Do the Right Thing: Indirect Remedies in Private Law

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Abstract
Private law provides diverse remedies for right violations: compensatory and punitive, monetary and non-monetary, self-help and court-awarded. The literature has discussed these (and other) classifications of remedies, yet it overlooked the important distinction between direct and indirect remedies. Some remedies directly order right-infringers to realize the desired outcome, while others bring it about indirectly, by inducing them to self-comply. This classification cuts across the traditional ones.

This Article fills the gap in the literature by introducing the novel category of indirect remedies. It identifies how indirect remedies are used in current legal rules—with examples from property, contract, torts, intellectual property and family law—and underscores several advantages of the indirect form of relief. The normative discussion demonstrates that indirect remedies may be superior to direct ones in encouraging cooperative and considerate behavior, reducing interference with personal autonomy, fulfilling the educative role of the law, preserving the parties’ relationship, decreasing expressive harms, and mitigating litigation costs and wealth effects. In light of these benefits, the Article sets guidelines for crafting additional indirect remedies in new contexts.
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INTRODUCTION

All legal systems must design remedies for rights violations. The vast literature on this subject has offered several classifications of remedies. We are well familiar with the distinction between compensatory and punitive remedies,\(^1\) monetary and non-monetary remedies,\(^2\) and extra-judicial remedies.\(^3\)

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\(^1\) Under this classification, one may discuss whether compensation should be limited to the injured party’s losses, or should penalize the injurer by requiring the payment of supracompensatory damages. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (1998) (addressing the efficiency justifications for granting punitive damages in certain circumstances).

versus court-awarded remedies. These classifications differ in terms of their content, aims, and scope. Yet, we intuitively assume that all remedies have a common denominator: They attain the desired outcome directly.

Take, for instance, the monetary/non-monetary classification. When the strived-for outcome is that the promisee receives expectation damages from the promisor, the remedy directly realizes this goal by ordering payment of the sum. Alternatively, when the desired outcome is that the contracted-for asset be delivered in-kind, the promisee is awarded specific performance. Thus, regardless of whether the law aims at a monetary or a non-monetary outcome, the remedy embodies the desired result.

The same seems to be true for the other classifications as well. Once we have determined whether the wrongdoer should pay compensatory or punitive damages, the remedy requires the payment of the chosen amount. Likewise, if the injured party is entitled to exercise self-help in lieu of suing in court, one intuitively assumes that both the extra-judicial and the judicial remedies attain the end-result in a similar way. Thus, when a trespasser has wrongfully ousted a possessor, both the self-help measure and the state-enforced injunction directly restore possession through forceful expulsion of the wrongdoer.

The direct correlation between remedies and outcomes seems not only descriptively accurate, but also normatively sound. If the law is to save time and money for all the parties—plaintiffs, defendants and courts—shouldn’t it always grant the remedy that embodies the desired outcome?

This Article argues that this ostensibly rhetorical question should often be answered in the negative. It introduces a novel classification of remedies, which distinguishes between “direct” and “indirect” forms of redress. Indirect remedies are unique in that their immediate product is not the end-result that the law aims at. Specifically, an indirect remedy (hereinafter IR) attains the desired outcome by inducing self-compliance by the injurer.

To illustrate, when a car mechanic exercises a possessory lien, the sought-after result is not that the vehicle remain in her hands. The mechanic is not interested in the car itself and is not free to use it. Rather, the lien encourages the owner of the car to voluntarily offer remuneration for the services rendered. When a tenant withholds the rent, the ultimate goal of the remedy is not to save the tenant money, but to induce the landlord to repair defects in the apartment or remove other obstacles to her enjoyment. In a similar fashion, when a declaratory judgment states that a

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1 Thus, while a possessor is permitted to use reasonable force to restore property that was wrongfully taken from her, a buyer cannot exercise self-help to obtain a good that the seller is unjustifiably withholding. Daphna Lewinsohn-Zamir, Identifying Intense Preferences, 94 CORNELL L. REV. 1391, 1411–12 (2009).
certain contingency is covered by an insurance policy, it does not seek merely to point out the true state of affairs, but to prompt the insurance company to willingly pay the insured what is due her. Other examples of IRs include suspension of contractual performance to induce fulfillment of the counter-performance, preliminary injunctions that bring about the resolution of the conflict, and damages awards in defamation suits that incentivize libelers to apologize. The heretofore overlooked category of IRs cuts across all the familiar classifications. IRs can be monetary or non-monetary, compensatory or punitive, self-help or court-awarded.

The Article aims to be both descriptive and normative. Descriptively, it demonstrates the prevalence of IRs in diverse fields of private law and identifies indirectness as a common denominator of seemingly unrelated legal remedies. It offers a taxonomy of IRs, highlighting their diversity and ingenuity. As the above examples illustrate, an in-kind IR may aim at a monetary outcome (possessory lien), a monetary IR may attempt to induce an in-kind result (rent-withholding), a declaratory IR may strive for a monetary or non-monetary end-product, and so forth.

Normatively, the Article justifies the use of IRs in appropriate circumstances by addressing the basic puzzle that such remedies pose: Why grant a remedy that is likely to achieve the desired outcome in two stages instead of one? IRs offer several advantages over direct remedies. Generally speaking, IRs incentivize (potential or actual) wrongdoers to do the right thing of their own accord, rather than ordering them to behave in the way that would realize the desired outcome. Self-compliance is highly beneficial. First, it reduces the injury to the autonomy of the right-infringer while enhancing the value of what has been received in the eyes of the right-holder. In addition, cognitive-dissonance theory suggests that IRs would more effectively educate people to cooperate and to consider others’ interests, as compared to direct remedies. To the extent that the law seeks to play an educative role, it should consider the relative efficacy of its educational devices. Third, indirect enforcement tends to reduce animosity and expressive harms, thereby promoting the preservation of ongoing relationships between the parties (or at least minimizing the non-pecuniary costs of the conflict). Finally, IRs typically require less involvement on the part of the legal system, and are therefore less costly to administer than direct

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4 See, e.g., Cass R. Sunstein, Free Markets and Social Justice 5 (1997) (“[I]t is fully legitimate for government and law to try to shape preferences in the right way, not only through education, but also (for example) through laws forbidding racial discrimination, environmental degradation and sexual harassment, and through efforts to encourage attention to public issues and to diverse points of view”).
remedies. Consequently, IRs can mitigate the distorting effect of wealth on the vindication of rights and improve access to justice.\footnote{See Lawrence M. Friedman, The Legal System: A Social Science Perspective 133–34 (1975) (stating that the high costs of civil litigation, which largely fall on private parties, constitute a major barrier to access to the courts).}

While the literature has discussed each of the remedies I characterize as indirect in isolation, it has not focused attention on IRs as a distinct category.\footnote{The authors of a comprehensive article on self-help remedies did not distinguish between indirect and direct forms of self-help. See Douglas L. Brandon et al., Special Project: Self-Help: Extrajudicial Rights, Privileges and Remedies in Contemporary American Society, 37 Vand. L. Rev. 845 (1984). In their discussion of self-help by tenants, for example, the authors group together the direct remedy of rent-application (which allows tenants to repair the apartment by themselves and deduct the cost from their rent) and the IR of rent-withholding (which permits tenants to refrain from paying the rent in order to induce the landlord to repair the premises). Id., at 956–58.} My analysis will facilitate the more appropriate use of IRs and set guidelines for designing IRs in new contexts. For instance, IRs are particularly well-suited to cases where there is (a) little likelihood of error regarding the existence of a right and its infringement, and (b) a high risk of miscalculating a direct remedy. To avoid charges of unfairness or arbitrariness, there should be a recognizable relationship between the content of the IR and the injury to the right-holder.

Two caveats are in order. First, I do not argue that as a rule IRs should supplant direct remedies. A remedy that directly aims at the sought-after outcome may be the best response to an infringement of a right. However, awareness of the existence of IRs and a better understanding of their various advantages and limitations can improve the legal response to right violations. Second, since my project focuses on the ways to vindicate rights, I will not address the justifications for any of the substantive rights discussed here. I have assumed that the right itself is well-founded, and therefore concentrate on remediing its infringement by indirect or direct means.

The Article is structured as follows. Part I provides a general taxonomy of IRs. It demonstrates the wealth of remedial possibilities with examples from property, contract, torts, intellectual property, and family law. Part II then elaborates on the abovementioned advantages of indirect rights-enforcement. This discussion establishes the need to articulate the circumstances in which IRs are appropriate and to choose between different types of indirect relief. Part III addresses such considerations as the costs of errors, the risk of ineffectiveness, the identity of the right-infringer (private individual versus public entity), the type of interaction involved (ongoing relations versus end-game or one-shot game), and the presence or absence of a direct remedy for the harm.
I. A TAXONOMY OF INDIRECT REMEDIES

I categorize a remedy as indirect if its immediate product is not the end-result that the law aims at. IRs are a means of steering (potential or actual) right-infringers in the right direction, bringing about the desired outcome through self-compliance. Thus, expectation damages constitute a direct—rather than indirect—remedy, even though they anticipate the possibility that the promisee would use the money to buy a similar asset in the market. The remedy directly realizes the sought-after outcome in terms of the desired behavior on the part of the infringing promisor. The goal of the legal rule is that the promisor pay a certain sum of money (autonomy considerations, for instance, may tilt the scales against forcing her to perform in-kind). Actual payment by the promisor successfully realizes the strived-for outcome, and it is immaterial whether the promisee subsequently uses the money to cover.

In a similar fashion, the fact that the parties are free to agree on an alternative remedial solution to the court order does not turn a direct remedy into an indirect one. A remedy is “direct” whenever it embodies the ultimate behavior that the law wishes the right-infringer to perform. The fact that the court’s ruling may be altered ex-post by the affected parties does not change the direct nature of the remedy. A remedy is “indirect” only when the law intentionally grants a remedy which does not embody the desired end-result.

It is important to distinguish between an IR in the sense described above and the deterrence effect of remedies in general. Arguably, an important goal of remedies—including direct ones—is to guide individuals’ behavior and deter them from violating rights. Thus, when the law awards compensation for copyright infringement, it not only redresses the harm done, but also deters injurers from future violations (and may prevent copyright infringement ex ante as well). However, the existence of this feature is insufficient for a remedy to be labeled indirect. It is also necessary that the content of the remedy not constitute an adequate legal solution to the injury. Because monetary redress is a satisfactory end-result in terms of copyright protection, compensation for copyright infringement does not fulfill the second requirement. This point can be further demonstrated by comparing two possible remedies for non-payment of debts. According to Remedy A, a person who does not pay her debt would be ordered to pay the money she owes. Under Remedy B, a person who does not pay her debt would be subject to detainment of an asset she owns (currently held by another person) until she pays the money. Both remedies deter people from not paying their debts and incentivize the fulfillment of obligations. Yet, whereas the realization of Remedy A rectifies the injury to the creditor’s right, realization of
Remedy B does not. The latter only encourages the right-infringer to pay the debt of her own accord. For this reason, Remedy A is classified as direct, and Remedy B as indirect.

It is also important to highlight the difference between the direct/indirect classification of remedies and Stephen Smith’s distinction between remedies that confirm or replicate already-existing duties and remedies that do not. Smith argues that one should distinguish between the question of what duty a person has towards another and the question of what remedy the court should give when the said duty is breached. Sometimes, the court refuses to grant an order despite the fact that the defendant has a legal duty to do what the plaintiff requests the court to order her to do. For example, considerations of high enforcement costs or the expiration of the limitation period may prevent the granting of an order requiring the defendant to perform her duty towards the right-holder.

The distinction I propose between direct and indirect remedies cuts across Smith’s classification. A direct remedy can be replicative or non-replicative. Thus, for instance, while an injunction against a trespasser to land and an order for specific performance against a promisor replicate the defendant’s duty towards the plaintiff, expectation damages and punitive damages are not replicative remedies. In a similar fashion, an indirect remedy is not necessarily non-replicative, although, by definition, it does not order the right-infringer to perform her duty. This is the case of the declaratory judgment, which states the legal position on a disputed issue, thereby confirming and replicating the defendant’s duty vis-à-vis the plaintiff.

Parties can also privately contract for indirect remedies, as in the case of the security deposit, which is customized to the particulars of the lease and is supposed to motivate the tenant to take proper care of the property. Some of the observations and insights offered in this Article apply mutatis mutandis to such privately crafted remedies. My focus, however, is on legislative and court-awarded IRs, which are generally available even to unsophisticated parties. Furthermore,

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8 Id., at 33, 39, 43–47. Smith acknowledges that most court orders are replicative, i.e., “commanding defendants to do the very thing they should have done already.” Id., at 47.
9 Id., at 49–51, 55, 58–59.
10 See also id., at 47, 49–51, where Smith states that an order of specific performance and an order to vacate another’s land are replicative remedies, whereas expectation damages are not. The latter remedy is non-replicative because it “replaces a non-monetary rule-based duty with a monetary court-ordered duty.” In a similar vein, punitive damages are not replicative since the court-awarded damages are higher than the pre-existing duty to pay compensatory damages for the injury. See Stephen A. Smith, Rule-Based Rights and Court-Ordered Rights, in RIGHTS AND PRIVATE LAW 221, 244, 247 (Andrew Robertson & Donal Nolan eds., 2011).
such indirect remedies would be far less one-sided or susceptible to abuse than indirect remedies fashioned contractually by parties with unequal bargaining power.

The taxonomy presented in this Part contrasts the content of the IR with the content of its desired outcome (hereinafter DO). For example, the DO of a monetary IR can be that the injured party receives something in-kind (or an in-kind IR can have a monetary DO). Even when the IR and the DO are of the same type, their content can differ. For instance, the IR and the DO can both concern a non-monetary asset, but a different one. Below I elaborate on these and other possibilities and examine their manifestation in current legal rules.

A. From an In-Kind IR to a Monetary DO

An IR may provide a right-holder with some form of in-kind redress, designed to induce a right-infringer to pay the right-holder the money due her. This type of IR can take several forms.

Possessory Lien. The possessory lien, a security interest granted to certain possessors, is typically given to service providers to secure payment for a service or improvement they have rendered. The service providers may retain their possession of the debtor’s asset until the debt has been satisfied.\(^1\) A prime example is an automobile mechanic.\(^2\) In order to encourage the owner to pay for the work done on her car, the mechanic is permitted to hold onto the car without being liable for unlawful detention.\(^3\) Although the mechanic cannot sell the car to satisfy a claim for remuneration,\(^4\) the detention of the asset is an inexpensive and easily exercised self-help device which is likely to induce the owner to fulfill her obligation, since the detained asset is usually worth considerably more than the amount owed. Thus, the in-kind\(^5\) remedy will indirectly bring about the desired monetary outcome.

Distraint of Animals. Another in-kind remedy which aims at a monetary outcome is the distraint of trespassing animals. Possessors of livestock are strictly liable for the damage

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12 BROWN, id., at 393 (“[T]he automobile ‘mechanic’ is a prominent example of those entitled to a possessory lien”).


14 PALMER, supra note 11, at 944. In this respect, the common law possessory lien differs from a pledge. GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY, vol. 2, § 43.1 at 1183 (1965) (explaining the secured party’s right to dispose of the collateral in a public or private sale). Statutory possessory liens have sometimes extended the lienor’s right to include the sale of the detained asset. BROWN, supra note 11, § 14.1 at 446.

15 Here and elsewhere in the Article, “in-kind” (in relation to a remedy) refers to a non-monetary remedy.
caused by intruding animals. The injured landowner can sue in tort for direct redress, i.e., to receive a monetary award for her losses. But the law entitles her to an IR as well: She may seize and retain the animals as a way of incentivizing the wrongdoer to offer compensation. The injurer’s need to quickly recover her livestock may motivate her to voluntarily compensate the injured landowner. Some states increase the likelihood of the parties reaching agreement by authorizing the appointment of disinterested third parties—such as town officials or other residents—to assess the damage caused.

Suspension of Performance. A contractual party faces the risk that she will perform her part of the agreement but the other party will not. For instance, a seller may deliver the contracted-for goods, but the buyer may fail to pay for them. One way to deal with this risk is by requiring the mutual performances to be due simultaneously. Indeed, contract law favors the interpretation that the parties’ obligations must be performed concurrently. Failure by one party to render performance will automatically suspend the other party’s obligation until she is assured that the breaching party will perform as well. Thus, the seller in our example is granted an in-kind self-help remedy—the right to postpone her delivery of an asset—which aims to induce the buyer to


20 RESTATEMENT (SECOND) OF CONTRACTS § 234(1) (1981) (“Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary”). Such simultaneous obligations are also known as “concurrent conditions.” E. ALLAN FARNsworth, CONTRACTS § 8.10 at 559 (3rd ed., 1999).

21 G. H. TREITEL, REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT 280 (1988) (“the modern tendency is to lean towards holding the performances on both sides to be concurrent conditions unless the contract itself contains provisions as to the order of performance”).

22 U.C.C. § 2-511(1) (2011) (“Unless otherwise agreed tender of payment is a condition to the seller’s duty to tender and complete any delivery”); RESTATEMENT (SECOND) OF CONTRACTS § 238 cmt. a (1981) (“Where the performances are to be exchanged simultaneously […] each party is entitled to refuse to proceed with that simultaneous exchange until he is reasonably assured that the other party will perform at the same time”).

pay. Since non-compliance would deny the buyer the benefit of the bargain, the in-kind remedy is likely to indirectly bring about the desired monetary result.\textsuperscript{24}

The IR of suspending performance is not limited to cases where the mutual obligations are due at exactly the same time. If one party fails to perform on the required date, the injured party may be entitled to withhold her remaining duties.\textsuperscript{25} Returning to the same example, the seller’s non-delivery can be a response to the buyer’s earlier breach of her obligations. Once again, the in-kind IR is intended to produce a monetary DO. In a similar fashion, suspension of performance may be a remedy for prospective non-performance by the other party. Before she can receive the counter-performance, the prospective breacher must provide adequate assurances that she will perform.\textsuperscript{26}

**B. From a Monetary IR to an In-Kind DO**

A different type of IR affords the injured party monetary relief, designed to encourage the injurer to give something in-kind.

**Rent Withholding and Rent Abatement.** The indirectness of these remedies can be demonstrated with respect to one of the most important rights given to tenants: the implied warranty of habitability (IWH). The IWH holds that residential premises much be fit for human habitation.\textsuperscript{27} The requirement of habitability encompasses not only health and safety hazards (such as unsound ceilings or rodent infestation), but the provision of essential services (such as hot water and heating) as well.\textsuperscript{28} If the landlord breaches this obligation, the tenant is entitled, among other things, to terminate the lease\textsuperscript{29} or sue for damages.\textsuperscript{30} But it may be the case that what the tenant most desires is for the landlord to repair the premises. Indeed, the whole purpose of crafting an IWH is to ensure that rental housing be in habitable condition.\textsuperscript{31}

\textsuperscript{24} See Eyal Zamir, *The Missing Interest: Restoration of the Contractual Equivalence*, 93 VA. L. REV. 59, 86 (2007) (stating that the right to withhold performance “provides a powerful incentive to perform by depriving the actual or prospective breacher of the benefits she expects to get from the bargain”).

\textsuperscript{25} RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

\textsuperscript{26} FARNSWORTH, *supra* note 20, § 8.23 at 613–16.


\textsuperscript{29} JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 484 (2nd ed., 2005).

\textsuperscript{30} *Id.*, at 482, 485–86.

\textsuperscript{31} See also STOEBUCK & WHITMAN, *supra* note 28, § 6:41, at 318: “They [tenants] need a remedy that will get their present living quarters fixed up, not a remedy that […] will require them to move to another apartment where the rats are even larger.”
This outcome may be aimed at directly, by an action for mandatory injunction against the landlord. However, the law offers tenants two indirect avenues as well: rent withholding and rent abatement. The first allows the tenant to withhold rent as long as the landlord does not fulfill her obligation, whether by simply holding back the rent or by depositing it into an escrow account. In both cases, the landlord receives no rent and the monetary sanction may induce self-compliance with the IWH. The second remedy, rent abatement, also uses monetary means to bring about a desired in-kind outcome. The agreed-upon rent is reduced by the same proportion as the decrease in the apartment’s market rent due to its nonconformity with the IWH. Rent abatement ordinarily requires a judicial proceeding, and, as the Restatement (Second) of Property: Landlord and Tenant states, “[a]batement is allowed until the default is eliminated, or the lease terminates, whichever first occurs.” Thus, a landlord who wishes to receive the full rent must actually fix the property.

Rent withholding and rent abatement are available for other landlord breaches as well, such as when the lease property is adversely affected by third-party rights, interference on the part of the landlord, or non-performance of a promise that deprives the tenant of a significant inducement to the making of the lease. As in the case of the IWH, the monetary remedy may indirectly bring about a desired outcome in-kind: removal of the legal or physical obstructions to the tenant’s enjoyment.

Suspension of Performance. The IR of withholding performance discussed above is not limited to cases where an in-kind form of relief is designed to bring about a monetary outcome. It could also be the other way around: The remedy of payment suspension can encourage

32 SCHOSHINKI, supra note 27, § 3:32 at 152.
33 SINGER, supra note 29, at 484.
34 Brandon et al., supra note 6, at 958 (stating that a majority of American states have adopted a rule “that only requires tenants to notify the landlord of the reasons for withholding rent while allowing them to retain possession of the unpaid rent”). To be effective, this variant of rent withholding must be accompanied by some defence against retaliatory eviction by the landlord for failure to pay rent. On such a defence, see SINGER, supra note 29, at 488–90.
37 The tenant can initiate a declaratory-judgment procedure to determine whether she is entitled to abate the rent and in what amount. RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT, § 11.1 cmt. b. Only in the State of Pennsylvania is rent abatement a self-help remedy. Id., reporter’s note 2.
40 See supra notes 20–26 and accompanying text.
performance in-kind by the breaching party. For example, a buyer may withhold the money she is required to pay in order to induce a breaching seller to deliver the object of sale.\textsuperscript{41}

Rent withholding, rent abatement, and suspension of performance aim to put pressure on the breaching party by not paying money otherwise owed. However, indirect monetary remedies may involve not only an omission, but also a commission. The injuring party can be required to pay money to the plaintiff, as an indirect way to induce performance in-kind. Two examples of this are the astreinte remedy in contracts and tort compensation for refusal to divorce.

\textit{Astreinte.} Ordinarily, an injunction or specific performance order can be directly enforced upon a defaulting defendant. French law, however, limits such enforcement to obligations to give ("obligation de donner"), as opposed to obligations to do or not to do ("obligation de faire ou de ne pas faire").\textsuperscript{42} Thus, while judgments for the delivery of certain goods or for the payment of money can be coercively realized, judgments concerning the doing of other acts cannot. This restriction on in-kind enforcement is based on the idea that a free person should not be compelled by the state to behave in a particular way.\textsuperscript{43}

In response, French courts have developed the astreinte, an original form of enforcement.\textsuperscript{44} The judge orders that the defendant pay the plaintiff a certain sum of money for each day she does not perform in-kind.\textsuperscript{45} The payment is not limited to the plaintiff’s losses, but is determined by the degree of the breaching party’s recalcitrance and her capacity to perform.\textsuperscript{46} This penal remedy was used, for example, to induce a contractor to execute certain building operations, an employer to grant a certificate of employment, a manufacturer to desist from unfair competition practices, and a buyer to take delivery of goods in accordance with a contract she had signed.\textsuperscript{47} Although an astreinte is particularly useful when the desired outcome cannot be realized directly,
it has also been employed as an added incentive to voluntary performance, when direct enforcement was possible.\textsuperscript{48} In both cases, the indirect monetary remedy is intended to bring about a sought-after in-kind outcome.

\textit{Compensation for Refusal to Divorce}. According to Jewish religious law, a woman can obtain a divorce (known as a \textit{get}) only if her husband grants it of his own free will. A \textit{get} which is not voluntarily given is invalid.\textsuperscript{49} A woman who does not have a \textit{get} is considered married under Jewish law, even if she obtains a civil divorce. Her future relationships will be regarded as adulterous and children born of such relations will be considered illegitimate.\textsuperscript{50}

Since courts and legislatures cannot award a \textit{get} coercively,\textsuperscript{51} they have adopted indirect measures to address the wife’s plight.\textsuperscript{52} For example, Israeli courts have recognized tort claims for losses due to the husband’s unjustified refusal to give a \textit{get}. Thus, a woman can receive substantial monetary compensation for injury to her autonomy and dignity, her inability to remarry, and her lost opportunity to have legitimate children with a new partner.\textsuperscript{53} Significant damages awards may prompt men to consent to a divorce.\textsuperscript{54} A different remedy is found in the New York Domestic Relations Law. An amendment from 1992 allows the court to take a husband’s refusal to grant a \textit{get} into account when deciding the equitable distribution of marital

\begin{itemize}
\item \textsuperscript{48}For instance, an astreinte was issued to encourage the promisor to deliver a specific car or to convey a parcel of land. \textsc{Zweigert \& Kötz, supra} note 42, at 476–77.
\item \textsuperscript{49}Benjamin Shmueli, \textit{What Have Calabresi \& Melamed Got to Do with Family Affairs? Women Using Tort Law in Order to Defeat Jewish and Shari’\textsc{a} Law}, 25 \textsc{Berkeley J. Gender \& Just.} 125, 137 (2010).
\item \textsuperscript{50}Adam H. Koblenz, \textit{Jewish Women Under Siege: The Fight for Survival on the Front Lines of Love and the Law}, 9 \textsc{U. Md. L. J. Race, Religion, Gender \& Class} 259, 276, 277 (2009).
\item \textsuperscript{52}Refusals to divorce pose a far greater problem for the Jewish wife than for the Jewish husband. Although the \textit{get} must be voluntarily “received” by the wife (and not only voluntarily “given” by the husband), religious courts can grant a man permission for a second marriage if his wife unjustifiably refuses to receive a \textit{get}. Yehiel S. Kaplan, \textit{Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law}, in, 15 \textsc{Jewish L. Ann.} 57, 75–76 (Berachyahu Lifshitz ed., 2004) (explaining when a husband will be permitted to marry a second wife): Nadel, \textit{id.}, at 60–61 (discussing the differential impact of refusals to divorce on husbands and wives). A married Jewish woman, in contrast, cannot obtain similar permission to remarry. Ariel Rosen-Zvi, \textit{Family and Inheritance Law}, in, \textsc{Introduction to the Law of Israel} 75, 85 (Amos Shapira \& Keren C. DeWitt-Arar eds., 1995).
\item \textsuperscript{53}There is no specific tort of \textit{get-refusal} in Israeli law. The wife’s suit is based on the general torts of negligence (which also covers intentional harm) or breach of statutory duty (failure to abide by the Rabbinical Court’s ruling that a \textit{get} should be given). Shmueli, \textit{supra} note 49, at 138–39, 148–58.
\item \textsuperscript{54}Shmueli reports that “courts have awarded punitive, aggravated, or increased damages for intangible non-pecuniary injury.” Shmueli, \textit{supra} note 49, at 128. Courts must tread carefully when determining the sum of damages. Supracompensatory damages entail the risk that the rabbinical courts will regard the husband’s consent to give a \textit{get} in exchange for the wife’s waiver of the monetary award as “monetary coercion,” something which would invalidate the \textit{get}. For discussion of this issue, see Kaplan, \textit{supra} note 52, at 61–107.
\end{itemize}
assets or determining the amount and duration of maintenance awards.\textsuperscript{55} Once again, the
monetary remedy strives to indirectly bring about an in-kind outcome—the giving of a \textit{get}.\textsuperscript{56}

\textbf{C. From a Declaratory IR to a Monetary or In-kind DO}

Another type of IR is a simple declaration of the plaintiff’s rights. The goal of the declaration is to
induce the defendant to voluntarily fulfill a monetary or in-kind obligation.

\textit{Declaratory Judgment}. A declaratory judgment states the legal position regarding an issue in
dispute,\textsuperscript{57} and, in contrast to an executory judgment, does not include an order that can be
enforced against the defendant.\textsuperscript{58} A basic condition for granting this equitable remedy\textsuperscript{59} is that the
question referred to the court is not hypothetical. There is a conflict to be resolved, and a
declaration is likely to have a practical effect on the parties.\textsuperscript{60} By its very nature, a declaratory
judgment is an IR, because it usually intends to bring about another monetary or in-kind outcome.
For example, a court could declare that a certain contingency is covered by an insurance policy,\textsuperscript{61}
a particular asset belongs to Person A,\textsuperscript{62} or a certain interpretation of a will is correct.\textsuperscript{63} The aim
of the declaration is that following the judgment, the money would be paid, the property promptly
transferred, and the will executed accordingly.\textsuperscript{64}

\begin{thebibliography}{99}
\bibitem{55} N.Y. Dom. Rel. Law § 236B(5)(h) & 6(d). Although the language of the law does not refer to
Jewish couples, it is well known that this legislation was designed to assist wives who were refused a \textit{get},
and indeed, it was coined “\textit{get} statutes.” Joel A. Nichols, \textit{Multi-Tiered Marriage: Ideas and Influences
from New York and Louisiana to the International Community}, 40 \textit{VAND. J. TRANSNAT’L L.} 135, 153
(holding that the husband’s entitlement to half of his wife’s pension benefits and to maintenance payments
is conditioned upon his voluntary granting her a \textit{get} within 45 days). \textit{See also} Jamie Pinto v. Nesim Pinto,
260 A.D. 2d 622, 688 N.Y.S. 2d 701 (1999) (affirming a judgment that awarded the wife title to all the
parties’ assets if the husband did not deliver a religious divorce within a specified period of time).
\bibitem{56} For discussion of in-kind (rather than monetary) IRs that aim to induce \textit{get}-giving, see infra
notes 72–81 & 201–204 and accompanying text.
\bibitem{57} \textit{See} THE RT. HON. THE LORD WOOLF & JEREMY WOOLF, \textit{THE DECLARATORY JUDGMENT} § 1.02
\bibitem{58} \textit{Id.}, \textit{id}. However, the declaration by the courts operates as \textit{res judicata} (see RESTATEMENT
(SECOND) JUDGMENTS § 33 (1982)). Thus, a defendant who subsequently behaves contrary to the
declaration cannot challenge it in future proceedings. \textit{WOOLF & WOOLF, id.}, § 1.07.
\bibitem{59} \textit{RESTATEMENT (SECOND) JUDGMENTS} §33 cmt. a (1982) (“The entertainment of an action for
declaratory relief is [...] discretionary with the court”).
\bibitem{60} \textit{RESTATEMENT (SECOND) JUDGMENTS} §33 cmt. a (1982) (“the likelihood that the action [for
declaratory relief] will in fact terminate the controversy, and the private or public utility of the declaration,
are significant factors in exercise of discretion”).
\bibitem{61} ADRIAN ZUCKERMAN, \textit{ZUCKERMAN ON CIVIL PROCEDURE: PRINCIPLES OF PRACTICE} § 22.19
\bibitem{62} \textit{WOOLF & WOOLF, supra} note 57, § 1.02.
\bibitem{63} \textit{RESTATEMENT (SECOND) JUDGMENTS,} § 33, cmt. a (1982).
\bibitem{64} There are rare cases in which a declaratory judgment does not aim at some subsequent behavior, one
being a declaration of status. A claimant may apply for a declaration that she is divorced or that a certain
person is her parent, without intending at the time to obtain something from the declaration.
\end{thebibliography}
The indirectness of the remedy is particularly evident when the court grants an affirmative declaration concerning the plaintiff’s entitlement to receive money or an asset in-kind. However, the indirect feature exists even when the judgment involves a negative declaration. For instance, when a court declares that a claimant does not have to comply with what it has determined to be invalid tax notices, the intended result is that the tax authority would not initiate enforcement proceedings against her. In this respect, even a negative declaration can affect the defendant’s behavior and indirectly achieve another desired outcome.

D. From a Monetary or In-Kind IR to a Declaratory DO

A judgment ordering monetary or in-kind giving usually includes declarations regarding the plaintiff’s rights. For example, an award of expectation damages or specific performance will be based on the court’s preliminary holding that the promisee’s contractual right has been breached. Thus, there seems to be no need to induce an additional declaration by granting monetary or in-kind relief. Notwithstanding this reasoning, some IRs do precisely this.

Damages in Defamation Cases. The remedy of court-ordered apology is generally unavailable in the United States in civil proceedings. The denial of this relief primarily rests on recognition of people’s right not to speak, which is part of the constitutional right to free speech. At the same time, voluntary apologies and retractions of defamatory statements can be offered by defendants in mitigation of damages. Apologies and retractions are a defendant’s acknowledgement of the injury to the plaintiff (and in the case of apologies, also an expression of regret for the harm caused). These declarations are different from those given by the court in its judgment, and thus the latter do not obviate the need for the former. A wrongdoer unwilling to apologize or retract statements will therefore be obligated to pay higher damages. The additional

65 See UNIFORM DECLARATORY JUDGMENTS ACT § 1 (1922) (“The declaration may be either affirmative or negative in form and effect”).
66 For a description of such a case, see WOOLF & WOOLF, supra note 57, §§ 2.16–2.17.
67 In contrast, apologies can be coerced in some countries, such as Japan and South Korea. Pierre-Dominique Ollier & Jean-Pierre Le Gall, Various Damages, in, INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW: XI TORTS 63, 91–92 (André Tunc ed., 1986).
70 See Elad Peled, Constitutionalizing Mandatory Retraction in Defamation Law, 30 HASTINGS COMM. & ENT. L. J. 33, 34 (2007) (“A retraction is a withdrawal of the defamatory charge, or at least part of it, by the speaker”).
71 AARON LAZARE, ON APOLOGY 23 (2004) (defining an apology as including both an acknowledgement of responsibility for the injury and an expression of regret or remorse).
monetary payment can be viewed as incentivizing defendants to offer apologies of their own accord. In this way, the monetary remedy may indirectly bring about a declaratory outcome.

Arguably, defamation damages are not a “clean” example of a monetary remedy that aims at a declaration. An apology or retraction can mitigate damages only if it is extended before the sum has been determined. Once the judgment for higher damages has been awarded, the defendant cannot reduce the amount by offering an apology or a retraction. However, the fact that the monetary remedy can help realize the declaratory outcome only ex ante is immaterial here; it is sufficient for my purposes that the possibility of incurring a larger monetary sanction may prompt defendants to voluntarily apologize or retract their defamatory statements.

E. From an In-Kind IR to an In-Kind DO and from a Monetary IR to a Monetary DO

The IRs discussed thus far were of a different type than the outcome they sought to bring about. However, IRs are not limited to such cases, as the IR and the DO can also be of the same type, as when an in-kind IR aims at a different in-kind DO.

Non-Monetary Remedies against Get-Refusers. As explained above, Jewish husbands cannot be coerced into granting a divorce, and therefore courts and legislatures have crafted monetary IRs that encourage them to give a get. Such indirect inducement, however, can also be non-monetary. A case in point is the New York Domestic Relations Law, which holds that the state will not grant a civil divorce to a person who has not removed a barrier to the other spouse’s remarrying under religious law. This applies only to the spouse suing for civil divorce, and therefore if a man does not seek a civil divorce, the statute cannot address his wife’s condition. Despite any shortcomings of the rule, what matters here is that an in-kind remedy (the barring of civil divorce) is used to bring about a different in-kind outcome (the granting of a get). Interestingly, Israeli law recognizes a harsher in-kind remedy to incentivize a divorce: the imprisonment of husbands who refuse to comply with a rabbinical court’s order to give a get.

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72 See supra notes 49–56 and accompanying text.
74 N.Y. Dom. Rel. Law § 253(2), (6). Although the statute does not expressly refer to a Jewish divorce, its purpose is to prevent Jewish men from withholding gets. Koblenz, supra note 50, at 280; Nadel, supra note 51, at 71 & n. 134.
75 Nichols, supra note 55, at 161–62.
76 Nadel, supra note 51, at 73–74.
77 Most of the literature on the get statutes focuses on their constitutionality, and thus far they have withstood constitutional scrutiny. Nadel, supra note 51, at 78–99.
78 Although in principle this law is also applicable to Jewish wives who refuse to receive a get, in practice it is employed almost exclusively with respect to Jewish husbands. This is because a man may be granted permission to remarry despite his wife’s refusal to receive a get. See supra note 52.
Since the goal of incarceration is to induce a divorce, rather than to punish, the husband controls how long he spends in prison, and a subsequent expression of willingness to grant a divorce would bring about his immediate release. Although the extreme measure of imprisonment is employed only in exceptional circumstances, it is an example of an in-kind remedy that aims at a different in-kind result.

Preliminary Injunctions. A preliminary injunction is a court order issued at the beginning of the litigation, before all the evidence has been heard and the case decided on the merits. For example, a plaintiff may seek a preliminary injunction to enjoin a patent or copyright infringement, prevent a breach of contract, or abate a nuisance. Preliminary relief will be given only if the injunction is required to prevent irreparable harm to the plaintiff and the expected harm outweighs the expected irreparable harm to the defendant from the preliminary remedy. At first blush, a preliminary injunction does not appear to be an IR at all. As its name indicates, a preliminary injunction is bound to be replaced by the final judgment and court-awarded remedy. To quote Adrian Zuckerman, preliminary orders “all have one common denominator in that they are not designed to provide a final resolution to the matter in dispute. Rather, they are intended to achieve some procedural end or to regulate the parties’ conduct pending litigation.”

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79 For discussion of this unique remedy, see Kaplan, supra note 52, at 107–19. The term of imprisonment may be up to five years, and the court can extend it to a maximum of ten years. Rabbinical Courts (Enforcement of Divorce Judgments) Law, 1995, S.H. 139 § 3(b) (in Hebrew); File No. 4534-21-1 Rabbinical Court of Appeal, Anonymous v. Anonymous p. 2 (Mar. 4, 2008), Nevo Legal Database (by subscription) (Isr.) (extending a husband’s one-year prison sentence by four years and stating that he would be released immediately upon giving his wife a get).


81 For example, it is not enough that the rabbinical court ruled that the husband must divorce his wife, and that six months have elapsed since this order was issued. The Attorney General must also agree to apply to the district court for an order of imprisonment, and the district court must also accept this request. Kaplan, supra note 52, at 112–13.

82 ZUCKERMAN, supra note 61, § 9.5 at 298–99.


84 These requirements are known as the “Leubsdorf–Posner” formula. See respectively John Leubsdorf, The Standard for Preliminary Injunctions, 91 HARY. L. REV. 525, 525, 541–42 (1978); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 595–96 (7th ed., 2007). The court-formulated, traditional “balance of the hardships” test, considers (1) the plaintiff’s likelihood of success on the merits; (2) the amount of irreparable harm to the plaintiff if the injunction is denied; (3) the balancing of expected harms to the plaintiff and the defendant; and (4) the impact of an injunction on the public interest. Mark A. Lemley & Eugene Volokh, Freedom of Speech and Injunctions in Intellectual Property Cases, 48 DUKE L. J. 147, 158 (1998). If it eventually transpires that the preliminary injunction was wrongfully issued, the plaintiff must compensate the defendant for her losses. In the United States, these damages are limited to the amount set in the bond posted by the plaintiff. Ofer Grosskopf & Barak Medina, Remedies for Wrongfully-Issued Preliminary Injunctions: The Case for Disgorgement of Profits, 32 SEATTLE U. L. REV. 903, 907–08 (2009).

85 ZUCKERMAN, supra note 61, § 9.1 at 296. Furthermore, realization of a preliminary injunction may grant the plaintiff a direct remedy in the form of preventing irreparable harm until the conflict has been
Notwithstanding the stated goals, preliminary injunctions often serve as the final remedy. The granting of preliminary relief may suffice to end the conflict and bring about the desired outcome; when this occurs, the preliminary injunction serves, de facto, as an IR. Witness, for example, the significance of preliminary injunctions in intellectual-property disputes. Once the court has indicated its position by preliminarily enjoining the defendant from infringing the plaintiff’s patent or copyright, neither party may wish to incur additional costs by pursuing the litigation to its bitter end. The defendant may either relinquish her attempt to lawfully use the right, or decide to buy a license from the right-holder. In both cases, the in-kind preliminary remedy has achieved a different in-kind outcome, without need for further intervention by the state.

**Suspension of Performance.** The remedy of withholding performance until the counter-performance is guaranteed is also applicable to circumstances where both the IR and the DO are in-kind. This is the case with barters, which involve the exchange of non-monetary assets. A modern-day example is the case of an owner of a vacant parcel who engages a contractor to construct an apartment building on the land. The parties may agree that the landowner will receive a certain number or percentage of the new apartments and that the contractor will sell the others. The landowner is entitled to suspend the transfer of title to the buyers until she receives her own apartments.

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resolved. Below, I do not argue that preliminary injunctions are solely an IR, but claim that although a preliminary injunction appears to be a direct remedy, at times it operates as an IR.

86 **WILLIAM RODOLPH CORNISH & DAVID LLEWELYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS** 70 (6th ed., 2007) (stating that “an interim injunction [...] is a rapid and relatively cheap way of procuring temporary redress” and that “businesses frequently treat the outcome of the interim proceedings as settling the matter in dispute”).

87 See Leubsdorf, supra note 84, at 525 (noting that a preliminary injunction “may endure for months or years”).

88 In NBC Universal, Inc. and Bravo Media v. The Weinstein Co., 2008 WL 4619203 (N.Y. Sup. Ct. 2008) (No. 601011/08), the court preliminarily enjoined the defendant from selling “Project Runway” to Lifetime, because this allegedly breached a copyright licensing agreement with NBC. Following the preliminary injunction, the defendant acknowledged its breach and paid NBC a settlement fee in order to move the show to Lifetime. See Bill Carter, Weinstein Strikes a Deal in ‘Project Runway’ Lawsuit, N.Y. Times, Apr. 1, 2009, available at http://www.nytimes.com/2009/04/02/arts/television/02wein.html.

89 For discussion of the suspension of performance remedy, see supra notes 20–26 & 40–41 and accompanying text.

90 See U.C.C. § 2-304(1) (2011) (applying Article 2 on Sales to instances where the price to be paid is in goods rather than money. In this case, “each party is a seller of the goods that the party is to transfer”).

91 See also L’enfant Plaza Properties, Inc. v. The United States, 1981 U.S. Ct. Cl. Lexis 1394, 18–25 (holding that the plaintiff company’s obligation to build three buildings and the defendant company’s obligation to construct the surrounding streets are concurrent performances; hence the failure of the former to complete its obligation excuses the latter from fulfilling its).
Are there monetary IRs that seek to bring about a different monetary DO? At first, this category would seem to be redundant, since money is money is money. Why award a monetary remedy in order to achieve another monetary result? In addition, such IRs would appear to be impossible, because when the plaintiff receives a monetary remedy, the defendant’s obligation has been discharged. Nevertheless, there are monetary remedies that do not terminate the debtor’s obligation, but rather intend to incentivize her to bring about a different monetary outcome.

Procedural Set-Off. Under the Common Law, set-off is usually a procedural right whose exercise requires judicial proceedings. A person sued for payment may claim that the plaintiff also owes her money. If the court accepts this claim, it would order the set-off of one debt against the other. Thus, although a creditor cannot offset cross obligations out of court, she can respond to an unpaid debt by withholding a payment she owes the debtor. This may induce the debtor to voluntarily fulfill her monetary obligation, perhaps by consensual offsetting of the mutual debts. A suit to enforce the reciprocal obligations may therefore become unnecessary.

In conclusion, although the literature overlooks IRs as a remedial category, private law abounds with IRs of varying types. We now turn to the advantages offered by this form of redress.

II. THE ADVANTAGES OF INDUCED SELF-COMPLIANCE

The distinctive feature of IRs is their ability to incentivize people to do the right thing of their own accord. The IR steers people in the correct direction, which can lead to self-compliance and obviate further—or more intrusive—legal measures. Thus, distraint of trespassing animals may prompt the owners to propose compensation for the harm caused; withholding of rent may lead landlords to remove obstacles to the tenants’ enjoyment; the possibility of reduced damages awards may encourage libelers to offer apologies to victims of defamatory statements; and court declarations as to plaintiffs’ rights may induce defendants to voluntarily fulfill their obligations.

IRs may also affect behavior ex ante. The very existence of an easily exercised IR may be sufficient to prevent potential right violations. For instance, the fact that a contracting party can suspend her performance until the other party’s counter-performance has been guaranteed likely

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93 In contrast, Civil Law recognizes a substantive right of set-off that discharges the cross-obligations by unilateral and extrajudicial notification of one party to another. REINHARD ZIMMERMAN, COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION 32–36 (2002). Set-off in Civil Law systems is a direct remedy, because the desired end-result is realized by its very application.
94 Contractual set-off is allowed in all legal systems. ZIMMERMAN, id., at 20.
incentivizes the latter to fulfill her obligation on time. Similarly, knowing that mechanics can hold onto vehicles, the owners may decide to promptly pay repair costs. The same is true for Jewish husbands who may agree to a divorce at the outset, aware that a refusal to do so would result in their receiving a smaller share of the marital assets.\footnote{See Lisa Zornberg, Beyond the Constitution: Is the New York Get Legislation Good Law?, 15 PACEL. REV. 703, 761–62 (1995) (describing, based on interviews, how the very enactment of the get statutes resolved divorce disputes and induced men to give their wives a get).}

IRs aim to bring about the desired outcome through self-compliance by the (actual or potential) wrongdoer. In contrast, direct remedies \textit{order} the wrongdoer to behave in a way that realizes the preferred outcome. This Part analyzes the various benefits of achieving the end-result by self-compliance rather than direct enforcement.\footnote{Part II addresses the advantages of successful IRs, i.e., those which indeed induce self-compliance. For discussion of the relative effectiveness of IRs in comparison to direct remedies, see infra Part III.B.}

\textbf{A. Filling In for Unavailable Direct Remedies}

Inducing self-compliance through IRs is obviously advantageous when a direct remedy is legally unavailable. A case in point is the absence of a coerced apology for defamation.\footnote{See supra notes 67–68 and accompanying text.} Since defendants cannot be ordered to apologize, the law incentivizes voluntary apologies by indicating that damages would be higher if no apology is offered.\footnote{See supra notes 68–71 and accompanying text.} Another example is the impossibility of coercing divorce under Jewish law.\footnote{See supra notes 49–51 and accompanying text.} Since a \textit{get} must be given voluntarily, legislatures and courts use indirect means to encourage the husband to grant a divorce.\footnote{See supra notes 52–56 & 73–81 and accompanying text.} The crafting of an IR is crucial when the law cannot be altered to allow for the direct form of redress. This is obviously true for the Jewish \textit{get}, whose requirements and validity are determined in accordance with religious law. However, the case of apologies may be similar if legislation authorizing coerced apologies would be held to unconstitutionally infringe upon the right to free speech.\footnote{See supra note 68 and accompanying text.}

The category of “unavailable direct remedies” also includes instances where a direct remedy is generally obtainable for a certain right violation, but is unobtainable under a particular set of circumstances. Take, for example, a breach of the implied warranty of habitability.\footnote{See supra notes 27–31 and accompanying text.} Although tenants are entitled, in principle, to apply for a mandatory injunction against their landlord,\footnote{See supra note 32.}
their application may be rejected due to the extent of state supervision that would be required. An IR that puts pressure on the landlord to self-comply, such as rent withholding, may be the only viable option. Even if rent withholding by a single tenant would not suffice to mobilize the landlord, similar action by several tenants may persuade the landlord to fix the apartments.

The absence of direct remedies is not the main justification for creating IRs. Indeed, the indirect form of redress is not the exclusive one in most of the examples discussed in Part I. IRs such as possessory lien, distraint of animals, suspension of performance, rent withholding, rent abatement, declaratory judgments, and procedural set-off exist alongside direct remedies that can compel the defendant to give the plaintiff the sum of money or asset to which she is ultimately entitled. The cases where the right-holder can choose between indirect and direct remedies are more intriguing, because they present a puzzle: Why would the injured party—or the law—opt for a seemingly inferior way to enforce the infringed right rather than employ the remedy that would directly lead to the desired outcome? The next sections demonstrate that an indirect approach may sometimes be preferable even when a direct remedy is available.

B. Reducing Interference with Autonomy

Although most legal remedies interfere to some degree with a person’s autonomy and freedom of action, IRs typically involve a lower level of intrusion than direct remedies do. There are various reasons for this. First, some IRs involve self-help through omission, allowing the injured party to hold something back from the injuring party. Thus, a tenant may withhold the rent, a neighboring landowner may detain the trespassing animal, and a party to a contract may suspend her own performance. Since the things withheld are in the control (or possession) of the injured party, employment of the remedy does not substantially interfere with the autonomy or privacy of the infringer. In addition, the fact that the injured party does the withholding—rather than the state—further reduces the likelihood that the infringer would feel coerced or intimidated.

Second, even when the IR cannot be realized by passive self-help but requires a court decision, the intrusion on autonomy is likely to be perceived as less significant when the IR is in the form of an omission (rather than a commission). For example, once the court determines the size of the rent abatement, it is executed through an omission, i.e., the non-payment of a portion

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104 See Stoebuck & Whitman, supra note 28, at 333 (stating that a court cannot enforce “an order that calls for supervision of a complex series of actions over a long period of time,” and that therefore it “may be reluctant to order the correction of multiple defects in rental housing”). See also Hirsch & Hirsch, supra note 35, at 11–12 (noting that the state rarely invokes the remedy of court-appointed receivers to take control of apartment buildings to correct housing-code violations).
105 See supra notes 32–35 and accompanying text.
of the rent. Likewise, when a court rejects a petition for civil divorce from a man who has refused to give his wife a get, he is not coerced into doing anything, but is simply denied something he sought to receive. Third, an IR may be less injurious to the wrongdoers’ autonomy because it neither orders them to do something nor refuses them anything. A prime example of this is a declaratory judgment, which merely states the legal position with respect to an issue in dispute.

Finally, although some IRs require right-infringers to act in a certain way, the injury to their autonomy is mitigated to some extent by the fact that the IR does not order them to perform the sought-after outcome itself. Consequently, the IR leaves them with the freedom to decide if and how to take action. Consider, for instance, an astreinte against a contractor who has failed to execute certain of her duties. The requirement that she pay damages for every day of default interferes less with her autonomy than an order to build, due to the monetary nature of the IR and the discretion she has vis-à-vis execution. Libelers also experience less interference with their autonomy when they are not forced to apologize, but can instead choose to pay additional damages. This type of IR can serve to identify those people who have a strong dislike of apologizing. An apology is welfare enhancing to the injured party, and it stands to reason that many injurers would not find it to be particularly humiliating. Others, however, might find the prospect of making an apology to be degrading. By stating that an apology can reduce the

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106 Similarly, although procedural set-off requires a decision by the court, it is executed through non-payment by the party exercising the set-off.

107 This argument is supported by psychological studies demonstrating that loss due to a commission looms larger than loss resulting from an omission. See, e.g., Ilana Ritov & Jonathan Baron, Reluctance to Vaccinate: Commission Bias and Ambiguity, in BEHAVIORAL LAW AND ECONOMICS 168, 184 (Cass R. Sunstein ed., 2000) (finding that people are reluctant to vaccinate a child even when the risk of dying from the disease is significantly higher than the risk of dying from the vaccine).

108 See LAZARE, supra note 71, at 45 (claiming that an apology can successfully restore a person’s self-respect and dignity). Indeed, an apology may even resolve the dispute and obviate the need for a law suit. See Elizabeth Latif, Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions, 81 B. U. L. REV. 289, 295 (2001) (stating that sometimes all that is necessary to achieve a settlement is “an admission by the other party that he or she did wrong”); Brent T. White, Say You’re Sorry: Court Ordered Apologies as a Civil Rights Remedy, 91 CORNELL L. REV. 1261, 1271 (2006) (noting that “up to 98% of civil medical malpractice claimants desire apologies” and that “37% wouldn’t have filed suit had the doctor fully explained and offered an apology to begin with”). See also Daphna Lewinsohn-Zamir, Can't Buy Me Love: Monetary versus In-Kind Remedies, 2013 U. ILLINOIS L. REV. 151, 165–66, 175–76 (discussing the results of an experimental study which found that people prefer a settlement agreement that includes an apology over a higher wholly monetary settlement); Jennifer K. Robbennolt, Apologies and Legal Settlement: An Empirical Examination, 102 MICH. L. REV. 460 (2003) (finding that apologies facilitate settlement agreements in civil disputes); Daniel W. Shuman, The Role of Apology in Tort Law, 83 JUDICATURE 180, 180 (2000) (“Tort plaintiffs often claim that what they really wanted was an apology and brought suit only when it was not forthcoming or, that when they received an apology it was the most valuable part of the settlement”).

109 Apology processes vary greatly in how much humiliation they inflict. Compare, for example, an oral apology between two parties to one which is broadcast on national television.
damages award, the IR incentivizes the giving of apologies without overburdening those who strongly oppose them.\footnote{One may claim that the law should not mitigate the injury to libelers’ autonomy. I have not taken a stand on this issue here; my aim is to demonstrate that IRs tend to interfere less with right-infringers’ autonomy than direct remedies do. The weight afforded to this consideration when choosing the remedy may differ depending on the context.} In addition, by making apologies optional, the IR leaves those libelers who choose to apologize with ample discretion in shaping the form the apology takes.

Non-monetary IRs which involve a commission are rare and especially injurious to the wrongdoer’s autonomy. An example of this type of IR is when a man who has refused to comply with the order of a rabbinical court to give his wife a get is sent to prison. This remedy is only awarded in exceptional circumstances.\footnote{See supra notes 79–81 and accompanying text. Nevertheless, this IR may still be justified given the unavailability of a direct remedy against the husband, and the particularly detrimental effects of the man’s refusal on his wife’s autonomy, dignity, and liberty. See supra notes 49–50 and accompanying text.} Furthermore, as a rule, the IRs that were eventually discarded were those that entailed substantial injury to the autonomy and dignity of right-infringers. One example is the exercise of distraint by landlords. The Common Law originally allowed landlords to seize their tenants’ personal property, and to hold it until the overdue rent was paid.\footnote{Brandon et al., supra note 6, at 938–40.} Most American jurisdictions today do not grant landlords this right.\footnote{Id., at 942–43. The Uniform Residential Landlord and Tenant Act expressly abolishes distraint for rent. UNIF. RESIDENTIAL LANDLORD & TENANT ACT §4.205(b) (1972).} The abolishment of imprisonment as an incentive to pay debts is another example of the reluctance to employ IRs which significantly encroach upon autonomy.\footnote{Pablo Lerner, The Chief Enforcement Officer and Insolvency in Israeli Law, 7 THEORETICAL INQ. L. 565, 575 (2006) (“[C]ivil arrest for non-payment of debts disappeared in Western countries during the nineteenth century”); Note: Imprisonment for Debt: In the Military Tradition, 80 YALE L. J. 1679, 1679 (1971) (stating with respect to American law that “[i]mprisonment for debt as a method of enforcing commercial obligations is now banned in every state”).} In sum, most current IRs interfere less with people’s autonomy than direct remedies do. To the extent that reducing intervention with injurers’ autonomy is a worthwhile and important goal, it supports the use of IRs.

C. Enhancing the Value of Fulfilled Obligations

Self-compliance by the (actual or potential) right-infringer also confers a beneficial effect on right-holders. Arguably, something received through the voluntary fulfillment of an obligation would be worth more to the recipient than the same thing received as a result of state coercion. In an experimental study conducted elsewhere,\footnote{Daphna Lewinsohn-Zamir, Taking Outcomes Seriously, 2012 UTAH L. REV. 861.} I demonstrated that people perceive outcomes broadly and judge them in terms of various factors which are not limited to end-results. Consequently, events with similar end-results are seen to generate different outcomes with
different values. Specifically, the experiments revealed that when something is given to an entitled party “nicely,” with goodwill and mutual cooperation, the recipient places a higher value on what she has received and, conversely, unwilling giving decreases the value of the ensuing outcome in the eyes of the recipient. Thus, when a contracted-for asset is not transferred voluntarily by the promisor but is obtained only following a specific performance order by the court, the outcome has lesser value for the promisee, even when all pecuniary costs (such as litigation costs) are covered.116

These findings are highly relevant for efficiency analysis. Since the goal of economic efficiency is to maximize people’s welfare,117 measured by the extent to which their preferences are fulfilled,118 we should consider ways to encourage voluntary—rather than state-enforced—compliance. IRs can serve as an important tool in this regard, because the very existence of an IR may prevent a potential right violation altogether, and the exercise of an IR may prompt wrongdoers to fulfill their primary obligation to the right-holder without any need for state enforcement.119 In both cases, self-compliance would enhance the value of what the right-holder has received, as compared to coercive realization of the same end-result. However, it may very well be the case that ex ante self-compliance would be more beneficial to the recipient’s welfare than ex post self-compliance. There is usually no external indication with ex ante self-compliance that the other party contemplated non-compliance. Such indications exist with ex post self-compliance, but following the exercise of the IR, the wrongdoer fulfills her obligation without state enforcement. Notwithstanding this difference, it is reasonable to assume that even ex post self-compliance would be preferable from the perspective of the injured party to a scenario where the right-infringer resisted compliance every step of the way. Even if self-compliance following an IR is not voluntary in the full sense of the word, this type of remedy usually involves less coercion than a direct remedy,120 and therefore the value of the end-result for the right-holder would be higher.121

116 Id., Part II.
119 See supra notes 94–95 and accompanying text.
120 In this respect, the IR of imprisoning husbands who refuse to divorce their wives is the exception that proves the rule. See supra notes 78–81 and accompanying text.
121 One may argue that the injured party may sometimes derive greater satisfaction from coercing the injurer to perform her duty than from self-compliance. This can occur only in situations where the right was in fact infringed (in contrast those where the existence of an IR prevented the infringement).
Two additional examples will demonstrate this advantage of IRs. The beneficial ex ante effect of IRs is manifest with respect to apologies. A coerced apology—even if legally permissible—would have lesser value to the injured party than an apology offered at the injurer’s initiative.\(^{122}\) An IR which states that apologies can mitigate the damages award incentivizes libelers to voluntarily apologize,\(^{123}\) thereby enhancing the welfare of the injured party.

The favorable ex post effect of IRs can be illustrated with the case of legal or factual uncertainty. Sometimes, non-compliance and infringement stem from uncertainties about the existence or scope of a right.\(^{124}\) Removing the uncertainty may thus pave the way to voluntary self-compliance. The best-suited IR for this task is the declaratory judgment. Once the court has declared, e.g., that a certain contingency is covered by an insurance policy, it stands to reason that the insurance company would voluntarily pay the required sum, and no coercive enforcement would be necessary.\(^{125}\)

D. Encouraging Cooperation through Cognitive Dissonance

The two previous sections focus on the beneficial effect of self-compliance on the welfare of the parties: It reduces the injury to the autonomy of the right-infringer and enhances the value of the fulfilled obligation from the perspective of the right-holder. An additional advantage of self-compliance pertains to the educative role of the law. It is widely acknowledged that the law aims not only to change an individual’s external behavior—through the use of sanctions or rewards\(^{126}\)—but also to influence her values, attitudes and preferences.\(^{127}\) For instance, it would

\(^{122}\) See Latif, supra note 108, at 302–05 (citing scholars who claim that “coerced apologies are of little value”). But see LAZARE, supra note 71, at 117–19, 223–26 (claiming that while apologies should ideally be sincere in order to be maximally effective, sincerity is less important in public apologies and when the offender has been humiliated).

\(^{123}\) See supra notes 68–71 and accompanying text.

\(^{124}\) Such uncertainties may be augmented by the psychological phenomenon of self-serving bias. Behavioral studies have found that perceptions and judgments are often biased in a way that excessively favors the individuals themselves and their own interests. As a consequence of this, they fail to reach mutually beneficial agreements. Christine Jolls et al., A Behavioral Approach to Law and Economics, 50 STAN. L. REV. 1471, 1501–04 (1998).

\(^{125}\) See also WOOLF & WOOLF, supra note 57, § 1.12 (noting the role of declaratory judgments in eliminating uncertainties about people’s rights and duties). In a similar fashion, preliminary injunctions can reduce uncertainties by indicating the court’s position on the issue in dispute (see supra notes 85–88 and accompanying text). Sometimes this should suffice to remove obstacles to self-compliance.

\(^{126}\) For example, the law can deter people from behaving in a certain way by increasing the severity and certainty of punishment. TOM R. TYLER, WHY PEOPLE OBEY THE LAW 3 (2006).

be less than ideal if people refrained from racial discrimination simply to avoid the sanctions that the law inflicts on racist practices. By condemning and punishing this type of behavior, anti-discrimination laws endeavor to change people’s attitudes towards ethnic minorities.\textsuperscript{128} Equal treatment of minorities based on the belief that all people are equal is preferable to equal treatment out of fear of punishment.\textsuperscript{129} Thanks to the propensity of IRs to encourage self-compliance, they are apt to be superior to direct remedies as an educative device.

My argument is supported by the theory of cognitive dissonance, first articulated in 1957 by Leon Festinger.\textsuperscript{130} Cognitive dissonance is the uncomfortable state of tension that arises when an individual holds two psychologically inconsistent cognitions (attitudes, beliefs, opinions, and so on). The individual is motivated to reduce the unpleasant dissonance, possibly by altering one of the cognitions to make it more compatible with the other.\textsuperscript{131} Social psychologists have found that cognitive dissonance often occurs when a person’s behavior conflicts with a prior attitude, and that the dissonance may lead to attitude change.\textsuperscript{132} However, a precondition for attitude change is that the individual accept responsibility for her behavior.\textsuperscript{133} A prime example of perceived responsibility is freedom of choice. If a person could have chosen not to engage in a certain activity, her counter-attitudinal behavior produces a dissonance\textsuperscript{134} and consequently a change in her attitude to align it with the activity.\textsuperscript{135} In contrast, if she had no choice but to act in a counter-attitudinal way, the inconsistent behavior is attributed to the coercing source. No dissonance

\textsuperscript{128} See Kenworthy Bilz & Janice Nadler, Law, Psychology, and Morality, 50 PSYCH. LEARNING & MOTIVATION 101, 102 (2009).
\textsuperscript{129} See also Gerard E. Lynch, The Role of Criminal Law in Policing Corporate Misconduct, 60 LAW & CONTEMP. PROBS. 23, 46 (1997) (“For society to function, most people have to obey the law for reasons of conscience and conviction, and not out of fear of punishment”).
\textsuperscript{130} Leon Festinger, A Theory of Cognitive Dissonance (1957).
\textsuperscript{131} Elliot Aronson, The Social Animal 184 (10th ed., 2008).
\textsuperscript{133} Id., at 300.
\textsuperscript{134} See Colin Fraser et al., Introducing Social Psychology 257 (2001) (“[…] it is necessary for you to feel you have been in a position to exercise volition, to have decided or acted from your own choice, for dissonance to develop”).
\textsuperscript{135} Id., at 256 (“[…] if you hope to change someone’s views by getting him or her to act contrary to them, then the less overt pressure you appear to be exerting in eliciting the behavior the greater the chance of attitude change”). See also Charles A. Kiesler et al., Attitude Change: A Critical Analysis of Theoretical Approaches 206 (1969) (stating that “the greatest attitude change will occur theoretically when the pressure is the minimal amount necessary to induce the subject to perform the act”).
arises and hence there is no need to alter her attitude. Thus, in an interesting experimental study, white college students were asked to write an essay endorsing the doubling of scholarship funds for African American students at the expense of scholarships for white students. The members of one group were given a choice of whether to write the essay; the members of a second group were required to write it. The experimenters found that the students in the former group became more supportive of the scholarship policy and expressed more positive beliefs about African Americans in general.

A different way to explain attitude change as a means to reduce dissonance is through the notion of “inadequate justification.” The fewer external reasons people have to engage in behavior in conflict with their attitudes—e.g., compliance is not compelled, the penalties for non-compliance are not severe, the rewards for compliance are not large—the greater the dissonance and the greater the need for internal justification of their behavior. A likely response to the dissonance is altering one’s attitudes in the direction of the behavior, convincing oneself that the previously held beliefs were incorrect.

The dissonance theory of attitude change is supported by William Muir’s empirical study of educators’ opinions regarding prayer in public schools. Muir interviewed educators about their

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137 Michael R. Leippe & Donna Eisenstadt, Generalization of Dissonance Reduction: Decreasing Prejudice Through Induced Compliance, 67 J. PERSONALITY & SOC. PSYCH. 395, 400, 402, 404 (1994). See also Timothy C. Brock, Cognitive Restructuring and Attitude Change, 64 J. ABNORMAL & SOC. PSYCH. 264 (1962). In this study, non-Catholic college students were instructed to write an essay in favor of conversion to Catholicism. Brock found that the students who were informed that the essay was optional expressed a more positive change in attitude towards conversion to Catholicism than the students who were not so informed. Id., at 266–67, 270–71.

138 Experimental studies have found, counter-intuitively, that a mild punishment or a small reward have a stronger and longer-lasting effect on attitudes than a severe punishment or a large reward. For a general discussion of this issue, see Aronson, supra note 131, at 207–22. The inverse correlation between the severity of punishment and both attitude change and long-lasting compliance was demonstrated, for example, in Elliot Aronson & J. Merrill Carlsmith, Effect of the Severity of Threat on the Devaluation of Forbidden Behavior, 66 J. ABNORMAL & SOC. PSYCH. 584 (1963). In this study, children were threatened with either a mild or a severe punishment if they played with what they considered the most attractive of several toys. All the children refrained from playing with the forbidden toy. The experimenters then asked the children to rate the attractiveness of the toys for a second time. They found that the children who had received a mild threat now found the forbidden toy less appealing than before, but that the other children experienced no attitude change. Aronson & Carlsmith, id., at 586–87. Evidently, the possibility of receiving a mild punishment did not justify the decision to not play with the toy. Consequently, these children experienced cognitive dissonance, which led them to convince themselves that the once-preferred toy was undesirable. In contrast, the threat of severe punishment provided ample external justification for not playing with the toy. Hence, compliance did not cause a cognitive dissonance in these children, and their attitude remained unchanged.

139 William K. Muir, Jr., Prayer in the Public Schools: Law and Attitude Change (1967).
attitude towards daily prayer in schools several months before and after the Supreme Court ruled that religious exercises in public schools are unconstitutional and therefore prohibited.\textsuperscript{140} Muir found, inter alia, that those educators whose favorable attitude towards school prayer was not altered by the court’s decision stated that the ban was not their responsibility or that they had no alternative but to comply with the ban.\textsuperscript{141} In contrast, those educators whose attitude changed from supportive to critical of school prayer asserted that they had a choice between compliance and defiance. This perception of freedom of choice was based, for example, on the belief that the ban would not be enforced.\textsuperscript{142}

Dissonance theory suggests that IRs would educate people more effectively than direct remedies would. IRs do not order people to act in a way that would realize the desired outcome, but rather gives them a choice. Since right-infringers have this freedom, if they eventually decide to comply, they are more likely to attribute their behavior to their own volition than to external coercion. Consequently, it is more likely that they would experience dissonance and alter their anti-cooperative attitude towards the right-holder to justify their compliance. Even if those who self-comply do so due to the IR, and not because they truly care about the interests of the right-holder, this behavior may eventually lead to a real transformation. People who at first practice strategic self-compliance may ultimately learn to cooperate with others and arrive at consensual solutions, which would further obviate the need for legal intervention.\textsuperscript{143}

IRs may vary in the perceived freedom infringers are given. Arguably, self-compliance due to an omission-type or non-punitive IR (such as a possessory lien, suspension of performance, or rent abatement) is more likely to be perceived as voluntary than self-compliance due to a punitive IR (such as supracompensatory damages for refusal to divorce). Notwithstanding possible variations between the effects of different IRs, the likelihood of creating a dissonance that would alter people’s attitudes is even smaller when direct remedies are employed. The law’s external and coercive role in realizing the desired outcome is clearest and most blatant in this case.

\textsuperscript{141} Muir, supra note 139, at 88–89.
\textsuperscript{142} Id., at 93–94.
\textsuperscript{143} Note that cognitive dissonance theory is not the only psychological theory to explain why people who engage in counter-attitudinal behavior go on to change their attitudes. For example, according to Daryl Bem’s self-perception theory, attitude change does not result from the need to reduce unpleasant tension, but rather from a calm, rational process of inferring one’s attitudes from observing one’s behavior. Thus, if a person has freely chosen to act in a certain way, she may conclude that her behavior in fact reflects her beliefs. Daryl J. Bem, An Experimental Analysis of Self-Persuasion, 1 J. EXPERIMENTAL SOC. PSYCH. 199 (1965). Since Bem’s theory predicts the same results as cognitive dissonance theory (see Kassin et al., supra note 1, at 213), it also supports my argument that the propensity of IRs to induce voluntary self-compliance is likely to have beneficial long-term effects on attitudes and behavior.
Thus, the law should care about people’s reason for complying. A useful distinction in this context is between extrinsic motivation, grounded in the desire to receive a reward or avoid a punishment, and intrinsic motivation, based on conviction and involving the internalization of a value or belief. Social psychologists are agreed that conformity is less stable when it is based on extrinsic motivation: If a person is motivated by the threat of punishment, her compliance may depend on the existence of constant surveillance and public enforcement. Intrinsic motivation is independent of an external source, and is therefore self-sustaining and highly resistant to change. Importantly, conformity based on intrinsic motivation is likely to continue even in private and even without monitoring.

In conclusion, to the extent that IRs succeed in changing attitudes and providing intrinsic motivation for self-compliance, the law has a greater chance of achieving long-term educative effects.

E. Preserving Relationships and Decreasing Expressive Harms

Applying to court for a direct remedy seems to be a natural and straightforward way to enforce one’s rights. This step, however, may exact a steep price from both sides to the conflict. Litigation ordinarily ruins the relationship between the parties. Merchants who formerly transacted with one another sever their commercial ties; neighbors who used to greet each other warmly are no longer on friendly terms. In addition to its monetary costs, a law suit also exacts a high emotional cost. During the litigation process, each side does its best to discredit

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144 J. Richard Eiser, Social Psychology: Attitudes, Cognition and Social Behaviour 84–85 (1986). In a similar vein, Herbert Kelman distinguishes between “compliance” and “internalization.” Hebert C. Kelman, Processes of Opinion Change, 25 Public Opinion Q. 57 (1961). A person merely complies if “[h]e does not adopt the induced behavior […] because he believes in its content, but because it is instrumental in the production of a satisfying social effect” (id., at 62). In contrast, internalization occurs “when an individual accepts influence because the induced behavior is congruent with his value system” (id., at 65).

145 Fraser et al., supra note 134, at 266 (explaining that when behavioral change is not accompanied by attitudinal change, “if freed from the pressures and surveillance which initially produced the changed behavior, people are likely to revert to their previous actions”); Tyler, supra note 126, at 4 (“people who make instrumental decisions about complying with various laws will have their degree of compliance dictated by their estimate of the likelihood that they will be punished if they do not comply”).

146 Aronson, supra note 131, at 37, 38, 40; Fraser et al., id., id. (stating that internalized attitude change is “voluntarily maintained by self-monitoring”); Kelman, supra note 144, at 70 (asserting that when internalization occurs, a person will conform “quite regardless of surveillance”).

147 See Stewart Macaulay, Non-Contractual Relations in Business: A Preliminary Study, 28 Am. Soc. Rev. 55, 65 (1963) (“A breach of contract law suit may settle a particular dispute, but such an action often results in a ‘divorce’ ending the ‘marriage’ between the two businesses […]”).

the evidence or reliability of the other, and few experiences are as unpleasant as a cross-examination. Furthermore, a suit culminates with a publicized reasoned judgment involving justifications that typically impose non-monetary costs on the losing party. For example, by explaining how the defendant breached an obligation or behaved negligently, the judgment inflicts expressive harms and damages the defendant’s reputation. The creation of expressive harms may aggravate the hostility between the parties.

Because IRs can reduce animosity and expressive harms, they may work to preserve the relationship between the parties (pertinent to ongoing relationships), or at least minimize the non-pecuniary costs of the conflict (important also for one-time interactions and end-games). Both benefits are correlated with the IRs’ encouragement of self-compliance and only moderate interference with the injurer’s autonomy, as discussed above.

Generally speaking, IRs do not order the right-infringer to fulfill the desired outcome, but simply nudge potential or actual injurers in the right direction. If an injurer decides to voluntarily realize this outcome as a result of the IR, it may be difficult to pinpoint the role that the legal sanction played in her decision. Put differently, IRs allow the right-injurer to save face, because outwardly she has fulfilled her obligation without direct state enforcement. In this respect, the law is operating back stage rather than center stage. A closer look at different types of IRs will illustrate this point.

An IR consisting of an omission on the part of the right-holder is likely to engender relatively little hostility, especially if the IR is also a self-help measure. Thus, when a mechanic retains the fixed vehicle, a neighbor detains a trespassing animal, a promisee suspends her performance, or a tenant withholds the rent, there is a greater chance that the relationship can be salvaged than if the right-holder files a law suit against the injurer. In these four scenarios, the injured party’s behavior is passive in that she continues to hold on to a resource that she had received from the other party, had obtained incidentally, or was hers to begin with. Furthermore, in the absence of court intervention, there would be no official public document attesting to the injurer’s conduct.

149 See also Macaulay, supra note 147, at 65 (“Many executives […] dislike the prospect of being crossexamined in public”).
150 I do not deny the importance of reasoned judgments, such as in establishing precedents that will guide people’s behavior (see Strahilevitz, supra note 148, at 1251, 1254). My aim, however, is to highlight the advantages of IRs, which ordinarily require less-than-full litigation. These benefits may outweigh those of a suit culminating with a reasoned judgment. See also Strahilevitz, id., at 1254–55 (stating that “most litigation does not raise […] issues of first impression, and so it is only a small subset of filed complaints that have the propensity to contribute much to the development of the law”).
151 See supra notes 94–95 & 106–114 and accompanying text.
and hence expressive harms would be reduced as well.\textsuperscript{152} But even when the IR requires a court decision, it may be less destructive to relations and reputations than a full-blown suit for a direct remedy. One possible reason is that the final judgment does not contain any derogative statements with respect to the parties’ behavior. The declaratory judgment only determines the legal position on a certain issue.\textsuperscript{153} Second, since an IR often involves only a partial discussion of the conflict, the legal process is likely to be relatively short. Thus, a preliminary injunction does not necessitate that all the evidence be heard and rent abatement is limited to determining the appropriate rent reduction. Plausibly, the more legal issues that must be resolved and the more protracted the litigation, the greater the resultant hostility and expressive harms.\textsuperscript{154}

Although any litigation or even threat of litigation may adversely affect relationships,\textsuperscript{155} it stands to reason that the magnitude of this effect is influenced by various factors, including the type of IR employed. In this respect, it is useful to think of a continuum from low to high detrimental effects. As explained above, IRs which are realizable without court intervention by a self-help omission of the injured party, or merely entail a court declaration lie on the less-detrimental end of the continuum. At the other extreme are IRs that not only order the defendant to behave in a certain way, but are supracompensatory as well. Thus, the sum stipulated in an astreinte is not limited to the plaintiff’s losses, but is determined according to the degree of the defendant’s fault or defiance.\textsuperscript{156} Similarly, compensation for refusal to divorce is often of the aggravated kind.\textsuperscript{157} It is reasonable to assume that the punitive nature of the damages would

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\textsuperscript{152} See Lior Jacob Strahilevitz, Reputation Nation: Law in an Era of Ubiquitous Personal Information, 102 NW. U. L. REV. 1667, 1678–82 (2008) (arguing that tenants’ involvement in litigation—even as successful plaintiffs—brands them as litigious and adversely affects their chances of obtaining rental housing in the future); Strahilevitz, supra note 148, at 1244 (“By filing suit, even to enforce an uncontroversial statutory, tort, contract or property right, a plaintiff signals her litigiousness to the world”).

\textsuperscript{153} See WOOLF & WOOLF, supra note 57, § 1.10 (stating that declaratory proceedings “are ideal means of resolving disputes amicably with less danger of generating the antagonism which can be caused by the adversarial nature of litigation…”); Edson R. Sunderland, A Modern Evolution in Remedial Rights—The Declaratory Judgment, 16 MICH. L. REV. 69, 76 (1917) (“To ask the court merely to say whether you have certain contract rights as against the defendant is a very different thing from demanding damages or an injunction against him. When you ask for a declaration of right only, you treat him as a gentleman. When you ask coercive relief you treat him as a wrongdoer. That is the whole difference between diplomacy and war; the former assumes that both parties wish to do right, the latter is based on an accusation of wrong”).

\textsuperscript{154} See also Ward Farnsworth, Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral, 66 U. CHI. L. REV. 373, 384–91, 395–97 (1999) (an examination of twenty nuisance cases that showed that no bargaining occurred after judgment, largely due to animosity between the parties); Jolls et al., supra note 124, at 1498 (stating that “litigants are often not on speaking terms by the end of a protracted trial”).

\textsuperscript{155} Macaulay, supra note 147, at 61, 64.

\textsuperscript{156} See supra notes 45–47 and accompanying text.

\textsuperscript{157} See supra notes 52–54 and accompanying text.
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increase the hostility between the parties and the expressive harms to the defendant.\textsuperscript{158} A non-monetary IR which involves a commission is probably the most damaging measure in terms of non-pecuniary effects. It comes as no surprise that this type of remedy is limited to exceptional cases where the relationship is, in any case, beyond repair. A case in point is the imprisonment of Jewish men who have long refused to give their wives a get.\textsuperscript{159}

\textbf{F. Reducing Costs and Wealth Effects}

Litigation is typically a protracted and expensive affair. Litigants might have to wait years for their day in court\textsuperscript{160}; jurors and witnesses often lose many days of work.\textsuperscript{161} In addition, both sides to the dispute must bear their own litigation costs, including attorney and expert-witness fees, as the winner is not reimbursed for these expenses under the “American rule.”\textsuperscript{162} Suits for direct remedies—such as damages in contract or in tort—are especially costly, because they require the court to determine all the relevant facts, identify and resolve every legal issue, calculate the damages, and write a reasoned opinion. Furthermore, state enforcement mechanisms may be necessary to ensure that the court’s orders are executed. The costs involved in litigation place a heavy burden on the legal system and on people whose rights were infringed. Litigation costs have an especially pronounced detrimental effect on plaintiffs who are not wealthy.\textsuperscript{163} From the perspective of these (potential) plaintiffs, their injurers may be, de facto, “litigation proof.”\textsuperscript{164} The

\textsuperscript{158} Thus, the middle ground on the continuum of non-pecuniary costs is held by IRs that call for the injured party to receive payment in the amount of her loss.

\textsuperscript{159} See supra notes 78–81 and accompanying text.


\textsuperscript{161} Macaulay, supra note 147, at 64–65; Newman, \textit{id.}, at 1644.

\textsuperscript{162} James R. Maxeiner, \textit{Cost and Fee Allocation in Civil Procedure}, 58 AM. J. COMP. L. SUPP. 195, 197–98 (2010). Note that some costs are not reimbursed even under the “English rule,” which requires the losing party to pay the winning party’s attorney’s fees. The winner is not compensated, for example, for the time and inconvenience the lawsuit involved. POSNER, supra note 84, at 617.

\textsuperscript{163} This problem is exacerbated by the fact that “there is no legal right to state-support for representation in civil litigation.” Maxeiner, supra note 162, at 211. \textit{See also} Deborah L. Rhode, \textit{Access to Justice}, 69 FORDHAM L. REV. 1785, 1788 (2001) (noting that “[a]lthough courts have discretion to appoint council where necessary to assure due process, they have done so only in a narrow category of cases”).

\textsuperscript{164} See Rhode, \textit{id.}, at 1785 (“An estimated four-fifths of the civil legal needs of the poor, and the needs of an estimated two- to three-fifths of middle-income individuals, remain unmet”). \textit{See also} James W. Meeker & John Dombrink, \textit{Access to the Civil Courts for Those of Low and Moderate Means}, 66 S. CAL. L. REV. 2217, 2218–19 (1993) (noting the financial, cultural, and practical obstacles to pursuing a civil law suit).
resulting under-compensation of victims and under-deterrence of wrongdoers leads to inefficiency. 165

Since IRs need only to provide right-infringers with an incentive to self-comply, and do not require coercive enforcement of the desired outcome, they are less expensive than direct remedies. Reducing the costs of rights-enforcement is always worthwhile, but is especially crucial when the injured party is a person of modest means. IRs can mitigate the distorting effect of wealth on the realization of rights and thus improve access to justice. The extent of the reduction in costs varies with the circumstances and type of IR employed.

When the IR, by its very existence, can prevent the infringement, it reduces enforcement costs to zero. For example, when an owner who brings her car to a small auto-repair shop is cognizant of the fact that the mechanic can detain her vehicle until she has paid the bill, this awareness may induce her to voluntarily pay the mechanic’s fee, regardless of any reluctance she might feel. Although the existence of a direct remedy may also prevent right-infringement, this scenario is less likely for the reason that the potential injurer is aware that the injured party may choose not to go to court in light of the very high cost of suits for direct remedies. Since the employment of IRs entails significantly lower costs, there is a much greater likelihood that IRs will be exercised by the injured party. Consequently, IRs are a superior preventive device, available to non-affluent and affluent right-holders alike.

Even when the IR does not prevent the infringement of a right, its enforcement costs are low if it is based on self-help. An IR that can be exercised unilaterally by the injured party, with no need for an attorney or the court, is inexpensive or even free. Thus, for instance, an IR involving suspension of performance or procedural set-off requires only that the injured party refrain from action. 166

Finally, even when the IR requires an application to the court and possibly a lawyer, litigation costs are often lower than in suits for direct remedies, because the decision regarding the IR typically focuses on a particular issue and does not require that all aspects of the conflict be resolved. Put differently, since IRs aim to steer injurers in the right direction and to encourage self-compliance, they commonly require a more limited legal process. Thus, a declaratory

165 See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 397 (2004) (stating that the costliness of litigation causes victims to bring fewer claims and injurers to take fewer precautions than would be efficient).

166 Some forms of self-help are more costly. For example, distraint of trespassing animals requires that the animals be cared for and fed. However, this would still cost less than pursuing a law suit for the harm the animals caused.
judgment can be requested without providing proof that the right was infringed, acquiring expert testimony, or quantifying the plaintiff’s losses. Likewise, a preliminary injunction is issued at the start of litigation, before all the evidence has been heard.

Any cost-reducing IR improves the position of non-affluent right-holders, even if it does not specifically apply to low-income groups. Some IRs are especially relevant for those with few or moderate means, such as tenants, who are generally less well-off than their landlords (who presumably own at least one other piece of property in addition to the rental unit). Tenants may be financially unable to bear the costs of pursuing a law suit for damages or an injunction against a breaching landlord. In contrast, an IR such as rent-withholding, which commonly requires only that the landlord be notified, is simple and inexpensive. Even if the tenant is required to deposit the withheld rent into escrow, the costs are far lower than those of litigation for direct remedies. Similarly, although rent abatement requires a court decision in the United States, it is still relatively cheap and quickly realizable. For one thing, once the court authorizes the abatement and determines its scope, it can be instantly and unilaterally implemented by the tenant. All she has to do is reduce the amount of rent she pays. In contrast, an order for compensation or specific performance against the landlord may require enforcement by an external governmental body.

167 Indeed, a plaintiff can receive a declaration, e.g., about the correct construction of a contract not only following its breach but also before the breach occurs. UNIFORM DECLARATORY JUDGMENTS ACT § 3 (1922). Once uncertainties as to the correct legal position have been removed, the defendant may decide not to breach the contract, thereby saving further costs to both parties.

168 See WOOLF & WOOLF, supra note 57, § 1.09 (noting that declaratory judgments are inexpensive because they do not necessarily involve questions of fact).

169 See supra note 82 and accompanying text.

170 Brandon et al., supra note 6, at 959–60 (explaining that the litigation costs of landlord-tenant disputes may be prohibitive). See also Harvey Gee, From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court, 17 GEO. J. POVERTY L. & POL’Y 87, 87, 92–94 (2010) (describing the dire state of affairs in the housing courts in New York, where most tenants have no legal representation and their petitions receive only a few minutes of the court’s attention).

171 Rent withholding is a self-help measure in the majority of American jurisdictions. Bradon et al., supra note 6, at 958.


173 But see David A. Super, The Rise and Fall of the Implied Warranty of Habitability, 99 CAL. L. REV. 389 (2011). Super argues that many states have imposed substantive and procedural requirements that hamper low-income tenants’ chances of successfully invoking the implied warranty of habitability. Id., at 423–39. One such hurdle is the requirement that rent withholding must be a deliberate response to the lack of habitability, rather than unintentional non-payment of the rent. Id., at 425–26. However, Super acknowledges that these obstacles to widespread invocation of the IWH were not inevitable and could have been rejected by the court. Id., at 439–50. For the purposes of this Article, it suffices that IRs like rent withholding and rent abatement can be fashioned in a way that promotes the ability of non-affluent tenants to enforce their right to a habitable home.

174 See supra note 37 and accompanying text.
One may ask whether a better solution to the costliness of court-awarded direct remedies might be to grant tenants a *direct self-help* remedy. Would this not be optimal, since it compels the desired outcome and economizes on its costs? No, not necessarily. Take, for instance, rent application (“repair and deduct”), which allows the tenant to repair the premises herself and subtract the costs from the rent, provided the landlord had been notified of the defect and had neglected to repair it. One drawback of this remedy is that (at present) it is limited to relatively minor problems that do not require expensive repairs.\(^{175}\) While the law could be amended to allow for major, costly repairs as well, this would create other difficulties. Complex repairs are time-consuming, disruptive, and expensive,\(^ {176}\) and the typical tenant does not have the requisite expertise to contract for and supervise large-scale repairs. Furthermore, tenants who make significant repairs to the property face the risk that a court will decide that the work was not done properly or that the costs incurred were excessive.\(^ {177}\) For these reasons, sometimes IRs such as rent withholding and rent abatement are tenants’ only feasible option. While such remedies only incentivize the breaching party to self-comply and do not compel performance directly, they may be more successful than direct remedies in achieving the desired outcome.

### III. Crafting Indirect Remedies

Although IRs offer several distinct advantages, these advantages may not be equally realizable in every situation and the indirect form of redress is not suitable for every case of rights-infringement. This Part delineates the circumstances in which IRs are appropriate, discusses the risk that IRs will fail to induce self-compliance, advises how one would decide which IR is best suited to the case at hand, and suggests directions for the expansion of indirect redress.

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\(^{175}\) SCHOSHINSKI, *supra* note 27, §§ 3:36–3:38; Hirsch & Hirsch, *supra* note 35, at 8 (stating that tenants are allowed to deduct “no more than one or two months’ rent”). The Uniform Residential Landlord and Tenant Act places a monetary ceiling on repairs: $100 or one-half the periodic rent, whichever is greater. UNIFORM RESIDENTIAL LANDLORD AND TENANT ACT § 4.103 (1972). The Restatement allows the deduction of “reasonable costs incurred in eliminating the default” from the rent. RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 11.2 (1977). These are defined as a sum “that does not exceed the amount of the rent that will be available to apply against the cost.” *Id.*, cmt. c.

\(^{176}\) Brandon et al., *supra* note 6, at 957.

\(^{177}\) Hirsch & Hirsch, *supra* note 35, at 8–9 (noting that repairs undertaken by tenants could be deemed unjustified and therefore in breach of the lease). The Restatement explains that a tenant may use rent application only for a defect “which the tenant can and does eliminate” and that she should attempt to eliminate “only those defaults which a reasonably prudent owner would attempt to eliminate” and do so “in a manner which a reasonably prudent owner would adopt.” RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 11.2, cmt. c (1977).
A. Error Costs

An important consideration in the decision of whether to craft an IR is the risk of error. IRs aim to steer infringers in the correct direction, inducing them to self-comply. Therefore, an indirect approach is suitable for cases when we can be relatively certain what that direction is. Prima facie, an IR is appropriate in circumstances where there is little doubt about the existence of a right or the fact that it has been infringed.

“Reciprocity situations,” for example, meet this condition. Consider a scenario of two parties who have agreed on an exchange of resources. Since it is clear that the parties have mutual rights, there is a fairly low risk of error in an IR which allows one party to refrain from carrying out or completing her part of the exchange if the other party does not fulfill hers. When a vehicle is brought to an auto-repair shop, it is highly probable that the mechanic is entitled to remuneration, and hence an IR in the form of a possessory lien entails low error costs. For similar reasons, it makes sense to create a suspension-of-performance or rent-withholding IR, to be exercised should the other party fail to perform her part of the deal.

Arguably, IRs may involve errors that do not relate to the existence or infringement of a right. For example, exercise of a possessory lien may cost the car owner more than the payment she owes the mechanic. Furthermore, there is a risk that, in order to repossess the car, the owner would pay the mechanic a sum larger than the remuneration she is entitled to (and even pay her when no money is owed). Although these risks should not be ignored, I believe that they should not be given undue weight. First, there is a high chance that the IR would be effective and incentivize the injurer to perform her obligation before the loss materializes. Second, the car owner’s awareness of the existence of the IR and the damage she is likely to suffer if it is exercised may induce her to pay the mechanic’s bill on time. Third, the risk that IRs would be misused is not unique to these remedies and is likely to be smaller in reciprocity situations than in non-reciprocity scenarios, due to the typical existence of an agreement between the parties regarding their mutual obligations. 178 Lastly, it is reasonable to assume that individuals who are risk-averse would hesitate before employing an IR when there is considerable doubt about the existence of the right or its scope. Thus, a mechanic who detains a car of a person who does not owe her money would be liable in tort. The fear of incurring tortious liability would reduce the cases of unlawfully exercised possessory liens. 179

178 In addition, legislative and court-awarded IRs are much less susceptible to abuse than contractually created IRs that are fashioned in circumstances of unequal bargaining power.
179 Furthermore, the fear of injuring one’s reputation mitigates the risk of IR misuse.
A second category of cases where the risk of errors is relatively low includes both tort and contract scenarios. Other things being equal, self-help IRs are more appropriate to torts based on strict liability than to those that require the plaintiff to prove negligence. The negligence of an injurer may be controversial or difficult to verify, and consequently there is a high risk of error in exercising the IR. IRs entail less of a risk when liability is not conditioned upon the injurer’s fault, as in the case of the distrainment of trespassing animals. Since the possessor of livestock is strictly liable for the damage caused by intruding animals, there is a relatively low cost of error cost in granting a right to detain the animals. As contractual liability typically does not require fault, contract scenarios are prime candidates for IRs. In contrast, IRs are unsuitable for nuisance cases that involve complex factual and/or legal issues.

A third area where error costs are relatively low are those cases where the court has already determined the existence or infringement of a right. An obvious example is the declaratory judgment, which is awarded after a plaintiff has proved that she has a certain right; another is remedies for refusal to divorce. Both the monetary and in-kind IRs that aim to induce the giving of a get are awarded after a court has held that a man has unjustifiably refused to grant his wife a divorce.

Once we have identified those cases where we can state with confidence that a right exists or has been infringed, there may be another advantage to the IR: Unlike the direct remedy, the IR does not involve a risk of error in quantifying the loss. Whenever a court assesses the plaintiff’s losses—such as the magnitude of damages for breach of contract—there is a risk of computation errors. This is especially problematic when the harm to the plaintiff includes non-pecuniary losses. Since IRs aim to induce the injurer to self-comply, they can obviate the need for difficult

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180 See supra note 16 and accompanying text.
181 See Stephen A. Smith, Contract Theory 153 (2004) (claiming that “contractual liability is strict. It is no defense to argue that a breach was ‘not my fault,’ and the narrowness of the frustration doctrine means that a plea of changed circumstances is rarely successful”).
182 The tort of nuisance cannot be characterized as one of strict liability. Although fault is not a precondition for liability, it is a relevant consideration in balancing the competing interests of the parties. The existence of a nuisance depends on the unreasonableness of the defendant’s interference with the plaintiff’s reasonable use and enjoyment of her own land. Israel Gilead, Tort Law: Israel, in, International Encyclopedia of Law §§ 191–192 at 145–46 (2003).
183 The complexity of such cases may stem not only from the difficulty in deciding whether the defendant’s behavior constitutes a nuisance, but also from the need to determine the appropriate remedial outcome, whether complete or partial abatement of the nuisance or only monetary compensation.
184 Note that risk of error is higher when we are dealing with the IR of preliminary injunction. Although a preliminary injunction is also granted by court decision, it is issued before all the evidence has been heard. Nevertheless, error costs may still be lower in comparison with remedies that are not based on any court determination.
quantifications. Thus, if IRs such as suspension of performance and rent withholding induce injurers to voluntarily perform their contractual obligations, this error cost is avoided completely.

Elsewhere, IRs can mitigate the risk of computational mistakes. A case in point is damages for defamation. Libelous statements inflict not only monetary losses but emotional damage and a loss of dignity as well, both of which are notoriously difficult to monetize.\footnote{Stanley Ingber, Rethinking Intangible Injuries: A Focus on Remedy, 73 CAL. L. REV. 772, 772, 778–79 (1985); Robert L. Rabin, Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss, 55 DEPAUL L. REV. 359, 365 (2006).} An IR that states that apologies can mitigate the damages award will encourage wrongdoers to apologize of their own accord. By reducing the magnitude of non-pecuniary harms, an apology sidesteps the need to quantify these harms in monetary terms.

True, there are IRs that require the court to award damages for as long as the injurer does not perform her duty in-kind (in contrast to IRs that grant the injured party a right not to pay the injurer until she carries out her duty). Examples of such IRs are the astreinte and compensation for refusal to divorce. However, since in both cases the damages are punitive,\footnote{See supra notes 44–46, 52–54 and accompanying text.} the court need not accurately quantify the harm. Furthermore, to the extent that these IRs are effective, the punitive damages would be temporary, or it might not be necessary to collect them at all.

In sum, from the perspective of error costs, IRs are most suitable for types of cases where (a) the likelihood of error with respect to the existence or infringement of a right is low, and (b) when the risk of error in quantifying a direct remedy for the right violation is high.

**B. Effectiveness versus Other Goals**

Another important consideration is the probable effectiveness of the IR. There is little point in crafting a remedy unlikely to achieve its purpose. In this context, one may claim that since by definition IRs do not command injurers to realize the sought-after outcome, there is no guarantee that their goal will be achieved. Put differently, although successful IRs have significant benefits, in practice IRs may fail to have the desired effect on injurers. Before addressing this issue, I would point out that this concern is less relevant when the right-violation was caused by uncertainties about the existence or scope of the right. In these cases, once the legal state-of-
affairs has been clarified, self-compliance will plausibly follow.\textsuperscript{187} Likewise, coercive enforcement may not be needed if the injuring party is a public entity or the state.\textsuperscript{188}

Admittedly, there is no absolute assurance that the incentives generated by IRs would bring about self-compliance by the right-infringer.\textsuperscript{189} However, it would be a mistake to compare partially successful IRs to full-proof direct remedies, as the latter can also fail to vindicate rights. The frequently exorbitant cost of pursuing a civil suit for direct remedies may render the injurer “litigation proof.”\textsuperscript{190} Inexpensive and easily realizable IRs are likely to be more effective than costly direct remedies, at least for people of few or moderate means. I would not propose that IRs be the exclusive remedy available, but rather that they should ordinarily be optional, an alternative to direct forms of redress. Consequently, the right-holder herself would decide which route she prefers. She would estimate, for instance, the probability that an IR would suffice to induce self-compliance by the other party, and compare the risk of failed indirect incentives with the extra monetary and non-pecuniary costs of direct remedies. The tradeoff between effectiveness and other goals will favor IRs in some cases and direct remedies in others.

One may argue that legislators can bolster the effectiveness of IRs by crafting punitive—rather than compensatory—IRs. For instance, were rent abatement not limited to the proportion of the decrease in the market rent of the defective apartment\textsuperscript{191} but instead to twice this proportion, then the landlord would have a greater incentive to fix the apartment. Similarly, if libelers who do not apologize face the prospect of supracompensatory damages (rather than only damages for actual pecuniary and non-pecuniary losses), then more apologies would be offered voluntarily.

Nevertheless, punitive IRs should not be made generally available. Although a punitive IR may more effectively induce self-compliance than a non-punitive one, this greater effectiveness may conflict with other goals of indirect redress. Plausibly, the more penalizing the IR is, the greater its detrimental effect on the parties’ relationship and the greater the injury to the injurer’s autonomy and reputation. Furthermore, the right-infringer may perceive an extremely punitive IR as leaving her little choice not to comply. If she then attributes her compliance to the harsh

\textsuperscript{187} See supra notes 123–125 and accompanying text.
\textsuperscript{188} Cf. Lord Denning’s statement in Franklin v. The Queen [1974] 1 Q.B. 205, 218: “It is always presumed that, once a declaration of entitlement is made, the Crown will honor it. And it has always done so.”
\textsuperscript{189} In the notorious Abraham case (supra note 80), lengthy imprisonment did not induce the husband to grant his wife a divorce.
\textsuperscript{190} See supra notes 160–164 and accompanying text.
\textsuperscript{191} See supra note 36 and accompanying text.
For an explanation how freedom of choice and insufficient external justification create a cognitive dissonance that leads to attitude change, see supra notes 130–146 and accompanying text.

See also ELLIOT ARONSON & TIMOTHY D. WILSON, SOCIAL PSYCHOLOGY 198 (7th ed., 2010) (“So if you want a person to do something or not to do something only once, the best strategy would be to promise a large reward or threaten a severe punishment. But if you want a person to become committed to an attitude or to a behavior, the smaller the reward or punishment that will lead to momentary compliance, the greater will be the eventual change in attitude and therefore the more permanent the effect. Large rewards and severe punishments, because they are strong external justifications, encourage compliance but prevent real attitude change”).

Cf. Macaulay, supra note 147, at 63 (claiming that in repeat contractual interactions, both parties would avoid conduct liable to hamper future transactions between them).

In a similar vein, the “safeguarding of the relationship” consideration is inapplicable to a one-time tort interaction between strangers. See also Macaulay, id., at 65–66 (explaining that dealers sue the manufacturer for wrongful termination of their franchise because their relationship has ended and there is no prospect of future business between the parties).

See, respectively, supra notes 42–43 & 49–51 and accompanying text.
compliance, then the desired outcome has been achieved—and did not come at the expense of the attainment of other goals. If, however, the IR fails, the right-holder can still apply for a direct remedy.

Furthermore, the very existence of a direct remedy may increase the likelihood that the IR will succeed, at least with respect to plaintiffs who are relatively well-off. For instance, although the non-punitive remedy of declaratory judgment merely determines the legal state-of-affairs, and does not contain any orders, the defendant will commonly abide by it. The declaration operates as res judicata, and the defendant cannot challenge it in a subsequent suit; the plaintiff, however, is entitled to subsequently apply to the court for damages or an enforcement order. In that case, why not avoid further costs through self-compliance?

Not all punitive IRs conflict with the goals of preserving the parties’ relationship and decreasing expressive harms. In this respect, we may sometimes be able to have our cake and eat it too. Arguably, this is the case when the punitive feature of the IR is incidental, unintentional, or unavoidable, as when a mechanic exercises a possessory lien with respect to a car. The magnitude of the remedy’s “punitiveness” is determined by how much money the car owner owes and the value of the vehicle. The mechanic has no control over the fact that the vehicle in question is a Lamborghini, and she cannot exercise a possessory lien without detaining the car in its entirety. Similarly, when a party suspends her performance of a subsequent indivisible contractual obligation in response to the breach of a counter-obligation, the fact that the former obligation is more valuable than the latter is accidental and unavoidable. These factors mitigate the adverse effects of a punitive IR, in comparison to cases in which the injured party initiates a suit for a punitive remedy against the injurer.

C. Rational Nexus

The unique characteristic common to all IRs is that their immediate product is not the end-result that the law aims at, but rather something else. Is there a limit on what that “something else” can be, provided the IR induces injurers to self-comply? Yes, there are various reasons to favor a rational nexus requirement between the content of the IR and the injury to the right-holder. Without this nexus, both the right-violator and the general public are liable to perceive the IR as unfair and arbitrary. This would not only undermine the legitimacy of the legal rule or lead to

197 WOOLF & WOOLF, supra note 57, § 1.07. See also RESTATEMENT (SECOND) JUDGMENTS § 33 cmt. c & illus. 1 (stating that the declaratory judgment does not bar the plaintiff from suing for further relief, such as damages).
over-deterrence; the absence of a rational nexus would also hinder the attainment of some of the advantages of IRs.

Imagine an IR which states that a landlord who does not fix a defective apartment would be ineligible for a driver’s license, or that a car owner who does not pay a mechanic’s bill would be barred from practicing law. These sanctions are likely to be perceived as vindictive and non-proportional. It seems unreasonable to significantly obstruct a person’s mobility or freedom of occupation, even if she fails to perform her contractual obligations. Importantly, effectiveness and cost-reduction are not the only goals of IRs. IRs also aim to preserve interpersonal relationships and educate people to cooperate with one another, goals which will not be attained in the above examples. With a nexus-less IR, the punishment does not fit the crime. Because there is no connection between the harm caused and the sanction inflicted, right-infringers may not understand the educative message of the legal rule, and would focus on the sanction rather than on its cause. Furthermore, and for this very reason, a nexus-less IR is likely to engender greater hostility between the parties.

IRs must strike a delicate balance if they are to avoid these problems. For the IR to realize its potential advantages, the remedy must not coerce the injurer into achieving the desired outcome, but at the same time, it must be related to the injury itself. This balance can be achieved through a variety of rational nexus techniques. One, similar in flavor to “Tit for Tat” (TFT), is structured as a natural reaction to the right-infringement, and allows the injured party to respond to the injurer’s behavior in a qualitatively similar way. This IR provides a clear message to wrongdoers, and would probably be viewed as proportional to the loss suffered by the right-holder. TFT is the indirect technique used in such IRs as barring civil divorce (reciprocal to obstruction of divorce under religious law), possessory lien (non-payment of a debt related to the detained asset), and suspension of contractual performance (breach of the counter-performance).

A different rational nexus technique is “compensation in lieu of compliance.” The wrongdoer is not ordered to realize the desired outcome, but must pay damages for the harm resulting from this choice. Once again, there is a clear and reasonable connection between the IR and the injury to the right-holder. This device is employed when courts take a man’s refusal to divorce into account when deciding the equitable distribution of marital assets or determining the amount and

198 See supra Parts II.D & II.E.
199 This is “the policy of cooperating on the first move and then doing whatever the other player did on the previous move.” ROBERT AXELROD, THE EVOLUTION OF COOPERATION 13 (1984). Thus, if the other party chose not to cooperate, the first party will reciprocate with non-cooperation. Id.
200 See also AXELROD, id., at 122 (explaining that TFT “has great clarity” and “is eminently comprehensible to the other player”).
duration of maintenance awards. Similarly, in defamation cases, when courts award higher damages against libelers who do not apologize, they are highlighting the connection between the remedy and the loss incurred in the absence of an apology.\textsuperscript{201}

A small number of IRs fail to maintain a rational nexus. Israeli law, for example, authorizes the court to inflict various in-kind sanctions on Jewish citizens who have refused to comply with a judgment ordering them to divorce their spouse. These individuals may have their driver’s license or passport revoked, lose the right to have a bank account, and be ineligible to hold a civil-service job or work in a field that requires a license.\textsuperscript{202} From a rational nexus perspective, these IRs are highly problematic. The wrongdoer is made to suffer in a way that is unrelated to the injury inflicted on his or her spouse, and the sanction does not affect the spouse’s loss. A possible explanation—if not justification—for these unusual IRs is that they are meant to deal with spouses (usually husbands)\textsuperscript{203} who obstinately refuse to divorce. There is virtually no hope of educating them to cooperate, and, in any case, the couple’s relationship is beyond repair. Moreover, since the IR is the exclusive remedy (as a coerced get is invalid under religious law), harsh punitive measures may very well be the only legal option left. Notwithstanding these considerations, the IR of supracompensatory damages in tort\textsuperscript{204} may sometimes be preferable, at least when the recalcitrant spouse is relatively well-off. Such damages may be perceived as fairer, because they relate the wrongdoing to the corresponding harm. In addition, the payments would mitigate the injured spouse’s losses and enhance her welfare.

\textbf{D. Extensions}

Part II underscored the various advantages of indirect redress and Part III pointed to important considerations to bear in mind when crafting IRs. This analysis plausibly implies that the role of IRs should be expanded and additional forms of indirect relief created. While extensive

\textsuperscript{201} Note that a rational nexus may exist even when damages are supracompensatory. For example, although payments under an astreinte are punitive in nature, there is still a close relationship between the remedy and the fact that the plaintiff has suffered a loss from the defendant’s non-performance.

\textsuperscript{202} See Rabbinical Courts (Enforcement of Divorce Judgments), 1995, S.H. 139 § 2 (in Hebrew). See also IBAA (Jer) 186/00 Miron Elchanan v. The Central Committee of the Israel Bar Association (June 19, 2001) Nevo Legal Database (by subscription) (Isr.) (upholding a decision to deny a license to practice law to a man who refused to divorce his wife); File No. 373701/13 Rabbinical Court (TA), Anonymous v. Anonymous p. 4 (Nov. 17, 2011), Nevo Legal Database (by subscription) (Isr.) (ruling that a woman who refused to receive a divorce would be denied the right to a driver’s license and a bank account for a one-year period).

\textsuperscript{203} See supra note 52.

\textsuperscript{204} On tort compensation for the refusal to divorce, see supra notes 52–54 and accompanying text.
discussion of these possibilities exceeds the scope of this Article, I will introduce two examples that illustrate the potential for new IRs.

**Neighbor Relations in Condominiums.** The tendency of IRs to induce self-compliance reduces interference with right-infringers’ autonomy and decreases both expressive harms and animosity between the parties to the conflict. These benefits are particularly significant when the parties have an ongoing relationship. While the law currently offers IRs with respect to certain continuous relationships, such as that between landlord and tenant, it has no IRs for others, such as between apartment owners in condominiums. Members of a condominium association have sole ownership of their own apartments and concurrent ownership in the common elements (such as stairways, roof, garden, heating system, and water facilities). The areas held in common are not subject to partition. The governing board, elected by the owners, is responsible for maintaining the common elements, collecting assessment fees (also called common charges) for this purpose, and related tasks.

According to existing law, if the board neglects its duty to repair the common elements, the apartment owners must resort to a direct remedy: a suit for mandatory injunction or damages. Aside from being costly, this action is likely to have an adverse effect on neighborly relations. It may therefore be worthwhile to craft IRs akin to tenants’ remedies of rent withholding and rent abatement. Indeed, relation-preserving IRs can be regarded as especially crucial in the condominium context. Whereas most landlords do not reside in the same building as their tenants, members of a condominium association often see each other on a daily basis. In addition, since the board’s duty to repair the common elements is not conditioned on fault, there would be little risk of error as to the apartment owners’ right in this regard. Thus, alongside the possibility of directly coercing enforcement, the law should allow apartment owners to opt for a

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205 See *supra* Parts II.B & II.E.
206 See *supra* notes 194–196 and accompanying text.
207 See *Singer*, *supra* note 29, at 374.
209 Singer, *supra* note 29, at 374–76; Restatement (Third) of Prop. (Servitudes) §§ 6.5, 6.6 (2000).
210 This neglect may be due, e.g., to the fact that the defect affects only a small group of owners. A leaky roof, for example, primarily causes damage to the apartments on the top floor.
211 *See* RESTATMENT (THIRD) OF PROP. (SERVITUDES) § 6.13, cmt. c (2000); Agassiz West Condominium Association v. Solum, 527 N.W.2d 244, 247 (N.D. 1995) (stating that an aggrieved apartment owner can “bring an action for damages or injunctive relief for failure to comply with the condominium’s by-laws”).
212 See *supra* notes 27–39 and accompanying text.
213 On the importance of this condition in the crafting of IRs, see *supra* notes 180–183 and accompanying text.
milder remedy of either withholding or abating their assessment fees until they have been assured that the board will repair the common property.  Both IRs, executed passively through an omission by the right-holders, may be sufficient inducement for the board to fulfill its obligations, without jeopardizing neighborly relations.

Non-Pecuniary Losses. When a right is infringed, the injured party may suffer both pecuniary and non-pecuniary losses. Generally speaking, optimal deterrence requires that both types of losses be compensated for. In contract law, for example, non-pecuniary harms are dealt with under the heading of “emotional disturbance.” According to the Restatement (Second) of Contracts, recovery for mental distress depends on whether “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.” This condition may be satisfied when a main purpose of the contract was to provide enjoyment or pleasure. Thus, courts have granted emotional-disturbance damages when a couple had to find an alternative venue for their wedding after the banquet hall wrongfully scheduled another wedding for the same date, and when a family sued builders for defects in the construction of their new home. Mental-distress damages were also awarded for breaches relating to burial services.

Note that the new IRs can limit the right to withhold or abate assessment fees to those serious defects which significantly affect the apartment owners’ enjoyment. Be that as it may, the Article focuses on the new IRs of this type, rather than on the scope of the IRs. Under current law, courts refuse to acknowledge a right to withhold assessment fees, in the absence of express authorization by either the legislature or the declaration or by-laws of the condominium. See, e.g., Agassiz West Condominium Association v. Solum, 527 N.W.2d 244, 247 (N.D. 1995) (holding that the declaration and by-laws do not permit apartment owners “to withhold assessments for common charges for any reason,” and therefore they cannot refuse to pay “because of disagreements over repairs to common areas”); James E. Pooser and James E. Ross v. The Lovett Square Townhomes Owners’ Association, 702 S.W.2d 226, 230 (Tex. Ct. App. 1985) (stating that neither the Condominium Act nor the declaration mandate that “the duty to pay assessments is contingent upon the obligation to repair common elements”).

On the advantages of omission-type IRs, see supra notes 106 & 151–152 and accompanying text. See SHAVELL, supra note 165, at 242 (“If damages do not fully reflect nonpecuniary losses, parties’ incentives to reduce risks may be inadequate”).

My focus here is on non-pecuniary losses not caused by bodily harm. Courts are more willing to award emotional-disturbance damages in cases of physical harm. FARNSWORTH, supra note 20, § 12.17 at 293.


SMITH, supra note 181, at 429–30.

Murphy v. Lord Thompson Manor, Inc., 938 A.2d 1269, 1274–76 (Conn. Ct. App. 2008). Similarly, damages for mental suffering have been granted with respect to breaches of contracts by air-carriers, innkeepers and tour operators. TRIETEL, supra note 21, at 196.


Even when non-pecuniary losses are reasonably foreseeable,\(^{223}\) they are inherently difficult to quantify.\(^{224}\) The payment of money does not actually eliminate feelings of sorrow, anguish or anger,\(^{225}\) and any sum awarded is liable to be either under- or over-compensatory. In contrast, apologies are an effective means to ease mental distress, and on occasion can resolve the dispute altogether.\(^{226}\) However, court-ordered apologies are unavailable under American law,\(^{227}\) and, in any case, coerced apologies are inferior to voluntary ones.\(^{228}\) A desirable solution might be to incentivize breakers of contract to offer apologies of their own initiative, perhaps by creating a new IR that resembles the one used in the tort of defamation.\(^{229}\) Accordingly, contract law would state that apologies can mitigate compensation for emotional disturbance. By indicating that unwillingness to apologize would lead to a higher damages award, the IR encourages voluntary apologies. In this way, the law would be able to reduce both the magnitude of non-pecuniary harms and the risk of quantification errors.\(^{230}\)

These are but two examples of potential extensions of the availability of IRs. Other extensions can and should be considered, while taking into account the benefits and limitations these remedies offer.

**CONCLUSION**

This Article introduced a new and important category of remedies that has been overlooked in the literature: indirect relief. It demonstrated that the distinction between direct and indirect remedies cuts across all the familiar classifications of remedies, and that indirect remedies in fact abound in private law. Furthermore, the Article highlighted the propensity of indirect remedies to induce self-compliance by right-infringers and showed that this characteristic yields significant benefits to all parties involved: plaintiffs, defendants and courts. Indirect remedies may reduce


\(^{224}\) See Shavell, *supra* note 165, at 242 (noting that “because nonpecuniary losses cannot be observed directly, they are difficult for courts to estimate”).

\(^{225}\) Cf. 1 Dan B. Dobbs, Dobbs Law of Remedies: Damages-Equity-Restitution § 3.1 at 281–82 (2nd ed., 1993) (explaining why damages for non-pecuniary harm cannot be regarded as strictly compensatory, and justifying such damages, inter alia, on the grounds that they provide fellowship and public sympathy for the injured party).

\(^{226}\) See supra note 108.

\(^{227}\) Legislation which would authorize coerced apologies might be deemed an infringement on the right to free speech and therefore be unconstitutional. See supra notes 67–68 and accompanying text.

\(^{228}\) See supra note 122.

\(^{229}\) See supra notes 68–71 and accompanying text.

\(^{230}\) On error costs as a factor in the crafting of IRs, see Part III.A.
interference with personal autonomy, educate people to behave cooperatively, preserve interpersonal relationships, and mitigate litigation costs and wealth effects. In light of these benefits, the law should expand the use of indirect rights-enforcement to other situations where this form of redress is suitable, such as those suggested herein.