen. See *Volkswagen Settlement*, *supra* note 3, at 19 (“The Settlement requires Volkswagen to establish a Funding Pool in the amount of \$10.033 billion. This amount presumes 100% Buyback of all purchased Eligible Vehicles and 100% Lease Termination of all leased Eligible Vehicles.” (citation omitted)).

136. See *id.* at 39–40.

137. *Id.* at 40.

with the government and paid a \$2.8 billion criminal fine and an additional \$1.5 billion in civil penalties.<sup>138</sup>

The settlement offered plaintiffs two options to recover for the lost pecuniary value of the car: (1) “Buyback”—Volkswagen buys the owner’s vehicle at its prescandal price, or (2) “Fix”—Volkswagen fixes the owner’s vehicle according to a plan approved by the EPA.<sup>139</sup> The Buyback option, designed to allow people to terminate their relationship with Volkswagen, fell short of covering the full pecuniary loss. Because this option made use of the prescandal retail value of cars in their actual *used* conditions, it allowed Volkswagen to keep some of the fraudulently inflated value.<sup>140</sup>

Thus, more compensation was necessary in the settlement to make car owners financially whole. Such compensation was offered as an add-on “restitution payment.” This additional component entitled each owner to the greater of \$5,100 or \$3000 plus twenty percent of the vehicle’s value.<sup>141</sup> What exactly this recovery intended to measure is not entirely clear. If its intent was to fix the shortfall in the Buyback option, or to account for the hassle of the Fix option, the amount is excessive. In light of the court’s acknowledgment that some damages needed to cover the frustration suffered by environmentally conscious buyers,<sup>142</sup> the restitution payment is probably best understood as a crude compensation for the emotional harm alleged by the plaintiffs.

#### B. *The Law*

Had the case proceeded to trial, a pecuniary damage measure for the lost value of the cars would have been awarded, likely resembling the restitution payments in the settlement. But would the court have awarded compensation for emotional harm? How would such emotional recovery be measured? The parties to the settlement certainly expected some emotional damages to be awarded, and their settlement reflected this expectation. The “restitution payment” to the car owners went beyond redress for pecuniary harm. And the hefty payment of almost \$5 billion toward emissions mitigation programs, which was entirely separate from the criminal fines paid to the government, went directly to the environmental source of the emotional distress.

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138. See Rule 11 Plea Agreement at 12–13, *United States v. Volkswagen AG*, No. 16-CR-20394, 2017 WL 1425975 (E.D. Mich. Apr. 21, 2017), 2017 WL 1093308.

139. See Volkswagen Settlement, *supra* note 3, at 6.

140. To see why, imagine that the fraud raised the new or used price by twenty-five percent relative to the postdetection level. Consider a car that would have cost \$20,000 new and \$12,000 used, but due to the fraud was priced, predetection, at \$25,000 new and \$15,000 used. Buyers of the new car overpaid \$5000, but under the buyback they would receive only \$3000 back (the car would be bought back at \$15,000, which is \$3000 over its current market price). Effectively, Volkswagen would not be compensating owners for the fraudulently inflated price of the portion of the car already consumed.

141. See Volkswagen Settlement, *supra* note 3, at 20.

142. See *infra* notes 143–144 and accompanying text.

Indeed, the court explicitly recognized the gravity of the emotional harm when it approved the settlement. The court referred to the Federal Trade Commission's position that the settlement should "fully compensate[] victims of Volkswagen's unprecedented deception," and that compensation should cover "the value of the lost opportunity to drive an environmentally-friendly vehicle."<sup>143</sup> The court recognized the dilemma as follows:

[R]ecovery of [emotional] damages is less certain given that "[t]he direct harm caused by the TDI engines' nonconformity was not to the vehicle owner—who obtained a vehicle that performed as expected—but to the public at large. *Something could be allowed on account of the owner's frustration and inconvenience, but recovery on this basis might be only modest.*"<sup>144</sup>

Indeed, the underlying rationale of both the Buyback and the Fix options recognized that a low-emission car is worth more than a high-emission car to many consumers. Otherwise, why allow consumers to withdraw from a deal (Buyback) or require in-kind repair (Fix)? Why not award diminution-in-value damages exclusively? Such remedies are valuable to owners only if they also care about emissions. Recall that no federal or state authority has declared the diesel cars illegal to drive,<sup>145</sup> and Volkswagen was already being separately punished for violating public environmental laws.<sup>146</sup> The private law settlement thus reflects an attempt to redress more than the pecuniary loss.

An award of emotional damages in this case would have accurately reflected the prevailing doctrine. Despite the general reluctance of contract law to award remedies for emotional harm, this case likely fell within

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143. Volkswagen Settlement, *supra* note 3, at 28 (internal quotation marks omitted) (quoting Federal Trade Commission's Statement Supporting the Settlement at 1–2, In re Volkswagen "Clean Diesel" Mktg., Sales Practices, & Prods. Liab. Litig., No. 2672 CRB (JSC) (N.D. Cal. filed Aug. 26, 2016), <https://www.ftc.gov/system/files/documents/cases/160726ftc-vw-statement.pdf> [<https://perma.cc/C4R8-DEVY>]).

144. *Id.* at 16 (third alteration in original) (emphasis added) (quoting Expert Report of Andrew Kull at 17, *Volkswagen*, No. MDL 2672 CRB (JSC) (filed Aug. 26, 2016) (on file with the *Columbia Law Review*)).

145. The EPA has stated it will not confiscate Eligible Vehicles and "[t]he 44 states participating in the Attorneys General statement have also agreed to allow Class vehicles to stay on the road pending participation in the Class Action Settlement." See *id.* at 40 (alteration in original) (internal quotation marks omitted) (quoting Plaintiffs' Notice of Motion, Motion, and Memorandum in Support of Final Approval of the 2.0-Liter TDI Consumer and Reseller Dealer Class Action Settlement at 31, *Volkswagen*, No. MDL 2672 CRB (JSC) (filed Aug. 26, 2016) (on file with the *Columbia Law Review*)).

146. See, e.g., Nick Carey & David Shepardson, VW Pleads Guilty in Diesel Emissions Case as Part of \$4.3 Billion Settlement, *Wash. Post*, (Mar. 17, 2017), [https://www.washingtonpost.com/business/economy/vw-pleads-guilty-in-diesel-emissions-case-as-part-of-43-billion-settlement/2017/03/10/3e91a9e4-05d1-11e7-b9fa-ed727b644a0b\\_story.html](https://www.washingtonpost.com/business/economy/vw-pleads-guilty-in-diesel-emissions-case-as-part-of-43-billion-settlement/2017/03/10/3e91a9e4-05d1-11e7-b9fa-ed727b644a0b_story.html) [<https://perma.cc/Z6MD-X2QJ>].

what courts regard as the “personal interest” category of transactions.<sup>147</sup> The cars were marketed as low emitting not because such an attribute serves an economic or commercial interest but rather to appeal to buyers’ personal, nonpecuniary, emotional satisfaction.<sup>148</sup> It would be odd to classify the emissions assurance as “incidental” and not deserving of remedial protection given that it was a principal advantage sold to buyers and had a substantial impact on the price of the vehicles.

A court would have found it more difficult to speculate as to the amount of the emotional damages recovery. Existing doctrine is a black box in that regard because it is asked to do the impossible—to put a price tag on a loss that is defined as nonpecuniary and incommensurable.<sup>149</sup> As in the settlement, such recovery would likely have been crude and invariant across plaintiffs. Sincere environmentalists and fakers alike would have collected the same award. The duration of each plaintiff’s use of the vehicle would likely not have factored into the award, even though it surely affects the magnitude of the emotional harm.<sup>150</sup>

Unlike the settlement, it is hard to imagine that a court-set award would have tried to remedy the emotional harm by requiring Volkswagen to contribute billions of dollars toward emissions reduction. This strategy, which directly restores the underlying interest, requires a different set of doctrinal tools, which the restoration damages remedy would hopefully provide. The next section thus briefly demonstrates how restoration damages could be used in the *Volkswagen* case.

### C. Restoration Damages

If car owners suffered emotional harm, it is because their interest in driving low-emitting vehicles was violated. The intermediate underlying interest injured by the breach is thus straightforward: clean air. The longer one owned and the more miles one drove the vehicle, the larger the gap between the promised and the actual emissions it caused, and the graver the injury to the underlying interest. Thus, each owner’s emotional harm

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147. See *Valentine v. Gen. Am. Credit, Inc.*, 362 N.W.2d 628, 631 (Mich. 1984) (suggesting that courts may award damages for emotional distress arising from the breach of contract when the primary purpose in forming the contract was “to secure protection of personal interests”); see also *supra* text accompanying notes 34–35.

148. See *Volkswagen Settlement*, *supra* note 3, at 2 (“Volkswagen sold nearly 500,000 Volkswagen- and Audi-branded TDI ‘clean diesel’ vehicles, which they marketed as being environmentally friendly . . .”).

149. See, e.g., *Valentine*, 362 N.W.2d at 631 (denying mental distress damages for breach of an employment contract); *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, 53 (Mich. 1980) (noting the “difficulty of monetary estimation” of emotional harm); *Zager v. Dimilia*, 524 N.Y.S.2d 968, 969 (Village Ct. 1988) (stating that the emotional bond between a man and his pet is impossible to reduce to monetary terms).

150. Ironically, in the actual settlement, the restitution payments depended on usage inversely: Cars with higher mileage had lower values, so their owners received lower restitution payments. See *Volkswagen Settlement*, *supra* note 3, at 30.

is derived from a single personalized quantity, measured by the excess emissions her car ownership caused relative to the promised level.

Not only is it easy to measure and quantify the injury to the underlying interest of each individual plaintiff, it is also reliably easy to restore the underlying interest. Volkswagen could be ordered to take actions that reduce emissions to exactly offset the injurious increase. For each unit of carbon that was emitted in excess of its promise to its customers, Volkswagen could be required to accomplish a unit of reduced carbon. Indeed, the settlement identified two possible emission-reduction strategies: invest in zero-emissions electric vehicle technology and establish an emissions mitigation trust to reduce excess nitrogen oxides emissions.<sup>151</sup> Other, more straightforward strategies, not tied to particular environmental causes, are also available. For example, Volkswagen could be ordered to purchase but not use emissions permits in the amount of carbon dioxide equal to the increase attributed to its deception. Or, the court could establish the target amount of emissions reduction and let Volkswagen choose a restoration strategy that meets this goal. This would elicit the least-cost restoration.

Plaintiffs claiming to have suffered emotional damages due to the emissions would see their underlying interest restored because their ownership and driving of the car would now accomplish the personal environmental goal promised under the contract. Since the goal was to reduce emissions, it would now be fully satisfied. If all owners are sincere about their claim of emotional harm, all would join this restoration remedy, and the sum total of restoration ordered would equal the sum total of the excess emissions due to all the vehicles.

But not all owners are sincere. Thus, a key to the implementation of the restoration damages is to sort out the fakers. The sorting mechanism proposed in section II.B would entitle the defendant to offer opt-out money damages, or some combination of partial restoration and money. These alternatives would be cheaper for the defendant and more valuable to the fakers or the semi-environmental plaintiffs.

The restoration remedy should not be scaled down in light of the public remedies sought and obtained by the EPA and state regulators. These fines increase deterrence but do not accomplish the remedial goal of restoration damages because the money is not earmarked to redress the underlying environmental interest. It might be that some car owners' vexation and frustration would be soothed by the knowledge that the wrongdoer is being fined dearly. But this psychological-retributive sentiment is not the goal of the restoration remedy, and it does not reduce the need to repair the underlying interest. For many owners, even full restoration would not relieve the offense of being cheated, and it is exactly this added sense of betrayal that the fines address.

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151. See *id.* at 39–40.

Moreover, even from a deterrence perspective, the fines paid to the government do not justify a reduction of the private law restoration remedy. Rivers of ink have been spilled to justify larger damages for willful breach, and this is not the place to reproduce the rationale.<sup>152</sup> It is hard to think of a breach more willful than that committed by Volkswagen, and the fines paid to the government may well fit the remedy multiplier necessary to deter such willful transgressions.

#### IV. THE SOCIAL VALUE OF RESTORATION DAMAGES

The first three Parts of this Essay described the proposed restoration damages measure. Part I explained the problem, Part II the solution, and Part III gave an example. The implicit goal of compensating as accurately as possible sincere plaintiffs for the emotional harm they suffered guided this entire discussion. This Part now addresses why it is important to accurately compensate emotional harms. The answer has an obvious core: People are more fully compensated for their overall harm, and wrongdoers are better deterred. If successful, the restoration remedy would advance the two primary social goals of remedies—compensation and deterrence of emotional harm—in a way unmatched by any other existing private law remedy. This Part takes a closer look at these interests and the trade-offs between them. It identifies two additional social benefits that the restoration remedy may create: saving administrative costs and benefitting third parties.

##### A. *Compensation*

Restoration damages make plaintiffs who suffered emotional harm whole if the court successfully identifies the underlying impaired interest and correctly measures the degree of restoration that would exactly offset the harm. In the polluting car example, this measurement is straightforward—carbon-for-carbon. In the vegetarian food example,<sup>153</sup> it is more challenging to identify the interest and measure it, although errors of over- and under-restoration could average out.

If the underlying interest is accurately identified and measured, no plaintiff is left undercompensated. Those experiencing significant emotional harm value the restoration greatly, and those with a weaker attachment to the underlying interest value the restoration proportionally less. There is, however, a concern with overcompensation. As discussed in section II.B, the key to solving the problem of verification is to separate the sincere from the fakers through some payment of money damages to the

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152. See *infra* note 159 (explaining that willful breaches often result in higher damages awards compared to inadvertent breaches).

153. See *supra* text accompanying note 66 (noting that the motivations for reducing meat consumption can vary from concerns about animal welfare to religious restrictions, health-related motivations, or personal taste).

fakers. Thus, some victims are compensated in full (with restoration), while some nonvictims, or victims who suffered small emotional harms, are overcompensated (with money).

Overcompensation is a problem that may afflict other remedies as well, including conventional money damages. Ideally, if verification and measurement were feasible, a remedy of money damages would be superior to restoration damages in compensating victims because it would result in neither under- nor overcompensation. But in the presence of verification and measurement difficulties, a remedy of pure damages would undercompensate some victims and overcompensate others. We thus cannot offer a general proposition on the superiority of either the restoration remedy or money damages with respect to compensation. If the overcompensation problem coming out of the election-of-remedy scheme of restoration damages is severe, the scheme would perform poorly.<sup>154</sup>

Note that the overcompensation could be fully resolved by eliminating the election-of-remedy mechanism altogether and requiring all plaintiffs to accept restoration damages. Here, no one is under- or overcompensated because fakers receive restoration damages that have no compensatory value to them, and restoration damages achieve the exact quantum of compensation for all plaintiffs better than any other remedy. But the burden on the defendant would be greater, creating overdeterrence, as the next section explains.

#### B. *Deterrence*

Restoration damages can create overdeterrence for two reasons. First, restoration might be more expensive than the emotional harm it remedies. And second, fakers have to be paid off despite suffering no harm. While both overdeterrence problems are possible, their scope seems limited.

Specifically, to achieve optimal deterrence a defendant should bear the least cost necessary to make the victim whole. Ideally, restoration should be awarded only when its cost is less than the emotional harm it

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154. Still, restoration damages have the advantage over conventional damages of avoiding undercompensation, as long as the underlying interest is accurately identified and measured. Therefore, if the legal system fears undercompensation more than overcompensation, the scheme envisioned by this Essay would be superior to conventional damages. Indeed, some commentators believe that as between faulty injurer and innocent victim, the law should err on the side of overcompensating the victim. See, e.g., Jules L. Coleman, *Mental Abnormality, Personal Responsibility, and Tort Liability*, in *Mental Illness: Law and Public Policy* 107, 120–21 (Baruch A. Brody & H. Tristram Engelhardt, Jr. eds., 1980) (arguing that justice considerations favor the victim over the wrongdoer); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 *Iowa L. Rev.* 449, 468 (1992) (quoting the previous argument).

eliminates.<sup>155</sup> Otherwise, if verification and measurement of the emotional injury were perfect, money damages, rather than restoration, would provide optimal deterrence. The restoration remedy is particularly appealing in cases of high emotional harm because it is more likely that the cost of restoration would be less than the emotional harm it cures.

Restoration damages could create overdeterrence even when they are the least-cost measure to reduce high emotional harm—when fakers are hard to identify and a bounty needs to be offered to sort them out. In this Essay's stylized two-plaintiff-type example, the bounty is nominal and thus its deterrence distortion is negligible.<sup>156</sup> But it is also true that when plaintiff types vary, the bounty for separating the fakers can be substantial.<sup>157</sup> True, the overdeterrence arising from this informational challenge could be corrected by scaling down the restoration remedy for all plaintiffs, but this would in turn defeat the compensation goal underlying the scheme.<sup>158</sup>

Ultimately, the problem of overdeterrence under the restoration remedy is mitigated by several additional factors. First, when emotional harm is low, plaintiffs are not motivated to sue, and when they are represented through a class action they are not motivated to redeem their award. Such passivity might be an artifact of the present regime in which the monetary recovery for emotional harm is low. Participation rates might increase if the monetary bounties were higher.

Second, if overdeterrence leads to costly precautions, contractual parties might be motivated to explicitly bargain *ex ante* over the extent of emotional harm liability. People with low emotional stakes in the activity might contractually waive their right to recover restoration damages for a discount. Like any remedy, the restoration measure would be a default rule that can be disclaimed contractually. Even when its application is limited to contracts that have a "personal" element, parties with low emotional stakes could opt out.

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155. To be sure, an award of inefficient restoration could be renegotiated to avoid the wasteful investment. Even then, however, the plaintiffs may extract settlements exceeding their actual losses. See *supra* section II.C.1 (explaining why post-trial renegotiation might be inefficient).

156. See *supra* section II.B.2 (discussing how the sorting mechanism works).

157. See *supra* section II.B.2.

158. Another overdeterrence problem could arise if victims choose restoration not because they suffered severe emotional harm but because they are tempted by the opportunity to contribute to what they think to be a good cause. Thus, in the *Volkswagen* case, an environmentalist who suffered emotional harm that is lower than the monetary payment option offered to her under the restoration scheme might nevertheless choose the more costly restoration option because she is tempted by the opportunity to contribute to the environment. While not impossible, such behavior would likely not be widespread. More realistically, third parties might offer money rewards to plaintiffs who choose restoration. To avoid this overdeterrence problem, this Essay suggests that such arrangements should be prohibited. See *supra* section II.C.3 (explaining why side deals reduce the effectiveness of our sorting mechanism).



Third, if the emotional harm arises from an intentional and malicious violation, overcompensation does not create overdeterrence because the objective of remedies is to completely deter such conduct. Indeed, compensation in such willful harm cases usually exceeds actual harm to satisfy this deterrence rationale.<sup>159</sup> The Volkswagen example falls into the willful breach category, and overcompensation is necessary to deter such hard-to-detect violations.

### C. *Administrative Costs*

A distinct advantage of the restoration remedy, compared to conventional money damages, is simplified administration. The restoration remedy requires the same preliminary burden of classifying the injury as one justifying recovery for emotional harm as the existing money damages remedy. But it simplifies the measurement and verification tasks. The main task for courts would be to determine what full restoration entails—namely, what are the injured underlying interests and what forms and magnitude of restoration would be adequate. This is not a trivial task, but plaintiffs could help courts by self-reporting the interest allegedly impaired. Since plaintiffs value restoration damages only if they truly value that interest, they would have no interest in cheating. The court would still have to determine whether the alleged injury is real. But the court would not have to set the menu of remedial options since the defendant would have the incentive to design it.

This procedure is less burdensome than the existing money award litigation. Plaintiffs no longer have to prove their harm, and courts no longer have to figure out how to translate emotional grievance into dollars. Under the present regime, courts sometimes standardize compensation by awarding a uniform measure of damages to all plaintiffs, based on their average harm or some crude personalization by categorizing plaintiffs into several groups.<sup>160</sup> But even with standardization, administrative costs are likely to be high because it might be hard to calculate average harms. Surveys of plaintiffs may create distorted accounts, and surveys among the general population may not be representative.<sup>161</sup>

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159. See, e.g., Oren Bar-Gill & Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 Mich. L. Rev. 1479, 1481 (2009) (arguing that when a party is caught in the act of willful breach, it is punished not merely for this act, but for the (probabilistically) inferred mesh of bad conduct that came with it); Richard Craswell, *When Is a Willful Breach ‘Willful’?: The Link Between Definitions and Damages*, 107 Mich. L. Rev. 1501, 1507–08 (2009) (explaining why damages should be high in willful breach cases).

160. Thus, in most jurisdictions, damages for pain and suffering can be awarded on a per diem basis measured from the time of the injury until the plaintiff’s end of life expectancy. See, e.g., *Debus v. Grand Union Stores of Vt.*, 621 A.2d 1288, 1290 (Vt. 1993) (allowing per diem damages for pain and suffering).

161. See Viscusi, *supra* note 67, at 57–58 (observing “that interviews may not elicit accurate responses because respondents have no incentive to give thoughtful or honest answers”).

Consider, for example, the burden of remedying emotional harm arising from consumption of falsely labeled vegetarian food.<sup>162</sup> Rather than establishing an arbitrary money award (which would attract endless fake claimants, thus requiring some costly verification mechanism), the court need only designate a restoration target that fits the reported impaired interest and the sum necessary to offset the wrong. The court would identify, for example, an organization dedicated to vegetarian causes (perhaps one proposed by the plaintiff) and the money necessary to offset the harm to animals committed by the use of animal ingredients in the food.

D. *Third-Party Effects*

Restoration of an underlying interest shared by others creates a public good, benefitting all those who value the interest. Restoring an environmental resource or a religious symbol benefits all environmentalists or members of the religious sect. This is an advantage that money damages do not have. It is possible that an emotionally harmed recipient of money damages would spend the award to restore an underlying interest shared by others. But as long as some of the monetary awards are privately consumed, they create no benefit to others.

This advantage highlights the great attractiveness of restoration damages in cases involving harm to public goods. Our discussion earlier did not distinguish between emotional harms from injuries to public and private interests. We now see that the case for restoration damages is stronger in public interest cases. While restoration damages could also remedy private harms (like a spoiled wedding celebration or a devastated backyard<sup>163</sup>), it is only in the case of public harms that the third-party effect augments the social value of the remedy. These third parties may not have legally protected expectations, but they benefit nevertheless.

The magnitude of the effect on third parties depends on another aspect of the harm to the underlying interest: whether it accumulates across victims. Some harms are lumpy. For instance, the destruction of a religious symbol through tortious action or an oil spill affects many parties, including those who cannot sue for practical or legal reasons.<sup>164</sup> Granting restoration to the active plaintiffs affects nonsuing parties and might remedy their losses entirely. In such cases, restoration might be the cheapest—and maybe the only—way to compensate *all* victims, regardless

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162. See *supra* text accompanying note 66 (discussing possible reasons why people avoid consuming meat).

163. See *supra* note 36 (mentioning cases in which current contract law allows recovery for emotional harm, including that resulting from defective services for weddings).

164. Liability might not be imposed for duty of care and proximate cause reasons. See Restatement (Third) of Torts: Liab. for Physical Harm and Emotional Harm § 29 (Am. Law Inst. 2012) (adopting the term “scope of liability” to refer to what is commonly known as “proximate cause”).

of their participation in the lawsuit.<sup>165</sup> It also creates optimal deterrence, since the wrongdoer internalizes the entire social harm caused by his wrongdoing.

In other cases, the harm is divisible and accumulates across victims. Selling a polluting car model in the guise of environmental promises creates harms that add up as more people purchase the model. Here, the only parties who are compensated are the suing plaintiffs. Third parties who care about the environment are not recognized as victims or third-party beneficiaries, and are thus not entitled to restoration. Nevertheless, they benefit from the restoration remedy, in the same way that they benefit from the nonbreached contracts of others.<sup>166</sup>

#### CONCLUSION

This Essay began with a puzzle: Why do emotional harms receive such meager protection in private law? A possible reason is the misalignment between the emotional injuries plaintiffs suffer and the remedies private law has in its arsenal. The two main reasons for this divergence are the verification and measurement problems. The absence of remedies to overcome these problems stops courts short of assigning liability.

This Essay offers a novel solution to the misalignment—a new private law remedy of restoration damages. The remedy has a simple theoretical foundation and requires little information to implement. Plaintiffs claiming emotional grievance have to identify the underlying interest, and the court has to certify that the transaction or the violation indeed implicated such interest. It is then up to the wrongdoer to offer a method for restoration and to create an election-of-remedy menu to sort out sincere plaintiffs from fakers. In various settings, the restoration remedy has advantages over the conventional monetary damages remedy: It better compensates, better deters, saves administrative costs, and creates benefits to third parties not involved in the litigation.

While many of the cases that motivated our analysis involved emotional harms arising from people's interest in the integrity of public goods like the environment, the proposed restoration remedy could also be applied to more traditional settings with a single wrongdoer inflicting private harm on a single victim.

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165. Cf. Sharkey, *supra* note 114, at 392–94 (explaining that “societal damages” should compensate absent plaintiffs).

166. On a different perspective, in the *Volkswagen* case, Volkswagen committed a wrong toward noncontractual parties since the actual emission was not only beyond what the warranties guaranteed, but also beyond what the law allowed. Ideally, all victims, both contractual and noncontractual, should get compensated even if this is practically and legally impossible. Restoration compensates those victims as well. See discussion *supra* Part III. Under this view, restoration should probably be mandatory, to offset the emotional harm suffered by plaintiffs and nonplaintiffs alike. Cf. Sharkey, *supra* note 114, at 394–99 (explaining that “societal damages” should compensate “quasi-plaintiffs,” who “in and of themselves, do not amount to legally cognizable injuries”).

In an economy increasingly focused on products that provide emotional rather than physical benefits, sellers' promises to deliver emotionally satisfying experiences have to be backed up with a legal infrastructure supporting the expectations they create. Public law and nonlegal enforcement norms have made significant adjustments to protect the growing domain of emotional expectations. For private law to do its share, new remedies specially designed to address emotional harms are needed. The restoration damages measure developed in this Essay could fill this timely role.