

TWO STANDARDS OF REPAIR: RESTORATION AND RESILIENCE

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INTRODUCTION

Shattered ceramics usually show cracks even when the shards are glued back together. So discarding them is tempting. But a Japanese practice called Kintsugi counsels a different response: reassemble the shards using adhesive infused with gold dust.¹ The results are stunning, with the cracks glowing like lightning, giving ceramicware new life. Kintsugi turns a lamentable event—someone’s having dropped some pottery—into an opportunity for artwork, a blessing in disguise. Kintsugi seeks repair, but does not seek to erase the evidence of the breakage. It is a repair that

* Author’s note.

¹ For some recent popular coverage of Kintsugi, see Amy Azzarito, *The Most Glamorous Way to Fix a Broken Ceramic*, ARCHITECTURAL DIGEST, June 19, 2017, <https://www.architecturaldigest.com/story/kintsugi-japanese-art-ceramic-repair>; Y-Jean Mun-Desalle, *The Ancient Craft of Kintsugi Continues to Fascinate Contemporary Artists*, FORBES, Aug. 19, 2020, <https://www.forbes.com/sites/yjeanmundelsalle/2020/08/19/the-ancient-craft-of-kintsugi-continues-to-fascinate-contemporary-artists/>; Terushi Sho, *Kintsugi: Japan’s Ancient Art of Embracing Imperfection*, BBC NEWS, Jan. 8, 2021, <http://www.bbc.com/travel/story/20210107-kintsugi-japans-ancient-art-of-embracing-imperfection>.

creates something new, a mode of repair that seeks to make something *better* than before it broke, without erasing all traces of injury. Call this ideal of repair, which Kintsugi realizes, *resilient repair*.

More will be said about resilient repair in a moment. But notice first a more familiar reparative ideal, one that governed Fred Haefele.² As Elizabeth Spelman recounts, Haefele owns a “dilapidated” vintage motorcycle and seeks to restore it.³ According to Spelman, Haefele “is burning not simply to repair the vintage machine but to restore it, make it resemble as closely as possible a vehicle in its original state.”⁴ So extreme is his devotion to his restorative ideal that he foregoes safety-enhancing redesigns for the sake of pursuing “the authentic factory style.”⁵ Repair in this sense attempts to undo destructive forces as though they never happened. Call this ideal, *restorative repair*.⁶

Without using these labels, judges and tort theorists frequently claim that compensatory damages seek restorative repair. They routinely assert, for example, that the goal of compensatory damages is to make the plaintiff “whole,”⁷ and to render wrongdoings as if they never happened.⁸ Compensatory damages aim to restore plaintiffs to their pre-injury states as much as possible, rather than empowering them to make things better than before the injury, even though many of their injuries—like lost limbs—simply cannot be undone. And the

² See ELIZABETH V. SPELMAN, REPAIR: THE IMPULSE TO RESTORE IN A FRAGILE WORLD 13 (2002).

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ These ideals, of course, are not entirely mutually exclusive. Even Kintsugi involves restorative repair, at least to the extent that a shattered bowl returns to its original shape. Still, restorative repair does eschew any attempt to make things better, and regards the existence of visible flaws or departures from the restorative ideal as falling short of the ideal. Kintsugi, meanwhile, takes those flaws to be a feature, not a bug.

⁷ See, e.g., *Fair v. Bakhtiari*, 195 Cal.App.4th 1135, 1153 (2011) (“The purpose of compensatory damages is to make plaintiffs whole for harm caused by defendants.”).

⁸ See, e.g., Arthur Ripstein, *As If It Had Never Happened*, 48 WM. & MARY L. REV. 1957 (2007) (claiming that “[l]aw students are usually told that the purpose of damages is to make it as if a wrong had never happened,” while defending this “common sense” conception of damages).

restorative conception of repair continues to frame thinking about the scope of damages that successful plaintiffs may recover.

This paper takes resilient repair seriously as an alternative way to understand the aim of compensatory damages. To begin, Part I observes that recent commentary about corrective justice identifies the duty of repair's content based on the *object of repair*. This inquiry asks, *what does the duty require to be repaired?* Although identifying an object of repair is one way to specify our reparative duties, a different way is often overlooked. Specifically, reparative obligations can be individuated on the basis of the applicable *standard of repair*. This question asks, *what ideal or criteria for success govern our reparative activities?* To illustrate this latter point, Part I discusses John Gardner's distinction between the *status quo ante* and *status quo aliter*, and the difference this might make in assessing remedies.⁹

Having created some conceptual space in Part I, Part II begins to occupy it by taking a closer look at a particular standard of repair: ideal of resilient repair. After explaining some of the ideal's key features, Part II argues that there are perfectly general reasons why this approach to injuries makes sense, as well as special reasons to do so when those injuries derive from wrongdoings. Part III returns to law. First, I illustrate how courts and commentators tend to conceive of compensatory damages in terms of restorative repair, and list some familiar criticisms of this tendency. Rather than adjudicating between defenders of the restorative view of compensatory damages and their opponents, Part III shows that the resilient view captures the benefits of the restorative approach while preventing many objections to it from arising in the first place. To illustrate, I will show that hedonic damages are better justified in terms of resilient repair rather than its restorative cousin.

A natural worry emerges from this discussion. If successful plaintiffs are entitled to demand that defendants not only make them "whole" but may also be entitled to demand to be made *better off* in some non-trivial way, compensatory damages become unlimited—at least in principle. The paper concludes with some provisional remarks on some potential constraints that mitigate this concern, suggesting that principles of reasonableness and

⁹ JOHN GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW (2018) [GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW].

non-punitiveness may constrain compensatory payouts.

This essay's claims, concluding remarks included, remain tentative. My overall aim is neither to refute the restorative interpretation of compensatory damages nor to decisively defend a resilience-based alternative. Much more might be said for and against both proposals. Still, I do hope to generate interest in what I take to be an overlooked interpretive and normative resource in understanding remedies: resilience. Given that both remedial norms and ideals of resilience apply to persons after harms and wrongs have taken their toll, and given that they therefore have overlapping domains of application, a resilience-based perspective on compensatory damages is worthy of greater attention than it has received: virtually none.

I. INDIVIDUATING REPARATIVE OBLIGATIONS

This paper will take for granted that a duty of repair exists in law and morality. But the duty is contested because there exist several plausible ways to interpret its content. One way, perhaps the main way, to distinguish these interpretations is by reference to an *object of repair*. The objects that tort law traditionally protects and makes available for repair are human bodies and property.¹⁰ But more recent interventions in tort theory have suggested that reparative processes in tort law should prioritize repairing frayed relationships, or relational repair.¹¹ Relational repair also sits at the center of restorative justice, which seeks to restore damaged relationships between persons who commit crimes, their victims, and the broader community.¹²

¹⁰ ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2018). Sometimes writers characterize the object of repair less in terms of the concrete holdings, focusing instead on restoring a person's *rights*. See, e.g., Gregory Keating, *Duty or Right? A Comment on John Gardner's From Personal Life to Private Law*, 15 JERUSALEM REV. OF L. STUDIES 152, 164 (2017) ("Tort law is more about mending broken bodies than mending broken relationships, more about repairing rights than about reconciling persons."). We will not dwell on this distinction for purposes of discussion.

¹¹ Linda Radzik, *Tort Processes and Relational Repair*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 231, 233-35 (John Oberdiek, ed., 2014).

¹² John Braithwaite, *Restorative Justice and Social Justice*, 63 SASK. L. REV. 185 (2000) ("Healing relationships, as opposed to balancing hurt with hurt, is one core value of restorative justice."). Moral repair, as developed by Margaret Urban Walker, likewise involves a form of relational repair that

There is little reason to think, either in tort law or everyday life, that reasons to repair relationships and reasons for repairing harms are mutually exclusive. Repairing harms may prove useful for repairing relationships. Margaret Urban Walker's conception of restorative justice *requires* wrongdoers to repair harms as prerequisite to relational repair.¹³ The fact that we can distinguish duties of repair based on the object of repair should not obscure the further fact that repairing one object may depend on repairing another.

By emphasizing that duties of repair can be distinguished by their objects, however, theorists of repair overlook another cross-cutting way to individuate reparative duties in terms of the applicable *standard of repair*. These standards set ideal criteria for success that govern our reparative practices. As noted in the Introduction, this paper will examine two such ideals: resilient repair and restorative repair. And, in principle, each ideal is capable of guiding our conduct *regardless* of the underlying object it seeks to repair.

This point is easy to miss. Or, as is more often the case, the possibility of different reparative ideals is sometimes raised for the sole purpose of disposing of one of them as a non-starter. For example, John Gardner distinguishes between seeking to restore victims to the *status quo ante*, and seeking to restore them to what he calls the *status quo aliter*. The former seeks to place victims in the situation they occupied before the wrongdoing occurred. The latter ideal—Gardner's preferred one, and the one that he claims actually governs compensatory remedies—seeks, through damages, to realize a world in which the plaintiff had carried on the same “track” without having suffered the tortious

involves “restoring or creating trust and hope in a shared sense of value and responsibility.” MARGARET URBAN WALKER, MORAL REPAIR: RECONSTRUCTING MORAL RELATIONS AFTER WRONGDOING 28 (2006).

¹³ WALKER, *supra* note 12, at 208. Similarly, Rahul Kumar—in focusing on the “reparations” debate, distinguishes between “compensatory” repair and “reparations as restoration,” with the latter mode of repair coextensive to what has elsewhere been called relational repair. Monetary compensation is seen as one vehicle among others to repair strained relationships between the state and the descendants of oppressed peoples. Rahul Kumar, *Why Reparations?*, in PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 193, 195-196 (John Oberdiek, ed., 2014) This paper does not adopt Kumar's labels.

injury.¹⁴ Courts, in other words, “aim to put the plaintiff’s life back on its previous track (*aliter*), even though not necessarily at its previous (*ante*) position on that track.”¹⁵ Gardner regards restoration to the status quo ante appropriate for certain contractual remedies, like rescission, but inappropriate for tort law. After all, restoration of victims to their positions *ante* may in principle require tort victims to give up *gains* obtained since their injuries occurred. But compensatory damages do not require this: defendants pay successful plaintiffs enough money such that we can pretend that the plaintiff’s life had continued, and can continue, as though the defendant had never wronged the plaintiff in the first place.

Courts do not always carefully distinguish between *ante* and *aliter*, at least when characterizing the goal of compensatory damages. But for our purposes, two points are more important. First, the distinction illustrates another way of individuating duties of repair that focus not on the object of repair but the ultimate ideal by which we evaluate the repair’s success. Second, although I focus on two further ideals below, nothing in this paper will claim that these ideals exhaust the field. The conceptions I identify—resilient repair and restorative repair—nevertheless loom large in our moral lives. And resilient repair in particular, although seemingly novel, may already coexist in the law with its restorative cousin.

II. REPAIR: RESTORATION OR RESILIENCE

A. *The Ubiquity of the Resilience Ideal of Repair*

The Kintsugi method is a transformative conception of repair. The technique does not pretend that a bad event never happened or try to fully erase evidence of its occurrence. Kintsugi aspires to make the bad good, reassembling broken shards to a condition better than before, at least aesthetically. Unsurprisingly, this practice has proven an appealing metaphor, with a handful of popular books explicitly drawing on Kintsugi to illustrate an underlying ideal of resilience.¹⁶ The conception of repair

¹⁴ GARDNER, FROM PERSONAL LIFE TO PRIVATE LAW, *supra* note 9, at 164.

¹⁵ *Id.* at 165.

¹⁶ CÉLINE SANTINI, KINTSUGI: FINDING STRENGTH IN IMPERFECTION (2019);

manifested in the Kintsugi method—what is here called resilient repair—has proven popular in the self-help genre more generally.¹⁷

The ideal of resilient repair is also a mainstay of political rhetoric after natural disasters. After flash flooding severely damaged New York’s Southern Tier and Finger Lakes communities, state legislators vowed—with help from state funding—that their communities would “come back stronger than ever” and that the funding would “help us build back better and stronger than before.”¹⁸ After Hurricane Sandy, a U.S. Senator praised outlays of federal funding to New Jersey that would fund “rebuilding our state stronger than ever before.”¹⁹ After Hurricane Katrina, a legislator from Louisiana considered it imperative to “rebuild[] our State stronger than ever before.”²⁰ And U.S. President Joseph R. Biden made his vow to “Build Back Better” his campaign’s chief slogan, implicitly referencing, among other things, the Covid-19 pandemic that has devastated the country.²¹

CANDICE KUMAI, *KINTSUGI WELLNESS: THE JAPANESE ART OF NOURISHING MIND, BODY, AND SPIRIT* (2018).

¹⁷ Consider some recent books on the topic of resilience written for popular audiences: ROSS EDGLEY, *THE ART OF RESILIENCE: STRATEGIES FOR AN UNBREAKABLE MIND AND BODY*; TOD BOLSINGER, *TEMPERED RESILIENCE: HOW LEADERS ARE FORMED IN THE CRUCIBLE OF CHANGE*; GAIL GAZELLE, *EVERYDAY RESILIENCE: A PRACTICAL GUIDE TO BUILD INNER STRENGTH AND WEATHER LIFE’S CHALLENGES* (2020); RICK HANSON & FOREST HANSON, *RESILIENT: HOW TO GROW AN UNSHAKABLE CORE OF CALM, STRENGTH, AND HAPPINESS* (2020); WILLIAM B. IRVINE, *THE STOIC CHALLENGE: A PHILOSOPHER’S GUIDE TO BECOMING TOUGHER, CALMER, AND MORE RESILIENT* 41-66 (2019).

¹⁸ Press Release, Gov. Andrew Cuomo, *Governor Cuomo Announces \$13 Million in Relief Funds for Communities Damaged by Severe Storms and Flash Flooding*, Nov. 2, 2018, <https://www.governor.ny.gov/news/governor-cuomo-announces-13-million-relief-funds-communities-damaged-severe-storms-and-flash>.

¹⁹ Press Release, Sen. Robert Menendez, *Lautenberg, Menendez Announce Nearly \$9.4 Million in Federal Funding to Help Local Communities Recover from Superstorm Sandy*, Apr. 13, 2013, <https://www.menendez.senate.gov/newsroom/press/menendez-lautenberg-announce-nearly-94-million-in-federal-funding-to-help-local-communities-recover-from-superstorm-sandy>.

²⁰ Hon. Charlie Melancon, Testimony, Senate Hearing 111-1007, Ad Hoc Subcommittee on Disaster Recovery, Aug. 26, 2010.

²¹ Joseph R. Biden, TWITTER, Jul. 24, 2020, <https://twitter.com/JoeBiden/status/1286817188288970758?s=20>; see also Joseph R. Biden, TWITTER, Jul. 20, 2020 (“[W]e’ll emerge stronger.”),

Politicians are not alone. The Global Facility for Disaster Reduction and Recovery (GFDRR) preceded Biden in naming one of its reports, *Building Back Better: Achieving resilience through stronger, faster, and more inclusive post-disaster reconstruction*.²² The report “explore[s] how countries can strengthen their resilience to natural shocks.”²³ The United Nations likewise endorsed an ideal of resilience in its Sendai Framework for Disaster Risk Reduction, listing “Building Back Better” as a priority in responding to disasters.²⁴

One hears similar expressions of resolve after terrorist attacks. Here is David Childs, architect of One World Trade Center building, the building that would replace the original Twin Towers after terrorists destroyed them on September 11, 2001:

The whole idea wasn’t to rebuild buildings—that’s the architectural drive, but I always felt very strongly that the idea was to come back and prove to the world that we had returned, and returned better than before.²⁵

<https://twitter.com/JoeBiden/status/1283034009895751680?s=20>; Joseph R. Biden, TWITTER, May 19, 2020 (“The United States of America has always emerged stronger from every trial and tribulation — and we will again.”), <https://twitter.com/JoeBiden/status/1262910915768315904?s=20>.

²² Stephane Hallegatte, Jun Rentschler, Brian Walsh, *Building Back Better: Achieving resilience through stronger, faster, and more inclusive post-disaster reconstruction*, Global Facility for Disaster Reduction and Recovery (GFDRR), June 18, 2018, <https://www.gfdr.org/en/publication/building-back-better>. The GFDRR is a global partnership administered by the World Bank. GFDRR, *Partnership Charter*, Feb. 23, 2007, <https://www.gfdr.org/sites/default/files/publication/partnership-charter.pdf>.

²³ Stephane Hallegatte, Jun Rentschler, Brian Walsh, *Building Back Better: Achieving resilience through stronger, faster, and more inclusive post-disaster reconstruction*, Global Facility for Disaster Reduction and Recovery (GFDRR), June 18, 2018, <https://www.gfdr.org/en/publication/building-back-better>. The GFDRR is a global partnership administered by the World Bank. GFDRR, *Partnership Charter*, Feb. 23, 2007, <https://www.gfdr.org/sites/default/files/publication/partnership-charter.pdf>.

²⁴ United Nations, Sendai Framework for Disaster Risk Reduction 2015-2030 21 (2015), <https://www.undrr.org/publication/sendai-framework-disaster-risk-reduction-2015-2030>.

²⁵ Scott Raab, *An Absolute Miracle, in Spite of Our Best Efforts*, ESQUIRE, Jan. 1, 2015, at 84.

Childs echoes sentiments heard in response to the Oklahoma City bombing just five years before the 9/11 attacks, a white supremacist terrorist attack that killed or injured hundreds of people in the Murrah Federal Building. Although federal employee Robert Roddy expressed “concerns about returning to a federal building” after the attack, Roddy decided to do so regardless, remarking that the building “is stronger and better than before — like all of us.”²⁶ And here is a former Oklahoma state judge reflecting on the same attack:

The bombing brought Oklahoma City to its knees... At that point, this community had two choices. One was to go down and stay down. The other was to get up and prove that civics and citizenship and the rule of law will overcome and prevail. We are so strong and resilient that we are actually going to be better. That’s what we did.²⁷

These examples come from survivors of community-wide devastation. But they articulate an ideal of resilience that applies to individuals as well. Although a commonplace theme in self-help books,²⁸ individual resilience—in the sense of emerging better off than before serious setbacks—is also an underlying theme in Susan Brison’s groundbreaking book, *Aftermath*, in which she describes the process of rebuilding her life after surviving a rape and attempted murder.²⁹ She recounts struggling with a shattered sense of self, explains what this “shattering” meant, and details the process of trying to rebuild her life.³⁰ As part of that rebuilding process, Brison participated in a rape survivors’ support group, whose facilitator—herself a survivor—asserted, “You can never be the same. But you can be better.”³¹ Initially, Brison found the claim absurd.³² She found

²⁶ Staff, *HUD Moves into New Building; Some Employees Like the Location Close to the Site of the Bombing*, THE DAILY OKLAHOMAN, March 16, 2004 (emphasis added).

²⁷ SAM ANDERSON, BOOM TOWN 359 (2018).

²⁸ See sources collected *supra* note 17.

²⁹ SUSAN BRISON, AFTERMATH: VIOLENCE AND THE REMAKING OF A SELF xii (2002) [hereinafter, BRISON, AFTERMATH].

³⁰ *Id.*

³¹ *Id.* 20 (emphasis added).

³² *Id.* 20.

similar remarks from others insulting, criticizing “the Pollyannaish comments I got shortly after my assault—from people who had no idea what I was going through, but [who] were certain that the experience would make me stronger.”³³ But ultimately Brison “came to agree,” with the caveat that the “better” life would not mean “having a life that’s more coherent, in control, [or] predictable.”³⁴ Instead, she could have a life in which she emerged “tougher than ever.”³⁵

These examples illustrate a readily recognizable conception of resilience, one that calls for individuals or communities to return, in some respect, better than before even the most severe setbacks. What counts as “better,” though, raises questions. Who gets to decide what qualifies as better? How do we evaluate whether something or someone has satisfied that standard of betterment? Sometimes, in the case of rebuilding with an eye towards disaster relief, the goals will be fairly obvious even if the manner by which they are achieved are difficult. Rebuilding better after hurricanes will involve rebuilding with an eye towards mitigating vulnerabilities to future hurricanes. This type of post-injury betterment involves understanding harms as “learning experiences.” We treat setbacks as sources of information that can better inform our planning activities going forward.

But what it means for *individuals* or *communities* to bounce back better is trickier to ascertain. And with good reason. People are not pottery or houses near floodplains. What it means for people to return “better” will depend on their circumstances, including their goals, commitments, the nature of the underlying injuries constraining them, and the resources at their disposal. And crucially, I think, moral agents *themselves*—whether individuals and communities—must play a central role in determining *for themselves* what “better” requires, given their status as autonomous agents who bear primary responsibility for making and executing their own plans. This status suggests that, for individuals and communities to demonstrate resilience, *they*

³³ Susan Brison, *Trauma Narratives and the Remaking of the Self*, in *ACTS OF MEMORY: CULTURAL RECALL IN THE PRESENT* (Mieke Bal, Jonathan Crewe, & Leo Spitzer, eds., 1999) (“One aunt actually called the whole ordeal ‘a real blessing from above, for sure.’”) [hereinafter, Brison, *Trauma Narratives*].

³⁴ BRISON, *AFTERMATH*, *supra* note 29, at 115.

³⁵ *Id.* at 14.

themselves must participate in their own resilient repair in light of their chosen standards of success. So although there is a sense in which individuals who seek resilient repair must try to make things “better” than before, and although Part III will say a bit more about what betterment might concretely entail for individuals, for present purposes betterment will remain underspecified. Instead, it is worth dwelling on how this ubiquitous conception of repair differs in kind from restorative repair.

B. Contrasting Restorative Repair

Having identified the rough outlines of the resilience conception of repair, contrast it with restorative repair. Doing so will give us a better grip on the contours of both conceptions.

The most important difference is that resilient repair does not take as its constitutive aim undoing all the negative effects of past harms—whereas restorative repair does just that. From the perspective of restorative repair, Kintsugi necessarily falls short because cracks remain visible. A preferable technique would render those cracks invisible while rendering the pottery just as strong as before.

We can see how restorative repair might operate in the other examples canvassed so far. After natural disasters, homeowners would stubbornly insist on rebuilding, plank by plank, exactly the same building in exactly the same location. After the 9/11 and Oklahoma City attacks, identical buildings would be built on the same site of the original attacks. And victims of violence, if possible, would not only get all the medical attention they needed, but if they could, they would also take pills that would erase traumatic memories that otherwise haunt their dreams.

Resilient repair, by contrast, stands ready to acknowledge and even embrace traces of past harms by repurposing them into something valuable. This ideal, as already observed, governs Kintsugi. But it also governs natural disaster recovery plans that rebuild physical facilities such that they are not as vulnerable to natural disasters. So too did resilient repair implicitly guide the rebuilding efforts after the aforementioned terrorist attacks. Specifically, there was no effort to rebuild either the Murrah Federal Building or the Twin Towers in their original forms. The

buildings that replaced them—the Oklahoma City Federal Building and the so-called Freedom Tower—were built “to reduce vulnerability” associated with bombings.³⁶ Making the physical facilities safer than before is one way to pursue resilience’s constitutive aim of betterment.³⁷

There is another way that these sites exhibit the ideal of resilient repair. Like Kintsugi, no effort was made to hide or erase the original sites of the terrorist attacks. The site of the Murrah Federal Building became a memorial and museum.³⁸ The two square “footprints” where the Twin Towers originally stood also became memorials.³⁹ Whatever repair required, the communities devastated by these attacks felt compelled to preserve their memory rather than pretend the attacks never happened. They felt compelled to honor the victims of those attacks. So, I submit, the felt need to repair in some material respects “better,” coupled with the demand to accommodate the traces of past injuries rather than erase them, suggest that resilient repair rather than restorative repair better captures the ideal that actually guided the relevant decision makers charged with rebuilding.

Still, I hasten to add that resilient repair does not entirely exclude restorative repair. Partial restoration may even be required to achieve the goal of coming back better. Notice that even Kintsugi involves recombining shards into bowls, not two-dimensional mosaics (though even turning shards into mosaics may itself manifest resilient repair). The bowl is restored insofar as it is a bowl, not some other thing. As for natural disasters and terrorist attacks, roads must be cleared. People still need homes and places to work.

But to the extent that they manifest resilient repair, these practices make no effort to erase all evidence of injury. Again, the

³⁶ U.S. Gen. Services Admin., Oklahoma City Federal Building, https://www.gsa.gov/cdnstatic/Oklahoma_City_Federal_Building_Oklahoma_City_OK.pdf.

³⁷ The new buildings also reflected symbolic expressions of betterment, with (for example) the Freedom Tower standing taller than the original Twin Towers. BBC News, *One World Trade Center becomes New York's tallest building*, Apr. 30, 2012, <https://www.bbc.com/news/world-us-canada-17898138>.

³⁸ Oklahoma City National Memorial Museum, <https://memorialmuseum.com/experience/the-memorial/>

³⁹ 9/11 Memorial & Museum, <https://www.911memorial.org/>.

cracks are highlighted as something beautiful or worth admiring, filled as they are with gold-infused adhesives. Ruins become museums. Losses are repurposed into value. Implicit in resilient repair, as compared to restorative repair, is the acknowledgment that undoing harms done, at least fully, is not possible—and maybe not even desirable. And what distinguishes resilient repair is that despite foregoing the task of fully eliminating evidence of past harms, resilient repair nevertheless strives to make the end result in some respect better than before.

So far we have discussed how resilient repair operates in the wake of destroyed property, both personal (ceramicware) and real (buildings). But again, persons are neither pottery nor buildings. Still, the restorative ideal—as compared to the resilient one—is even less attainable when it comes to setbacks faced by human beings. As Scott Hershovitz reminds us, sometimes it makes no sense to seek to restore what has been lost, which may include life and limb.⁴⁰ Persons who carry enduring memories of traumatic events, Susan Brison observes, “frequently remark that they are not the same people they were before they were traumatized.”⁴¹ And, for some, being able to pick up the pieces of their lives and carry on living may in itself prove a remarkable achievement regardless of whether it is accurately characterized as one involving betterment. Again, our assessments of what counts as “better” will have to remain fairly open-ended; we are not in a position to stand in judgment of what betterment specifically requires in any individual person’s case. For now, what is clear is that, just as the “betterment” of physical facilities can be consistent with transforming those facilities in some beneficial way, and just as our achieving a better outcome is consistent with recognizing or even underscoring serious setbacks, we can also understand betterment of individuals after setbacks as somehow consistent with their suffering from those setbacks.

C. *Reasons for Resilient Repair*

So there is an ideal of repair that understands the task not as erasing harms as though they never happened, but rather making

⁴⁰ Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. L. REV. 107, 110-13 (2011).

⁴¹ Brison, *Trauma Narratives*, *supra* note 33.

things in some respects better than before the harm. This resilient repair may involve restoration to some extent. But the resilience conception also sees no point in pretending that certain harms did not occur. The restoration, to the extent possible and pursued, happens only to serve the more fundamental goal of emerging better than before, in some meaningful sense.

What it means to come back better, as already noted, will not always be clear. But the line of inquiry taken up now concerns the normative foundations of resilient repair. We can frame the question comparatively: What reasons do we have to seek resilient repair rather than restorative repair? We will end up answering that question. But for now I wish to frame the question non-comparatively: what reasons do we have to come back better than before in the aftermath of serious setbacks? Answering this question will help answer the preceding one.

On one interpretation, emerging better than before a setback involves nothing more than complying with the demands of practical rationality interpreted as maximizing expected utility. Having learned that we've built a house near shore, and having learned that climate change will make structures built near shorelines ever more vulnerable to floods and hurricanes, then rationally (and all else equal) we should rebuild structures to better withstand these events, including (perhaps) by rebuilding further away from shore. Pursuing individual resilience, on this interpretation, operates much the same way. Setbacks of all kinds are sunk costs. They cannot be changed. The only rational response is to maximize our expected utility going forward. But nothing fundamentally changes as a result of having suffered a *setback* because we *always* have these reasons of practical rationality. Victims or not, rationality always counsels making ourselves better off than before any arbitrary prior point in time.

Instrumental rationality and expected utility theory have their place. If we want to avoid future flooding, we should rebuild away from the flood-prone areas and ensure as best we can that our buildings can withstand unforgiving winds. The Sendai framework emphasizes this type of reason for building back better in exhorting countries and NGOs to devote greater resources to disaster recovery and to enable populations to take greater preventative measures.

But other reasons to bounce back better relate to the messages

we send to others (expressive reasons) and narratives that we internalize (narrative reasons). To illustrate, consider a speech given by Mayor Bill de Blasio's in 2016, celebrating the return of federal agencies as leaseholders in One World Trade Center.⁴² Referring to the 9/11 terrorist attacks on the World Trade Center, de Blasio remarked:

And it's a day to remember – and the Secretary [Jeh Johnson] always invokes that point – we won't allow ourselves to be terrorized. Well, the terrorists attacked this nation, they attacked New York City, in particular. And I often say – it was not just a physical attack, it was an attack on our values. It was an effort to undermine our democracy. It was an effort to make us retreat from what we believe. And had we gone into a defensive crouch, had we as a nation decided we had to retreat and retreat, it would have been sadly a victory for a terrorist. But there was such resolve at the federal level, state level, city level. We'd rebuild here. We would bring back all of the strength that we associated with this location, including now the presence of our federal government. We would show that the terrorists achieved none of their aims. In fact, they strengthened our resolve. And today is one of those days that puts an exclamation point on that idea.⁴³

At the same event, Jeh Johnson, then-Secretary of the Department of Homeland Security, echoed de Blasio: "Terrorism cannot prevail if we refuse to be terrorized,"⁴⁴ adding, "It is a sign of our determination to move forward and to come back stronger than ever before. Literally out of the ashes, we have rebuilt

⁴² Thomas MacMillan, *Officials Hail Return of Federal Workers to World Trade Center*, The Wall St. J., Sept. 9, 2016, <https://www.wsj.com/articles/officials-hail-return-of-federal-workers-to-world-trade-center-1473462107>.

⁴³ Mayor Bill de Blasio, *Transcript: Mayor de Blasio Delivers Remarks Commemorating the Federal Government's Return to One World Trade Center*, Sept. 9, 2016, <https://www1.nyc.gov/office-of-the-mayor/news/722-16/transcript-mayor-de-blasio-delivers-remarks-commemorating-federal-government-s-return-one>.

⁴⁴ Thomas MacMillan, *Officials Hail Return of Federal Workers to World Trade Center*, The Wall St. J., Sept. 9, 2016, <https://www.wsj.com/articles/officials-hail-return-of-federal-workers-to-world-trade-center-1473462107>.

stronger and taller.”⁴⁵

This kind of political rhetoric is by now familiar. But this time we should notice that building back “better” or “stronger” takes on a different significance. Terrorist acts are symbolic acts that aim to send messages to entire communities. The precise meaning—either intended or received—of these attacks is often contested. But more general claims expressed by these attacks—expressions of contempt, demonstrations of the targeted group’s weakness, a denigration of their “values”—are not difficult to discern. What matters for our purposes is that resilient repair, apart from having instrumental value, has symbolic or expressive value. Rebuilding after 9/11 “better” and “stronger,” and thereby demonstrating a refusal to take a “defensive crouch,” is a “sign”—a symbol or expression—of the ultimate strength of the community attacked. And if the aim is to terrorize that same community, rebuilding signals a refusal to be terrorized and thus the ultimate failure of the terrorist’s aims.

Apart from securing expressive value, emerging better than before has related narrative value. What I call “narrative value” concerns the narratives that partly constitute the identities of persons and communities. Part of what de Blasio and Johnson impart with their speeches is not just a message to the world that New York would not be cowed by terrorist attacks. A story of resilience after 9/11—both individual and community—is constitutive of the identities of many who lived through the event. Victimized individuals and communities may see themselves irreversibly changed by traumatic events, yet nevertheless interpret them as formative events, the interpretation of which partially constitute of their identities as persons.

Now, saying that a narrative about some harmful event partially constitutes a person’s identity does not by itself say very much. Compare narratives according to which we are utterly defeated by a setback, unable to respond constructively, and unable to piece our lives back together. Internalizing this story of defeat involves internalizing a story according to which one’s agential capacities have failed. This poses serious risk of harm to

⁴⁵ Department of Homeland Security, *September 11, 2016: Remember and Looking Forward*, Sept. 13, 2016, <https://www.dhs.gov/blog/2016/09/13/september-11-2016-remembering-and-looking-forward>.

one's self-respect, which is important for motivating individuals to formulate and execute their life plans. If an event defeats a person, if they are forever living in the traumatic past and unable to formulate and execute plans of life going forward, so much the worse for their identities.

But the very fact that one has overcome serious harms is itself something that many people embrace as part of who they are, and we might add, a source of self-worth and self-respect, which are themselves valuable.⁴⁶ For example, and as Paul Longmore explains, people who suffer from debilitating injuries that leave them permanently disabled frequently find that "[t]hey have incorporated the[ir] disabilities into their identities, into their very selves. And they see their experiences as yielding much that is positive in their personal growth."⁴⁷ So we have reason to emerge better than before setbacks in order to realize a narrative of resilience, which grounds sound judgments of self-respect, a basic good that Rawls considered one of the most important.

Of course these expressive and narrative reasons are not confined to circumstances involving wrongdoing. How we respond to setbacks—including ones that involve no wrongdoings by others—similarly has expressive or symbolic value. Our ability to respond stronger after setbacks imposed by the fates—an unexpected illness, for example—communicates to others certain aspects of our capacities. This may prove instrumentally valuable to the extent that others may find these attributes appealing, but expressing one's fortitude may be constitutively valuable insofar as it constitutes part of a valued reputation. And we might likewise internalize certain narratives about our own resilience in part because we act resiliently in the face of setbacks.

Nothing here fully catalogues the values that make resilient repair worth pursuing. But, for our limited purposes, the more important point is that expressive and narrative reasons are not

⁴⁶ Expressive and narrative reasons for resilient repair interrelate. The narratives we internalize partly constitute who we are or who we take ourselves to be. But these narratives are influenced by how others understand us to be. And the dynamic can run in reverse. Others may accept the narratives that we have internalized—sometimes even if those narratives poorly reflect reality.

⁴⁷ Paul K. Longmore, *Medical Decision Making and People with Disabilities: A Clash of Cultures*, in *WHY I BURNED MY BOOK AND OTHER ESSAYS ON DISABILITY* 204, 209 (2003).

simply reasons for resilient repair, full stop. They operate as contrastive reasons for pursuing resilient repair *rather than* restorative repair.⁴⁸ This is because restorative repair is incompatible with securing these expressive or narrative aims. After all, restorative repair views harms and whatever traces they leave in their wake as regrettable and to be erased. This ideal seems to work well for art restorers or owners of body shops. But trivial exceptions aside, restorative repair fails as an ideal that governs human beings. It is practically impossible to, say, fully restore a lost limb or erase traumatic memories.

By contrast, resilient repair remains operative after restorative repair is rendered impossible, in part because it accommodates, acknowledges, or recognizes that some harms cannot be undone. Rebuilding a life or a community stronger than before presupposes rebuilding after *a setback*, not simply before an arbitrary point in time (as the normative decision theorist would maintain). Our efforts in rebuilding our communities or our lives are informed by the knowledge that a serious setback has occurred and are responsive to that knowledge. The so-called Freedom Tower makes room, as noted earlier, for the 9/11 memorial that sits in the footprints of the Twin Towers. Likewise, the site of the Murrah Federal Building was demolished and made a memorial, while the new Oklahoma City Federal Building was moved downtown as part of a downtown revitalization project, one touted as “a national symbol of strength and resilience.”⁴⁹ And individuals 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. The reasons we have for telling those stories to ourselves and others presuppose that setbacks are part of those stories. Setbacks partially constitute those stories and thus are necessary to secure whatever distinctive value they have. And none of this mentions the ubiquitous reasons to improve things going forward, the reasons of practical rationality that guide our rebuilding to better resist terrorist attacks.

⁴⁸ This may be unsurprising if all practical reasons turn out to be contrastive ones. JUSTIN SNEDEGAR, *CONTRASTIVE REASONS* (2017).

⁴⁹ U.S. Gen. Services Admin., Oklahoma City Federal Building, https://www.gsa.gov/cdnstatic/Oklahoma_City_Federal_Building__Oklahoma_City__OK.pdf.

A final point. Notice also that restorative repair sometimes seems morally problematic even when in principle it *does* seem possible. We will see this point developed at length when we revisit in Part III arguments by Samuel Bagenstos and Margo Schlanger, arguments which focus on how the restorative ideal tends to demean people with disabilities. For now, notice that trying to totally reconstruct the Twin Towers or the Murrah Federal Building arguably denigrates the memories of those who died. Survivors of mass atrocities like the Holocaust and the Armenian Genocide frequently, and correctly, insist on the importance of honoring the lives lost by remembering what took place. Without attempting a full account of an “ethics of memory,”⁵⁰ I nevertheless regard this as a strike against the restorative repair to the extent it cannot accommodate those who wish *not* to forget, but rather, to recognize and accommodate traumatic events even as they strive to make things better.

To summarize, several types of reasons support resilient repair: reasons of practical rationality, expressive reasons, and narrative reasons. These reasons in turn may be grounded in more fundamental concerns like self-respect, but what remains clear is that, to the extent that resilient repair makes possible a sense of betterment while recognizing and being in some sense guided by harmful events gone past, restorative repair cannot comfortably accommodate these same concerns. Indeed, even when we can achieve the restorative ideal, there are sometimes moral reasons against doing so.

III. INTERPRETING COMPENSATORY DAMAGES

So we have various reasons for repair, and to do so resiliently rather than merely restoratively. But such repairs can be costly. Kinstugi characteristically uses *gold* dust, after all. Rebuilding after 9/11 cost billions of dollars. Natural disaster recovery is not cheap in the best of circumstances, least of all when striving to rebuild using the latest developments in civil and environmental engineering, rather than simply patching things up to survive another day. Resilient repair is an *ideal*. Many communities lack the resources to come close to that ideal. And under circumstances of scarcity questions of proper allocation—

⁵⁰ I have in mind AVISHAI MARGALIT, *THE ETHICS OF MEMORY* (2004).

questions of justice—become pressing.

Setting aside the “who pays” question when confronting natural disasters and large-scale terrorist attacks, let’s focus on justice between persons as pursued through tort law. Although very little about tort law’s constitutive aim is uncontroversial, let’s assume along with many others that tort law pursues and embodies some form of corrective justice between the parties, where plaintiffs try to force defendants to comply with their *duty of repair*. Let’s further assume, as is also widely assumed, that the duty to pay compensatory damages manifests in institutional form the duty of repair. Again, while these assumptions are not uncontroversial, they are widely taken for granted, and accepting them for the sake of argument will (hopefully) prove illuminating.

More specifically, Section A below will establish that courts and commentators often conceive of compensatory damages in terms of restorative repair. Section A will also briefly survey some conceptual and moral criticisms of this understanding. This sets the stage, in Section B, for a resilience-based reconceptualization of compensatory damages. Focusing specifically on hedonic damages, which have been heavily criticized, I will argue that we can reconceive them in terms of resilient repair. Doing so allows us to disarm some of the most forceful conceptual and moral criticisms of hedonic damages, which presuppose that they must be understood in terms of the restorative ideal.

A. *Compensatory Damages as Restorative Repair*

As Arthur Ripstein remarks, “Law students are usually told that the purpose of damages is to make it as if a wrong had never happened.”⁵¹ Courts and commentators routinely conceive compensatory damages in terms of the restorative ideal. And often they explicitly use the language of restoration. Here is a court reciting language that, for most practical purposes, could be cited as boilerplate in most jurisdictions in the United States, and which most students of tort law would find totally unremarkable:

Compensatory damages serve as recompense for the loss sustained. The essential purpose is to make plaintiff whole to

⁵¹ Arthur Ripstein, *As if it Never Happened*, 48 WM. & MARY L. REV. 1957, 1957 (2007) [hereinafter, Ripstein, *As if it Never Happened*].

the extent possible. This is true whether the wrong inflicted lies in tort or contract. The goal is to restore the plaintiff to the extent possible to the same position he or she was in prior to the occurrence of the wrong.⁵²

Another state court, also using the language of restoration, remarks that “the aim of compensatory damages is to restore a plaintiff to the financial position he/she would presently enjoy but for the defendant’s injurious conduct.”⁵³

Courts like these—i.e., most modern common law courts—have scholarly defenders. Professor Ripstein, quoted at the outset, goes on to defend the make-whole conception of compensatory damages, embracing the dictum that the goal of compensatory damages is restore the victim to the position they would have occupied had the wrongdoing never occurred.⁵⁴ Ripstein’s defense is grounded in a version of what John Gardner calls the *continuity thesis*, which holds that some normative aspect of the pre-wrongdoings situation survives in the wake of a wrongdoing, and also explains and justifies imposing a secondary duty of repair on the wrongdoer.⁵⁵ Ripstein’s version of the continuity thesis holds that rights—and in particular, rights to one’s *means*—survive their violation, and that this explains reparative obligations.⁵⁶ The means that tort law protects, according to Ripstein, are one’s person, property, and reputation.⁵⁷ But the

⁵² See, e.g., *Kessel v. Leavitt*, 204 W. Va. 95, 187, 812 (1998).

⁵³ *Maul v. Kirkman*, 270 N.J. Super. 596, 618, 637 A.2d 928, 939 (App. Div. 1994).

⁵⁴ Ripstein, *As if it Never Happened*, *supra* note 51.

⁵⁵ John Gardner, *What Tort Law is For*, Volume I: *Corrective Justice*, 30 L. & PHIL. 1, 11 (2011) [hereinafter, *What Tort Law is For*].

⁵⁶ Ripstein, *As if it Never Happened*, *supra* note 51. It is less obvious to me that John Gardner’s understanding of the continuity thesis—which emphasizes the continuity of reasons that justify primary duties—requires him to embrace the make-whole conception of repair. Some of his doctrines embrace literal repair as the only genuine form of repair, regarding pain and suffering damages as not genuinely reparative, making his version an even narrower conception of restorative repair than the one articulated here. But other loose characterizations of the secondary duty of repair suggest that its dictate is merely to do the “next best” thing, which seems indeterminate as between restorative repair and resilient repair. That is, it is far from obvious to me why we should assume that the “next best” thing excludes resilient repair. Gardner, *What Tort Law is For*, *supra* note 55, at 33.

⁵⁷ ARTHUR RIPSTEIN, *PRIVATE WRONGS* (2018) [hereinafter, RIPSTEIN,

basic idea is that because one continues to have a right to these means, wrongful deprivations thereof by others requires restoration of those same means to the extent possible, or a nearby available substitute. So Ripstein, in providing his Kantian framework, provides scaffolding for the judicial rhetoric sounding in restorative repair. Reparative obligations, satisfied by way of compensatory damages, seek restoration.

Critics of this restorative conception of repair abound. Some of the objections are conceptual. Scott Hershovitz emphasizes that it is impossible to fully restore a person to the *status quo ante*, while claiming that this makes the make-whole conception a poor fit for what tort law's remedies primarily accomplish.⁵⁸ John Goldberg and Benjamin Zipursky have insisted that, as a matter of history and doctrine, the make-whole conception of "full compensation" is of recent vintage and far from conceptually inevitable, arguing in favor of a sharp distinction between rights and redress.⁵⁹

The restorative conception also faces moral objections. Jeremy Waldron observes that, in certain circumstances, "moments of carelessness" end up causing "massive losses" to others, and decries the possibility that defendants may be forced to pay large compensatory awards despite relatively trivial levels of fault.⁶⁰ Many writers have observed that restorative repair, without using those words, reinforces existing patterns of entitlement that are themselves unjust.⁶¹ More recent work by Ronen Avraham and Kimberly Yuracko have shown how members of historically oppressed social groups receive lower compensatory payouts precisely because of the diminished holdings and lower life expectancies of those groups, all of which trace directly to their history of oppression.⁶² The restorative conception of repair has also been challenged for expressing the moral judgment that

PRIVATE WRONGS].

⁵⁸ Hershovitz, *supra* note 40, at 110-13.

⁵⁹ JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, *RECOGNIZING WRONGS* (2020); John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435 (2006); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695 (2003).

⁶⁰ Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 387 (David G. Owen ed., 1995).

⁶¹ See, e.g., JULES L. COLEMAN, *RISKS AND WRONGS* 304-05 (1993).

⁶² Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661 (2017).

money is commensurable with other values when they are not. As Margaret Jane Radin has pointed out, this raises worries about commodification, worries which arise with particular force when defendants pay money to plaintiffs for nonpecuniary harms.⁶³ And, as we will see in detail shortly, evaluating human bodies in light of the restorative ideal arguably stigmatizes disabled persons.⁶⁴

Defenders of the restorative conception of repair have rejoinders, which sometimes involve conceding that some compensation traveling under the label “compensatory damages” goes beyond what the duty of repair requires.⁶⁵ But my present aim is not to join the debate. Instead, the aim so far has been, first, to illustrate that the prevailing “make whole” conception of compensatory damages, or at least the rhetoric used to characterize the aim of compensation, reflects the ideal of restorative repair. Compensatory damages, so conceived, embark on a project of erasure. The ideal is to make things as though the injurious wrongdoing never happened, to the extent that can be accomplished with money. The second goal was to show that, for conceptual and moral reasons, this ideal has attracted serious objections. This second point motivates adopting a different conception of repair, which prevents some of these objections from arising in the first place.

B. Compensatory Damages as Resilient Repair

Critics of the restorative interpretation of compensatory damages face their own challenges in seeking an alternative. One challenge is a challenge of theoretical “fit.” Even though, as John

⁶³ Margaret Jane Radin, *Compensation and Commensurability*, 43 DUKE L.J. 56 (1993).

⁶⁴ See discussion *infra* Part II.B.

⁶⁵ Sometimes they acknowledge and retreat into narrower conceptions of repair. Ripstein argues that restoration of one’s means—and if one’s bodily function or property cannot be restored, payment of money as the “universal” means—is what secondary duties of repair require. Ripstein, *As if it Never Happened*, *supra* note 51, at 1984. Gardner acknowledges that secondary duties of repair require only repair in a “strict” sense, explaining away payment for pain and suffering and other non-pecuniary damages as serving different, non-reparative functions, including “to assuage frustration, resentment, and other kinds of ill-feeling that afflict plaintiffs.” See Gardner, *What Tort Law is For*, *supra* note 55, at 47.

Goldberg has argued, the make-whole conception of damages is only a relatively recent development (well, “relatively” in light of the age of the common law), restoration *now* seems like a firmly entrenched feature of the common law.⁶⁶ And although we should never assume that “entrenched” means *worth preserving*, those courts and commentators who emphasize the restorative ideal do seem to capture something intuitive and elegant about a wrongdoer’s responsibility to fix what they have wrongfully broken. We should not, as it were, toss the baby with the bathwater.

The good news is that, as we have seen, the ideal of resilient repair has a place for restorative repair. Recall the examples used to illustrate resilient repair throughout. Kintsugi *does* restore at least the shape of broken ceramics. Buildings are rebuilt, but with improved security, and often with memorials that honor the memories of those who perished. As far as bodily injury goes, some wounds heal. And when there is loss of limb, prosthetics partially restore lost functionality. But rather than seeing these restorative measures as merely falling short of the restorative ideal, we should see the restoration as *serving* the more fundamental goal of resilient repair, as partial constituents thereof. And as we have seen, resilient repair properly seeks resources that go beyond a strict restorative model, resources sufficient to enable victims to, in some meaningful sense, come back better than before.

What might that “something more” look like concretely? Again, this will be highly sensitive to a person’s perceived needs, commitments, and aspirations. Susan Brison extolled the virtues of learning self-defense *en route* to realizing her resilience.⁶⁷ For others, funds to learn new skills or training might be called for. Or to the extent that one’s close social ties contribute to personal resilience, maybe facilitating greater interactions—costs to defray travel expenses, for example—may contribute towards resilience. Or maybe cognitive behavioral therapy is called for—which is especially appropriate given that a stated goal of such therapy is to foster resilience.⁶⁸ Or maybe simply lump sum amounts

⁶⁶ Goldberg, *supra* note 59, at 447-462.

⁶⁷ BRISON, *AFTERMATH*, *supra* note 29, at 20.

⁶⁸ MICHAEL NEENAN, *DEVELOPING RESILIENCE: A COGNITIVE BEHAVIORAL APPROACH* (2D ED. 2017).

allocated to satisfy the extra-restorative “resilience interests,” however the successful plaintiff ultimately chooses to use them. In any event, what resilient repair calls for, as discussed earlier, will be sensitive to the individual plaintiff’s particular circumstances.

For our limited theoretical purposes, the fact that resilient repair may partially depend on restorative repair, but is not constrained by it, helps respond to conceptual objections to the traditional conception of compensatory damages. Again, unlike the traditional conception that aspires to erase the past, the resilient conception makes no effort to undo the past completely. It cannot be done. Nor can even the best compensatory damages turn back the clock. But partial restoration *is* possible and sometimes worth pursuing. Resilient repair accepts this claim, too. And so too do courts that award compensatory damages. So, if theorists of compensatory damages seek a conception of repair that is well suited to render inapplicable the impossibility objection, the resilience conception of repair fits the bill.

What about the moral objections? The resilience-based conception of compensatory damages does not provide resources to respond to all of them. If compensatory damages are fundamentally unfair because massive damage awards for negligence claims are inherently unfair, nothing presented here necessarily responds to that concern. But the resilient-repair model of compensatory damages *does* have the resources to respond to some moral critiques. To illustrate, it is worth dwelling on the objection levied by Samuel Bagenstos and Margo Schlanger against awarding hedonic damages for disabling injuries.⁶⁹

Hedonic damages are sometimes awarded as a subset of compensatory damages. Traditionally, hedonic damages are conceived as compensation owed for “loss of the enjoyment of life,” given that “[t]ortious injury may deprive the plaintiff of one or more personal dimensions, activities, or opportunities for self-actualization that had brought pleasure or satisfaction to life.”⁷⁰ Those damages go beyond damages for pain and suffering or

⁶⁹ Samuel R. Bagenstos & Margo Schlanger, *Hedonic Damages, Hedonic Adaptation, and Disability*, 60 VAND. L. REV. 745 (2007).

⁷⁰ DAVID G. OWEN & MARY J. DAVIS, 3 OWEN & DAVIS ON PROD. LIAB. § 25:4 (4th ed. 2020).

mental anguish. While pain and suffering damages compensate for physical discomfort, and while mental anguish damages traditionally compensate for “shock, fright, emotional upset, and/or humiliation” caused by the tort, hedonic damages, by contrast, compensate for limitations “on the injured person’s ability to participate in and derive pleasure from the normal activities of daily life, or for the individual’s inability to pursue his talents, recreational interests, hobbies, or avocations.”⁷¹ In Texas, for example, courts have allowed compensation for lost recreational activities like an “inability to run, bicycle, participate in triathlons, and play with children.”⁷² Most jurisdictions already permit recovery for lost quality of life or hedonic damages.

Focusing on cases in which plaintiffs acquire disabling injuries, Professors Bagenstos and Schlanger observe that plaintiffs’ attorneys have adopted a strategy—often embraced by courts—that characterize plaintiffs as condemned to a permanent state of suffering and indignity, incapable of enjoying life to its fullest.⁷³ The Wyoming Supreme Court, ostensibly justifying hedonic damages awards in cases of disabling injuries, had this to say:

We [have] held that loss of mobility may be compensable even if it doesn’t result in loss of earnings because mobility “is the right to be a normal human being.” This suggests that appellee’s neck injury, which has caused him to curtail some of his physical activities, should be compensable because it has deprived him of ordinary human pleasures.⁷⁴

So courts sometimes accept that disabling injuries result in permanent loss of overall quality of life. Much more common, it seems, is the idea that these same injuries prevent plaintiffs from undertaking activities that they had once previously enjoyed. One court awarded a plaintiff hedonic damages for a hand injury because the plaintiff would no longer likely pursue activities

⁷¹ Bagenstos & Schlanger, *supra* note 69, at 748.

⁷² *Patlyek v. Brittain*, 149 S.W.3d 781, 787 (Tex. App.—Austin 2004) (citing *Plainview Motels, Inc. v. Reynolds*, 127 SW 3d 21, 38-39 (Tex. App.—Tyler 2003)).

⁷³ Bagenstos & Schlanger, *supra* note 69, at 756.

⁷⁴ *Mariner v. Marsden*, 610 P.2d 6, 12 (Wyo. 1980) (citing *Fox v. Fox*, 296 P.2d 252, 262 (Wyo. 1956)).

including “tennis, weightlifting, basketball, or heavy household chores.”⁷⁵ Another upheld a damages award after the plaintiff had “testified that before the accident she was very active and enjoyed gardening, housework, camping, canoeing, and motorcycle riding but that after the accident either she could not enjoy these activities at all or she was only able to enjoy them much less frequently.”⁷⁶ And loss-of-consortium recoveries are commonplace.

Professors Bagenstos and Schlanger argue that courts should not permit recovery for hedonic damages associated with debilitating injuries.⁷⁷ They survey empirical research about adaptive preferences indicating that persons with disabilities are fully capable of enjoying their lives.⁷⁸ So, to the extent that hedonic damages presuppose that a person who acquires a disability permanently loses out on the ability to fully enjoy life, those damages often rest on a falsehood. Morally, Bagenstos and Schlanger argue that awarding hedonic damages for disabling injuries is demeaning and perpetuates stigmatizing beliefs about persons with disabilities.⁷⁹ These awards demean because they express the judgment, sometimes quite explicitly, that persons with disabilities have less valuable lives.⁸⁰ Bagenstos and Schlanger also worry about how plaintiffs’ attorneys depict the lives of persons with disabilities, stigmatizing them as little more than objects of pity.⁸¹ For these reasons, Bagenstos and Schlanger conclude that courts should not award hedonic damages for disabling injuries.⁸²

Some of the blame for these demeaning and stigmatizing messages, according to Bagenstos and Schlanger, traces to the make-whole conception of compensatory damages. “The language of wholeness,” they point out, “is a classic linguistic devaluation of life with a disability; other similar signals—use of the words ‘normal’ or ‘crippled’—are common as well.”⁸³ The make-whole conceit makes the baseline ideal the non-disabled person, in effect

⁷⁵ *Yosuf v. United States*, 642 F. Supp. 432, 439 (M.D. Pa. 1986).

⁷⁶ *Hendrix v. Stepanek*, 771 N.E.2d 559, 568 (Ill. App. Ct. 2002).

⁷⁷ Bagenstos & Schlanger, *supra* note 69, at 774.

⁷⁸ *Id.* at 775-78.

⁷⁹ *Id.* at 787.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² *Id.* at 774.

⁸³ *Id.* at 756.

communicating to the world that disabled persons are less than full persons. They are, as the Wyoming Supreme Court regrettably put the point, not “normal human beings.”⁸⁴

But I doubt whether Bagenstos and Schlanger escape the grip of the make-whole conception. They argue that compensatory damages *are* and *should be* available to enable newly disabled plaintiffs to move through the social world as unencumbered as reasonably possible.⁸⁵ For those with mobility impairments, this might require, for example, assistive technology like wheelchairs to allow them to do so.⁸⁶ They also endorse compensation for medical treatment to mitigate actual pain and suffering.⁸⁷ These claims rest on an implicit, unarticulated baseline of agency that must be *restored* in some way, and which uncompensated disabilities threaten to take away—at least given our social world’s failure to adequately accommodate the needs of those with disabilities. And it is unclear how this baseline can be understood except by reference to the agency and mobility of non-disabled persons.

There are ways out of this tension. For their part, Bagenstos and Schlanger try to distinguish compensating for assistive technology and the like. This type of compensation does not rest, they contend, on demeaning claims about the disvalue of disabled lives. Nor does this kind of award likely perpetuate stigma against persons with disabilities.⁸⁸ The difference, they assert, is that these damages “merely recognize concrete obstacles to physical health and participation in the community that money can overcome.”⁸⁹

But even if this “way out” succeeds, their ultimate prescription—eliminating hedonic damages—remains. This leaves a potentially large source of compensation on the table for those persons who acquire life-changing disabilities as a result of tortious conduct. And one need not see disabled persons as objects of pity to worry that this proposed reform might do more material harm than good to a group that is already marginalized.

⁸⁴ *Mariner*, 610 P.2d at 12.

⁸⁵ Bagenstos & Schlanger, *supra* note 69, at 750.

⁸⁶ *Id.* at 784.

⁸⁷ *Id.* at 775.

⁸⁸ *Id.* at 784.

⁸⁹ *Id.*

Nor, I believe, is it necessary to eliminate hedonic damages. The problems that Bagenstos and Schlanger point to, though real, ultimately trace to a theoretical source, not to a material one rooted in the *fact* that courts award hedonic damages to persons who have acquired disabling injuries. The source, I submit, is that courts presuppose a *restorative* ideal of repair rather than the resilience-based conception. The restorative conception—with its sole concern for erasing harms—forces plaintiffs, their attorneys, and courts to frame hedonic damages in terms of a permanent degradation of a plaintiff's life after she has become disabled. Hedonic damages, on this view, function to offset this degradation by restoring the person to the place they would have occupied had the injury never happened. This is why the Bagenstos and Schlanger critique has bite: the restorative framework encourages plaintiffs and courts to articulate their reasons for compensation in terms of permanent loss and degradation, rather than as funding opportunities for personal growth.

By contrast, from the resilience perspective, we can embrace psychological findings about adaptive preferences and reject stigmatizing judicial rhetoric without jettisoning hedonic damages. After all, certain losses *are* genuine losses, and there is no sound reason to ignore reality.⁹⁰ But from the resilience perspective, that's okay: the resilience conception encourages recognizing, perhaps even honoring, one's injuries. Notice, moreover, that properly *honoring* past injuries as partially constitutive of one's present identity often requires compensation, perhaps even significant compensation. If one can no longer play basketball due to the loss of one's legs, the restorative conception of repair sees these as losses, losses that must be compensated because one's life will forever be diminished. Again, Bagenstos and Schlanger correctly criticize this characterization. But the resilience conception recognizes these losses as genuine losses

⁹⁰ Chris Essert has tried to vindicate hedonic damages within a corrective justice framework in Christopher Essert, *Tort Law and Happiness*, 36 QUEEN'S L.J. 1 (2010). Essert observes that hedonic adaptation does not change the fact that the tortfeasor wrongfully caused a wrongful loss, just like a tort that ends up unforeseeably causing a net benefit for a plaintiff does not necessarily undermine the plaintiff's recovery for the tort. I don't find the analogy convincing, at least in part because it seems to beg the question, and in part because growing awareness about psychological research on hedonic adaptation renders that adaptation foreseeable.

without viewing them as losses, full stop. Instead, they become potential opportunities to develop new preferences—say, by learning to play wheelchair basketball.⁹¹ But new opportunities—and empowering newly disabled plaintiffs to locate and embrace them—is potentially costly because bouncing back better than before can be costly. Specialized wheelchairs built for playing basketball are not cheap.

And this is how a resilience-based understanding of hedonic damages comes to the rescue. Hedonic damages can be reconceptualized *precisely in terms of* acquiring new “pleasures” to substitute for old ones, focusing on developing future capabilities, not dwelling on a false notion of permanent loss of life’s value. This approach resonates with the Supreme Court of Canada’s characterization of hedonic damages in *Lindal v. Lindal*, where the Court formulates the idea in terms of financing an “*alternative* source of satisfaction to replace one” that the plaintiff had lost.⁹² In short, Bagenstos and Schlanger are right to be concerned with the contingent way that hedonic damages, and the plaintiffs seeking them, are *characterized* by courts and the litigants themselves. But I think that, given that alternative ways of characterizing hedonic damages grounded in resilient repair are available, it is a mistake to discard that form of relief altogether. Hedonic damages can recognize actual losses, and respond to them, without recognizing that those losses will forever diminish a person’s life, and without forcing plaintiffs and courts to mischaracterize the overall quality of life that disabled persons are fully capable of enjoying. Jettisoning the restorative ideal of repair, unless it serves the resilience ideal, is the way how.

CONCLUSION: WHAT CONSTRAINS RESILIENT REPAIR?

The dominant way of thinking about the duty of repair, in its own right or as embodied in compensatory damages, reflects what I have called the restorative ideal. After some setback happens, the ideal aspires to wave a magic wand and undo all the harms

⁹¹ Nat’l Wheelchair Basketball Ass’n, <https://www.nwba.org/>.

⁹² *Lindal v. Lindal*, [1981] 2 SCR 629 at 638, 129 DLR (3d) 263 [*Lindal*] (emphasis added). I became aware of this formulation from Essert, *supra* note 90, at 7.

that flowed from it—to restore persons to the position they would have occupied had the injury never happened. Critics of this view abound. But the restorative ideal, for all its apparent problems, does seem attractive in some cases and is already entrenched in law—at least if we take judicial rhetoric to match legal practice.

In articulating the resilience conception of repair, I hope to offer an appealing alternative, one capable of capturing what is intuitively attractive about the restorative view while moving beyond its limitations. The resilience view is more responsive to how victims should, ideally, move forward constructively after wrongdoings. Resilient repair also offers a home for unfixable harms, in the way that Kintsugi embraces and even honors evidence of past breakage. At the same time, resilient repair sometimes calls for partial restoration, when doing so serves the goal of bouncing back better than before. Although much more can be said for and against this proposal, my hope is that this paper succeeds in getting private law theorists to take resilience seriously—especially since they potentially respond to the same question: what should individuals do after others have wrongfully harmed them?

But I want to conclude with some tentative remarks on a natural concern about my proposal. The worry is that compensatory damages, if they were to reflect resilient repair, would be in principle unlimited. After all, if the primary aim of compensatory damages is, as Arthur Ripstein suggests, to make the wrongdoer restore a victim's rightful holdings,⁹³ then compensatory damages contain a built-in constraint: precisely the value of holdings lost attributable to the tortfeasor's proximately caused harms. By contrast, if the goal of compensatory damages, either through hedonic damages or simply as applied to a tortfeasor's holdings, is to render the successful plaintiff *better off* than before (in some meaningful way), then nothing tells us whether a defendant has made the plaintiff sufficiently better off to satisfy the defendant's duty of repair. Indeed, it simply is not desirable to issue blank checks to courts and juries, especially when unconstrained by the actual value of the holdings that the

⁹³ See RIPSTEIN, *PRIVATE WRONGS*, *supra* note 10, at 252. See also Bruce Chapman, *Wrongdoing, Welfare, and Damages: Recovery for Non-Pecuniary Loss in Corrective Justice*, in PHIL. FOUNDATIONS OF TORT LAW 411 (David G. Owen, ed., 1995).

plaintiff lost as a result of the defendant's wrongdoings. The threat of massive windfalls awarded to sympathetic plaintiffs looms large. The ideal of making the victim "better off" is not specified precisely enough to say when enough is enough.

I am less concerned. As John Goldberg has observed, many jurisdictions have long counselled providing successful plaintiffs with "reasonable" recoveries rather than "full compensation."⁹⁴ Reasonableness—although admittedly not a bright-line rule—does provide some constraint on the ideal of resilient repair. So too might instructions against punishing the defendant. That is, if courts explicitly recognize the resilience conception of compensatory damages, they should still police those awards with the goal preventing juries from punishing the defendant under the guise of compensating the plaintiff.⁹⁵ Exorbitant "compensatory" awards may signal that juries are punishing rather than merely compensating.

Surely this is all too quick and speculative. Much more remains to investigate, including whether and how the ideal of resilient repair squares with the various "continuity theses" that exist and how the ideal deals with wrongful death.⁹⁶ But as I mentioned at the outset, my main aim here has been more modest: to generate interest in a conception of resilience as an interpretive and normative resource useful for understanding, and perhaps reforming, remedies. Once again, given that both remedial claims and the ideal of resilience operate in the wake of harmful wrongdoings, a resilience-based perspective on compensatory damages is worthy of greater attention than it has received.

⁹⁴ Goldberg, *supra* note 59, at 447-462.

⁹⁵ As I argue elsewhere, where punitive damages are potentially in play, courts may relax this assumption, allowing for a resilience-based rationale for allowing plaintiffs to keep punitive damages that they secure from defendants. See Erik Encarnacion, *Resilience, Retribution, and Punitive Damages*, 100 TEX. L. REV. (forthcoming).

⁹⁶ For an illuminating discussion, see Sandy Steel, *Compensation and Continuity*, 26 LEGAL THEORY 250 (2020).