Article

Making Whole, Making Better, and Accommodating Resilience

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The conventional story about compensatory damages is that they aim to make plaintiffs whole, but not better off. This make-whole ideal implies that courts should subtract material gains from compensatory awards because otherwise plaintiffs would be unjustly enriched. This Article undermines this conventional wisdom in three ways. First, it highlights an oft-overlooked point: that sometimes courts may, as a doctrinal matter, award compensatory damages that render plaintiffs materially better off than before. Second, and more surprisingly, the Article shows that awarding material "betterments" is sometimes (and paradoxically) required by the make-whole ideal itself, not merely as a limited exception to it (as some authorities suggest). Third, the Article argues that plaintiffs have compelling but currently unrecognized interests in rebuilding aspects of their lives—including property—better than before the wrongdoings they suffer.

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Accommodating such "resilience interests" in the law of tort remedies is not only justified but would also systematically require courts to allow plaintiffs to keep material betterments, at least more often than legal practice generally allows. In short, plaintiffs often have compelling reasons to "build back better." Courts can and should allow them to do so without necessarily abandoning the aim of making them whole. Indeed, failing to recognize these reasons means that plaintiffs are routinely undercompensated.

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INTRODUCTION

The nuts and bolts of *Burr v. Clark* are pretty simple.[1] The Burrs called the Clarks' company to fix their malfunctioning water boiler, which had been purchased a few years earlier for $50.[2] They sent a technician who, in a sad irony, accidentally destroyed it.[3] The Burrs installed a new boiler, sued the Clarks, and sought reimbursement for the boiler plus costs of installation ($315.32).[4]

The Burrs' demand seemed reasonable. Once destroyed, the Burrs needed another boiler, which in this case happened to be a *new* boiler.[5] An expert testified that fixing the old one wasn't feasible, that no used boilers were readily available for installation, and that installing the new boiler was the cheapest available option.[6] And, as between the victim and wrongdoer, it seems fair to expect that the wrongdoer should bear the costs for this replacement. So perhaps it should come as little surprise that the Supreme Court of Washington affirmed the full $315.32 judgment for the Burrs.[7]

But perhaps this outcome *should* be surprising. After all, the standard governing compensatory damages awards—sometimes traveling under the name *restitutio in integrum*—is to make plaintiffs whole,[8] or to render their situations as though the wrongdoing never happened.[9] Here, however, there is a sense in

1. 190 P.2d 769 (Wash. 1948).

2. *Id.* at 771, 774.

3. *Id.* at 771.

4. *Id.* at 772.

5. *Id.*

6. *Id.* at 774.

7. *Id.* at 775. The case was decided in 1948, so the judgment might be in the neighborhood of $3,900 as of March 2022. *See CPI Inflation Calculator*, U.S. BUREAU OF LAB. STAT., https://www.bls.gov/data/inflation_calculator.htm [https://perma.cc/X3B7-L2ZD].

8. *See, e.g.*, Edwards v. Wilmington Transp. Co. (The Catalina), 18 F. Supp. 461, 468 (S.D. Cal. 1937) (noting the objective of damages in admiralty is to make the libelant whole); The Baltimore, 75 U.S. (8 Wall.) 377, 385 (1869) (stating that damages should be sufficient to restore an injured vessel to its condition immediately prior to the injury when practicable).

9. *See, e.g.*, Lima v. Deutsche Bank Nat'l Tr. Co., 494 P.3d 1190, 1199 (Haw. 2021) ("[C]ompensatory damages are intended to restore a plaintiff to the position they would have been in prior to the alleged tortious act." (citing Bynum v. Magno, 101 P.3d 1149, 1153 (Haw. 2004))); DOUGLAS LAYCOCK & RICHARD L. HASEN, MODERN AMERICAN REMEDIES: CASES AND MATERIALS 14 (5th ed. 2019)

which the Burrs were not merely made whole, they were made *better off*. Before it was destroyed, the boiler was old, and was worth less—perhaps much less—than its original $50 purchase price (remember: it was malfunctioning).[10] Boilers never last forever, anyway. So, maybe it is a mistake to construe the plaintiff's loss as a loss of a functioning boiler, to be replaced by another reasonably available functioning boiler; instead, the loss should have been limited to the fair market value of the lost boiler immediately before it was destroyed. Indeed, courts usually apply this measure of property loss in the United States.[11]

Or perhaps the award of replacement costs was appropriate—but should have been reduced to reflect the boiler's depreciation. Suppose, for example, that a replacement boiler costs $1,000 and was expected to last twenty-five years. Now suppose that, when destroyed, the old boiler had five years of useful life remaining. According to one method of measuring damages, the defendants should be required to pay for only five years of the

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(using the term "rightful position" to describe the ideal of placing the plaintiff in the position they would have occupied but for the wrongdoing); ARTHUR RIPSTEIN, PRIVATE WRONGS 233 (2016) (stating that the purpose of damages is to make it as if a wrong never happened); RESTATEMENT (THIRD) OF TORTS: REMEDIES § 2 (AM. L. INST., Tentative Draft No. 1, 2022) (explaining that plaintiffs that have established liability in tort are entitled to remedies that place them in the position as if the tort had not been committed). Conceptually, there is a difference between placing the plaintiff in the position they would have occupied but for the defendant's wrongdoing (*status quo aliter*) and placing them in the position they were in immediately before the wrongdoing (*status quo ante*). But courts don't always notice the difference. *See, e.g.*, Hoever v. Marks, 993 F.3d 1353, 1360 (11th Cir. 2021) ("Compensatory damages restore a plaintiff to his pre-injury position."). But the distinction won't make much of a practical difference for our purposes. For a detailed discussion of the *ante*/*aliter* distinction, and a cogent argument that courts have in mind *status quo aliter* when calculating compensatory damages, see JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW 165 (2018).

10. *See Burr*, 190 P.2d at 774 (stating that the boiler was old and needed repair).

11. DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES § 5.12(1), at 559–60 (3d ed. 2018) (explaining that damages for harm to personal property are often based on the market value of the property at the time of harm); *id.* § 5.2(1), at 509–10 (explaining that damages for harm done to real property is the difference between the value before and after the harm); LAYCOCK & HASEN, *supra* note 9, at 22–24 (listing the aforementioned formulations for damages); *cf.* RESTATEMENT (SECOND) OF TORTS § 929(1)(a) (AM. L. INST. 1979) (limiting damages for harm to land to the difference between the value before and the value after harm occurred).

new boiler's useful life—i.e., 1/5 of $1,000 (i.e., $200).[12] Courts routinely discount replacement or repair costs along these lines. And they do so because they seek to "avoid[] giving a windfall to a plaintiff by replacing old and depreciated equipment with new equipment."[13] These discounted awards view destroyed fixtures as lost years of useful life of fixtures rather than the value of their full lifespans.[14]

But the Burrs were fully reimbursed.[15] Even though they were manifestly better off, replacing their old, malfunctioning boiler with a new one, the court held that the defendants failed to establish that the Burrs had been unjustly enriched.[16] Still, insofar as the Burrs were made materially better off, they received what some courts and commentators call a *betterment*, regardless of whether that betterment is described in terms of increased market value or additional years of their fixture's useful life.[17]

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12. *Cf.* CEH, Inc. v. F/V Seafarer (O.N. 675048), 880 F. Supp. 940, 953 (D.R.I. 1995) (applying straight-line depreciation to reduce compensation for a replaced trawl).

13. BP Expl. & Oil, Inc. v. Moran Mid-Atl. Corp., 147 F. Supp. 2d 333, 338 (D.N.J. 2001).

14. The destroyed boiler might have retained market value as scrap metal. But the court declined to reduce the Burrs' award on this basis because the Clarks failed to introduce evidence of that value. *See Burr*, 190 P.2d at 774. So the court might have been receptive to reducing the award.

15. *Burr*, 190 P.2d at 775.

16. Again, the defendants had tried unsuccessfully to argue that the old boiler retained scrap value and that the Burrs' recovery should be reduced by that value. *See id.* at 774–75.

17. Courts in the United States don't consistently use the word "betterment" in the context of damages, preferring "windfall," though "windfall" is also regularly used to describe extra-compensatory damages more generally. *See, e.g.*, Old Second Nat'l Bank v. Jafry, 57 N.E.3d 1251, 1259 (Ill. App. Ct. 2016) (Schostok, J., dissenting) ("Compensatory damages are not intended to bestow a windfall on the plaintiff or to punish the defendant."). There are exceptions. *See, e.g.*, Tenn. Valley Auth. v. Vulcan Materials Co. (*In re* Crounse Corp.), 956 F. Supp. 1377, 1381 (W.D. Tenn. 1996) (using "betterment" to describe leaving the injured party better than before the injury); City of New Orleans *ex rel.* Sewerage & Water Bd. v. Am. Com. Lines, Inc., 662 F.2d 1121, 1124 (5th Cir. 1981) (explaining the same); Canal Barge Co., Inc. v. Griffith, 480 F.2d 11, 27 (5th Cir. 1973) ("As a practical matter, repair may leave property in a better condition."); Oregon *ex rel.* State Highway Comm'n v. Tug Go-Getter, 468 F.2d 1270, 1273–74 (9th Cir. 1972) (explaining that windfall did not apply when a plaintiff was compelled, due to the defendant's negligence, to build a new structure to replace an old but sufficient structure). For similar definitions of

An influential view implies that something has gone wrong in *Burr v. Clark* and similar cases giving rise to betterments. The view, already telegraphed, goes something like this: under the make-whole ideal—sometimes called the "rightful position" standard—compensatory damages aim to make plaintiffs whole, or to make things for the plaintiff as though the wrongdoing had never happened.[18] But awarding betterments to plaintiffs makes them materially *more than whole* or leaves them *better off* than before the wrongdoing, at least to the extent that the market value or use value of their property is greater than it was before the wrongdoing.[19] Betterments thus reflect unjust overcompensation that courts should deduct from compensatory damages awards. Call this line of reasoning the "anti-betterment argument."

This argument is influential—and mistaken. As for its influence, Part I shows that courts rely on the anti-betterment argument to justify reducing compensatory damages awards to plaintiffs, often failing to consider whether the reductions are warranted. That is, they move directly from the make-whole premise to the conclusion that material betterments count as unjustified windfalls. And they do so without pausing to consider whether those enhancements of value rightly belong to the

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"betterment" from commentators, see Maree Chetwin & Tina Yee, *Reasonableness Resounds Through Damages: Its Impact on Betterment*, 12 N.Z. BUS. L.Q. 92, 93 (2006) (defining betterment as occurring when a plaintiff needs to restore or replace an item, and the restoration or replacement is of better condition, is more efficient, or will last longer); Michael G. Pratt, *Betterment,* 40 DALHOUSIE L.J. 67, 69 (2017) ("Betterment is the phenomenon of property being more valuable to the plaintiff after reinstatement than if it had not been wrongfully damaged."); JAMES M. FISCHER*,* UNDERSTANDING REMEDIES 32 (4th ed. 2021) (explaining that betterment is an economic principle and not an aesthetic one).

18. LAYCOCK & HASEN, *supra* note 9, at 14.

19. *See, e.g.*, Lawrence C. Young, Inc. v. Servair, Inc., 190 N.W.2d 316, 317 (Mich. Ct. App. 1971) ("The purpose of awarding damages is to compensate for damages incurred, not to provide the plaintiff with a windfall."); Corp. Air Fleet of Tenn., Inc. v. Gates Learjet, Inc., 589 F. Supp. 1076, 1082 (M.D. Tenn. 1984) (using the same language as *Servair*); P.A.M. Transp., Inc. v. Builders Transp., Inc., 568 N.E.2d 453, 458 (Ill. App. Ct. 1991) ("The purpose of awarding compensatory damages is to make the injured party whole, but not to enable him to profit at defendant's expense."); Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956, 958 (Fla. Dist. Ct. App. 2004) ("[T]he purpose of compensatory damages is to compensate, not to punish defendants or bestow a windfall on plaintiffs."). For more cases making this common argument, see *infra* notes 48, 51–63 and accompanying text.

plaintiff.[20] Although courts occasionally deny such offsets, they don't always—and nothing approximating a consistent approach has emerged.[21] The anti-betterment argument operates like an argumentative default. And because it operates to systematically reduce compensation for meritorious plaintiffs, the argument matters.

But the argument is mistaken. After spelling out the anti-betterment argument's premises more explicitly, Part II offers two objections to this conventional wisdom. Section A offers a doctrinal objection, highlighting several categories of cases in which courts allow plaintiffs to keep compensatory betterments. To the extent that the cases were correctly decided, it is false to assume—as the anti-betterment argument does—that courts may not allow compensatory damages to make plaintiffs more than materially whole. Even if this first objection is sound, however, it might seem like the anti-betterment argument can be saved with a small adjustment, one that recognizes rare exceptions to the make-whole ideal. Section B advances a conceptual objection, arguing that betterments should not be understood exclusively as exceptions to the make-whole ideal; instead, the ideal itself might require awarding material betterments. Compensatory damages aim to provide reasonable *substitutes* for losses. But because reasonable substitutes (e.g., a new boiler for an old one) often create additional value along other evaluative dimensions (e.g., a boiler with higher market value and years of remaining useful life), providing adequate substitutes will often make plaintiffs materially better off in some way. Material betterments thus follow from the view that compensatory damages provide a form of substitutionary remedy. But courts routinely fail to recognize this basic point. And plaintiff compensation suffers as a result.

While Part II criticizes the anti-betterment argument, Part III takes a more constructive turn: it shows why awarding betterments may be morally required. The core argument is grounded in basic fairness.[22] To begin, to the extent that

20. *See infra* Part I.

21. Ariel Porat & Eric Posner, *Offsetting Benefits*, 100 VA. L. REV. 1165, 1166 (2014) ("The legal rules that govern [offsetting benefits cases] are widely acknowledged to be a mess.").

22. The fairness argument already appears in inchoate form in some U.S. jurisdictions but more explicitly in jurisdictions outside the United States. *See infra* notes 168–84 and accompanying text.

remedies compensate for damaged and destroyed property, repairing or replacing that property is often entirely reasonable. And sometimes reasonable repairs and replacements incidentally yield enhanced material value—i.e., a betterment. When this happens, the question arises about who most fairly should be allowed to capture this value as between the victim and wrongdoer. And often the answer to this question is clear: the victim. In concrete terms, as between the Burrs and the Clarks, the Clarks more fairly bore the cost of replacing the boiler with the only reasonably available substitute boiler, which happened to be a new one—even if doing so incidentally conferred on the Burrs a better boiler than they had before the accident.[23]

That said, *Burr v. Clark* and other cases like it may seem like relatively easy and rare cases: they typically involve betterments that arose because there was no reasonably available alternative. The Burrs, remember, obtained a new boiler partly because no used one was readily available.[24] But harder cases exist in which the plaintiffs nonetheless sought to make themselves better off than before the wrongdoing even though cheaper options were available.[25] Suppose, for example, that the Burrs had the option of purchasing a used boiler but nonetheless opted for a pricier, newer one. The question becomes whether plaintiffs can fairly demand that defendants shoulder the costs of betterment in these circumstances too.

Part IV argues that the answer is, sometimes, yes. I argue that remedies law ought to accommodate plaintiff efforts to abide by an ideal of resilience. That is, the law ought to help victims of wrongdoings to "bounce back better." This ideal is undergirded by several compelling interests. Sometimes the interests involve mere practical rationality—e.g., that we should always strive to make things better, full stop. But seeking and securing material betterments also serves interests in proving to ourselves and others that we can continue to pursue and achieve important long-term self-enhancing goals in the aftermath of serious setbacks. Material betterments, in other words, play an important role in providing compelling proof to ourselves and others that we can still be effective agents. I also suggest that

23. *See supra* notes 1–7 and accompanying text.

24. Burr v. Clark, 190 P.2d 769, 774 (Wash. 1948).

25. *See, e.g.*, sources cited *supra* notes 17–19.

accommodating these important interests provides reasons for permitting plaintiffs to keep material betterments. So, en route to showing that compensatory betterments are more frequently justifiable than previously recognized, Part IV also shows how courts can and should accommodate ideals of resilience in evaluating claims for damages, despite having wholly ignored the ideal so far.

Still, not every betterment is justifiable. A slip and fall causing minimal injuries should not provide the basis for a multi-billion-dollar verdict, even on the grounds that we have strong reasons to make the plaintiff better off than before. Accordingly, Part V acknowledges that awarding material betterments to plaintiffs *does* sometimes seem unreasonable, while suggesting some reasons why. After evaluating several explanations, Part V concludes that awarding betterments to plaintiffs is less likely to be fair if doing so is either punitive or unjustly exploitative. Although this analysis is tentative, the chief takeaway is that the make-whole ideal itself plays *no essential role* in explaining what makes a betterment unjust. The anti-betterment argument, in other words, simply performs no justificatory work.

This Article's conclusions range from modest to radical. Modestly, I draw attention to case law and commentary that show that rightful compensatory damages may legitimately include material betterments. Less modestly, this Article shows that courts err—and have erred systematically—when they deny plaintiffs material betterments *solely* on basis of the make-whole ideal. Plaintiff-side counsel also should be mindful that their clients may be entitled to more compensation than they may realize. More radically, this Article argues that because "bouncing back better" is not cheap, and because tort victims have compelling reasons to do so anyway, wrongdoers rather than victims ought to bear those resilience-related expenses. But regardless of whether this Article's more unconventional claims are embraced, what remains clear is that using compensatory damages to make plaintiffs materially better off than before the wrongdoing is not as conceptually bizarre as it might initially seem, and that betterments aren't inherently unjust—despite the ubiquity of the anti-betterment argument. And if these claims are correct, perhaps cases like *Burr v. Clark* shouldn't be quite so rare after all.

I. THE ANTI-BETTERMENT ARGUMENT AND WHY IT MATTERS

Burr v. Clark could have come out very differently. Indeed, more than two decades earlier, a Nebraska jury faced remarkably similar facts involving an old, destroyed boiler that the plaintiffs replaced with a new one under circumstances in which purchasing a used boiler wasn't an option.[26] But rather than awarding to the plaintiffs the full costs of replacing the destroyed boiler with that new one ($1,250), the Nebraska Supreme Court upheld a partial award ($1,125), which likely "took into consideration the difference in value of the new and the old boiler,"[27] presumably concluding that they ought not make the plaintiffs materially better off as a result of awarding compensation. The jury, in other words, might have taken into account something like the anti-betterment argument.

That argument, already previewed in the Introduction, is ubiquitous and widely embraced by courts and commentators. Before turning to its details, however, consider two clarifications. The first is about terminology. Keep in mind that a "betterment" occurs when, as a result of a compensatory damages award, the plaintiff would be made materially better off—or placed "in a better position"—than they would have been had the wrong not been done.[28] The typical case involves a plaintiff that seeks reimbursements for property repairs or replacements that have resulted in either (1) increased market value of the property above its pre-harm market value[29] or (2) added years of useful life to the plaintiff's property, compared with the estimated years of useful life that had remained immediately before the old property's destruction.[30] Let's call an "unambiguous betterment"

26. Koyen v. Citizens' Nat'l Bank, 185 N.W. 413, 414 (Neb. 1921).

27. *Id.* at 415.

28. *See* sources cited *supra* note 17.

29. *See, e.g.*, City of New Orleans *ex rel.* Sewerage & Water Bd. v. Am. Com. Lines, Inc., 662 F.2d 1121, 1124 (5th Cir. 1981) (holding there was no error when the trial court failed to depreciate the original assets).

30. *Cf.* Oregon *ex rel.* State Highway Comm'n v. Tug Go-Getter, 468 F.2d 1270, 1273 (9th Cir. 1972) (holding that there was no depreciation of damages where the replacement of a damaged pier extended the lifespan of a bridge structure). Notice, moreover, that "betterment" in the typical case is used more narrowly than the broader notion of "benefit" associated with the offsetting-benefits rule. *See* Porat & Posner, *supra* note 21, at 1166 (defining offsetting benefits as "benefits that the victim or a third party receives as a result of the same act that caused the harm"). That rule is discussed in Part II.A, *infra*.

one that produces *both* enhanced market value and additional lifespan. The Burrs, for example, likely received an unambiguous betterment in this sense when they were fully reimbursed for purchasing a new boiler to replace their destroyed one.[31]

The second clarification concerns the class of cases that this Article will address. This Article focuses on doctrines governing compensatory damages for damaged or destroyed *property*, thereby bracketing questions raised, for example, by consequential and non-pecuniary damages. Apart from easing exposition, narrowing the Article's scope has a theoretical motivation. The Article ultimately argues that courts should not automatically reduce compensatory damages payouts to the extent that they include some betterments, at least not solely on the grounds that failing to exclude them would violate the make-whole ideal. But identifying genuine "betterments" is difficult for some forms of compensation—say, large sums paid for pain and suffering. After all, without relatively precise market values for pain and suffering, it is difficult to say whether such sums accurately represent "full" compensation or instead whether they make plaintiffs materially better off than before. Focusing narrowly on compensating for harms to property, by contrast, raises fewer such concerns; whether a new boiler has higher market value or use value than an old one, for example, is comparatively straightforward.[32] This narrow focus allows the present discussion to bypass the question of whether a betterment in fact exists in a given case and turn directly to the question of whether those value enhancements are justifiable.

Having clarified terminology and methodology, we can now turn to the anti-betterment argument. The argument is simple, initially compelling, and starts with the make-whole ideal—i.e., the idea that compensatory damages awards seek to make plaintiffs whole: no more, no less.[33] (Alternatively, the same ideal is expressed in terms of making things for the plaintiff as if the wrongdoing never happened, or as close as possible.[34]) But if plaintiffs seek reimbursement for repairs or replacements that increase the market value of their property as a result (compared

31. *See supra* notes 1–7 and accompanying text.

32. *See supra* notes 1–7 and accompanying text.

33. *See* sources cited *supra* note 9 and accompanying text.

34. LAYCOCK & HASEN, *supra* note 9, at 14–15 (discussing the plaintiff's "rightful position").

to the market value of that which was destroyed), or if repairs or replacements add years of useful life to fixtures or other goods (compared to the remaining years of useful life that the old property had left), plaintiffs in effect seek to capture additional value beyond that which was lost. This additional value, if kept, would make plaintiffs *more than* whole. (In other words, it would make things for the plaintiff materially *better than* before the wrongdoing.) Forcing defendants to pay in excess of what they are required to pay under the make-whole ideal is unjust, and any additional value obtained by the plaintiff would count as an unjust windfall. So, betterments are unjustly included as part of compensatory damages awards.[35] Courts therefore ought to reduce compensatory damages awards to avoid this injustice.

This argument is spelled out more explicitly in Part II. But for now, notice the influence of this argument, which is routinely endorsed by courts and commentators. A representative example comes from the U.S. Court of Appeals for the Fifth Circuit, which lays out a version of the argument in *Freeport Sulphur Co. v. S/S Hermosa*:

> The purpose of compensatory damages in tort cases is to place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred. When there is a tortious injury to property and the market value of that property is unknown, the amount of damages must be determined by the cost of repairs to the property. These two principles are in apparent conflict when the repairs that are necessary to correct damage caused by negligence enhance the pretort value of the plaintiff's property. In such a case, the increase in value is deducted from the plaintiff's recovery for the cost of repairs.[36]

Another example, drawn from a federal district court in *In re Crounse Corp.*, articulates a version of the argument in terms of unjust enrichment:

> The replacement of an old structure or vessel may leave the injured party in a better position than it occupied before the accident, at the expense of the tortfeasor. Courts have developed the term "betterment" to describe such an outcome, and to prevent this manner of unjust

35. Notice also that the argument doesn't depend on peculiarity of the make-whole metaphor. We can put the point differently. If the aim of compensatory damages is to make things as though the wrongdoing never happened, then betterments seem to flout this aim, making things *better than* before the wrongdoing. An example of this version appears immediately below in *Freeport Sulphur Co. v. S/S Hermosa*, 526 F.2d 300 (5th Cir. 1976) (en banc).

36. *Freeport Sulphur Co.*, 526 F.2d at 304 (citations omitted).

> enrichment, courts have traditionally adhered to judicially-crafted rules.[37]

Notice how quickly both courts reason from the make-whole premise to the conclusion that betterments must be excluded from compensatory damages awards. In *Freeport Sulphur*, the court moves from the ideal—i.e., the idea that the "purpose of compensatory damages in tort cases is to place the injured person as nearly as possibly in the condition he would have occupied if the wrong had not occurred"[38]—to the conclusion that any "increase" in value must be deducted from the plaintiff's recovery.[39] In *Crounse*, the court observes that betterments entail "leav[ing] the injured party in a better position than it occupied before the accident," and, without argument, characterizes such betterments as a form of "unjust enrichment."[40] Both courts present their conclusions as though they follow automatically, needing no further explanation.[41] Their arguments rationalize exactly the kind of reduction of damages discussed above,[42] while downplaying conflicting authority, sparse though it is.[43] And these courts are not alone. Other courts enlist the anti-betterment

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37. Tenn. Valley Auth. v. Vulcan Materials Co. (*In re* Crounse Corp.), 956 F. Supp. 1377, 1381 (W.D. Tenn. 1996).

38. *Freeport Sulphur Co.*, 526 F.2d at 304.

39. *Id.*

40. *In re Crounse Corp.*, 956 F. Supp. at 1381.

41. *Cf. supra* notes 36–37 and accompanying text (exemplifying conclusory reasoning).

42. *See supra* notes 26–35 and accompanying text.

43. *Freeport Sulphur Co.*, 526 F.2d at 304 n.5 ("In *The Baltimore*, dicta indicate that, in negligence cases, there should not be any deduction for new materials furnished in place of the old. This dicta has not generally been followed, as the cases cited throughout Part II of this opinion indicate." (citation omitted)). In fairness, the court in *Crounse* devotes more space listing apparent exceptions to the no-betterment rule, but largely leaves them unexplained, or suggests that the appearances are deceiving: they are cases in which no genuine betterment exists. *See, e.g.*, *In re Crounse Corp.*, 956 F. Supp. at 1382 ("Courts have recognized that repair to an integral part of a structure [by replacing old parts with new ones] tends not to add to the life expectancy of the entire structure."). This "integral part" exception simply changes the subject: new parts add to the life expectancy of that same integral part, even if not the whole structure. Brakes are integral parts of cars. Yet replacing old brakes with new ones adds years of useful life to my *brakes*. The fact that it might not extend the life of my car overall is irrelevant. My new brakes add value.

argument to justify practices that reduce compensation for plaintiffs.[44]

This point is worth emphasizing. Not only is the anti-betterment argument influential, it serves to reduce compensatory damages awards to meritorious plaintiffs. As the forthcoming *Restatement (Third) of Torts: Remedies* remarks:

> It might seem to be a clear corollary of the rightful-position standard [i.e., the make-whole ideal] . . . that an injured plaintiff should recover only the net damages—the harm suffered minus any benefit conferred. *And very often the law proceeds in just this way*. Whenever damages are calculated on a net basis—whenever losses are netted against savings or new revenues—the offsetting-benefits rule is implicitly at work. Very often, this netting seems such an obvious part of the damage calculation that it is unnecessary to invoke any rule.[45]

As we will see when we return to the *Restatement* below, its views on betterments are more complicated than these comments suggest; indeed, I will rely on the *Restatement* to criticize the anti-betterment argument.[46] For now, notice that the *Restatement*—insofar as it reflects the standard practice in

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44. *See, e.g.*, Lawrence C. Young, Inc. v. Servair, Inc., 190 N.W.2d 316, 317 (Mich. Ct. App. 1971) ("The purpose of awarding damages is to compensate for damages incurred, not to provide the plaintiff with a windfall."); Netzel v. United Parcel Serv., Inc., 537 N.E.2d 1348, 1354 (Ill. App. Ct. 1989) ("The purpose of compensatory damages is to make the injured party whole, not to punish the defendant or bestow a windfall upon the plaintiff."); Pillsbury Co. v. Midland Enters., Inc., 715 F. Supp. 738, 764 (E.D. La. 1989) ("[W]here repair or replacement costs form the basis of the damage award, the Court must determine whether the repair or replacement adds new value to or extends the useful life of the property; if so, an appropriate reduction from the full repair or replacement costs should be made." (footnote omitted)); P.A.M. Transp., Inc. v. Builders Transp., Inc., 568 N.E.2d 453, 458 (Ill. App. Ct. 1991) ("The purpose of awarding compensatory damages is to make the injured party whole, but not to enable him to profit at defendant's expense."); Algie v. RCA Glob. Commc'ns, Inc., 891 F. Supp. 875, 899 (S.D.N.Y. 1994), *aff'd*, 60 F.3d 956 (2d Cir. 1995) (asserting that making plaintiffs whole is the objective, not awarding windfalls); Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956, 958 (Fla. Dist. Ct. App. 2004) (noting the same); Evenson v. Lilley, 228 P.3d 420, 422 (Kan. Ct. App. 2010) ("The underlying purpose of any measure of damages in a tort action is to make the injured party whole again. Consequently, any rule for measuring damages is subordinate to the goal of compensating an injured party for the injury done. . . . Nevertheless, an injured party is not entitled to a windfall." (citations omitted)).

45. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. b (AM. L. INST., Tentative Draft No. 1, 2022) (emphasis added). This commentary accompanies its restatement of the so-called *offsetting benefits rule*, which holds that courts should reduce a plaintiff's compensatory damages awards to reflect benefits they receive as a result of the tort. *Id.* § 9.

46. *See* discussion *infra* Part II.

courts—acknowledges that courts deduct material benefits conferred on plaintiffs as an obvious and normal feature of damages calculations, one that hardly warrants attention.[47] The new *Restatement*, in other words, embraces the anti-betterment argument, at least in the mine-run of cases.

In addition to directly rationalizing reduced plaintiff payouts, the anti-betterment argument also does so indirectly. This is because courts and commentators enlist the argument's concerns about plaintiff "windfalls" to justify legal practices that, in turn, reduce plaintiff compensation. Consider, for example, the so-called "lesser than" or "lesser of two" rule adopted by some jurisdictions.[48] The rule stipulates that restoration costs should be awarded only if they are less than lost market value.[49] Sometimes the rule is formulated in terms of priority, such that market diminution effectively operates as a strict ceiling on damages payouts: restoration costs become available only when they are less than the market-loss measure, effectively making such costs mandatory whenever they are less than that measure.[50]

Anti-betterment reasoning supplies one rationale for this rule. In *Gass v. Agate Ice Cream*, the New York Court of Appeals considered whether the plaintiff should be reimbursed for the cost of automobile repairs rather than the diminution of market

47. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. b (AM. L. INST., Tentative Draft No. 1, 2022). To be sure, the *Restatement* allows that exceptions to this rule exist. *Id.* § 9 ("But the court may refuse to set off such a benefit if it would be inequitable or inappropriate to do so."). But they are, in the *Restatement*'s view, truly exceptions—rare ones at that. The *Restatement* denies that the make-whole ideal might entail conferring material betterments. *Id.* at § 2 cmt. c, e.

48. The name, "the lesser than rule," is expressly adopted by courts in the State of Washington. *See, e.g.*, Thompson v. King Feed & Nutrition Serv., Inc., 105 P.3d 378, 382 (Wash. 2005) (en banc) ("[P]rior case law holds [that] the 'lesser than' rule is limited to situations where property is damaged and capable of repair."). New York also adopts the rule, calling it the "lesser of two" principle. *See* World Trade Ctr. Props. LLC v. Am. Airlines, Inc. (*In re* Sept. 11 Litig.), 802 F.3d 314, 329 (2d Cir. 2015) ("New York courts have applied the 'lesser of two' principle across a broad spectrum of possessory interests . . . .").

49. *See King Feed & Nutrition Serv.*, 105 P.3d at 383 ("[A]n owner is entitled to recover the entire cost of restoring a damaged building to 'its' former condition unless those costs exceed 'its' diminution in value.").

50. *Cf.* DOBBS & ROBERTS, *supra* note 11, § 5.2(4), at 513 (observing that limiting repair costs to diminished market value renders the two measures equivalent for all practical purposes).

value.[51] A defendant had negligently damaged the plaintiff's car.[52] At trial, a jury awarded the plaintiff $224, the estimated cost of repair, even though the car's value before the accident was only $100.[53] The sole question on appeal involved the proper measure of damages.[54] The New York Court of Appeals reversed the trial court's judgment and granted a new trial.[55] In justifying the reversal, Chief Judge Cuthbert Pound explained—while articulating the lesser-than rule—that awarding repair costs "is subject to the limitation, first, that the cost of repairs must be less than the diminution in market value due to the injury, and, secondly, that the repairs must never exceed the value of the automobile itself as it was before the injury."[56] To justify these lesser-than limitations, Chief Judge Pound asserted, without further argument, that "[t]he plaintiff should not benefit by the loss."[57]

Chief Judge Pound's rationale, terse though it is, reflects the anti-betterment argument. He quickly and implicitly moves from the premise that the plaintiff has somehow benefited from a loss (e.g., received a betterment), to the conclusion that this benefit should not be kept by the plaintiff. To do so would amount to an unjust windfall, in virtue of making the plaintiff more than whole, or better off than before the wrongdoing.[58] The judge's task, then, is to ensure that any properly documented, material gain received by a plaintiff flowing from repairs or replacements should be offset against the compensatory damages award.

Gass was decided in 1934.[59] But several jurisdictions, New York included, still endorse the lesser-than rule as Judge Pound

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51. Gass v. Agate Ice Cream, Inc., 190 N.E. 323, 324 (N.Y. 1934).

52. *Id.*

53. *Id.* (noting that the jury was not bound to believe the defendant's expert witness who valued the car at $100, but no other evidence regarding the value was presented).

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *See id.* ("The anomaly is thus presented of a recovery for the estimated cost of repairs in excess of the amount of a recovery in case of a total loss. A rule of damages which produces such a result is obviously unfair.").

59. *Id.* at 323.

articulated it.[60] They also appear to have endorsed his seemingly "axiomatic" rationale[61]—i.e., the anti-betterment argument.[62] So, the argument helps to rationalize this compensation-limiting rule. Indeed, the argument has played a similar role in justifying other pro-defendant practices that limit compensation.[63]

In sum, the anti-betterment argument is consequential, leading courts to reduce plaintiff payments both directly (as a result of accepting, implicitly or explicitly, the anti-betterment argument) and indirectly (as a result of applying doctrines that limit compensation, where those doctrines are in turn justified by anti-betterment reasoning). To the extent that meritorious plaintiffs routinely obtain less than they demand, and to the extent that this argument rationalizes this result, the argument matters. But the argument's popularity is unfortunate because it is not sound.

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60. *See, e.g.*, Wooster Feed Mfg. Co. v. Village of Tallmadge, 81 N.E.2d 811, 812 (Ohio Ct. App. 1948) (adopting explicitly Chief Judge Pound's articulation of the lesser-than rule, as well as his stated rationale); *see also* Ass'n of Md. Pilots v. Balt. & Ohio R.R. Co., 304 F. Supp. 548, 558 (D. Md. 1969) ("It is axiomatic that a plaintiff should not benefit by his loss."). Some New York Courts continue to embrace the rule articulated in *Gass* and its rationale. *See* Danseglio v. Jemval Corp., No. 14291/06, 2011 WL 1731423, at *7 (N.Y. Sup. Ct. Apr. 14, 2011) (recognizing that plaintiffs should not benefit from their loss), *aff'd as modified*, 99 A.D.3d 853 (N.Y. App. Div. 2012); *see also* Kalka v. Schorer, No. SC-000156-21/LF, 2022 WL 3333187, at *4 (N.Y. City Ct. May 10, 2022) ("The plaintiff is not entitled to benefit by the loss . . . [W]here repairs place the property in a better condition than before the accident, the increased value of the repaired article above its value before the accident may be deducted from the cost of repairs." (alteration in original) (quotation omitted)); Bartle v. Poly Enters., No. SC-000031-22/LF, 2022 WL 3272338, at *1 (N.Y. City Ct. May 10, 2022) (same).

61. *See Ass'n of Md. Pilots*, 304 F. Supp. at 558.

62. Hewlett v. Tug Evelyn, 283 F. Supp. 917, 919–20 (E.D. Va. 1968) (finding Chief Justice Pound's principle controlling and emphasizing one should not benefit by the loss).

63. For example, courts' preference for market loss measures rather than restoration costs is sometimes explained by reference to anti-betterment reasoning. *See, e.g.*, New Mexico v. Gen. Elec. Co., 335 F. Supp. 2d 1185, 1252 (D.N.M. 2004) ("Use of the diminished value measure in turn eliminates any risk of economic waste or windfall." (quoting 1 DAN B. DOBBS, LAW OF REMEDIES § 5.2(2), at 716 (2d ed. 1993))); New Prime, Inc. v. Brandon Balchune Constr., Inc., 3:14-CR-2410, 2017 WL 6419066 at *4 (M.D. Pa. Dec. 15, 2017) ("Limiting damages to the 'diminution in value' in cases involving permanent harm is meant to prevent a 'windfall' to plaintiffs.").

II. AGAINST THE ANTI-BETTERMENT ARGUMENT

To see why the anti-betterment argument isn't sound, spelling out its premises more explicitly will help. This will not only expose the tacit assumptions on which the argument relies, it will also help identify similar but subtly distinct objections to the argument.

The anti-betterment argument can be elaborated as follows:

> Premise 1: A compensatory damages remedy is permissibly awarded to a plaintiff if and only if it makes that plaintiff whole and no more than whole—i.e., if the compensation places the plaintiff in the position they would have occupied but for the wrongdoing.
>
> Premise 2: If a compensatory damages award in effect confers a betterment on a plaintiff (i.e., allows the plaintiff to keep awards that increase the plaintiff's market-value holdings or years of property's useful life as compared to before the wrongdoing), then that award thereby makes plaintiffs more than whole.
>
> Conclusion: Therefore, if a compensatory damages award in effect confers a betterment on a plaintiff, then that award is not permissibly awarded to that plaintiff.

This more explicit formulation of the anti-betterment argument contains nothing new. Briefly, Premise 1 articulates the make-whole ideal, while clarifying that compensatory damages may not make plaintiffs "more than whole." This clarification borders on platitude in many jurisdictions,[64] and it is often assumed to be a straightforward corollary or necessary implication of the make-whole ideal itself.[65] Premise 2 focuses on the concrete context of compensatory damages awarded for harms to property. The premise expresses the commonplace that enhanced material value, either in terms of enhanced market value or additional years of useful life, counts as a betterment that leaves plaintiffs materially *better off* than before the wrongdoing, and in turn, makes those plaintiffs more than whole. Finally, the conclusion follows straightforwardly: compensatory damages are impermissibly awarded when they make plaintiffs more than whole. The cure for such impermissible awards is a short step away: courts should reduce excess payments to eliminate

64. *See, e.g.*, Kassman v. Am. Univ., 546 F.2d 1029, 1033 (D.C. Cir. 1976) ("The office of compensatory damages is to make the plaintiff whole, but certainly not more than whole.").

65. *Cf.* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. b (AM. L. INST., Tentative Draft No. 1, 2022) ("Very often, this netting seems such an obvious part of the damage calculation that it is unnecessary to invoke any rule.").

betterments, thereby rendering plaintiffs whole and compensatory awards legitimate.

But both premises are false. Doctrinally speaking, Premise 1 is false because it is not the case that courts are permitted to award compensatory damages *if and only if* compensation makes a plaintiff whole and no more than whole, even when "more than whole" is taken to mean enhancing market value or extending property's useful life.[66] Section A will show why. Section B makes a more radical and unfamiliar claim: that betterments can be rightfully awarded *as a consequence of* the make-whole ideal.[67] That is, Premise 2 is false: the make-whole ideal is not only consistent with awarding betterments, it is conceptually possible that the ideal sometimes *requires* betterments.[68] This entails, surprisingly, that sometimes plaintiffs should be allowed to keep their betterments as a matter of correctly applying the make-whole ideal in the first place, rather than merely as a rare exception to the make-whole rule.

A. A DOCTRINAL OBJECTION

Recall the first premise of the anti-betterment argument: compensatory damages awards are justly awarded if and only if they make plaintiffs materially whole and no more than whole. This premise is false because courts sometimes permissibly allow plaintiffs to keep compensatory awards that make them materially more than whole.[69]

Before turning to doctrine, it is worth mentioning that some leading tort theorists—who themselves draw on positive law in support of their views—would reject this assumption out of hand. Civil recourse theorists have long argued, for example, that it is a mistake—a *doctrinal* mistake—to think that the only aim of compensatory damages is to make plaintiffs whole. John Goldberg and Benjamin C. Zipursky have pointed out that courts instruct juries to award plaintiffs *fair* or *reasonable*

66. *See* discussion *infra* Part II.A.

67. *See* discussion *infra* Part II.B.

68. *See* discussion *infra* Part II.B.

69. *Cf.* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 437 (2006) ("[M]any tort victims . . . appropriately obtain a remedy in the form of less-than-full compensation or more-than-full compensation.").

compensation rather than full compensation.[70] True, Goldberg and Zipursky recognize that the make-whole ideal plays a role in providing guidance to courts and juries as they search for a reasonable amount.[71] But Goldberg and Zipursky deny that making plaintiffs whole is always necessary or sufficient for awarding just compensation.[72] They further argue that this observation undermines theories of tort law and compensatory damages that rely on corrective justice theory, which seem wedded to the make-whole ideal.[73]

This civil recourse challenge is compelling.[74] But not everyone has been persuaded to reject corrective justice theory or the make-whole ideal associated with it.[75] There nevertheless

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70. JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS 155 (2020) ("Juries usually determine damages and are guided in doing so by an instruction from the trial judge to set damages in an amount that constitutes 'fair' and 'reasonable' compensation to the plaintiff.").

71. *Id.* ("[O]ne might suppose that 'making whole' can be a sensible way of fleshing out what counts as 'fair compensation.'").

72. *See generally* sources cited *supra* notes 69–70 (discussing compensation and fairness schemes).

73. *See* John C.P. Goldberg & Benjamin C. Zipursky, *Replies to Commentators*, 41 LAW & PHIL. 127, 153–54 (2022) (arguing that, although the make-whole doctrine is well-established in corrective justice theory, the "fair and reasonable" approach is more fundamental). To be clear, this doctrinal objection to corrective justice theories of tort law is not the only one that Goldberg and Zipursky have offered. *See, e.g.*, Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 709–24 (2003) (presenting a critique of the corrective justice theory).

74. Other tort theorists—who otherwise disagree with Goldberg and Zipursky on much else—likewise deny that the make-whole ideal is the sole criterion for determining whether compensatory damages are correctly awarded. *See generally* Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107 (2011); Hanoch Dagan & Avihay Dorfman, *Substantive Remedies*, 96 NOTRE DAME L. REV. 513, 518, 555–57 (2020) (laying out other criteria).

75. Some legal philosophers argue that the make-whole ideal is *essential* for understanding tort law's remedial aims, not merely a useful rule of thumb. *See, e.g.*, John Gardner, *Torts and Other Wrongs,* 39 FLA. ST. U. L. REV. 43, 53 (2011) ("[R]eparative damages would still be the common law's remedy of first resort . . . . [f]or this is the only remedy against a tortfeasor that the successful plaintiff enjoys *as of right*."); *see also* Ernest J. Weinrib, *The Gains and Losses of Corrective Justice*, 44 DUKE L.J. 277, 297 (1994) ("As long as private law is a practice in which reasons and justifications matter, corrective justice will be the key to understanding it."). Stephen Smith argues specifically that Goldberg and Zipursky have difficulty accounting for the law's strong preference for make-whole relief in ordinary cases involving pecuniary losses. Stephen A. Smith, *Are*

remains a doctrinal challenge to Premise 1, one that doesn't necessarily entail abandoning corrective justice theory or embracing civil recourse theory. The objection is that the anti-betterment argument ignores doctrinal *exceptions* to the make-whole rule. This argument, unlike Goldberg and Zipursky's, neither characterizes the make-whole ideal itself as a dispensable rule of thumb nor outright rejects the view that compensatory damages seek corrective justice. Instead, following the forthcoming *Restatement (Third) of Torts: Remedies*, this Article will assume for the sake of argument that compensatory damages and the make-whole ideal are expressions of corrective justice,[76] expressions which nevertheless allow for certain exceptions. So, even if we were to grant—contra Goldberg and Zipursky—that compensatory damages primarily seek corrective justice, this Article argues that the anti-betterment argument would still be flawed for doctrinal reasons.

And the forthcoming *Restatement* illustrates why. Section 9 begins with language expressing the so-called "offsetting benefits rule," a rule that initially seems consistent with the anti-betterment argument's conclusion.[77] The rule states that "[i]f a defendant's tort harms the plaintiff and also causes or enables the plaintiff to receive a benefit that the plaintiff could not have received but for the tort, the plaintiff's damages generally should be reduced by the amount of the benefit."[78] Taken alone, this language seems consistent with the uncompromising lesson of the anti-betterment argument. The would-be plaintiff "benefits" at issue in this Article are *betterments*—again, enhanced property value, whether couched in terms of enhanced market value or

Tort Remedies 'Civil Recourse'?, 41 LAW & PHIL. 83, 101 (2022) (arguing that the civil recourse theory's focus on wrongdoing and accountability struggles to justify damage awards equal to the plaintiff's loss). Goldberg and Zipursky reply "that it is a mistake to think of making whole as the foundational principle of tort law or tort damages," arguing that, as an interpretation of law, compensation that is "'fair and reasonable'—is the more general principle; the latter—'make whole'—is a specific articulation of it." Goldberg & Zipursky, *supra* note 73, at 152–54.

76. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 2 cmt. b (AM. L. INST., Tentative Draft No. 1, 2022) ("Restoration to the plaintiff's rightful position does corrective justice between the parties; it shifts the costs of defendant's tort from the plaintiff who suffered those costs back to the defendant who inflicted them.").

77. *See id.* § 9.

78. *See id.*

added useful life, that derive from repairing or replacing harmed property.[79] And the ordinary operation of the offsetting-benefits rule is exactly the same as the ordinary operation of the anti-betterment argument: to compel courts to reduce compensatory damages awards to reflect any demonstrated benefits, including betterments that the defendants can establish to the court's satisfaction.[80] In *Freeport Sulphur Co. v. S/S Hermosa*, for example, certain repairs increased the useful life of a dock from twenty-five years (immediately before its injury) to thirty-five years (after repair).[81] Rather than awarding the plaintiff a *full* reimbursement for those repair costs, the court instructed the district court to award a *partial* reimbursement by deducting an amount reflecting the dock's extended useful life.[82] This reasoning seems impeccable from the perspective of the anti-betterment argument. And it fully comports with the first sentence of section 9 of the forthcoming *Restatement*.[83]

But section 9—unlike *Freeport Sulphur* or other cases embracing the anti-betterment argument—also unambiguously recognizes an exception.[84] Specifically, section 9 adds that "the court may refuse to set off such a benefit *if it would be inequitable or inappropriate to do so*."[85] This exception seems broad. Indeed, the new *Restatement*'s formulation of the exception is *broader* than the previous iteration, which appeared in section

79. *See* sources cited *supra* note 17.

80. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 (AM. L. INST., Tentative Draft No. 1, 2022).

81. Freeport Sulphur Co. v. S/S Hermosa, 526 F. 2d 300, 306 (5th Cir. 1976) (en banc).

82. *See id.* ("The percentage of useful life extension is thus 10/35, or 28.6 percent. The district court erred in applying the fraction 10/25, or 40 percent, to the cost of repairs. This fraction represents the useful life extension as a percentage of the precollision remaining useful life of the property. As indicated above, however, the proper ratio is that which the useful life extension bears to the remaining useful life of the property after repairs." (citation omitted)).

83. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 (AM. L. INST., Tentative Draft No. 1, 2022) ("If a defendant's tort harms the plaintiff and also causes or enables the plaintiff to receive a benefit that the plaintiff could not have received but for the tort, the plaintiff's damages generally should be reduced by the amount of the benefit.").

84. *See id.* ("But the court may refuse to set off such a benefit if it would be inequitable or inappropriate to do so.").

85. *Id.* (emphasis added).

920 of the *Restatement (Second) of Torts*.[86] The old section 920 similarly allowed that courts may decline to offset benefits when doing so would be "inequitable."[87] But the new *Restatement* adds that courts can also decline if doing so would be "inappropriate," as well.[88] In explaining why the new *Restatement* "expands the exception," comment f cites a "concern that 'inequitable' may not capture the full range of considerations" for which courts may permissibly decline to subtract benefits from compensation.[89]

Without purporting to be exhaustive, and while insisting that what counts as "inequitable or inappropriate is for the considered judgment of the court," the *Restatement*'s comments illustrate the exception with examples.[90] The first set of cases involves those for which "plaintiffs should not in effect be charged for benefits that were thrust upon them, that they cannot readily convert to cash, and that they may not have wanted."[91] In *Brown v. Colegio de Abogados*, for example, a bar association impermissibly mandated its members to purchase life insurance.[92] A class of lawyers—members of the association—sought and received a damages award in the form of reimbursements for premiums paid.[93] But the bar association asked the court to reduce this award because the members actually received coverage.[94] In effect, the association argued that the damages award should be offset entirely. But the court declined to reduce the award

86. *See* RESTATEMENT (SECOND) OF TORTS § 920 (AM. L. INST. 1979) ("When the defendant's tortious conduct has caused harm to the plaintiff or to his property and in so doing has conferred a special benefit to the interest of the plaintiff that was harmed, the value of the benefit conferred is considered in mitigation of damages, to the extent that this is equitable.").

87. *See id.*

88. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 (AM. L. INST., Tentative Draft No. 1, 2022).

89. *Id.* § 9 cmt. f.

90. *Id.*

91. *Id.*

92. Brown v. Colegio de Abogados de P.R., 613 F.3d 44, 47 (1st Cir. 2010).

93. *Id.* at 47–48 (recapping that the district court awarded $4,156,988.70 in damages).

94. *Id.* at 52 ("Colegio has consistently argued . . . that the class is composed of non-objecting parties who got the benefit of the insurance protection and that therefore no damages should be awarded.").

calculation because the plaintiffs had not desired the coverage to begin with.[95]

Other cases involve a benefit "to which plaintiff was already entitled."[96] In *Levi v. Schwartz*, for example, the plaintiff sought reimbursement for harm caused to his property by the city's construction project.[97] On appeal, the defendants argued that the lower court should have instructed the jury to consider the benefits that the city's project conferred on the plaintiff in calculating damages, "such as better streets, sewage, and lighting, in mitigation of damages."[98] But the appeals court rejected the argument because those are precisely the type of public benefits that the city's project was slated to confer on the plaintiff anyway.[99]

The *Restatement* also describes cases in which "the benefit appears as a windfall that should more appropriately go to plaintiff than to defendant, especially if defendant was highly culpable."[100] To illustrate, in *United States v. House*, the defendant prisoner killed another prisoner, Jack Callison, and the government sought reimbursement for Callison's autopsy, funeral, and related expenses.[101] The defendant argued that he saved the state far more money by not having to feed or house Callison,

95. *Id.* at 52–54 (ruling that the same damages calculation will be used as that used by the district court for all members remaining in the class following the expiration of the notice period but that the overall award might decrease slightly if individual members elect to opt out).

96. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. f (AM. L. INST., Tentative Draft No. 1, 2022).

97. Levi v. Schwartz, 95 A.2d 322, 325 (Md. 1953) (claiming that "defendants had unlawfully entered their lot and from it had excavated and removed soil which constituted the support of its front, sides, and rear, so that the property has become subject to washing and other damages from the elements").

98. *Id.* at 328.

99. *Id.* (recognizing that a plaintiff is not barred from recovery if the injury suffered is the result of the "forethought of the plaintiff" or of a gift); *cf.* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. f, illus. 5 (AM. L. INST., Tentative Draft No. 1, 2022) (utilizing a similar fact pattern to demonstrate the same holding).

100. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. f (AM. L. INST., Tentative Draft No. 1, 2022).

101. 808 F.2d 508, 509 (7th Cir. 1986) (stating the lower court ordered restitution in the amount of $1,303.61 to cover the expenses).

and thus should not have to pay criminal restitution.[102] In rejecting this argument, a federal appeals court pointed out that the defendant was already incarcerated and indigent, and that the main consequence of forcing him to pay compensation was to block certain funds from being dispersed to his commissary account, thereby depriving him of snacks and other goods available in the commissary.[103] Judge Frank Easterbrook, writing for the majority, added that depriving the defendant of snacks was tantamount to the only available punishment remaining for the state to impose against the inmate for the killing.[104]

These aren't the only cases where subtracting benefits would be "inequitable or inappropriate."[105] For our purposes,

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102. *See id.* ("The slaying saved the government money, House insists; $1,303 is peanuts compared with the cost of feeding and housing Callison even for a month.").

103. *See id.* at 510 ("The computation should not be complicated by possible offsets. The murderer might as well say that because his victim would have died of natural causes if not by violence, he did not 'cause' funeral expenses to be incurred."); *cf.* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. f, illus. 6 (AM. L. INST., Tentative Draft No. 1, 2022) (providing a similar fact pattern and outcome).

104. *House*, 808 F.2d at 510 ("One may doubt whether deprivation of potato chips is an appropriate maximum punishment for manslaughter, but it was the only one available to the sentencing court.").

105. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. f (AM. L. INST., Tentative Draft No. 1, 2022) ("These examples are not exhaustive."). Here are two further exceptions not expressly recognized by the *Restatement*. *Burr v. Clark* represents the first, by now familiar example in which the defendant simply failed to satisfy its burden of establishing that a betterment exists even though it is manifestly clear that it does. *See generally* Burr v. Clark, 190 P.2d 769, 775 (Wash. 1948) ("In the absence of such proof by the appellants, we will not consider the question of mitigation of damages."). The second involves cases in which plaintiffs are allowed to recover repair costs needed to upgrade their property by bringing them into conformity with new property regulation—i.e., additional costs associated with bringing their property "up to code." *See, e.g.*, Zindell v. Cent. Mut. Ins. Co. of Chicago, 269 N.W. 327, 329–31 (Wis. 1936) (affirming $3,251 damages to rebuild walls within the current regulations requiring 8-inch walls); Jesel v. Benas, 160 S.W. 528, 529 (Mo. Ct. App. 1913) (ruling similarly that ordinances required the repaired wall to be thicker than the damaged wall); Peluso v. Singer Gen. Precision, Inc., Link Div., 365 N.E.2d 390, 401 (Ill. App. Ct. 1977) ("We hold that the cost of repair can include the expense necessary to conform those repairs to existing building codes."); Fed. Ins. Co. v. Cogswell Sprinkler Co., No. 03-CV-10920-MEL, 2004 WL 5383992, at *2 (D. Mass. Sept. 30, 2004) (allowing recovery for "the costs of bringing the building into code compliance should be a recoverable part of the damage" even though "the upgrades in this case represent an improvement in the property's pre-loss condition").

however, notice that they undermine Premise 1 of the anti-betterment argument. Premise 1 insists that compensatory damages cannot be appropriately awarded if they make plaintiffs *more than whole*. But, as shown above, the *Restatement* and case law suggest the contrary: there is an important exception to that rule which allows courts to make plaintiffs more than whole when the alternative would be "inequitable or inappropriate."[106] So, insofar as we take the forthcoming *Restatement* to accurately capture development of the common law, and insofar as the cases it relies on are correctly decided, Premise 1 is therefore false. And courts that explicitly or implicitly adopt the reasoning of the anti-betterment argument risk making a mistake while undercompensating plaintiffs as a result.

Still, one might object that the doctrinal objection misses the point. Premise 1 might be understood as a normative claim, rather, about what compensatory damages *should* be—and how they should be understood—despite case law to the contrary.[107] Likewise, cases and commentators who offer something like the anti-betterment argument might simply criticize the cases that come out differently as wrongly decided. Although we turn to normative justifications for awarding betterments more explicitly in Parts III and IV below, there remains a more fundamental challenge to the anti-betterment argument, one that operates at a conceptual level, and one that seems to have escaped the attention of courts and commentators. We take up that objection next.

B. A CONCEPTUAL OBJECTION

There is another objection, which targets Premise 2 and forces us to address the deeper philosophical foundations of the make-whole ideal. Recall Premise 2:

> If a compensatory damages award in effect confers a betterment on a plaintiff (i.e., allows the plaintiff to keep awards that increase the plaintiff's market-value holdings or years of property's useful life as compared to before the wrongdoing), then that award thereby makes plaintiffs more than whole.

This premise asserts that betterments make plaintiffs more than whole, insofar as they increase the material value of the

106. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 (AM. L. INST., Tentative Draft No. 1, 2022).

107. *See* cases cited *supra* note 17 (giving examples of windfall to plaintiffs).

plaintiff's holdings above the level they held before the wrongdoing. "Material value" in the relevant sense is measured either by reference to market value or years of useful life.[108]

But even this claim is false. Making a plaintiff whole might require enhancing the material value of their holdings.[109] To see how, Subsection 1 identifies two leading interpretations of the make-whole ideal—normative and material—and shows that making a plaintiff (normatively) whole is consistent with making her (materially) better.[110] Subsection 2 turns to the material interpretation and assumes, for the sake of argument, that the material interpretation is correct. Despite this assumption, Subsection 2 explains why the make-whole ideal remains compatible with awarding betterments.[111] Finally, Subsection 3 provides a fully general argument for why the make-whole ideal is in principle compatible with betterments, regardless of whether the make-whole ideal is interpreted materially or normatively.[112] Regardless of interpretation, the upshot of my analysis will be that plaintiffs may sometimes be permitted to keep betterments not just as an *exception* to the make-whole ideal but also as a *consequence* of correctly applying it. This matters because it forces courts to consider whether the make-whole ideal requires betterments in *any* case involving potential betterments, rather than in rare or exceptional cases. And my argument matters because plaintiffs' attorneys might be leaving their clients' money on the table by failing to notice how making whole might require making (materially) better.

1. How Betterments Are Consistent with Making (Normatively) Whole

The first interpretation of the make-whole ideal—the *normative* one—is associated with the work of Ernest Weinrib and Arthur Ripstein.[113] On this view, the make-whole ideal is

108. *See* Pillsbury Co. v. Midland Enters., Inc., 715 F. Supp. 738, 764 (E.D. La. 1989) (useful life); *Burr*, 190 P.2d at 774 (fair market value).

109. *See, e.g.*, *Burr*, 190 P.2d at 774–75 (awarding damages equivalent to a new boiler as opposed to limiting to cost of a secondhand boiler).

110. *See infra* Part II.B.1.

111. *See infra* Part II.B.2.

112. *See infra* Part II.B.3.

113. ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 63 (1995) ("[C]orrective justice requires the actor to restore to the victim the amount representing the

compatible with several measures of damages—i.e., costs of repair, replacement, or lost market value—for a simple reason: the principle aims to restore a *normative* equilibrium, not a material one.[114] Although their respective theories are rich and elegant, for our purposes their key point is that legal rights and duties survive their own violation.[115] Stealing my wallet, for example, doesn't destroy my right to exclusive possession of it.[116] Legal remedies, like compensatory damages in this picture, seek to restore one's material means but do so in order to restore the normative efficacy of that continuing right. That is, undoing material losses matters but only derivatively as a result of repairing a normative situation.[117]

Understanding the make-whole ideal in terms of restoring a normative equilibrium, rather than a material one, allows us to see how multiple measures of property damages might be compatible with that ideal. After all, determining whether a remedy succeeds in restoring normative efficacy may depend on a more fine-grained specification of the underlying right and its violation.[118] If, in a given case, negligent property harms are significant primarily because they involve violating my right to use and enjoy my land, then awarding repair or replacement costs is likely the most fitting remedy—even if those costs exceed fair market losses. If, in another case, the injury is significant primarily because it undermines my right to sell my land, then market losses likely better capture the nature and extent of the harm.[119] No measure of loss will necessarily apply in all cases because no single measure will necessarily guarantee that a right will continue to be normatively efficacious in all cases. Instead, the comparatively abstract dictate of making a plaintiff

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actor's self-enrichment at the victim's expense."); RIPSTEIN, *supra* note 9, at 243 (describing how rights survive violations).

114. RIPSTEIN, *supra* note 9, at 243 (describing violated rights exceeding damages).

115. *Id.*

116. *See id.*

117. *Id.*; *see also* Weinrib, *supra* note 75, at 294 (discussing the correlation between normative gains and losses over material ones in torts).

118. I am unsure whether Ripstein would adopt my elaboration of his views at this point.

119. *Cf.* Pratt, *supra* note 17, at 71 (arguing that diminution of market value is the best measure of damages, at best, "only in the special case of damage to property that is valued solely for its market return").

whole involves ensuring that legal rights and duties have robust influence after their violation.[120]

But notice this: understanding the make-whole ideal in normative rather than material terms opens up the possibility that, in order to restore a right's *normative* efficacy, a damages award might require making a plaintiff *materially* better off than before a wrongdoing. And it's a good thing, too—at least to the extent that some corrective justice theorists aspire to account for equitable remedies like replevin and disgorgement, which straightforwardly allow for "betterments" of this variety.[121] To illustrate, suppose that *A* steals *B*'s corn, and then distills it into something more valuable, like whiskey.[122] Or suppose that *A* steals *B*'s car and repairs it, thereby making *B*'s car more valuable than before.[123] Or, consider a case where *A* steals *B*'s watch and sells it on the market for a profit that far exceeds what *B* paid for it.[124] In each case, *B* may recover from *A* something more valuable than *B* had before the wrongdoing, whether whiskey, an enhanced car, or handsome profits.[125] And if these types of remedies instantiate rather than deviate from the make-whole ideal, they offer clear counterexamples to the claim that the ideal *never*

120. RIPSTEIN, *supra* note 9, at 234.

121. *See* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 82–85 (2009) (discussing these examples in tort, property, and contract law). Ernest Weinrib argues that rental value might be the appropriate remedy in some cases where disgorgement seems available. His analysis of *Olwell v. Nye & Nissen Co.*, 173 P.2d 652 (Wash. 1946), is an example. *See* ERNEST J. WEINRIB, CORRECTIVE JUSTICE 132–38 (2012). For a helpful discussion of the two writers on this point, see Nicolas B. Cornell, *What Do We Remedy?*, *in* CIVIL WRONGS AND JUSTICE IN PRIVATE LAW 209, 215–20 (Paul B. Miller & John Oberdiek eds., 2020) (arguing that the Ripstein/Weinrib debate on the correct remedy in *Olwell* shows that rights violations underdetermine the correct remedy). For our purposes, even if Weinrib were correct, the plaintiff would still receive back his property *plus* rental value that he did not previously have, and thus arguably a betterment.

122. *See* Silsbury v. McCoon, 3 N.Y. 379, 379 (1850) ("Where a quantity of corn was taken from the owner by a *wilful* trespasser and converted by him into whisky, *held*, that the property was not changed, and that the whisky belonged to the owner of the original material." (alteration in original)).

123. *See generally* Austrian Motors, Ltd. v. Travelers Ins. Co., 275 S.E.2d 702 (Ga. Ct. App. 1980) (involving a stolen car that was taken in to receive over $4,000 in improvements).

124. *See* DOBBS & ROBERTS, *supra* note 11, § 4.4(3), at 450 (discussing gains from sale of another's legal property).

125. *See id.* ("[H]e recovers whatever enhanced value it has as a result of defendant's efforts.").

allows plaintiffs remedies that make them materially better off than before the defendant's wrongdoing.

But one might distinguish these cases. After all, they involve cases of equitable or restitutionary relief.[126] And one might endorse a conception of corrective justice according to which restitution—understood as either a cause of action or remedy—is simply beyond the purview of corrective justice.[127] Corrective justice, on this account, is about undoing wrongful *material* losses, which excludes cases involving unjust material gains by definition. Indeed, this understanding of corrective justice seems to motivate the understanding of the make-whole ideal endorsed by the *Restatement (Third) of Torts: Remedies*.[128] So, even though showing how (material) betterments may be compatible with making plaintiffs (normatively) whole, it remains more challenging to show that (material) betterments are compatible with the *material* understanding of the make-whole ideal. We turn to that issue next.

2. How Betterments Are Consistent with Making (Materially) Whole

There is another reason compensatory betterments are in principle compatible with the make-whole ideal, even if we assume that it serves to undo material losses rather than normative ones. But to see why we must take a closer look at material losses. We will see that no matter how we interpret the make-whole ideal's conception of materiality, we end up with the result where the make-whole ideal—properly understood—is compatible with awarding to plaintiffs compensatory damages that include betterments. More concretely, on any plausible material interpretation of the make-whole ideal, we can understand *Burr v. Clark*'s result as, in principle, justifiable as a correct application of that ideal, rather than merely a limited exception to it.

To begin, consider two possible material interpretations of the make-whole ideal, neither of which can be correct. First, we might be tempted by the view that "making whole" in the context

126. *See id.* (discussing when restitution is appropriate as relief).

127. I thank Doug Laycock for discussion on this point.

128. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 2, cmt. b (AM. L. INST., Tentative Draft No. 1, 2022) ("Restoration to the plaintiff's rightful position does corrective justice between the parties; it shifts the costs of defendant's tort from the plaintiff who suffered those costs back to the defendant who inflicted them.").

of property harms means nothing more or less than restoring lost market value;[129] second, we might understand making whole when property damage exists in terms of reimbursing the plaintiff for repairing or replacing physical property that was damaged or destroyed.[130] Neither measure of damages provides an adequate interpretation of what it might mean, fundamentally, to make a plaintiff "materially" whole.

Consider lost market value. In the United States, this measure of damages for property harms is the leading one.[131] But the make-whole ideal still should not be understood to seek undoing market losses to the exclusion of all else. To see why, assume that the make-whole ideal requires exclusively undoing market losses. Now, consider the following cases: (1) the defendant damages the plaintiff's real property but makes no difference to its market valuation;[132] (2) the defendant increases the market value of the plaintiff's property by removing the plaintiff's trees without permission;[133] (3) the defendant negligently and irreparably damages plaintiff's old (but still functional) water heater, but the heater had no market value immediately before its destruction.[134] If making whole requires restoring market value and nothing else, plaintiffs would receive no compensation in these cases. Indeed, in the second case, the tortfeasor created a net *gain* for the plaintiff.

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129. *See, e.g.*, Bd. of Cnty. Comm'rs v. Slovek, 723 P.2d 1309, 1314 (Colo. 1986) (acknowledging that although the market-diminution measure won't always apply and asserting that "the proper measure of damages [for harmed property] was the diminution of market value"); Trinity Church v. John Hancock Mut. Life Ins. Co., 502 N.E.2d 532, 535 (Mass. 1987) ("The general rule for measuring property damage is diminution in market value."); Dickens v. Oxy Vinyls, LP, 631 F. Supp. 2d 859, 865 (W.D. Ky. 2009) ("Diminution in value of the property is the only proper measure of damages."); Irwin v. Degtiarov, 8 N.E.3d 296, 300 (Mass. App. Ct. 2014) ("Diminution in market value is the common method of measuring damage to property under our common law.").

130. *See, e.g.*, Canal Barge Co., Inc. v. Griffith, 480 F.2d 11, 27 (5th Cir. 1973) ("[R]epair may leave property in a better condition.").

131. *See* sources cited *supra* note 129 (discussing diminution in market value).

132. RESTATEMENT OF TORTS (SECOND) § 929 cmt. b. (AM. L. INST. 1979) (discussing when the cost to repair or diminution of value applies).

133. Based loosely on *Glavin v. Eckman*, 881 N.E.2d 820, 824 (Mass. App. Ct. 2008) (discussing how removing a tree may increase the market value of the property).

134. Based loosely on *Burr v. Clark*, 190 P.2d 769, 774 (Wash. 1948) (comparing the value of the boiler before being damaged to a new one).

This implication doesn't fit judicial practice—and with good reason. When the market diminution measure would yield no recovery, either because there is no market loss or no discernible one, courts will often award plaintiffs reasonable costs for repairing or replacing damaged or destroyed property.[135] This fallback is not generally understood by courts to count as overcompensation; if anything, the *failure* to award reasonable repair or replacement costs would count as *undercompensation*, or as some courts put the point, a failure to "adequately" account for losses.[136] Courts appear to award such restoration costs in order to make plaintiffs materially whole, rather than in spite of it.[137] So, at least from point of view of judicial practice, interpreting the make-whole principle to require restoring all and only lost market value is implausible.

My aim in advancing this lack-of-fit argument is limited. After all, sometimes meritorious plaintiffs do in fact obtain little more than nominal damages when they fail to provide adequate

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135. *See, e.g.*, Hogan Transfer & Storage Corp. v. Waymire, 399 N.E.2d 779, 787–88 (Ind. Ct. App. 1980) ("The nature of the property damage may clearly indicate that change in market value will not compensate for actual loss, leading the court to award damages measured by cost of repair."); Goodyear Tire & Rubber Co. v. Holmes, 193 P.3d 821, 827 (Colo. 2008) (finding cost of repairs or replacement the appropriate measure of damages when diminution in value damages fail to make whole). One might offer a disjunctive account, according to which the make-whole ideal allows for *either* market losses or restoration costs, strictly construed. But this interpretation basically reduces the ideal to a mere restatement of the law without explaining its underlying foundations. It also seems arbitrary, while failing to explain why additional disjuncts are forbidden.

136. State v. Hawthorne, 573 So. 2d 330, 333 (Fla. 1991) ("[W]e can foresee instances when the market value of the property would not adequately reflect the victim's loss or when the consideration of the percentage of depreciation would be inequitable." (footnote omitted)).

137. *See, e.g.*, U.S. Fid. & Guar. Co. v. Davis, 413 P.2d 590, 592 (Ariz. Ct. App. 1966) ("[I]f the market value would not be a fair compensation to the plaintiff for his loss, he is sometimes permitted to recover the value to him based on his actual money loss"); Morrison v. Campbell, 431 S.W.3d 611, 620 (Tex. App. 2014) (observing that "in some cases we acknowledge that the recovery of the market value of property does not make the plaintiff whole," given that Texas courts sometimes allow "recovery of damages in excess of the market value of personal property, but only when the property can be repaired rather than when property must be replaced"). Also, even if one is preoccupied primarily with the normative question of what remedies *should be* rather than matters of interpretive fit, courts—I will insist—largely have it right on this score. Allowing defendants to pay nothing in such cases, especially where other grounds for relief aren't available, often seems prima facie unreasonable or unfair, yielding a right without an effective remedy.

proof of losses.[138] And private law theorists concerned with normative issues may care primarily about what judicial practice *should* be as opposed to what it presently entails. Still, our initial goal—en route to criticism or reform—is *understanding* the make-whole ideal and canvassing plausible accounts of it. Given this goal, the lack-of-fit objection should at least motivate us to pursue a more plausible alternative. And it simply isn't plausible to maintain that the ideal is concerned exclusively with restoring lost market value.

Consider the second option. Perhaps making plaintiffs whole for their property losses should be interpreted in terms of physical repair or replacement, exclusively.[139] The object of repair or replacement, at least where a tangible thing is at issue, should be the real or personal property itself rather than the market value of that property. From the perspective of this alternative baseline, awarding the costs of repair or replacement—i.e., restoration costs—makes plaintiffs whole.

But this interpretation of the make-whole principle also raises problems. Again, courts tend to prefer the market-diminution measure when restoration costs seem excessive, and especially when they seem disproportionate compared to the market-value metric.[140] But if we are assuming, for the sake of argument, that the make-whole ideal calls exclusively for reimbursing costs of repair or replacement, judicial preference for the market-loss metric would mean that courts frequently undercompensate. Recall the *Gass* case, in which the jury awarded the plaintiff $224 to repair the plaintiff's $100 vehicle.[141] The court reversed the award on the ground that it exceeded the total fair market value of the vehicle ($100), which was the maximum that would have been awarded under the New York's lesser-than rule.[142] Similarly, courts that award lost market value often do

138. *See, e.g.*, Fisk v. Powell, 84 N.W.2d 736, 741 (Mich. 1957) ("[P]laintiffs are limited to only nominal damages in the absence of any showing of actual damages.").

139. *See* sources cited *supra* note 129 (discussing cost of repair or replacement damages).

140. DOBBS & ROBERTS, *supra* note 11, § 5.13(2), at 570; *see, e.g.*, Thompson v. King Feed & Nutrition Serv., Inc., 105 P.3d 378, 383 (Wash. 2005) (en banc) (favoring the $300,000 market diminution award over the disproportionate $500,000 cost of replacement).

141. Gass v. Agate Ice Cream, 190 N.E. 323, 324.

142. *Id.*

so *because* they view restoration costs to be excessive—i.e., that conferring restoration costs in some cases would confer a wasteful windfall and thereby flout rather than effectuate the make-whole ideal.[143]

For these reasons, a material interpretation of the make-whole ideal cannot plausibly be understood exclusively in terms of restoring market value or reimbursing costs associated with repairing or replacing physical property. Perhaps we should conclude that courts are simply behaving inconsistently while pursuing some form of rough justice. Sometimes making whole means awarding lost market value, sometimes it means reimbursing costs of repair or replacement. But this apparent incoherence might instead motivate a different interpretation of the make-whole ideal. Ideally, the right kind of interpretation would reconcile decisions to award full restoration costs with those that favor awarding lost market value.

A natural interpretive strategy is to increase the level of abstraction with which we understand materiality.[144] Rather than strictly in terms of market value or physical restoration, one

143. *See, e.g.*, Ritter v. Bergmann, 891 N.E.2d 248, 257 (Mass. App. Ct. 2008) ("Replacement or restoration costs are also appropriate 'where diminution in market value is unavailable or unsatisfactory as a measure of damages.'"). There is another possibility—that market losses are proxies for restoration costs, or vice versa. Interpreted this way, the make-whole ideal still wouldn't plausibly fit in cases where (1) market losses are known but negligible, and (2) courts award at least some restoration costs *precisely because* a market-based award would insufficiently compensate. And this problem is wholly apart from the seeming arbitrariness of selecting one measure as the genuine dictate of the make-whole principle.

144. There is a version of this strategy that is a non-starter but worth mentioning since courts sometimes invoke it—that reimbursement or replacement costs are proxies for market value losses. *Cf.* Mono v. Peter Pan Bus Lines, Inc., 13 F. Supp. 2d 471, 480 (S.D.N.Y. 1998) ("Thus, courts use replacement cost as a means of calculating the monetary value of the lost services."). Suffice it to say that this is fiction in many cases; there are cases in which there truly is no measurable market value losses because there are no market losses, but in which costs for repair or replacement are wholly appropriate. *See, e.g.*, Puget Sound Power & Light Co. v. Strong, 816 P.2d 716, 717 (Wash. 1991) ("As recognized by the court below, if the damaged property has no market value, the measure of damages is the cost of replacement."); Crompton Greaves, Ltd. v. Shippers Stevedoring Co., 776 F. Supp. 2d 375, 394 (S.D. Tex. 2011) ("If the property has no market value and can be replaced, replacement costs are the proper measure of damages." (quoting Pasadena State Bank v. Isaac, 228 S.W.2d 127, 128 (1950))). This set of cases would make no sense on this proxy strategy.

thought understands material loss in terms of lost *use value*.[145] Roughly, we might think of use value as the value of the material property to the owner, given the purposes for which the owner used that property.[146] In the mine-run of cases, restoring lost market value might serve as a reasonable proxy for restoring use value. If you negligently destroy my old car with market value x, then I am entitled to recover x to purchase a similar substitute in the used car market. But in other cases, market value is an inadequate proxy. Indeed, in some jurisdictions, reasonable replacement or repair costs are awarded only when the plaintiff shows that repair or replacement costs—which, again, might exceed market loss—are necessary to restore value "personal to the owner."[147] Although this exception is unwieldy and vaguely formulated, it does seem to presuppose or express something akin to use value; the exception might prove the rule according to which the property's value given its purpose in the plaintiff's life—its use value—is really what the make-whole ideal seeks to restore.

Understood as such, the make-whole ideal is not in principle incompatible with betterments. Recall that betterments arise when plaintiffs recover *either* more money than the amount of lost market value *or* receive full reimbursement for repairs or replacements that add more years of useful life than were lost by the property's damage or destruction.[148] Also recall that repairing or replacing property—as fully restoring use value might require—sometimes increases the property's market value above its value immediately before injury.[149] But this enhancement of market value wouldn't count as a genuine overcompensation if

145. I thank Oren Bracha for advancing this strategy in conversation.

146. The distinction between use value and exchange value (i.e., market value) has a long pedigree. For a recent discussion, see *In re* Oakley, 344 F.3d 709, 713 (7th Cir. 2003) ("The distinction that we are emphasizing is between use value and exchange value."); *see also* 1 KARL MARX, CAPITAL: A CRITIQUE OF POLITICAL ECONOMY 126 (Ben Fowkes trans., Penguin Books & New Left Rev. 1976) (distinguishing between use value as "usefulness of a thing" and the exchange value, understood in relation to something else for which an external object can be exchanged).

147. *See, e.g.*, Wiersum v. Harder, 316 P.3d 557, 571 (Alaska 2013) (Fabe, C.J., concurring) ("[T]he court may award restoration costs that exceed diminution of value where there is a reason personal to the owner for restoring the land to the original condition.").

148. *See* discussion *supra* Part I.

149. DOBBS & ROBERTS, *supra* note 11, § 5.13(2), at 570.

we assume that the only relevant baseline for evaluating overcompensation is restoring lost use value. Insofar as they arise incidentally as byproducts of restoring use value, *market* betterments would be fully compatible with making plaintiffs whole, so understood. Indeed, some courts recognize this explicitly, at least when property can be appropriately repaired.[150] It follows that making whole is in principle compatible with making materially better off—at least to the extent that market-value or use-value betterments are byproducts of fully restoring that use value.

Notice what this analysis shows: Premise 2 of the anti-betterment argument is false. Recall the premise:

> If a compensatory damages award in effect confers a betterment on a plaintiff (i.e., allows the plaintiff to keep awards that *increase the plaintiff's market-value holdings* or years of property's useful life as compared to before the wrongdoing), *then that award thereby makes the plaintiff more than whole*.

But, as we have seen, if we understand the restoration of value that the make-whole ideal seeks in terms of restoring use value, this allows for the possibility that *market value* betterments are conceptually consistent with correctly applying the make-whole ideal. Again, market betterments may simply be byproducts of making plaintiffs materially whole with respect to their lost use value.

Nor is this result limited to understanding material value in terms of use value exclusively. The motivation for that understanding, you'll recall, was to explain how multiple measures of property damages might be compatible with making plaintiffs materially whole. Understanding material losses in terms of use-value losses is just one way of describing losses at a higher level of generality, under which we might subsume restoration costs or market value losses. But *any* attempt to describe the relevant material value more abstractly allows for the possibility that restoring that (abstract) value may, as a byproduct, allow for material betterment according to another value metric, whether it be market value or years of useful life. This possibility emerges

150. *See, e.g.*, Morrison v. Campbell, 431 S.W.3d 611, 620 (Tex. App. 2014) ("Texas courts have therefore allowed recovery of damages in excess of the market value of personal property, but only when the property can be repaired rather than when property must be replaced. Thus, in some case we acknowledge that the recovery of the market value of property does not make the plaintiff whole.").

as a result of describing the relevant value in more abstract terms.

To illustrate, suppose that the goal of making plaintiffs materially whole was to restore their "well-being"—a vague evaluative term if there ever was one.[151] If well-being were truly the evaluative baseline, then restoring that baseline might require compensating plaintiffs such that they end up with more money than their property losses, understood either in terms of lost market value or years of the property's useful life. At least nothing about restoring lost well-being itself intrinsically limits payments to lost market value or years of useful life. Making a plaintiff whole by restoring their well-being would seem conceptually compatible with conferring material betterments.

Thus, just like making plaintiffs normatively whole is compatible with material betterments, making them materially whole—insofar as we describe materiality in more abstract terms—is, too. And for much the same reason: the goal of restoring a normative equilibrium is an abstraction that creates conceptual space between that goal and various ways of achieving it, while making it difficult to rule out, in principle, any specific measure of material value as a way of achieving it. Understanding the goal of the make-whole ideal in terms of restoring material loss similarly allows for the possibility that achieving that goal may incidentally yield net gains along some other evaluative dimension that is not strictly identical to achieving that goal. Fully restoring use value may, in principle, yield net market gains. So, Premise 2 is false.

3. An Argument from the Nature of Substitutional Remedies

There is another reason why correctly applying the make-whole ideal can be compatible with betterments, regardless of whether understood materially or normatively. The reason is fully general, insofar as it also applies to normative interpretations of that ideal: compensating for losses is a *substitutional* activity.[152]

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151. For an overview on well-being, see Roger Crisp, *Well-Being*, STAN. ENCYC. OF PHIL. (Sept. 15, 2021), https://plato.stanford.edu/entries/well-being [https://perma.cc/VA87-CHRK].

152. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 1, cmt. f (AM. L. INST., Tentative Draft No. 1, 2022) ("Compensatory damages are substitutionary; they offer a sum of money as a substitute for plaintiff's true rightful position, the position in which the plaintiff was never harmed in the first place.").

To see why, notice that all interpretations of the make-whole ideal—again, regardless of whether they adopt a normative or material interpretation—must recognize that it is strictly speaking impossible for remedies to fully undo wrongful transactions.[153] This is true even in cases involving stolen property that can be returned to its rightful owner. As Scott Hershovitz reminds us, such cases are "not nearly so simple" as they seem,[154] given that the plaintiff cannot obtain the time spent without her property and cannot undo the indelible fact of having been the victim of theft. "[E]ven in the simple case," argues Hershovitz, "justice calls for something that is not an allocating back, but rather a giving of something new."[155] Indeed, even defenders of the make-whole ideal defend it by qualifying it,[156] implicitly recognizing that it's strictly speaking impossible to undo wrongdoings as though they never happened.[157]

One such qualifier is important for explaining the substitutionary nature of compensatory damages. Because wrongs can never be completely undone, much recent work on corrective justice theory, following an orthodox view of compensatory damages in general, holds that the make-whole ideal seeks—albeit imperfectly—to provide plaintiffs with *substitutes* for the losses

153. Hershovitz, *supra* note 74, at 117 (2011) ("We cannot undo what we have done."). Hershovitz ultimately tries to persuade scholars of tort law to abandon the metaphors of making plaintiffs "whole" or placing them in the position they would have occupied but for the wrongdoing. *See id.* And I sympathize. Erik Encarnacion, *Two Standards of Repair: Restoration and Resilience*, *in* 2 OXFORD STUDIES IN PRIVATE LAW THEORY 131, 131–58 (Paul B. Miller & John Oberdiek eds., 2023) [hereinafter Encarnacion, *Two Standards*] (suggesting alternatives to the making whole conception of damages); Erik Encarnacion, *Corrective Justice as Making Amends*, 62 BUFF. L. REV. 451, 474–90 (2014) [hereinafter Encarnacion, *Making Amends*] (critiquing sympathetically Hershovitz's conception of corrective justice). But this Article takes for granted the make-whole ideal given its entrenchment in legal practice.

154. Hershovitz, *supra* note 74, at 112.

155. *Id.*

156. *See, e.g.*, ANDREW S. GOLD, THE RIGHT OF REDRESS 117–20 (2020) (arguing, contra Hershovitz, that conventional compensatory damages "thus qualify as a form of justice even if they are not the justice we would hope for, all things considered"); *cf.* Hershovitz, *supra* note 74, at 116 (observing that defenders of corrective justice and the make-whole model formulate their ideals "chock full of qualifiers," and giving further examples).

157. *See* RESTATEMENT (THIRD) OF TORTS: REMEDIES § 1 cmt. f (AM. L. INST., Tentative Draft No. 1, 2022) (referring to compensatory damages as "substitutionary" and contrasting them with injunctive relief).

suffered by the plaintiff.[158] Put differently, restorative remedies are going to be, even in the best-case scenario, substitutional; they are, appealing to John Gardner's oft-asserted proviso, the "next-best" thing to having not wronged the plaintiff to begin with.[159]

Again, this is important. This interpretation of the make-whole ideal accepts, in effect, Hershovitz's criticism. Yes, strictly speaking, it is always impossible to make plaintiffs whole by undoing losses, regardless of whether those losses are construed normatively or materially. But the ideal, properly understood, seeks only to provide reasonable or next-best *substitutes* for those losses. Remedies are not time machines. But the make-whole ideal promises no such thing. It is, at best, a demand for defendants to proffer material, monetary substitutes for normative or material losses, to the extent possible.

Once this point is granted, however, the objection (finally) comes into view. Making whole is compatible with betterments because reasonable or next-best substitutes may in some respects be *better than* the thing being substituted for along some significant dimensions, even if not in all dimensions preferable to the original. That is just part of what it means for something to be a substitute. Some sugar substitutes have zero calories and are preferable to that extent (better than before), even if not suitable for baking (worse).[160] Nor is it obvious why the content of remedial rights and obligations, to the extent they seek to confer

158. John Gardner discusses unconvincing attempts to distinguish between reparation and substitution. Gardner, *supra* note 75, at 56 n.50 ("I regard [a] proposed 'substitution' measure of compensation, not as a rival to the reparative measure, but as just one among many possible reparative measures, the choice among which depends on the logic of 'next-best conformity' . . ."). Given Hershovitz's point, however, I think it is more accurate to say that compensatory damages are always substitutes for not having suffered losses to begin with. For the orthodox view, see RESTATEMENT (THIRD) OF TORTS: REMEDIES § 1 cmt. f (AM. L. INST., Tentative Draft No. 1, 2022) ("Compensatory damages are substitutionary; they offer a sum of money as a substitute for plaintiff's true rightful position, the position in which the plaintiff was never harmed in the first place.").

159. John Gardner, *What Is Tort Law For? Part I. The Place of Corrective Justice*, 30 L. & PHIL., Jan. 2011, at 1, 33.

160. Some sugar substitutes are better than others for baking. Aspartame is apparently bad for baking because the heat causes it to lose its sweetness. Pam Anderson, *How Sugar Substitutes Stack Up*, NAT'L GEOGRAPHIC (July 17, 2013), https://www.nationalgeographic.com/science/article/130717-sugar-substitutes-nutrasweet-splenda-stevia-baking [https://perma.cc/N3KP-JPJ2].

next-best substitutes for primary ones, must necessarily be worse across all dimensions than not having violated the right to begin with. Put slightly differently, the next-best thing might be materially better than the original along some important dimension, even if not better all things considered. Even the strictest adherents to the make-whole ideal can construe the principle to allow for material betterments. So, in turn, we have another reason to doubt Premise 2: compensatory damages aim to provide reasonable substitutes for losses, which in turn creates the possibility that material betterments might arise as a byproduct of providing these next-best substitutes.

In a similar spirit, Michael Pratt has observed that "sometimes reversing a loss requires a remedy that overcompensates the plaintiff," given "the familiar phenomenon of a goal that can be met in practice only by exceeding it, in the sense of overshooting the mark."[161] Pratt adds: "I cannot buy shoes for my son that are big enough for him except by buying shoes that are a little too big for him."[162] More abstractly, and drawing inspiration from Aristotle, if corrective justice involves restoring a normative equilibrium of a plaintiff, represented by a point on a number line (x), and if such a perfect restoration is strictly speaking impossible, we might still have the imperfect options of either undershooting the mark by a lot (x - 100) or overshooting by a little (x + 2). And if those are the options, it is not obvious why we should opt for undershooting rather than overshooting.

Despite the similarity, Pratt's point, and the Aristotelian version of it, might be misleading for our purposes. Both suggest that overcompensating by a little might be the only alternative to undercompensating by a lot. But my point is that correctly applying the make-whole ideal—*correctly* compensating—requires providing *substitutes* that might in turn require material betterments, without those betterments counting as genuinely overcompensatory, all things considered. Sometimes undoing a disturbance from x - 100 back to x itself is possible but will entail material betterments as represented on a *different* but parallel number line—e.g., from y - 3 to y + 20. Cases involving full reimbursement for repairs or replacements of damaged property, while yielding enhanced market values of the repaired or

161. Pratt, *supra* note 17, at 80.

162. *Id.*

replaced property, involve precisely this kind of parallel betterment.

Let's recap. The anti-betterment argument plays several roles. Litigants and courts appeal to it directly to justify reducing compensatory damages. It also plays the same role, albeit indirectly, by rationalizing doctrines that are in turn used to limit plaintiff payouts. But the core premises of the argument are false. As a matter of doctrine, sometimes it is inappropriate or inequitable for courts to discount compensatory damages awards, even if allowing plaintiffs to keep those full awards would make plaintiffs better off than before the wrongdoing. More surprising, there are sound conceptual reasons why correctly applying the make-whole ideal—whether interpreted normatively or materially—might actually *require* granting material betterments to plaintiffs. So, the anti-betterment argument is not sound.

III. FOR REASONABLE BETTERMENTS: A BASIC FAIRNESS ARGUMENT

Even if sometimes betterments are reasonably awarded as an *exception* to the make-whole ideal, and even if sometimes they are awarded as a correct *application* of that ideal, this doesn't establish as a normative matter *when* betterments ought to be awarded under either possibility. We need an argument—and not just any argument will do. After all, concerns about judicial administration readily justify allowing plaintiffs to keep betterments in some cases. Courts may award betterments because, for example, measuring a given betterment might on occasion be too difficult or speculative.[163] Public policy rationalizations are available in other cases. Failing to award betterments in some cases might, for example, create perverse incentives, like encouraging risky behavior in pursuit of "windfall" relief.[164] But none of these considerations speak to the demands of justice *between the parties themselves*. Rather, considerations of public policy and judicial administration purport to resolve the question of what parties owe to each other by appealing to the interests of *third parties*—e.g., the public and its courts. This is not to say that these interests are always irrelevant and that appealing to

163. Porat & Posner, *supra* note 21, at 1205–06 (listing factors weighing against betterments that sound in judicial administrability and public policy).

164. *Id.*

them is never justified. But the kind of argument we are looking for in the first instance—especially to the extent that betterments can be awarded consistently with corrective justice's make-whole ideal—will better justify awarding betterments as a matter of justice between disputing parties.[165]

With this justice-seeking constraint in mind, I offer a basic fairness argument. Consider the following example:

> *Coffee*. Suppose you negligently bump into me while walking to work, causing me to spill all my coffee (which I prepared at home). Being a fairly decent person, you recognize a duty to make things right. To that end, you offer to buy me a cup of coffee from the pricey coffee shop on the corner, since it's the closest reasonably available place to purchase a replacement. I agree, and you buy me coffee that not only is *more* coffee than I had before you bumped into me, but it is also more expensive than my home-prepared brew. It tastes better, too. Also suppose that, if you don't buy me the coffee, that will mean you will not have another reasonable opportunity to make sure I have coffee before work.

Notice a few things about *Coffee*. The coffee you purchased for me likely has a higher market value than the home-made cup of coffee I spilled. From that baseline, I am better off. But I am also better off along other evaluative dimensions: I have *more coffee* than I had before, and it is a newer (or fresher at least) cup of coffee. You have, as it were, replaced something old (and not so fresh) with something new (much fresher and tastier, for that matter). So, there's a sense in which, even from the perspective of securing a use-value replacement, my replacement is *better* than before. Indeed, there are several ways in which the replacement has made me materially better off than before.

Despite my improved lot, I submit, not only was the *offer* to purchase me this coffee reasonable, *asking you* to purchase the

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165. Ariel Porat and Eric Posner have offered an account of when benefits should be offset against compensatory awards *in general*, not just in cases involving betterments. *See* Porat & Posner, *supra* note 21, at 1177 ("Courts should calculate damages by subtracting benefits from the loss when those benefits are social rather than private."). Criticizing their views would pull us far off course. Suffice it to say that their core theoretical commitment—that damages "should equal the victim's loss minus any social benefit"—is dubious. *Id.* Among other concerns, I doubt whether individual plaintiffs, as opposed to someone else, should be reimbursed for *social* costs imposed by wrongdoers. Nor does that commitment place front and center the goal of doing justice between the parties, as opposed to securing public policy objectives wholly external to their interactions. A version of these well-known concerns is addressed by Ernest Weinrib. *See generally* WEINRIB, *supra* note 113. For further discussion, see *infra* note 245.

coffee likewise would have been reasonable. What would seem unreasonable is for you to later send me an invoice seeking to recoup the difference between the market value of the coffee you purchased for me and the market value of the coffee that you caused me to spill. And not just because this ex post invoice would be surprising. If you had agreed to purchase the new cup only on the condition that I pay you for the value added by the new cup, that too would have been unreasonable. And not merely because demanding reimbursement would be gauche or manifest vicious penny pinching. Seeking the difference seems unreasonable partly because it means that you are, in effect, seeking to retroactively force me to help pay for an improvement of my holdings—more and better coffee—that I secured only as a result of *your* negligence.[166] Recall: the only readily available substitute coffee happened to be pricier, better, and higher in volume. Other alternatives would (by stipulation) involve going without a cup of coffee altogether. So, who should capture the value—and, on the other side of the coin, who should bear the costs—of the incidental enhancements that derive from seeking out that substitute? As between the two of us, a natural answer as a matter of basic fairness is that the wrongdoer should bear the costs even if it means that the victim incidentally captures the added value.[167]

166. Michael Pratt similarly points out that it is generally impermissible to force people to purchase things they do not voluntary choose to buy, which is in turn a well-established proposition of the law of unjust enrichment. Pratt, *supra* note 17, at 83. We will return below to Pratt's position—some of which resonates with the one offered above. *See infra* Part III. For now, notice that the fairness argument above does not require characterizing the outcome—i.e., in which the plaintiff must receive less than full restoration costs—as involving a coerced purchase.

167. Analogous fairness arguments have been offered in support of the collateral source rule, which holds that courts should not offset benefits arising from independent sources (like the plaintiff's own insurance coverage) as a result of the tort. DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES AND MATERIALS 122–23 (8th ed. 2011) ("An underlying justification for the [collateral source] rule is that should a windfall arise because of an outside payment, the party to profit from that collateral source should be the injured person, not the tortfeasor."); WILLIAM MURRAY TABB ET AL., REMEDIES: CASES AND PROBLEMS 756 (7th ed. 2021) ("[P]roponents [of the collateral source rule] argue that as between the tortfeasor and the plaintiff, any windfall should be enjoyed by the innocent party."). Whether a betterment counts as a "windfall" depends on whether the betterment is understood as captured by the plaintiff as an exception to the make-whole rule or as a result of the correct application of it.

Courts in the United States occasionally feel the intuitive pull of cases like *Coffee*, though rarely articulating anything like the fairness argument. Other jurisdictions have been more forthright in allowing plaintiffs to capture reasonable betterments while relying on a version of the fairness argument already discussed. Consider an old admiralty case from England, *The Gazelle*.[168] The defendants owned a brig that damaged the ship, The Gazelle, and destroyed various of its contents.[169] The defendants sought to reduce the amount they owed, arguing that the plaintiffs were made better off as a result of the repairs, given that the repairs involved new "materials" or "articles" that replaced old ones.[170] The defendants, in other words, advanced the anti-betterment argument.[171] Writing in 1844, the High Court of Admiralty responded:

> The right against the wrongdoer is for a *restitutio in integrum*, and this restitution he is bound to make without calling upon the party injured to assist him in any way whatsoever. If the settlement of the indemnification be attended with any difficulty (and in those cases difficulties must and will frequently occur), the party in fault must bear the inconvenience. He has no right to fix this inconvenience upon the injured party; and *if that party derives incidentally a greater benefit than mere indemnification, it arises only from the impossibility of otherwise effecting such indemnification without exposing him to some loss or burden, which the law will not place upon him*.[172]

In this context, full "indemnification" would mean conferring on the successful plaintiff no more and no less that the pecuniary value of the losses that they have suffered (however ultimately calculated). But notice that the admiralty court seems to endorse the fairness argument floated above: that if providing an adequate substitute for the damaged goods inevitably yields some kind of material improvement for the victim, and if the wrongdoer cannot extract the value of that improvement without thereby imposing some type of burden on the plaintiff, then (other things being equal) the plaintiff should get to keep the extra value. What counts as a "loss or burden" is not further defined.[173] But being forced to finance a portion of one's own

168. *The Gazelle* (1844) 166 Eng. Rep. 759; 2 W. Rob. 279.

169. *Id.* at 760.

170. *Id.* at 761.

171. *Id.*

172. *Id.* at 760 (emphasis added).

173. *See id.* at 761 (referring to the betterment concept as an animating "principle" but proceeding to analyze the facts of the case before the court).

substitute coffee, or forced renovations more generally, seems to qualify. That is, having already suffered a wrongdoing, the victim shouldn't be further "burdened" by having to self-finance incidental gains that derive from adequate remedial substitutes. As one English court observed, subtracting the value of the betterment from the plaintiff's damages award would "be the equivalent of forcing the plaintiffs to invest their money" in improving their own property.[174] Whether characterized as coerced investment or not, subtracting a betterment from the costs of reasonable repairs would at a minimum count as an unwelcome burden that, in fairness, the defendant rather than the plaintiff should bear.

Although *The Gazelle* doesn't use the language of "betterment," more recent Canadian and Australian decisions have done so, while explicitly acknowledging that sometimes awarding full costs for repairing or replacing damaged property will be reasonable even if betterments arise as a result. Consider *Nan v. Black Pine Manufacturing*.[175] Black Pine negligently installed a hearth heater, which burned down the home of the Nan family.[176] The trial court awarded, among other costs, $69,000 representing replacement costs for building a new home on their land.[177] Black Pine appealed, arguing that this amount should be reduced by $32,000 to reflect the depreciation of the old house.[178] Allowing the Nans to recover costs for a new house would, in other words, confer a betterment on them that *per se* constituted overcompensation.[179] Black Pine, in other words, relied on the anti-betterment argument.

But the British Columbia Court of Appeal rejected it.[180] And the court did so despite explicitly endorsing the make-whole principle, adding that the court also had to be mindful that "the damages awarded must be *reasonable* both to the plaintiff and to the defendant."[181] Even assuming that the Nans obtained a $32,000 betterment, the court continued, that betterment was a

174. Harbutt's Plasticine Ltd v. Wayne Tank and Pump Co Ltd [1970] 1 QB 447 (Eng.).

175. Nan v. Black Pine Mfg. Ltd., 1991 CarswellBC 75 (Can. B.C. C.A.) (WL).

176. *Id.* para. 2.

177. *Id.* para. 3.

178. *Id.* para. 5.

179. *Id.*

180. *Id.* paras. 29–31.

181. *Id.* para. 19 (emphasis added).

reasonable result of the Nans' award.[182] The court in turn quoted approvingly an Australian court that had faced a strikingly similar fact pattern, remarking,

> The question is whether it was reasonable for the plaintiffs to desire to reinstate their property. In my opinion, there is only one answer. It undoubtedly was. They had, in effect, lost their family home. That is the nature of their damage, and not some diminution in the value of their land. Fair compensation requires that they be given back what they had before; and the only way in which that purpose can be achieved is to award them the sum reasonably necessary to restore their property to the condition in which it was before the defendants effectively destroyed it. . . . The cost to a defendant of competing measures is a significant factor. But it is but one ingredient in the calculation of whether the plaintiffs' claim is reasonable or not. There are cases, and this, in my opinion, is one, where the nature of the plaintiffs' loss is such that there is only one mode of fairly repairing it. If that turns out to be more expensive than another, the wrongdoer has no one but himself to blame.[183]

Parts of this passage are difficult to follow.[184] For one thing, it is not obvious why the court found that there was "only one" way of repairing a home such that it enhanced the value of the plaintiff's property. But what does seem clear is that the court is advancing a version of the fairness argument. Sometimes there is "only one mode of fairly repairing" the plaintiff's losses; sometimes, that is, the most reasonable alternative—perhaps even the best way to make a plaintiff whole—will incidentally yield additional value to the plaintiff or involve some additional cost to the defendant.

What makes a mode of repair "fair" or "most reasonable" in this sense? It will be difficult to say ex ante. But *Nan*, *Burr v. Clark*, and even *Coffee* all involve destroyed property—the homestead, the boiler, and the cup of coffee—that required urgent

182. *Id.* para. 23.

183. *Id.* para. 28 (quoting *Evans v Balog* (1976) 1 NSWLR 36, 40 (Austl.)).

184. The fact that the plaintiffs, both in the Australian case and the Nans' case, lost their family home seemed to play a role in the courts' judgment that full replacement costs seemed reasonable. But that role is unclear. Nor is it obvious that the intimate nature of the loss *should* play any role. As the *Nan* court itself explained, awarding full replacement costs might be justified even if the plaintiff is a *commercial* entity, suggesting that whether the loss involves the intimacy of the home, or the cold world of arm's length transactions, matters little. *See id.* paras. 21–22 (discussing previous cases involving damage to commercial properties).

replacement.[185] Somewhat less superficially, the property in each case played some functional role in the plaintiff's life, and time was of the essence in restoring the property to play that functional role, thereby allowing plaintiffs to continue pursuing their projects relatively uninterrupted. The Nans needed a house *now*, and assuming it was reasonable to insist on staying on their own land, this would require building a new house. The Burrs needed a functional boiler to remain in their home, and assuming it was reasonable to want to continue living there, this effectively required purchasing a new boiler. My mundane project involved bringing hot coffee to work to make the day slightly more bearable. Restoring this project required buying a new cup of coffee. All of the additional value that arose in the aftermath of the wrongdoing was incidental to each person's trying to recover the reasonable projects, big and small, that each plaintiff pursued. And the basic fairness argument encountered in discussing *Coffee* explains why.

One might object as follows: even if a skeptic grants that there are exceptions to the general rule against betterments, or even if they grant the more surprising claim that making plaintiffs whole might actually *require* allowing plaintiff betterments, the examples cited so far seem marginal, confined to cases in which the betterments arose only because there was no alternative repair or replacement that was readily available *without* betterment. Suppose, for example, that one could wave a magic wand and conjure an exact replacement thermos of home-brewed coffee. Wouldn't that replacement suffice (in *Coffee*)? Or suppose we could use the same wand to conjure up a brick-by-brick, item-by-item replacement of the lost house and its contents (as in *Nan*) or that the Burrs could have identified a cheaper but still functional boiler (as in *Burr*). Wouldn't we think that those cheaper replacements should limit the scope of damages rather than the more expensive alternative? And wouldn't an appeal to the make-whole ideal explain these intuitions? If so, this would suggest that the ideal exerts a gravitational pull towards restoring precisely either lost market value or use value (when available). Furthermore, even those rare courts or commentators that

185. Although it is tempting to add that the underlying property interest spoke to the plaintiff's basic needs—e.g., a warm house in the cold Northeastern winter, or housing—but *Coffee* suggests otherwise, at least assuming (perhaps controversially) that coffee is not a basic need.

admit to allowing betterments seem to do so grudgingly, simply because the alternative would be to in effect entail, as the *Restatement* remarks, "charg[ing plaintiffs] for benefits that were thrust upon them, that they cannot readily convert to cash, and that they may not have wanted."[186] In sum, the import of the fairness argument might be confined to cases where betterments are in effect coerced or imposed under something close to duress.

Part IV will take up this challenge directly. For now, notice that this criticism concedes this Article's basic objections against the anti-betterment argument. The challenge changes the subject, questioning the significance or scope of the objections rather than their soundness. But to the extent that a subset of plaintiffs may be entitled to compensation even if it makes them in some respects materially better off than before, and to the extent that plaintiffs do not enjoy those benefits—whether as a result of judicial or practitioner oversight—this seems consequential, at least to those plaintiffs who systematically receive less compensation than they demand.

IV. REASONABLE BETTERMENTS SHOULD ACCOMMODATE RESILIENCE

The anti-betterment argument is not sound because there are exceptions to the make-whole rule and because betterments can be compatible with that rule. That was the lesson of Part II. Part III argued that betterments might be inevitable when providing reasonable substitutes for material losses, and that when this happens, the wrongdoer rather than the victim should pay for those material improvements. Awarding offsets to defendants, in other words, would force plaintiffs to pay for improvements arising only as a result of the defendant's wrongdoing. And that's prima facie unfair.

Despite these results, the make-whole ideal still seems to exert a gravitational pull on compensatory damages. Betterment cases like *Coffee*, *Burr*, and *Nan* arguably involve circumstances in which plaintiffs obtained betterments at least partly because cheaper alternatives were not readily available. Had cheaper substitutes been available, opponents of betterments might argue, the betterments would not and should not have been awarded. When cheaper alternatives exist, there does not appear

186. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. f (AM. L. INST., Tentative Draft No. 1, 2022).

to be any countervailing force to prevent compensatory damages from being dragged downward.

This appearance is misleading. This Part will argue that individuals have *resilience interests* in making things better off than before wrongdoings, interests that justify allowing plaintiffs to keep betterments even when cheaper substitutes are available. To motivate this claim, Section A revisits the *Nan* case and the choices they faced in the immediate aftermath of the fire that destroyed their home. I argue that it was reasonable for them to seek material improvements in their home even if cheaper alternatives were available—indeed, that they are in some sense subject to criticism for foregoing improvements. Section B articulates in general terms an ideal at work in the reimagined *Nan* case—i.e., the ideal of resilience, while offering reasons why individuals might find the ideal attractive. Finally, Section C argues that, insofar as individuals seem reasonable in seeking to conform to the ideal, the law should accommodate their efforts by allowing them to keep their betterments. The upshot, in short, is that even if cheaper alternative substitutes are available that would have avoided the plaintiff's material betterment, there is good reason to allow the plaintiff to keep them anyway.

A. AN ILLUSTRATION: REVISITING *NAN*

Recall the *Nan* case. The Nan's family home burned down after Black Pine negligently installed a hearth heater.[187] After the fire, the Nans faced difficult decisions about how they would move on with their lives—including choosing where they would live and how they would pay for their decisions, whatever they happened to be. Let's take for granted that they chose to rebuild on their plot of land and that this choice is a reasonable one. They would still face decisions about *how* to rebuild.

Consider one option. Imagine that the Nans had chosen to rebuild, brick-by-brick, slat-by-slat, exactly the same home they lost. Also suppose, somewhat fancifully, that they rebuilt entirely with used materials—indeed, materials with exactly the same degree of physical degradation as their old house immediately before the fire destroyed it. Imagine further that rebuilding yielded no net gain in terms of market value, and that rebuilding did not involve additional effort as compared to rebuilding using

187. *Nan*, 1991 CarswellBC 75, para. 5.

new materials. In short, imagine that the Nans rebuilt their home as close as possible to the home they had lost—but not any better.

The Nans' conduct, on this fictional account, seems impeccable from the perspective of tort law's traditional understanding of remedies. They rebuilt a near-perfect material substitute for what had been lost. Of course, there's no such thing as a *perfect* substitute; they still would have preferred avoiding the fire and using their time to think about things other than rebuilding. But among the range of reasonable substitutes available to them, this one surely counts as one of them. Indeed, adherents to the traditional understanding of compensatory remedies for property harms might argue that this scenario represents the *best available* substitute, not merely a reasonably available one. Regardless of whether this option is the best or merely a reasonably available one, the Nans should in principle be able to fully recover these rebuilding costs, especially if those costs are less than the total market value lost in the fire. And the Australian court agreed in the real *Nan* case.[188]

But something about this imagined scenario seems odd. The fictional Nans' choices seem questionable or even prima facie worthy of criticism. After all, by foregoing any improvements to their home, the fictional Nans have missed an opportunity to rebuild better than before the fire. They might have rebuilt with new materials rather than used ones, sought out more fire-resistant materials, eliminated a useless third bedroom and used that space instead to upgrade their bathroom, installed a mid-range marble countertop in their kitchen to replace the particle board one, and so on. In short, rather than aiming to perfectly replicate their old property, the Nans might have chosen to renovate to improve upon what they had lost.

Explanations for why they might have avoided renovating are easy to imagine. The first set of replies presupposes that the Nans had limited funds. Having a home is a pressing need. They could not wait for compensation, we might imagine, from any source let alone the uncertain proceeds of litigation. Or maybe the Nans spent funds only to the extent that they could be recouped from Black Pine later on, while believing that foregoing improvements increased the likelihood that they would be fully reimbursed. A second set of replies assumes no financial

188. *Id.* paras. 29–30.

constraints. Perhaps the Nans simply preferred to rebuild as before because they preferred to allocate their disposable funds in ways other than renovation and improvement. Or maybe maximally replicating their old home also maximized sentimental value.

We will return to these complications later on. For now, set them aside. Assume that some or all of the improvements that the Nans had in mind were not wholly cost prohibitive. And assume that they *would have* preferred to build a new home in ways that they regarded to be improvements.

Given these additional stipulations, the Nans' choice not to try to improve the situation—their attempt to rebuild *as* before rather than *better than* before—seems odd because it flouts an ideal that I have elsewhere called an *ideal of resilience*.[189] Section B below will briefly describe my account of that ideal, which holds that individuals ought to make things, in some meaningful way, better than before the setbacks they suffer. To the extent that individuals forego opportunities to do so, they are prima facie open to criticism for not trying, given the compelling reasons for bouncing back better (which Section B also explains). And ultimately this ideal and its supporting reasons justify allowing plaintiffs to keep compensatory betterments when they arise as a result of pursuing this ideal. The surprising upshot will be that awarding betterments may be reasonable to accommodate resilience interests, even if this means the plaintiffs may sometimes intentionally pursue an improvement of their holdings at the defendant's expense.

B. AN IDEAL OF RESILIENCE AND REASONS TO EMBRACE IT

After briefly describing the ideal of resilience presupposed in the rest of the discussion, this Section will offer considerations in favor of embracing the ideal.

189. *See* Erik Encarnacion, *Resilience, Retribution, and Punitive Damages*, 100 TEX. L. REV. 1025, 1056 (2022) [hereinafter Encarnacion, *Resilience*] ("'Resilience' refers to a feature of an action or undertaking in which, in response to a setback, one successfully makes one's situation meaningfully better than before that setback."); Encarnacion, *Two Standards*, *supra* note 153, at 3 (providing a "resilience-based perspective on compensatory damages").

1. An Ideal of Resilience

Let's begin with the normative ideal of resilience. According to the ideal, individuals who suffer setbacks *should* try to make things better after tragedy strikes; indeed, they should try make things better along some significant dimension than *before* the setback.[190] Elsewhere I have argued that the ideal is real in the sense that individuals and communities appear to embrace it—i.e., that that the ideal exists "out there" in the world of ideas.[191] This ideal is not new. Something like it appears in political rhetoric. Think, for example, about President Joe Biden's plan to "build back better,"[192] which in turn borrows its phrase from similar notions of resilience developed in the disaster relief literature.[193] Indeed, politicians from across the political spectrum have appealed to something approximating the ideal. Consider Republican Representative Markwayne Mullin, who in 2005 spoke ten years after the bombing of the Murrah Federal Building in Oklahoma City: "It is because of the strength of our communities and the help from Americans across this great nation that our state rebounded [from the bombing] *stronger than before*."[194]

A similar notion of resilience that describes *individuals*' abilities to bounce back better finds expression in popular

190. Encarnacion, *Resilience*, *supra* note 189, at 1055–60.

191. *See id.*; Encarnacion, *Two Standards*, *supra* note 153.

192. *Statement by President-Elect Joe Biden on the November Jobs Report and Continuing Economic Crisis*, BUILDBACKBETTER.GOV (Dec. 4, 2020), https://web.archive.org/web/20201204183000/https://buildbackbetter.gov/press-releases/statement-by-president-elect-joe-biden-on-the-november-jobs-report-and-continuing-economic-crisis [https://perma.cc/SA36-K9JH].

193. *See, e.g.*, SANDEEKA MANNAKKARA ET AL., RESILIENT POST DISASTER RECOVERY THROUGH BUILDING BACK BETTER 1 (2019) (attributing the phrase's popularization to rebuilding efforts in aftermath of the Indian Ocean Tsunami in 2004).

194. Press Release, James Lankford, On the 20th Anniversary, Oklahoma Delegation Remembers Bombing Tragedy (Apr. 17, 2015) (emphasis added), https://www.lankford.senate.gov/news/press-releases/on-the-20th-anniversary-oklahoma-delegation-remembers-bombing-tragedy [https://perma.cc/7EX9-E9E4].

works[195] and works of psychology,[196] including work on post-traumatic growth.[197] Indeed, psychologists Richard Tedeschi and Robert Calhoun claim that "[t]he general understanding that suffering and distress can be possible sources of positive change is thousands of years old," further claiming that "some of the early ideas and writings of the ancient Hebrews, Greeks, and early Christians, as well as some of the teachings of Hinduism, Buddhism, and Islam," contain the theme that suffering may produce positive transformations.[198]

These sources give a general sense of an ideal of resilience. But the ideal, as understood here, should be distinguished from these examples in two ways. First, the ideal, as described here, governs *individuals* rather than groups of people. By contrast, political actors generally invoke rhetoric that construes the *political community* as resilient, rather than any individual within that community. Second, academic psychology generally seeks a descriptive rather than normative understanding of resilience. The *ideal* discussed here, by contrast, instructs how individuals *ought* to behave or think, and is therefore normative. And because the ideal is normative, it places burdens on individuals—specifically, those who have suffered setbacks.

The normativity of the ideal raises questions. After all, not all normative ideals are *good* ideals. Many ideals are more pernicious than they are worth. Ideal beauty standards, for example, might exact a high financial and psychological toll on those

195. *See, e.g.*, Jancee Dunn, *How to Bounce Back Better,* CNN (Sept. 26, 2012), https://www.cnn.com/2012/09/26/living/health-bounce-back/index.html [https://perma.cc/3LNA-6MGF] (characterizing the process of recovering from individual setbacks as "bouncing back").

196. *See, e.g.*, STEVEN M. SOUTHWICK & DENNIS S. CHARNEY, RESILIENCE: THE SCIENCE OF MASTERING LIFE'S GREATEST CHALLENGES 6 (1st ed. 2012) ("In people, resilience refers to the ability to 'bounce back' after encountering difficulty.").

197. Richard G. Tedeschi & Lawrence G. Calhoun, *Posttraumatic Growth: Conceptual Foundations and Empirical Evidence*, 15 PSYCH. INQUIRY 1, 1 (2004) ("The term *posttraumatic growth* refers to positive psychological change experienced as a result of the struggle with highly challenging life circumstances."). *But see* Stephen J. Lepore & Tracey A. Revenson, *Resilience and Posttraumatic Growth: Recovery, Resistance, and Reconfiguration*, *in* HANDBOOK OF POSTTRAUMATIC GROWTH 24, 29 (Lawrence G. Calhoun & Richard G. Tedeschi eds., 2006) (noting that Tedeschi and Calhoun have distinguished resilience from posttraumatic growth by arguing that posttraumatic growth is by definition transformative, whereas resilience in itself may not be).

198. Tedeschi & Calhoun, *supra* note 197, at 2.

pressed to conform to them. So, if the ideal of resilience is worth taking seriously, it is worth evaluating reasons why one should embrace it. As it turns out, some of the reasons implicate the very foundations of human agency.

2. The Ideal and Some Reasons to Embrace It

Several reasons support conforming to the ideal of resilience—or at least trying to. Some might reflect borderline trivial matters of expected utility or instrumental rationality; roughly, if we take expected utility theory seriously, one (rationally) ought always to try to make things better—maximize utility—than at any prior point in time.[199] Instrumentally, we should use setbacks, for instance, as learning opportunities—i.e., to reassess our situations to mitigate the likelihood that those setbacks will reoccur.[200]

More than just cold matters of practical rationality are at stake. Seeking to bounce back better responds to a human need to construct meaning from meaningless tragedy. All of us have our moments as Job. And many of us find no comfort in cursing the heavens. Trying to make things meaningfully better affords us the opportunity to, again, construct some meaning out of meaningless tragedy by making the bad good. The possibility that things can be better promises some measure of solace, comfort, hope, and perhaps even motivation to move forward in a constructive way.

Other reasons support trying to conform to the ideal of resilience. After setbacks, improving our lives better than before signals—both to ourselves and to others—that we actually have the wherewithal to move forward and make things better after setbacks.[201] And if these setbacks involve wrongdoings by others, standing up for ourselves in a way that makes us better off as a result of wrongdoing bolsters self-respect (I call this a self-regarding "narrative" reason) and signals to others that we are not

199. *See, e.g.*, Encarnacion, *Resilience*, *supra* note 189, at 1060 ("Bouncing back better is simply another way of saying we ought to maximize expected utility, which is little more than a dictate of practical rationality.").

200. *See id.*; Encarnacion, *Two Standards*, *supra* note 153, at 9 ("We treat setbacks as sources of information that can better inform our planning activities going forward.").

201. *See, e.g.*, Encarnacion, *Resilience*, *supra* note 189, at 1060.

to be trifled with (i.e., an other-regarding "expressive" reason).[202] Making oneself meaningfully better off, along a significant dimension, signals to oneself and others (including wrongdoers) that one has not only survived the setback but thrived despite it.[203] Apart from being intrinsically valuable, this signal contributes to a person's self-respect and perhaps impacts the esteem with which she is held in her community.[204]

Nothing said so far says anything about why making oneself *materially* better off relates to the ideal of resilience that began the discussion, let alone anything about law. To bridge that gap, notice that making oneself *materially* better off than before a wrongdoing can represent, albeit imperfectly, one way to build back better "meaningfully." If one is unjustly fired from a poorly paid job only to obtain a more lucrative one later on, this manifests one way one might bounce back better. Now, material remuneration is of course no guarantee that one's life will be perfect henceforth, let alone all-things-considered better. But material betterment is a way of establishing, to oneself and others, that one has bounced back better—in an important way—after a setback.

C. ACCOMMODATING THE IDEAL BY AWARDING BETTERMENTS

To see how law re-enters the picture, notice that nothing about the ideal of resilience requires building back better in stoic silence while disconnected from the background community in which one lives.[205] Also notice that striving to conform to the ideal takes time and often considerable resources and social support, both material and emotional. To the extent wrongdoers can be enlisted to provide at least some of that *material* support—

202. *See id.* at 1063 ("By realizing resilience, victims can create new narratives that in part signal *to others* how we may be treated (mitigating messages signaled by the wrongdoer) while also demonstrating *to the victims themselves* that they are competent agents capable of emerging stronger from setbacks (in the service of self-respect).").

203. *See* Encarnacion, *Two Standards*, supra note 153, at 15 ("[I]ndividuals who have internalized their own narrative of resilience necessarily must recognize and assign meaning to serious setbacks in order to tell those stories to themselves and others.").

204. *See id.*; Encarnacion, *Resilience*, *supra* note 189, at 1062–63 (noting the "*expressive* potential" of stories of resilience in elevating victims' social standing).

205. Encarnacion, *Resilience*, *supra* note 189, at 1078 ("Victims can demonstrate to themselves and the broader community their own resilience.").

i.e., in the concrete form of allowing victims to keep material betterments that arise from these life-rebuilding activities—it seems entirely reasonable to expect them to do so.[206] And this approach, if correct, would bolster the judgment that making some defendants shoulder the costs of betterment—and thereby help victims realize their resilience interests—is fair.

To illustrate this last point more concretely, recall our reimagined *Nan* case from Section A. I claimed that, insofar as the Nans decided to rebuild exactly as before, but no better, they were prima facie criticizable for missing an opportunity to build back better. (Section B elaborated on the ideal presupposed by that criticism.) But Section A also observed that several considerations may have mitigated that criticism. One set of considerations involved financial constraints: the Nans (we supposed) simply did not have the resources at their disposal to build back better. But assuming that they did have the resources, they would have built back in ways that, for them, would have made things better. And it is possible, moreover, that rebuilding better from their point of view would have given rise to betterments—i.e., enhanced market value or extended useful life, or perhaps both.

Although financial constraints may still hinder the Nans' rebuilding efforts, my claim now is that if they *did* seek to rebuild with an eye towards making themselves better off than before—i.e., if they did rebuild while implicitly trying to conform to the ideal of resilience—there are good reasons for doing so, as noted above in Section B. And insofar as conforming with the ideal of resilience requires individuals to enlist the assistance of others in general, and insofar as it is generally permissible to allow victims to demand assistance from their wrongdoers, it likewise seems prima facie fair to permit plaintiffs like the Nans to enlist the assistance of their tortfeasors *towards building back better*. One way of doing this, of course, is to allow plaintiffs to keep their betterments while disallowing defendants from offsetting compensatory damages.

So, other things being equal, there are compelling reasons why building back better counts *in favor of* awarding betterments, at least insofar as those betterments arise from the efforts of plaintiffs to behave resiliently. Courts should therefore

206. The case is even stronger when the wrongdoing manifests ill will. *Id.* at 1065.

view betterments far more favorably than they do and should not automatically assume that they should be subtracted from compensatory awards. In sum, courts should accommodate the resilience interests of their plaintiffs, as reflected in compensatory betterments arising from plaintiffs' rebuilding in accordance with the ideal of resilience.

V. AGAINST UNREASONABLE BETTERMENTS

Having argued that plaintiffs should be allowed to try to improve their property holdings at the expense of their defendants, and that courts should allow plaintiffs to keep betterments arising from such efforts, an obvious worry emerges. Are there any limits to betterments that plaintiffs may keep? Consider this case:

> *Paint*. While driving your car in a parking lot, you negligently side swipe my parked car. Neither of us is insured. Although there's a clear, foot-long scratch, eliminating any appearance of a scratch would cost $200. You promise to pay for the repair. Later that week, I hand you a bill for $5,000. This reflects the cost of a new paint job covering the entire car, even though I could have procured a $200 fix instead.

This betterment will not do. And, if courts were to award the costs of repair to me, it would likely order you to pay $200 rather than $5,000. *Paint* is like *Coffee* in which I tried to make you pay for my betterment. But I suspect *Paint* differs.

Several explanations present themselves. Proportionality might be a concern. $5,000 is a great deal larger than $200. And the principle might distinguish *Coffee*, since the price of a new cup of coffee might not seem disproportionately high compared to the home-brewed variety, at least given the small sums at stake. But there are also cases where disproportionality doesn't seem to be the main issue, at least not sufficient to shake the judgment that plaintiff should obtain full restoration costs even if they include betterments. *Burr v. Clark*, for example, falls into this category, given that the costs of paying for and installing a new boiler might be disproportionately large compared to, say, the option of waiting for and paying for a used boiler to reach the market.[207]

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207. 190 P.2d 769, 775 (Wash. 1948). An additional problem with the proportionality explanation arises when the comparators at issue are not alternative ways of paying for repair or replacement, but rather alternative ways of making the defendant pay. From this perspective, any compensation will seem

Another possible explanation appeals to the duty to mitigate damages.[208] This "duty" is not strictly speaking a duty, so much as a principle that eliminates reimbursements for costs that the plaintiff could reasonably have avoided.[209] This explanation fits some cases nicely. Recall that, in *Burr*, an expert testified that there was no reasonably available or cheaper option other than buying a new boiler.[210] If the Nans were going to live on their homestead, they would need to build a new house.[211] And if I were going to have any coffee at work, I needed to buy a pricier cup.[212] So, to the extent that we—and more importantly, courts—are satisfied with brute appeals to the concept of reasonable alternatives, we may have something of an answer: betterments are permissibly awarded only if they arise incidentally as a result from restorative efforts that could not reasonably be undertaken without yielding betterments. Otherwise the betterment is to be excluded.

But, in recognizing the duty to mitigate, some commentators and courts warn courts against construing it too zealously.[213]

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disproportionately large in contexts where the market diminution measure is zero. So, the point of a proportionality principle in rendering awards unto defendants cannot simply be to minimize the costs conferred to them.

208. *See, e.g.*, Preston v. Keith, 584 A.2d 439, 441–42 (Conn. 1991) ("The theoretical foundation for the plaintiff's duty to mitigate damages is that the defendant's negligence is not the proximate, or legal, cause of any damages that could have been avoided had the plaintiff taken reasonable steps to promote recovery and avoid aggravating the original injury.").

209. *See* Tenn. Valley Sand & Gravel Co. v. M/V Delta, 598 F.2d 930, 932 (5th Cir. 1979) ("Courts have often referred to a so-called duty to mitigate damage, but there is no such duty, for there is no correlative right upon its violation." (citations omitted)); DeMarion Janitorial Servs., Inc. v. Universal Dev. Corp., 625 F. Supp. 1353, 1358 n.5 (N.D. Miss. 1985) ("[T]he so-called duty to mitigate or minimize damages is a misnomer because a victim owes no duty to the person who hurts him."); Broward County v. Patel, 641 So. 2d 40, 43 n.6 (Fla. 1994) ("A 'duty to cure' or 'a duty to mitigate of damages' is something of a misnomer in this context, because neither party has an obligation to cure or mitigate anything.").

210. *Burr*, 190 P.2d at 774.

211. Nan v. Black Pine Mfg. Ltd., 1991 CarswellBC 75, para. 5 (Can. B.C. C.A.) (WL).

212. *See supra* Part III.

213. *See* CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 35, at 134 (1935) (stating that only the "conduct of a reasonable man" is needed to avoid potential injury or loss); *see also* 1 THEODORE SEDGWICK, MEASURE OF DAMAGES § 221, at 415 (9th ed. 1912) (observing that plaintiffs are required no

The "duty" is not to minimize damages at all costs.[214] As one treatise asserts:

> A wide latitude of discretion must be allowed to the person who by another's wrong has been forced into a predicament where he is faced with a probability of injury or loss. Only the conduct of a reasonable man is required of him. *If a choice of two reasonable courses presents itself, the person whose wrong forced the choice cannot complain that one rather than the other is chosen*.[215]

So, although a widely recognized duty to mitigate damages does place some pressure against awarding compensatory awards that include betterments, the duty does not necessarily exclude betterments, insofar as they derive from betterments secured through plaintiffs' *reasonable* efforts to restore their property.[216] And as I have argued in Part IV, some reasonable efforts to restore one's property may include the aims of building back better. Still, this leaves the question of what makes a betterment unreasonable. What follows doesn't purport to be an exhaustive discussion, but I hope it is useful in illustrating limiting principles that are both promising and unpromising.

A. A NOTE ON "WINDFALLS"

Start with a non-starter. Betterments might be thought unreasonable because they represent windfalls. Indeed, some courts and at least one treatise appear to have endorsed this very argument.[217] But it is a bad one. To see why, assume that the Burrs obtained a new boiler (as they did), and assume that the court was willing to entertain the argument that their compensation should be reduced by one third to avoid allowing the Burrs to recover something new for something old. If windfalls were truly the problem that courts sought to avoid, the Burrs could voluntarily damage their new boiler—short of rendering it

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more than ordinary diligence in mitigating damages); Hogland v. Klein, 298 P.2d 1099, 1102 (Wash. 1956) (quoting McCormick at length).

214. MCCORMICK, *supra* note 213, § 35, at 133–34.

215. *Id.* § 35, at 134 (emphasis added).

216. *See* Chetwin & Yee, *supra* note 17, at 93 (favoring the Canadian approach in which "[r]easonableness is a consideration as to whether . . . diminution in value is awarded").

217. Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956, 958 (Fla. Dist. Ct. App. 2004) ("[T]he purpose of compensatory damages is to compensate, not to punish defendants or bestow a windfall on plaintiffs."); *see* DOBBS & ROBERTS, *supra* note 11, § 5.13(2), at 573 ("The ultimate goal [in calculating depreciation adjustments] is to avoid giving plaintiff a windfall gain or benefit.").

inoperable but reducing the lifespan of the new boiler in the process—to avoid having to reduce the award. There would be no unjust windfall because the Burrs, in this imagined case, would have no windfall at all.[218]

But this would be absurd because the fact that the Burrs are made better off is beside the point. The real issue is *whether the defendant ought to pay*, under the circumstances, for the plaintiff's improved lot, regardless of whether the plaintiffs end up keeping it. And as already argued in Part II, there is likely no way of simply appealing to the make-whole ideal to argue that the plaintiff should not be made better off, at least no way of doing so without begging the question. If there are reasons why some betterments are impermissible, and therefore should not count as part of compensatory damages, those reasons must come from elsewhere.

B. LESSONS FROM UNJUST ENRICHMENT?

As noted earlier, *In re Crounse Corp.* characterized betterments as a form of unjust enrichment.[219] Michael G. Pratt develops a sophisticated version of this idea, drawing on unjust enrichment doctrine.[220] An implication of his view, however, is that unjust enrichment doctrine actually *justifies* allowing plaintiffs to keep some betterments, while explaining when such betterments are unjustly kept. In short, for Pratt, betterments are impermissible only when they are unjust enrichments, and in many cases, betterments are not really enrichments at all.[221]

To illustrate, recall *Burr v. Clark*.[222] The Burrs were not enriched—Pratt would argue—because the negligence of the Clarks' technician effectively forced them, under the circumstances, to buy a new boiler to replace the old one. Under these forced-choice circumstances, some jurisdictions allow those who are effectively compelled to receive benefits—enrichments—to "subjectively devalue" them, and in turn, treat them as though they were not truly enriched.[223] This is so even if, in fact, the

218. For a more detailed critique of the unjust enrichment argument, see HANOCH DAGAN, THE LAW AND ETHICS OF RESTITUTION 11–36 (2004).

219. *See supra* Part I.

220. Pratt, *supra* note 17, at 70.

221. *Id.*

222. 190 P.2d 769 (Wash. 1948).

223. Pratt, *supra* note 17, at 84.

market value the plaintiff receives is enhanced to render the plaintiff materially better off than before.[224] No enrichment means no unjust enrichment. And in turn, no betterment.

But this argument rests on some dubious assumptions, at least some of which Pratt presumably inherits from the law of unjust enrichment. To see why, grant that the court may sometimes allow plaintiffs to "subjectively devalue" enhancements that they receive. It doesn't follow that the plaintiff has not been *enriched* by that betterment. Let's say I possess a T206 Honus Wagner baseball card,[225] having been bequeathed to me by a relative whom I despise.[226] Indeed, I despise the relative so much that I cannot bring myself to seek out purchasers or solicit auctioneers.[227] I subjectively disvalue the card, but surely possessing the card increases my holdings and thereby enriches me. My subjective devaluation of what is objectively valuable is one thing, but enrichment is—or should be—evaluated by the latter understanding. So, relying on subjective devaluation to show that there is no "enrichment" and hence no betterment is dubious.[228]

The real issue is whether the enrichment that accrues with a plaintiff's betterment is *unjust* and thus should be allocated

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224. *Id.*

225. Dan Hajducky, *T206 Honus Wagner Baseball Card Sells for $6.606 Million, Shattering Previous Record*, ESPN (Aug. 16, 2021), https://www.espn.com/mlb/story/_/id/32031670/t206-honus-wagner-baseball-card-sells-6606-million-shattering-previous-record [https://perma.cc/TT7C-BA5S].

226. This example does not necessarily challenge Pratt's use of unjust enrichment doctrine, because such doctrine makes an exception for subjective devaluation when it involves "incontrovertible benefits" to the recipient of the benefit—including money. Pratt, *supra* note 17, at 85. Two points. First, incontrovertible benefits are generally highly liquid assets; selling a Honus Wagner, by contrast, involves a lot of transaction costs, including selecting among and negotiating with auction houses. *See* Hajducky, *supra* note 225. Second, this further epicycle seems an exception that proves the rule: generally, whether someone subjectively devalues something that is nonetheless valuable is entirely beside the point. I thank Michael Pratt for email correspondence on this point.

227. Even in damaged form, the card fetches a premium. Dan Hajducky, *Damaged T206 Honus Wagner Card Sells for $1,528,066 at Auction*, ESPN (Apr. 26, 2022), https://www.espn.com/mlb/story/_/id/33809780/damaged-t206-honus-wagner-card-sells-1528066-auction [https://perma.cc/3JX9-PVRY].

228. *See* AVM LODDER, ENRICHMENT IN THE LAW OF UNJUST ENRICHMENT AND RESTITUTION 166 (2012) (describing subjective devaluation as a doctrinal "misstep").

back (in effect) from the plaintiff to the defendant, not whether it is as an enrichment at all. And on this point Pratt's discussion seems to resonate with the more basic fairness argument already discussed above,[229] as well as the views voiced in *The Gazelle,*[230] *Brown v. Colegio de Abogados,*[231] and collected in the comments of the forthcoming *Restatement*.[232] Recall that these discussions identify cases in which courts award betterments when the alternative would in effect coerce plaintiffs to improve or obtain property that they were not planning to improve or obtain.[233] And I discussed these cases already to show that the make-whole doctrine contains exceptions.[234] So, for the purposes of showing that betterments might be correctly awarded either as an exception to the make-whole rule or as a correct application of it, I agree with Pratt.

We part ways insofar as my analysis (1) does not rely on unjust enrichment doctrine and (2) maintains that betterments might be correctly awarded even when there is no coerced choice—e.g., when betterments are awarded because funding betterments satisfies the plaintiff's resilience interests, as in our imagined *Nan* case above.[235] This second point is important. If it is correct, the notion of "coerced improvements" cannot be the sole dividing line between permissible and impermissible betterments; after all, sometimes non-coerced betterments would be permissibly awarded to plaintiffs—again, as in cases where a plaintiff seeks a reasonable betterment when cheaper alternatives are available, to satisfy those interests. Still, the "forced betterments" idea plays a role in assessing the fairness of any particular betterment award—just not a decisive one.

C. EX ANTE OPPORTUNISM

An undesirable form of ex ante opportunism might arise if courts were to explicitly permit recovery for betterments. An

229. Pratt, *supra* note 17, at 84.

230. *The Gazelle* (1844) 166 Eng. Rep. 759, 761; 2 W. Rob. 279, 283–84.

231. Brown v. Colegio de Abogados de Puerto Rico, 613 F.3d 44, 53 (1st Cir. 2010).

232. RESTATEMENT (THIRD) OF TORTS: REMEDIES § 9 cmt. f (AM. L. INST., Tentative Draft No. 1, 2022).

233. *See supra* Parts II and III.

234. *See supra* Part II.

235. *See supra* Part IV.A.

explicit argument for this position is found in the American admiralty case, *In re Crounse Corp.*:

> The argument for preventing the occurrence of betterment . . . is simple and obvious—the application of depreciation to reduce damage awards discourages the purposeful placement of an old and decayed vessel or other object in the way of traffic. If recovery is allowed to better the plaintiff's position, then the waterways will fill with decrepit vessels and other objects whose owners would prey on the negligence of others, hoping to improve the condition of their assets at the expense of tortfeasors.[236]

This passage suggests at least two points about perverse incentives created by awarding betterments. The first can be framed in terms of promoting behavior that, although lawful, is nevertheless socially undesirable. Once individuals know that they can recover the costs of purchasing new property to replace old property when it is destroyed, individuals will purchase old property with the sole aim of hoping that someone's negligence will cause the old property's destruction, allowing those individuals to recover handsomely at very low cost (i.e., the cost of buying used or already damaged goods).[237] *Crounse* mentions waterways,[238] but we might as well imagine streets lined with decrepit cars. This type of behavior does not seem, on the first framing, socially useful.

The second way of framing the concern involves, by contrast, lawlessness. More precisely, rather than merely promoting socially undesirable (but lawful) arbitrage opportunities, individuals will create *unreasonable* risks to others in pursuit of those opportunities. Not only will waterways and streets clog with leaky boats and broken cars, for example, but individuals will also place them to *increase* the likelihood that accidents will occur. Whatever else we might say about the law's remedial rules, it surely counts against them to the extent they promote the very wrongful losses that they seek to remedy.

Although the worry about how remedial rules might promote socially undesirable behavior should not be dismissed out of hand, such concerns are often overstated. The first version of the concern proves too much. After all, if someone acts lawfully—

236. Tenn. Valley Auth. v. Vulcan Materials Co. (*In re* Crounse Corp.), 956 F. Supp. 1377, 1381 (W.D. Tenn. 1996) (citation omitted).

237. *See id.* at 1381 ("The replacement of an old structure or vessel may leave the injured party in a better position than it occupied before the accident, at the expense of the tortfeasor.").

238. *Id.*

i.e., within her rights—to place a boat in a waterway (paid rent for a spot at a pier, for example), and if someone negligently destroys her old boat as a result, it is difficult to see why that should automatically preclude compensation that results in betterment. Even if there is a sense in which the behavior is socially useless, so is my right to count blades of grass on my lawn.[239] We often have the right to do socially useless things. Without more, seeking out arbitrage opportunities does not suffice to establish a normative concern; in general, the state allows people to do with their rights what they will. Nor can we appeal to the make-whole ideal to explain what is wrong with this kind of ex ante opportunism—at least not without begging the question, as has already been discussed at length.[240]

This suggests that the real concern about incentives involves creation of *unreasonable* risks,[241] which flouts tort law's duty of care—i.e., tort law's distinctive duty.[242] This incentives problem is important. Although evaluating this concern turns on an empirical study far beyond what this paper can undertake, I offer two points in response. First, as with all moral hazard arguments, there is a standing worry that this version of the ex ante opportunism argument may prove too much: in some sense the whole system of tort litigation creates perverse incentives for bad-faith, repeat-player plaintiffs. But that's not a good argument against that system. Second, tort law itself contains doctrines that try to mitigate the perverse incentives that *Crounse* makes salient.[243] For example, if the concern is that would-be plaintiffs intentionally create unreasonable risks for the sole purpose of securing a payday, then comparative or contributory negligence doctrines would partially or fully protect the defendant against liability.[244] These built-in doctrines mitigate, even if

239. JOHN RAWLS, A THEORY OF JUSTICE 432 (1971).

240. *See supra* Part I.

241. *See, e.g.*, Clay Elec. Coop., Inc. v. Johnson, 873 So. 2d 1182, 1185 (Fla. 2003) (explaining that the duty of care protects individuals "against unreasonable risks").

242. *See, e.g.*, Young v. Gastro-Intestinal Ctr., 205 S.W.3d 741, 753 (Ark. 2005) (Imber, J., dissenting) ("In tort law, the nature of any given duty is defined by the applicable standard of care.").

243. Tenn. Valley Auth. v. Vulcan Materials Co. (*In re* Crounse Corp.), 956 F. Supp. 1377, 1381 (W.D. Tenn. 1996).

244. *See* Sutton Press v. Keystone Pipe & Supply Co., 86 Pa. Super. 249, 251 (Pa. Super. Ct. 1925) ("Contributory negligence prevents recovery."); Kirby v.

not wholly eliminate, concerns that betterments will encourage more people to impose unreasonable risks on others.

These responses are not decisive. As noted before, nothing in this Article precludes the possibility that a bright-line rule against betterment might have some compelling rationale grounded in public policy. Perhaps routinely allowing recovery of betterments *would* create a serious problem of undesirable ex ante opportunism, such that countervailing concerns about unfairness pale in comparison. But if—once again—we are concerned primarily with doing justice *between the parties* to the dispute, such concerns will only be of peripheral importance.[245] For our limited purposes, the important thing to notice is that ex ante opportunism, if it provides any reason to disfavor betterments, does not always do so, and does not appeal to the make-whole ideal whatsoever.

D. EX POST OPPORTUNISM

An ex post version of the problem exists. Suppose that compensatory damages claims routinely include awards covering betterments. Once an injury occurs, potential defendants become vulnerable to damages claims. Would-be plaintiffs might take unfair advantage of this vulnerability; they may exploit it by inflating damages rather than mitigating them or by undertaking extensive renovations that improve the value of their property rather than simply restoring it. *Paint* illustrated this behavior.[246] Indeed, courts sometimes suggest that concerns about

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Larson, 256 N.W.2d 400, 418 (Mich. 1977) ("Where contributory negligence bars all recovery where the plaintiff is negligent, the doctrine of comparative negligence operates to apportion damages according to the fault of each of the parties.").

245. Some might chafe at this traditional point of view. But in addition to having supporters in the academy, some courts still voice support for it. *See* Reben v. Ely, 705 P.2d 1360, 1362 (Ariz. Ct. App. 1985) ("Tort law, like contract law, concerns private relations between parties."); Hancey v. United States, 967 F. Supp. 443, 445 (D. Colo. 1997) ("Tort law concerns private relations between parties."). *But see* Burke v. Rivo, 551 N.E.2d 1, 6 (Mass. 1990) (O'Connor, J., dissenting) ("Tort law finds its source in social values and ought to promote appropriate public policy."). And many writers have pointed out the institutional features of civil litigation, and the institutional competencies of courts, that make the traditional view appealing. *See, e.g.*, WEINRIB, *supra* note 113, at 65; GOLDBERG & ZIPURSKY, *supra* note 70, at 152 (critiquing movement in torts scholarship and jurisprudence that tasked courts with "solv[ing] large-scale problems as a systematic basis").

246. *See supra* Part V.

exploitation motivate their refusal to award restoration costs that far exceed the diminution of market value.[247]

This rationale is appealing because it leaves open the possibility that some betterments may be awarded permissibly. After all, if the primary concern is exploitation ex post, then betterments that do not flow from such exploitation don't need to be excluded—at least not without further argument. Again, *Burr v. Clark* involves plaintiffs that needed to replace a boiler, likely immediately, to ensure that their house was still habitable.[248] And an expert testified that replacing the boiler with a new one was the only reasonably available option at the time.[249] This conduct is hardly an exploitative attempt to maximize compensatory payouts. But my behavior in *Paint* seems less innocent on its face, like an attempt to take unfair advantage of you.

This ex post exploitation rationale is plausible.[250] My main substantive worry is that opposing ex post opportunism seems in tension with our resilience interests.[251] As I argued in Part IV, there are compelling reasons to strive to make things better for oneself after tragedy: doing so often involves considerable costs, and it is often fair to force those who have wrongfully caused those tragedies to defray those costs. This suggests that not all betterments necessarily involve *pernicious* ex post opportunism that courts should vigorously police. Not all betterments are exploitative, and perhaps more controversially, not all betterments take unfair advantage simply because they fail to reflect the cheapest available alternative. As long as we keep this possibility in mind, satisfying the ideal of resilience seems compatible with avoiding pernicious ex post exploitation.

Still, suppose that concerns about ex post opportunism are so weighty that they provide a compelling, bright-line rule

247. *See, e.g.*, Woodward-Gizienski & Assocs. v. Geotechnical Expl., Inc., 255 Cal. Rptr. 800, 803 (Cal. Ct. App. 1989) ("[I]njured property owners have no guarantee they will be fully compensated for what they expend on repairs; thus, they have no motive to encourage excessive repairs.").

248. Burr v. Clark, 190 P.2d 769, 770–71 (Wash. 1948).

249. *Id.* at 772.

250. It also raises difficult questions about what counts as taking unfair advantage of a person. For a helpful overview, see generally Matt Zwolinksi & Benjamin Ferguson, *Exploitation*, STAN. ENCYC. OF PHIL. (Oct. 3, 2022), https://plato.stanford.edu/entries/exploitation [https://perma.cc/8H3A-5SWA] (providing a philosophical analysis of what constitutes unfair advantage).

251. *See supra* Part IV.

against awarding *any* form of material betterment to plaintiffs, even at the cost of some unfairness to individual plaintiffs who are made to finance the cost of material improvements. Even so, we have learned something: the make-whole ideal plays no essential role in the argument; concerns about ex post exploitation would do all the normative work.

E. "PUNITIVE" BETTERMENTS

There's another principled way of distinguishing between impermissible and permissible compensatory betterments, one that may capture many of the same cases that opportunism explanations capture, while also explaining other cases that might otherwise fall through the cracks. The trick is to notice that my behavior in *Paint* doesn't only seem exploitative, but also *punitive*, regardless of whether my subjective intent was to punish. Merely negligent behavior does not normally warrant punitive reactions.[252] Accordingly, courts assert that compensatory damages should not aim to punish.[253] So your merely accidental scratching of my car doesn't warrant reactive behavior that plausibly "reads" as punitive. And it certainly doesn't warrant a court's signing off on a "compensatory" award that signals punishment when such signaling is not warranted. So, the suggestion here is that betterments are not permissibly included in compensatory damages awards when they manifest punitive behavior under circumstances where punitive behavior isn't warranted.

This principle has several advantages. First, it captures a hypothetical like *Coffee* and a case like *Burr v. Clark*.[254] In

252. *But see* Seana Valentine Shiffrin, *The Moral Neglect of Negligence*, *in* 3 OXFORD STUDIES IN POLITICAL PHILOSOPHY 197 (David Sobel et al. eds., 2017) (arguing that negligence can be a serious moral wrongdoing). Still, tort law consistently refuses to punish for mere negligence. *See, e.g.*, Toe v. Cooper Tire & Rubber Co., No 11–1588, 2013 WL 1749739, at *4 (Iowa Ct. App. Apr. 24, 2013) ("Mere negligent conduct is therefore not sufficient to support a claim for punitive damages.").

253. *See, e.g.*, Coop. Leasing, Inc. v. Johnson, 872 So. 2d 956, 958 (Fla. Dist. Ct. App. 2004) ("[T]he purpose of compensatory damages is to compensate, not to punish defendants or bestow a windfall on plaintiffs."); Jefferson v. Mercy Hosp. & Med. Ctr., 97 N.E.3d 173, 186–87 (Ill. App. Ct. 2018) ("[C]ompensatory tort damages are intended to compensate plaintiffs, not to punish defendants."); Sowers v. R.J. Reynolds Tobacco Co., 975 F.3d 1112, 1137 (11th Cir. 2020) ("Compensatory damages are not designed to punish or to deter.").

254. Burr v. Clark, 190 P.2d 769 (Wash. 1948).

neither did the betterments read as punitive, in part because the betterments were the only reasonably available substitutes for the spilled coffee and destroyed boiler, respectively. Second, it seems consistent with—if not outright explains—our judgments about *Paint*. Part of why repainting my entire car seems excessive is that it seems *punitive*; I'm not just making you offset the $200 loss incurred, I'm *making you pay* in the punitive sense of the phrase. And my behavior may be reasonably interpreted that way regardless of whether it was my subjective intent to punish you.

There is another advantage, which is that the punitiveness approach accounts for a curiosity in the compensatory damages. Although courts disfavor awards of replacement costs that exceed diminution of market value, sometimes courts will render such awards—awards that seem to yield betterments—when the defendant's behavior involves willful or purposeful violation of another's rights. Courts have also declined to subtract offsets from compensatory awards when the defendant's wrongdoing is egregious. We already saw *United States v. House*, in which a prisoner who murdered another prisoner (Callison) was denied an offset for the government's financial savings attributable to Callison's premature death.[255] Similarly, in *Sabella v. Appalachian Development Corp.*, defendants extracted oil and gas, in bad faith, from the plaintiffs' land.[256] Not only did the plaintiffs receive the revenue from the oil and gas produced, but the defendants were also denied offsets that took into account the defendants' production costs—costs that the plaintiffs obviously didn't have to bear.[257]

These results initially seem puzzling. Although willful wrongdoings make *punitive* damages more readily available, it is not obvious why a defendant's willful (as opposed to accidental) violations of the plaintiff's rights should give rise to a different measure of *compensation* or allow a plaintiff to avoid an offset, let alone keep any resulting betterments. Indeed, one

255. United States v. House, 808 F.2d 508, 510 (7th Cir. 1986).

256. Sabella v. Appalachian Dev. Corp., 103 A.3d 83, 86–87 (Pa. Super. Ct. 2014).

257. *Id.* at 104 ("Because the Haners were not good-faith purchasers of the OGMs, they were entitled to no offsets whatsoever; rather, Sabella was entitled to recover the entirety of the revenues the Haners derived from their production upon Sabella's OGMs.").

treatise has described this measure as "harsh" and difficult to explain, especially when punitive damages are available.[258]

But once we understand that the per se betterments are impermissible when they are impermissibly *punitive*, we can more readily account for cases like *House* and *Sabella*. When willful or bad faith rights violations are involved, the fact that awarding betterments seems punitive matters little, since punitive reactions would be warranted in such a case. In turn, courts that sign off on such "punitive" compensatory betterments would be justified in doing so. In sum, this suggests that betterments are sometimes permissible because they are not punitive (as *Burr v. Clark* shows), but also that sometimes even punitive betterments are permissible when the underlying rights violation warrants punitive reaction (as in *House*, *Sabella*, and punitive damages more generally).[259]

CONCLUSION

Courts in the United States rarely award compensatory damages that make the plaintiff materially better off than before. And when they do, they seek to ignore or downplay the fact, exaggerating the uncertainty of benefits that the plaintiff has received, or blaming the defendant for failing to establish conclusively that the plaintiff has in fact obtained such a benefit.[260] Worse, fears about betterment have bolstered a variety of doctrines and practices that severely restrict plaintiffs' ability to pursue a range of reasonable remedial options. This in turn prevents plaintiffs from obtaining the full costs associated with replacing or repairing their property, even when doing so would be reasonable.

But kneejerk judicial hostility to betterments likely rests on a mistake. The make-whole ideal can be understood in several plausible ways, none of which necessarily prohibits material enhancements. And although some betterments *are* problematic, the chief concern, in my view, is that plaintiffs will seek to

258. DOBBS & ROBERTS, *supra* note 11, § 5.3(2), at 525.

259. For more extensive discussion and criticism of compensatory damages that serve to punish, see generally James Goudkamp & Eleni Katsampouka, *Punitive Damages and the Place of Punishment in Private Law*, 84 MOD. L. REV. 1257 (2021).

260. *See, e.g.*, Burr v. Clark, 190 P.2d 769, 774–75 (Wash. 1948) (noting that the appellant failed to show respondents could have mitigated damages).

leverage the defendant's liability in a way that manifests impermissibly a punitive reaction or ex post exploitation. But regardless of whether these explanations suffice to exhaustively explain the conditions under which betterments are unreasonable, the key point remains: nakedly appealing to the make-whole ideal doesn't suffice either. Sometimes the make-whole ideal takes a back seat to other concerns that militate in favor of awarding betterments. Sometimes—and even more surprisingly—making plaintiffs whole *requires* making them materially better off than before, given the nature of substitutionary remedies. In any event, unqualified adherence to the anti-betterment argument, and the dubious practices it ostensibly supports, should be put to rest.

Finally, and most surprising of all, I have defended an ideal of resilience that *requires individuals* to make things better for themselves. The reasons in favor of this ideal are compelling, but they may require those who suffer wrongdoings to incur significant costs. To the extent that those costs give rise to material betterments—like the increased market value of the plaintiff's property or its extended useful life—it may be entirely reasonable to demand that the wrongdoer rather than the victim shoulder the burden of realizing those benefits. Bouncing back better is a reasonable aspiration but often not cheap. And as between wrongdoer and victim, it seems prima facie fairer to make the wrongdoer pay to help the victim realize that ideal.