SUBSTITUTE VICTIMS

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Abstract: Scholars have long recognized that the dominant theory of corrective justice—according to which compensatory damages are designed to return a tort victim to the position they were in prior to the tort—inherently tethers damages awards to victims' economic status. In this way, tort law's internal logic creates perverse incentives for tortfeasors to target the poorest victims for their riskiest activities and to exercise greater care toward wealthier individuals.

The Article demonstrates the centrality of this problem in tort law, illustrating how tortfeasors who can identify their potential victims in advance are likely to systematically target poorer victims for their risky activities, rather than their wealthier counterparts, rendering the former "substitute victims" for the latter. The Article illustrates how the problem of substitute victims manifests in the context of three dominant tort doctrines: negligence, nuisance, and product liability. It then proposes a novel solution, tackling the problem from a new angle by shifting the focus away from an evaluation of the harm the victim suffers and toward an assessment of the benefit the tortfeasor gains by choosing to exploit the system of compensatory damages to profit from existing socioeconomic inequities.

The Article provides a comprehensive analysis to show that an injurer who benefits from their deliberate choice to target a substitute victim is unjustly enriched. Accordingly, the victim of such a choice should have a claim for restitution of the benefit the tortfeasor obtained at their expense, which can be measured by the costs the tortfeasor saved as a result of that choice. By subverting the opportunity for tortfeasors to benefit from deliberately targeting poorer victims over wealthier ones for their risky activities, the proposed framework effectively tackles the problematic incentives created by the prevailing compensatory damages model. The Article further proposes a practical test for valuing gain-based damages within the framework of the law of unjust enrichment, demonstrates how it applies in the three legal contexts presented, and highlights its desirability from a policy standpoint. The Article then completes the analysis by addressing its potential challenges and practical limitations.

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INTRODUCTION

Potential tortfeasors—i.e., anyone who engages in an activity that entails risk to another—commonly find themselves in a position to decide whom to subject to their risky conduct.[1] In such cases, a rational tortfeasor can be expected to select among potential victims based on the relative costs associated with each, including the cost of any precautionary measures the tortfeasor may take to reduce the risk of injury, and the amount of damages they can expect to pay if injury does result.[2] Because our tort law system awards damages based on the restorative principle—which functions to return the injured party to the position they would have been in but for the tortfeasor's misconduct[3]—a rational actor will likely direct their risky activities toward individuals whose losses they perceive as less costly to compensate, and who are thus less costly to protect.[4] This perception might be based on known facts, or it could be based on assumptions grounded in the individuals' membership in disadvantaged groups like minorities[5] and women,[6] whose income and wealth are low-

[1] *See, e.g.*, Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325, 335 (2018) ("While American companies and local governments are not so explicit about targeting minority and poor communities, evidence showing correlations between risk and minority communities suggests that such targeting may in fact be taking place."); Ariel Porat, *Misalignments in Tort Law*, 21 YALE L.J. 82, 97 (2011) ("[T]he injurer could know in advance that his average potential victim's income is different from the average income. Such cases are not rare.").

[2] *See, e.g.*, Yuracko & Avraham, *supra* note 1, at 335 ("The incentive to allocate risk based on the anticipated financial costs of the harm has not, of course, gone unnoticed by those in positions of power."); Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry* (explaining that from a wealth maximization perspective "a person should feel free to drive faster in a poor than in a wealthy neighborhood because expected accident costs are on average lower in the former"), *in* PHILOSOPHICAL FOUNDATIONS OF TORT LAW 99, 110 (David G. Owen ed., 1995).

[3] *See, e.g.*, Maldonado v. Flannery, 272 A.3d 1089, 1114 (Conn. 2022) (holding that "[t]he purpose of an award of compensatory damages is 'to restore an injured party to the position he or she would have been in if the wrong had not been committed'" (quoting Rizzuto v. Davidson Ladders, Inc., 905 A.2d 1165, 1181 (Conn. 2006))); Gibson v. United States, 499 P.3d 1165, 1171 (Mont. 2021) (stating that "[t]he purpose of compensatory damages 'is to redress the concrete loss that a plaintiff has suffered by reason of a defendant's wrongful conduct'" (quoting Seltzer v. Morton, 154 P.3d 561, 600 (Mont. 2007))); Bloostein v. Morrison Cohen LLP, No. 651242/2012, slip op. at 16 n.28 (N.Y. Sup. Ct. Feb. 18, 2019) (asserting that "the purpose of damages in a personal injury case is to put the plaintiff in the position that the plaintiff would have been but for the injury"); MCI Commc'ns Servs. v. CMES, Inc., 728 S.E.2d 649, 652 (Ga. 2012) (holding that "the purpose of damages is to put the aggrieved party in the position, as near as possible, as he or she would have been without the injury or damage").

[4] *See* Posner, *supra* note 2 (describing that "the magnitude of the loss if an accident occurs . . . [is] a function in part of the income of the victim[], making the optimal expenditure of time and other resources on avoiding accidents in the poor neighborhood also lower").

[5] *See, e.g.*, Dhruti J. Patel, *Policing Corporate Conduct Toward Minority Communities: An Insurance Law Perspective on the Use of Race in Calculating Tort Damages*, 53 U. MICH. J.L. REFORM 227, 242 (2019) ("Beyond theoretical arguments, research shows numerous examples of corporations targeting minority individuals and communities, which aligns with the incentives created by tort

er, on average, than those of individuals belonging to more privileged groups.[7] When a potential injurer chooses to direct their risky or harmful activities toward less costly individuals instead of more costly ones, they engage in the practice of what I term "substituting victims." In turn, the preferred targets are the "substitute victims."

The idea of restoration at the heart of our tort law system encourages the practice of substituting victims. The function of restoration is to reverse the effects of the tortfeasor's wrongdoing on the victim.[8] Accordingly, the damages awarded to compensate the victim's loss reflect their circumstances prior to the tort, including their socioeconomic status.[9] Thus, to evaluate the harmful impact that the defendant's wrongful behavior caused to the victim, damages for bodily injury are generally assessed based on criteria such as the plaintiff's

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law."); Yuracko & Avraham, *supra* note 1, at 325 (explaining generally that the use of race-based tables to evaluate a plaintiff's wage, work-life expectancy, and life expectancy when calculating damages awards results in lower damages awards for minorities, which in turn incentivizes "potential tortfeasors to allocate risk disproportionately to minority communities"); Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 665 (2017) (illustrating that injurers may change their behavior if they know that their victim is Black rather than white, using the example of a courier service that decides to reroute its drivers through Black neighborhoods, "where its drivers face less liability costs associated with driving faster").

[6] *See, e.g.*, Avraham & Yuracko, *supra* note 5, at 664 ("The disadvantage [B]lacks and women suffer in the United States, in terms of their job market prospects, are reflected in the level of tort damages they receive."); MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW 156, 158 (2010) (stating that women and minorities receive lower damages, and noting that this, in turn, may impact the measure of deterrence when potential injurers consider avoidance of dangerous conduct toward them).

[7] Reports confirm that the average income and wealth of Black people and women persistently lag behind those of privileged groups. *See, e.g.*, ELISE GOULD & JORI KANDRA, ECON. POL'Y INST., STATE OF WORKING AMERICA 2021: MEASURING WAGES IN THE PANDEMIC LABOR MARKET 12 (2022), https://files.epi.org/uploads/247140.pdf [https://perma.cc/F75C-QWRR] ("An examination of wage levels tells us that men, on average and across the wage distribution, are paid significantly more than women. In a regression framework—controlling for race/ethnicity, education, age, and geographic division—women are paid on average 22.1% less than men . . . . On average, the Black–white regression-adjusted pay gap grew from 8.6% in 1979 to 14.6% in 2021."); *see also Median Annual Earnings by Sex, Race, and Hispanic Ethnicity*, U.S. DEP'T LAB., https://www.dol.gov/agencies/wb/data/earnings/wage-gap-race-occupation [https://perma.cc/7TSA-2LR5] (confirming the existence of racial and gender gaps in earning per occupation).

[8] *See, e.g.*, ERNEST J. WEINRIB, CORRECTIVE JUSTICE 92 (2012) (explaining that even though the defendant infringed the plaintiff's right, the right itself continues to exist, and so the plaintiff "can justly apply to courts for the restoration of what remains rightfully theirs"); JULES L. COLEMAN, RISKS AND WRONGS 371–73 (1992) ("If it is to implement corrective justice, tort law must impose liability on that individual who has the duty in corrective justice to make good the victim's loss.").

[9] *See, e.g.*, Arthur Ripstein, *As if It Had Never Happened*, 48 WM. & MARY L. REV. 1957, 1967 (2007) (explaining that the plaintiff is entitled to the means of which the defendant's wrongdoing deprived them, not only because they reflect the plaintiff's future income stream or capital assets, but also because they represent their self-determination).

"loss of income,"[10] whereas damages to property are assessed based on the property's "market value."[11] These criteria are intended to reflect the victim's true loss,[12] and thus the amounts required to make them "whole again."[13] As such, restoration returns the rich to their prior state of wealth and the poor to their prior state of poverty.

A major problem that inheres this loss-based theory of tort damages is that it creates a perverse incentive for tortfeasors to prey upon the poor to reduce the costs of their risky activities. Simply put: if a tortfeasor can control the costs associated with their risky conduct ex ante by choosing to direct it toward poorer, rather than wealthier, potential victims, they can be expected to choose the less costly victim[14] whenever possible.

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[10] Except for reimbursement of past and future medical costs, damages awarded for loss of life and bodily injury mostly represent the plaintiff's estimated loss of income. *See, e.g.*, RESTATEMENT (SECOND) OF TORTS § 910 (AM. L. INST. 1979) (describing how an injury entitles the victim to damages that include the future harms resulting from the injury, including the anticipated future income the victim would be expected to earn absent the injury); Catt v. Skeans, 867 N.E.2d 582, 588 (Ind. Ct. App. 2007) ("The basic measure of damages for lost earning capacity is the difference between the amount the plaintiff was capable of earning before the injury and the amount he was capable of earning thereafter."); Nat'l R.R. Passenger Corp. v. McDavitt, 804 A.2d 275, 290 (D.C. 2002) ("Generally speaking, where there is a history of employment to consider, the future earnings loss may be gauged by comparing 'the demonstrated earning capacity of the injured party prior to the injury . . . projected over the remaining working life of the injured party.'" (alteration in original) (quoting District of Columbia v. Barriteau, 399 A.2d 563, 567 n.6 (D.C. 1979))).

[11] *See, e.g.*, Wright v. Temple, 993 N.W.2d 553, 560–61 (S.D. 2023) (stating that property damage is normally calculated by subtracting the property's fair market value after the accident from the property's fair market value before the accident, where "fair market value" reflects "'[t]he price that a seller is willing to accept and a buyer is willing to pay on the open market and in an arm's-length transaction; the point at which supply and demand intersect'" (citing *Value*, BLACK'S LAW DICTIONARY (12th ed. 2024))). Juries are regularly instructed to use market value for calculating property loss. *See, e.g.*, JUD. COUNCIL OF CAL. CIV. JURY INSTR. NO. 3903J (2024) (including market value in the calculation for property damages); N.Y. PATTERN JURY INSTR. – CIV. NO. 2:311 (2023) (same); GA. SUGGESTED PATTERN JURY INSTR. – CIV. 66.020 (2022) (same).

[12] The New York Pattern Jury Instructions provide that:

> [Y]ou must render a verdict in a sum of money that will justly and fairly compensate the plaintiff for all losses resulting from the injuries . . . . This is accomplished by awarding a sum of money that compensates the party for the actual loss sustained as well as those items that will be sustained in the future.

N.Y. PATTERN JURY INSTR. – CIV. NO. 2:277 (2023).

[13] *See, e.g.*, Meals *ex rel.* Meals v. Ford Motor Co., 417 S.W.3d 414, 419 (Tenn. 2013) ("An award of damages, which is intended to make a plaintiff whole, compensates the plaintiff for damage or injury caused by a defendant's wrongful conduct."); Cope v. Vermeer Sales & Serv. of Colo., Inc., 650 P.2d 1307, 1309 (Colo. App. 1982) ("The principle of making the injured party whole underlies all negligence cases.").

[14] *See* Posner, *supra* note 2, at 110 (describing how, under the existing damages scheme in tort law, some accident victims receive less than others, simply because they are less wealthy, making them less costly victims to a potential tortfeasor).

Scholars have long warned that disparities in damages for harms resulting from similar risk exposures create a severe problem in terms of deterrence because they render some people less costly to harm than others.[15] Legislators have attempted to mitigate the ill incentives created by disparities in tort damages through public law tools,[16] especially in the context of nuisance. Because poorer neighborhoods are generally easy to identify, they are easy to target for risk.[17] Studies reveal, however, that these developments alone have failed to bring about sufficient change.[18] Additionally, in the past two decades, scholars

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[15] *See, e.g.*, *id.* (illustrating how victims who earn less are less costly to tortfeasors); Avraham & Yuracko, *supra* note 5, at 697 (noting that according to the optimal deterrence model, which uses tort law to influence companies to behave in ways that minimize both the costs of harm and the costs of precautions, "[i]f race and gender are accounted for when calculating damages, companies will target the 'cheapest' race and gender—[B]lacks and women, respectively"); Maytal Gilboa, *The Color of Pain: Racial Bias in Pain and Suffering Damages*, 56 GA. L. REV. 651, 699 (2022) (explaining that due to racial disparities in pain and suffering damages rendering negligence against white people more costly than negligence against Black people, "potential tortfeasors are generally incentivized to be more cautious around [w]hite people than around Black people"); *see also, e.g.*, CHAMALLAS & WRIGGINS, *supra* note 6, at 158 (illustrating how minorities and women receive lower damages than other victims, thereby making them more appealing to a potential tortfeasor from a cost perspective); Porat, *supra* note 1, at 90 (describing how undervaluing damages awarded to certain victims creates a severe underdeterrence problem with respect to those victims).

[16] Only a few states have enacted statutes that forbid including race, ethnicity, and gender in the calculation of damages. *See, e.g.*, CAL. CIV. CODE § 3361 (West 2024) ("Estimations, measures, or calculations of past, present, or future damages for lost earnings or impaired earning capacity resulting from personal injury or wrongful death shall not be reduced based on race, ethnicity, or gender."); OR. REV. STAT. § 31.770 (2024) ("A calculation of the projected future earning potential of the plaintiff that takes into account the race or ethnicity of the plaintiff is inadmissible in any civil action.").

[17] *See, e.g.*, Exec. Order No. 14,008, 86 Fed. Reg. 7619, 7629–32 (Jan. 27, 2021) (addressing the climate crisis, with special considerations for securing environmental justice goals, and helping marginalized communities); S.B. 5141, 67th Leg., Reg. Sess. (Wash. 2021) (requiring agencies to consider environmental harms and environmental benefits on "overburdened communities and vulnerable populations" in every significant action); S.B. 232, 219th Leg., Reg. Sess. (N.J. 2020) (mandating that permits or renewals for facilities will be denied when the cumulative impact on low-income communities is expected to constitute an unreasonable risk to the health of the residents of the community); U.S. ENV'T PROT. AGENCY, *Plan EJ 2014*, https://www.epa.gov/environmentaljustice/plan-ej-2014 [https://perma.cc/2KHF-6DPA] (Dec. 26, 2023) (providing a strategic plan integrating environmental justice principles in the Environmental Protection Agency's programs, policies, and activities).

[18] *See, e.g.*, Michael Mascarenhas, Ryken Grattet & Kathleen Mege, *Toxic Waste and Race in Twenty-First Century America: Neighborhood Poverty and Racial Composition in the Siting of Hazardous Waste Facilities*, 12 ENV'T & SOC'Y: ADVANCES IN RSCH. 108 (2021) (surveying past studies on sites of hazardous waste facilities near minorities and communities belonging to low-socioeconomic status, and finding that disparities have not improved over time); Elisheba Spiller, Jeremy Proville, Ananya Roy & Nicholas Z. Muller, *Mortality Risk from PM2.5: A Comparison of Modeling Approaches to Identify Disparities Across Racial/Ethnic Groups in Policy Outcomes*, 129 ENV'T HEALTH PERSPS. 2021, at 127004-1 (finding that the approach used in most federal policy analyses of air pollution policy assessment underestimates the health impacts on minority communities); Ihab Mikati et al., *Disparities in Distribution of Particulate Matter Emission Sources by Race and Poverty Status*, 108 AM. J. PUB. HEALTH 480, 480 (2018) (identifying disproportionately high burdens from facilities emitting particulate matter for individuals from non-white communities and those experiencing poverty).

have attempted to contend with disparities in tort damages through proposals to reconsider how damages are valued. Some of these scholars suggest that to prevent disadvantaged social groups from becoming systematic risk targets, tort damages should aim to award similar damages for harms resulting from similar risk exposures, regardless of the victims' socioeconomic background.[19] But with a few exceptions,[20] courts have not embraced these suggestions,[21] which are largely inconsistent with prevailing tort law.[22]

This Article argues that the problem of substitute victims must be approached from a different angle: rather than viewing this problem through the lens of the victims' losses, we should focus on the gains that tortfeasors obtain from choosing "less costly victims" to enhance their own profit. This argument is twofold. First, it asserts that the approach reflected in current scholarship—which has thus far focused on finding ways to narrow the gaps in loss-based damages awarded to different victims for harms resulting from similar risk exposures—is bound to fail, or to offer, at most, an incomplete solution.[23] The reason, however, has nothing to do with the merits of the various techniques offered for valuing losses. It is rather because awarding similar damages to plaintiffs of different socioeconomic statuses is inconsistent with the restorative theory of tort damages, according to which damages should bring the

[19] *See, e.g.*, Porat, *supra* note 1, at 140 (maintaining that changes need to be made in the criteria for granting damage awards for bodily injury by closing the gap between high- and low-income victims); Avraham & Yuracko, *supra* note 5, at 667 (proposing that criteria used for valuing damages, such as life-expectancy and work-life expectancy, should be computed based on blended tables "that do not delineate on racial or gender lines"). For a similar argument, see, for example, CHAMALLAS & WRIGGINS, *supra* note 6, at 170.

[20] These rulings mostly relate to compensation for plaintiffs with no established earnings record, such as children. *See, e.g.*, G.M.M. *ex rel.* Hernandez-Adams v. Kimpson, 116 F. Supp. 3d 126, 152 (E.D.N.Y. 2015) (holding that "[t]he use of race-based statistics to obtain a reduced damage award—which is now extended to the use of ethnicity-based statistics, to calculate future economic loss—is unconstitutional"); McMillan v. City of New York, 253 F.R.D. 247, 255 (E.D.N.Y. 2008) ("Equal protection . . . demands that the claimant not be subjected to a disadvantageous life expectancy estimate solely on the basis of a 'racial' classification.").

[21] *See supra* notes 10–11 and accompanying text; *see also* Porat, *supra* note 1, at 106 (noting that the prevailing practice of tort law is "not blind to the value of the interests that the rights protect").

[22] For a discussion of the prevailing approach to restoration in light of the principle of corrective justice, see *infra* notes 193–195 and accompanying text.

[23] These include proposals to abolish the notorious use of gender- and race-based tables to evaluate the average wage, life expectancy, and work-life expectancy when calculating damages awards. *See, e.g.*, CHAMALLAS & WRIGGINS, *supra* note 6, at 158–70 (proposing that gender- and race-based tables not be used because they result in lower damage awards to women and racial minorities); Avraham & Yuracko, *supra* note 5 (same). These proposals call for a reform that would narrow but not eliminate disparities in tort damages. Thus, even in the most optimistic case that these proposals are accepted, the negative effects of damages disparities—manifesting in underdeterrence toward victims associated with lower-income groups—would likely persist.

plaintiff to the position they would have been had the tort never happened.[24] Indeed, courts try to eliminate disparities in damages resulting from the same risk when they can do so consistently with this restorative theory of tort law.[25]

Second, and importantly, the Article proposes a doctrinal and theoretical analysis based on the law of unjust enrichment as an alternative and potentially more promising vehicle for contending with tortfeasors' systematic choice of less costly victims for self-profit.[26] A few scholars have previously suggested evaluating damages based on the cost saved by the tortfeasor by applying a lower level of care rather than based on the plaintiff's loss.[27] Developed as a hybrid type of damages—born in the "law of harms," yet valued by the defendant's gain—these suggestions only offer a partial response to the practice of substituting victims. As the Article demonstrates, this type of damages only partially reduces the attractiveness of targeting substitute victims, who are still generally perceived as less costly to harm based on their expected damages evaluation, compared to that of other potential victims. In contrast, the proposed solution based on the law of unjust enrichment offers a remedy that allows the recovery to be measured either by the costs that the tortfeasor saved by applying a lower level of care, *or* by the costs they saved by paying less damages through substituting victims. By allowing victims to sue for the gains tortfeasors realize from substituting victims, the proposed approach more effectively addresses the tortfeasors' incentive to exploit disparities in damages by choosing less costly victims. Additionally, the suggestion to evaluate compensatory damages based on the cost saved by the tortfeasor through applying a lower level of care is inconsistent with the conventional restorative theory of tort damages—designed to return the injured party to their condition prior to the tortfeasor's wrongdoing.[28] Conversely, the proposed solution based on the law of unjust enrichment offers a remedy that preserves the internal logic of tort law.

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[24] *See supra* note 3 and accompanying text; RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. L. INST. 1979) ("When there has been harm only to the pecuniary interests of a person, compensatory damages are designed to place him in a position substantially equivalent in a pecuniary way to that which he would have occupied had no tort been committed.").

[25] *See, e.g.*, *Hernandez-Adams*, 116 F. Supp. 3d at 134 (describing a situation in which the tort victim of medical malpractice was a young Hispanic child, and Judge Jack Weinstein of the Eastern District of New York instructed the jury not to rely on race-based data referring to "the child as an average Hispanic" to evaluate his compensation). Because children have no established earnings record, work history, or significant educational history, calculating damages for loss of life and limb in their cases cannot reflect what they already had. *See* Yuracko & Avraham, *supra* note 1, at 327.

[26] This solution may thus raise jurisprudential questions concerning the theoretical tenability of turning to the law of unjust enrichment to resolve a problem inherent in the logic of tort law and the idea of restoration. I address this issue briefly below. *See infra* notes 286–291 and accompanying text.

[27] *See infra* notes 173–176 and accompanying text.

[28] *See infra* notes 56–57.

Framing the problem of disparities in tort damages in terms of "substitute victims" thus highlights the choice a tortfeasor makes among potential victims for self-profit. It is further helpful for articulating the test for assessing the gain-based damages that result from the practice of substituting victims. The gain realized by choosing substitute victims is reflected in the difference between the costs that the defendant would have spent had they chosen the more expensive, high-income victim, and the costs they actually spent by choosing the less costly, low-income victim.[29] The Article demonstrates that this gain can be assessed either by the likely spread between the loss-based damages of the former and the latter, or the likely reduction in the costs associated with investment in precautionary measures between the two.[30]

Importantly, the form of liability outlined in the Article does not seek to hold tortfeasors responsible for existing social inequalities or for how those inequalities are reflected in tort damages. Accordingly, in the proposed analysis, neither random victims nor victims whose socioeconomic status was not the likely motivation for selection would have a meritorious claim against their tortfeasors in unjust enrichment. By construing the practice of substituting victims as a mechanism for unjustly benefiting at the expense of another, the proposed framework aims only to negate the incentive tort law creates for tortfeasors to profit from social inequalities by targeting poor victims. The Article carefully outlines, first, the conditions necessary to support an inference that a defendant engaged in the practice of substituting victims, and second, the conditions under which this conduct satisfies the elements of a claim for unjust enrichment.

The Article makes four important contributions. First, it offers a unified framework of "substitute victims" for the problem of disparities in loss-based damages and demonstrates the detrimental implications of these discrepancies in three central tort law doctrines: negligence,[31] nuisance,[32] and product liability.[33] Second, it offers a doctrinal and theoretical framework for harnessing the law of unjust enrichment to contend with this long-standing problem. In doing so—and this is the Article's third important contribution—it demonstrates the promising potential of the doctrine of unjust enrichment as a powerful tool for confronting pressing, contemporary problems that other legal remedies have failed to address

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[29] This formula is a mirror image of the one used for computing damages for losses. *See supra* notes 10–11 and accompanying text; *see also* Maytal Gilboa, *Linking Gains to Wrongs*, 35 CANADIAN J.L. & JURIS. 365, 374–83 (2022) (explaining the law's evaluation of gain-based damages as the difference in the defendant's wealth before and after the defendant's wrongdoing).

[30] The criteria for assessing damages using these notations are outlined and demonstrated in *infra* Part IV, Sections B and C.

[31] *See infra* Part II.A.

[32] *See infra* Part II.B.

[33] *See infra* Part II.C.

sufficiently.[34] Fourth, the Article ventures beyond the theoretical realm. It provides a practical test to evaluate gain-based damages by adapting the traditional formula applied for assessing loss-based damages to the unique framework of substitute victims as a paradigm of unjust enrichment. It further demonstrates how the proposed framework can be implemented, thus showing that it is not only doctrinally sound but also functionally viable and desirable as a matter of policy. The proposed framework offers a mechanism that compels injurers to disgorge the gains they obtain by substituting victims, thus subverting their incentives to seek out less costly victims for their risky activities.

The Article proceeds as follows. Part I is dedicated to delineating the problem of substitute victims.[35] Part II demonstrates the breadth of the problem by exploring it in three different legal contexts.[36] The first two—negligence and nuisance—are familiar legal territories for exploring problems related to disparities in tort damages. The third is a less explored setting of product liability, where I introduce an inherent problem in the law of design defect, I term "binary risk design." This problem refers to types of products that require their manufacturers to make a dichotomic choice of design between identified customer groups.[37] Part III discusses the proposed solution.[38] It starts by offering a critical review of the current suggestions for addressing the problem; continues with an overview of the doctrine of unjust enrichment and an analysis of how the key elements of the doctrine may apply to the problem of substitute victims; and finishes by demonstrating how the suggested analysis can apply to the three examples used to illustrate the problem in the contexts of negligence, nuisance, and product liability. Part IV completes the

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[34] *See, e.g.*, Lionel Smith, *Unjust Enrichment*, 66 MCGILL L.J. 165, 166 (2020) ("[M]uch of the law of unjust enrichment seems to be about fixing injustices that the law itself is in danger of creating."); Emily Sherwin, *Reparations and Unjust Enrichment*, 84 B.U. L. REV. 1443, 1448 (2004) (stating that the law of unjust enrichment has been used as a "vehicle for novel legal claims"); Maytal Gilboa, Yotam Kaplan & Roee Sarel, *Climate Change as Unjust Enrichment*, 112 GEO. L.J. 1039, 1039–40 (2024) (discussing the failure of tort-based climate litigation and suggesting a framework of "climate change as unjust enrichment" to address the pressing challenge that this litigation confronts); Ayelet Gordon-Tapiero & Yotam Kaplan, *Unjust Enrichment by Algorithm*, 92 GEO. WASH. L. REV. 305, 305 (2024) (suggesting that to effectively respond to the profitability of harmful algorithms, we should rely on the doctrine of unjust enrichment); David N. Fagan, *Achieving Restitution: The Potential Unjust Enrichment Claims of Indigenous Peoples Against Multinational Corporations*, 76 N.Y.U. L. REV. 626, 629 (2001) (proposing that the law harness the unique qualities of the law of unjust enrichment to develop a theory of recovery for indigenous peoples seeking redress for the government's exploitation of their resources).

[35] *See infra* notes 40–62 and accompanying text.

[36] *See infra* notes 63–159 and accompanying text.

[37] *See infra* notes 133–142 and accompanying text.

[38] *See infra* notes 160–291 and accompanying text.

proposed analysis by discussing possible challenges to the framework.[39] The Conclusion summarizes the discussion.

I. DELINEATING THE PROBLEM

This Part highlights how tort law, centered on principles of corrective justice, creates an incentive problem that leads to the targeting of low-income victims by tortfeasors. Section A identifies that problem, illustrating how the damages scheme allows a tortfeasor to reduce the costs of their tortious behavior by targeting poorer victims.[40] Section B describes how corrective justice—the dominant theory underlying the damages system in tort law—supports the incentive problem and explains how shifting the focus from corrective justice principles and toward the profit a tortfeasor realizes by targeting a lower-cost, lower-income victim instead of a higher-income one could help ameliorate this issue.[41]

A. The Less Costly Victim

Tort law imposes standards that require potential tortfeasors to act equally cautiously toward all potential victims.[42] Yet, principles at the very heart of tort law encourage injurers to value the risks that their activities entail differently depending on the identity of their potential victim.[43] As scholars have acknowledged over the years, the reason for this is that damages awards are significantly influenced by the economic status of the victim.[44] Thus, a key criterion used for assessing damages for loss of life and bodily injury is the victim's loss of income.[45] Damages for loss of property are typically evaluated based on the property's assessed market value.[46] The use of these criteria aims

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[39] *See infra* notes 292–309 and accompanying text.

[40] *See infra* notes 42–55 and accompanying text.

[41] *See infra* notes 56–62 and accompanying text.

[42] *See, e.g.*, Porat, *supra* note 1, at 86 (pointing out the author's conclusion that he "could not find a single court decision suggesting that a different standard of care applies to driving in rich and poor neighborhoods"); *see also* Avraham & Yuracko, *supra* note 5, at 664 (noting that courts "presumably apply the same standard of care across all neighborhoods regardless of the racial or socioeconomic composition of their residents").

[43] *See* Posner, *supra* note 2, at 110 (describing how potential tortfeasors may be less cautious with their risky behavior near less affluent victims, because the existing tort damages scheme makes injuring them less costly than wealthier victims).

[44] *See supra* notes 5–7 and accompanying text.

[45] *See supra* note 9 and accompanying text. For plaintiffs with no established earnings record, courts assess the damages by relying on race and gender-based data, which significantly reduces the awards that the victims would otherwise receive. *See, e.g.*, United States v. Bedonie, 317 F. Supp. 2d 1285, 1315 (D. Utah 2004) ("Using race and sex adjustments to calculate lost income significantly reduces the awards that the victims would otherwise receive."), *rev'd by* United States v. Serawop, 410 F.3d 656, 670 (10th Cir. 2005).

[46] *See supra* note 10 and accompanying text.

to reflect the victim's actual loss resulting from the defendant's wrongful behavior[47]—a loss that necessarily reflects the victim's economic background.

For this reason, a rational tortfeasor who can identify and thus choose in advance the potential subjects of their risky activity would likely prefer to impose the risk on victims whose damages would be as low as possible.[48] Simply put, a tortfeasor is expected to prefer victims who are poorer rather than richer. Because injurers may not know their victims' actual socioeconomic status, they may base their choice of "less costly victims" on assumptions drawn from features suggesting that they belong to social groups whose members are poorer on average.[49] A rational injurer who seeks to minimize their exposure to tort liability may thus prefer a female over a male victim[50] and a Black or Latino victim over a white one[51]—victims whose life, limbs, and property are, on average, less costly to harm.[52] In this way, tort damages create a mechanism that validates and induces the selection of disadvantaged victims as risk bearers over victims perceived as belonging to better-off segments of society.

That less costly victims are chosen *in place* of more costly alternatives is a crucial feature of the practice I term hereinafter "substituting victims." The emphasis on this "substitutive" element has two main goals. First, it highlights the detrimental implications of a potentially systematic choice of less over more costly victims. Second, as I later show, the substitute framing is crucial for identifying such deliberate choices as a practice that meets the doctrinal

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[47] *See* Learned Hand, *Restitution or Unjust Enrichment*, 11 HARV. L. REV. 249, 256 (1897) (articulating that the idea that damages should reflect the "true value" of injury expresses the nature of recovery as "an obligation destined to stand in the place of the plaintiff's rights, and be, as nearly as possible, an equivalent to him for his rights"); *see also, e.g.*, RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. L. INST. 1979) (noting that compensatory damages are designed to place the plaintiff in the same position they would have been situated if the tort had not been committed); CHARLES T. MCCORMICK, HANDBOOK ON THE LAW OF DAMAGES § 137 (1935) ("[D]amages for a tort should place the injured person as nearly as possible in the condition he would have occupied if the wrong had not occurred . . . .").

[48] *See* Posner, *supra* note 2 (illustrating how potential tortfeasors can keep the costs of their tortious conduct down by selecting poorer victims).

[49] *See generally* Shreya Atrey, *The Intersectional Case of Poverty in Discrimination Law*, 18 HUM. RTS. L. REV. 411 (2018) (providing an analysis of poverty and discrimination from an angle of intersectionality).

[50] Women's wages are lower than men's on average, which translates to lower damages amounts for bodily injury. *See, e.g.*, Avraham & Yuracko, *supra* note 5, at 665 (describing how "gender still exert[s] an enormous influence on monetary remedies").

[51] Jonathan Cardi, Valerie P. Hans & Gregory Parks, *Do Black Injuries Matter?: Implicit Bias and Jury Decision Making in Tort Cases*, 93 S. CALIF. L. REV. 507, 550 (2020) (finding that "in [tort] suits against individual defendants, [B]lack plaintiffs were awarded lower dollar damage awards than white plaintiffs").

[52] *See supra* note 4 and accompanying text; *see also* Martha Chamallas, *The Architecture of Bias: Deep Structures in Tort Law*, 146 U. PA. L. REV. 463, 464 (1998) (describing how "[m]ost empirical studies indicate that women of all races and minority men continue to receive significantly lower damage awards than white men in personal injury and wrongful death suits").

elements of unjust enrichment, assessed by the costs the defendant saved by engaging in it.

To demonstrate the basic features of the problem of substitute victims, consider the following hypothetical.

Jean and her motorcycle: Jean's hobby is riding her motorcycle in the street near her house, where she also practices her daring stunts. There are only two other houses on Jean's street, one to her left and the other to her right. In one house lives a neighbor who earns an average income, and in the other, a neighbor who earns half of the first neighbor's income. Assume that Jean knows each of her neighbors' approximate income. Assume further that the expected damages Jean will be required to pay should the harm resulting from *the exact same riding* amount to $100 for the neighbor with the average income (probability of 0.001 for harm of $100K, based on that neighbor's loss of income), and $50 for the neighbor who earns half of that (probability of 0.001 for harm of $50K, based on that neighbor's loss of income). For simplicity, assume also that by riding her motorcycle cautiously, Jean can reduce the risk of harm to zero.[53] Riding cautiously, however, is expected to reduce Jean's enjoyment from riding and performing stunts by an amount valued at $60.

This example illustrates the basic conditions giving rise to the problem of substitute victims: (1) there is more than one potential victim of the tortfeasor's risky activity; (2) the tortfeasor is in a position to choose between the potential victims *in advance*; and (3) the tortfeasor knows, or is able to identify (either directly or by association) the chosen victim's lower socioeconomic status.[54]

It is easy to see how these conditions are realized in Jean's example, where there are two discrete, identifiable victims, positioned in a way that enables Jean to make a contrastive, ex ante choice between them. Under these circumstances, Jean can choose among three options: (1) focus her risky activity on the average-income neighbor's street segment; (2) focus her activity on the lower-income neighbor's street segment; or (3) distribute the risk arbitrarily between her two neighbors, as she would presumably do if her victims were random or indistinguishable.[55] This unique factual setting is created due to the

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[53] Also, for simplicity, the analysis does not include the risk to which Jean exposes herself by riding the motorcycle. *See generally* Robert Cooter & Ariel Porat, *Does Risk to One-self Increase the Care Owed to Others? Law and Economics in Conflict*, 29 J. LEGAL STUD. 19 (2000) (explaining why the Learned Hand rule should also include the risk that the defendant's negligent act or omission inflicts on themself, in addition to the risk they inflict on others).

[54] We assume for purposes of this hypothetical that Jean knows her neighbors' economic status. Later, I address the evidentiary difficulties that this third requirement may entail for plaintiffs who claim to be substitute victims. *See infra* Part IV.A.

[55] Exactly how the risk would have been distributed but for Jean's choice of victim is largely speculative. Therefore, the assumption that but for her practice of substituting victims Jean would have distributed her risk equally reflects a normative rather than a factual determination. *See, e.g.*, Maytal Gilboa, *Multiple Reasonable Behavior Cases: The Problem of Causal Underdetermination in*

combination of the parties' (physical) positions, literally situating Jean at a crossroad, enabling her to choose between two potential victims differing in their socioeconomic statuses. Jean and her motorcycle thus illustrate how this "crossroad setting" creates a strong incentive for potential injurers to choose a lower-income victim as a substitute vis-à-vis a higher-income victim, whenever they can do so.

Before turning to demonstrate how the factual pattern embodied in this simple example commonly operates through applying central tort law doctrines, a short explanation of the source of the problem is in order.

B. The Gist of the Problem

As the example of Jean and her motorcycle illustrates, the problem of substitute victims results from the way socioeconomic gaps are translated into damages for harm. Importantly, the valuation of harm in terms of damages is not a matter of exact science. Rather, it reflects the normative function of corrective justice to restore the injured party to the position they would have been in if the tort had not been committed,[56] or, as the commonly used saying goes, "to make the plaintiff whole again."[57]

This understanding of corrective justice informs the underlying principle that damages aspire to reflect (to the extent feasible) the actual loss to the plaintiff caused by the defendant's wrongdoing. This view—which represents one of the dominant approaches to tort law both among scholars[58] and in courts[59]—also explains the discrepancies in damages for harms resulting from similar risk exposures. Simply put, the discrepancies in damages mirror the discrepancies in victims' socioeconomic situations prior to their injury.

Some scholars have addressed the ill incentives created by the discrepancies in damages for harms resulting from similar risk by offering alternative ap-

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Tort Law, 25 LEGAL THEORY 77, 94–103 (2019) (proposing to address uncertainty concerning "the counterfactual inquiry of the but-for test" through normative analysis).

[56] RESTATEMENT (SECOND) OF TORTS § 903 cmt. a (AM. L. INST. 1979) (stating that compensatory damages are designed to place the tort victim in a position pecuniarily equivalent to that which he would have occupied had the tort not been committed).

[57] *See supra* note 13 and accompanying text.

[58] *See, e.g.*, Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449 (1992) (describing corrective justice as the main category of tort law, alongside the category he refers to as "civil liability as a means for advancing . . . public policies such as general social compensation, wealth redistribution, loss spreading, or the attainment of economic efficiency through deterrence"); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) (proposing a bridged approach to the competing theories of contemporary tort law, namely, corrective justice and deterrence).

[59] *See supra* note 3 and accompanying text.

proaches to corrective justice,[60] or by calling to put the restorative function of corrective justice aside in favor of an approach that incorporates tort law with equality.[61] Although the ambition behind these suggestions is admirable, I discuss below the practical and conceptual problems that they entail, which may prevent courts and legislators from embracing them.[62] For purposes of the present discussion, however, it suffices to highlight the fundamental difference between these suggestions and the analysis this Article proposes. While conceding that tort law's dominant damages theory creates incentives that encourage tortfeasors to impose the costs associated with their risky activities systematically on poorer victims, the proposed analysis shifts the focus away from the structure of incentives embedded in tort doctrine. Instead, it emphasizes the tortfeasor's choice to exploit the structure of tort law for self-profit at the expense of the poor.

II. Substitute Victims and Tort Law: Demonstrating the Problem

Each of the following Sections in this Part illustrates a scenario in which victims are chosen as risk targets because they are identified as "less costly" than alternative victims. Together, these illustrations reveal how widespread and pressing the problem of substitute victims is in our tort system. Section A describes the problem of substitute victims in the context of negligence and demonstrates how a risk-utility evaluation of negligent behavior generates incentives that lead to exposing lower-income individuals to riskier behavior as compared to higher-income individuals.[63] Section B illustrates the incentives to practice in substituting victims in the context of nuisance, which in turn leads to exposing poorer individuals to environmental harms.[64] Section C details the problem of substitute victims in design defect cases, revealing the motivation of product designers to prioritize the safety of higher-income groups at the expense of lower-income ones.[65]

A. Negligence

This Section first demonstrates the problem of substitute victims in negligence cases through the lens of Judge Learned Hand's seminal risk-utility for-

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[60] *See* Avraham & Yuracko, *supra* note 5, at 695–96 (providing a discussion of such an alternative approach to corrective justice).

[61] *See, e.g.*, Chamallas & Wriggins, *supra* note 6, at 170 ("The elimination of race-based and gender-based computations . . . is a tort reform that would infuse a much-needed equality dimension into basic tort concepts of value and compensation.").

[62] I review these suggestions as part of my discussion of solutions to the problem of substitute victims. *See infra* notes 177–197 and accompanying text.

[63] *See infra* notes 68–91 and accompanying text.

[64] *See infra* notes 94–126 and accompanying text.

[65] *See infra* notes 129–159 and accompanying text.

mula.[66] Then, it considers the undesirable policy implications that this problem entails, namely, both the selection of less wealthy victims and the lower level of care used toward those victims.[67]

1. Substitute Victims

Consider again the example of Jean and her motorcycle, which demonstrates a generic manifestation of the problem of substitute victims in the context of negligence. It should be noted that this example is not merely theoretical. Rather, it represents a broader scope of circumstances in which the practice of substituting victims may operate in negligence. Thus, the implications of Jean's choice could be much greater in scale if, for example, Jean were running a courier service from her home and needed to decide which street segment her employees should travel through for their deliveries.[68] Before returning to Jean and her motorcycle, however, it is helpful to provide a brief explanation of how negligence law generally encourages the practice of substituting victims.

The well-known "Hand formula" is useful for this purpose. Judge Learned Hand famously articulated this formula when writing on behalf of the U.S. Court of Appeals for the Second Circuit in *United States v. Carroll Towing Co.*[69] It was later widely embraced by courts[70] and incorporated into the *Restatement of Torts*.[71] The formula expresses the idea of negligence in terms of a simple risk-utility equation.[72] According to this formula, an actor is required to take precautions to avoid a given harm (or "Loss" in the language of the Hand formula) only when $B < PL$, where B represents the cost of care (that is, the "Burden" of the precautions), P denotes "Probability," and L denotes "Loss."[73] PL therefore expresses the expected harm, which also represents the standard of care that potential injurers must exercise vis-à-vis their potential

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[66] *See infra* notes 68–82 and accompanying text.

[67] *See infra* notes 83–91 and accompanying text.

[68] *See* Avraham & Yuracko, *supra* note 5, at 663–65 (discussing the example of a manager for a delivery service who reroutes drivers from white to Black neighborhoods to save costs, because "it is less costly for courier companies to have accidents involving [B]lacks").

[69] 159 F.2d 169, 173 (2d Cir. 1947).

[70] *See, e.g.*, U.S. Fid. & Guar. Co. v. Plovidba, 683 F.2d 1022, 1026 (7th Cir. 1982) ("[T]he [Hand] formula is a valuable aid to clear thinking . . . . It gives federal district courts in maritime cases, where the liability standard is a matter of federal rather than state law, a useful framework.").

[71] RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. e (AM. L. INST. 2010) (explaining that the balancing approach to negligence expresses the idea that "[c]onduct is negligent if its disadvantages outweigh its advantages").

[72] *See* Loomis v. Amazon.com LLC, 277 Cal. Rptr. 3d 769, 787 (Ct. App. 2021) (Wiley, J., concurring) ("The judicial use of cost-benefit analysis is familiar throughout tort doctrine, in the doctrines of negligence as well as strict liability.").

[73] *Carroll Towing Co.*, 159 F.2d at 173.

victims in economic terms.[74] In other words, an actor is required to invest in precautions only so long as the cost of such precautions is lower than the cost of the expected harm. If they do not invest in precautions under such conditions and their conduct causes harm, they will be held liable in negligence and must compensate the victim for their loss.[75] In this way, the Hand formula realizes a primary economic goal of tort law: minimizing the costs of accidents and their prevention.[76]

Importantly, the Hand formula defines what is considered "reasonable behavior" on the assumption that the standard of care, which is set based on the expected harm (PL),[77] applies in the same way to all similar cases.[78] Going back to the example of Jean and her motorcycle, however, it becomes clear that Jean's incentives do not align with this assumption. With respect to the very same activity—riding her motorcycle—Jean is likely to evaluate the risk of her conduct differently depending on the direction in which she chooses to undertake it.[79] Recall that riding cautiously costs Jean $60 in loss of enjoyment. Jean can thus ride cautiously, at a cost of $60, in the direction of her higher-income neighbor to avoid $100 worth of risk.[80] In these circumstances, her conduct is considered reasonable, so she will not be held liable in negligence in the event that an accident occurs.[81] But if Jean rides in the direction of her lower-income neighbor, whose potential loss is valued at only $50, she is likely to forgo cau-

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[74] *See, e.g.*, STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 182–89 (2004) (noting that the duty of care reflects the expected losses resulting from the accident); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32–33 (1972) (explaining the relation between the expected harm and the precautions that would avoid it).

[75] *See, e.g.*, SHAVELL, *supra* note 74, at 236–37 (arguing that injurers are incentivized efficiently when the damages align with the actual harm suffered by the victim).

[76] *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24–34 (1970) (explaining that the primary goal of accident law is to reduce the sum of the costs of accidents and the costs of avoiding them).

[77] *See supra* note 73 and accompanying text.

[78] *See supra* note 42 and accompanying text.

[79] Studies have long shown that the order and estimated values of the alternatives may significantly influence decision-making. *See, e.g.*, Nathan N. Cheek & Jacob Goebel, *What Does It Mean to Maximize? "Decision Difficulty," Indecisiveness, and the Jingle-Jangle Fallacies in the Measurement of Maximizing*, 15 JUDGMENT & DECISION MAKING 7, 7 (2020) (exploring the meaning of "maximizing" in choice making); Marcelo Karanik, Jose Antonio Gomez-Ruiz, José Ignacio Peláez & Rubén Bernal, *Reliability of Ranking-Based Decision Methods: A New Perspective from the Alternatives' Supremacy*, 24 SOFT COMPUTING 11769, 11769 (2020) ("When choosing an option, the decision maker not only considers the positions of the different alternatives into the ranking, but also usually checks the intensity values associated with them."). In our example, Jean's choice might have been different had her house been located at the end of the street, obliging her to ride, at least to some extent, through her higher-income neighbor's segment.

[80] That is a 0.001 probability of an averaged harm of $100K, based on that neighbor's loss of income.

[81] Considering the investment in precautions, her riding is considered reasonable. *See supra* notes 73–75 and accompanying text.

tion, because its cost exceeds the damages Jean expects to pay in the event of an accident (i.e., \$60 > \$50). Jean is therefore likely to choose the latter option even though the standard of care is the same vis-à-vis both of her neighbors.

It should be noted that even under a regime of strict liability, where liability is imposed regardless of negligence or fault of any kind,[82] Jean has no incentive to act cautiously toward her lower-income neighbor. Even under such a regime, Jean is likely to prefer saving the \$60 cost of care, which exceeds Jean's expected damages payment of \$50.

2. Policy Implications

The crux of the substitute-victim problem is Jean's motivation to systematically focus her risky activity on her lower-income neighbor's street segment rather than distribute it between her two neighbors, as she would presumably do absent an identifiable choice of victim.[83] This choice of victim has several implications. First, as scholars have repeatedly acknowledged, discrepancies in damages awarded to different victims for similar risky activities may result in a lower level of care toward victims of lower socioeconomic status.[84] As the Hand formula shows us, injurers are expected to set the level of care based on their assessment of the expected cost of harm to the potential victim.[85] Injurers are thus likely to set the bar lower with respect to victims they identify as less costly to harm.[86]

Second, as Guido Calabresi has famously explained, in addition to minimizing the social cost of accidents by incentivizing potential injurers to exercise cost-effective care, a secondary economic goal of tort law is to spread out the remaining risks.[87] The economic rationale behind this objective is that concentrating losses instead of distributing them may result in greater negative

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[82] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM ch. 4, scope note (AM. L. INST. 2010) ("Strict liability is liability imposed without regard to the defendant's negligence or intent to cause harm."); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 205 n.2 (1973) ("The concept of strict liability is a various one, but at its core is the notion that one who injures another should be held liable whether or not the injurer was negligent or otherwise at fault."); John C.P. Goldberg & Benjamin C. Zipursky, *The Strict Liability in Fault and the Fault in Strict Liability*, 85 FORDHAM L. REV. 743, 745 (2016) (noting that the prevailing approach is that "[a] defendant subject to strict liability must pay damages irrespective of whether she has met, or failed to meet, an applicable standard of conduct").

[83] *See supra* note 55 and accompanying text.

[84] *See supra* note 15 and accompanying text.

[85] *See supra* note 4 and accompanying text.

[86] *See supra* note 4 and accompanying text.

[87] CALABRESI, *supra* note 76, at 39–45. For a thorough review of Calabresi's work on distributive economic analysis, see generally Mark A. Geistfeld, *Risk Distribution and the Law of Torts: Carrying Calabresi Further*, 77 LAW & CONTEMP. PROBS. 165 (2014).

effects on the risk bearers' wellbeing.[88] This is especially true for risk bearers belonging to disadvantaged social groups, for whom the experience of loss may be more devastating than it would be for individuals whose economic wherewithal makes them more resilient to losses.[89]

Third, a suboptimal level of care may cause injurers to increase their level of activity.[90] This is so because injurers generally adjust not only their decision to act, but also the amount of their activity, based on their expected cost. In our example, Jean may decide not only to ride in her poorer neighbor's direction, but also to ride more frequently. This makes intuitive sense: if Jean enjoys riding her motorcycle more when experiencing the rush of daredevilry, riding with greater care may be expected to decrease her desire to ride, while riding with less care would increase it.

In summary, not only does Jean have no incentive to ride her motorcycle with care in the direction of her lower-income neighbor, but Jean may also be expected to impose the risk of her riding consistently on this neighbor rather than on her higher-income neighbor, while possibly increasing the frequency of her risky activity. And, of course, more riding with less care exposes the lower-income neighbor to even greater risk. Not only is the doctrine of negligence incapable of preventing this outcome, but it also affirmatively incentivizes it by design.[91]

B. Nuisance

This Section considers the substitute victims problem in the nuisance context, first using the illustration of a hypothetical chemical facility to show its incentives to direct its nuisances toward properties of lower value.[92] Then, this

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[88] Tsachi Keren-Paz, *Egalitarianism as Justification: Why and How Should Egalitarian Considerations Reshape the Standard of Care in Negligence Law?*, 4 THEORETICAL INQUIRIES L. 275, 283 (2003) (noting the critique of law and economics that "[m]easuring efficiency in absolute figures ignores the diminishing marginal utility of money and hence is unsuitable if what we are concerned about is individual (or even aggregated individual) well-being").

[89] Avraham & Yuracko, *supra* note 5, at 693 (discussing the concern of risk distribution as a matter of fairness, suggesting, inter alia, that "policymakers should be concerned not only with the extent of accident costs and the number of bearers of these costs, but also with whether their bearers belong to advantaged or disadvantaged groups").

[90] *See, e.g.*, SHAVELL, *supra* note 74, at 202 (describing how injurers will engage in high levels of risky behavior if courts fail to implement optimal levels of care); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW 40 (1987) (stating that if courts fail to consider activity levels when determining the level of care, a socially excessive amount of those activities may result).

[91] *See* Porat, *supra* note 1, at 84–85 (describing the problem of misalignment by design in negligence, which occurs when "the risks that are accounted for in setting the standard of care are different from the risks for which liability is imposed and damages are awarded").

[92] *See infra* notes 97–115 and accompanying text.

Section highlights the policy implications of the current nuisance damages scheme, which leads to the burdens of nuisance and environmental harm falling disproportionately on low-income populations consisting primarily of non-white individuals.[93]

1. Substitute Victims

The doctrine of nuisance protects landowners from interference with the use and enjoyment of their land through intrusions[94] such as noise,[95] odor,[96] and aesthetic blight.[97] Nuisance is among the most prominent subjects of legal research, and is known for garnering special attention in law and economics scholarship.[98] This Subsection reviews the landscape of the nuisance doctrine, focusing on the problem of substitute victims. For this purpose, consider the following example.

The chemical facility: A chemical company is considering where to locate its new facility, which it values at over one billion dollars. Assume that due to the nature of its operations, there are only two possible locations: *A* and *B*. For simplicity, assume that at either location, the facility will emit gases that will make the surrounding area completely uninhabitable unless protective measures are employed. Assume further that if no such measures are taken, the residents of Location *A* will suffer an aggregate loss of $500M, whereas the residents of Location *B* will suffer a loss of $100M.[99] Lastly, for simplicity,

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[93] *See infra* notes 116–126 and accompanying text.

[94] *See* RESTATEMENT (SECOND) OF TORTS § 821D (AM. L. INST. 1979) (defining private nuisance as "a nontrespassory invasion of another's interest in the private use and enjoyment of land").

[95] *See, e.g.*, Mendez v. Rancho Valencia Resort Partners, LLC, 207 Cal. Rptr. 3d 532, 543 (Ct. App. 2016) ("It is clear that '[e]xcessive and inappropriate noise may under certain circumstances constitute an interference with the present enjoyment of land amounting to a nuisance'" (quoting Schild v. Rubin, 283 Cal. Rptr. 533, 543 (Ct. App. 1991))); Shore v. Maple Lane Farms, LLC, 411 S.W.3d 405, 416 (Tenn. 2013) (determining that "excessive noise may constitute a nuisance when it imposes discomfort beyond the reasonable limit dictated by surrounding conditions").

[96] *See, e.g.*, McKiver v. Murphy-Brown, LLC, 980 F.3d 937, 939, 946–48 (4th Cir. 2020) (finding in favor of the plaintiffs, who were abutters to a commercial hog-feed operation, on their claim for loss of use and enjoyment of their property due to repeated invasion by odor and the detrimental effects of the same); Tulou v. Raytheon Serv. Co., 659 A.2d 796, 809 (Del. Super. Ct. 1995) (reversing a decision of the Environmental Appeals Board granting a construction permit to a processed waste facility that released foul-smelling fumes).

[97] Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 992 (2004) (explaining that nuisance protects landowners' interests in the use of their land from "indirect intrusions such as noise, odor, and occasionally aesthetic blight, that interfere with an owner's use and enjoyment of her land").

[98] Timothy Swanson & Andreas Kontoleon, *Nuisance*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS VOLUME II: CIVIL LAW AND ECONOMICS 380 (Boudewijn Bouckaert & Gerrit De Geest eds., 2000).

[99] These values are assumed to reflect both home prices and all other related losses to the residents of these locations. The example is intentionally oversimplified for purposes of demonstration.

assume that the facility has only one effective option to prevent such losses—a biofiltration system that requires a consistently high level of maintenance at an overall cost of $200M—and that by using this system, the risks associated with the facility's emissions are reduced to zero.

The chemical facility example illustrates a classic nuisance scenario,[100] which the prevailing law in most jurisdictions addresses with what is sometimes referred to as "a hybrid liability regime."[101] In this regime, an activity is deemed unreasonable only if it is undertaken without compensation for the losses it causes.[102] This regime is reflected in the celebrated decision in *Boomer v. Atlantic Cement Co.*,[103] decided by the New York Court of Appeals in 1970, where the homeowner-plaintiffs filed an action for nuisance for the dirt, smoke, and vibrations emanating from a large cement plant.[104] At that time, New York's longstanding nuisance law[105] authorized injunctive relief whenever a defendant's behavior was found to constitute a nuisance that resulted in substantial damage to another.[106] But the *Boomer* court departed from this rule by denying the plaintiffs' request for an injunction and instead awarding them damages reflecting "total economic loss to their property present and future" resulting from the nuisance.[107] *Boomer* has established its place in the "legal

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[100] *See supra* notes 94–97 and accompanying text.

[101] *See, e.g.*, Joseph A. Schremmer, *Getting Past Possession: Subsurface Property Disputes as Nuisances*, 95 WASH. L. REV. 315, 336 (2020) (describing how the *Restatement (Second) of Torts* uses the "balance of utilities test" in which activity that damages another's property may be considered reasonable if the conduct's utility is especially high); Gregory C. Keating, *Strict Liability Wrongs* (defining nuisance cases as "harm-based strict liability" cases, which means imposing liability for the harm resulting from an "interference [which] is justified and ought to be continued"), *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF TORTS 292, 296 (John Oberdiek ed., 2014).

[102] *See generally* Schremmer, *supra* note 101 (articulating the "balance of utilities test" and its assessment that an injurer may behave reasonably in harming another if the social utility of that harm is significant). Accordingly, when a cement factory pollutes the air with dust, society's need for building materials may justify an action for damages, rather than stopping the activity. *See id.* at 337 (expressing that the process of weighing the "gravity of the harm" against the "utility of the conduct" assesses the social value of the actor's activity in general); *see also* William L. Prosser, *Nuisance Without Fault*, 20 TEX. L. REV. 399, 418 (1942) (noting that harmful conduct only amounts to nuisance when it is unreasonable in light of the social utility that that harmful conduct produces).

[103] 257 N.E.2d 870 (N.Y. 1970).

[104] *Id.* at 871.

[105] *See* Swanson & Kontoleon, *supra* note 98, at 381 (providing an historical review of nuisance doctrine in common law); Prosser, *supra* note 102, at 399 (same).

[106] The leading case for this proposition was *Whalen v. Union Bag & Paper Co. See* 101 N.E. 805, 806 (N.Y. 1913) ("Although the damage to the plaintiff may be slight as compared with the defendant's expense of abating the condition, that is not a good reason for refusing an injunction.").

[107] *See* 257 N.E.2d at 873 (reasoning that, due to the extreme imbalance of harms between the parties (absent an injunction, the plaintiffs' total property damage amounted to less than $1M, whereas an injunction would have caused the defendant to lose 300 employees and an investment of more than $45M), a damages award for the plaintiff would be preferable to an injunction against the defendant); *see also* Jeff L. Lewin, Boomer *and the American Law of Nuisance: Past, Present, and Future*, 54

canon"[108] as embodying what Guido Calabresi and Douglas Melamed have termed the "liability rule,"[109] which protects an entitlement by imposing damages for its violation.[110] Calabresi and Melamed juxtaposed this form of protection with the "property rule," under which an entitlement cannot be burdened or revoked without the holder's consent.[111] Over the years, many scholars have recognized the advantage of the liability rule in confronting issues such as holdout problems[112] and have found it preferable for achieving an efficient allocation of resources, especially when multiple parties are involved, as in our nuisance example.[113]

Equipped with this basic understanding of the nuisance doctrine, we can now return to the chemical facility example and observe how the substitute-victim problem manifests in the nuisance context. Consider first the option of building the facility in Location *A*. Were the chemical company to choose to locate its facility there, it would likely choose to invest in the biofiltration system at a cost of $200M to eliminate the risk of liability for damages in the amount of $500M. But if the company chooses Location *B*, it is unlikely to invest in the $200M biofiltration system to eliminate the risk, and it instead would likely opt to pay damages in the amount of $100M.[114] This outcome is similar to the result illustrated by the example of Jean and her motorcycle above.[115]

ALB. L. REV. 189, 192 (1990) (describing this evolutionary shift as "abandoning the dichotomous all-or-nothing rules of traditional nuisance law in favor of a rule of comparative nuisance").

[108] Hanoch Dagan & Avihay Dorfman, *Substantive Remedies*, 96 NOTRE DAME L. REV. 513, 518 (2020).

[109] Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972).

[110] *Id.* at 1106.

[111] *Id.* at 1105–06.

[112] *Id.* at 1107.

[113] *See, e.g.*, Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1721 (2004) (maintaining that property rules take into account both the need to gather information regarding assets and activities and align with the idea of an owner's entitlement to exclude others from their property); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2150 (1997) (examining how Calabresi and Melamed's framework can adapt to new tasks by integrating substantive and procedural aspects and highlighting the potential for courts to utilize additional rules beyond those in the original framework for these purposes); Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 5 (2002) (introducing dynamic pliability rules, which offer owners either property or liability rule protection, contingent on meeting specific conditions).

[114] This is a rational decision because $200M > $100M.

[115] Like Jean's poorer neighbor, the residents of Location *B* are more likely to be chosen as the victims of the actor's risky or harmful activity over the wealthier residents of Location *A*, and the company is likely to forgo the costly protective measures it would have taken to reduce the risk of harm toward the wealthier residents of Location *A*.

2. Policy Implications

The environmental justice movement[116] has long argued that under the current law of nuisance, "people of color and the poor are exposed to greater environmental risks than are whites and wealthier individuals."[117] Indeed, if, as predicted, the chemical company decides to locate its facility in Location *B*, that location's poorer residents become the substitute victims of the company's harmful activity, rather than the wealthier, probably "whiter"[118] residents of Location *A*. Moreover, as the chemical facility example illustrates, when precautionary measures are more costly than compensating the injured victims, companies are unlikely to invest in precautions to protect those victims.

Importantly, the chemical company's decision to place its facility in Location *B* based on factors like the lower average price of housing in the area is a rational response to the economic incentives embedded in the doctrine of nuisance. This type of behavior in itself is not considered wrongful in the tortious sense. To the contrary, so long as the company does not violate any regulations, and it compensates the residents of Location *B* for the harm its activity causes, its choice to locate the facility in Location *B* is considered both efficient and lawful under the prevailing interpretation of nuisance law.[119] In this way, nuisance law creates incentives for conduct that ends up rendering residents of poor neighborhoods even poorer.[120]

Lawmakers have tried to contend with the detrimental results of this incentive structure through regulation. A noteworthy example is Executive Order 12898,[121] which directs federal agencies to identify and address "dispropor-

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[116] *See generally* Robert D. Bullard, *Introduction: Environmental Justice—Once a Footnote, Now a Headline*, 45 HARV. ENV'T L. REV. 243 (2021) (providing a review of the development of the environmental justice movement).

[117] Vicki Been, *Locally Undesirable Land Uses in Minority Neighborhoods: Disproportionate Siting or Market Dynamics?*, 103 YALE L.J. 1383, 1384 (1994).

[118] *See supra* note 18 and accompanying text.

[119] *See supra* notes 102–110 and accompanying text.

[120] *See, e.g.*, Mascarenhas et al., *supra* note 18, at 121 (comparing hosting and non-hosting hazardous waste facilities tracts and finding that "both [the] mean annual household incomes and owner-occupied housing values have significantly decreased in host neighborhoods versus non-host areas from 2000 to 2010. As a result, people of color living in host neighborhoods are poorer today than they were a decade ago"); *see also, e.g.*, Mahmud Isnan, Teerayut Horanont & Anon Plangprasopchok, *Machine Learning Approach with Environmental Pollution and Geospatial Information for Mapping Poverty in Thailand* (noting that "[p]overty drives pollution, and pollution drives poverty" and further explaining that "[p]ollution . . . has economic costs such as costs associated with pollution-related diseases, including direct medical fees, costs to the healthcare system, and the potential costs associated with missed productivity and economic development"), *in* APPLIED GEOGRAPHY AND GEOINFORMATICS FOR SUSTAINABLE DEVELOPMENT: PROCEEDINGS OF ICGGS 2022, at 160–61 (Wuttichai Boonpook et al. eds., 2022).

[121] Exec. Order No. 12,898, 3 C.F.R. 859 (1995), *reprinted as amended in* 42 U.S.C. § 4321 (1994 & Supp. VI 1998), https://www.fema.gov/fact-sheet/executive-order-12898-environmental-

tionately high and adverse human health or environmental effects . . . on minority populations and low-income populations."[122] This order, signed by President Bill Clinton in February of 1994, was intended to target environmental injustice within existing federal laws and regulations.[123] Despite this and other regulations with somewhat similar agendas,[124] however, studies show that low-income, often predominantly minority populations continue to bear a disproportionate burden of industrial and polluting facilities.[125] The chemical facility example demonstrates why. As rational economic actors, polluting facilities can be expected to prefer exposing poorer communities, rather than wealthier ones, to their harmful activities whenever such a choice is available. Simply put, the practice of substituting victims pays off.

Although choosing Location *B* over Location *A* in the circumstances of the chemical facility example does not constitute a tort, I propose below that it may give rise to a cause of action in unjust enrichment.[126] Before introducing this proposal, however, I turn to a third and final example of the problem of substitute victims, this time in the context of product liability, and specifically, design defects.

C. Product Liability for Design Defects

This Section examines the problem of substitute victims in the context of design defects, first considering a car manufacturer that must make the binary choice of whether to prioritize the safety of males who earn more on average, or females who earn less on average.[127] Then this Section highlights the policy outcomes of the prevailing law in design defect cases, which incentivizes manufacturers to prioritize higher earners in designing a product, and which generally leaves no remedy available for lower-earners harmed by those manufacturers' choice.[128]

1. Substitute Victims

A significant majority of product liability cases center around design defects.[129] Design defects concern flaws in the original design of a product, mak-

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justice [https://perma.cc/BK6C-HZ8A] (pertaining to "[f]ederal [a]ctions to [a]ddress [e]nvironmental [j]ustice in [m]inority [p]opulations and [l]ow-[i]ncome [p]opulations").

[122] *Id.*

[123] Bullard, *supra* note 116, at 245.

[124] For additional examples of such regulations, see *supra* note 17.

[125] *See supra* note 18 and accompanying text.

[126] *See infra* Part III.

[127] *See infra* notes 129–153 and accompanying text.

[128] *See infra* notes 154–159 and accompanying text.

[129] *See, e.g.*, DUNCAN FAIRGRIEVE & RICHARD GOLDBERG, PRODUCT LIABILITY 384 (3rd ed. 2020) (stating that "design defectiveness is the predominant claim in product liability litigation"); David G. Owen, *Design Defects*, 73 MO. L. REV. 291, 293–94 n.9 (2008) ("An insurance industry

ing it inherently unsafe or potentially harmful to users even when manufactured correctly.[130] To illustrate the problem of substitute victims in this context, consider the following example.

The car manufacturer: A car manufacturer needs to decide where to position the car's steering wheel, airbag, pedals, and gearbox to accommodate the size of its customers. Assume that positioning these elements based on average male dimensions is expected to lead to more female accident casualties. Conversely, positioning them to fit average female dimensions is expected to lead to more male casualties. If these elements are positioned based on the average dimensions of men and women taken together, a greater number of casualties of both sexes is expected.

Identifying the practice of substituting victims as one focusing on the choices of injurers paves the way for detecting this example's problem. The car manufacturer example represents a unique category of cases, which concern what I term here "binary-risk design." In binary-risk design cases, manufacturers confront design decisions that are conceptually similar to the choices presented in the preceding examples, where injurers are in a position to choose between two (or more) identified victims or groups of victims. Indeed, any choice the car manufacturer in our example makes potentially puts a burden of risk on one group of victims over another. Although this example presents a choice between two groups based on their sex, product manufacturers make contrastive choices involving other groups as well. For instance, manufacturers of many risky products typically design their products to fit the great majority of right-handed users at the expense of left-handed users.[131] Although right-handed design bias has been associated with higher injury and mortality rates for left-handers,[132] it is difficult to imagine a claim that this bias represents a

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study of large claims (in excess of $100,000) some time ago revealed that strict liability design defects was the principal claim in 75% of such cases.").

[130] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. d (AM. L. INST. 1998) ("[A] product asserted to have a defective design meets the manufacturer's design specifications but raises the question whether the specifications themselves create unreasonable risks."); DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, DOBBS' LAW OF TORTS § 452, at 903 (2d ed. 2011) ("[A] design defect occurs when the intended design of the product line itself is inadequate and needlessly dangerous."); Denis W. Boivin, *Strict Products Liability Revisited*, 33 OSGOODE HALL L.J. 487, 510 (1995) ("A design defect occurs when the product is manufactured in conformity with its intended specifications, but the specifications themselves create unreasonable risks for consumers.").

[131] Stanley Coren, *Left-Handedness and Accident-Related Injury Risk*, 79 AM. J. PUB. HEALTH 1040, 1041 (1989) (stating that "[e]veryday implements, such as scissors, gearshifts, and can openers, even the direction in which the threading of screws is angled, are biased toward right-handed use").

[132] *See generally id.* (illustrating how right-handed bias in products has had an adverse effect on the lifespans of left-handed individuals). *See also* Diane F. Halpern & Stanley Coren, *Do Right-Handers Live Longer?*, 333 NATURE 213, 213 (1988) (showing higher survival rates for right-handers and suggesting that the association of left-handedness with reduced longevity may drive from "an environment designed for a right-handed majority."). For a study that has not found significant evi-

design defect. Below, I provide a legal explanation for this; however, even intuitively, such claim may seem untenable, because right-handed bias is driven by the fact that the great majority of the population (about ninety percent) is right-handed.[133]

In its basic structure, the car manufacturer's choice between a pro-female or pro-male design parallels the right-handed or left-handed design dilemma. Yet, these examples differ in a significant manner. Not only is there no significant difference in the number of females and males in the United States, but some sources also indicate that females account for more than fifty percent of the population and actually outnumber males in the majority of states.[134] And although males still drive more than women,[135] studies indicate that the driving gap between the sexes has largely narrowed and might eventually disappear.[136] Designing cars in a way that is, on average, safer for men than for women thus reflects considerations other than a major gap in the number of drivers. Some studies suggest that this design choice is likely rooted in a kind of "male-unless-otherwise-indicated" thinking,[137] envisaging men as the default design model for the structure of the human body.[138] The following analysis suggests

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dence that left-handedness increases the risk of death, see Runa E. Steenhuis, *An Examination of the Hypothesis That Left-handers Die Earlier: The Canadian Study of Health and Aging*, 6 LATERALITY 69, 69 (2001).

[133] *See, e.g.*, *Is Handedness Determined by Genetics?*, NAT'L LIBR. MED., https://medlineplus.gov/genetics/understanding/traits/handedness/ [https://perma.cc/G2JJ-TQ35] (presenting data according to which about 90% of people are right-handed).

[134] *See, e.g.*, *Gender Ratio in the United States*, STAT. TIMES, https://statisticstimes.com/demographics/country/us-sex-ratio.php [https://perma.cc/X5ZE-2QFB] (providing statistics for the populations of males and females in the United States); *Population, Female (% of Total Population)—United States*, WORLD BANK GRP., https://data.worldbank.org/indicator/SP.POP.TOTL.FE.ZS?locations=US [https://perma.cc/ZMW7-6RCY] (same).

[135] Recent studies show that men in the United States still drive longer distances than women, but these gaps have been decreasing over the years. *See, e.g.*, *National Household Travel Survey Daily Travel Quick Facts*, BUREAU TRANSP. STAT. (May 31, 2017), https://www.bts.gov/statistical-products/surveys/national-household-travel-survey-daily-travel-quick-facts [https://perma.cc/MGE6-KC3P] (revealing that, on average, women drive less than men); *Demographic Differences in Use of Alternate Transportation Among Older Drivers: AAA LongROAD Study*, FOUND. FOR TRAFFIC SAFETY (Apr. 2019), https://aaafoundation.org/demographic-differences-in-use-of-alternate-transportation-among-older-drivers-aaa-longroad-study/ [https://perma.cc/2DLZ-6NQS] (providing statistics around forms of transportation used by older drivers in the United States); Michael Sivak, *Female Drivers in the United States, 1963–2010: From a Minority to a Majority?*, 14 TRAFFIC INJ. PREVENTION 259, 259 (2013) (finding that females drove significantly more frequently and for more miles in 2010 than they did in 1963).

[136] *See* Sivak, *supra* note 135 (concluding that the driving gap between the sexes narrowed between 1963 and 2010 and might disappear if this trend continues).

[137] CAROLINE CRIADO PEREZ, INVISIBLE WOMEN: DATA BIAS IN A WORLD DESIGNED FOR MEN 12 (2021).

[138] *Id.* at 11 ("Seeing men as the human default is fundamental to the structure of human society. It's an old habit and it runs deep—as deep as theories of human evolution itself.").

an additional explanation, which also raises concerns that the pro-male bias in car design may persist even if the problems these studies reveal are resolved. Viewing the car manufacturer's choice through the lens of substitute victims allows us to understand why.

Recall that damages valuation for bodily injuries is significantly influenced by the victim's loss of income.[139] Studies indicate that on average, men's wages are twenty percent higher than women's—a gap that has remained relatively stable in the United States over the past twenty years.[140] Accordingly, compensating female drivers (or passengers)[141] for loss of life and limb is on average less costly than compensating male drivers. And given that wage gaps between the sexes have not narrowed meaningfully over the past several decades,[142] they are not expected to disappear soon. For this reason, a rational car manufacturer would prefer that a successful design defect claim be brought, if at all, by a female driver.

Further, the prevailing test courts apply in defective design claims is not equipped to offer a solution to the problem of substitute victims that inheres in the binary-risk structure of car design and systematically burdens female drivers. To the contrary, it exacerbates the problem by inducing manufacturers to cling to their choice of substitute victims. The majority of U.S. courts define the defectiveness of product designs in terms of reasonableness,[143] manifesting

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[139] *See supra* notes 5–7 and accompanying text.

[140] *See, e.g.*, Katherine Haan, *Gender Pay Gap Statistics in 2024*, FORBES ADVISOR, https://www.forbes.com/advisor/business/gender-pay-gap-statistics/ [https://perma.cc/Q34S-C922] (Mar. 1, 2024) (presenting intersectional pay gaps by considering both race and gender in average wage disparities, and reporting, inter alia, that "[w]omen of color are among the lowest-paid workers in rural areas, with rural Black and Hispanic women making just 56 cents for every dollar that rural white, non-Hispanic men make"); *see also* GOULD & KANDRA, *supra* note 7 (providing statistics reflecting that women are paid 22.1% less than men on average).

[141] I generally refer to "drivers" in the text for simplicity. The analysis is the same, however, whether the claim is brought by a driver or a passenger, whenever the design element reflects a pro-male bias. *See infra* note 150 and accompanying text.

[142] *See, e.g.*, Carolina Aragão, *Gender Pay Gap in U.S. Hasn't Changed Much in Two Decades*, PEW RSCH. CTR. (Mar. 1, 2023), https://www.pewresearch.org/short-reads/2023/03/01/gender-pay-gap-facts/ [https://perma.cc/5ANS-RFFH] (illustrating that the gender pay gap has remained stable over the past twenty years).

[143] RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. d (AM. L. INST. 1998) (stating that the majority of courts in the United States apply a standard of reasonableness based on risk-utility balancing when judging the defectiveness of product designs); *see also, e.g.*, Diluzio-Gulino v. Daimler Chrysler Corp., 897 A.2d 438, 441 (N.J. Super. Ct. App. Div. 2006) (stating the rule that "[a] plaintiff asserting a design defect in a products liability action 'must prove under a risk-utility analysis the existence of an alternate design that is both practical and feasible,' and 'safer' than that used by the manufacturer" (quoting Lewis v. Am. Cyanamid Co., 715 A.2d 967, 980 (N.J. 1998))). Some courts, however, shift the burden of risk-utility balancing to the defendant. *See* Gonzalez v. Autoliv ASP, Inc., 64 Cal. Rptr. 3d 908, 917 (Ct. App. 2007) (requiring that the risk-utility burden shift to the defendant "[o]nce the plaintiff makes a prima facie showing that the injury was proximately caused by the product's design" (quoting Barker v. Lull Eng'g Co., 143 Cal. Rptr. 225, 237 (1978))).

a risk-utility balance between "the likelihood of harm or injury, and the gravity of such injury, against the burden or precautions that would be effective to avoid the injury or harm."[144] In the context of design defect claims, this risk-utility test has a distinctive feature: it requires plaintiffs to prove that a feasible, safer, alternative design existed at the time the product was manufactured.[145] This requirement, embraced in most jurisdictions,[146] means that a plaintiff must show that a safer alternative would have resulted in a lesser injury, not only to herself or to similarly situated victims, but also to "the aggregate injuries from all accident[s]."[147] Establishing the availability of a safer alternative design thus requires empirical evidence that "the number of lives saved (or injuries avoided) by adopting [the] alternative design . . . would be greater than the corresponding number of lives lost (or injuries sustained) as a result of such adoption."[148]

Given the nature of binary-risk design, the plaintiff's need to prove the feasibility of a safer alternative suggests that a car manufacturer can never be liable to female drivers whose injuries result from a pro-male bias in car design. Changing the design to accommodate average female dimensions would only reverse the situation, substituting male drivers for female drivers as victims. The car manufacturer can thus argue that such an alternative is not safer in the aggregate than its current, pro-male design choice. Interestingly, a manufacturer indeed asserted this argument in *General Motors Corp. v. Farnsworth*, a case decided by the Supreme Court of Alaska in 1998.[149] There, the plaintiff—a woman measuring 5'3" and weighing 129 pounds—argued that a General Motors truck was defectively designed because it failed to protect "small occupants."[150] General Motors insisted that "no single design can protect all occupants equally well and that a design that optimizes safety for the average

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[144] *See, e.g.*, Ford Motor Co. v. Moore, 905 N.E.2d 418, 424 (Ind. Ct. App. 2009) (illustrating use of reasonableness criteria for assessing the defectiveness of a design), *vacated by* TRW Vehicle Safety Sys., Inc. v. Moore, 936 N.E.2d 201, 228 (Ind. 2010).

[145] *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2(b) ("A product . . . is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor . . . ."); *see also, e.g.*, A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1453 (2010) ("Under the design defect doctrine, a firm can be held liable for accidents caused by its product if the design of the product was defective, meaning, essentially, that a different design could have been employed that was safer and not excessively costly.").

[146] *See generally* Cami Perkins, *The Increasing Acceptance of the Restatement (Third) Risk Utility Analysis in Design Defect Claims*, 4 NEV. L.J. 609 (2004) (providing a review of the states who adopted this standard).

[147] *Ford Motor Co.*, 905 N.E.2d at 425.

[148] *Diluzio-Gulino*, 897 A.2d at 441 (quoting Crespo v. Chrysler Corp., 75 F. Supp. 2d 225, 229 (S.D.N.Y. 1999)).

[149] 965 P.2d 1209, 1212–13 (Alaska 1998).

[150] *Id.*

sized man will decrease safety for women and children,"[151] and argued that its design was not defective because it "would protect individuals the size of an average man or larger."[152] In the end, however, the Supreme Court of Alaska did not adjudicate the merits of this argument because the evidence showed that the vehicle performed so unsafely that it was defective under an alternative, less commonly applied "consumer expectation" test.[153]

2. Policy Implications

As illustrated above, the "safer alternative design" element of the reasonableness inquiry in design defect cases operates to justify a car manufacturer's male-biased design choice.[154] Thus, damages claims asserted by female car-users on the theory that their injuries were caused by male-biased design are likely to fail, unless they are recognized under a distinct paradigm that unequivocally eschews the risk-utility framework in favor of an alternative reasonableness test.[155] Developing such a formula is not within the scope of this Article. It is important to note, however, that even if such a test would allow female drivers to recover for injuries resulting from a pro-male car design, they would probably retain their status as substitute victims. Because women's damages awards for loss of income are lower on average than men's, car manufacturers are likely to continue to mark women as preferable risk-bearers when it comes to car design.[156] Where there is no apparent way to design a car in a manner that is equally safe for female and male users,[157] choosing male-biased design is considered a reasonable choice.

Moreover, under current law, which would not hold manufacturers liable to female drivers who suffer injuries as a result of male-biased designs, there is

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[151] *Id.* at 1213.

[152] *Id.*

[153] *Id.* at 1221. For a review of the consumer expectation doctrine and its use vis-à-vis the risk utility test in most United States jurisdictions, see generally Perkins, *supra* note 146, which highlights the trend away from the consumer expectation test and toward the risk-utility test.

[154] *See supra* notes 143–149 and accompanying text.

[155] For example, a plaintiff might assert a unique formulation of the consumer expectations test. Currently, the prevailing view of this test is that it is only one factor among many to consider in the broader risk-utility balancing test. *See* RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmts. f, g (AM. L. INST. 1998) (providing that consumer expectations are one factor in a risk-utility test). Accordingly, only a few jurisdictions use the consumer expectation test in the design defect context. *See, e.g.*, *id.* cmt. g (stating that consumer expectations do not have a determinative role in adjudicating design defectiveness); Godoy *ex rel.* Gramling v. E.I. du Pont de Nemours & Co., 768 N.W.2d 674, 696 (Wis. 2009) (noting that only six states use the consumer expectation test when assessing claims of defective design).

[156] *See supra* note 142 and accompanying text.

[157] *See* PEREZ, *supra* note 137, at 188 (interviewing a traffic safety researcher who acknowledges that there is "currently no way EuroNCAP can identify the protective systems that protect both males and females the best way").

little incentive for manufacturers to invest in measures to narrow safety gaps between male and female users. Some studies support this conclusion, suggesting that manufacturers have been compromising on the level of care exercised to protect female car-users. Thus, recent findings reveal that car manufacturers do not effectively invest in developing car designs to enhance female users' safety, even when design adjustments are possible.[158] A victim less costly to compensate is perceived by injurers as less costly to harm, which in turn may translate into a lower level of care.[159]

III. Contending with the Problem of Substitute Victims

This Part considers potential solutions for the problem of substitute victims. Section A reviews some existing solutions to the undesirable effects of discrepancies in tort law damages, namely targeting risks toward lower-income victims. Section A further offers possible explanations as to why these solutions—mainly attempts to solve the problem through regulation or tort law litigation—have thus far largely failed.[160] Section B proposes a solution centered around the doctrine of unjust enrichment, highlighting its doctrinal and theoretical compatibility to address this problem, in its proposed framework titled "substitute victims."[161] Section C applies the proposed analysis to the examples used to illustrate the problem in the contexts of negligence, nuisance, and design defect.[162] Section D demonstrates that employing unjust enrichment principles to address the problem of substitute victims is not only doctrinally attainable but can also be supported from a policy perspective.[163]

A. Existing and Proposed Solutions

This Section first considers existing proposed solutions to the problematic outcome of discrepancies in tort damages, titled here "substitute victims." It concludes that these solutions are generally at odds with traditional tort law principles and entail practical difficulties, rendering them unlikely to succeed in becoming new law.[164] Then, this Section identifies a new proposed solution based on the doctrine of unjust enrichment—one that focuses on the benefit injurers gain through engaging in substituting victims.[165]

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[158] *See id.* at 185–91 (providing a thorough review of the failure of car manufacturers to appropriately address the unique features of their female customers).

[159] *See supra* note 85 and accompanying text.

[160] *See infra* notes 166–200 and accompanying text.

[161] *See infra* notes 203–252 and accompanying text.

[162] *See infra* notes 256–280 and accompanying text.

[163] *See infra* notes 282–291 and accompanying text.

[164] *See infra* notes 166–185 and accompanying text.

[165] *See infra* notes 186–200 and accompanying text.

1. Overview of the Current Landscape

Disparities in damages for harm resulting from similar exposure to risks are at the core of the problem of substitute victims. Whenever possible, a rational injurer is likely to exploit these disparities by choosing to impose their risk on victims whose injuries are less costly to them, thus generally preferring poorer rather than wealthier victims.

Because poverty does not, in itself, correspond to a protected classification for purposes of the Equal Protection Clause or federal antidiscrimination laws,[166] injurers who target poor people are unlikely to be held liable for such discrimination unless the victim can prove that the injurer chose to impose the risk upon them based on another protected classification such as race,[167] color,[168] disability,[169] sex,[170] or age.[171] Proving such discriminatory motives is, however, a difficult, sometimes almost impossible, task, even when they do not intertwine with economic motives that make them even more difficult to identify.[172] Accordingly, discrimination law does not seem an effective avenue for substitute victims to seek redress for their injuries.

A different approach to contending with the practice of substituting victims is to tackle the problem by further developing tort law itself. Examples of this approach include the suggestions to evaluate tort damages based on the costs of the tortfeasor's expenditures for harm prevention, particularly in negligence cases. Thus, scholars advocating such an approach explain that deterrence considerations should lead to considering damages based on the tortfea-

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[166] *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 121–22 (1973) (illustrating the U.S. Supreme Court's famous reluctance to acknowledge poverty as a suspect classification); *see also* Shreya Atrey, *The Intersectional Case of Poverty in Discrimination Law*, 18 HUM. RTS. L. REV. 411, 412 (2018) (describing that "apart from some notable exceptions, poverty and its consequences have been plainly dismissed in discrimination laws as 'constitutional castaways'" (quoting R v. Prosper [1994] 3 S.C.R. 236, 302 (Can.)); Been, *supra* note 117, at 1390–91 (explaining that although the selection of disproportionally poor neighborhoods to host what the author terms "locally undesirable land uses" would not be unconstitutional, selecting a neighborhood based on other classifications such as race or color would be unconstitutional).

[167] Civil Rights Act of 1964, 42 U.S.C. § 2000d (prohibiting discrimination based on race, color, and national origin).

[168] *Id.*

[169] Rehabilitation Act of 1973, 29 U.S.C. § 794(a) (prohibiting discrimination based on disability).

[170] Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (prohibiting discrimination based on sex).

[171] Age Discrimination Act of 1975, 42 U.S.C. § 6102 (prohibiting discrimination based on age).

[172] *See* Patient Protection and Affordable Care Act, 42 U.S.C. § 18116. Illustrating the difficulty of proving discriminatory intent, Section 1557 of the Affordable Care Act protects patients from discriminatory exclusion from or denial of health care services and benefits. *Id.* Yet, because Section 1557 requires plaintiffs to prove the medical care provider's discriminatory intent—an almost impossible task, considering that many are unaware of their bias—claims for protection are difficult to establish. *See id.*

sor's saving in the costs of care, especially when these costs outweigh loss-based damages.[173] This suggestion indeed responds to one of the significant symptoms of the problem of substitute victims, which is the possibility that such victims may be treated with a lower level of care. As I demonstrate below, however, this solution only partially decreases the incentives to practice substituting victims. Tortfeasors are still likely to prefer targeting "less costly victims" whose expected estimation of damages, should the risk materialize into harm, is lower compared to that of the alternative-wealthier victims.[174] Furthermore, this suggestion necessitates a normative framework that is aptly suited to conceptually ground this type of gain-based damages based on the tortfeasor's cost saving. Otherwise, as other scholars propose, expenditures-based damages require redirecting the basic tort norm from the compensatory obligation manifested in the damages remedy to the idea of preventing physical harm.[175] Instead of seeking ways to reconceptualize the internal design of tort law to justify gain-based damages, the proposal below, titled "Substituting Victims as Unjust Enrichment," provides a coherent normative infrastructure that justifies gain-based damages for substitute victims, without compromising on the restorative logic of tort law.[176]

A different approach to addressing the problem of substitute victims suggests dealing with its core issue by equalizing damages awards to all victims whose injuries result from similar risks. Prominent scholarly examples of this approach include a proposal to award similar amounts in damages for similar bodily injuries, regardless of the victims' loss of income,[177] and a proposal for narrowing the discrepancies in damages through the use of gender- and race-blended tables for damages calculations.[178] Scholars have also recognized the need for a more unitary method for computing damages for loss of land and

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[173] *See generally* Robert D. Cooter & Ariel Porat, *Disgorgement Damages for Accidents,* 44 J. LEGAL STUD. 249 (2015).

[174] *See infra* notes 244–252 and accompanying text.

[175] *See* Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 189 (2011). Geistfeld's argument relies on an interpretation of corrective justice pertaining to an infringement of the tortfeasors' duty to "satisfy the compensatory obligation by incurring these expenses through the exercise of reasonable care that directly protects the rightholder's interest in physical security." *Id.*

[176] *See infra* Part III.B.

[177] Porat, *supra* note 1, at 140 (stating that of all cases of misalignment in tort law discussed in his article, the misalignment between the damages awarded to victims and the standard of care is "the hardest to eliminate").

[178] Avraham & Yuracko, *supra* note 5, at 667 (arguing that tort-law damages should not be computed based on tables that use gender and race to estimate wage, life-expectancy, or work-life expectancy, suggesting instead to base these computations on blended tables "that do not delineate on racial or gender lines").

property in nuisance cases.[179] I discuss these suggestions at length in the next Section, as I find that the core issue driving the problem of substitute victims—disparities in damages—requires a distinct response. For the purpose of this Section, it suffices to note that scholars who suggest reforms in tort damages, such as the ones referenced above, sometimes posit that the proposed changes should be initiated by legislators rather than by courts.[180] This raises the question: should the problem of substitute victims, which entails a societal concern, be addressed through legislative action, rather than through private lawsuits for tort?

Indeed, there is intuitive appeal to the argument that solutions to problems stemming from existing socioeconomic gaps may be best developed by legislators. As demonstrated above in the discussions of design defect[181] and nuisance,[182] however, regulatory interventions alone have proven largely insufficient to overcome tortfeasors' incentives to profit through their choice of victims.[183] Like other societal problems, the challenge of substitute victims necessitates private litigation to fill in the gaps left by existing regulatory endeavors.[184] This observation brings us back to suggestions for addressing the problem through tort law, and, in particular, through changes in the criteria for valuing damages so that victims harmed by similar risks are compensated equally.[185] I now turn to this latter idea.

2. Equalizing Damages for Harms Resulting from Similar Risks

Proposals for awarding similar damages for harms resulting from similar risks, regardless of the victim's socioeconomic background, may seem ideal to treat the problem of substitute victims. If all victims received similar damages under these terms, injurers would have no incentive to choose less expensive victims. Such proposals have been grounded in new interpretations of the idea of restoration—for example, the idea that similar risk exposures cause similar

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[179] *See, e.g.*, Rachel Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1807 (2004) (suggesting that the damages awarded to victims from poor neighborhoods for the risk they suffer from nuisance should be computed by a "segregation multiplier," which is the amount their homes would be worth in a comparable-but-nonsegregated neighborhood).

[180] *See, e.g.*, Porat, *supra* note 1, at 140 ("[A]ligning the standard of care and damages in this area requires a major change in the criteria for awarding damages for bodily injury by narrowing the gap between damages awarded to high-income and low-income victims. Such a change should probably come from legislatures, not courts.").

[181] *See infra* notes 268–270 and accompanying text.

[182] *See supra* notes 121–125 and accompanying text.

[183] *See supra* note 18 and accompanying text.

[184] *See, e.g.*, Gilboa et al., *supra* note 34, at 1042 (discussing a similar argument with respect to climate litigation, which is needed to fill the gaps left by national and international regulations).

[185] *See supra* notes 177–179 and accompanying text.

"normative injuries," for which the damages are supposed to compensate.[186] A different interpretive ground for such proposals suggests that damages should not compensate for the actual loss of income, but rather for the loss of income *capacity*, which should be determined equally for all victims as a normative matter.[187] On a practical level, some of these suggestions were made to lay the theoretical groundwork for abolishing the highly problematic practice of using race- and gender-based tables for estimating relevant factors in damages calculation, such as average wages, life-expectancy, and work-life expectancy.[188] But, neither legislators nor courts are likely to adopt a general rule that completely eliminates disparities in damages due to pragmatic and conceptual problems.

Pragmatically, it is unlikely that legislators will pursue the suggested comprehensive change in the theory of tort damages. Public choice scholars have long observed that even regulations that ostensibly serve the public good are not immune from the influence of powerful interest groups.[189] Nuisance cases such as in the example involving the chemical facility above are especially susceptible to these difficulties. Potential victims who belong to powerful social groups, and who likely reside in wealthy neighborhoods, may use their influence and resources to thwart any proposal that would increase their neighborhoods' exposure to risks.[190]

Conceptually, tort law's theoretical underpinnings cannot be reconciled with proposals to completely eliminate discrepancies in damages by equalizing all compensatory rewards for similar risks. Such proposals rest on interpretations of corrective justice that focus on the idea that the subject of compensation is the normative rather than the factual impact of the defendant's wrongdoing.[191] Because the "normative injury" resulting from similar risky activities is the same, the damages awarded to compensate for this injury should like-

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[186] *See, e.g.*, Avraham & Yuracko, *supra* note 5, at 695 (providing an argument for an equalizing damages approach based on a plausible interpretation of corrective justice); Porat, *supra* note 1, at 106 (same).

[187] Avraham & Yuracko, *supra* note 5, at 695.

[188] *Id.* at 665–66.

[189] Godsil, *supra* note 179, at 1871.

[190] *See, e.g.*, Dinah Shelton, *Using Law and Equity for Poor and the Environment* (describing how "NIMBY ('not in my back yard') is a principle that can be successfully invoked almost exclusively by the wealthy and powerful"), *in* POVERTY ALLEVIATION AND ENVIRONMENTAL LAW 11, 13 (Yves Le Bouthillier et al. eds., 2012); Robert M. Frye, *Environmental Injustice: The Failure of American Civil Rights and Environmental Law to Provide Equal Protection from Pollution*, 3 DICK. J. ENV'T L. & POL'Y 53, 67 (1993) (highlighting that "[o]ver the past twenty years, white, educated, mid-to-upper income citizens have become more aware of the environmental and aesthetic risks associated with such facilities, and they have organized to fight proposals to locate waste disposal sites in their areas").

[191] *See supra* note 190.

wise be the same.[192] But these interpretations fundamentally depart from the dominant theory of corrective justice and the idea of restoration.

The dominant approach to corrective justice does not arbitrarily ground the concept of restoration in an evaluation of the victim's situation prior to the tort. Rather, this approach reflects the idea that damages awards represent the plaintiff's recovery of their right to pursue any purpose they choose, as if the tort had never happened.[193] Restoring the plaintiff's right to choose their life's path free from the injurer's interference can be achieved only by restoring "the means to which . . . [they] had a right."[194] These means are reflected in the value of what the plaintiff lost as a matter of fact, i.e., the income or the property that the victim "already had" prior to defendant's tort.[195] Valuation criteria such as the plaintiff's loss of income to compensate for their bodily injury serve as proxies for assessing the value of the possibilities the plaintiff lost because of the defendant's wrongful behavior.[196] This normative justification for compensatory damages under the prevailing approach to corrective justice cannot be reconciled with proposals for eliminating discrepancies in damages by equalizing all compensatory rewards resulting from similar risks.

That is not to say that discrepancies in damages for loss of life and bodily injury cannot be narrowed, for example, by abolishing the notorious practice of using race- and gender-based tables to calculate personal injury damages based on the victims' association with a specific racial or gender group.[197] This development, if accepted, however, may decrease the gaps in tort damages, but would not eliminate them. Therefore, it would not negate the overall attractiveness of choosing victims from poorer, disadvantaged groups rather than wealthier, more powerful ones, whenever such a choice is possible for a potential injurer. Before turning to the main task of proposing an avenue that does negate the incentive to choose "less costly victims," the next Subsection lays a foundation for shifting the focus away from approaches that aim to quantify and restore the victim's loss and toward one that focuses on the tortfeasor's gain.

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[192] *See supra* note 190.

[193] WEINRIB, *supra* note 8, at 92 (explaining that "[b]ecause the right continues to exist [despite the inflicted harm], plaintiffs can justly apply to courts for the restoration of what remains rightfully theirs"); *see also* Ripstein, *supra* note 9, at 1967 (describing restoration's focus on placing the victim in a place where they are free to pursue their purposes, as if the injury never occurred).

[194] Ripstein, *supra* note 9, at 1961.

[195] *See, e.g.*, Arthur Ripstein, *Means and Ends*, 6 JURISPRUDENCE 1, 14 (2015) (positing the following illustration: "if I pay you compensation for having wronged you, I just give you back what you already had, that is, I give you back the constraint that you had on my conduct").

[196] Porat, *supra* note 1, at 106.

[197] *See supra* note 23 and accompanying text.

3. From Harms to Benefits

People benefit from being wealthy. They benefit from living in nicer houses, surrounded by nicer parks, while enjoying better medical care, education, and everything else money can buy. The natural vehicle for addressing disparities in wealth is public law, and primarily the taxation system.[198] The benefit wealthier people obtain due to third parties' decisions to impose their risky activity on poorer people rather than on them, however, poses a different dilemma. This benefit inures to the wealthy thanks to injurers' preference to direct their risky activity to victims who can potentially reduce the costs associated with that activity.

Of course, in real life, the rich might pull strings to make themselves (and the neighborhoods they live in) safer at the expense of the poor.[199] The examples of substitute victims presented in the previous Part, however, aim to highlight the *injurers' interest* in shifting risks from the rich to the poor to enhance their own profits. As I argue in the next Section, when this interest materializes into the practice of substituting victims—that is, when the requirements outlined at the beginning of this Article in a paradigmatic case are fulfilled[200]—the benefit the injurers obtain from choosing the less costly victims can substantiate a meritorious claim for unjust enrichment.

B. Proposal: Substituting Victims as Unjust Enrichment

This Section provides an analysis of the problem of substitute victims as an instantiation of unjust enrichment, first identifying the ways in which injurers save costs by selecting less-wealthy victims[201], then highlighting the key paradigms and elements of the doctrine of unjust enrichment and its suitability to address the problem.[202]

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[198] *See, e.g.*, SHAVELL, *supra* note 74, at 3 (explaining that any undesirable distributional effects coming from legal rules can be offset using the tax system); LIAM MURPHY & THOMAS NAGEL, THE MYTH OF OWNERSHIP: TAXES AND JUSTICE 3 (2002) ("In a capitalist economy, taxes are not just a method of payment for government and public services: They are also the most important instrument by which the political system puts into practice a conception of economic or distributive justice."); ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 8 (6th ed. 2016) ("Many economists believe that progressive taxation and social welfare programs . . . can accomplish redistributive goals in modern states more efficiently than can be done through modifying or reshuffling private legal rights.").

[199] *See, e.g.*, Deborah N. Archer, *White Men's Roads Through Black Men's Homes: Advancing Racial Equity Through Highway Reconstruction*, 73 VAND. L. REV. 1259, 1268 (2020) (drawing a connection between class and racial inequality and economic deprivation, noting that "highway politics" has been a tool to enable the "growth and expansion [of white communities] at the expense of Black communities," inter alia, "by building roads to whites-only suburbs through the heart of Black neighborhoods").

[200] *See supra* note 54 and accompanying text.

[201] *See infra* notes 201–206 and accompanying text.

[202] *See infra* notes 207–252 and accompanying text.

1. Saving Costs

The following analysis first delineates and then demonstrates the conditions under which the benefit resulting from the practice of substituting victims can be perceived as unjust enrichment. This brief Subsection defines the central types of benefits on which the analysis focuses.

The practice of substituting victims is beneficial to injurers in two main, interconnected ways. First, by choosing a potential victim of lower socioeconomic status, injurers reduce the average expected damages they will be required to pay in the event that the risk their activity entails materializes. Second, a lower assessment of expected damages can lead to a lower level of care, which is in itself beneficial to injurers because exercising lesser care costs less.[203] In all of the examples discussed above demonstrating the practice of substituting victims in the contexts of negligence,[204] nuisance,[205] and design defect,[206] the injurers' benefit manifests in the costs they save by choosing less expensive victims as well as by lowering their costs of care through this choice.

Substituting victims for economic advantage does not constitute a tort. That is, the injurer is not considered to have done anything wrong in the tortious sense by choosing to direct their risky activities toward less costly victims for self-profit. Nevertheless, as I now turn to show, this choice can be considered a basis for liability in unjust enrichment.

2. The Law of Unjust Enrichment: Sketching the Doctrine

The general principle of the law of unjust enrichment, also referred to as the law of restitution,[207] requires that a person unjustly enriched at the expense of another make restitution of the undeserved benefits.[208] Subject to some interjurisdictional variations,[209] this principle generally calls for a plaintiff to prove not only the factual element of the enrichment—namely, the benefit the

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[203] *See supra* note 85 and accompanying text.

[204] *See supra* Part II.A.

[205] *See supra* Part II.B.

[206] *See supra* Part II.C.

[207] *See* Andrew Kull, *Rationalizing Restitution*, 83 CALIF. L. REV. 1191, 1219 (1995) (describing the conceptualization of restitution as "merely a description of the end result, not a reference to the basis of liability"); *see also* Francesco Giglio, *Gain-Related Recovery*, 28 OXFORD J. LEGAL STUD. 501, 501–02 (2008) (describing legal academics' characterization of "restitution" as either the legal act of giving back or surrendering, as opposed to the remedy of "disgorgement," which operates as a means of stripping the defendant of wrongfully obtained profits).

[208] RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 (AM. L. INST. 2011) ("A person who is unjustly enriched at the expense of another is subject to liability in restitution").

[209] For a thorough review of the unjust enrichment cause of action across various jurisdictions in the United States, see David Dittfurth, *Restitution in Texas: Civil Liability for Unjust Enrichment*, 54 S. TEX. L. REV. 225, 265–79 (2012).

defendant obtained at their expense—but also the normative basis for deeming such enrichment unjust.[210]

The three doctrinal features of unjust enrichment that make it an advantageous route of recovery for substitute victims are (1) the definition of "enrichment," (2) the enrichment's characterization as "unjust," and (3) the requirement that the defendant's unjust enrichment be obtained at the plaintiff's expense. Thus, to prove "enrichment," a plaintiff does not need to show a transfer of wealth from themself to the defendant causing a direct growth in the defendant's wealth.[211] Rather, enrichment can also manifest as saving expenditures.[212] The second requirement—that the defendant's enrichment be "unjust"[213]—functions as the "normative gate" distinguishing meritorious from non-meritorious claims for restitution of a gain the defendant realized at the expense of the plaintiff.[214] This requirement allows plaintiffs to bring civil lawsuits for unjust enrichment not only when the defendant was enriched by committing a wrong, but also in instances in which "the defendant is passive and the plaintiff herself confers the benefit upon him."[215]

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[210] For a discussion of the nature of the "unjust" requirement, see generally Maytal Gilboa & Yotam Kaplan, Essay, *The* Other Hand *Formula*, 26 LEWIS & CLARK L. REV. 883 (2022) (arguing that this abstract element necessitates more clarity and thus proposes a formula for distinguishing just from unjust enrichment). *See also* Emily Sherwin, *Restitution and Equity: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083, 2106–12 (2001) (arguing that unjust enrichment is merely a title lumping together various doctrines, with no direct role in guiding adjudication); Christopher Wonnell, *Replacing the Unitary Principle of Unjust Enrichment*, 45 EMORY L.J. 153, 155 (1996) (offering to replace the unified principle of unjust enrichment in favor of focusing on the particular legal categories comprising this legal field).

[211] RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. b.

[212] *Id.*

[213] *See supra* note 210 and accompanying text.

[214] Private law scholars have been debating the normative justification for rendering an enrichment unjust—some by seeking a unifying principle that distinguishes unjust enrichment from other private law fields, and others by conceding that the grounds for finding a defendant's enrichment unjust vary from case to case. A review of this debate is not within the scope of this Article. For articles dedicated to this quandary, see, for example, Ernest Weinrib, *Correctively Unjust Enrichment* (providing a theoretical account of unjust enrichment as corrective justice), *in* PHILOSOPHICAL FOUNDATIONS OF THE LAW OF UNJUST ENRICHMENT (Robert Chambers, Charles Mitchell & James Penner eds., 2009); Gilboa & Kaplan, *supra* note 210, at 892 (proposing "a simple mathematical criterion explaining the requirement for the injustice of the defendant's gain"); Lionel Smith, *Restitution: A New Start?* (arguing against attempts to generalize the law of unjust enrichment under one grand unified theory and suggesting instead a view that recognizes a plurality of causes of action within the overarching principle of unjust enrichment), *in* THE IMPACT OF EQUITY AND RESTITUTION IN COMMERCE 91, 94 (Peter Devonshire & Rohan Havelock eds., 2018); ROBERT STEVENS, THE LAWS OF RESTITUTION (2023) (generally arguing there is no unity of reason for restitution claims, and offering an analysis of what the author presents are distinct causes of action in restitution instead).

[215] HANOCH DAGAN, UNJUST ENRICHMENT: A STUDY OF PRIVATE LAW AND PUBLIC VALUES 3–4 (1997).

Wrongful enrichment is a generic, rather intuitive, description of an "unjust benefit" that a defendant obtained through misconduct.[216] Examples of this type of unjust enrichment are gains realized through patent[217] or copyright infringement,[218] opportunistic breach of contract,[219] or even commission of a crime.[220] In all of these paradigmatic cases, the defendant is enriched through their wrongful activity, and the doctrine of unjust enrichment formulates the wrongfulness in terms of the defendant's benefit rather than the plaintiff's loss.[221] The recovery of the wrongfully obtained benefit is commonly known as "disgorgement of profit."[222]

Enrichment, however, may also be deemed "unjust" in the absence of wrongdoing. A paradigmatic example of such cases is liability in restitution for mistaken payments.[223] Subject to some defenses,[224] a recipient of a mistaken payment is under a duty of restitution even if the mistake was not the recipient's fault[225]—i.e., when the defendant-recipient has done nothing wrong—and even if the plaintiff who made the mistake acted negligently.[226] Another example of unjust enrichment in the absence of the defendant's fault is in cases of rescue. A patient who receives emergency life-saving care while unconscious

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[216] *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51(4) (defining disgorgement in terms of eliminating the profit attributable to the defendant's misconduct).

[217] 35 U.S.C. §§ 283, 284, 289 (enabling courts in design patent infringement cases to issue injunctions and award either disgorgement of the infringer's profits or the patentee's loss of profits, but not both). For a critical review of the disgorgement remedy in design patent law, see, for example, Pamela Samuelson & Mark Gergen, *The Disgorgement Remedy of Design Patent Law*, 108 CALIF. L. REV. 183 (2020), which examines the normative goal that underlies the disgorgement remedy through a discussion of *Samsung Electrics Co. v. Apple Inc.*, 580 U.S. 53 (2016).

[218] For a study on disgorgement in intellectual property cases, see generally Pamela Samuelson, John M. Golden & Mark P. Gergen, *Recalibrating the Disgorgement Remedy in Intellectual Property Cases*, 100 B.U. L. REV. 1999 (2020).

[219] RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 39.

[220] *See, e.g.*, Riggs v. Palmer, 115 N.Y. 506, 513–14 (1889). For example, in a New York Court of Appeals case from 1889, the plaintiff, a grandson who was to inherit the bulk of his grandfather's estate, poisoned his grandfather to prevent the possibility that he would change his will. *Id.* at 508–09. At that time, the law did not prohibit the grandson from inheriting his grandfather's estate under such circumstances. *Id.* at 513–14. The New York Court of Appeals saw this outcome as offensively unjust and determined that the grandson's receipt of his share of the estate would constitute unjust enrichment and therefore must instead be given to the grandfather's other heirs. *Id.*

[221] Ernest J. Weinrib, *Restitutionary Damages as Corrective Justice*, 1 THEORETICAL INQUIRIES L. 1, 15 (2000).

[222] *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION &UNJUST ENRICHMENT § 51(4) (defining disgorgement in terms of eliminating the profit attributable to the defendant's misconduct).

[223] *See, e.g.*, *id.* § 6 cmt. a (noting that in cases of benefit conferred by mistake, liability in restitution holds even if it is the claimant who acted negligently in making a mistaken payment).

[224] A central defense in such cases is when the plaintiff can assert that they relied on the mistaken payment in good faith, and so returning the payment would cause them loss. This assertion is commonly known as the doctrine of change of position. *See, e.g.*, *id.* § 65 cmts. a, d.

[225] *See supra* note 223 and accompanying text.

[226] *See supra* note 223 and accompanying text.

can be deemed unjustly enriched if they do not pay for their treatment.[227] Additionally, a person who benefits from a valid court decision such as a preliminary injunction that is later reversed[228] may also be deemed unjustly enriched. Each of these examples illustrates a cognizable cause of action for unjust enrichment in which the plaintiff may be entitled to restitution even though the defendant has not acted wrongfully.[229]

The normative foundations for what makes the defendant's enrichment "unjust" in non-wrongful cases have been a matter of debate in the literature, with some identifying a unifying idea to all of these cases and others arguing that this area of law consists of distinct causes of action similar to tort law.[230] The purpose of the following analysis is not to resolve or reflect on this scholarly debate. Rather, it is to provide a plausible interpretation for identifying the practice of substituting victims for profit as a case of *unjust* enrichment.

While it might be difficult to define the practice of substituting victims as wrongful enrichment in the absence of a clear violation of a specific legal standard rendering it as such, the following approach suggests that even if not strictly wrongful, this practice can be construed as unjust. Particularly relevant to it is a theory that encompasses the normative grounds of claims in unjust enrichment based on the idea of protecting the plaintiff's fundamental right to freedom.[231] According to this idea, which can be traced to the Kantian concept of a universal principle of right,[232] all people are equally free from subordina-

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[227] *See* Cotnam v. Wisdom, 104 S.W. 164 (Ark. 1907) (determining that there was a right to restitution owed to two physicians who provided emergency services with due skill and care on an unconscious person).

[228] *See, e.g.*, Dass v. Tosco Corp., 280 F. App'x 571, 571 (9th Cir. 2008) (affirming the district court's grant of summary judgment awarding Tosco Corporation damages in the amount that it could reasonably have made absent a wrongful injunction, which was later revoked); *see also* Ofer Grosskopf & Barak Medina, *Remedies for Wrongfully-Issued Preliminary Injunctions: The Case for Disgorgement of Profits*, 32 SEATTLE U. L. REV. 903, 909 (2009) ("[T]he Supreme Court has recognized the right of restitution of money paid in accordance with a judgment that was subsequently reversed."); Douglas Lichtman, *Irreparable Benefits*, 116 YALE L.J. 1284, 1287 (2007) (arguing that courts should consider the possibility that the plaintiff will obtain "irreparable benefits" as a result of a wrongfully-issued preliminary injunction when considering whether to issue such injunctions).

[229] Lionel Smith, *Restitution: A New Start?* ("The causes of action [in unjust enrichment] are different because the essential elements of the claim[s] are different."), *in* THE IMPACT OF EQUITY AND RESTITUTION IN COMMERCE 91, 94 (Peter Devonshire & Rohan Havelock eds., 2018).

[230] *See supra* note 214 and accompanying text.

[231] *See generally* Jennifer M. Nadler, *What Right Does Unjust Enrichment Law Protect?*, 28 OXFORD J. LEGAL STUD. 245 (2008).

[232] *See* IMMANUEL KANT, THE METAPHYSICS OF MORALS 6:230 (Mary Gregor ed. & trans., 1996) (1797) (articulating famously the fundamental criterion for the justification of principles of law, namely the universal principle of right: "Any action is *right* if it can coexist with everyone's freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone's freedom in accordance with a universal law").

tion to others and should be perceived as "acting from self-chosen ends."[233] Thus, all persons hold a primary right to be treated as self-determining beings, meaning as "absolute ends" in and of themselves, rather than as means for the ends of others.[234] Any juridical relationship that results in the subordination of one person to another's purposes is inconsistent with this idea.[235] According to this theory, by awarding restitution following a mistaken payment,[236] a rescue,[237] or a reversed preliminary injunction,[238] the courts validate the notion that the plaintiff did not intend to unilaterally benefit the defendant, but rather acted as a free and self-determinate being seeking to realize their own goals.[239]

Lastly, the requirement that the defendant obtained unjust enrichment at the plaintiff's expense paradigmatically expresses the transfer of benefit from the latter to the former, meaning that the plaintiff's loss corresponds to the defendant's benefit.[240] The simplest example of this equation is one of mistaken payments, where one party mistakenly transfers a sum of money to another who is thereby subject to restitution of that sum to the mistaken payer.[241] While mistaken payments is a straightforward *factual* demonstration of the requirement that the defendant's enrichment is obtained at the plaintiff's expense, the "at the expense requirement" can be understood *normatively*,[242] as a reflection of the idea that the defendant's gain and the plaintiff's loss are manifestations of "the excess over and the shortfall from one's due."[243] The injurer's gain can be said to have been obtained at the victim's expense through the injurer's subtracting from the victim's right. Thus, while in cases of substituting victims

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[233] Nadler, *supra* note 231, at 248; *see also* Jacob Weinrib, *What Can Kant Teach Us About Legal Classification?*, 23 CANADIAN J.L. & JURIS. 203, 211–12 (2010) (explaining the connection between the universal principle of right and the concept of "innate right," stating that the latter is defined as "[*f*]*reedom* (independence from being constrained by another's choice), insofar as it can coexist with the freedom of every other in accordance with a universal law" (quoting KANT, *supra* note 232, at 6:237)).

[234] In the Kantian terminology, insofar as our relationships with others are concerned, each one of us is our own master. *See* KANT, *supra* note 232, at 6:237–38.

[235] Weinrib, *supra* note 233, at 211.

[236] *See supra* notes 223–226 and accompanying text.

[237] *See supra* note 227 and accompanying text.

[238] *See supra* note 228 and accompanying text.

[239] Nadler, *supra* note 231, at 264–65.

[240] *See, e.g.*, RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. a (AM. L. INST. 2011) (stating that "the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other.").

[241] *See supra* notes 223–226 and accompanying text.

[242] *See* ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW 118 (2012) (explaining that, as in negligence—where the idea of correlativity is present because the plaintiff's suffering is correlative to the normative, rather than factual, surplus of the defendant—in unjust enrichment, the defendant's factual gain can correspond to the plaintiff's normative loss, as manifested in the defendant's subtraction from the plaintiff's right).

[243] *Id.* at 117.

there is no direct factual transfer of money that results in factual gain for the defendant-injurer and a corresponding factual loss for the plaintiff-substitute victim, the injurer's gain can still be understood as having been obtained at the victim's expense through the injurer's subtracting from the victim's right to be treated as an equally free and absolute end.

Having outlined the doctrine of unjust enrichment, we can now consider the phenomenon of substitute victims with reference to the doctrine's requirements. The problem of substitute victims is driven by injurers' motivation to minimize the costs that their risky activities entail. Injurers seek to reduce both the amounts they will be required to pay to compensate their victims in the event of injury and the costs of precautions needed to avoid or reduce the chances of harm. When they choose to reduce these costs by focusing their risky activity on people they perceive as less costly to injure, they treat the chosen victims as a means for realizing their own ends, rather than as equally free and absolute ends. Injurers who engage in the practice of substituting victims thus exploit tort law to subordinate poorer populations for maximizing their own profit. The benefit they obtain from engaging in this practice should therefore be deemed unjust and subject to restitution.

3. Gain-Based Recovery to Substitute Victims

Having identified the circumstances that give rise to the problem of substitute victims as a paradigmatic case of unjust enrichment, I now turn to demonstrate how these circumstances can be addressed through gain-based damages. The motivation underlying the practice of substituting victims—to benefit from disparities in tort damages by affirmatively choosing lower-cost victims—enables us to translate this idea into a formula for estimating the appropriate gain-based damages in such cases.

The suggested formula for assessing gain-based damages generally estimates the gain the injurer obtains by choosing a substitute victim *instead of* a more costly victim.[244] This formula operates in the same manner as the counterfactual inquiry used in the traditional, loss-based damages model, which compares the plaintiff's position before and after the tort to determine the extent of their damages,[245] but implements it mutatis mutandis to estimate the

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[244] Recall that choosing a less costly victim "by chance" rather than by design does not evoke the problem of the substitute victim. *See supra* notes 30–31 and accompanying text.

[245] *See, e.g.*, *supra* note 56 and accompanying text (demonstrating the standard operation of the counterfactual inquiry currently involved in tort damages); *see also, e.g.*, Stephen Yelderman, *Damages for Privileged Harm*, 106 VA. L. REV. 1569, 1570 (2020) ("Compensatory damages are meant to restore a plaintiff to the position she would have enjoyed absent the defendant's wrong. Their amount is typically figured by way of a counterfactual."); Robert N. Strassfeld, *If . . . : Counterfactuals in the Law*, 60 GEO. WASH. L. REV. 339, 346 (1992) ("[A]ll determinations of tort damages imply a compar-

defendant's *gain* resulting from their choice of a "less costly victim."[246] Accordingly, this test requires a comparison between the costs the injurer would have spent had they chosen a more costly victim and the costs they actually spent by choosing a less costly victim instead. The difference between the two reflects the benefit that the tortfeasor obtained by using the tort victim as a means for producing profit, i.e., the benefit that the tortfeasor has obtained at the expense of that substitute victim.[247]

The costs the injurer would have spent had they chosen a more costly victim can be estimated as either (1) the damages they would have been required to pay had they injured that victim; *or* (2) the expenditures the injurer would have spent to reduce or avoid the risk had they chosen the more costly victim. The choice between these two options can be determined through a counterfactual inquiry envisaging what the injurer would have done in the hypothetical scenario where they faced the wealthier victim, who is proven to have been a readily relevant alternative choice, instead of the one they actually chose.[248] This type of counterfactual inquiry and application of the but-for test to evaluate damages is highly common and appears in many other legal paradigms.[249]

In cases where there are two or more relevant, not-chosen, wealthier alternative victims, the counterfactual formula may be applied in a similar manner, with some adjustments to the approach outlined above. One way to implement the formula in such cases would be to conduct the counterfactual analysis by considering either the average damages amount the injurer would have been required to pay or the average cost the injurer would have spent on precautionary measures had they chosen a more costly victim; and compare the result with the cost the injurer had actually spent by choosing the less costly victim. Another way to implement the formula in cases of multiple potential

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ison between the actual world and a counterfactual one in which the defendant had not injured the plaintiff.").

[246] *See generally* Gilboa, *supra* note 29 (describing the role of a but-for causal analysis in the context of gain-based damages).

[247] This benefit is obtained at the expense of the chosen less costly victim, whose loss can thus be measured by the costs that the tortfeasor saved as a result of violating their protected right to be treated as an equally self-determining being. *See* RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 1 cmt. a (AM. L. INST. 2011) ("While the paradigm case of unjust enrichment is one in which the benefit on one side of the transaction corresponds to an observable loss on the other, the consecrated formula 'at the expense of another' can also mean 'in violation of the other's legally protected rights,' without the need to show that the claimant has suffered a loss.").

[248] Like any other counterfactual inquiry, this test consists of a hypothesis that may require some speculation. *See* James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901, 914 (1982) (noting that counterfactual inquiries are "to some extent . . . unavoidable in connection with issues such as proximate cause and damages" (footnote omitted)).

[249] *Id. See generally* Strassfeld, *supra* note 245 (highlighting that tort damages always require a comparison between the real world and a counterfactual one in which the victim was not harmed by the tortfeasor).

not-chosen wealthier victims might be to randomly select one of these wealthier victims, and compare the costs the injurer would have incurred to protect or compensate that victim vis-à-vis the cost the injurer incurred by choosing the less costly victim. The latter counterfactual version of the proposed but-for test to evaluate gain-based damages for substituting victims seems preferable, as it envisions an appropriate counterfactual state of affairs in which the injurer would have acted properly by not deliberately targeting a victim based on their wealth.[250]

The proposed formula for assessing gain-based damages is not only practical but also makes normative sense. Recall that the recovery in cases of substitute victims expresses the injurer's violation of the victim's right to be treated as an equally self-determining being.[251] The unique feature of the problem of substitute victims is the injurer's deliberate choice to increase profits from engaging in a risky activity by targeting victims they identify as less costly compared to alternatives. For this reason, the costs the injurer saves by choosing the substitute victim should not be based on a generic evaluation criterion such as market value. Rather, they should be estimated in comparison to the expenditures the injurer would have spent had they imposed their risky activity on the alternative unchosen victim in the *particular case*, unless the circumstances prevent such a comparison.[252]

Having laid the doctrinal and theoretical framework for understanding the practice of substituting victims as unjust enrichment, I demonstrate its application in the next Section.

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[250] *See* Gilboa, *supra* note 29, at 375 (explaining that only by defining the appropriate state of affairs in the circumstances "can the factfinder proceed to the technical stage of comparing the result (loss or gain) that actually occurred with the probable result that would have occurred had the appropriate state of affairs happened instead").

[251] *See supra* notes 233–234 and accompanying text.

[252] The approach of applying the but-for test by randomly selecting one of the not-chosen wealthier victims and comparing the cost the injurer would have incurred on protective measures or compensation for them with the cost incurred by choosing the less costly victim may help address at least some evidentiary difficulties associated with identifying the not-chosen victim. Furthermore, as cases are litigated, courts may develop flexible versions of this proposal, inter alia, by using proxies. *See infra* notes 296–306 and accompanying text. Using proxies is a common method of estimation in the law. *See, e.g.*, Maytal Gilboa & Yotam Kaplan, *The Costs of Mistakes*, 122 COLUM. L. REV. F. 61, 80–81 (2022) (suggesting that the defense claim titled "discharge for value"—which provides that a recipient of a mistaken payment who relied on the payment based on existing debt can avoid revocation of that payment—should be taken into account as a proxy rule for "harmful mistakes," that is, cases in which the circumstances make it reasonable to assume that the recipient relied on the mistaken payment); Kevin Cole, *Affirmative Consent* (suggesting that "no-means-no" is a proxy rule to prove consent in the context of sexual assault), *in* THE PALGRAVE HANDBOOK OF APPLIED ETHICS AND THE CRIMINAL LAW 47, 50 (Larry Alexander & Kimberly Kessler Ferzan eds., 2019); Oren Bracha & Patrick R. Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025, 1055–56 (2016) (describing the use of rough proxies to determine whether a particular use is fair and therefore non-infringing of copyrights).

C. Demonstrating Substituting Victims as Unjust Enrichment

To demonstrate how the unjust enrichment doctrine offers a solution to the problem of substitute victims, this Section returns to the examples outlined above, illustrating how the problem manifests in the contexts of negligence,[253] nuisance,[254] and product liability for design defect.[255]

1. Negligence and Substitute Victims

For convenience, the example used to demonstrate the problem of substitute victims in negligence cases is reproduced below.

Jean and her motorcycle: Jean's hobby is riding her motorcycle in the street near her house, where she also practices her daring stunts. There are only two other houses on Jean's street, one to the left and the other to the right of Jean's house. In one house lives a neighbor who earns an average income, and in the other, a neighbor who earns half of the first neighbor's income. Assume that Jean knows each of her neighbors' approximate income. Assume further that the expected damages Jean will be required to pay should the harm resulting from *the exact same riding* materialize amount to $100 for the neighbor with the average income (probability of 0.001 for harm of $100K, based on that neighbor's loss of income), and $50 for the neighbor who earns half of that (probability of 0.001 for harm of $50K, based on that neighbor's loss of income). For simplicity, assume also that by riding her motorcycle cautiously, Jean can reduce the risk of damages to zero. Riding cautiously, however, is expected to reduce Jean's enjoyment from riding and performing stunts by an amount estimated at $60.

As previously explained, aware that the very same risky activity can expose her to damages amounting to either $50 or $100, Jean is likely to choose to focus her riding and stunts on the lower-income neighbor's segment of the street. By so choosing, Jean is likely to save the $60 cost of cautious driving,[256] which she probably would have invested had she ridden in her wealthier neighbor's segment of the street.[257] This means that Jean profited from the lower economic status of her poorer neighbor, which, according to the analysis proposed above,[258] constitutes unjust enrichment. The question that remains is how much Jean should have to pay in damages.

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[253] *See infra* notes 256–261 and accompanying text.
[254] *See infra* notes 262–265 and accompanying text.
[255] *See infra* notes 266–280 and accompanying text.
[256] Because $60 > $50.
[257] Because $60 < $100.
[258] *See supra* Parts III.A and III.B.

As outlined, we must first assess what expenses Jean would have incurred had she ridden along her higher-income neighbor's street segment.[259] In that case, Jean would likely have invested $60 in care—a cost she saved by riding along her lower-income neighbor's street segment instead. These savings can then be translated into damages based on Jean's gain. For this purpose, it is useful to mention Robert Cooter and Ariel Porat's suggestion of estimating damages for accidents by dividing the injurer's savings in the cost of precautions by the probability of liability,[260] which is particularly relevant when the defendant's savings in the cost of care outweigh loss-based damages.[261] Applying this formula to our example enables us to set Jean's gain-based damages at $60K (her $60 savings from recklessly riding her motorcycle divided by the probability of harm, which is 0.001). $60K represents Jean's enrichment from choosing to impose her risky activity on her lower-income neighbor, thus using that neighbor as a means for self-profit (in the form of her greater enjoyment of risky riding and stunts). Note that $60K is higher than the $50K loss-based damages the lower-income neighbor would have been awarded under the prevailing law, which focuses on the loss resulting from the accident and is blind to the problem of substitute victims.

Lastly, if it can be proven that Jean could not have performed her stunts at all if required to exercise caution, her enrichment as a result of focusing her risky activity on her low-income neighbor's street segment could not be estimated based on her cost savings from not taking precautionary measures. Instead, it would be estimated based on the damages Jean would have been required to pay had she driven along her higher-income neighbor's street segment and caused an accident, or $100K. This amount represents Jean's enrichment as a result of focusing her risky activity on her lower-income neighbor to reduce her exposure to the higher damages in the particular case where no precautions could be taken to reduce the risk.

2. Nuisance and Substitute Victims

To demonstrate how the proposed analysis can be implemented in the nuisance context, consider again the example of the chemical facility albeit with some minor changes.

The chemical facility: A chemical company is considering where to locate its new facility, which it values at over one billion dollars. Assume that due to the nature of its operations, there are only two possible locations: *A* and *B*. For simplicity, assume that at either location, the facility will emit gases that will

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[259] *See supra* notes 246–249 and accompanying text.
[260] *See generally* Cooter & Porat, *supra* note 173.
[261] *Id.* at 250.

make the surrounding area completely uninhabitable unless protective measures are employed. Assume further that if no such measures are taken, the residents of Location *A* will suffer an aggregate loss of $500M, whereas the residents of Location *B* will suffer a loss of $100M. Lastly—and this is a change from the original example—assume that there is more than one possible precautionary measure the facility can take. The first is a high maintenance biofiltration system. The system's overall costs amount to $200M, and using it is expected to reduce the risk to zero. A second option is to build high windbreak walls around the locations at risk. The overall costs of this option amount to $25M, and it is expected to reduce the risk resulting from the facility by half (i.e., the expected losses to the residents of Locations *A* and *B* thus drop to $250M and $50M, respectively).

Under prevailing nuisance law, the company considering its options is still likely to prefer Location *B* over Location *A*. This is because if it chooses Location *A*, it will likely invest $200M to reduce the risk to zero and avoid paying damages in the amount of $500M. In contrast, by choosing Location *B*, the company can reduce its costs further as compared to the original example due to the availability of an alternative precaution. Under these new circumstances, the company is likely to prefer investing in the less expensive precaution of building high windbreak walls at the cost of $25M, which reduces the risk of loss to Location *B*'s residents by half, setting it at $50M. This strategy would therefore allow the company to reduce its overall costs to $75M,[262] which is even lower than the $100M it was required to pay Location *B*'s residents in the original version of the chemical facility example.[263]

This new version of the chemical facility example thus highlights the possibility for injurers to take advantage of the prevailing nuisance regime to reduce the costs associated with their activity by minimizing the sum of the investment in precautionary measures and the expected damages payment. The loss-based nuisance regime induces the chemical company in the above example to minimize the costs associated with operating its facility by choosing Location *B*. Moreover, the new version of the chemical facility example also illustrates that locating polluting facilities in poor areas leaves the residents of these areas even poorer.[264] This is because once the new chemical facility is installed, Location *B* becomes an even less attractive residential area. This, in turn, may result in further depression of property values in the future, as well as in a reduction of alternative residential opportunities for the residents of Location *B*. This outcome, however, is less likely under the proposed gain-based

[262] $25M + $50M.
[263] *See supra* note 114 and accompanying text.
[264] *See supra* note 120 and accompanying text.

framework, in which the practice of choosing substitute victims is understood to produce unjust enrichment. Under the proposed framework, the overall potential damages payment to Location *B*'s residents would be $200M, which is the cost the company would have spent had it chosen to locate the facility in the wealthier Location *A*. Knowing that it would be required to pay the overall sum of $200M under the proposed solution, the company would have an incentive to invest in the expensive precaution of the biofiltration system for Location *B* in advance, thus reducing its residents' loss to zero, just as it would have done had it chosen Location *A*.

Lastly, it is important to note that as in the negligence context, gain-based damages for substituting victims in nuisance are influenced by the availability of precautionary measures. To illustrate this last point, consider the unlikely (yet possible) case in which there are no precautionary measures available to reduce the risk caused by the injurer's activity; that is, suppose that neither the biofiltration system nor the windbreak walls, nor any other precautionary measure is viable under the circumstances. Recall that according to the proposed solution, the company attempting to expand its profits by choosing Location *B* instead of Location *A* should pay gain-based damages computed based on the counterfactual inquiry into the costs it would have incurred had it chosen the alternative, more expensive Location *A*. In case there were no precautionary measures available to reduce the risk caused by its activity, if the company had built the facility in the wealthier Location *A*, it would have incurred $500M in damages to its residents. This is the reason that under the current loss-based nuisance regime, the company has an incentive to build its facility in the poorer Location *B*, where it will incur only $100M in damages to residents, thus saving $400M and increasing its net profit. Under the proposed framework, however, if the company is proven to have engaged in the practice of substituting victims, the residents of Location *B* should be entitled to restitution of the $400M the company saved at their expense by treating them as a means to increase its profit.[265]

3. Design Defects and Substitute Victims

Finally, I turn to illustrate how an understanding of substituting victims as unjust enrichment can be applied in the special case of "binary-risk design." For convenience, the original example illustrating this context is reproduced below.

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[265] *But see generally* Godsil, *supra* note 179 (suggesting that the damages awarded to victims from poor neighborhoods for the risk they suffer from nuisance should reflect the amount their homes would be worth in a comparable-but-nonsegregated neighborhood).

The car manufacturer: A car manufacturer needs to decide where to position the car's steering wheel, airbag, pedals, and gearbox to accommodate the size of its customers. Assume that positioning these elements based on average male dimensions is expected to lead to more female accident casualties, whereas positioning them to fit average female dimensions is expected to lead to more male casualties. If these elements are positioned based on the average dimensions of men and women taken together, a greater number of casualties of both sexes is expected.

The car manufacturer presents a unique problem of substitute victims. The manufacturer has no choice but to select one group of car-users who would be "protected by design" at the expense of the other group.[266] Whichever choice it makes, one group will be subject to a greater risk than the other. Viewing the problem through the lens of substitute victims reveals that the selection of female car-users as the preferred victim group may well be influenced by the fact that women's wages, on average, remain significantly lower than men's,[267] which, under a loss-based damages theory, makes them less costly to harm.

There is, however, a key difference between this example and the earlier cases of negligence and nuisance. Here, the car manufacturer *must* choose one group of car-users over another when designing its cars, hence the term "binary-risk design." This difference complicates the normative analysis that justifies liability in unjust enrichment in the previous examples. In binary-risk design cases, manufacturers are often responding to the particular circumstances that require them to choose one group of victims over another, rather than electing to make such a choice. Yet, as I now explain, female car-users may nevertheless have a claim for gain-based damages under the doctrine of unjust enrichment, albeit based on a different normative idea than the normative analysis suggested above.

As noted, studies indicate that car manufacturers do not invest sufficiently in efforts to narrow the safety gaps between male and female car-users. For example, beginning in 2011, manufacturers in the United States have been required to use a so-called "female dummy" for their crash tests.[268] Yet evidently, the female dummy they have been using does not possess the anatomical features of a female person, but is instead "a scaled-down male dummy."[269] Because females are not "scaled-down males," but rather have different physical

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[266] *See supra* notes 145–148 and accompanying text.

[267] *See generally, e.g.*, GOULD & KANDRA, *supra* note 7 (highlighting the continued existence of a significant wage gap between men and women).

[268] *See* Anthropomorphic Test Devices, 49 C.F.R. § 572 (2024) (requiring that a "[s]mall [a]dult [f]emale [c]rash [t]est [d]ummy" be used in safety tests).

[269] PEREZ, *supra* note 137, at 86.

traits, relying on these dummies in crash tests does not accurately predict the effects of crashes on female car-users.[270] In what follows, I propose that the doctrine of unjust enrichment can and should be harnessed to eliminate car manufacturers' ability to gain from failing to take seriously their duty to mitigate the reducible risks they impose on female car-users.

To see why, it is important to recognize that even if cars cannot be designed to be equally safe for both male and female car-users, manufacturers still hold a duty to narrow the safety gaps as part of their generic "duty . . . to research and develop adequate safety devices."[271] The costs a car manufacturer saves by failing to comply with its duty to promote female customers' safety—to the extent possible within the binary-risk framework—should thus be deemed as wrongful enrichment resulting from the breach of that duty.[272]

The reimbursement mechanism for female car-users seeking to recover the unjust benefit, wrongfully gained by the car manufacturer at their expense, can include various forms of aggregated legal claims akin to class actions.[273] In such actions, the lead plaintiff—a female car-user—would represent a group of similarly situated female customers, at whose expense the car manufacturer benefited by saving on the costs of care. As in a typical class action, the representative plaintiff may be entitled to a share of any monetary award resulting from the proceedings.[274] This award is intended to encourage potential representatives to act as "private attorneys general" to promote the social interest of the groups they represent.[275] Courts may in some circumstances find it appropriate to order cy pres relief instead of the conventional remedies common in class action lawsuits.[276] The cy pres doctrine allows the court to direct the defendant to donate a portion of the damages awarded in the class action to a charitable organization related to the subject of the lawsuit.[277] In the context of

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[270] *Id.* at 86–87.

[271] Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585, 624 n.99 (1985) (warning that the lack of a duty to research in genuine attempt to improve the product may create inefficient incentives for manufacturers to hide information).

[272] The benefit resulting from the violation of a duty may be subject to restitution in the form of disgorgement of profit. *See supra* notes 216–220 and accompanying text.

[273] For an explanation of such mechanisms, see, for example, Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 71 (2004).

[274] *Id.* at 103–04.

[275] *Id.* at 122 (quoting John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 398 (2000)).

[276] Martin H. Redish, Peter Julian & Samantha Zyontz, *Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis*, 62 FLA. L. REV. 617, 634 (2010).

[277] *Id.* ("In its current form as used in the federal courts, cy pres relief in class actions has involved the donation of a portion of the settlement or award fund to charitable uses which are in some loose manner connected to the substance of the case."). The use of cy pres as a class action remedy was pioneered in a 1972 student comment. Stewart R. Shepherd, Comment, *Damage Distribution in Class Actions: The Cy Pres Remedy*, 39 U. CHI. L. REV. 448, 448 (1972).

binary-risk design actions, courts may order the award to be paid to a research institute dedicated to exploring solutions to narrow safety gaps between the sexes in binary-risk car designs.[278] Another alternative remedy that may be appropriate is fluid class recovery.[279] Under this alternative, a court may require the defendant to provide the plaintiff or other involved parties goods, services, future price reductions, or comparable forms of compensation in place of a monetary award.[280] For example, in the context of a car manufacturer, the defendant could offer female customers discounted or subsidized pricing on car safety products.

D. Policy Implications

The following Section presents a brief summary of the implications of the proposed framework that treats substituting victims as a form of unjust enrichment.[281]

1. Deterrence

Loss-based damages create an incentive for injurers to direct their risky activities toward victims whose life or property is valued as less costly to harm than those of others. Gain-based damages, by contrast, which fix the amount of recovery based on the costs the injurer saved by choosing the less costly victim, tackle this problem. Injurers who know that they will be held liable in restitution for such savings will at least exercise a high level of caution if they make such a choice. Shifting the focus from loss- to gain-based damages therefore improves the deterrent effect of damages awards.

The economic perspective provides an additional interesting inference. A common concern with compensating for harm lies in its potential to discourage victims from taking preventive measures.[282] When victims stand to receive full compensation for their losses, they may lack the incentive to invest in protecting themselves from harm. Such investment is costly and unprofitable for the victim because it lowers the compensation amount.[283] This concern becomes largely irrelevant, however, when the victims' claim is grounded on the law of

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[278] More cases of male versus female binary-risk design may relate, for example, to setting the temperature in workplaces and so-called unisex products. *See* PEREZ, *supra* note 137, at 125–27.

[279] *See, e.g.*, Redish et al., *supra* note 276, at 661–62 (explaining the difference between cy pres relief and fluid class recovery).

[280] *Id.* at 662.

[281] *See infra* notes 282–291 and accompanying text.

[282] *See* COOTER & ULEN, *supra* note 198, at 331–33 (presenting the paradox of compensation, in which the anticipation of compensation skews the incentives for injured parties to invest in precautionary measures).

[283] *Id.*; *see also* Gilboa et al., *supra* note 34, at 1093–94.

unjust enrichment. If substitute victims understand that their recovery is equal to the injurer's gain, they still have a strong incentive to minimize their harm if possible.[284] This represents another economic advantage of the proposed solution—it creates better incentives on the plaintiffs' end as well as on the potential tortfeasors'.

2. Fairness as Equality

The recent suggestions that all victims should be similarly protected for harms resulting from similar risks express the idea of "fairness as equality," according to which similarly situated plaintiffs ought to be treated alike.[285] Because loss-based damages reflect the effect of harm on the particular victim of a defendant's wrongdoing, they are significantly influenced by the victim's socioeconomic status. This creates disparities in damages awarded to different victims for harms resulting from similar risks and provides a problematic opportunity for injurers to target less costly victims to maximize their own profits.

The proposed analysis perceiving the practice of substitute victims as unjust enrichment provides an effective legal response to this anomaly. Gain-based damages valued at the costs the injurers save by choosing less costly victims negate the incentives to choose poorer victims and to reduce the level of care they exercise toward those victims. The proposed solution thus aspires to equalize the level of care applied to all victims. This is a desirable result in terms of fairness as equality.

3. Corrective Justice

I have explained that disparities in loss-based damages are a product of the dominant approach to corrective justice, and in particular, of the idea of restoration as reversing the tort victim's loss, putting them in the same position they would have been in but for the tort.[286] To avoid repetition, this short Subsection focuses on a related but distinct jurisprudential question concerning the theoretical tenability of turning to unjust enrichment to resolve a problem inherent in the logic of tort law and the idea of restoration.

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[284] Gilboa et al., *supra* note 34, at 1093–94.

[285] *See, e.g.*, Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 88 & n.3 (2006) (defining "global fairness" as the idea that "like cases should be treated alike"); CHAMALLAS & WRIGGINS, *supra* note 6, at 163 (describing the concept of universal justice manifested in compensatory damages in different legal systems).

[286] *See supra* note 24 and accompanying text.

The law of unjust enrichment is a theory of recovery "originated to fill [the] gaps left uncovered by traditional legal categories"[287] by offering solutions to problems that other areas of law have failed to address effectively.[288] Importantly, this does not mean that the doctrine of unjust enrichment lacks internal logic. Rather, it means that it may potentially provide a framework for a new remedial approach to problems that arise when the internal logic of traditional private law doctrines leads to socially unfair results. In our context, the law of unjust enrichment appears as a promising avenue to contend with "legal deadlocks" such as the problem of substitute victims, which tort law both encourages and fails to resolve.

Thus, the normative foundation of the proposed solution that perceives gain resulting from substituting victims as unjust enrichment is the idea that the right protected by the law of unjust enrichment is one of self-determination,[289] which requires that all individuals be equally free from subordination. Injurers' taking advantage of the structure of tort law, using it as a means to their own profit-maximizing ends at the expense of victims chosen by them, cannot align with this logic.[290] The monies saved as a result of others' subordination is therefore deemed unjust and subject to restitution. This form of liability subverts the ill-incentives created by tort law, without compromising the notion of corrective justice as the internal logic of private law. For that reason, whereas the proposed framework's perception of the practice of substituting victims as a form of unjust enrichment raises interesting questions about the relationship between the law of unjust enrichment and tort law,[291] it provides a solution that leaves intact the idea of restoration and does not, in any way, impose a new order that is inconsistent with the internal logic of tort law.

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[287] *See* Fagan, *supra* note 34, at 629; *see also, e.g.*, Mitchell v. Riegel Textile, Inc., 259 F.2d 954, 955–56 (D.C. Cir. 1958) ("Equitable principles are not confined by rigid formulas."); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 4 cmt. b (AM. L. INST. 2011) ("It is fair to conclude that even the legal side of unjust enrichment had its origins in equitable principles, whether English or Roman or both.").

[288] *See supra* note 34 and accompanying text.

[289] Nadler, *supra* note 231, at 248.

[290] *See supra* note 235 and accompanying text.

[291] These questions have been explored in other contexts. *See generally, e.g.*, Peter Siegelman & Steven Thel, *You Do Have to Keep Your Promises: A Disgorgement Theory of Contract Remedies*, 52 WM. & MARY L. REV. 1181 (2011) (providing an explanation of the prevalence of gains-based remedies in contract law); Gilboa et al., *supra* note 34 (discussing the failure of tort-based climate litigation and suggesting a doctrinal and theoretical framework of climate change as unjust enrichment to address the pressing challenge that this litigation requires).

IV. Possible Objections

Although the discussion above reveals significant policy advantages to understanding the practice of substituting victims as unjust enrichment, it does not imply that this framework is perfect. For example, even under the proposal advanced here, injurers may continue to impose risks disproportionately on poorer victims for the simple reason that in the event of a lawsuit, such victims are less likely to have significant resources to invest in litigation and thus are less likely to prevail.[292] Accordingly, even under the proposed framework, the socioeconomic status of potential victims remains a significant consideration that injurers are likely to take into account. The proposed solution thus offers a general framework, which can and should be open to further development and refinement as cases are litigated in light of its principles. In what follows, I elaborate on three additional difficulties that the framework I propose may face.

Section A discusses the evidentiary difficulties associated with the problem of substitute victims, which involve inquiries into the tortfeasor's state of mind prior to effectuating the harm on the chosen victim.[293] Section B considers the potential difficulties of a multitude of alternative victims that the injurer chose to not harm, and explains how these difficulties may result in disputes over the appropriate damages calculation.[294] Section C considers the challenge that an injurer may conceal their practice of substituting victims by selecting victims that are only slightly less costly than the wealthier alternative victims, thereby making it difficult for a court to identify that the injurer has indeed substituted victims.[295]

A. Evidentiary Difficulties

There are two prominent evidentiary difficulties that any proposal to contend with the problem of substitute victims needs to consider. The first concerns the victim's need to establish that the defendant-injurer is situated in a way that enables them to choose among potential victims *in advance*—that is, before conducting the risky activity.[296] The second difficulty concerns the need

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[292] *See, e.g.*, Ehud Guttel, Alon Harel & Shay Lavie, *Torts for Nonvictims: The Case for Third-Party Litigation*, 2018 U. Ill. L. Rev. 1049, 1061 (observing that the poor, women, and minorities "are less likely to receive high economic damages, and given that the compensation they get is lower than their litigation costs, it is often rational on their part not to sue" (footnote omitted)); Allan Kanner, *Equity in Toxic Tort Litigation: Unjust Enrichment and the Poor*, 26 Law & Pol'y 209, 222 (2004) (asserting that "many polluters believe that their chances of getting 'caught' decrease as the incomes of the people they harm decrease," because low-income victims are less likely to bring legal action).

[293] *See infra* notes 296–307 and accompanying text.

[294] *See infra* note 308 and accompanying text.

[295] *See infra* note 309 and accompanying text.

[296] *See supra* note 54 and accompanying text.

to prove that the defendant-injurer had the ability to assess (at least by way of proxy) the economic status of the chosen victim and possibly compare it to at least one of the alternative victims.[297] Fulfilling these requirements may be minimally sufficient to raise an inference that a particular victim was chosen based on their comparatively lower economic status for saving the costs associated with the risky activity.

In the example of Jean and her motorcycle in the negligence context, we assumed that the injurer conducted their activity in a location that allowed them to choose between two potential victims, and that they were familiar with these victims' economic status. In reality, it may be extremely difficult to prove these conditions. The inference of such a choice may be drawn from an observable, systematic decision to impose the risk on a less costly victim. However, even in the seemingly obvious example of Jean and her motorcycle, she may still be able to negate this claim by alleging, for example, that the chosen direction for riding her motorcycle was determined by wind patterns or her personal preference for performing stunts while enjoying the particular view in that direction. The evidentiary difficulties bear upon the very core of the substitute victims problem: the causal link between the victims' respective economic characteristics and the injurer's choice of victim based on economic status.

Evidentiary challenges in establishing a defendant's state of mind are not unusual, however. Courts and litigants commonly face such challenges when confronting tort claims,[298] as well as in other legal fields.[299] One possible approach to contending with evidentiary difficulties would be developing a proxy rule that raises a presumption about the defendant's intent.[300] A plaintiff who satisfies the elements of such a proxy rule will establish a presumption that the defendant deliberately chose a less costly victim. An example for such a proxy rule may be a combination of evidence showing, by a preponderance of the evidence, that the injurer was in a position to consider imposing the risk on several alternative victims (including the victim(s) eventually chosen) at the relevant time, *and* that the injurer was in a position to identify the potential

[297] *See supra* note 252 and accompanying text.

[298] Consider, for example, the doctrine of informed consent, which requires a determination of whether the patient would have consented to treatment had the physician appropriately informed them with the relevant information about alternatives. For a critical analysis of the doctrine, see generally Maytal Gilboa & Omer Pelled, *The Costs of Having (Too) Many Choices: Reshaping the Doctrine of Informed Consent*, 84 BROOK. L. REV. 367 (2019).

[299] *See* Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545, 559–60 (2014) (illustrating the doctrine of reasonable expectations in contract law, which requires courts to identify and decide "whether a consumer would have rejected the contract if she had known that the contract contained the unexpected terms").

[300] *See supra* note 252 and accompanying text.

victims' socioeconomic status.[301] These conditions may be more easily proven in the context of nuisance[302] or binary-risk design[303] than in the context of negligence.[304] As the examples illustrate, it is usually less controversial in the former contexts that the risk targets are chosen based on their association with a particular group of victims often distinguished by socioeconomic characteristics. The proposed analysis that views the practice of substituting victims as a form of unjust enrichment may serve as a useful means of granting such victims the right to sue for gain-based damages, whether as a central or a supplementary course of recovery.

When a victim is successful in proving the conditions needed to raise an inference that the defendant engaged in the practice of substituting victims, the defendant should then have an opportunity to rebut the inference and present their defenses.[305] For example, in the context of negligence, the defendant should have the opportunity to prove that the accident victim was not targeted but random;[306] and in the context of nuisance, the defendant can try to convince the factfinder that its choice of location was based on features other than the socioeconomic status of nearby residents.[307]

B. Accuracy

A key element in proving any claim alleging a practice of substituting victims is the existence of at least one alternative victim who would have been more costly to compensate and therefore more costly to protect if injured than the chosen victim. This element is also central to any damages calculation under the proposed restitutionary damages scheme. Recall that the proposed analysis for valuing the benefit that can be causally attributed to the injurer's choice of victim compares the costs the defendant would have incurred had it chosen the more expensive victim with the costs it actually incurred based on its selection of the less expensive victim. In the event of a multiplicity of relevant unchosen victims, the damages calculation may take them all into ac-

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[301] These two estimations are context dependent. For instance, it may be easier to prove that a defendant had the opportunity to make such estimations in a nuisance case than in a negligence case, as the latter usually arises out of unplanned, accidental circumstances.

[302] *See supra* Part II.B.

[303] *See supra* Part II.C.

[304] *See supra* Part II.A. Notice that the negligence example assumed that the injurer had knowledge of their neighbors' economic status.

[305] Further development of the proposed solution may include determining conditions under which central unjust enrichment defenses can be invoked to mitigate or even eliminate restitutionary recovery in claims brought by putative substitute victims.

[306] This would be difficult to prove in cases of systematic exposure to risk.

[307] An example might be proximity to a natural resource that is necessary for the operation of the chemical facility.

count. In such circumstances, the formula for damages would need to be adjusted to reflect the average costs the defendant saved by not choosing the alternative victims. The problem with this calculation is that it may open the door to strategic litigation behavior on the defendant's part. For example, the defendant might try to identify an expansive group of relevant, unchosen victims that includes as many "inexpensive victims" as possible. Such a strategy could enable the defendant to reduce the recovery amount by reducing the average cost of the unchosen victims.

This difficulty, however, does not appear to be a major concern for three main reasons. First, the suggested alternative approach to evaluating the injurer's enrichment from substituting victims—conducting the counterfactual inquiry by comparing the defendant's cost associated with choosing the less costly victim with the hypothetical cost associated with a victim randomly chosen from the wealthier, unchosen group of victims—may mitigate this problem, at least to some extent. Second, recall that the plaintiff has the opposite incentive to include in the universe of relevant, unchosen victims the wealthiest alternatives. The adversarial process should allow the court to ascertain the relevant comparators for each party. Third, courts are accustomed to resolving disputes about which comparators are relevant in a variety of contexts and can develop a framework for determining which unchosen victims should be considered for calculating gain-based damages. This framework can be context specific within the various substitute victim paradigms. For example, the test for determining who should be included in the circle of unchosen victims in a nuisance case should take into account factors such as governmental zoning.[308] Thus, residents of an area that cannot accommodate the defendant's operations due to zoning restrictions would not be considered relevant, unchosen victims, and would not be considered in assessing gain-based damages.

C. Strategic Behavior

In this Section, I identify a key area of potential strategic behavior by injurers under the proposed scheme. If an injurer anticipates being compelled to disgorge their gains for engaging in the practice of substituting victims, they may attempt to obscure their practice by choosing only slightly less costly victims instead of the least costly victims available. By strategically selecting victims who fall within a range of "neither too inexpensive nor too costly" alter-

[308] Zones are delineated according to the nature of activities conducted within them, with specific uses allocated to each zone based on its designated category of use. *See, e.g.*, N.Y.C., ZONING RESOLUTION art. I, ch. 1, § 11-121 (2024) (categorizing New York City into residential, commercial, and manufacturing districts). How one can use land depends on the location of each zone, as well as its population density and the category of the zone. *See id.*

natives, an injurer may conceal their intentional choice of less costly victims by making it appear that the victim was random.

This worry, too, however, should not be overstated. First, the scenario resulting from such a strategy is still an overall improvement from the current situation, in which injurers are incentivized to target the poorest possible victims for their risky activities. Strategically choosing marginally wealthier victims may mean that risky activities will no longer be concentrated on the very weakest populations. Second, courts can deter such strategic behavior by awarding punitive damages, on top of any gain-based recovery, when it is uncovered.[309]

Although the proposed framework does not eliminate the possibility of strategic behavior by injurers, it does not appear any more vulnerable to such behavior than the prevailing regime and may well mitigate the worst outcomes for the poorest victims. And although admittedly imperfect, this framework's advantages seem to outweigh its potential pitfalls and offer a promising avenue to address the long-standing problem of substitute victims.

CONCLUSION

The idea that underlies the prevailing view of tort remedies is that damages return the injured party to the same position they would have been in but for the injurer's wrongdoing, as if the wrong has never happened.[310] Because the extent of a plaintiff's losses depends on what they had when the defendant's wrongful conduct found them, those losses are valued commensurately with the plaintiff's preexisting socioeconomic status.[311] This logic creates disparities in tort damages awarded to different victims for similar risky activities, and in turn, incentivizes tortfeasors to choose victims of lower rather than higher socioeconomic status whenever possible.

Current proposals for contending with this problem have focused on modifying how harms should be calculated and offering reforms to the idea of restoration so that different victims harmed by similar risks will receive similar damages, regardless of their socioeconomic status. This Article discusses the shortcomings of these approaches and demonstrates that a shift in focus from the victims' harm to the injurers' benefit offers a promising alternative for addressing disparities in tort damages. Specifically, the Article first reframes the problem in terms of "substitute victims" to identify and define the practice of

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[309] *See generally, e.g.*, Mitchell A. Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (arguing that when victims frequently do not sue injurers, the underenforcement of legal rights results in underdeterrence, and proposing the use of punitive damages calculated to account for the probability that action would not be brought against the injurer to contend with this problem).

[310] *See supra* note 3 and accompanying text.

[311] *See supra* note 9 and accompanying text.

choosing to impose a risk on poorer victims *instead of* on wealthier victims for cost-saving purposes. Identifying a category of cases susceptible to this practice under a unified framework of "substitute victims" highlights the general inability of loss-based damages regimes to contend with an injurer's incentive to increase their profits by choosing a less costly victim (or group of victims) among two or more potential targets for their risky activities.

The Article explains and demonstrates the conditions whereby the practice of substituting victims can satisfy the criteria for restitution under the doctrine of unjust enrichment. The proposed analysis shows that the law of unjust enrichment can provide an effective legal avenue to contend with the problem of substitute victims and is also desirable from a policy standpoint. By taking away the benefit an injurer obtains by choosing a less costly victim, an unjust enrichment claim directly tackles injurers' incentive to prey upon more vulnerable victims and populations. Through characterizing the practice of substituting victims as a paradigmatic case of unjust enrichment, the Article captures a simple yet profound intuition: although injurers are not responsible for existing social inequities or for their reflection in tort damages, they should be held responsible for taking advantage of these inequalities for self-profit at the expense of the poor.