
DO THE RIGHT THING: INDIRECT REMEDIES IN PRIVATE LAW

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Private law provides diverse remedies for right violations: compensatory and punitive, monetary and nonmonetary, self-help and court awarded. The literature has discussed these (and other) classifications of remedies, yet it has overlooked the important distinction between direct and indirect remedies. Some remedies directly order rights-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, tort, 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 the distorting effect that wealth has on the vindication of rights. In light of these benefits, this Article sets guidelines for crafting additional indirect remedies in new contexts.

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 nonmonetary remedies,² and extrajudicial and court-

¹ Classifying remedies in this manner, 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 generally 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).

² According to this categorization, scholars debate the choice between damages and specific performance as the remedy for breach of contract. For a recent defense of

awarded remedies.³ 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 distinction between monetary and nonmonetary remedies. When the strived-for outcome is that the promisee receive 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 nonmonetary 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 wrongdoer to pay 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 extrajudicial 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 – should not 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, one that distinguishes between “direct” and “indirect” forms of redress. Indirect remedies (IRs) are unique in that their immediate product is *not* the end result that the law aims to achieve. Specifically, an IR attains the desired outcome by inducing the injurer to self-comply.

To illustrate, when a car mechanic exercises a possessory lien, the sought-after result is not that the vehicle remain in the mechanic’s 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 volunteer remuneration for the services rendered. Similarly, 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 the tenant’s enjoyment. Likewise, when a declaratory judgment states that a certain contingency is

expectation damages as the default contractual remedy, see Daniel Markovits & Alan Schwartz, *The Myth of Efficient Breach: New Defenses of the Expectation Interest*, 97 VA. L. REV. 1939 (2011).

³ 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).

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 pay willingly 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 nonmonetary, compensatory or punitive, self-help or court awarded.

This Article aims to be both descriptive and normative. Descriptively, it demonstrates that IRs are prevalent 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 nonmonetary end-product, and so forth and so on.

Normatively, this 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 steps instead of one? IRs offer several advantages over direct remedies. Generally speaking, IRs incentivize both potential and actual wrongdoers to *do the right thing* of their own accord, rather than *order* them to behave in the way that would realize the desired outcome. Self-compliance is highly beneficial. First, it interferes less with the autonomy of the right-infringer and at the same time enhances the value of what has been received in the eyes of the right-holder. Second, cognitive-dissonance theory suggests that IRs, as compared with direct remedies, would more effectively educate people to cooperate and to consider others' interests. To the extent that the law seeks to play an educative role,⁴ 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 nonpecuniary 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 remedies. Consequently, IRs can mitigate the distorting effect of wealth on the vindication of rights and improve access to justice.⁵

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.”).

⁵ 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

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.⁶ My analysis facilitates the more appropriate use of IRs and sets guidelines for designing IRs in new contexts. For instance, IRs are particularly well-suited to cases where there is (a) a low risk of error regarding the existence of a right and its infringement, and (b) a high risk of miscalculating a direct remedy. In addition, 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. Awareness of the existence of IRs and a better understanding of their various advantages and limitations can, however, improve the legal response to rights 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 assume that the right itself is well founded, and therefore concentrate on the indirect and direct ways of remedying its infringement.

This Article proceeds as follows. Part I provides a general taxonomy of IRs. It demonstrates the wealth of remedial possibilities with examples from property, contract, tort, intellectual property, and family law. Part II 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 to achieve. IRs are a means of steering potential and actual rights-infringers in the right direction, bringing about the desired outcome through self-compliance. Thus, the awarding of expectation damages constitutes a *direct* – rather than indirect – remedy, even though it anticipates

parties, constitute a major barrier to access to the courts).

⁶ The authors of a comprehensive article on self-help remedies did not distinguish between indirect and direct forms of self-help. See Douglas Ivor Brandon et al., *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.

the possibility that the promisee will 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 that 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 the behavior of individuals and deter them from violating rights.⁷ Thus, when the law awards compensation for copyright infringement, it not only redresses the harm done, but also deters the injurers from future violations (and may prevent copyright infringement *ex ante* as well). The mere fact that the remedy deters violations, however, does not render it an indirect remedy. To qualify as indirect, the remedy must 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 the nonpayment of a debt. 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 that she owns, but that is currently held by another person, until she pays the money. Both remedies deter the individual from not paying her debts and incentivize her to fulfill her obligations. Yet, whereas Remedy *A* rectifies the injury to the creditor’s right, 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.⁸ Smith argues that one should distinguish between the question of what duty a

⁷ See DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES 3-5 (8th ed. 2011) (stating that the deterrence of potential defendants and prevention of future right infringement is among the goals of tort, contract, and unjust enrichment remedies).

⁸ See Stephen A. Smith, *Rights and Remedies: A Complex Relationship*, in TAKING REMEDIES SERIOUSLY 31 (Robert J. Sharpe & Kent Roach eds., 2010).

person has towards another and the question of what remedy the court should give when that duty is breached.⁹ 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.¹⁰ 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.¹¹

The distinction I propose between direct and indirect remedies cuts across Smith's classifications. A direct remedy can be replicative or nonreplicative. Thus, for instance, while an injunction against a trespasser to land or an order for specific performance against a promisor replicates the defendant's duty towards the plaintiff, the awarding of expectation damages or punitive damages does not.¹² In a similar fashion, an indirect remedy is not necessarily nonreplicative, although, by definition, it does not order the right infringer to perform her duty. The prime example is 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 are relevant also to such privately crafted remedies. My focus, however, is on legislative and court-awarded IRs, which are generally available even to unsophisticated parties. It is worthwhile to note that the latter type of 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 (DO). For example, the DO of a monetary IR may be that the injured party receive something in-kind. Conversely, the DO of an in-kind IR may be that the injured party receive money. Even when the IR and the DO are of the *same type*, their content may differ. For instance, the IR and the DO can both involve a nonmonetary asset, but a different one. Below I

⁹ *Id.* at 42.

¹⁰ *Id.* at 33, 39, 43-47. Smith acknowledges that most court orders are replicative; that is, they "command[] defendants to do the very thing they should have done already." *Id.* at 47.

¹¹ *Id.* at 49-51, 55, 58-59.

¹² *See id.* at 47, 49-51 (stating 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 nonreplicative because it "replaces a non-monetary rule-based duty with a monetary court-ordered duty." Stephen A. Smith, *Rule-Based Rights and Court-Ordered Rights*, in *RIGHTS AND PRIVATE LAW* 221, 247 (Donal Nolan & Andrew Robertson eds., 2012). 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. *Id.* at 244.

elaborate on these and other possibilities and examine their manifestation in current legal rules.

A. *From an In-Kind Indirect Remedy to a Monetary Desired Outcome*

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 to her. This type of IR can take several forms.

1. 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.¹³ A prime example is an automobile mechanic.¹⁴ In order to encourage the owner to pay for the work done on her car, the mechanic is permitted to retain possession of the car without being liable for unlawful detention until the owner pays for the work.¹⁵ Although the mechanic cannot sell the car to satisfy his claim for remuneration,¹⁶ the detention of the asset is an inexpensive and easily exercised self-help device that 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-kind¹⁷ remedy will indirectly bring about the desired monetary outcome.

2. Distrainment of Animals

Another in-kind remedy that aims at a monetary outcome is the distrainment of trespassing animals. Possessors of livestock are strictly liable for the damage caused by intruding animals.¹⁸ The injured landowner can sue in tort

¹³ RAY ANDREWS BROWN, *THE LAW OF PERSONAL PROPERTY* § 13.1, at 390-91, 394-95 (Walter B. Raushenbush ed., 3d ed. 1975); N.E. PALMER, *BAILMENT* 943, 945-46 (2d ed. 1991); *id.* § 13.2, at 396-97.

¹⁴ BROWN, *supra* note 13, § 13.1, at 393.

¹⁵ E.L.G. TYLER & N.E. PALMER, *CROSSLEY VAINES' PERSONAL PROPERTY* 137 (5th ed. 1973).

¹⁶ PALMER, *supra* note 13, at 944. In this respect, the common law possessory lien differs from a pledge. *See* 2 GRANT GILMORE, *SECURITY INTERESTS IN PERSONAL PROPERTY* § 43.1, at 1183 (1965) (explaining a 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 13, § 14.1, at 446.

¹⁷ Here and elsewhere in this Article, "in-kind" – in relation to a remedy – refers to a nonmonetary remedy.

¹⁸ RESTATEMENT (SECOND) OF TORTS § 504(1) (1977); W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* § 76, at 540 (5th ed. 1984). This tortious liability may be conditioned on the injured party's fencing off her land. RESTATEMENT (SECOND) OF TORTS § 504(4) (1977); *see also* 2 DAN B. DOBBS ET AL., *THE LAW OF TORTS* § 438, at 843-

for direct redress, that is, to receive a monetary award for her losses.¹⁹ 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.²⁰ The injurer's need to recover her livestock quickly may motivate her to compensate the injured landowner voluntarily. 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.²¹

3. 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 to require that the parties perform simultaneously.²² Indeed, contract law presumes that the parties are to perform their obligations concurrently absent contrary agreement.²³ 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.²⁴ Thus, the seller in our example is granted an in-kind self-help remedy²⁵ – the right to postpone

44 (2d ed. 2011).

¹⁹ ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* 46 (1991).

²⁰ *Id.* at 46-47 (describing the remedy of distraint in California's Estray Act); David S. Steward, *Iowa Agricultural Fence Law: Good Fences Make Good Neighbors*, 43 *DRAKE L. REV.* 709, 717 (1995) (discussing the distraint remedy in Iowa).

²¹ ELLICKSON, *supra* note 19, at 46 n.27 (citing WASH. REV. CODE ANN. § 16.60.015 (Supp. 1989)); Marsha K. Ternus, *Liability for the Escape of Animals*, 30 *DRAKE L. REV.* 257, 269 (1980-81).

²² 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 541 (4th ed. 2004).

²³ G.H. TREITEL, *REMEDIES FOR BREACH OF CONTRACT: A COMPARATIVE ACCOUNT* 280 (1988) (“[T]he 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.”).

²⁴ 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.”).

²⁵ Mark P. Gergen, *A Theory of Self-Help Remedies in Contract*, 89 *B.U. L. REV.* 1397, 1398 (2009) (“[T]he principal self-help remedy in contract is the power to withhold performance in response to breach.”).

delivery of the asset – that aims to induce the buyer to pay. Since noncompliance would deny the buyer the benefit of the bargain, the in-kind remedy is likely to bring about the desired monetary result indirectly.²⁶

The IR of suspending performance is not limited to cases where the mutual obligations are due concurrently. If one party fails to perform on the required date, the injured party may be entitled to withhold performance of her remaining obligations.²⁷ Returning to the same example, the seller's nondelivery can be a response to the buyer's earlier failure to perform 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 nonperformance by the other party. Before she can receive the counter-performance, the prospective breacher must provide adequate assurances that she will perform.²⁸

B. *From a Monetary Indirect Remedy to an In-Kind Desired Outcome*

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

1. 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 must be fit for human habitation.²⁹ 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.³⁰ If the landlord breaches this obligation, the tenant is entitled to, among other things, terminate the lease³¹ or sue for damages.³² But it may be that what the tenant most desires is for the landlord to repair the premises. Indeed, the whole

²⁶ 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 that she expects to get from the bargain”).

²⁷ RESTATEMENT (SECOND) OF CONTRACTS § 237 (1981).

²⁸ FARNSWORTH, *supra* note 22, § 8.23, at 593-97 (explaining that the Uniform Commercial Code empowers a party that believes that the other party will not perform “to demand assurance that performance will be forthcoming”).

²⁹ 1 MILTON R. FRIEDMAN, FRIEDMAN ON LEASES § 10:1.2, at 10-13 (Patrick A. Randolph, Jr. ed., 5th ed. 2013); ROBERT S. SCHOSHINSKI, AMERICAN LAW OF LANDLORD AND TENANT § 3:16, at 122 (1980).

³⁰ WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 6.38, at 303-04 (3d ed. 2000). Courts have generally refused to uphold even express waivers of the warranty of habitability by tenants. FRIEDMAN, *supra* note 29, § 10:1.4, at 10-27 & n.53.

³¹ JOSEPH WILLIAM SINGER, INTRODUCTION TO PROPERTY 484 (2d ed. 2005).

³² *Id.* at 482, 485-86.

purpose of crafting an IWH is to ensure that rental housing is in habitable condition.³³

This outcome may be achieved directly by an action for mandatory injunction against the landlord.³⁴ The law, however, offers the tenant two indirect avenues as well: rent withholding and rent abatement. The first allows the tenant to withhold rent as long as the landlord fails to fulfill her obligations,³⁵ whether by simply holding back the rent³⁶ or by depositing it into an escrow account.³⁷ 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.³⁸ Rent abatement ordinarily requires a judicial proceeding,³⁹ and, as the *Restatement (Second) of Property: Landlord and Tenant* states, "is allowed until the default is eliminated, or the lease terminates, whichever first occurs."⁴⁰ 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 third-party rights adversely affect the property, or the landlord interferes with the tenant's use and enjoyment or fails to perform a promise that deprives the tenant of a significant incentive for having entered into a lease.⁴¹ As in the case of the IWH, the monetary remedy may

³³ See STOEBCUK & WHITMAN, *supra* note 30, § 6:41, at 318 ("[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.").

³⁴ SCHOSHINSKI, *supra* note 29, § 3:32, at 152.

³⁵ SINGER, *supra* note 31, at 484.

³⁶ Brandon et al., *supra* note 6, at 958 (explaining that a majority of U.S. 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 defense against retaliatory eviction by the landlord for failure to pay rent. On such a defense, see SINGER, *supra* note 31, at 488-90.

³⁷ RESTATEMENT (SECOND) OF PROP.: LANDLORD AND TENANT § 11.3 (1977); Werner Z. Hirsch & Joel G. Hirsch, *The Changing Landlord-Tenant Relationship in California: An Economic Analysis of the Swinging Pendulum*, 14 SW. U. L. REV. 1, 9 (1983).

³⁸ SCHOSHINSKI, *supra* note 29, § 3:25, at 141-44; Edward H. Rabin, *The Revolution in Residential Landlord-Tenant Law: Causes and Consequences*, 69 CORNELL L. REV. 517, 525 (1984).

³⁹ 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 (1977). Only in Pennsylvania is rent abatement a self-help remedy. *Id.* § 11.1 reporter's note 2.

⁴⁰ *Id.* § 11.1.

⁴¹ *Id.* §§ 4.2, 4.3, 5.1, 5.2, 6.1, 6.2, 7.1.

indirectly bring about a desired outcome in-kind: removal of the legal or physical obstructions to the tenant's enjoyment.

2. Suspension of Performance

The IR of withholding performance discussed above⁴² 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 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.⁴³

Rent withholding, rent abatement, and suspension of performance aim to pressure the breaching party to perform by allowing the nonbreaching party to withhold money otherwise owed. Yet indirect monetary remedies may also pressure the breaching party to perform in-kind by requiring her to pay the nonbreaching party a certain sum of money. Two examples of this are the *astreinte* remedy in contracts and tort compensation for refusal to divorce.

3. *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*).⁴⁴ 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.⁴⁵

In response, French courts have developed the *astreinte*, an original form of enforcement.⁴⁶ The judge orders that the defendant pay the plaintiff a certain sum of money for each day she does not perform in-kind.⁴⁷ The payment is not

⁴² See *supra* Part I.A.3.

⁴³ U.C.C. § 2-507(1) (2011) ("Tender of delivery is a condition to the buyer's duty to accept the goods and, unless otherwise agreed, to his duty to pay for them.").

⁴⁴ KONRAD ZWEIGERT & HEIN KÖTZ, INTRODUCTION TO COMPARATIVE LAW 475-76 (3d rev. ed. 1998).

⁴⁵ *Id.* at 475.

⁴⁶ The *astreinte* was adopted in the legislation of other countries, such as Greece, Portugal, and Poland. *Id.* at 479. Subsequent French legislation has declared the *astreinte* to be independent of a damages award. DONALD HARRIS & DENIS TALLON, CONTRACT LAW TODAY: ANGLO-FRENCH COMPARISONS 269 (1989).

⁴⁷ HARRIS & TALLON, *supra* note 46, at 268. There are two types of *astreintes*: provisional and definitive. Under the former, the final sum to be paid is determined on a later date and the court may order a lower sum than the one initially set. Under the latter, the monetary sum for every day, week, or month of default is fixed in advance and cannot be changed. The *astreinte* expires at the end of the period indicated in the judgment, but the

limited to the plaintiff's losses, but is determined by the degree of the breaching party's recalcitrance and her capacity to perform.⁴⁸ This penal remedy has been 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.⁴⁹ 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.⁵⁰ In both cases, the indirect monetary remedy is intended to bring about a sought-after in-kind outcome.

4. Compensation for Refusal to Divorce

According to Jewish religious law, a woman can obtain a divorce – known as a *get* – only if her husband grants it of his own free will.⁵¹ A *get* that is not voluntarily given is invalid.⁵² A woman who is not granted a *get* is considered married under Jewish law, even if she obtains a civil divorce.⁵³ Her future relationships will be regarded as adulterous and children born of such relations will be considered illegitimate.⁵⁴

Since courts and legislatures cannot award a *get* coercively,⁵⁵ they have adopted indirect measures to address the wife's plight.⁵⁶ For example, Israeli

plaintiff can apply for a new *astreinte* if the defendant remains in default. TREITEL, *supra* note 23, at 59-61.

⁴⁸ ZWEIGERT & KÖTZ, *supra* note 44, at 478 (“[T]he *astreinte* has nothing to do with compensation and should normally be related in amount to the degree of the debtor's fault in not performing and to his economic circumstances.”).

⁴⁹ TREITEL, *supra* note 23, at 61.

⁵⁰ For instance, an *astreinte* may be used to encourage the promisor to deliver a specific car or to convey a parcel of land. See ZWEIGERT & KÖTZ, *supra* note 44, at 476-77.

⁵¹ Benjamin Shmueli, *What Have Calabresi & Melamed Got to Do with Family Affairs? Women Using Tort Law in Order to Defeat Jewish and Shari'a Law*, 25 BERKELEY J. GENDER L. & JUST. 125, 137 (2010).

⁵² *Id.*

⁵³ Adam H. Koblenz, *Jewish Women Under Siege: The Fight for Survival on the Front Lines of Love and the Law*, 9 U. MD. L.J. RACE RELIGION GENDER & CLASS 259, 276 (2009).

⁵⁴ *Id.* at 276-77.

⁵⁵ Edward S. Nadel, *New York's Get Laws: A Constitutional Analysis*, 27 COLUM. J.L. & SOC. PROBS. 55, 60 (1993).

⁵⁶ Refusals to divorce pose a far greater problem for the Jewish wife than for the Jewish husband. Although the *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 *get*. Yehiel S. Kaplan, *Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law*, in 15 JEWISH L. ANN. 57, 75-76 (Berachyahu Lifshitz ed., 2004) (explaining when a husband will

courts have recognized tort claims for losses due to the husband's unjustified refusal to give a *get*. Thus, a woman can receive substantial monetary compensation for the injury to her autonomy and dignity, her inability to remarry, and her lost opportunity to have legitimate children with a new partner.⁵⁷ Significant damages awards may prompt men to consent to a divorce.⁵⁸ New York's Domestic Relations Law provides another example of a civic remedy that aims to induce Jewish husbands to grant their wives a religious divorce. An amendment from 1992 allows the court to take a husband's refusal to grant a *get* into account when deciding the equitable distribution of marital assets or determining the amount and duration of maintenance awards.⁵⁹ Once again, the monetary remedy strives to bring about an in-kind outcome indirectly – the giving of a *get*.⁶⁰

be permitted to marry a second wife); Nadel, *supra* note 55, 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. See Ariel Rosen-Zvi, *Family and Inheritance Law*, in INTRODUCTION TO THE LAW OF ISRAEL 75, 85 (Amos Shapira & Keren C. DeWitt-Arar eds., 1995).

⁵⁷ There is no specific tort of *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 *get* should be given). Shmueli, *supra* note 51, at 138-39, 148-58.

⁵⁸ Shmueli reports that "courts have awarded punitive, aggravated, or increased damages for intangible non-pecuniary injury." *Id.* 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 *get* in exchange for the wife's waiver of the monetary award as "monetary coercion," which would invalidate the *get*. For discussion of this issue, see Kaplan, *supra* note 56, at 61-107.

⁵⁹ N.Y. DOM. REL. LAW § 236, pt. B, (5)(h) & 6(d) (McKinney 2010) ("In any decision . . . the court shall, where appropriate, consider the effect of a barrier to remarriage . . ." *Id.* § 236, pt. B, 5(h)). 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 *get*, and indeed, it and similar statutes have been coined "*get* statutes." Joel A. Nichols, *Multi-Tiered Marriage: Ideas and Influences from New York and Louisiana to the International Community*, 40 VAND. J. TRANSNAT'L L. 135, 153 (2007). For an application of this IR, see *S.A. v. K.F.*, 22 Misc. 3d 1115A (N.Y. Sup. Ct. 2009) (holding that the husband's entitlement to half of his wife's pension benefits and to maintenance payments was conditioned upon him voluntarily granting her a *get* within forty-five days); see also *Jamie Pinto v. Nesim Pinto*, 622 N.Y.S.2d 701 (N.Y. App. Div. 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).

⁶⁰ For discussion of in-kind (rather than monetary) IRs that aim to induce *get*-giving, see *infra* Parts I.E.1, III.C.

C. *From a Declaratory Indirect Remedy to a Monetary or In-Kind Desired Outcome*

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

A declaratory judgment states the legal position regarding an issue in dispute,⁶¹ and, in contrast to an executory judgment, does not include an order that can be enforced against the defendant.⁶² A basic condition for granting this equitable remedy is that the question referred to the court is not hypothetical.⁶³ There is a conflict to be resolved, and a declaration is likely to have a practical effect on the parties.⁶⁴ 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,⁶⁵ a particular asset belongs to a specific person,⁶⁶ or a certain interpretation of a will is correct.⁶⁷ The goal in granting the declaratory judgment is that the money be paid, the property promptly transferred, or the will executed accordingly, as the case may be.⁶⁸

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. But 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 not initiate enforcement proceedings against her.⁶⁹ In this respect, even a negative

⁶¹ See SIR HARRY WOOLF ET AL., *THE DECLARATORY JUDGMENT* 1 (3d ed. 2002).

⁶² *Id.* at 2. The declaration does, however, operate as *res judicata*. See RESTATEMENT (SECOND) OF JUDGMENTS § 33 (1982). Thus, a defendant who subsequently behaves contrary to the declaration cannot challenge it in future proceedings. See WOOLF ET AL., *supra* note 61, at 4.

⁶³ See RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. a (1982); ADRIAN ZUCKERMAN, *ZUCKERMAN ON CIVIL PRACTICE: PRINCIPLES OF PRACTICE* § 22.19, at 792 (2006).

⁶⁴ See RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. a (1982) (“[T]he 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.”).

⁶⁵ See 14 LEE R. RUSS & THOMAS F. SEGALLA, *COUCH ON INSURANCE* § 202:3 (3d ed. 1999).

⁶⁶ WOOLF ET AL., *supra* note 61, at 2.

⁶⁷ See, e.g., RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. a (1982).

⁶⁸ 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.

⁶⁹ For a description of such a case, see WOOLF ET AL., *supra* note 61, at 18-19.

declaration can affect the defendant's behavior and indirectly achieve another desired outcome.

D. *From a Monetary or In-Kind Indirect Remedy to a Declaratory Desired Outcome*

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.

The remedy of court-ordered apology generally is unavailable in the United States in civil proceedings.⁷⁰ The denial of this relief primarily rests on recognition of the individual's right *not* to speak, which is part of the constitutional right to free speech.⁷¹ At the same time, voluntary apologies and retractions of defamatory statements can be offered by defendants in mitigation of damages.⁷² An apology or retraction is a defendant's acknowledgement of the injury to the plaintiff⁷³ and, in the case of an apology, also an expression of regret for the harm caused.⁷⁴ These statements are different from those that the court issues 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 ordered to pay higher damages.⁷⁵ The additional 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 insofar as an apology or retraction can mitigate damages only if it is extended before the sum has been determined.

⁷⁰ See Jennifer K. Robbennolt et al., *Symbolism and Incommensurability in Civil Sanctioning: Decision Makers as Goal Managers*, 68 BROOK. L. REV. 1121, 1147 n.114 (2003). In contrast, apologies can be coerced in some countries, such as Japan and South Korea. See Pierre-Dominique Ollier & Jean-Pierre Le Gall, *Various Damages*, in 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 3, 89-93 (André Tunc ed., 1986).

⁷¹ See Jonathan R. Cohen, *Advising Clients to Apologize*, 72 S. CAL. L. REV. 1009, 1018 & n.25 (1999).

⁷² See Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 479-80 (1986).

⁷³ 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 . . .").

⁷⁴ See 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).

⁷⁵ See Wagatsuma & Rosett, *supra* note 72, at 479.

Once the judgment for higher damages has been awarded, the defendant cannot reduce the amount by offering an apology or a retraction. But 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 apologize voluntarily or retract their defamatory statements.

E. *From an In-Kind Indirect Remedy to an In-Kind Desired Outcome and from a Monetary Indirect Remedy to a Monetary Desired Outcome*

Each of the IRs discussed thus far has differed in terms of type from the outcome it seeks to bring about. But IRs are not limited to such cases; 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.

1. In-Kind 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*.⁷⁶ Such indirect inducement, however, can also be nonmonetary. A case in point is the New York Domestic Relations Law, which provides 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.⁷⁷ This applies only to the spouse suing for civil divorce, and, consequently, if a man does not seek a civil divorce, the statute cannot address his wife's condition.⁷⁸ Despite any shortcomings of the rule,⁷⁹ 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*).⁸⁰ Interestingly, Israeli law recognizes a harsher in-kind remedy to incentivize a divorce: the imprisonment of a husband⁸¹ who refuses to comply with a rabbinical court's order to give a *get*.⁸² Since the goal

⁷⁶ See *supra* Part I.B.4.

⁷⁷ N.Y. DOM. REL. LAW §§ 253(2), 253(6) (McKinney 2010). Although the statute does not expressly refer to a Jewish divorce, its purpose is to prevent Jewish men from withholding *gets*. Koblenz, *supra* note 53, at 280; Nadel, *supra* note 55, at 71 & n.134.

⁷⁸ See Nichols, *supra* note 59, at 161-62.

⁷⁹ See Nadel, *supra* note 55, at 73-74 (explaining ways in which the *get* statute is underinclusive).

⁸⁰ Most of the literature on the *get* statutes focuses on their constitutionality, and thus far the statutes have withstood constitutional scrutiny. See *id.* at 78-99.

⁸¹ 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 56.

⁸² For discussion of this unique remedy, see Kaplan, *supra* note 56, 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, 5755-1995, SH No.

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.⁸³ Although the extreme measure of imprisonment is employed only in exceptional circumstances,⁸⁴ it is an example of an in-kind remedy that aims at a different in-kind result.

2. Preliminary Injunctions

A preliminary injunction is a court order issued at the beginning of the litigation, before the court has heard all the evidence and decided the case on the merits.⁸⁵ 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.⁸⁶ Preliminary relief will be given only if the injunction is required to prevent irreparable harm to the plaintiff that outweighs the irreparable harm to the defendant that granting the preliminary remedy would be likely to cause.⁸⁷ 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,

1507 p. 139 (Isr.); File No. 4534-21-1 Rabbinical Court (Jerusalem), Anonymous v. Anonymous 2 (Apr. 3, 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*).

⁸³ CA 164/67 Attorney General v. Yachia Abraham, 22 PD 29, 48, 52 [1968] (Isr).

⁸⁴ 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 56, at 112-13.

⁸⁵ ZUCKERMAN, *supra* note 63, § 9.5, at 298-99.

⁸⁶ Richard R.W. Brooks & Warren F. Schwartz, *Legal Uncertainty, Economic Efficiency, and the Preliminary Injunction Doctrine*, 58 STAN. L. REV. 381, 382-83 (2005).

⁸⁷ See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 595-96 (7th ed. 2007); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 541-42 (1978). 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 balance 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, 907-09 (2009).

they are intended to achieve some procedural end or to regulate the parties' conduct pending litigation."⁸⁸

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.⁸⁹ 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.⁹⁰ The defendant may either relinquish her attempt to use the right lawfully, or decide to buy a license from the right-holder.⁹¹ In both cases, the in-kind preliminary remedy has achieved a different in-kind outcome – without the need for further intervention by the state.

3. Suspension of Performance

The remedy of withholding performance until the counter-performance is guaranteed⁹² is also applicable to circumstances where both the IR and the DO are in-kind. This is the case with barter, which involve the exchange of nonmonetary assets.⁹³ 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

⁸⁸ ZUCKERMAN, *supra* note 63, § 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 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.

⁸⁹ WILLIAM CORNISH & DAVID LLEWELYN, *INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADE MARKS AND ALLIED RIGHTS* 69-70 (6th ed. 2007) (stating that a preliminary injunction “contributes a great deal to the practical efficacy of intellectual property rights,” and that “businesses frequently treat the outcome of the interim proceedings as settling the matter in dispute”).

⁹⁰ Andrew Muscato, *The Preliminary Injunction in Business Litigation*, 3 N.Y.U. J.L. & BUS. 649, 672-73 (2007).

⁹¹ In *NBC Universal, Inc. v. Weinstein Co.*, the court preliminarily enjoined the defendant from selling “Project Runway” to Lifetime because this allegedly breached a copyright licensing agreement with NBC. No. 601011/08, 2008 WL 4619203 (N.Y. Sup. Ct. Sept. 26, 2008). Following the preliminary injunction, the defendant acknowledged its breach and paid NBC a settlement fee in order to move the show to Lifetime. Bill Carter, *Weinstein Strikes a Deal in ‘Project Runway’ Lawsuit*, N.Y. TIMES (Apr. 1, 2009), <http://www.nytimes.com/2009/04/02/arts/television/02wein.html>.

⁹² For discussion of the suspension of performance remedy, see *supra* Parts I.A.3, I.B.2.

⁹³ See U.C.C. § 2-304(1) (2011) (applying Article 2 of the Uniform Commercial Code to instances where the price to be paid is in goods rather than money).

the others to buyers. The landowner is entitled to suspend the transfer of title to the buyers until she receives the promised apartments from the contractor.⁹⁴

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 attempt to incentivize her to bring about a different monetary outcome.

4. Procedural Set-Off

In common law systems, set-off is usually a procedural right whose exercise requires judicial proceedings.⁹⁵ A person sued for payment may claim that the plaintiff also owes her money. If the court accepts this claim, it orders the set-off of one debt against the other.⁹⁶ 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 fulfill her monetary obligation voluntarily,⁹⁷ perhaps by consensual offsetting of the mutual debts.⁹⁸ 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, distraintment of trespassing animals may prompt the

⁹⁴ See *L'enfant Plaza Prop., Inc. v. United States*, No. 67-75, 1981 WL 30785, at *18-25 (Ct. Cl. Apr. 13, 1981) (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 obligation), *aff'd in part, rev'd in part*, 678 F.2d 167 (Ct. Cl. 1982).

⁹⁵ PHILIP R. WOOD, *ENGLISH AND INTERNATIONAL SET-OFF* § 24-12, at 1144 (1989).

⁹⁶ RORY DERHAM, *SET-OFF* 20 (2d ed. 1996); REINHARD ZIMMERMANN, *COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION* 22-23 (2002).

⁹⁷ In contrast, civil law systems recognize a substantive right of set-off that discharges the cross-obligations by unilateral and extrajudicial notification of one party to another. ZIMMERMANN, *supra* note 96, at 32-36. Set-off in civil law systems is a direct remedy, because the desired end result is realized by its very application.

⁹⁸ Contractual set-off is allowed in all legal systems. *Id.* at 20.

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 fulfill their obligations voluntarily.

IRs may also affect behavior *ex ante*. The very existence of an easily exercised IR may be sufficient to prevent potential rights violations. For instance, the fact that a contracting party can suspend her performance until the other party's counter-performance has been guaranteed likely incentivizes the latter to fulfill her obligations on time. Similarly, knowing that a mechanic can hold onto a vehicle, its owner may decide to pay repair costs promptly. The same is true for a Jewish husband, who may agree to a divorce at the outset because he is aware that a refusal to do so would result in him receiving a smaller share of the marital assets.⁹⁹

IRs aim to bring about the desired outcome through self-compliance by the actual or potential wrongdoer. In contrast, direct remedies *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.¹⁰⁰

A. *Filling in for Unavailable Direct Remedies*

Inducing self-compliance through an IR is obviously advantageous when a direct remedy is legally unavailable. A case in point is the absence of a coerced apology for defamation.¹⁰¹ Since defendants cannot be ordered to apologize, the law incentivizes voluntary apologies by indicating that damages would be higher if no apology is offered.¹⁰² Another example is the impossibility of coercing divorce under Jewish law.¹⁰³ Since a *get* must be given voluntarily, legislatures and courts use indirect means to encourage the husband to grant a divorce.¹⁰⁴ 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 *get*, whose requirements and validity are determined in accordance with religious

⁹⁹ See Lisa Zornberg, *Beyond the Constitution: Is the New York Get Legislation Good Law?*, 15 PACE L. 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*).

¹⁰⁰ This Section addresses the advantages of successful IRs, that is, those that indeed induce self-compliance. For a discussion of the relative effectiveness of IRs in comparison to direct remedies, see *infra* Part III.B.

¹⁰¹ See *supra* Part I.D.

¹⁰² See *supra* Part I.D.

¹⁰³ See *supra* Part I.B.4.

¹⁰⁴ See *supra* Parts I.B.4, I.E.1.

law. This might also be true in the case of apologies, insofar as coercing an apology violates the constitutional right to free speech.¹⁰⁵

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.¹⁰⁶ Although a tenant is entitled, in principle, to apply for a mandatory injunction against her landlord,¹⁰⁷ the tenant’s application may be rejected due to the extent of state supervision that would be required.¹⁰⁸ An IR that puts pressure on the landlord to self-comply, such as rent withholding,¹⁰⁹ 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 IRs. Indeed, the indirect form of redress is not the exclusive one in most of the examples discussed in Part I. IRs such as the possessory lien, the distraint of animals, the suspension of performance, rent withholding, rent abatement, declaratory judgments, and procedural set-off all exist alongside direct remedies that may be used to compel the defendant to give the plaintiff the sum of money or asset to which she is ultimately entitled. And indeed, the cases in which the right-holder may 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 or vindicate a right rather than a remedy that directly leads 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, IRs typically involve a lesser degree 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

¹⁰⁵ See *supra* note 71 and accompanying text. In this respect, the case of the *astreinte* may be different. See *supra* Part I.B.3. Arguably, French law may be validly altered to allow for some direct enforcement of an obligation to do.

¹⁰⁶ See *supra* Part I.B.1.

¹⁰⁷ See SCHOSHINSKI, *supra* note 29, § 3:32, at 154.

¹⁰⁸ See STOEBUCK & WHITMAN, *supra* note 30, 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 37, at 11-12 (explaining that the state rarely invokes the remedy of court-appointed receivers to take control of apartment buildings to correct housing-code violations).

¹⁰⁹ See *supra* notes 34-37 and accompanying text.

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 – the nonpayment of a portion of the rent.¹¹⁰ 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.¹¹¹ Third, an IR may be less injurious to the wrongdoer's autonomy because it neither orders her to do something nor refuses her anything. A prime example of this is a declaratory judgment, which merely states the legal position with respect to an issue in dispute.¹¹²

Finally, although some IRs require a rights-infringer to act in a certain way, the injury to her autonomy is mitigated to some extent by the fact that the IR does not order her to perform the sought-after outcome itself. Consequently, the IR leaves her 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 with respect to whether or how to perform her obligations under the contract. 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

¹¹⁰ Similarly, although procedural set-off requires a decision by the court, it is executed through nonpayment by the party exercising the set-off.

¹¹¹ 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: Omission Bias and Ambiguity*, in *BEHAVIORAL LAW AND ECONOMICS* 168, 184 (Cass R. Sunstein ed., 2000) (showing 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, because they perceive themselves to be more responsible for death caused by a commission than for death caused by an omission). Hence, it stands to reason that a loss caused by being refused something by the state would hurt less than a loss caused by being coerced to act by the state.

¹¹² *See supra* note 61 and accompanying text.

apology is welfare enhancing to the injured party,¹¹³ and it stands to reason that many injurers would not find it to be particularly humiliating.¹¹⁴ Others, however, might find the prospect of making an apology to be degrading. By providing that an apology can reduce the damages award, the IR incentivizes the giving of apologies without overburdening those who strongly oppose them.¹¹⁵ In addition, by making apologies optional, the IR leaves those libelers who choose to apologize with ample discretion in determining the form the apology takes.

Nonmonetary IRs that 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.¹¹⁶ Furthermore, as a rule, the IRs that were eventually discarded were those that entailed substantial injury to the autonomy and dignity of the rights-infringer. One example is the exercise of distraint by a landlord. Common law systems originally allowed a landlord to seize her tenant's

¹¹³ See LAZARE, *supra* note 74, at 45-52 (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 lawsuit. See Brent T. White, *Say You're Sorry: Court-Ordered Apologies as a Civil Rights Remedy*, 91 CORNELL L. REV. 1261, 1271 (2006) (arguing 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"); Elizabeth Latif, Note, *Apologetic Justice: Evaluating Apologies Tailored Toward Legal Solutions*, 81 B.U. L. REV. 289, 295 (2001) (explaining that sometimes all that is necessary to achieve a settlement is "an admission by the other party that he or she did wrong" (quoting Steven B. Goldberg et al., *Saying You're Sorry*, 3 NEGOTIATION J. 221, 221 (1987)) (internal quotation marks omitted)); see also Daphna Lewinsohn-Zamir, *Can't Buy Me Love: Monetary Versus In-Kind Remedies*, 2013 U. ILL. 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 to a higher monetary settlement); Jennifer K. Robbenolt, *Apologies and Legal Settlement: An Empirical Examination*, 102 MICH. L. REV. 460 (2003) (showing that apologies facilitate settlement agreements in civil disputes); Daniel W. Shuman, *The Role of Apology in Tort Law*, 83 JUDICATURE 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." (internal quotation marks omitted)).

¹¹⁴ Apology processes vary greatly in how much humiliation they inflict. For example, it stands to reason that an oral apology between two parties is much less humiliating than an apology that is broadcast on national television.

¹¹⁵ 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 rights infringers' autonomy than do direct remedies. The weight afforded to this consideration when choosing the remedy may differ depending on the context.

¹¹⁶ See *supra* notes 82-84 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 husband's refusal on his wife's autonomy, dignity, and liberty.

personal property and to hold it until the overdue rent was paid.¹¹⁷ Most U.S. jurisdictions today do not grant landlords this right.¹¹⁸ The abolishment of imprisonment as an incentive to pay debts is another example of the reluctance to employ IRs that significantly encroach upon autonomy.¹¹⁹ In sum, most current IRs interfere less with people's autonomy than direct remedies do. To the extent that reducing interference with an injurer's 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 rights-infringer also confers a beneficial effect on the rights-holder. 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 reported on elsewhere,¹²⁰ I demonstrated that people perceive outcomes broadly and judge them in terms of various factors that are not limited to end-results. Consequently, events with similar end-results are viewed as generating different outcomes, which vary in their value.¹²¹ 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.¹²² Conversely, when something is given to an entitled party unwillingly, its value in the eyes of the recipient decreases.¹²³ 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 is less valuable to the promisee, even when all pecuniary costs – such as litigation costs – are covered.¹²⁴

These findings are highly relevant for efficiency analysis. Since the goal of economic efficiency is to maximize the welfare of individuals,¹²⁵ measured by the extent to which their preferences are fulfilled,¹²⁶ we should consider ways

¹¹⁷ Brandon et al., *supra* note 6, at 938-40.

¹¹⁸ *Id.* at 942-43. The Uniform Residential Landlord and Tenant Act expressly abolishes distraint for rent. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.205(b) (amended 1974).

¹¹⁹ See Pablo Lerner, *The Chief Enforcement Officer and Insolvency in Israeli Law*, 7 THEORETICAL INQUIRIES 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) (mentioning that, with respect to American law, "[i]mprisonment for debt as a method of enforcing commercial obligations is now banned in every state").

¹²⁰ Daphna Lewinsohn-Zamir, *Taking Outcomes Seriously*, 2012 UTAH L. REV. 861.

¹²¹ *Id.* at 869-84.

¹²² *Id.* at 873-75, 881-83.

¹²³ *Id.*

¹²⁴ *Id.* at 874-75, 884.

¹²⁵ LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 18, 24-27 (2002).

¹²⁶ Scott Shapiro & Edward F. McClennen, *Law-and-Economics from a Philosophical*

to encourage voluntary – rather than state-enforced – compliance. IRs can serve as an important tool in this regard, both because the very existence of an IR may prevent a rights violation altogether and because the exercise of an IR may prompt a wrongdoer to fulfill her primary obligation to the rights-holder without any need for state enforcement.¹²⁷ In both cases, self-compliance would enhance the value of what the rights-holder has received, as compared to coercive realization of the same end-result. It may very well be the case, however, 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 noncompliance. 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 in which the rights-infringer resisted compliance every step of the way. Even if self-compliance following an IR is not entirely voluntary, this type of remedy usually involves less coercion than a direct remedy,¹²⁸ in which case the value of the end-result for the rights-holder is likely to be higher.¹²⁹

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.¹³⁰ An IR that provides that apologies can mitigate the damages award incentivizes libelers to apologize voluntarily,¹³¹ 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, noncompliance and infringement stem from

Perspective, in 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 460, 460 (Peter Newman ed., 1998). Satisfaction of preferences is tantamount to the realization of the individual's desired state of affairs. RICHARD B. BRANDT, A THEORY OF THE GOOD AND THE RIGHT 146-47 (1998).

¹²⁷ See *supra* notes 98-99 and accompanying text.

¹²⁸ In this respect, the IR of imprisoning husbands who refuse to divorce their wives is the exception that proves the rule. See *supra* notes 81-84 and accompanying text.

¹²⁹ 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 to those where the existence of an IR prevented the infringement. Nevertheless, it stands to reason that these cases would be quite rare and that right holders would generally prefer voluntary compliance by the injurer.

¹³⁰ See Latif, *supra* note 113, at 302-05 (citing scholars who claim that “coerced apologies are of little value”). But see LAZARE, *supra* note 74, 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).

¹³¹ See *supra* Part I.D.

uncertainties about the existence or scope of a right.¹³² 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, for example, 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.¹³³

D. *Encouraging Cooperation Through Cognitive Dissonance*

The two previous Sections focus on the beneficial effect of self-compliance on the welfare of the parties: self-compliance reduces the injury to the autonomy of the rights-infringer and enhances the value of the fulfilled obligation from the perspective of the rights-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 rewards¹³⁴ – but also to influence her values, attitudes, and preferences.¹³⁵ For instance, it would 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, antidiscrimination laws endeavor to change people's attitudes towards ethnic minorities.¹³⁶ Equal treatment of minorities based on the belief that all people are equal is preferable to equal treatment out

¹³² Such uncertainties may be augmented by the psychological phenomenon of self-serving bias. See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1501-04 (1998). 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, individuals tend to fail to reach mutually beneficial agreements. *Id.*

¹³³ See WOOLF ET AL., *supra* note 61, at 6-7 (discussing 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* Part I.E.2. Sometimes this should suffice to remove obstacles to self-compliance.

¹³⁴ 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).

¹³⁵ FRIEDMAN, *supra* note 5, at 18, 50-51, 111-17, 124-26; Richard H. McAdams, *The Origin, Development, and Regulation of Norms*, 96 MICH. L. REV. 338, 397-99 (1997); Cass R. Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2025-44 (1996). The legitimacy and efficacy of education through the law have been addressed in the literature and are beyond the purview of this Article. For a thorough discussion of this issue, see Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1138-69 (1986).

¹³⁶ See Kenworthy Bilz & Janice Nadler, *Law, Psychology, and Morality*, in 50 THE PSYCHOLOGY OF LEARNING & MOTIVATION 101, 102 (Daniel M. Bartels et al. eds., 2009).

of fear of punishment.¹³⁷ 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.¹³⁸ Cognitive dissonance is the uncomfortable state of tension that arises when an individual holds two psychologically inconsistent cognitions (attitudes, beliefs, opinions, and so on).¹³⁹ The individual is motivated to reduce the unpleasant dissonance, possibly by altering one of the cognitions to make it more compatible with the other.¹⁴⁰ 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.¹⁴¹ A precondition for attitude change, however, is that the individual accept responsibility for her behavior.¹⁴² 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 dissonance¹⁴³ and consequently a change in her attitude to align it with the activity.¹⁴⁴ In contrast, if she had no choice but to act in a counter-attitudinal way, the inconsistent behavior is attributed to the coercing source.¹⁴⁵ No dissonance arises and hence there is no need to alter her attitude.¹⁴⁶ Thus, in an interesting experimental study, white college students were asked to write an essay endorsing the doubling of scholarship funds for black students at the expense of scholarships for white students.¹⁴⁷ The

¹³⁷ See Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, 60 L. & 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.").

¹³⁸ See LEON FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

¹³⁹ ELLIOT ARONSON, *THE SOCIAL ANIMAL* 180 (11th ed. 2011).

¹⁴⁰ *Id.*

¹⁴¹ ELIOT R. SMITH & DIANE M. MACKIE, *SOCIAL PSYCHOLOGY* 278 (3d ed. 2007).

¹⁴² *Id.*

¹⁴³ See COLIN FRASER ET AL., *INTRODUCING SOCIAL PSYCHOLOGY* 257 (2001) ("[I]t 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.").

¹⁴⁴ *Id.* at 256 ("[I]f 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) ("[T]he greatest attitude change will occur theoretically when the pressure is the minimal amount necessary to induce the subject to perform the act.").

¹⁴⁵ Joel Cooper & Russell H. Fazio, *A New Look at Dissonance Theory*, in 17 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 229, 236-37 (Leonard Berkowitz ed., 1984).

¹⁴⁶ SAUL KASSIN ET AL., *SOCIAL PSYCHOLOGY* 211 (7th ed. 2008); Cooper & Fazio, *supra* note 145, at 236.

¹⁴⁷ Michael R. Leippe & Donna Eisenstadt, *Generalization of Dissonance Reduction:*

members of one group were given a choice as to 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 blacks in general.¹⁴⁸

A different way to explain attitude change as a means to reduce dissonance is through the notion of “inadequate justification.”¹⁴⁹ The fewer external reasons people have to engage in behavior in conflict with their attitudes – for example, compliance is not compelled, the penalties for noncompliance 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.¹⁵⁰ 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.¹⁵¹

The dissonance theory of attitude change is supported by William Muir’s empirical study of educators’ opinions regarding prayer in public schools.¹⁵² Muir interviewed educators about their attitude towards daily prayer in schools

Decreasing Prejudice Through Induced Compliance, 67 J. PERSONALITY & SOC. PSYCHOL. 395, 400-04 (1994).

¹⁴⁸ *Id.* In another study, non-Catholic college students were instructed to write an essay in favor of conversion to Catholicism. See Timothy C. Brock, *Cognitive Restructuring and Attitude Change*, 64 J. ABNORMAL & SOC. PSYCHOL. 264, 270 (1962). The author 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 271.

¹⁴⁹ See ARONSON, *supra* note 139, at 207-22.

¹⁵⁰ *Id.*

¹⁵¹ 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 *id.* In a study showing the inverse correlation between the severity of punishment and both attitude change and lasting compliance, children were threatened with either a mild or a severe punishment if they played with what they considered the most attractive of several toys. Elliot Aronson & J. Merrill Carlsmith, *Effect of the Severity of Threat on the Devaluation of Forbidden Behavior*, 66 J. ABNORMAL & SOC. PSYCHOL. 584, 586-87 (1963). 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. *Id.* Evidently, the possibility of receiving a mild punishment did not justify the decision not to 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.

¹⁵² See WILLIAM K. MUIR, JR., PRAYER IN THE PUBLIC SCHOOLS: LAW AND ATTITUDE CHANGE (1967).

several months before and after the Supreme Court ruled that religious exercises in public schools are unconstitutional and therefore prohibited.¹⁵³ Muir found, among other things, 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.¹⁵⁴ In contrast, those educators whose attitude changed from supportive to critical of school prayer asserted that they had a choice between compliance and defiance.¹⁵⁵ This perception of freedom of choice was based, for example, on the belief that the ban would not be enforced.¹⁵⁶

Dissonance theory suggests that IRs should educate people more effectively than direct remedies. IRs do not order people to act in a way that would realize the desired outcome, but rather give them a choice. Since rights-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 anticompetitive attitude towards the rights-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 rights-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.¹⁵⁷

IRs may vary in the perceived freedom infringers are given. Arguably, self-compliance due to an omission-type or nonpunitive 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

¹⁵³ *Id.* at 11.

¹⁵⁴ *Id.* at 88.

¹⁵⁵ *Id.* at 94.

¹⁵⁶ *Id.*

¹⁵⁷ Observe 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. See Daryl J. Bem, *An Experimental Analysis of Self-Persuasion*, 1 J. EXPERIMENTAL SOC. PSYCHOL. 199 (1965). Thus, if a person has freely chosen to act in a certain way, she may conclude that her behavior in fact reflects her beliefs. *Id.* at 200. Since Bem's theory predicts the same results as cognitive dissonance theory, see KASSIN ET AL., *supra* note 146, 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.

remedies are employed. The law's external and coercive role in realizing the desired outcome is clearest and most blatant in this case.

Thus, the law should care about a person'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.¹⁵⁸ Social psychologists agree 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.¹⁵⁹ Intrinsic motivation is independent of an external source, and is therefore self-sustaining and highly resistant to change.¹⁶⁰ Importantly, conformity based on intrinsic motivation is likely to continue even in private and even without monitoring.¹⁶¹

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 a 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;¹⁶² neighbors who used to greet each other

¹⁵⁸ J. RICHARD EISER, *SOCIAL PSYCHOLOGY: ATTITUDES, COGNITION AND SOCIAL BEHAVIOUR* 84 (1986). In a similar vein, Herbert Kelman distinguishes between "compliance" and "internalization." Hebert C. Kelman, *Processes of Opinion Change*, 25 *PUB. OPINION Q.* 57, 62-66 (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.

¹⁵⁹ FRASER ET AL., *supra* note 143, 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 behaviour, people are likely to revert to their previous actions"); TYLER, *supra* note 134, at 4 ("[P]eople 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.").

¹⁶⁰ ARONSON, *supra* note 139, at 37.

¹⁶¹ *Id.* at 37, 38, 40; FRASER ET AL., *supra* note 143, at 266 (stating that internalized attitude change is "voluntarily maintained by self-monitoring"); Kelman, *supra* note 158, at 70 (asserting that when internalization occurs, a person will conform "quite regardless of surveillance").

¹⁶² 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

warmly are no longer on friendly terms. In addition to its monetary costs, a lawsuit also exacts a high emotional cost.¹⁶³ During the litigation process, each side does its best to discredit the evidence or credibility of the other, and few experiences are as unpleasant as a cross-examination.¹⁶⁴ Furthermore, a suit culminates with a publicized reasoned judgment involving justifications that typically impose nonmonetary 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.¹⁶⁵

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 nonpecuniary 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 previously.¹⁶⁶

Generally speaking, IRs do not order the rights-infringer to fulfill the desired outcome, but simply nudge potential or actual injurers in the right direction. If an injurer decides to realize this outcome voluntarily 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 rights-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 illustrates this point.

An IR consisting of an omission on the part of the rights-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 the 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 rights-holder files a lawsuit against the injurer. In these four scenarios, the injured party's behavior is passive in that she continues to hold onto a resource that she had received from the other party, had obtained

two businesses . . .").

¹⁶³ See Lior Jacob Strahilevitz, *Pseudonymous Litigation*, 77 U. CHI. L. REV. 1239, 1247 (2010).

¹⁶⁴ See Macaulay, *supra* note 162, at 65.

¹⁶⁵ I do not deny the importance of reasoned judgments, such as in establishing precedents that will guide people's behavior. See Strahilevitz, *supra* note 163, 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 *id.* at 1254-55 ("[M]ost 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.").

¹⁶⁶ See *supra* Part II.B.

incidentally, or owned to begin with. Furthermore, in the absence of court intervention, there would be no official public document attesting to the injurer's conduct, and hence expressive harms would be reduced as well.¹⁶⁷ 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.¹⁶⁸ 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.¹⁶⁹

Although any litigation or even the threat of litigation may adversely affect relationships,¹⁷⁰ 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 that may be realized without court intervention by a self-help omission of the injured party, or that 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

¹⁶⁷ See Strahilevitz, *supra* note 163, at 1244 (“By filing suit, even to enforce an uncontroversial statutory, tort, contract, or property right, a plaintiff signals her litigiousness to the world.”); 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).

¹⁶⁸ See WOOLF ET AL., *supra* note 61, at 5 (stating that declaratory proceedings “are the 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.”).

¹⁶⁹ See Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 421 (1999) (examining twenty nuisance cases that showed that that no bargaining occurred after judgment, largely due to animosity between the parties); Jolls et al., *supra* note 132, at 1498 (“[L]itigants are often not on speaking terms by the end of a protracted trial.”).

¹⁷⁰ Macaulay, *supra* note 162, at 61, 64.

not limited to the plaintiff's losses, but is determined according to the degree of the defendant's fault or defiance.¹⁷¹ Similarly, compensation for refusal to divorce is often of the aggravated kind.¹⁷² It is reasonable to assume that the punitive nature of the damages would increase the hostility between the parties and the expressive harms to the defendant.¹⁷³ A nonmonetary IR that involves a commission is probably the most damaging measure in terms of nonpecuniary 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 a Jewish man who has long refused to give his wife a *get*.¹⁷⁴

F. *Reducing Costs and Wealth Effects*

Litigation is typically a protracted and expensive affair. Litigants often wait years for their day in court;¹⁷⁵ jurors and witnesses often lose many days of work.¹⁷⁶ In addition, both sides to a dispute must bear their own litigation costs, including attorney and expert-witness fees, since the winner is not reimbursed for these expenses under the "American rule."¹⁷⁷ 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 the people whose rights have been infringed. Litigation costs have an especially pronounced detrimental effect on plaintiffs who are not wealthy.¹⁷⁸ From the perspective of such plaintiffs, their

¹⁷¹ See *supra* notes 47-49 and accompanying text.

¹⁷² See *supra* notes 56-58 and accompanying text.

¹⁷³ Thus, the middle ground on the continuum of nonpecuniary costs is held by IRs that call for the injured party to receive payment in the amount of her loss.

¹⁷⁴ See *supra* notes 81-84 and accompanying text.

¹⁷⁵ Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 *YALE L.J.* 1643, 1644-45 (1985).

¹⁷⁶ Macaulay, *supra* note 162, at 64-65; Newman, *supra* note 175, at 1644.

¹⁷⁷ James R. Maxeiner, *Cost and Fee Allocation in Civil Procedure*, 58 *AM. J. COMP. L.* 195, 197-98 (2010). Observe 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. See POSNER, *supra* note 87, at 617. The winner is not compensated, for example, for the time and inconvenience the lawsuit involved. *Id.*

¹⁷⁸ This problem is exacerbated by the fact that "there is no legal right to state-support for representation in civil litigation." Maxeiner, *supra* note 177, at 211; see also Deborah L. Rhode, *Access to Justice*, 69 *FORDHAM L. REV.* 1785, 1788 (2001) ("Although courts have discretion to appoint counsel where necessary to assure due process, they have done so only in a narrow category of cases . . .").

injurers may be, de facto, “litigation proof.”¹⁷⁹ The resulting under-compensation of victims and under-deterrence of wrongdoers leads to inefficiency.¹⁸⁰

Since IRs need only provide rights-infringers with an incentive to self-comply and 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 vindication 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 pay the mechanic’s fee voluntarily, regardless of any reluctance she might feel. Although the existence of a direct remedy may also prevent rights-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 prophylactic, available to nonaffluent and affluent rights-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 a 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.¹⁸¹

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,

¹⁷⁹ See Rhode, *supra* note 178, 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.”); see also James W. Meeker & John Dombrink, *Access to the Civil Courts for Those of Low and Moderate Means*, 66 S. CAL. L. REV. 2217, 2218-19 (1993) (discussing the financial, cultural, and practical obstacles to pursuing a civil law suit).

¹⁸⁰ See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 397 (2004) (observing that the costliness of litigation causes victims to bring fewer claims and injurers to take fewer precautions than would be efficient).

¹⁸¹ Some forms of self-help are more costly. For example, distraint of trespassing animals requires that the animals be cared for and fed. This would still cost less, however, than pursuing a lawsuit for the harm the animals caused.

they commonly require a more limited legal process. Thus, a declaratory judgment can be requested without providing proof that the right was infringed,¹⁸² producing expert testimony, or quantifying the plaintiff's losses.¹⁸³ Likewise, a preliminary injunction is issued at the start of litigation, before all the evidence has been heard.¹⁸⁴

Any cost-reducing IR improves the position of nonaffluent 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.¹⁸⁵ In contrast, an IR such as rent-withholding, which commonly requires only that the landlord be notified, is simple and inexpensive.¹⁸⁶ Even if the tenant is required to deposit the withheld rent into escrow,¹⁸⁷ the costs are likely to be far lower than those necessary to pursue direct remedies through litigation.¹⁸⁸ Similarly, although rent abatement requires a court decision in the United States,¹⁸⁹ it is still a relatively affordable remedy. For example, once the court authorizes the

¹⁸² Indeed, a plaintiff can obtain a declaration, for example, about the correct construction of a contract not only following its breach but also before the breach occurs. UNIF. 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.

¹⁸³ See WOOLF ET AL., *supra* note 61, at 5 (observing that declaratory judgments are inexpensive because they do not necessarily involve questions of fact).

¹⁸⁴ See *supra* note 85 and accompanying text.

¹⁸⁵ Brandon et al., *supra* note 6, at 959-60; see also Harvey Gee, *From Hallway Corridor to Homelessness: Tenants Lack Right to Counsel in New York Housing Court*, 17 GEO. J. ON POVERTY L. & POL'Y 87, 92-94 (2010) (describing the dire state of affairs in New York's housing courts, where most tenants have no legal representation and their petitions receive only a few minutes of the court's attention).

¹⁸⁶ Rent withholding is a self-help measure in the majority of U.S. jurisdictions. Brandon et al., *supra* note 6, at 958.

¹⁸⁷ SCHOSHINSKI, *supra* note 29, §§ 3:39 to :41.

¹⁸⁸ But see David A. Super, *The Rise and Fall of the Implied Warranty of Habitability*, 99 CALIF. 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 be a deliberate response to the lack of habitability, rather than unintentional nonpayment of rent. *Id.* at 425-26. Super acknowledges, however, that these obstacles to widespread invocation of the implied warranty of habitability 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 nonaffluent tenants to enforce their right to a habitable home.

¹⁸⁹ See *supra* notes 39-40 and accompanying text.

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.

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 that the landlord has been notified of the defect and has neglected to repair it.¹⁹⁰ One drawback of this remedy is that, presently, it is limited to relatively minor problems that do not require expensive repairs.¹⁹¹ 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,¹⁹² 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.¹⁹³ For these reasons, sometimes an IR such as rent withholding or rent abatement is a tenant's 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

¹⁹⁰ Hirsch & Hirsch, *supra* note 37, at 8.

¹⁹¹ SCHOSHINSKI, *supra* note 29, § 3:36, at 159-60; Hirsch & Hirsch, *supra* note 37, 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. UNIF. RESIDENTIAL LANDLORD & TENANT ACT § 4.103 (1972). The Restatement allows a tenant to deduct from the rent "reasonable costs incurred in eliminating the default." 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.

¹⁹² Brandon et al., *supra* note 6, at 957.

¹⁹³ Hirsch & Hirsch, *supra* note 37, at 8-9 (observing that repairs undertaken by a tenant 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 & TENANT § 11.2 cmt. c (1977).

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 should decide which IR is best suited to the case at hand, and suggests directions for the expansion of indirect redress.

A. *Error Costs*

An important consideration in the decision whether to craft an IR is the risk of error. IRs aim to steer infringers in the correct direction, and induce them to self-comply.¹⁹⁴ Therefore, an indirect approach is suitable for cases in which 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, satisfy this condition. Consider a scenario in which two parties 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 that 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 that is exercisable in the event that the other party fails to hold up their end of the bargain.

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 will pay the mechanic a sum larger than the amount to which the mechanic is entitled. Although these risks should not be ignored, 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 nonreciprocity scenarios due to the typical existence of an agreement between the parties regarding their mutual obligations.¹⁹⁵ Last, 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. For example, a mechanic who detains the car of a person who does not owe her money would be liable in tort.

¹⁹⁴ See *supra* Part I.

¹⁹⁵ 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.

The fear of incurring tort liability would reduce the cases of unlawfully exercised possessory liens.¹⁹⁶

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 the risk of error in exercising an IR is high. IRs entail less of a risk when liability is not conditioned upon the injurer's fault, as in the case of the distraint of trespassing animals. Since the possessor of livestock is strictly liable for the damage caused by intruding animals,¹⁹⁷ the risk of error in granting a right to detain the animals is relatively low. As contractual liability typically does not require fault, contract scenarios are prime candidates for IRs.¹⁹⁸ In contrast, IRs are unsuitable for private nuisance cases¹⁹⁹ that involve complex factual or legal issues.²⁰⁰

A third area where the risk of error is relatively low involves cases in which 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 the remedies available in cases where a husband refuses to grant his wife a 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.²⁰¹

¹⁹⁶ Furthermore, the fear of injuring one's reputation mitigates the risk of IR misuse.

¹⁹⁷ See *supra* Part I.A.2.

¹⁹⁸ See STEPHEN A. SMITH, CONTRACT THEORY 153 (Peter Birks ed., 2004) (“[C]ontract liability is strict.”).

¹⁹⁹ 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. See Israel Gilead, *Israel*, in 2 INTERNATIONAL ENCYCLOPAEDIA OF LAWS: TORT LAW §§ 191-192, at 145-46 (Sophie Stijns ed., 2003) (“In sum, liability for Private Nuisance is ‘mixed’: it lies somewhere between fault-based and strict liability.”); see also 2 DOBBS ET AL., *supra* note 18, § 400, at 622 (defining the law of private nuisance as “liability for substantial and unreasonable interference with the plaintiff's use and enjoyment of her land by negligent or intentional interference, or, more rarely, by strict liability activities”).

²⁰⁰ 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.

²⁰¹ Observe that the 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 compared to remedies that are not based on any court determination.

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 error. This is especially problematic when the harm to the plaintiff includes nonpecuniary losses.²⁰² Since IRs aim to induce the injurer to self-comply, they can obviate the need for difficult quantifications. Thus, if IRs such as suspension of performance and rent withholding induce injurers to perform their contractual obligations voluntarily, 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,²⁰³ both of which are notoriously difficult to monetize.²⁰⁴ An IR that states that an apology can mitigate the damages award will encourage wrongdoers to apologize of their own accord. By reducing the magnitude of nonpecuniary 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. Examples of such IRs are the *astreinte* and compensation for refusal to divorce.²⁰⁵ But since in both cases the damages are punitive,²⁰⁶ 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, in terms of error costs, IRs are most suitable for types of cases where (a) the risk of error with respect to the existence or infringement of a right is low, and (b) 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

²⁰² See *infra* Part III.D.2.

²⁰³ *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); see also Stanley Ingber, *Rethinking Intangible Injuries: A Focus on Remedy*, 73 CALIF. L. REV. 772, 819 (1985).

²⁰⁴ Ingber, *supra* note 203, at 778; Robert L. Rabin, *Pain and Suffering and Beyond: Some Thoughts on Recovery for Intangible Loss*, 55 DEPAUL L. REV. 359, 365 (2006).

²⁰⁵ See *supra* Part I.B.3-4.

²⁰⁶ *Id.*

this issue, I would like to point out that this concern is less relevant when the rights-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.²⁰⁷ Likewise, coercive enforcement may not be needed if the injuring party is a public entity or the state.²⁰⁸

Admittedly, there is no absolute assurance that the incentives generated by IRs will bring about self-compliance by the rights-infringer.²⁰⁹ It would be a mistake, however, to compare partially successful IRs to fool-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.”²¹⁰ 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 do not propose that IRs be the exclusive remedy available, but rather that they ordinarily be optional, an alternative to direct forms of redress. Thus, the rights-holder herself may decide which route she prefers. She may estimate, for instance, the probability that an IR will suffice to induce self-compliance by the other party, and compare the risk of failed indirect incentives with the extra monetary and nonpecuniary 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 apartment²¹¹ 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, 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 nonpunitive one, this greater effectiveness may conflict with other goals of indirect redress. Plausibly, the more penalizing the IR, the greater its detrimental effect on the parties’ relationship and the greater the injury to the injurer’s autonomy and reputation. Furthermore, the rights-infringer may perceive an extremely punitive IR as leaving her little choice not to comply. If she then attributes her compliance to the harsh external sanction, she will experience no cognitive

²⁰⁷ See *supra* notes 132-33 and accompanying text.

²⁰⁸ Cf. *Franklin v. The Queen*, [1974] Q.B. 205 at 218 (Eng.) (Lord Denning, M.R.) (“It is always presumed that, once a declaration of entitlement is made, the Crown will honour it. And it has always done so.”).

²⁰⁹ In the notorious *Abraham* case, lengthy imprisonment did not induce the husband to grant his wife a divorce. See *CA 164/67 Attorney General v. Yachia Abraham*, 22 PD 29, 48, 52 [1968] (Isr.).

²¹⁰ See *supra* Part II.F.

²¹¹ See *supra* note 38 and accompanying text.

dissonance, and hence will feel no need to change her anticompetitive attitudes toward the rights-holder to align them with her counter-attitudinal behavior.²¹² Consequently, self-compliance is less likely to be accompanied by a long-term educative effect.²¹³ In light of these disadvantages, when contemplating a punitive IR, regulators should consider the relative importance of the conflicting goals in the relevant context.

One pertinent question is whether the relationship between the parties is likely to continue. When an ongoing relationship is at stake, the goal of preserving the relationship and decreasing expressive harms should receive much more weight, and arguably the long-term educative ability of the law is of greater consequence as well. Therefore, other things being equal, it is not advisable to create punitive IRs relating to disputes between neighbors, between landlords and tenants, or between employers and employees. Interestingly, the fact that the parties are repeat players in itself contributes to the effectiveness of the IR. If both parties have an interest in the continuation of the relationship, then an IR will often be enough to induce self-compliance.²¹⁴ In contrast, when the issue at hand is a divorce, where relations will be permanently severed, the consideration of effectiveness may be the decisive one, and therefore a punitive remedy may be preferable.²¹⁵

Another consideration is whether the IR is the exclusive remedy available to the rights-holder. If it is, a punitive IR may be necessary, because the success of the remedy is crucial. In the case of some existing punitive IRs, such as the *astreinte* and compensation for refusal to grant a divorce, a direct form of redress is currently unavailable. Hence, supracompensatory damages may be necessary to increase the likelihood of self-compliance.²¹⁶ In contrast, when the IR is nonexclusive, it may be preferable to craft a nonpunitive remedy. If it succeeds in inducing self-compliance, then the desired outcome has been achieved – and has not come at the expense of the attainment of other goals. If, however, the IR fails, the rights-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 nonpunitive 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

²¹² For an explanation of how freedom of choice and insufficient external justification create a cognitive dissonance that leads to attitude change, see *supra* Part II.D.

²¹³ See *supra* Part II.D.

²¹⁴ Cf. Macaulay, *supra* note 162, at 61 (claiming that in repeat contractual interactions, both parties would avoid conduct liable to hamper future transactions between them).

²¹⁵ In a similar vein, the “safeguarding of the relationship” consideration is inapplicable to a one-time tort interaction between strangers. Cf. *id.* at 65-66 (explaining that dealers sue manufacturers for wrongful termination of their franchise because their relationship has ended and there is no prospect of future business between the parties).

²¹⁶ See *supra* notes 46-49, 52-58, and accompanying text.

operates as *res judicata* and the defendant cannot challenge it in a subsequent suit; the plaintiff, however, is entitled to apply subsequently to the court for damages or an enforcement order.²¹⁷ 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.²¹⁸ The magnitude of the remedy's punitive character 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 entire car. 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 at which the law aims, but rather something else. Is there a limit on what that "something else" can be, provided that 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 rights-holder. Without this nexus, both the rights-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 overdeterrence; the absence of a rational nexus would also hinder the attainment of some of the advantages of IRs.

Imagine an IR that states that a landlord who does not fix a defective apartment shall be ineligible for a driver's license, or that a car owner who does not pay a mechanic's bill shall be barred from practicing law. These sanctions are likely to be perceived as vindictive and disproportionate. It seems unreasonable to obstruct significantly 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

²¹⁷ WOOLF ET AL., *supra* note 61, at 4; *see also* RESTATEMENT (SECOND) OF JUDGMENTS § 33 cmt. c & illus. 1 (1982) (stating that the declaratory judgment does not bar the plaintiff from suing for further relief, such as damages).

²¹⁸ *See supra* Part I.A.1.

cooperate with one another²¹⁹ – goals which will not be attained in the above examples. Without a rational nexus, the punishment does not fit the crime. Because there is no connection between the harm caused and the sanction inflicted, rights-infringers may not understand the educative message of the legal rule, and thus may focus on the sanction rather than on its cause. Furthermore, and for this very reason, an IR lacking a rational nexus to the injury to the rights-holder 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 and, at the same time, 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),²²⁰ is structured as a natural reaction to the rights-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,²²¹ and would probably be viewed as proportional to the loss suffered by the rights-holder. TFT is the indirect technique used in such IRs as barring civil divorce (reciprocal to obstruction of divorce under religious law), possessory lien (nonpayment 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 rights-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 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.²²²

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

²¹⁹ See *supra* Part II.D-E.

²²⁰ “TIT FOR TAT 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 chooses not to cooperate, the first party will reciprocate with noncooperation.

²²¹ See *id.* at 122 (explaining that TFT “has great clarity” and “is eminently comprehensible to the other player”).

²²² Observe 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 nonperformance. See *supra* Part I.B.3.

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, or be declared ineligible to hold a civil service job or work in a field that requires a license.²²³ 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) who obstinately refuse to divorce.²²⁴ 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 law²²⁵ – harsh punitive measures may very well be the only legal option left. Notwithstanding these considerations, the IR of supracompensatory damages in tort²²⁶ 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.

D. Extensions

Part II underscores the various advantages of indirect redress and Part III points to important considerations to bear in mind when crafting IRs. This analysis plausibly implies that the role of IRs should be expanded and that additional forms of indirect relief should be created. While extensive discussion of these possibilities exceeds the scope of this Article, I introduce two examples that illustrate the potential for new IRs.

1. Neighbor Relations in Condominiums

The tendency of IRs to induce self-compliance reduces interference with the autonomy of rights-infringers and decreases both expressive harms and animosity between the parties to the conflict.²²⁷ These benefits are particularly

²²³ See Rabbinical Courts (Enforcement of Divorce Judgments) Law, 5755-1995, SH No. 1507 p. 139 (Isr.); see also File No. 186/00 Supreme Court (Jerusalem), Elchanan v. The Central Committee of the Israel Bar Association (1999), 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 (Tel-Aviv-Jaffa), Anonymous v. Anonymous (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).

²²⁴ See *supra* notes 56-58 and accompanying text.

²²⁵ See *supra* note 55 and accompanying text.

²²⁶ On tort compensation for the refusal to divorce, see *supra* notes 56-58 and accompanying text.

²²⁷ See *supra* Parts II.B, II.E.

significant when the parties have an ongoing relationship.²²⁸ While the law currently offers IRs with respect to certain continuous relationships, such as that between landlord and tenant,²²⁹ it has no IRs for others, such as among apartment owners in a condominium. A member of a condominium association has sole ownership of her own apartment and concurrent ownership in the common elements such as stairways, roof, garden, heating system, and water facilities.²³⁰ The areas held in common are not subject to partition.²³¹ 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.²³²

According to existing law, if the board neglects its duty to repair the common elements,²³³ the apartment owners must resort to a direct remedy: a suit for mandatory injunction or damages.²³⁴ 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 those afforded to tenants, such as rent withholding and rent abatement.²³⁵ 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, the risk of error as to the apartment owner's rights in this regard would be low.²³⁶ Thus, alongside the possibility of directly coercing enforcement, the law should allow apartment owners to opt for a milder remedy of either withholding or abating their assessment fees until they have been assured that the board will repair the common property.²³⁷ Both IRs, executed passively

²²⁸ See *supra* notes 214-15 and accompanying text.

²²⁹ See *supra* Part I.B.1.

²³⁰ SINGER, *supra* note 31, at 374.

²³¹ Robert G. Natelson, *Condominiums, Reform, and the Unit Ownership Act*, 58 MONT. L. REV. 495, 496, 499 (1997).

²³² RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 6.5-6 (2000); SINGER, *supra* note 31, at 374-76.

²³³ For example, this neglect may be due 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.

²³⁴ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.13 cmt. c (2000); *Agassiz W. Condo. Ass'n v. Solum*, 527 N.W.2d 244, 247 (N.D. 1995).

²³⁵ See *supra* Part I.B.1.

²³⁶ On the importance of this condition in the crafting of IRs, see *supra* notes 197-200 and accompanying text.

²³⁷ Observe that the new IRs can limit the right to withhold or abate assessment fees to those serious defects that significantly affect the apartment owners' enjoyment. Be that as it may, this Article focuses on the need for 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

through an omission by the right-holders, may be sufficient inducement for the board to fulfill its obligations without jeopardizing neighborly relations.²³⁸

2. Nonpecuniary Losses

When a right is infringed, the injured party may suffer both pecuniary and nonpecuniary losses. Generally speaking, optimal deterrence requires that both types of losses be compensated for.²³⁹ In contract law, for example, nonpecuniary harms are dealt with under the heading of “Loss Due to Emotional Disturbance.”²⁴⁰ According to the *Restatement (Second) of Contracts*, recovery for mental distress²⁴¹ depends on whether “the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.”²⁴² This condition may be satisfied when a main purpose of the contract was to provide enjoyment or pleasure.²⁴³ 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,²⁴⁴ and when a family sued builders for defects in the construction of their new home.²⁴⁵ Mental-distress damages have also been awarded for breaches relating to burial services.²⁴⁶

absence of express authorization by either the legislature or the declaration or bylaws of the condominium. *See, e.g., Agassiz*, 527 N.W.2d at 247 (holding that the declaration and bylaws 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”); *Pooser v. Lovett Square Townhomes Owners’ Ass’n*, 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”).

²³⁸ On the advantages of omission-type IRs, see *supra* notes 110, 166-67, and accompanying text.

²³⁹ *See* SHAVELL, *supra* note 180, at 242.

²⁴⁰ RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981).

²⁴¹ My focus here is on nonpecuniary losses not caused by bodily harm. Courts are more willing to award emotional-disturbance damages in cases of physical harm. *See* RESTATEMENT (SECOND) OF CONTRACTS § 353 (1981); FARNSWORTH, *supra* note 22, § 12.17, at 810.

²⁴² RESTATEMENT (SECOND) OF CONTRACTS § 353 cmt. a (1981).

²⁴³ SMITH, *supra* note 198, at 429-30.

²⁴⁴ *Murphy v. Lord Thompson Manor, Inc.*, 938 A.2d 1269, 1274-76 (Conn. App. Ct. 2008). Similarly, damages for mental suffering have been granted with respect to breaches of contracts by air carriers, innkeepers, and tour operators. *See* TRIETEL, *supra* note 23, at 196.

²⁴⁵ *Taylor v. Burton*, 708 So.2d 531, 535-36 (La. Ct. App. 1998); *see also* Miranda Oshige McGowan, *Property’s Portrait of a Lady*, 85 MINN. L. REV. 1037, 1106-08 (2001) (surveying cases in which emotional-distress damages were awarded for breach of contracts relating to homes).

²⁴⁶ *See* *Allen v. Jones*, 163 Cal. Rptr. 445, 450 (Cal. Ct. App. 1980); *Hirst v. Elgin Metal*

Even when nonpecuniary losses are reasonably foreseeable,²⁴⁷ they are inherently difficult to quantify.²⁴⁸ The payment of money does not actually eliminate feelings of sorrow, anguish, or anger,²⁴⁹ 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.²⁵⁰ Court-ordered apologies, however, are unavailable under U.S. law,²⁵¹ and, in any case, coerced apologies are inferior to voluntary ones.²⁵² A desirable solution might be to incentivize breachers to offer apologies of their own initiative, perhaps by creating a new IR that resembles the one used in the tort of defamation.²⁵³ 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 would encourage voluntary apologies. In this way, the law would be able to reduce both the magnitude of nonpecuniary harms and the risk of quantification errors.²⁵⁴

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 introduces a new and important category of remedies that has been overlooked in the literature: indirect remedies. It demonstrates 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 highlights the propensity of indirect remedies to induce self-compliance by rights-infringers and shows that this characteristic yields significant benefits to all parties involved: plaintiffs, defendants, and

Casket Co., 438 F. Supp. 906, 907-08 (D. Mont. 1977).

²⁴⁷ For a general discussion of cases in which emotional distress is foreseeable, see Charlotte K. Goldberg, *Emotional Distress Damages and Breach of Contract: A New Approach*, 20 U.C. DAVIS L. REV. 57 *passim* (1986).

²⁴⁸ See SHAVELL, *supra* note 180, at 242 (“[B]ecause nonpecuniary losses cannot be observed directly, they are difficult for courts to estimate.”).

²⁴⁹ Cf. 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES-EQUITY-RESTITUTION § 3.1, at 281-82 (2d ed. 1993) (explaining why damages for nonpecuniary 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).

²⁵⁰ See *supra* note 113 and accompanying text.

²⁵¹ Legislation that authorizes coerced apologies would likely be deemed an infringement on the right to free speech and therefore unconstitutional. See *supra* notes 70-71 and accompanying text.

²⁵² See *supra* note 130 and accompanying text.

²⁵³ See *supra* Part I.D.

²⁵⁴ On error costs as a factor in the crafting of IRs, see *supra* Part III.A.

courts. Indirect remedies may reduce 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 in this Article.