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

Omri Ben-Shahar
dangelolawlib+omribenshahar@gmail.com

Ariel Porat
Ariel.Porat@chicagounbound.edu

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THE RESTORATION REMEDY IN PRIVATE LAW: A NOVEL APPROACH TO COMPENSATION FOR EMOTIONAL HARM

Omri Ben-Shahar & Ariel Porat

THE LAW SCHOOL
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The Restoration Remedy in Private Law:  
A Novel Approach to Compensation for Emotional Harm

Omri Ben-Shahar* & Ariel Porat**

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 sincere claimants 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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* Leo and Eileen Herzel Professor of Law, University of Chicago.
** Alain Poher Professor of Law at Tel Aviv University and Fischel-Neil Distinguished Visiting Professor of Law at the University of Chicago. For helpful comments we thank Alon Klement, Avery Katz,... and workshop participants at Columbia Law School,... Tal Abuloff, Bar Dor, and Niva Orion provided excellent research assistance.

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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 harms 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 of damages (“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 purchased at a premium a vehicle that the seller falsely promoted as low emitting, and which in fact was high-emitting. 1 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 could indeed have been 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 overcome 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 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 care about it and 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. 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.2

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” bounty—a 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, and award more than a trivial bounty to some plaintiffs, to account for varying degrees of concern for the underlying interest. We discuss ways to mitigate this complexity.

2 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). Atkinson’s sorting 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.
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. Otherwise, all plaintiffs would choose the remedy that is costliest for the defendant—restoration—and those who suffered no harm (or some small harm) would eventually sell a release. The defendant would then have to pay damages exceeding the true emotional harm inflicted. It is likewise important to bar side payments to the faker types by third parties who do care about the underlying interest and hope to increase the magnitude of restoration. Such claim selling would inflate the liability beyond the harm suffered by legally recognized victims.

Restoration damages exploit a feature of a certain class of emotionally distressing events—the impairment of some underlying concrete concern. The car buyers in the emissions example were distressed because their 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 fairly traded, catering to the vegetarian, religious, or fairness values of its clientele. If the food is discovered to lack the alleged properties, many (but not all) buyers will experience foreseeable emotional harm. Again, rather than trying to make the aggrieved buyer whole by money damages, the seller could 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.3

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.

3 The restoration remedy shares some design features with the cy pres distribution sometimes awarded in complex aggregate litigation. See Principles of the Law of Aggregate Litigation § 3.07 (2010). Under cy pres, in settlements courts oblige defendants to pay to charities or promote societal interests, which are closely related to the plaintiff’s impaired interests. This is done when direct compensation of victims is impractical. We discuss this comparison infra text accompanying note ___.
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, humane, and so on. Because the public concern implicated by a violation could be promoted in various ways, the restoration measure of damages is designed to restore the impaired interest through a substitute avenue. 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 harms arising from impairment of underlying private interests that have no communal aspect? In theory, restoration damages could be applied here too. Consider, two scenarios: (1) a consumer whose vacation trip was ruined by the hotel’s breach of contract; and (2) a homeowner who lost the use of the private backyard due to destruction caused by land developer. 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 a high likelihood of emotional harm and would be under-deterrred if the law of remedies ignores this harm, as it often does. We argue that in both cases restoration damages could be used as the 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

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4 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 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.


(RA: cite a case).

6 RA: Cite a case.
of market value. And, in both cases, the concern that fakers would make strategic emotional harm claims can be resolved through the sorting mechanism. Thus, unlike conventional approaches to the problem of defective service, the restoration measure with its built-in election of remedy mechanism awards the costlier remedy only to deserving plaintiffs.

The article proceeds as follows. Part I provides a brief overview of the inadequate treatment of emotional harms in contract and tort law. Part II introduces the restoration remedy as a novel way to redress emotional harm in general and in cases of harm to public goods in particular. Part III discusses the social value of restoration damages, arguing that it achieves the goals of compensation and deterrence at low administrative costs, while also providing a remedy that is socially productive. Part IV illustrates the application of the new remedy and its advantages in the Volkswagen case. 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 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 Part II.

A. Contract Law

1. Damages for Emotional Harm

7. 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”).
In common law, a breach of contract does not generally give rise to damages for the emotional harm that were caused by it.\textsuperscript{8} This rule is puzzling. The goal of contract remedies is to put the aggrieved party in as good a position as if the contract had not been breached. Courts generally do recognize that, as an empirical matter, a breach of contract is an emotionally disturbing event. They are not shy to admit that the aggrieved party “might not be made whole absent an award of mental distress damages.”\textsuperscript{9} And, yet, the basic approach is to not award emotional damages.

Why? One bad explanation is foreseeableability—the claim that the breaching party did not know (or have reason to know) that breach would also cause consequential emotional harm.\textsuperscript{10} It’s a bad justification because courts, in the same breath, also recognize “all breaches of contract do more or less” cause “distress, vexation and annoyance.”\textsuperscript{11}

A second and better justification for the no-emotional-damages rule is their speculative nature.\textsuperscript{12} Contract law does not allow compensation for uncertain harm,\textsuperscript{13} 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 be proven with accuracy, why not award some intermediate of “average” measure of damages? 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.\textsuperscript{14} Compensated for the pecuniary loss from breach, the aggrieved party is able to purchase performance elsewhere, and the distress suffered

\textsuperscript{8} See e.g., Erlich v. Menezes 21 Cal.4th 543 (Cal. 1999) (emotional damages not available in a defective construction case); Jankowski v. Mazzotta, 7 Mich.App. 483, 152 N.W.2d 49 (1967) (same). Cite Farnsworth.

\textsuperscript{9} Valentine v. General American Credit, 362 N.W.2d 628, *** (1984).

\textsuperscript{10} Cite


\textsuperscript{12} \textsc{Restatement (Second) of Contracts} § 353 (“damages for emotional disturbance . . . are often particularly difficult to establish and to measure”).

\textsuperscript{13} \textsc{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”).

\textsuperscript{14} \textsc{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”).
due to non-performance ought to be cured, rendering any additional emotional damages double compensation. Thus, for example, rather than bemoan the mental anguish from a breached employment contract, the discharged employee is encouraged to pursue mitigation strategies by seeking substitute occupation.

This avoidability justification for the no-emotional-damages rule might appear, at first blush, to square 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 expanded breach insurance. 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). Perhaps this is also why people who buy accident insurance policies do not seek added coverage for emotional harms.

But the insurance argument has a critical flaw: it ignores deterrence. If parties suffer emotional harm that goes uncompensated, the breaching party does not internalize the entire negative impact of breach and would take insufficient precautions to guarantee performance. Ultimately, the parties’ rational ex ante interest is to have

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their contract governed by remedial rules that induce optimal performance incentives. Excluding emotional damages categorically undermines this interest.\textsuperscript{18}

Despite the general reluctance to award emotional damages, courts have carved out narrow exceptions. These exceptions identify scenarios in which unavoidable emotional harm is particularly likely to result from breach.\textsuperscript{19} 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. In addition, courts recognize a “narrow exception” when the contract “has elements of personality”—namely, “a contract meant to secure protection of personal interests.”\textsuperscript{20} 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 particular emotional enjoyment.\textsuperscript{21} While the list of contracts recognized to have such features is a relic of an older era\textsuperscript{22}—it is, for example, surprising that employment contracts are not generally recognized to have an “element of personality”—the doctrine is founded on a solid principle: award emotional damages when the parties entered the contract in pursuit of the very same emotional interest that was eventually harmed.

\textsuperscript{18} Rea, \textit{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”).

\textsuperscript{19} \textbf{RESTATEMENT (SECOND) OF CONTRACTS} § 353 ("breach is of such kind that serious emotional disturbance was a particularly likely result.").

\textsuperscript{20} \textit{Kewin}, 295 N.W.2d 50, *** (emotional damages available when the contracts breached are "concerned not with trade and commerce but with life and death, not with profit but with elements of personality, not with pecuniary aggrandizement but with matters of mental concern and solicitude,"); \textit{Valentine}, 362 N.W.2d 628, *** ("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").

\textsuperscript{21} \textit{Valentine}, 362 N.W.2d 628, ***.

\textsuperscript{22} Typical examples are tour package contracts, contracts to perform cosmetic surgeries, and contracts for providing services for weddings or funerals. See, \textit{e.g.}, \textit{Jarvis v. Swan Tours EWCA Civ 8} (1972) (tourism contract); \textit{Sullivan v. O’Connor} 296 N.E. 2d 183 (1973) (cosmetic surgery); \textit{Lewis v. Holmes} 109 La. 1030 (1903) (contract for providing services for a wedding); and \textit{Hirst v. Elgin Metal Casket Co.}, 438 F.Supp. 906 (D.Mont.1977) (contract for manufacturing a casket).

\textsuperscript{23} \textit{Valentine}, 362 N.W.2d 628 (holding that an employment contract “is not entered into primarily to secure the protection of personal interests”).
2. Remedying 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, even though such cost of repair might be significantly higher than the diminution in market value that the defect caused. Famous examples involve the installation of non-conforming plumbing pipes, misplacement of a wall, or unfinished land reclamation. 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). But it may also indicate that the value assigned by the plaintiff to a specific module of performance, or to its meticulous completion, is 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). Seeking the cost of repair and completion is often the plaintiff’s best chance to redress the emotional harm.

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-emotional element and allow greater compensation when such element was bargained-for. This dilemma was famously framed as whether to protect

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“mere taste or preference, almost approaching the whimsy,”\textsuperscript{27} whether to recognize that an “owner’s right to improve its property is not trammeled by its small value” and that a party may “choose to erect a monument to his caprice or folly.”\textsuperscript{28} Courts ask whether the in-kind completion is merely an incidental purpose of the contract,\textsuperscript{29} or is it of special value, so central that without it the goal of the contract for the plaintiff would be frustrated.\textsuperscript{30}

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 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 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

\textsuperscript{28} Groves v. John Wunder Co., 205 Minn. 16, *** (1939).
\textsuperscript{29} Peevyhouse, 1962 OK 267, ***.
\textsuperscript{30} City School Dist. v. McLane Constr. Co., 85 A.D.2d 749 (1981) (allowing recovery for cost of repair because the aesthetics of the structure was important to the plaintiffs); Landis, 193 Ohio App. 3d 318 (same).
primarily when the performance sought is “unique”\textsuperscript{31} and damages are therefore difficult to ascertain so as to make the aggrieved party truly whole.\textsuperscript{32} 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.”\textsuperscript{33} 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.\textsuperscript{34}

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.\textsuperscript{35} Thus, when emotional harm resulting from a breach is likely, courts tend to uphold a liquidated damages clause which otherwise would have been stricken down.\textsuperscript{36}

**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 verifiable channel by which emotional harm is generated, and thus claims for emotional damages by injured victims are prima facie plausible\textsuperscript{37} Conversely, stand-alone emotional harm, not accompanied by physical harm, is generally uncompensated under tort law unless

\textsuperscript{31} Uniform Commercial Code § 2-716 (1) ("Specific performance may be decreed where the goods are unique or in other proper circumstances.").

\textsuperscript{32} RESTATEMENT (SECOND) OF CONTRACTS § 359(2) (1981).

\textsuperscript{33} RESTATEMENT (SECOND) OF CONTRACTS § 360, *** (1981).


\textsuperscript{35} Uniform Commercial Code § 2-718 (1) (referring to "difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy" as reasons to enforce liquidated damages). RA: check Charles Goetz and Robert E. Scott, ... *Liquidated Damages...* (***).

\textsuperscript{36} Cite.

\textsuperscript{37} RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM §46, cmt. a (2012); See DAN B. DOBBS ET AL., TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 581-590 (7th ed. 2013) (noting that some states require 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).
intentionally inflicted.\textsuperscript{38} Difficulties of proof, the risk of frivolous claims and floodgate concerns are the main policy considerations pulling to the direction of the non-emotional-damages rule.\textsuperscript{39}

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 infliction of emotional distress.\textsuperscript{40} Another exception permits plaintiffs to secure injunctions against prospective tortious behavior, primarily in nuisance cases.\textsuperscript{41} A classic explanation for this exception offered 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.\textsuperscript{42} Rather than engage in the inaccurate exercise of repair ex post, the law allows advance injunction.

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

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{38} 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)
\item \textsuperscript{39} See Kewin, 295 N.W.2d 50, 416 (difficulty of proof); Potter v. Firestone Tire & Rubber Co. 863 P.2d 795 (Cal. 1993) (floodgates concerns); See also 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); 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). For a recent account of the categories of cases where emotional harm is recoverable, see Robert Rabin, Dov Fox on Reproductive Negligence: A commentary, 117 Colum. L. Rev. Online 228 (2017).
\item \textsuperscript{40} In negligence cases, liability for stand-alone emotional harm has also been imposed when the harm resulted from injury to another or from 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 Dan B. Dobbs, The Law of Torts, 825 (2000).
\item \textsuperscript{41} See Restatement (Second) of Torts ch. 48 (1979). For an extend review on the injunction relief in nuisance cases, see Dan B. Dobbs, Law of Remedies 517-528 (1993).
\item \textsuperscript{42} Guido Calabresi & A. Douglas Melamed, Property Rules, Liability Rules, and Inalienability: One View of the Cathedral, 85 Harv. L. Rev. 1089, 1108 (1972) ("Taney may be sentimentally attached to his land. As a result, eminent domain may grossly undervalue what Taney would actually sell for, even if it sought to give him his true valuation of his tract.").
\end{itemize}
\end{footnotesize}
have from the mere knowledge that an environmental resource exists and will continue to exist. Under various federal statutes, governmental trustees are permitted to sue polluters for damages to natural resources, including “nonuse” values that stand for emotional harm. 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 ... shall not be limited by the sums which can be used to restore or replace such resources." In the few cases decided by courts, damages were awarded for aesthetic and existence values, both surrogates for types of emotional harm.

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. 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.

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

45 Id. § 9607(f).
46 Dobbins, supra note 45, at 911. See Note, supra note 43, at 782-783 (summarizing the case law on this matter).
47 See Mieske v. Bartell Drug Co., 92 Wn.2d 40, 44 (Wash. Apr. 19, 1979) (awarding 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) (awarding damages for the emotional distress caused by the killing of a pet).
48 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.
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.

* * *

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

There are two main legally recognized methods to value the harm for the purpose of making the plaintiff whole. One—the money method—is an award of 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 harmed party is awarded cash and may (but need not) use it to purchase exact replacement. Under the in-kind method, the harmed 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. Finally, we distinguish the restoration remedy from the remedy occasionally awarded in class actions that is aimed at promoting a societal cause.

A. The Principle: Least Cost Restoration

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 manifestations. The aggrieved party’s violated plan may have taken a specific manifestation, but it was intended to advance a more general personal agenda. Yet this more general agenda 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, other efforts can be used to accomplish an approximate satisfaction of the same interest.

Consider, for example, a religious or political preference relating to one’s diet, which is manifested by a plan to eat only vegetarian food. A violation of this plan, for example, by deceptively labeling a canned soup product ‘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. This intermediate underlying interest may be the concern for animal welfare, namely the interest to protect some species of animals from slaughter; or it may concern environmental protection, namely the interest to protect the environment from the harms caused by mass meat production; or it may concern physical health, namely the perceived effect of meat consumption on private or public health.49

Identifying the intermediate underlying interest makes it possible employ new forms of remedies. 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 and is identified, 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. 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 vegetarian who 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 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 to the aggrieved party. 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. There are many ways to design such 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 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, if the victims banded together in a collective action, the restoration damages would be divided and distributed to different targets, to repair different emotional harms. 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 to overcome it.
Declaration by the plaintiff is one, but not the only, way to identify the underlying interest. Other ways would be to employ representative surveys of like populations, experiments, Big Data, statistics, and expert opinions. These methods seek to identify social and psychological regularities, helping identify the intensity of the emotional distress. They could also quantify the amount of restoration needed. Surveys or other methods of eliciting revealed preferences could show how much restoration is needed to offset the emotional harm.

Which Underlying Interests Deserve Restoration? This question poses a fundamental challenge—when to impose liability for emotional harm—and it is largely independent of the question how to compensate once liability is established. The

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50 See, e.g., the contingent valuation method (CVM) that is used to estimate nonuse damages, described at supra note 45. 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).

51 RA: experiments, NOT epidemiological studies.


53 The use of statistical data is common in tort cases, where actuarial tables are employed to establish a victim's earning capacity or work and life expectancy. 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).

54 See FED. R. CIV. P. 35 (2007) (providing that when the mental condition of a plaintiff seeking emotional damages is at issue in a lawsuit, the court may order that party to undergo a mental examination by a physician or psychologist); Eskin v. Bartee, 262 S.W.3d 727, 735 (Tenn. 2008) (requiring evidence in the form of 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).

55 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 (presenting the main economic approaches that are used to evaluate damages to natural resources. One of them is "revealed preference technique," which uses the price of other goods and services to elicit people’s demand for environmental resources. Another approach is "Stated preference technique," which uses 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 50. 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").
liability question is hard because 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 and tort law doctrines protect against emotional harms only in a relatively small subset of the cases in which they are recognized to occur. Nevertheless, the liability and damages questions may be interdependent. If restoration damages are easy to assess, courts may be more willing to impose liability for emotional harm. And, conversely, if it is exceedingly expensive to restore the underlying interest, liability is less likely.

*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 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 be paid 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. At times courts might have information about the intensity of preferences and

56 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 certification of a class. See e.g., De La Fuente v. Stokely-Van Camp, Inc., 713 F.2d 225, 233 (7th Cir. Ill., 1983). But cf. Wal-Mart Stores, Inc. v. Dukes, 564
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, and standard solutions should apply to restoration damages.

The measurement of restoration would be difficult in many cases, but never more difficult than the alternative of assessing simple money damages, which not only requires to assess the intensity of the emotional harm, but also to set an arbitrary exchange rate harm/dollars. We think that it is better to approximate the underlying interest and provide a rough quantification of it, than to concoct a sum of money that is supposed to equal the emotional harm. We show in Section II.B below that even a rough approximation of a restoration remedy would have the very desirable effect that money damages lack, of weeding out fake claims. Still, we recognize that significant measurement problems might at times limit the application of restoration damages, or at the very least condition its application of plaintiffs’ success in proposing reliable methods of measurement.

*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 vegetarian driven by animal welfare 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 narrow (protect only the animals used in the case), 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.

*Relation to Cy Pres.* The restoration remedy bears superficial resemblance to a rarely used remedy—a *cy pres* distribution made in class actions. These are settlement

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U.S. 338, 350 (2011) ("Commonality requires a plaintiff to demonstrate that class members have suffered the same injury").
awards for the indirect benefit of the class, usually to third party recipients whose interests reasonably approximate those being pursued by the class. Courts approve settlements that contain *cy pres* distributions as an exception, only when individual distributions are not viable. As far as we know, *cy pres* has not been designed nor used for repairing emotional harm.

Like *cy pres*, restoration damages rely on the existence of an underlying impaired value that can be restored. But unlike *cy pres*, we envision restoration damages as the rule, not the exception, and not just in settlements. When a claim for emotional harm is made, individual remedies are often viable (and thus, as a matter of current doctrine, *cy pres* would not be available). Yet it is precisely in this core case that restoration damages should be preferred to direct compensation. *Cy pres* payments might occasionally function as restoration, but note they are not intended nor used to offset emotional harm.

Because the restoration damages scheme is designed primarily to redress emotional harms, it operates both in public and private harm cases. It has to deal with a problem that *cy pres* ignores: distinguishing sincere claimants from fakers. Unlike *cy pres*, which is award to the class a whole, the restoration damages scheme has an additional critical step: self-selection by claimants. It is this step that the next section describes.

**B. Election of Remedy**

1. **The Problem**

   The two key challenges of any regime aiming to remedy emotional harm are valuation and verification. We argued above that the restoration remedy addresses the

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57 See, generally, Principles of the Law of Aggregate Litigation § 3.07 (2010). For an example of such use of *cy pres*, see Block v. McDonald's Corp., 355 Ill. App. 3d 1174 (2005) (class action against McDonald's alleging it mixed into the french fries beef flavoring, despite claiming that the fries were vegetarian. In the settlement, McDonald agreed to apologize to all Hindu and vegetarians clients who were offended. McDonald had also agreed to pay $10 million to various vegetarian, Hindu and Jewish non-profit organizations); 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); In re Holocaust Victim Assets Litig., 424 F.3d 132 (2d Cir. 2005) (victims of Nazi looting); Kerry Barnett, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591 (1987) (giving case examples).
first problem of valuation by paying for in-kind substitution and thus rendering it unnecessary to measure the dollar equivalent of an emotional harm. But a second fundamental problem 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? (This last problem disappears if it is clear to the court that the cost of restoration is lower than all plaintiffs' combined emotional harm.).

But this is not always the case. 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 claims of emotional harm? In particular, if the lawsuit is brought as a class action on behalf of all consumers who purchased the mislabeled product, how can the court determine the fraction among them who truly suffered harm to their underlying vegetarian interest, and separate them from those who bought the same product but suffered no or small emotional loss? In litigation, the plaintiff would want to inflate 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 emotional harm 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 payments from the defendant in return for releasing her from the obligation to fund such remedy. Such Coasian bargain would hopefully safeguard against wasteful

58 See, e.g., Block v. McDonald's Corp., 355 Ill. App. 3d 1174, id.
investment in restoration and thus solve any ex post inefficiency problem that many courts seem to be troubled by,\(^5\) but it would still be distortive to ex ante incentives because compensation would be excessive. And like in the public goods case, fakers might be paid by interested third parties (non-victims) who benefit from restoration. To be sure, these problems are moot if the restoration remedy is non-waivable and inalienable. We discuss this condition below in more detail.\(^6\)

There are evidentiary ways to address the problem of verification, but they may be costly and require individualized inquiry into preferences and behavior, defeating the utility of class actions. In aggregate suits, a court may recognize that some of the plaintiffs are sincere about the emotional loss complaint, but it would be unmanageable to sort plaintiffs one by one and accomplish adequate compensation. In individual suits, courts might collect clues to adjudge the sincerity of emotional harm claims,\(^6\) but this would complicate the litigation. Ultimately, an evidence-based verification mechanism is impractical, explaining why current doctrine prefers to resolve the emotional harm challenge by general categorization. We need an alternative to the evidence-based or the categories-based mechanisms, 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.\(^6\)

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”

\(^5\) See e.g., Peevyhouse v. Garland Coal & Mining Co., 382 P.2d 109, 115 (Okla. 1963) (discussing the economic waste concern of restoration damages).

\(^6\) Intra note ___ and the accompanying text.


\(^6\) 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.
and “faker.” Later, we show how the mechanism works 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

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 (with the defendant or with a third party), a Faker would 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 might also be less efficient than a two-option menu. 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. In particular, we show that sorting would require the Faker bounty to be significantly higher and would inevitably involve significant over-compensation of some types of plaintiffs, resulting in over-deterrence for defendants. Because of these costs, full sorting would no longer be the right objective for a remedy
scheme. It would be better, at least in the types of the cases we identify below, 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 plaintiff’s type. Notice that a simple remedy of \( R=$100 \) would perfectly redress each type of plaintiff’s true emotional loss, but would also be prohibitively expensive, imposing costs on the defendant exceeding the harm caused.

To separate the three types, 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. **Hybrid 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:
\((S^*)\quad M_H + R_H \leq 100\)
\((I^*)\quad M_H + aR_H \geq 100a\)

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, but now one else, 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:

\[
Total\ Cost = 100 + (R_H + M_H) + (M_H + 1)
\]

We know, from condition \((I^*)\), that \(R_H \geq 100 - M_H/a\), and thus:

\[
Total\ Cost \geq 100 + (100 - \frac{M_H}{a} + M_H) + (M_H + 1)
\]

which, after simplifying, can be written as:

\[
Total\ Cost \geq 201 + \frac{2a - 1}{a} M_H
\]

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 \(R_H = 100\). In this case, option (2)—the hybrid 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).  

\[\text{The results flip if } a \leq \frac{1}{2}. \text{ Now the total cost is minimized by } M_H = 100a, \text{ namely the maximal level of } M_H \text{ that is consistent (from the two incentive conditions) with non-}\]

\[\text{\footnote{The cutoff level } a > \frac{1}{2} \text{ is specific to this example, in which there are three types with equal likelihood.}}\]
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.\textsuperscript{64} 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 intermediate emotional harm, they will either pool with the Sincere or with the Fakers. One way or another, such pooling creates over-compensation—either

\textsuperscript{64} 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.
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 value each additional $100 of restoration as $50 of money. This linearity reflects an assumption that restoration of the underlying interest has fixed marginal returns—that every additional increment of restoration is equally valuable. But what if this assumption is wrong? What if plaintiffs value the first dollars of restoration more than the last? In particular, if the first dollars of restoration address the most critical harm to the underlying interest, it is possible that each additional increment of restoration would have positive but diminishing value.

If plaintiffs have non-linear preferences, the hybrid option of damages (“option (2)”) becomes more 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.\(^6\) 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

\(^6\) 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.\(^{66}\)

Thus, with non-linear preferences, the lowest cost damages scheme involves finer 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?

3. Implementation

Is it realistic to expect courts to construct an election 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, 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

\(^{66}\) 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 $100 + 71 + 22 = 193.$
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 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 it 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 several possible harmed interests and select the appropriate restoration for each. We recognized above that such assessment tasks are not simple and it is entirely possible that some emotional harms are so difficult to restore that they’ll have to be overlooked. But so long as the court feels comfortable that a particular restoration strategy is a plausible response to an alleged emotional harm, it should establish it as the restoration damages option, and allow parties to sort in or out of it. The critical simplification step is to leave the design of other remedial options, which include less (or no) restoration and some quantum of money damages, to the defendant.

C. 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 emotional harm 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 address the victims’ make-whole interest while sidestepping these problems. And by internalizing the cost of an important component of the overall harm, it might better deter wrongdoers. If successful, the restoration remedy advances the two primary social goals of remedies—compensation and deterrence of emotional harm—in a way unmatched by any other existing private law remedy. In this part, we take a closer look at these interests, and 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 could 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
through some payment of money damages to fakers. Thus, some victims are compensated in full (with 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-compensate some victims and over-compensate others. 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.67

Note, that the over-compensation could be fully resolved by eliminating the election of 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 remedies. And second, fakers have to be paid off despite suffering no harm. While both problems are possible, we now try to argue that their scope is limited.

67 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).
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. The restoration remedy is particularly appealing in cases of high emotional harm, because it is more likely that the cost of restoration would be less than the emotional harm it cures.

Restoration damages could create over-deterrence even when it is the least-cost measure to reduce high emotional harm—when fakers are hard to identify and a bounty needs to be offered to sort them out. In our stylized two-type example, the bounty is nominal and thus its deterrence distortion is negligible. But we also saw that when plaintiff types vary, the bounty for separating the fakers 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 not motivated to sue, and when they are represented through a class action they are not motivated to redeem their award. Such passivity might be an artifact of the present regime in which the monetary recovery for emotional harm is low, and participation rates might increase if the monetary bounties were higher.

Second, if over-deterrence leads to costly precautions, contractual parties might be motivated to explicitly bargain ex ante over the extent of emotional harm liability. People with low emotional stakes in the activity might contractually waive their right to recover restoration damages, for a discount. Like any remedy, the restoration measure would be a default rule that can be disclaimed contractually. Even when its application is limited to contracts that have a “personal” element, parties with low emotional stakes could opt out.
Third, if the emotional harm arises from intentional and malicious violation, over-compensation does not create over-deterrence because the objective of remedies is to completely deter such conduct. Indeed, compensation in such willful harm cases usually exceeds actual harm, to satisfy this deterrence rationale.68 The car emissions example falls into the willful breach category, and over-compensation is necessary to deter such hard-to-detect violations.

C. Administrative Costs

A distinct advantage of the restoration remedy, compared to conventional money damages, is simplified administration. The restoration remedy requires the same preliminary burden as the existing money damages remedy—of classifying the injury as one justifying recovery for emotional harm. But it simplifies the measurement and verification tasks. The main task for courts would be to determine what full restoration entails—namely, what are the injured underlying interests and what forms and magnitude of restoration would be adequate. This is not a trivial task, but plaintiffs could help 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 into several groups). 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 that fits the reported impaired interest, and the sum necessary to offset the wrong. The court would identify, for example, an organization dedicated to vegetarian causes (perhaps one proposed by the plaintiff) and the money necessary to offset the harm to animals committed by the use of animal ingredients in the food.

D. Third-Party Effects

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

This advantage highlights the great attractiveness of restoration damages in cases involving harm to public goods. Our discussion earlier 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 devastated backyard), it is only in the case of public harms that the third party effect augments the social value of the remedy. These third parties may not have legally protected expectations, but they benefit nevertheless.
The magnitude of the effect on third parties depends on another aspect of the harm to the underlying interest: whether it accumulates across victims. Some harms are lumpy. A destruction of a religious symbol through tortious action, or an oil spill, affects many parties, including those who cannot sue for practical or legal reasons.\textsuperscript{69} 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 \textit{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.\textsuperscript{70}

\section*{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 than claimed that the expansion of recovery made possible by Restoration Damages is desirable, and compiled the social interests that would be served by it.

\textsuperscript{69} Liability might not be imposed for duty of care and proximate cause type of reasons. See Section 29 of the \textsc{Restatement (Third) of Torts: Liability for Physical Harm} adopted the term "scope of liability" to refer to what is commonly known as "proximate cause." \textit{See also} \textsc{Restatement (Third) of Torts: Liability for Physical Harm} §7 (dealing with the duty of care under negligence law).

\textsuperscript{70} On a different perspective, in the Volkswagen case, Volkswagen committed a wrong toward non-contractual parties (since the actual emission was not only beyond what the warranties guaranteed, but also beyond what the law allowed). Ideally, all victims, both contractual and non-contractual, should get compensated even if practically (and legally) this is impossible. Restoration compensates those victims as well. Under this view, restoration should probably be mandatory, to offset the emotional harm suffered by plaintiffs and non-plaintiffs alike.
Part IV now offers a demonstration. Returning to the case that inspired our thinking about this topic—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

From 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 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 40 times over the permitted limit.71

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. The litigation also considered claims filed by federal and state government entities for violation of criminal and other public laws.72

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

71 See Volkswagen Settlement, supra note 1, at p.2.
(covering 490,000 class members). Under it, Volkswagen agreed to pay consumers up to $10 billion in money damages.\textsuperscript{73} 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.”\textsuperscript{74}

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.\textsuperscript{75}

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.\textsuperscript{76}

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 $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

\textsuperscript{73} This amount is based on the unrealistic assumptions that all consumers will prefer the remedy most expensive for Volkswagen. See Volkswagen Settlement, \textit{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”).

\textsuperscript{74} See Volkswagen Settlement, \textit{supra} note 1, at 40.


\textsuperscript{76} 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.
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.”\(^77\) 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 frustration and inconvenience, but recovery on this basis might be only modest*.\(^78\) (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

\(^{77}\) See Volkswagen Settlement, *supra* note 1, at 28

\(^{78}\) Id. at 16.
no federal or state authority has declared the diesel cars illegal to drive,\textsuperscript{79} and Volkswagen was already being separately punished for violating public 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.\textsuperscript{80} The cars were marketed as low emitting not because 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.\textsuperscript{81} 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 not factored into the award (although it surely affects the magnitude of the emotional harm).\textsuperscript{82}

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

\textsuperscript{79} 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.

\textsuperscript{80} Valentine, 362 N.W.2d 628. See the text accompanying note 25.

\textsuperscript{81} 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).

\textsuperscript{82} 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.
underlying interest, requires a different set of doctrinal tools, which the restoration damages remedy would hopefully provide. 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 it easy to measure and quantify the injury to the underlying interest of each individual plaintiff, it is also reliably easy to restore the underlying interest. Volkswagen could be ordered to take actions that reduce emissions, to exactly offset the injurious increase. For each unit of carbon that was emitted in excess of its promise to its customers, Volkswagen 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 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
good 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.83 It is hard to think of breach more willful than that committed
by Volkswagen, and the fines paid to the government may well fit the remedy multiplier
necessary to deter such willful transgressions.

**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

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83 See supra note 68.
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. A possible reason, we speculated, 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 the idea, that some fundamental dilemmas in the design of private law remedies boil down to the scope of protection for emotional interests.

For example, expectation damages in contract law vary greatly depending on recognition of parties’ personal-emotional interests. Courts are awarding high cost-of-completion damages when the unfinished service spoils an emotionally valued goal of the plaintiff. Or, to take another example, specific performance and injunctions become available when emotional interests—like the plaintiff’s attachment to a particular goal—are centrally acknowledged. While the remedies sought in these cases do not involve the restoration damages we developed, the goals of such remedies are similar to that of the restoration measure. And, importantly, the sorting mechanism for screening sincere claims would apply with equal merit in these cases.

Unlike physical or pecuniary harm, emotional harms are hard to prove and verify, and we thus developed the election of remedy mechanism to sort the sincere plaintiffs. This mechanism, however, may be extended to resolve other remedial
problems that were not the focus of this article. Plaintiffs have private information about harms to reputation, harms to future interests, and even their future lost income. The law—through evidentiary as well as substantive private law remedial doctrines—limits recovery for such speculative harms, despite recognizing that plaintiffs are often left under-compensated (and defendants under-deterred). Variants of the restoration remedy can be developed in future work to compensate for these neglected harms.

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.