

# The Restoration Remedy in Private Law: A Novel Approach to Compensation for Emotional Harm

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## Abstract

*One of the most perplexing problems in private law is when and how to compensate victims for emotional harm. This article 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, the article proposes that damages be paid to directly 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—the article develops a sorting mechanism that separates those emotionally harmed from fakers, awarding the restoration measure of damages only to account for the harm suffered by the former class. The article 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. It is deeply puzzling why. We live in a society where emotional interests like dignity, privacy, personal fulfillment, and reputation are central to individual wellbeing, where people are willing to pay nicely for emotional benefits, and where many institutions are focused on advancing and protecting people’s emotional concerns. Public law and private norms show increasing respect for emotional interests, and yet private law is lagging behind.

A primary reason for this misalignment is the absence of a conceptually coherent private law remedy for emotional harm. For long, one of the most perplexing problems in private law has been how to hold wrongdoers accountable for emotional harm their actions cause. Unlike pecuniary or physical harms, emotional distress is difficult to verify and quantify, 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 article offers a novel remedy for emotional harm—the *restoration* measure (“restoration damages”). Under this remedy, the wrongdoer is not required to compensate the emotionally aggrieved parties directly, nor is the wrongdoer required to undo the

emotional harm. Instead, the wrongdoer has to restore the *underlying interest* that was impaired—an impairment that gave rise to the emotional harm.

Consider the following example. Environmentally conscious buyers purchase at a premium a vehicle that the seller falsely promotes as low emitting, and which in fact is high-emitting.<sup>1</sup> The aggrieved buyers recover the price overcharge, but seek additional remedy for the emotional harm arising from having participated in polluting activity. The court holds that buyers' primary interest in the transaction was indeed environmental, and the violation of this interest entitles them to additional compensation for emotional harm. But how should this harm be measured? Under the restoration damages measure, the seller would not pay the buyers directly, but would instead be ordered to pay for environmental improvements commensurate with the environmental harm that the previously undisclosed emissions caused. The seller, for example, could be ordered to purchase and set aside carbon allowances. Buyers would thus experience a reprieve: the environmental objective that led them to purchase the cars would be fully accomplished by the reduced emissions that the restoration remedy forces.

Restoration damages address the two fundamental challenges of compensation for emotional harm—measurement and verification—better than any other remedy. Consider first the problem of measurement. Any money damage measure paid to the plaintiff has to accomplish the impossible—quantify and monetize emotional harm. Restoration damages are not paid directly to the aggrieved parties, and thus no “exchange rate” is necessary to translate agony into dollars.

The second problem restoration damages overcomes is verification. 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—those who truly suffered emotional distress—they are unattractive to fakers. In our example, requiring the breaching seller to purchase carbon allowances provides a benefit only to “green” car buyers.

Restoration damages would work perfectly if fakers refrain from seeking them. They would repair the underlying injured interest only as much as necessary for those who

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<sup>1</sup> See *In re Volkswagen "Clean Diesel" Mktg., Sales Practices and Prods. Liab. Litig.*, No. 15-md-2672 (N.D. Cal. October 25, 2016) [hereinafter *Volkswagen Settlement*].

care about it and bother to seek such redress. The concern, however, is that fakers would seek restoration damages strategically, to bargain for high monetary settlements. While such Coasian bargaining would safeguard against wasteful investment in restoration, it would still be distortive because compensation will be excessive. To that end, the second major contribution of this article is in developing a general sorting mechanism that overcomes this concern.<sup>2</sup> We show how to design an election of remedy regime that would lead to restoration damages only for true victims, screening away fakers with small cash awards.

In its simplest form, the sorting mechanism requires that the plaintiff be offered two choices: a restoration remedy paid directly to repair the underlying interest, none of which goes to the plaintiff's pocket; or a "small" sum of money damages paid directly to the plaintiff's pocket. Sincere plaintiffs who truly care about the underlying interest would choose the first option; fakers would choose the second. In reality, the mechanism may have to be more complex, to account for the existence of plaintiffs who have different intensity of concern for the underlying interest. We discuss ways to mitigate this complexity.

Of course, this mechanism would only work to "separate" the sincere from the faker types if plaintiffs who select the restoration remedy are barred from settling post-judgment and releasing the defendant from the adjudged restoration obligation.<sup>3</sup> Otherwise, all plaintiffs would choose restoration, and while the plaintiffs who suffered no harm (or some small harm) would eventually sell a release, the defendant would have to pay damages exceeding the true emotional harm inflicted.

Restoration damages exploit a feature of a certain class of emotionally distressing events—the impairment of some underlying concrete concern. The car drivers in our

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<sup>2</sup> A self selection mechanism to address a similar sorting problem has been developed independently in a formal working paper by Nathan Atkinson, *Using Choice of Remedies to Ensure Adequate Compensation – Work in Progress* (June 2017). This self-selection mechanism is related to a solution proposed in an earlier article to the problem of strategic threats to use injunctions. See Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45 (1999). Unlike our mechanism that 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.

<sup>3</sup> We say that the sum of money offered to plaintiffs could be "small," assuming that emotional distress is an "all or nothing" event. We show in part III that the mechanism could be adjusted to apply to more continuous types of emotional impact.

example were distressed because a common interest (avoidance of carbon emissions) was impaired. In other circumstances, the emotional distress could arise from violation of religious, political, family, reputational, or spiritual values. For example a seller may warrant that food it sells is vegetarian, or kosher, or produced fairly, catering to the vegetarian, religious, or egalitarian values of its clientele. If the food is discovered to lack the alleged properties, many (but not all) buyers will experience foreseeable emotional distress. Again, rather than trying to make the aggrieved buyer whole by money damages, the seller may be ordered to restore the underlying interest by supporting animal welfare initiatives, or paying for the enhancement of religious services, or contributing to fair trade causes. The values that prompted customers to purchase the special food in the first place would be restored.

Accordingly, many of the examples we have in mind for the application of restoration damages address emotional distress arising from harm to a jointly consumed good. The environment is a public good and its impairment aggrieves many consumers. The same would be true for food and other products that are falsely marketed as conforming to various criteria of social justice (e.g., non-GMO, locally made, fairly traded, and so on). The distress due to breach arises from harm to a public concern. Because this concern can be promoted in various ways, the restoration measure of damages is designed to restore the impaired interest through a substitute avenue by which it could be promoted.<sup>4</sup> When thus applied to the reclamation of public goods, restoration damages create social benefits that likely exceed the social value of private monetary damages. Whereas plaintiffs may spend money damages to purchase private goods, restoration damages targeted to repair public goods create, in addition benefits to third parties. Anyone valuing these attributes would benefit as well.

What about emotional distress arising from harm to a private value, that has no communal aspect? In theory, restoration damages could be applied here too. Consider, two

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<sup>4</sup> Notice that the restoration remedy is different from conventional in-kind remedies, since it does not aim to put the victim in *precisely* in the same position as in the violation-free scenario. Conventional in-kind remedies are often impossible to implement. In our emissions example, the purchasers of the car have already used it and polluted the air. The specific manifestation of the injury to the underlying interest is an accomplished fact that could not be reversed through the conventional in-kind remedies. In contrast, the restoration remedy is applicable because it is aimed at the underlying interest, not at its specific irreversible manifestation.

scenarios: (1) a consumer whose vacation trip was ruined by the hotel's breach of contract,<sup>5</sup> and (2) a homeowner who lost the use of the private backyard due to destruction caused by land developer.<sup>6</sup> In both cases, standard monetary remedies (restitution of the price in (1) and diminution of the home's value in (2)) make the aggrieved party less than whole. The value of a vacation or of a tranquil private backyard is in the emotional gratification they secure, not in the wealth they produce. In both cases, the promisors can foresee the emotional harm and would be under-deterred if the law of remedies ignores them, as it often does. We argue that in both cases restoration damages can be used as the most appropriate measure of expectation remedy. In (1), the hotel would remediate the emotional distress by paying for the cost of a substitute trip. And in (2) the contractor would pay for the remediation of the backyard, however more costly it is relative to the diminution of market value. And, in both cases, the concern that fakers would make strategic emotional harm claims can be resolved through our sorting mechanism.

The article proceeds as follows. In Part I we provide a brief overview of how tort and contract law treat emotional harms, either directly or indirectly. Part II introduces the restoration remedy as a novel way to redress emotional harm in general and in cases of harm to public goods in particular. In Part III we discuss the social value of restoration damages as a superior mechanism for compensating victims and deterring wrongdoers, as administratively less costly, and as a socially productive form of remedy. Part IV applies our new remedy to the Volkswagen case and illustrates its advantages. It also highlights difficulties of implementation and shows how they could be overcome.

## I. Emotional Harm in Private Law

Private law does not eye claims of emotional harm generously. Perhaps because they have thus far failed to identify a robust and theoretically satisfying damage measure for emotional harms, courts are reluctant to award damages for stand-alone emotional harm. Measurement and verification difficulties, as well as the concern of frivolous claims, are the most common reasons. In this Section, we briefly summarize the emotional

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<sup>5</sup> See Miles Brignall, *Holiday from hell? How to claim compensation*, THE GUARDIAN (Sep. 6, 2014) <https://www.theguardian.com/money/2014/sep/06/holiday-hell-compensation-claim-summer-break>. (RA: cite a case).

<sup>6</sup> RA: Cite a case.

damages doctrine that, in the following section, we propose to reform. Readers familiar with this body of doctrine are urged to skip this discussion and go directly to Section II.

## A. Contract Law

### 1. Damages for Emotional Harm

In common law, a breach of contract does not generally give rise to damages for the emotional harm that may have been caused by it.<sup>7</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. And courts generally recognize that 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>8</sup> And, yet, the basic approach is to not award emotional damages.

Why? One bad explanation is foreseeability—the claim that the breaching party did not know (or have reason to know) that inflicting a pecuniary loss on its counterpart would also cause consequential emotional disturbance.<sup>9</sup> It’s a bad justification because courts, in the same breath, also recognize “all breaches of contract do more or less” “distress, vexation and annoyance.”<sup>10</sup>

A second and better justification for the no-emotional-damages rule is their speculative nature.<sup>11</sup> Contract law does not allow compensation for uncertain harm,<sup>12</sup> and emotional damages are uncertain and hard to verify and quantify. Yet it’s not clear why emotional damages should be barred *entirely*. If their magnitude varies greatly and cannot

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<sup>7</sup> See e.g., *Erllich v. Menezes* 21 Cal.4th 543 (Cal. 1999) (deciding that in a defective construction case emotional damages are not available); *Jankowski v. Mazzotta*, 7 Mich.App. 483, 152 N.W.2d 49 (1967) (deciding that no damages for mental anguish should be awarded for breaching a contract to build a house); RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981) (“Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result”).

<sup>8</sup> *Valentine v. General American Credit*, 362 N.W.2d 628, \*\*\* (1984).

<sup>9</sup> RESTATEMENT (SECOND) OF CONTRACTS § 353 (“Damages for emotional disturbance are not ordinarily allowed. Even if they are foreseeable, they are often particularly difficult to establish and to measure.”).

<sup>10</sup> *Steward v. Rudenr*, 84 N.W.2d 816, \*\*\* (Mich. 1957); *Kewin v. Mass. Mut. Life Ins. Co.*, 295 N.W.2d 50, \*\*\* (Mich. 1980).

<sup>11</sup> RESTATEMENT (SECOND) OF CONTRACTS § 353 (“damages for emotional disturbance . . . are often particularly difficult to establish and to measure”).

<sup>12</sup> RESTATEMENT (SECOND) OF CONTRACTS § 352 (1981) (“Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty”).

be proven with accuracy, why not award some intermediate of “average” measure of damages?<sup>13</sup> Or, at the very least, some low-end measure that is unlikely to err on the side of over-compensation?

A third, and sometimes a very good justification for the no-emotional-damages rule is their avoidability.<sup>14</sup> If the plaintiff is compensated for the pecuniary loss from breach, she is able to purchase performance elsewhere, and the distress she suffered due to non-performance would thus be cured, rendering any additional emotional damages double compensation. Thus, for example, rather than bemoan the mental anguish that a breach employment contract inflicted on her, the discharged employee is encouraged to pursue mitigation strategies by seeking substitute employment.

This avoidability justification for the no-emotional-damages rule squares well with the mimic-the-parties’-will basis for remedies—namely, the view that the aggrieved party would prefer, *ex ante*, to forgo such damages and save the premium she would otherwise have to pay, through a price adjustment, for this form of breach insurance.<sup>15</sup> In theory, there is perhaps a reason why contracting parties want coverage for pecuniary but not emotional losses, and it is a bit subtle. The idea is that emotional harm does not increase the aggrieved party's marginal utility of money in the same way that pecuniary harm does, so it would be irrational to transfer money from the pre-breach state to the post-breach state, especially if such transfer involves some transaction costs (such as measurement and litigation costs).<sup>16</sup>

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<sup>13</sup> For example, in class actions, when courts encounter difficulties in verifying entitlements to compensation, and in measuring and distributing it, they may use the “fluid class recovery” method. *See* Anna L. Durand, *An Economic Analysis of Fluid Class Recovery Mechanisms*, 34 STAN. L. REV. 173 (1981); John Bruno et al v. Alphabet Co. et al, 127 Cal. App. 3d, 342, 343 (1981) (“The theory underlying fluid class recovery is that since each class member cannot be compensated exactly for the damage he or she suffered, the best alternative is to pay damages in a way that benefits as many of the class members as possible and in the approximate proportion that each member has been damaged, even though, most probably, some injured class members will receive no compensation and some people not in the class will benefit from the distribution”).

<sup>14</sup> RESTATEMENT (SECOND) OF CONTRACTS § 350 (1981) (“...damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation”).

<sup>15</sup> Samuel A. Rea, Jr., *Nonpecuniary Loss and Breach of Contract*, 11 J. LEGAL STUD. 35, 53 (1982).

<sup>16</sup> Rea, *supra* note 15, at 37 (“...The theory of optimal insurance suggests that nonpecuniary losses should not necessarily be compensated... If it is... assumed that only the seller can influence the probability and that the loss can be measured...the seller should bear the entire risk. This result would encourage optimal precautions and eliminate the risk faced by the victim... This approach is not necessarily correct in cases with nonpecuniary loss, because buyers may not desire to insure against the entire loss”). *See* Richard J. Zeckhauser, *Coverage for Catastrophic Illness*, 21 PUB. POLICY 149 (1973) (\*\*); Philip J. Cook & Daniel A. Graham, *The Demand for Insurance and Protection: The Case of Irreplaceable Commodities*, 91 Q. J. ECON. 143 (1977) (\*\*); Micheal Spence, *Consumer Misperceptions, Product Failure and Producer Liability*, 44 REV. ECON. STUD. 138 (1977) (\*\*); Steven Shavell, *Theoretical Issues in Medical Malpractice*, in *THE ECONOMICS OF MEDICAL MALPRACTICE* 35 (Simon Rottenberg ed., 1978) (\*\*).



Perhaps this is also why people who buy accident insurance policies do not seek added coverage for emotional harms.<sup>17</sup>

The insurance argument ignores deterrence. If parties suffer emotional harm that goes uncompensated, the breaching party does not internalize the entire negative impact of breach and would breach even when it is efficient to perform. Ultimately, the parties' rational ex ante interest is to have their contract governed by remedial rules that induce optimal precautions against breach. Excluding emotional damages categorically undermines this interest.<sup>18</sup>

Accordingly, despite the general reluctance to award emotional damages, courts carved out narrow exceptions. These exceptions identify scenarios in which unavoidable emotional harm is particularly likely to result from breach.<sup>19</sup> The most prominent test is when the emotional harm accompanies some physical injury, and we'll discuss this in the next section dealing with tort remedies.<sup>20</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>21</sup> Contracts are found to have a "personal element"—as contrasted with the more common "commercial element"—when their primary purpose is not economic or patrimonial but to advance psychic satisfaction, to secure relief from a particular emotional inconvenience or annoyance, or to confer a

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<sup>17</sup> Rea, *supra* note 15, at 39.

<sup>18</sup> Rea, *id.*, at 37 ("...there is a conflict between the insurance and incentive objectives. The theory of optimal insurance suggests that nonpecuniary losses should not necessarily be compensated, but lack of such compensation may affect the seller's incentive to honor the contract"); For the argument that victims might be willing to insure against non-pecuniary 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, 1896-1914 (1995).

<sup>19</sup> RESTATEMENT (SECOND) OF CONTRACTS § 353 ("breach is of such kind that serious emotional disturbance was a particularly likely result.")

<sup>20</sup> *Id.* ("Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm.")

<sup>21</sup> *Kewin*, 295 N.W.2d 50, \*\*\* ("When we have a contract 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, then a breach of duty with respect to such contracts will inevitably and necessarily result in mental anguish, pain and suffering. In such cases the parties may reasonably be said to have contracted with reference to the payment of damages therefor in event of breach. Far from being outside the contemplation of the parties they are an integral and inseparable part of it"); *Valentine*, 362 N.W.2d 628, \*\*\* ("In determining what damages are recoverable, the court qualifies the general rule, pursuant to which mental distress damages for breach of contract are not recoverable, with a narrow exception. Rather than look to the foreseeability of loss to determine the applicability of the exception, the court considers whether the contract has elements of personality and whether the damage suffered upon the breach of the agreement is capable of adequate compensation by reference to the terms of the contract").

particular emotional enjoyment.<sup>22</sup> While the list of contracts often recognized to have such features is a relic of an older era<sup>23</sup>—it is, for example, surprising that employment contracts are not generally recognized to have an “element of personality”<sup>24</sup>—the doctrine is founded on a solid principle: award emotional damages when the parties entered the contract seeking to advance the very same emotional interest that was eventually harmed.

## 2. Remediating Non-Commercial Losses

While emotional damages are the exception, plaintiffs have had somewhat greater success getting courts to recognize and compensate a species of emotional losses arising from defective performance. The plaintiffs in such case are seeking money damages to undo the non-conforming performance and redo the project as promised. This cost of repair is significantly higher than the diminution in market value that the defect caused. Famous examples involve the installation of non-conforming plumbing pipes,<sup>25</sup> misplacement of a wall,<sup>26</sup> or unfinished land reclamation.<sup>27</sup> This divergence between the two measures of the loss—the cost of repair versus the diminution in value—is due to the fact that the market does not assign a significant price differential to the completed performance. The lower market valuation is sometimes taken to suggest that the repair is entirely wasteful (as when the plaintiff seeks to replace plumbing pipes already installed in the walls, for the sole reason that they are of a different brand.<sup>28</sup>). But it may also indicate that the value assigned by the plaintiff to a specific module of performance, or to its meticulous completion, is

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<sup>22</sup> *Valentine*, 362 N.W.2d 628, \*\*\* (“We conclude, because an employment contract is not entered into primarily to secure the protection of personal interests and pecuniary damages can be estimated with reasonable certainty, that a person discharged in breach of an employment contract may not recover mental distress damages”).

<sup>23</sup> Typical examples are tour package contracts, contracts to perform cosmetic surgeries, and contracts for providing services for weddings or funerals. *See, e.g.*, *Jarvis v. Swan Tours EWCA Civ 8* (1972) (tourism contract); *Sullivan v. O'Connor* 296 N.E. 2d 183 (1973) (cosmetic surgery); *Lewis v. Holmes* 109 La. 1030 (1903) (contract for providing services for a wedding); and *Hirst v. Elgin Metal Casket Co.*, 438 F.Supp. 906 (D.Mont.1977) (contract for manufacturing a casket).

<sup>24</sup> *Valentine*, 362 N.W.2d 628 (“An employment contract will indeed often have a personal element. Employment is an important aspect of most persons' lives, and the breach of an employment contract may result in emotional distress. The primary purpose in forming such contracts, however, is economic and not to secure the protection of personal interests. The psychic satisfaction of the employment is secondary”).

<sup>25</sup> *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239 (1921).

<sup>26</sup> *Plante v. Jacobs*, 10 Wis. 2d 567 (Wis. 1960).

<sup>27</sup> *Peevyhouse v. Garland Coal & Mining Co.*, 1962 OK 267 (Okla. 1962).

<sup>28</sup> *Jacob*, 230 N.Y. 239.

subjective and emotional, not widely shared by market participants (as when the plaintiff seeks to redo a workmanlike exterior paint job, for the sole reason that it was done with different color tone than specified.<sup>29</sup>).

For long, courts have been split on how to measure the recovery—whether to recognize only the commercial loss as reflected in the diminution in market value, or to respect the personal element and allow greater compensation when such element was bargained-for. This dilemma—whether to require damages to account for subjective and emotional harm—was famously framed as whether to protect “mere taste or preference, almost approaching the whimsy,”<sup>30</sup> whether to recognize that an “owner’s right to improve its property is not trammled by its small value” and that a party may “choose to erect a monument to his caprice or folly.”<sup>31</sup> Various tests are employed, and a primary question courts ask is whether the in-kind completion is merely an incidental purpose of the contract,<sup>32</sup> or is it of special value, so central that without it the goal of the contract for the plaintiff would be frustrated.<sup>33</sup>

This test—whether the plaintiff had some personal goal not measured by commercial value—is strikingly similar to the test for emotional damages. There, too, the courts essentially ask whether the plaintiff suffered injury to a “personal,” as opposed to a “commercial,” interest. But the test has been applied much more stingily in the emotional damages context. The reason for the differential application is probably the measurement problem: It is hard to measure pure emotional harm and award it 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 not to compensate for mental anguish, but to avoid it. Courts are finding it easier to allot such compensation, accurately measured so as to finish a job, than to speculate about the sum of money necessary to offset emotional harm. If indeed this is the reason for the greater readiness to

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<sup>29</sup> *Landis v. William Fannin Builders, Inc.*, 193 Ohio App. 3d 318 (2011).

<sup>30</sup> *O. W. Grun*, 529 S.W.2d 258, \*\*\*.

<sup>31</sup> *Groves v. John Wunder Co.*, 205 Minn. 16, \*\*\* (1939).

<sup>32</sup> *Peevyhouse*, 1962 OK 267, \*\*\*.

<sup>33</sup> *City School Dist. v. McLane Constr. Co.*, 85 A.D.2d 749 (1981) (allowing recovery for cost of replacing the unsightly beams in a structure – which were higher than both the cost of repair and the difference between the value of the structure as built and its value if the beams were as originally planned – because the aesthetics of the structure was important to the plaintiffs; *Landis*, 193 Ohio App. 3d 318 (“Because the purpose of the contract was the construction of a custom-built home with the aesthetics they desired, the corporation's failure to achieve those aesthetics warranted an award of damages that would allow them to correct the defect...”).

redress emotional grievances in defective performance cases, we suspect that the restoration measure we propose—which solves the problem of measurement—would encourage courts to expand the emotional harm doctrine and award compensation for it more generously.

### 3. Emotional Harm in Other Remedial Doctrines

Other remedial rules in contract law doctrines are designed, at least in part, to address emotional harms. Consider the specific performance remedy. It is available primarily when the goods are “unique”<sup>34</sup> and damages are therefore difficult to ascertain or are inadequate to make the aggrieved party truly whole.<sup>35</sup> A typical reason why the subject of the contract may be regarded as unique and damages inadequate is the presence of an emotional interest, such that “induce strong sentimental attachment.”<sup>36</sup> When buyers attach idiosyncratic emotional value that is hard to measure, market-based damages would leave them under-compensated, unable to find a replacement that would restore that emotional value.<sup>37</sup>

Another technique to compensate victims for emotional harm is to enforce liquidated damages. Under the liquidated damages doctrine, courts strike down agreed-upon damages that appear over-compensatory, but not if they are thought to protect interest otherwise not compensated by the expectation remedy.<sup>38</sup> Thus, when emotional

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<sup>34</sup> Uniform Commercial Code § 2-716 (1) (“Specific performance may be decreed where the goods are unique or in other proper circumstances.”).

<sup>35</sup> RESTATEMENT (SECOND) OF CONTRACTS § 359(2) (1981) (“The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance or injunction as to the contract as a whole”).

<sup>36</sup> RESTATEMENT (SECOND) OF CONTRACTS § 360, \*\*\* (1981) (stating that in determining whether the remedy in damages would be adequate, “the difficulty of proving damages with reasonable certainty,” and “the difficulty of procuring a suitable substitute performance by means of money awarded as damages” are major considerations, adding that some “types of interests are by their very nature incapable of being valued in money” such as with heirlooms, family treasures and works of art that induce a strong sentimental attachment,” for their protection specific performance is necessary); Anthony T. Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 355-357 (1978) (explaining that specific performance is granted for contracts for the sale of unique goods, such as heirlooms, antiques, and certain licenses and patent rights that can only be obtained from the promisor).

<sup>37</sup> Kronman, *id.*, at 362 (“Although it is true in a certain sense that all goods compete in the market—that every good has substitute - this is an empty truth. What matters, in measuring money damages, is the volume, refinement, and reliability of the available information about substitutes for the subject matter of the breached contract”).

<sup>38</sup> Uniform Commercial Code § 2-718 (1) (“Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by

harm resulting from a breach is likely, courts tend to uphold a liquidated damages clause which otherwise would have been stricken down.<sup>39</sup>

## B. Tort Law

Tort law permits recovery for emotional harms in more circumstances than contract law. Primarily, when an injury has a physical manifestation, the emotional distress that accompanies it is recoverable. A physical injury is a primary channel by which mental anguish is generated, and thus claims for emotional damages by injured victims are prima facie plausible<sup>40</sup> Conversely, stand-alone emotional harm, not accompanied by physical harm, is generally uncompensated under tort law unless intentionally inflicted.<sup>41</sup> Difficulties of proof,<sup>42</sup> the risk of frivolous claims<sup>43</sup> and floodgate concerns<sup>44</sup> are the main policy considerations pulling to the direction of the no-emotional-damages rule.

But there are exceptions. Some exceptions are general, baked into torts that are specifically designed to protect against non-pecuniary wrongs, such as libel and intentional

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the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.").

<sup>39</sup> Cite.

<sup>40</sup> RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §46, cmt. a (2012) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress..."); See DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 581-590 (7th ed. 2013) (noting that courts in different states vary in their approaches to the physical demand. As such, some courts hold that an emotional injury must be medically diagnosable as an emotional disorder, while others allow recovery only when the defendant's negligence caused the plaintiff a physical danger, which led to the emotional harm. Some courts combine those demands in different ways. See *Paz v. Brush Engineered Materials, Inc.*, 949 So.2d 1(Miss. 2007) (emotional injury diagnosed as an emotional disorder); *AALAR, Ltd. V. Francis*, 716 So.2d 1141 (Ala. 1998) (emotional harm is plausible only if the plaintiff was put in physical danger); *Catron v. Lewis*, 712 N.W.2d 245 (Neb. 2006) (the combined demands).

<sup>41</sup> See RESTATEMENT (THIRD) OF TORTS: LIABILITY 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. Boston Gas Co.*, 605 N.E.2d 805 (Mass. 1993) (the injured was required to show an objective evidence to the emotional distress); See DOBBS and the accompanying text, *Id.* (courts are yet to allow a stand-alone emotional claim, and usually combine emotional claims with physical ones).

<sup>42</sup> *Kewin*, 295 N.W.2d 50, 416 (stating that damages for emotional harm, even if foreseeable, are often difficult to establish and to measure). DAN B. DOBBS, THE LAW OF TORTS, 823 (2000) (arguing that emotional distress differs from one plaintiff to another and cannot easily be measured equally).

<sup>43</sup> Robert J. Rhee, *A Principled Solution for Negligent Infliction of Emotional Distress Claims*, 36 ARIZ. St. L.J. 805, 831-832 (2004) (arguing that because emotional distress is hard to prove, courts are more wary of fraudulent and frivolous emotional claims).

<sup>44</sup> See *Potter v. Firestone Tire & Rubber Co.* 863 P.2d 795 (Cal. 1993) (court emphasizing it's concerns over mass actions concerning emotional distress caused by fear of future illnesses, and the negative effect of mass litigation on cancer victims and drugs industry).

infliction of emotional distress.<sup>45</sup> Other general exceptions permit plaintiffs to secure injunctions against prospective tortious behavior, primarily in nuisance cases.<sup>46</sup> Why not wait for the harm to occur and compensate *ex post*? The classic explanation by Calabresi and Melamed—similar to the justification offered for specific performance—suggested that injunctions protect the idiosyncratic values owners ascribe to their property better than damages.<sup>47</sup> Rather than engage in the inaccurate exercise of repair, the law allows advance injunction.<sup>48</sup>

Alongside with tort law, environmental law also protects against emotional harms through specific enactments dealing with enforcement against polluters. Statutes allow recovery for "existence value" that reflects the psychological benefits that people have from the mere knowledge that an environmental resource exists and will continue to exist.<sup>49</sup> Under various federal statutes, governmental trustees are permitted to sue polluters for damages to natural resources, including "nonuse" values that stand for emotional harm.<sup>50</sup> Wrongdoers are liable for "damages for injury to, destruction of, or loss of" natural resources, and CERCLA for example explicitly requires that "[t]he measure of damages ...

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<sup>45</sup> *Supra* note. But also in negligence cases, liability for stand-alone emotional harm has been imposed when resulted by injury to another or by loss of consortium. *See* *Thing v. Lachusa*, 771 P.2d 814 (Cal. 1989) (obtaining damages from emotional distress caused by observing the injury to another is possible when the plaintiff is closely related to the injured victim, the plaintiff is present at the scene of the injury, and as a result the plaintiff suffers serious emotional distress); *Ferriter v. Daniel O'Connell's Sons, Inc.*, 413 N.E.2d 690 (Mass. 1980) (accepting a claim of loss of parental consortium). *See also* DOBBS, *LAW OF TORTS*, *supra* note 42, at 825.

<sup>46</sup> *See* RESTATEMENT (SECOND) OF TORTS ch. 48 (1979) (describing the general rules relating to injunctive relief in tort actions, and stating that the torts that are most frequently the subject of suit for an injunction include: trespass to land; impairment or loss of the support of land; pollution and diversion of waters; nuisance; wrongful dealings with chattels and wrongful interference with a business; interferences in domestic relations; and injuries to interests of personality). For an extend review on the injunction relief in nuisance cases, see DAN B. DOBBS, *LAW OF REMEDIES* 517-528 (1993).

<sup>47</sup> Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1108 (1972) ("[T]he problems with liability rules are equally real... 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. In practice, it is so hard to determine Taney's true valuation that eminent domain simply gives him what the land is worth "objectively," in the full knowledge that this may result in over or under compensation").

<sup>48</sup> Injunctions are also widely granted in IP infringement cases, although in this field it is not exactly idiosyncratic values, which motivates courts in granting injunctions; it is other difficulties in proving losses, which better explains this tendency. *See* (cite).

<sup>49</sup> Note, *Existence-Value Standing*, 129 HARV. L. REV. 775 (2016).

<sup>50</sup> *See* Clean Water Act 33 U.S.C. §§ 1251-1387 (2012); Oil Pollution Act *Id.* §§ 2701-61 (2012); and Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-75 (2016).

shall not be limited by the sums which can be used to restore or replace such resources."<sup>51</sup> In the few cases which were decided by courts, damages were awarded for aesthetic and existence values.<sup>52</sup>

Similar to contract law, tort law allows recovery for costs of repairing a damaged property even if those costs far exceed diminution in the property's objective value. This is done mostly in cases where the damaged property has special non-market value, where it is likely that the destruction of the property led to emotional disturbance.<sup>53</sup> A typical example is the *Trinity Church* case. An excavation contractor caused damage to the adjacent Trinity Church. The only way to repair the church, which had some damage prior to the accident, was by complete demolition and reconstruction. The damage did not affect the value of the church to the congregation, yet the majority of the court allowed recovery.<sup>54</sup>

Both the environmental cases and the special-use property cases (like religious institutions) deal with harms to public or jointly consumed goods. Remedies aimed at restoring the in-kind integrity of such assets benefit the public—often by creating emotional benefits—and thus courts are more ready to award costs of repair.

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<sup>51</sup> *Id.* § 9607(f). Liability for non-use values raises measurement challenges. One of the only ways to assess the level of these values directly is through a "contingent valuation method" (CVM). This method creates a hypothetical market to elicit an individual's economic valuation of a given natural resource. The results of the study shows, how much individuals would be willing to pay for the existence of a resource and, therefore, how much the destruction of that resource would harm the public. See Jeffrey C. Dobbins, *Pain and Suffering of Environmental Loss: Using Contingent Valuation to Estimate Nonuse Damages* 43 DUKE L.J. 879, 882 (1994). Regulations governing the measurement of natural resource damages (NRDs) allow the use of CVM (sometimes, under certain limitations). For NRD regulations pursuant to the CERCLA and CWA, see 51 Fed. Reg. 27674 (1986) (codified at 43 C.F.R. pt.11 (2014)), and 59 Fed. Reg. 14262 (1994) (codified at 43 C.F.R. pt. 11 (2014)). For NRD regulations pursuant to the OPA of 1990, see 61 Fed. Reg. 440 (1996) (codified at 15 C.F.R. pt. 990 (2015)). For a discussion about CVM in federal regulation, see Allan Kanner & Tibor Nagy, *Measuring Loss of Use Damages in Natural Resource Damage Actions*, 30 COLUM. J. ENVTL. L. 417, 433-438 (2005). Despite a considerable debate within the economic literature as to how best to design CVM, they remained a well-respected tool. For this debate, see, e.g., Glenn C. Blomquist & John C. Whitehead, *Existence Value, Contingent Valuation, and Natural Resources Damages Assessment*, 26 GROWTH & CHANGE 573, 583 (1995); Nick Hanley et al., *Choice Modelling Approaches: A Superior Alternative for Environmental Valuation?*, in ISSUES IN ENVIRONMENTAL ECONOMICS 185 (Nick Hanley & Colin Roberts eds., 2002).

<sup>52</sup> Dobbins, *supra* note 51, at 911. See Note, *supra* note 49, at 782-783 (summarizing the case law on this matter).

<sup>53</sup> See *Mieske v. Bartell Drug Co.*, 92 Wn.2d 40, 44 (Wash. Apr. 19, 1979) (the plaintiff was awarded damages for the intrinsic value of the loss of a home movie film that held special family memories, which exceeded the objective value of the film roll itself); *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267 (Fla. Apr. 3, 1964) (the plaintiff was awarded damages for the emotional distress caused by the killing of a pet).

<sup>54</sup> *Trinity Church in Boston v. John Hancock Mut. Life Ins. Co.*, 399 Mass. 43, 50 (1987). The court accounted for the preexisting condition by calculating damages at the amount of the difference between the destruction level of the church before and after the infliction of the harm (which was 39%), multiplied by costs of reconstruction.

This brief tour across the private law's remedy doctrines addresses the question *when are emotional harms recoverable*. The answer, in a nutshell, is—not often. In the next Part of the Article, we switch to a different inquiry: *How to make emotional harm recoverable*. We develop a new remedy, which we think solves some of the problems with the existing remedies for emotional harm, and—if adopted—should be used to extend significantly the scope of recovery for emotional harm.

## II. The Restoration Measure of Damages

### A. The Principle: Least Cost Restoration

There are two main legally recognized methods to value the harm done to the harmed party for the purpose of making her whole. One—the money method—is to award damages necessary to offset the measured reduction in the harmed party's welfare, for example just enough to purchase substitutes for the destroyed property or for the breached promise. The other—the in-kind method—is to undo or prevent the harm by preserving the pre-harm state of affairs, for example through an injunction or an order of specific performance. That which was taken (or was about to be taken) from the plaintiff is given back, in kind. Under the money method, the aggrieved party is awarded cash and may (but need not) use it to purchase exact replacement. Under the in-kind method, the aggrieved party receives no compensation, but her interest in the preservation of the violation-free status quo is secured.

We develop a third, hybrid, method—restoration damages—which 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. The restoration remedy is like the money method because it requires the defendant to pay damages. But it is unlike the money method because it is not paid to the plaintiff, but rather directly to complete a restoration project. The restoration remedy is also like the in-kind method because it gives the plaintiff not an allowance but rather an actual completed restoration. But it is unlike the in-kind method because it does not involve a reversal. It does not restore the exact manifestation of the interest that was violated, but rather a substitute to it.

We begin by presenting the technique. We then discuss areas in which it is arguably superior to the money and the in-kind methods, and consider some problems in



its implementation. In particular, we explain that the restoration remedy might be too expensive for the defendant and we suggest a sorting mechanism that ameliorates this concern.

### 1. The “Underlying Interest”

Any violation of a right—contractual or property—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, and thus hurts the underlying interest associated with this precise plan.

Damage remedies adopt the most general concept of an underlying interest, aiming to restore the aggrieved party’s “utility” by an award of money sufficient to offset the reduction of utility caused by the violation. In-kind remedies adopt the most concrete concept of an underlying interest, aiming to restore the aggrieved party’s specific use and enjoyment arising from an identified plan that was drawn prior to the violation.

But the concept of an “underlying interest” does not need to take one of these two polar articulations. The aggrieved party’s violated plan may have taken a specific manifestation, but it was intended to advance a more general concern. Yet this more general concern need not have been the abstract, tautological, all encompassing ‘utility maximization’—it could have been the advancement of a specific “intermediate” organizing value or preference, one that could be advanced by close substitutes.

Critical to the design of restoration damages is the conceptual existence of such intermediate underlying interest. It is an organizing goal that a person has, which dictates the specific choices made. An underlying interest may be a taste, a value, a need or necessity, a political or religious preference, an ideology—it is the motivation for the specific choices. Importantly, an underlying interest can be advanced by various substitute courses of actions, and thus if one effort to advance it is thwarted, others efforts can be used to accomplish an approximate satisfaction of the same interest.

Consider, for example, a religious or political plan relating to one’s diet (e.g, the preference to eat only vegetarian food). A violation of this plan, for example, by deceptively labeling a canned soup product as ‘vegetarian’ despite being prepared with

meat stock, impairs the most general interest of the deceived buyers (maximizing utility) as well as the most concrete interest (eating a vegetarian soup). But it is best viewed as a violation of an intermediate underlying interest – the reduction of overall meat consumption.<sup>55</sup> This intermediate underlying interest may be the concern for animal welfare, namely the interest to protect some species of animals from slaughter;<sup>56</sup> or it may concern environmental protection, namely the interest to protect the environment from the harms caused by mass meat production;<sup>57</sup> or it may concern physical health, namely the perceived effect of meat consumption on private or public health.<sup>58</sup>

Recognizing the existence of an intermediate underlying interest is critical to the remedial strategy the law can employ. In the absence of such intermediate interest, the only in-kind remedy is a reversal of the concrete harm. If such reversal is impossible the only remaining remedy is money damages aimed to undo the reduction in the aggrieved party's total utility. That is, in the absence of an intermediate underlying interest, the remedial toolkit is limited to the two polar methods. But if an intermediate underlying interest exists, an in-kind remedy can be tailored to reversal, not of the actual concrete harm, but rather of the harm done to the underlying interest.

## 2. The Restoration

Restoration damages do not aim to give the aggrieved party the money equivalent of her loss, not to reverse the specific and concrete injury she suffered. The canned soup customer was led to eat a meat product is not going to collect “make whole” damages (however such criterion is measured); and there is of course no way to flush the consumed

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<sup>55</sup> 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 OF FOOD AND NUTRITION* 639 (2014) (exploring vegetarians' motives for reducing their meat consumption).

<sup>56</sup> Matthew B. Ruby, *Vegetarianism. A blossoming field of study* 58 *APPETITE* 141, 142 (2012) (presenting the motivations for vegetarianism, and arguing that "the most commonly reported motivation given by vegetarians is concern about the ethics of raising and slaughtering non-human animals").

<sup>57</sup> *Id.* at 142 (arguing that environmental impact of meat consumption is a common motivation for vegetarianism).

<sup>58</sup> *Id.* at 142 (arguing that concern for personal health is the second most common motivation for vegetarianism). Other motivations for vegetarianism can be disgust toward meat, religious beliefs, desire for weight loss, taste preferences, saving money and political matters. See Daniel L. Rosenfeld & Anthony L. Burrow, *Vegetarian on purpose: Understanding the motivations of plant-based dieters* 116 *APPETITE* 456 (2017).

soup out of her body (which, in any event, would not accomplish true reversal, since the animal was already cooked). Instead, restoration damages require the wrongdoer to take an action that would undo the harm to the aggrieved party's intermediate underlying interest—restore the psychic satisfaction that was the subject of her plan to eat a vegetarian meal.

Under restoration damages, the wrongdoer would be ordered to pay money, earmarked for the advancement of a goal aligned with the underlying interest. The money would not be paid directly to the aggrieved party (more on that later). Rather, it would be paid directly to complete a different in-kind project, proposed by the plaintiff and approved by the court to match the underlying interest that the violation allegedly harmed. In the vegetarian soup example, if the underlying harmed interest was animal welfare, or environmentalist, or public health, the offending party may be required to contribute to either an animal welfare cause, an environmental cause, or to promote some other public health project.<sup>59</sup>

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<sup>59</sup> See Principles of the Law of Aggregate Litigation § 3.07 (2010), according to which 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. The court must apply the following criteria in determining whether a cy pres award is appropriate: (a) If individual class members can be identified through reasonable effort, and the distributions are sufficiently large to make individual distributions economically viable, settlement proceeds should be distributed directly to individual class members. (b) If the settlement involves individual distributions to class members and funds remain after distributions (because some class members could not be identified or chose not to participate), the settlement should presumptively provide for further distributions to participating class members unless the amounts involved are too small to make individual distributions economically viable or other specific reasons exist that would make such further distributions impossible or unfair. (c) If the court finds that individual distributions are not viable based upon the criteria set forth in subsections (a) and (b), the settlement may utilize a cy pres approach. The court, when feasible, should require the parties to identify a recipient whose interests reasonably approximate those being pursued by the class. If, and only if, no recipient whose interests reasonably approximate those being pursued by the class can be identified after thorough investigation and analysis, a court may approve a recipient that does not reasonably approximate the interests being pursued by the class.

For an example of the use of cy pres in the settlement context because of the infeasibility of direct distributions to class members, see *Block v. McDonald's Corp.*, No. 00 CH 9137 (Cir. Ct. of Cook County, Ill. Oct. 30, 2002), available at <http://www.edcombs.com/CM/Notices/Notices233.asp> (approving settlement of class suit alleging that McDonald's used beef tallow or beef extract in preparing french fries and hash-brown potatoes despite representing that those foods were cooked in vegetable oil; McDonald's agreed to pay \$10 million to various vegetarian and nutrition organizations). For other examples, see *Bruno v. Superior Court*, 179 Cal.Rptr. 342 (Cal. Ct. App. 1981) (case alleging unlawful fixing of milk prices and seeking, inter alia, lowering of milk prices in affected area); Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591 (1987) (giving case examples). For an example of a court's creative use of cy pres in a complex settlement involving millions of class members, see *In re Holocaust Victim Assets Litig.*, 424 F.3d 132 (2d Cir. 2005) (one of several Second Circuit opinions affirming trial court's use of cy pres to distribute part of \$1.25 billion class-action settlement to the neediest victims of Nazi looting).

There are many ways to design a remedy aimed at restoration of the underlying interest. Importantly, such design ought to follow several guidelines.

*What Is the Underlying Interest?* Unlike physical harm, psychic interests are hard to verify. Restoration damages would therefore rely on a plaintiff's declaration which interest was damaged. In the vegetarian example, we saw that there could be a variety of psychic interests, with different victims requiring different restoration targets. In such case, the restoration damages would be divided and distributed to different targets, to repair different injuries. Since the identification of the injured interest depends on a declaration by the plaintiff, there is a fundamental problem of *sincerity*. We show below how an election of remedy structure could help overcome it.

Declaration by the plaintiff is one, but not the only, way to identify the underlying interest. Other ways would be to employ surveys,<sup>60</sup> experiments,<sup>61</sup> Big Data,<sup>62</sup> statistics,<sup>63</sup> and expert opinions.<sup>64</sup> These methods seek to identify social and psychological regularities, helping identify the intensity of the emotional distress. They could also quantify the amount

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<sup>60</sup> See, e.g., the contingent valuation method (CVM) that is used to estimate nonuse damages, described at *supra* note 51. But cf. W. kip Viscusi, *The Value of Life in Legal Contexts: Survey and Critique* 2 AM. L. & ECON. REV. 195 (2000) (criticizing the use of surveys to estimate compensation for hedonic damages).

<sup>61</sup> RA: experiments, NOT epidemiological studies.

<sup>62</sup> Cf. Bruce R. Lindsay, *Social media and disasters: Current uses, future options, and policy considerations* 4 JOURNAL OF CURRENT ISSUES IN MEDIA AND TELECOMMUNICATIONS 4 (2011), available at [https://www.nisconsortium.org/portal/resources/bin/Social\\_Media\\_and\\_Dis\\_1423591240.pdf](https://www.nisconsortium.org/portal/resources/bin/Social_Media_and_Dis_1423591240.pdf) (suggesting to use social media in emergencies and disasters, in order to accelerate the damage estimate process by transmitting images of damaged structures such as dams, levees, bridges, and buildings taken from cell phones).

<sup>63</sup> The use of statistical data is very common in tort cases. For example, in order to evaluate pecuniary losses such as lost earnings, courts use statistics ("tables") to establish a victim's earning capacity and his work and life expectancy, both with and without the bodily injury. See, e.g., *Karpov v. Net Trucking, Inc.*, U.S. Dist. LEXIS 129130, 5-6 (N.D. Ind. 2010) (using statistical tables in order to calculate the injurer's lost earning capacity); RESTATEMENT (SECOND) OF TORTS § 924 cmt. e (1981) ("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"). In the same way, courts sometimes use the statistical mean (or average) income as a viable proxy for the victim's lost earnings. See, e.g., *Classic Coach, Inc. v. Johnson*, 823 So. 2d 517, 528 (Miss. 2002) ("In 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").

<sup>64</sup> For cases in which experts are used in order to evaluate damages, see e.g., FED. R. CIV. P. 35 (2007) (providing that when the mental condition of a party is at issue in a lawsuit, the court may order that party to undergo a mental examination by a physician or psychologist. Usually, the court will order this when the plaintiff seeks to recover damages for mental or emotional injuries); *Eskin v. Bartee*, 262 S.W.3d 727, 735 (Tenn. 2008) (holding that "a prima facie claim for negligent infliction of emotional distress must include evidence establishing each of the five elements of negligence and, for 'stand-alone' negligent infliction of emotional distress cases, expert proof establishing that the plaintiff's emotional distress is 'serious' or 'severe'"); *Olden v. LaFarge Corp.* 383 F.3d 495, 509 (6th Cir. 2004) (holding that the amount of damages occurred to plaintiffs, can be estimated by experts).

of restoration needed. Surveys or other methods of eliciting revealed preferences<sup>65</sup> could show how much restoration is needed to offset the emotional harm.

*Which Underlying Interests Deserve Restoration?* This question has proved challenging to courts. Every contract breach and every tort injury leads to emotional disturbance, and even after make-whole damages are paid some anguish may linger for the ordeal involved in the violation of one's rights. But the law, we saw, is stingy. Contract law doctrine protects against emotional distress only when a principal goal of the contract was to advance the alleged underlying emotional interest.<sup>66</sup> And tort law, while more generous, also provides stand-alone emotional distress compensation only in selective situations.<sup>67</sup> Such selection criteria are separate from the design and the quantification of the damage measure—they deal with the question of *liability*.<sup>68</sup>

*Measuring Restoration.* The primary purpose of restoration damages is to avoid converting psychic losses into dollars. If the purpose is to restore the underlying interest, the law needs to identify avenues by which such restoration may be accomplished. A problem of measurement still lingers, however. How much to invest in the substitute in-kind restoration? Sometimes this problem is trivial, as when the underlying interest is measured by a quantitative metric. For example, if the emotional loss arises from excessive

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<sup>65</sup> MACALISTER ELLIOTT ET AL., STUDY ON THE VALUATION AND RESTORATION OF BIODIVERSITY DAMAGE FOR THE PURPOSE OF ENVIRONMENTAL LIABILITY 4-10 (2001), available at [http://ec.europa.eu/environment/legal/liability/pdf/biodiversity\\_annexes.pdf](http://ec.europa.eu/environment/legal/liability/pdf/biodiversity_annexes.pdf) (presenting the main economic approaches that are used to evaluate damages to natural resources. One of them is "revealed preference technique." This technique attempt to find 'surrogate' or hidden markets for natural resources, where, through the price of other goods and services, individuals implicitly express preferences for environmental resources. Another approach is "Stated preference technique". This technique includes survey methods in which hypothetical markets are created by way of structured questionnaires for respondents to express their preferences). For a criticism on the use of stated preferences surveys to estimate damages, see Viscusi, *supra* note 60. See also 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").

<sup>66</sup> *Supra* notes 21-24 and accompanying text.

<sup>67</sup> *Supra* notes 41, 45 and accompanying text.

<sup>68</sup> See DOBBS, REMEDIES, *supra* note 46, at 212 ("Compensatory damages attempt to provide compensation to the plaintiff, but only within the framework of substantive goals. Substantive law in turn does not recognize all harm as compensable. It is not true that full compensation is always the substantive-law goal. Some injuries are too remote in tort or outside the scope of the parties' contemplation in contract. Even injuries that are real and are also the direct result of tortious behavior may nevertheless not be compensable in damages. Some kind of emotional distress are in this category"). See, e.g., *Thing V. La Chusa*, 48 Cal. 3d 644, 257 Cal.Rptr. 865, 771 P.2d 814 (1989) (\*\*\*)

pollution emissions, an offsetting reduction of emissions elsewhere would achieve in kind restoration. But other times the problem is hard, as when the underlying interest is qualitative and not restorable by close substitutes. For example, if the emotional loss arises from unintended consumption of non-kosher food, restoration damages should pay for an offsetting religious promotion. But what constitutes religious promotion? And how much is enough? (We are reminded of the humorous quip, “ask two Jews, you’ll get three opinions.”)

The measurement of restoration must deal with another difficulty—the intensity of the emotional harm. In all our examples, involving environmentalists, vegetarians, and religious people, the degree of emotional disturbance varies across people.<sup>69</sup> At times courts might have information about the intensity of preferences and could adjust the restoration measure accordingly. Other times, they would have to use averages and approximations. This is a standard methodological challenge for any damage measure,<sup>70</sup> and standard solutions should apply to restoration damages.

*Least Cost Restoration.* After the harm to underlying interest is verified and potential restoration avenues are established, which one should be selected? Plaintiffs would naturally ask for the most generous allowances to promote those interests, and perhaps also ones that have self-serving side effects. For example, a soup buyer with an underlying animal welfare agenda may ask for a contribution to a specific animal shelter, one that she manages. Here, we make one obvious point: select the least cost restoration measure. This thrift criterion should also help narrow down the scope of the recognized underlying interest. The animal welfare agenda may be broad (protect all farm animals) or

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<sup>69</sup> In class action lawsuit, it is common that different class members will suffer different damages. Although Fed. R. Civ P. 23 (2017) requires a certain level of commonality among the members of the group, variation in damages does not necessarily prevent the approval of the class action suit. *See e.g.*, *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 233 (7th Cir. Ill., 1983) (“It is very common for Rule 23(b)(3) class actions to involve differing damage awards for different class members... The district court apparently had confidence in its ability to deal with the allocation of damages... There are undoubtedly administrative complications in managing a distribution of damages to a class of this sort, but these problems are not nearly substantial enough to suggest that the district court abused its discretion in finding that this class was, indeed, manageable”). *But cf.* *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (“Commonality requires a plaintiff to demonstrate that class members have suffered the same injury”).

<sup>70</sup> Rough estimates, including the use of averages and approximations, are commonly used in awarding damages under current law. For examples regarding class action suits, see *supra* note 13. For examples regarding tort law and particular the evaluation methods that are used in order to estimate lost earnings, see the examples brought in *supra* note 62: *Karpov*, U.S. Dist. LEXIS 129130, at 5-6; *Classic Coach*, 823 So. 2d 517, at 528; RESTATEMENT (SECOND) OF TORTS § 924 cmt. e.

narrow (protect only the animals used in soup production), and restoration damages could be directed to advance the different interests. It will sometimes be cheaper to restore a broader interest because more options are available, and other times cheaper to pursue directly the narrow set of interests. In the next section we propose a sorting mechanism, allowing the plaintiffs to choose between restoration or money damages (or partial restoration combined with money damages).

## B. Election of Remedy

### 1. The Problem

The two key challenges of any regime aiming to remedy emotional harm, both arising from the incommensurability of the damage, are valuation and verification. We argued above that the restoration remedy addresses the first problem—valuation—rendering it unnecessary to measure the dollar equivalent of an emotional harm. By restoring, rather than measuring, the underlying interest, namely, by paying for an in-kind substitution, valuation is unnecessary. But a second fundamental problem looms, also due to the incommensurability of emotional harms—the problem of verification. How do we know that a party seeking restoration damages was truly emotionally distressed? If the harm is to a public good, how can we be certain that only plaintiffs who value the public good would be counted in calculating the necessary restoration? Furthermore, even if we were certain that a plaintiff suffered emotional harm, her harm might be too small to warrant costly restoration. How can we avoid such wasteful restoration?

Return to the mislabeled vegetarian soup 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. But what would stop other non-vegetarian customers from piling on fake or exaggerated 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,<sup>71</sup> how can the court determine the fraction among them who truly suffered harm

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<sup>71</sup> See, e.g., *Block v. McDonald's Corp.*, 355 Ill. App. 3d 1174 (2005) (the class action argued McDonald's flavored its French fries with beef flavoring, despite claiming earlier that the fries were vegetarian. In the settlement agreement, McDonalds agreed to apologize to all Hindu and vegetarians clients who were

to their underlying vegetarian interest, and separate them from those who bought the same product but suffered no or small emotional loss? In litigation, the plaintiff would want to inflate, and the defendant to depress, the perceived emotional harm. And when the underlying interest is a public 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 true sufferers because it would give them additional grounds for recovery. True, fakers do not gain any benefit from the restoration remedy. But they recognize, strategically, that the remedy is costly to the defendant. The value of restoration damages to them accrues from the opportunity to extract side payments by releasing the defendant from the obligation to fund such remedy. Such Coasian bargain would hopefully safeguard against wasteful investment in restoration (and thus solve any ex post inefficiency problem that many courts seem to be troubled by<sup>72</sup>), but it would still be distortive to ex ante incentives because compensation would constitute excessive compensation. To be sure, the problem of verification is moot if the restoration remedy is non-waivable and inalienable. We discuss this condition below in more details.<sup>73</sup>

There are evidentiary ways to address the problem of verification,<sup>74</sup> 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 the emotional loss complaint, but it would be unmanageable to sort plaintiffs one by one and accomplish individualized compensation. In individual suits, courts might collect clues to adjudge the sincerity of emotional harm claims,<sup>75</sup> but this would complicate the litigation. Ultimately, an evidence-based selection mechanism is

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offended. McDonald had also agreed to pay \$10 million to various vegetarian, Hindu and Jewish non-profit organizations, while not all of them were necessarily directed by McDonald's actions.

<sup>72</sup> See e.g., *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 115 (Okla. 1963) (discussing the economic waste concern as justifying damages \$300 for diminution of market value, rather than damages of \$29,000 for costs of repair).

<sup>73</sup> *Infra* note 90 and the accompanying text.

<sup>74</sup> See, e.g., *Horvath v. LG Electronics MobileComm U.S.A., Inc.* LEXIS 19215 (D. Cal. 2012) (In order to receive the agreed settlement, class members had to supply evidence and prove that they were residents of the United States, purchased a specific mobile phone between a specific period of time, notified LG or T-Mobile about the defect in time and continued to experience problems after that notice.)

<sup>75</sup> See, e.g., Betsy J. Grey, *The Future of Emotional Harm*, 83 *FORDHAM L. REV.* 2605, 2610-2613 (2015) (arguing that in individual suits, courts are skeptical of emotional harm claims and pose high barriers for the claimants).



impractical, explaining why current doctrine prefers to resolve the emotional harm challenge by general categorization. We need an alternative to the evidence-based mechanism, and in the remainder of this section we propose one. It is a screening, or sorting, mechanism that induces plaintiffs, each individually aware of his or her intrinsic emotional harm, to self-select.<sup>76</sup>

## 2. The Sorting Mechanism

Instead of evidence about the magnitude of the emotional harm, courts can use incentives—a mechanism that harnesses the private information each plaintiff has about his or her injury. To illustrate how an incentive-compatible mechanism works, consider a simplified setting in which there are only two types of plaintiff—“sincere” and “faker.” Later, we show how the mechanism works when there are more than two types, namely, when plaintiffs may have varying degrees of emotional injury.

### (i) 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 type 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.

Like any sorting mechanism, the key is to offer all plaintiffs a menu of remedy choices that “separates” them—where each type prefers a different item in the menu. With two types, we only need two options. 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 only restoration. With this in mind, the two remedial options that need to offered are straight forward:

- (1) Restoration: paid directly to repair in full the underlying interest of a Sincere
- (2) Money: A “modest” unrestricted sum of cash paid to the plaintiff’s pocket

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<sup>76</sup> A self selection mechanism similar to the one developed in this article has been developed separately in a formal working paper that addresses the problem of choice between damages and injunctions in private harm cases in contracts. See Atkinson, *supra* note 2.

A Sincere type would choose option (1) because she values restoration and because option (2)—with only a small sum of money in it—is not attractive enough relative to the value of restoration. A Faker would choose option (2), no matter how small the sum of money in it, because option (1) is worthless to her. In a sense, option (2) is designed as “bait”—for the sole purpose of smoking out the non-harmed fakers. By choosing the money damages, a Faker reveals its 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 (2) are small, this distortion is relatively benign.

Notice the importance of the inalienability condition. Once the remedial choice is made, it must not be renegotiated between the parties or else a Faker too would choose the costlier restoration remedy (option (1)). If able to trade the remedy, a Faker might expect to extract a bounty greater than the modest sum in option (2). As we discuss in Section III, 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. For example, a third party who also cares about the underlying interest and who expects to gain from restoration damages imposed in this litigation might offer to pay Fakers to choose restoration. Or, settlements might be negotiated before remedial choices are made (and prior to litigation), and if Fakers have credible threats to choose the costlier restoration damages of option (1) they may be able to extract a larger settlement and defeat the inalienability condition. Like any sorting mechanism, renegotiation may lead to its unraveling, and rendering it renegotiation-proof is a critical institutional challenge.

#### (ii) 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—an “Intermediate”—who suffered some mild emotional harm. The Intermediate type does care about the underlying interest and does benefit from restoration, but less than the Sincere type. We consider this three-type setting as a capsule for

understanding how the sorting mechanism would work in reality, where plaintiffs likely vary along a continuum.

We show below that it is still possible to “separate” the different types—to offer a menu of remedial options that induces each type to choose a different option. But we also show that, aside from the enormous complexity of a sorting menu, it is also. Unlike the two-type case, where the inefficiency due to sorting amounts to a negligible bounty paid to the Faker, in the multi-type setting greater inefficiency would result. First, sorting would require the Faker bounty to be significantly higher. Second, it would inevitable involve significant over-compensation of some types of plaintiffs. Because of these costs, full sorting would no longer be the right objective for a remedy scheme. It would be better to set up a remedial menu that leads to some partial “pooling”—namely, where different types of plaintiffs end up choosing the same remedy. We use a brief numerical illustration to draw out these general insights.

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 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 type of each plaintiff. 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, 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 damage option to sort out the Faker. But 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) Combination damages:  $R = R_H$ ;  $M = M_H$
- (3) Money damages, No Restoration:  $R = 0$ ;  $M = M_H + 1$

Option (1) is intended to provide full restoration to the Sincere.

Options (3) is intended to attract the Faker, as it provides the greatest money damages.

Option (2) is intended to attract only the Intermediate type. For that to succeed, two “incentive constraints” must be met:

- (S\*)  $M_H + R_H \leq 100$
- (I\*)  $M_H + aR_H \geq 100a$

Condition (S\*) guarantees that the Sincere would prefer option (1) of full restoration to the package of partial restoration and money offered under option (2). Condition (I\*) guarantees that the Intermediate would prefer option (2) to option (1). By construction, we know that the Faker prefers option (3).

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  $R_H \geq 100 - M_H/a$ , and thus:

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

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  $a \geq \frac{1}{2}$ —the total cost is minimized by  $M_H = 0$ , which (from the two incentive conditions) requires  $R_H = 100$ . Here, option (2)—the combination option—becomes identical to the option (1) of full restoration. 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 (2) for any reduction of its restoration component. But any such increase in the money payoff in option (2) has to be matched by an identical increase of the money payoff in option (3) (since option (3) has to include as least as much money damages as option (2).) 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, namely, with option (1).<sup>77</sup>

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  $R_H$ . With such high monetary component in option (2), this option would not contain any restoration component, and thus  $R_H = 0$ . 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 saving in terms of reduce money damages in option (2), and it is therefore more effective to load option (2) with cash. Yet because the Intermediate can always select option (1) and enjoy a payoff of  $100a$ , the minimum cash necessary in option (2) is  $100a$ . This would also be the money payment offered under option (3), since both (2) and (3) contain no restoration.

To recap, while it is possible to offer a menu of remedies that leads to full sorting of plaintiffs according to the intensity of the emotional harm suffered, such a scheme would lead to over-compensation. 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 over-compensation problem. Such over-compensation would undermine the compensatory goal that rationalizes the restoration damage measure—to each according to the true harm suffered. It would also create excessive deterrence.<sup>78</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 occur.

Under the optimal sorting menu we identified, Sincere plaintiffs always receive full restoration damages, and no money compensation. The primary goals of the restoration damages regime—to correctly compensate those who suffered the alleged emotional harm—is accomplished. 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 Intermediate types. Depending on the relative intensity of their

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<sup>77</sup> The cutoff level  $a > \frac{1}{2}$  is specific to this example, in which there are three types with equal likelihood.

<sup>78</sup> The deterrence concern could be overcome by reducing all remedies by the same multiple. However, this would result in significant *under*-compensation of some plaintiffs, in particular of the Sincere.

intermediate emotional harm, they will either pool with the Sincere or with the Fakers. One way or another, such pooling creates over-compensation—either too much restoration (if they pool with the Sincere) or too much money compensation (if they pool with the Fakers).

### (iii) Non Linear Preferences

The discussion above assumed that victims valuation of restoration and money damages exhibit constant substitution rate—namely, that for any type of victim, a dollar of restoration is equivalent to  $a$  dollars of money, and the rate does not change across level of restoration. If, for example,  $a = \frac{1}{2}$ , the plaintiff trade away each additional \$100 of restoration for \$51 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 non-linear preferences, the combination option of damages (“option (2)”) may become desirable. Consider a case in which full restoration would require restoration damages of \$100. Assume, now, that some “intermediate” parties have non-linear preferences. Specifically, imagine an intermediate plaintiff with average  $a = 0.6$ , but with 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  $a$  was fixed at 0.6, we showed that the lowest cost menu would have only two options, full restoration of \$100 and money damages of \$1, and the intermediate type plaintiffs would pool with the sincere and choose the restoration damages.<sup>79</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 \$21;
- (3) Money damages of \$22

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<sup>79</sup> Under the assumption that each type of plaintiff is equally likely, the total cost to the defendant of such two-option menu would be  $\$100 + \$100 + 1 = \$201$ .

A sincere plaintiff with  $a = 1$  would choose option (1), whereas a faker with  $a = 0$  will choose option (3). If the intermediate plaintiffs had a fixed  $a = 0.6$ , she would pool with sincere and choose option (1). But with diminishing  $a$ , she is best off choosing option (2), which gives her utility of  $0.8 \times \$50 + \$21 = \$61$ . This is more than she can get under option (1), \$60. And this three-option menu reduces the cost to the defendant.<sup>80</sup>

Thus, with non-linear preferences, the lowest cost damages scheme involves more fine separation of plaintiff types, with each type selecting a different combination in the menu of restoration/money options. Because some plaintiffs value greatly only partial restoration, such partial restoration remedial options, coupled with some money, become part of the least-cost restoration scheme. The analysis above demonstrates this general proposition—that combinations of restoration and money have to be part of the optimal remedy structure. We now ask, are such complex schemes feasible?

#### (iv) Implementation

Is it realistic to expect courts to construct an selection of remedy mechanism like the one developed in this section? We saw that even with only two types of plaintiffs, the design becomes quite complex, as courts have to determine what is the optimal bounty for non-sincere parties. In reality, parties vary along a continuum of sincerity, further complicating the challenge. And, adding to the complexity, their preferences over the combinations of money and restoration may be non-linear, which requires even more information to design a scheme that would compensate plaintiffs at the least cost.

It is unrealistic to expect courts to have the necessary information, but it is also unnecessary. To simplify the implementation, courts do not need to design the 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—a small money award that would pool the fakers and some intermediate types away from the restoration remedy. Or, the

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<sup>80</sup> Under the assumption that each type of plaintiff is equally likely, now the total cost to the defendant of the three-option menu would be  $\$100 + \$71 + \$22 = \$193$ .

defendant may have better information about the distribution of the plaintiff's preferences and thus offer different, or more than two, remedial options. The advantage, of course, is to remove the burden of constructing such menu from the court, and to place it on a party that has the right incentive to design such menu optimally.

While the court may delegate to the defendant the design of the menu of remedies, it should not delegate the determination 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 interest (e.g., people may be vegetarians, or environmentalists, for different reasons.) In such scenarios, the court should identify the possible harmed interests and select the appropriate restoration for each. These options must be included in the menu. But the design of other remedial options, which include less (or no) restoration and award money damages instead, could be left to the defendant.

### C. Non-Waivers and Inalienability

Restoration damages should not be subject to post-judgment settlement in which the plaintiff, in return for a side payment, waives her right to restoration and releases the defendant from the obligation to restore. The reason should be obvious by now: if plaintiffs are able to settle with the defendant after making their choice, many plaintiffs 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.

We think there is a difference between such post-judgment settlement and in-court opt outs, which our discussion above suggested would regularly occur under the menu that defendants would offer (or courts would establish). When offered by defendants, the waivers of restoration damages work best to address the actual loss to the plaintiffs. When negotiated post-judgment, the bargaining game changes and the waivers of the adjudged restoration remedy would now provide recovery greater than the loss. Plaintiffs with low emotional losses would be able to extract settlements that come closer to the cost restoration imposes on the defendant, rather than the cost that they truly suffered.



But the risk of such post-judgment extortion should not be exaggerated: it mainly depends on information and bargaining power. A defendant who suspects that the plaintiff derives low value from restoration would not easily be held up. In the same way that the defendant could induce plaintiffs to opt out in court, it could induce such opt out post-judgment, by making take-it-or-leave-it offers from the same menu. Still, the likelihood of renegotiation might encourage plaintiffs to choose from the menu of options strategically, in the hope of getting more.

The right of restoration should also be inalienable—not transferrable to third parties. When the underlying impaired interest is a public good, third parties may be eager to have plaintiffs choose restoration damages over money damages, and might pay them to do so. Such payments should be prohibited because they would raise the level of damages beyond the harm caused to the legally recognized plaintiffs.

The non-waiver and inalienability conditions could be easily enforced in class actions. While post trial settlements could occur, it would be hard to hide them from other litigants as well as from the public eye and the courts. 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 could be costly. Unlike private actions, waivers or transfers of the right of restoration in class actions would have to be done massively, which would make them detectable. The court could simply prohibit such side deals, and sanction violations by denial of recovery altogether.

### III. The Social Value of Restoration Damages

Part II argued that restoration damages is designed to address some of the fundamental problems that Part I identified with current emotional harm doctrine. Because emotional harm is hard to verify and measure, the restoration remedy could potentially address the victims' make-whole interest. And by internalizing the cost of an important component of the overall harm, it might better deter wrongdoers. In this part, we take a closer look at these interests—compensation and deterrence. We also identify two additional social benefits that the restoration remedy may create: saving administrative costs and benefitting third parties.

### A. Compensation

Restoration damages make victims who suffered emotional harm whole if the court successfully identifies the underlying impaired interest and measures correctly 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 case, it is more challenging to identify the interest and to measure it, although errors of over- and under-restoration would average out.

If the underlying interest is accurately identified and measured, no plaintiff is left under-compensated. Those with large emotional harm value the restoration greatly, and those with weaker attachment to the underlying interest value the restoration proportionally less. There is, however, a concern with over-compensation. We saw that the key to solving the problem of verification is to separate the sincere from the fakers, and that such separation necessarily leads to the payment of money damages to fakers. Thus, some victims are compensated in full (through restoration), while some non-victims, or victims who suffered small emotional harms, are over-compensated (with money).

How does this over-compensation problem compare to the conventional money damages scheme? Ideally, if verification and measurement were feasible, a remedy of money damages would be superior to restoration damages in compensating victims, since it would result in neither under- nor over-compensation. But in the presence of verification and measurement difficulties, a remedy of pure damages would under- and over-compensate victims. We thus cannot offer a general proposition on the superiority of one scheme vis-à-vis another with respect to compensation. If the over compensation problem under restoration damages is severe, the scheme might perform poorly.<sup>81</sup>

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<sup>81</sup> Still, it has the advantage over conventional damages of avoiding under-compensation (as long as the underlying interest is accurately identified and measured). Therefore, if the legal system fears under-compensation more than over-compensation, our scheme would be superior to conventional damages. Indeed, some commentators believe that as between faulty injurer and innocent victim, errors should be allocated to the former. *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).

Note, that the over-compensation could be fully resolved by eliminating the election remedy mechanism and requiring all plaintiffs to accept restoration damages. Here, no one is under- or overcompensated (fakers receive restoration damages that have no compensatory value to them), but the burden on the defendant would be greater, creating over-deterrence, as we explain in the next section.

## B. Deterrence

Restoration damages can create over-deterrence for two reasons. First, restoration might be more expensive than the emotional harm it reduces. And second, fakers have to be paid off despite suffering no harm. While both problems are possible, we think their scope is 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 eliminates. Otherwise, if verification and measurement of the emotional injury were perfect, money damages, rather than restoration, would provide optimal deterrence. But given the information problems, money damages would likely over- or under-compensate, and thus provide distorted deterrence incentives.

The restoration remedy is particularly appealing when the emotional harm can be cured by a measure that costs less than the monetary evaluation of the harm. It is particularly unappealing when the converse is true, namely, when the emotional harm is relatively minor compared to the cost of restoration. Recall that restoration damages for emotional harm are not available for every breach of contract, but only in cases in which the “personal element” of the contract is central. Such cases are characterized by high emotional harm. Similarly, all else equal, restoration is more likely to be cost justified in these high harm cases, in contractual, but also in tort cases.

Restoration damages could create over-deterrence even when it is the least-cost measure to reduce high emotional harm—when fakers are hard to identify and some bounty needs to be offered to sort them out. In our stylized two-type example, the bounty is nominal and thus its deterrence distortion is negligible. But we also saw that when plaintiffs vary more heterogeneously, the bounty to separating the less sincere ones could be substantial. True, the over-deterrence 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.

Ultimately, we think the problem of over-deterrence under the restoration remedy is mitigated by several additional factors. *First*, when emotional harm is low, plaintiffs are less motivated to sue. When they are represented through a class action, they are less likely to redeem their award. True, such passivity might be an artifact of a present regime in which the monetary recovery for emotional harm is low, and participation rates might increase if the monetary bounties were higher.

*Second*, if over-deterrence leads to costly precaution, at least in contractual cases, the 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 is a default rule that can be waived ex ante (although once the parties adopt it, they cannot waive the remedy ex post). Even when its application is limited to contract that, typically, have a personal element, parties with low emotional stakes could opt out.

*Third*, in those cases when the wrongdoing is intentional and malicious, so that the law aims at preventing the wrongdoing from occurring, over-compensation does not create over-deterrence.<sup>82</sup> The car emission example falls into this category, where over-compensation is necessary to deter hard-to-detect willful conduct.

### 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 as the existing money damages remedy—of classifying the injury as one that affects a “personal element” justifying recovery for emotional harm. But it

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<sup>82</sup> Over-deterrence is created under a negligence rule, because of the risk of errors, of both courts and injurers, regarding the standard of care. See COOTER & ULEN, *supra* note **Error! Bookmark not defined.**, at 355, 389 (describing the effect of court's errors with respect to the standard of care); See also Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994) (analyzing the incentive effects of court's errors with respect to the amount of damages and the standard of care); John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965 (1984) (arguing that if the standard of care is uncertain for the injurer, when expected damages are high, the injurer will over-comply with the standard, but if expected damages are low, the injurer will either over-comply or under-comply).

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 it by self-reporting the interest allegedly impaired. Since plaintiffs value restoration damages only if they truly value that interest, they would have no interest to cheat. 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 making some crude personalization, by categorizing plaintiffs according to their average expected harm and award damages accordingly). 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.

Consider, for example, the burden of remedying emotional harm arising from consumption of falsely labeled vegetarian food. Rather than establishing an arbitrary money award (which would attract endless fake claimants, thus requiring some costly verification), the court need only designate a restoration target and the sum necessary to offset each 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 that is 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 lumped together emotional harms from injury to public and to private interests. We now see that the case for restoration damages is stronger in the public interest cases. While restoration damages could remedy private harms too (like a spoiled wedding celebration or a damaged backyard), 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. A destruction of a religious symbol through tortious action affects many parties, including those who cannot sue for practical or legal reasons.<sup>83</sup> Granting restoration to the active plaintiffs affects non-suing 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 of their participation in the lawsuit. 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 non-breached contracts of others.

In sum, restoration damages compensate plaintiffs but benefit others as well. Restoration makes victims who cannot sue whole, and benefits third parties who are not victims. Such third party benefits have real social value.

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<sup>83</sup> Liability might not be imposed for duty of care and proximate cause type of reasons. See Section 29 of the RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM adopted the term “scope of liability” to refer to what is commonly known as “proximate cause.” See also RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §7 (dealing with the duty of care under negligence law).

#### IV. Application

Part II argued that Restoration Damages address the measurement and verification problems of emotional harm, which, Part I showed, have significantly limited the availability of emotional recovery. Part III then claimed that the expansion of recovery made possible by Restoration Damages is desirable, and compiled the social interests that would be served by it.

Part IV now offers a demonstration. Returning to the case that inspired our thinking about this topic—the recent litigation surrounding Volkswagen’s emissions breach—we show that the court approached plaintiffs’ emotional harm claims in a manner consistent with the Restoration Damages regime, but that the implementation of the approach was flawed and could, in the future, be greatly improved.

##### A. The Breach

During the years of 2009 to 2015, Volkswagen sold in US nearly 600,000 vehicles branded as “clean diesel” and marketed as environmentally friendly. In fact, these vehicles were high-emitters. The deception was made possible by an anti-detection “defeat device” built into the vehicles allowing the cars to pass regulatory emissions tests with flying colors. Specifically, this device was programmed to produce low-emission results when it sensed the vehicle is being tested in an emission testing facility. Elsewhere, when operating under normal circumstances, the emissions were higher. Volkswagen was able to brandish these “certified” low emissions to environmentally eager car buyers, hiding the fact that these vehicles emit nitrogen oxides at a factor of up to 40 times over the permitted limit.<sup>84</sup>

Ultimately, the fraud was detected and litigation ensued. The price of the cars, new or used, dropped. Aggrieved car owners joined hundreds of class actions alleging breach of contract and related causes of action, all eventually consolidated into a single multidistrict litigation in a federal court in California.<sup>85</sup> The litigation also

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<sup>84</sup> See Volkswagen Settlement, *supra* note 1, at p.2.

<sup>85</sup> *Id.* See also ANDREW D. BRADT, *A Radical Proposal: The Multidistrict Litigation Act of 1968*, 165 U. PA. L. REV. 831 (2017) (providing a general overview of the rise of federal multidistrict litigation (MDL) in the U.S.).

considered claims filed by federal and state government entities for violation of criminal and other public laws.<sup>86</sup>

## B. The Settlement

Guided by a resourceful judge, the parties quickly reached settlements. The most important one applied to the most commonly sold 2.0-liter diesel engine vehicles (covering 490,000 class members). Under it, Volkswagen agreed to pay consumers up to \$10 billion in money damages.<sup>87</sup> In addition, it agreed to invest \$2 billion over ten years to promote the use of zero emissions vehicles and \$2.9 billion in an emissions mitigation trust (specifically, to reduce the excess nitrogen oxides emissions). The court indicated that “[t]hese efforts address the environmental damage caused by Eligible Vehicles.”<sup>88</sup> Aside from these private law settlements, Volkswagen plea bargained with the government and paid \$2.8 billion criminal fine and additional \$1.5 billion in civil penalties.<sup>89</sup>

The settlement offered plaintiffs two options to recover for the lost pecuniary value of the car: (1) “Buyback” – Volkswagen buys owner’s vehicle at its pre-scandal price, or (2) “Fix” – Volkswagen fixes the owners vehicle according to a plan approved by the EPA. The “buyback” option, designed to allow people to terminate their relationship with Volkswagen, fell short of covering the full pecuniary loss. Because the “buyback” option makes use of the pre-scandal retail value of cars in their actual *used* conditions, it allowed Volkswagen to keep some of the fraudulently inflated value.<sup>90</sup>

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<sup>86</sup> EPA sued under Sections 204 and 205 of the Clean Air Act, 42 U.S.C. §§ 7523 and 7524. The Federal Trade Commission (“FTC”) sued under Section 13(b) of the Federal Trade Commission Act (“FTC Act”), 15 U.S.C. § 53(b), and alleges 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 CARB, has sued for violations of the Consumer Financial Protection Act, 12 U.S.C. § 5536, and various California state laws.

<sup>87</sup> This amount is based on the unrealistic assumptions that all consumers will prefer the remedy most expensive for Volkswagen. See Volkswagen Settlement, *supra* note 1, 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”).

<sup>88</sup> See Volkswagen Settlement, *supra* note 1, at 40.

<sup>89</sup> See *United States v. Volkswagen AG*, No. 16-CR-20394, 12-13 (Dist. Ct. Mich. 2017) (Volkswagen group plea bargain with the United States government).

<sup>90</sup> To see why, imagine that the fraud raised the new or used price by 25% relative to the post-detection level. Consider a car that would have cost \$20,000 new and \$12,000 used, but due to the fraud was priced, pre-detection, 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.



Thus, more compensation was necessary in the settlement to make car owners financially whole, and it was offered as an add-on “restitution payment”. This additional component entitled each owner to either \$5,100, or \$3000 plus 20% of the vehicle value, whichever greater. 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 caring buyers, the restitution payment is probably best understood as a crude compensation for the emotional harm alleged by the plaintiffs.

### C. 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 ones 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 thought that some emotional damages were in the cards, and their settlement reflected such expectation. The “restitution payment” to the car owners, we just saw, went beyond redress for pecuniary harm. And the hefty payment (almost \$5 billion) towards 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.

Indeed, the court explicitly recognized the gravity of the emotional harm when it approved the settlement. The court referred to the FTC 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>91</sup> The court recognized the dilemma, noting that “recovery of [emotional] damages is less certain given that the 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*

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<sup>91</sup> See Volkswagen Settlement, *supra* note 1, at 28

*frustration and inconvenience, but recovery on this basis might be only modest’.*<sup>92</sup> (emphasis added).

Indeed, the underlying rationale of both the “buyback” and the “fix” options recognized that for many consumers, a low emission car is worth more than a high emission car. 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 care also about emissions. Recall that no federal or state authority has declared the diesel cars illegal to drive,<sup>93</sup> and Volkswagen was already being separately punished for violating environmental laws. The private law settlement thus reflects an attempt to redress more than the pecuniary loss.

An award of emotional damages in this case accurately reflects the prevailing doctrine. Despite the general reluctance of contract law to award remedies for emotional harm, this case likely fell within what courts regard as the “personal interest” category of transactions.<sup>94</sup> The cars were marketed as low emitting not because of such attribute serves an economic-commercial interest, but rather in appeal to buyers’ personal, non-pecuniary, emotional satisfaction. As a principal advantage sold to buyers, and having a substantial impact on the price of the vehicles, it would be odd to classify the emissions assurance as “incidental” and not deserving of remedial protection.

More difficult is to speculate how large the emotional damages recovery would have been, if ascertained by court. 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 non-pecuniary and incommensurable.<sup>95</sup> As in the settlement, such recovery would likely have been crude, invariant across plaintiffs. Sincere environmentalists and fakers alike would have collected the same award, and the duration of each plaintiff’s use of the vehicle would likely have

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<sup>92</sup> *Id.* at 16.

<sup>93</sup> EPA has explicitly 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 Volkswagen Settlement, *supra* note 1, at 40.

<sup>94</sup> *Valentine*, 362 N.W.2d 628. See the text accompanying note 25.

<sup>95</sup> *Valentine*, 362 N.W.2d 628, at 263; *Kewin*, 295 N.W.2d 50, at 416 (stating that emotional distress is not possible to evaluate). *Zager v. Dimilia*, 138 Misc. 2d 448, 450 (N.Y. Village Ct., 1988) (stating that the emotional bond between a man and his pet is impossible to reduce to monetary terms).

not factored into the award (although it surely affects the magnitude of the emotional harm).<sup>96</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 towards emissions reduction. This strategy, which directly restores the underlying interest, requires a different set of doctrinal tools, which the restoration damages remedy provides. We thus end this article by briefly demonstrating how Restoration Damages could be used in the Volkswagen case.

#### D. Restoration Damages

If car owners suffered emotional harm, it is because their interest in driving low emitting vehicles was violated. The underlying interest that was injured by the breach of contract 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 is derived from a single personalized quantity, measured by the excess emissions its car ownership caused relative to the promised level.

Not only is 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 should be required to accomplish a unit of reduced carbon. How? 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. Other strategies are available. For example, Volkswagen could be ordered to purchase emissions permits in the amount of carbon dioxide equal to the injurious increase attributed to its deception, and not use them. Ultimately, under a restoration damages scheme the court could establish the target amount of emissions

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<sup>96</sup> Ironically, the restitution payments depended on usage, but in the opposite direction: the more mileage the car has, the lower its value and the restitution payment. *See Volkswagen Settlement*, *supra* note 1, at 30.

reduction goal and let Volkswagen choose a restoration strategy that meets this goal. This would elicit the least cost restoration.

Any plaintiff claiming to have suffered emotional damages due to the emissions would see its underlying interest restored, because her 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 less sincere ones. The sorting mechanism we proposed in Part III would entitle the defendant to offer opt-out money damages, or some combinations of partial restoration and money. These alternatives would be cheaper for the defendant and more valuable to the fakers or the semi-environmental plaintiffs.

Should the restoration remedy be scaled down in light of the public remedies sought and obtained by the EPA and state regulators? These fines increase deterrence, but they 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 the wrongdoer is being fined dearly. But this psychological-retributive sentiment is not the goal of restoration remedy, nor does it 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 fine addresses.

Moreover, even from a deterrence perspective, the fine paid to the government does 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>97</sup> It is hard to think of breach more willful than that committed by

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<sup>97</sup> See, e.g., Oren Bar-Gill and Omri Ben-Shahar, *An Information Theory of Willful Breach*, 107 Michigan L. Rev. (2009); Richard Craswell, *When is a Willful Breach 'Willful'? The Link Between Definitions and Damages*, 107 MICH. L. REV. 1501 (2009); George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225 (1994).

Volkswagen, and the fines paid to the government may well fit the remedy multiplier necessary to deter such willful transgressions.

### Conclusion

We started this article with a puzzle: why do emotional harms receive such meager protection in private law? We showed that courts adjudicating contract and tort claims often recognize that plaintiffs have sincere claims for emotional harm, and yet these courts award money damages for emotional injuries only in rare cases. The reason, we suggested, is the misalignment between the remedies private law has in its arsenal and the emotional injuries plaintiffs demonstrate. The absence of adequate remedies stop courts short of assigning liability.

The article offered a novel solution to this misalignment—a new private law remedy of restoration damages. It has a simple theoretical foundation and requires little information to implement. Parties claiming emotional grievance have to identify the underlying interest and the court has to certify that the transaction 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 victims from fakers.

While many of cases that motivated our analysis involved emotional harm arising from people's interest in the integrity of public goods like the environment, the restoration remedy we developed could be applied to more traditional settings with a single wrongdoer inflicting private harm on a single victim. We showed, but did not fully develop, that some fundamental dilemmas in the design of private law remedies boil down to the scope of protection for emotional interests. Expectation damages in contract law vary greatly depending on recognition of parties' personal-emotional interests. Specific performance and injunctions become available when such interests are likewise acknowledged. While the remedies sought in these cases do not involve the restoration damages measure we developed, the goals of such remedies are similar to that of restoration damages. And, importantly, the sorting mechanism we developed for screening sincere claims would apply with equal merit in these cases.

In an economy increasingly focused on goods and services that provide emotional rather than physical benefits, sellers' promises to deliver emotionally satisfying experience

has to be backed up with a legal infrastructure supporting the expectations they create. Public law and non-legal 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 article could fill this timely role.