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Substantive Remedies

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SUBSTANTIVE REMEDIES

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Often, private law remedies enforce or vindicate infringed underlying rights. Substantive remedies are different. Substantive remedies do not aim at restoring these rights; nor do they seek to change them. Instead, substantive remedies adjust the remedial response for a right violation so as to ensure post-wrong justice. They require the law of remedies not merely to look back, but rather to take a second look at the parties' post-wrong situation. At times, such a second look affects the type of remedy awarded (damages in lieu of injunctive relief); in other cases—for instance, the tort doctrine of crushing liability—it imposes a ceiling on the plaintiff's compensation; and in yet other cases, dealing with loss of earning capacity or with the thin-skull rule, remedies law's second-look sets a compensatory floor below which compensation should not go.

This Article shows that these seemingly disparate rules and doctrines are not embarrassing deviations from a traditional make-whole rule. Rather, they all manifest a distinctively liberal conception of remedies in private law, founded on the twin commitments to substantive freedom and equality. These commitments serve as the regulative ideals for the construction of respectful interactions at the remedy stage between plaintiffs and defendants.

Highlighting the irreducible role of substantive remedies in a liberal system of remedies law not only helps explain important pockets of the law and demonstrate their coherence. It also points to doctrinal confusions and failings. To this extent, our account provides a source of internal critique that can allow the law of remedies to make good on its latent affirmation of the ideal of relational justice whereby participants at the remedial stage relate as genuinely, rather than merely formally, free and equal persons.

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INTRODUCTION

So much has been written[1] on remedies law's classic *Boomer v. Atlantic Cement Co.*,[2] but virtually nothing has been said about the distinctive regime of remedies to which it maps on—*substantive* remedies. Substantive remedies do not aim at restoring primary rights; nor do they seek to change them. Instead, substantive remedies adjust the remedial response for a right violation so as to ensure *post*-wrong justice in a manner that takes seriously not only the setback to the plaintiff but also the predicament of the defendant *going forward*.

The *Boomer* court, announcing that its role is to "do justice between the contending parties,"[3] declined to enjoin a large cement plant despite the finding that its operation amounted to a nuisance as to seven owners of nearby properties, and notwithstanding the property damage it inflicted on these properties in the form of dust and vibrations.[4] Instead of invoking the "drastic remedy" of injunctive relief, the court awarded "permanent damages" that aim at reflecting the "total economic loss to [plaintiffs'] property present and future" caused by the nuisance.[5] In that, *Boomer* resisted the idea

1 *See infra* text accompanying notes 30–46.
2 257 N.E.2d 870 (N.Y. 1970).
3 *Id.* at 873.
4 *Id.* at 871–72, 875.
5 *Id.* at 873.

that remedies should serve to enforce the primary rights of the plaintiffs,[6] which in this case would have meant sustaining their right to use and enjoy their properties.[7] It also declined to enlist remedies law in the service of advancing "the general public welfare" by striking the optimal balance between environmental concerns and economic prosperity at the state and the national levels.[8]

Rather than either looking back at the plaintiffs' primary rights or looking forward at the general interest of society in order to determine what remedy to grant, the court took a *second look* at the respective conditions of the plaintiffs and the defendant at the *post-wrong* stage.[9] The remedy in *Boomer*, therefore, is neither about what the plaintiffs had all along nor is it about what society should have; instead, it concerns the *ex-post* predicament of the injurer as well as the setback to its victims. An important factor in taking a second look was the extreme disparity in the consequences of enjoining the plant: whereas the total property damage to the plaintiffs amounted to $185,000 (which at a later stage ended up being $710,000), the loss on the defendant's side came down to 300 employees and an investment in excess of $45,000,000.[10]

We argue that *Boomer* exemplifies a distinctive regime of private law remedies—of *substantive remedies*—and that this regime and its important doctrinal implications have gone virtually unnoticed in the theory and practice of remedies law. Remedies are substantive when they go beyond looking back at the infringed underlying rights in order to adjust the remedial response for a right violation so as to address both the plaintiff's setback and the defendant's predicament. Substantive remedies are, therefore, important *in and of themselves*, that is, apart from remedies' traditional role of enforcing or vindicating primary rights.[11] At times, as in *Boomer*, a second look at the parties' post-wrong respective conditions affects the type of remedy awarded; in other cases—where the doctrines of crushing liability, collateral sources, or structural payments apply—it imposes a ceiling on the plaintiff's recovery; and in yet other cases, such as the ones dealing with loss of earning capacity or with the thin-skull rule, it sets a compensatory floor below which recovery should not go.

This Article shows that these seemingly disparate rules and doctrines are not embarrassing deviations from the make-whole principle, in which "the primary remedial goal" is to try to restore "however imperfectly" the plain-

6 *Id.*; *see also* Stephen A. Smith, *Rights and Remedies: A Complex Relationship*, *in* TAKING REMEDIES SERIOUSLY 31, 47 (Kent Roach & Robert J. Sharpe eds., 2010).

7 *See, e.g.*, Adkins v. Thomas Solvent Co., 487 N.W.2d 715, 719 (Mich. 1992).

8 *Boomer*, 257 N.E.2d at 871.

9 *See id.* at 873.

10 *Id.*; *see also* Daniel A. Farber, *The Story of* Boomer*: Pollution and the Common Law*, 32 ECOLOGY L.Q. 113, 130 (2005).

11 On remedies law's traditional role, see, for example, ARTHUR RIPSTEIN, PRIVATE WRONGS 251 (2016); Smith, *supra* note 6, at 47.

tiff's "rightful position."[12] Rather, they all manifest a distinctively liberal conception of remedies, founded on the twin commitments of the liberal legal order to substantive freedom and equality (as opposed to negative liberty (or independence) and formal equality). These commitments serve as the regulative ideals for the legal construction of respectful interactions *at the remedy stage* between victims and wrongdoers (and, more generally, plaintiffs and defendants).

Our conception of private law remedies carries important explanatory and critical implications. As a matter of explanation, we show that contrary to the competing theoretical accounts of remedies law, the commitments to self-determination and substantive equality find ample support in current doctrine. For instance, we develop a principled case for excusing tort defendants from certain instances of crushing liability and in this way providing normatively superior foundations for the actual workings of the law.[13] Concerning criticism, our liberal conception of private law remedies helps to identify doctrinal confusions and failings. For instance, we criticize the long-standing practice of assessing loss of earning capacity by reference to the victim's race or gender (among other immutable traits), arguing that true commitment to substantive freedom and equality in remedies law precludes race- and gender-based damage computations. To this extent, our account provides a source of internal critique that can propel the law to make good on its latent commitment to putting participants at the remedial level in a position of relating as genuinely free and equal persons.

A pathbreaking contribution of our account of substantive remedies relates to the remedy's impact on the post-wrong predicament of the defendant-wrongdoer. A familiar way to introduce the matter is to consider the application of the make-whole standard to a tortious encounter between an economically poor student who inadvertently caused some damage to the ridiculously expensive property of an unusually rich person.[14] A major area of remedies—compensatory damages—remains explicitly hostile to admitting evidence as to the defendant's situation in making remedial decisions.[15] Tort theorists often take the matter to reflect a deeper point, namely, that a tort victim is entitled to full compensation irrespective of whether she needs the entire award to get her life back on track as it is hers as a matter of right; and the wrongdoer is correspondingly required, independently of how blameworthy her wrongdoing is, to pay the entire award even when it will certainly get her life dramatically off its current track.[16] As we argue below,

12 Samuel L. Bray, *Remedies, Meet Economics; Economics, Meet Remedies*, 38 OXFORD J. LEGAL STUD. 71, 85 (2018).

13 *See infra* Section III.A.

14 *See, e.g.*, JULES L. COLEMAN, RISKS AND WRONGS 304–05 (1992).

15 *See, e.g.*, Eisenhauer v. Burger, 431 F.2d 833, 837 (6th Cir. 1970) (applying Ohio law); Dawson v. Shannon, 9 S.W.2d 998, 999 (Ky. 1928).

16 *See, e.g.*, KENNETH S. ABRAHAM, THE LIABILITY CENTURY: INSURANCE AND TORT LAW FROM THE PROGRESSIVE ERA TO 9/11, at 214 (2008); ALAN BRUDNER & JENNIFER M. NADLER, THE UNITY OF THE COMMON LAW 141 n.75 (2d ed. 2013); STEVEN SHAVELL, ECONOMIC ANAL-

overlooking the defendant's predicament in such a case may even seem *inevitable* from the perspectives of some influential efficiency theories as well as corrective justice accounts.[17]

Our account, by contrast, rejects such a blanket disregard of the defendant's self-determination and the inequality that results if, and when, the remedial response puts her in an impermissible state of unfreedom. In fact, we show that the actual practice of remedies law exhibits a more ambivalent approach to the defendant's post-wrong condition than is commonly believed. Consider these: the legal construction of an expansive category of judgment-proof defendants,[18] a trend among personal injury lawyers to limit collectable compensatory damages to the sums available under the defendant's liability insurance,[19] the rise and spread of liability insurance,[20] the growing trend toward abolishing the collateral-source rule,[21] and the likely tendency among juries of adopting a more forgiving stance toward individuals as opposed to business corporations.[22] As in many practices, this list consists of a hodgepodge of doctrines and conventions, not all of which can, or should, be part of a principled account of substantive remedies. But it does cast doubts on the common view that the defendant's post-wrong condition is irrelevant. We argue that oftentimes it is relevant, and set out to specify under what conditions it should be so as a matter of right.[23]

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ysis of Accident Law (1987); Jeremy Waldron, *Moments of Carelessness and Massive Loss*, *in* Philosophical Foundations of Tort Law 387, 387–88 (David G. Owen ed., 1995); Jules L. Coleman, *The Structure of Tort Law*, 97 Yale L.J. 1233, 1248 (1988) (reviewing William M. Landes & Richard A. Posner, The Economic Structure of Tort Law (1987); Shavell, *supra*.).

17 *See infra* text accompanying notes 72–74, 84–87. Lawyer-economists are willing to consider defendants' wealth for the different purpose of fixing their standard of due care. *See* Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. Legal Stud. 413, 414–15 (1992).

18 *See* Stephen G. Gilles, *The Judgment-Proof Society*, 63 Wash. & Lee L. Rev. 603, 714–15 (2006).

19 *See* Tom Baker, *Blood Money, New Money, and the Moral Economy of Tort Law in Action*, 35 Law & Soc'y Rev. 275, 314 (2001).

20 Abraham, *supra* note 16, at 1415. The thought that liability insurance, including even compulsory liability insurance, could entirely solve remedies law's concern for the substantive freedom and equality of the defendant fails for two independent reasons. To begin with, many individuals do not have sufficient resources to pay the premium. *See infra* text following note 140. Second, insurers may not always observe the insured's level of care (say, due to moral hazard) and, so, may not be able to link the terms of the policy insurance to that level. *See* Steven Shavell, *Minimum Asset Requirements and Compulsory Liability Insurance as Solutions to the Judgment-Proof Problem*, 36 Rand J. Econ. 63, 68–73 (2005). For empirical evidence showing that compulsory automobile insurance is partially responsible for overall increase in traffic fatalities, see Alma Cohen & Rajeev Dehejia, *The Effect of Automobile Insurance and Accident Liability Laws on Traffic Fatalities*, 47 J.L. & Econ. 357, 358 (2004).

21 *See* Dan B. Dobbs, The Law of Torts § 380, at 1059 (2000).

22 *See* Jennifer K. Robbennolt & Valerie P. Hans, The Psychology of Tort Law 131 (2016).

23 *See infra* text accompanying notes 136–43.

We commence our discussion with *Boomer*, which has earned its place in "the legal canon"[24] as the exemplar of a proper "liability rule," namely, a form of entitlement protection, which is arguably conducive to economic efficiency.[25] Contrary to both its champions and critics, Part I argues that a closer reading suggests that *Boomer* embodies the notion of substantive remedies while denying the accounts of both law and economics and corrective justice. Part II systemizes the lessons of this illustration by developing the normative framework that illuminates the *Boomer* decision. It also defends our position on the nature of the connection between primary rights and remedies, and explains why a liberal conception of remedies law cannot measure the post-wrong conditions of the plaintiff and the defendant solely in terms of the make-whole principle. In that, we defend a bifurcated architecture of remedies law: there are remedies whose essential role is that of enforcing or vindicating—what we call *looking back* at—the terms of the interaction prior to their violation; and there are remedies that instantiate a revised determination of—a sort of *second-looking* at—these terms. In the course of doing so we elaborate on how persons' needs and interests in subsistence, self-determination, and convenience bear on a liberal framework of private law remedies. Part II also begins to address the complex operational challenge which this requirement entails, discussing both the way it might offend the rule of law and the possible strategies for addressing this concern.

Part III shifts from theory to implications, showing how our account of substantive remedies solves doctrinal puzzles and offers critical revisions in tort remedies law (the reasons for our focus on tort remedies, as we explain in due course, are neither arbitrary nor contingent).[26] We show how the law limits the potential devastating consequences of tort remedies on certain wrongdoers, using the doctrines of crushing liability, collateral-source rule, and structured payments as our points of reference. We also explore the mirror-image of this type of doctrines: cases in which rather than accommodating the defendant's post-infringement predicament, remedies law needs to adjust its rules *beyond* what the make-whole approach allows in order to give effect to the *plaintiff's* substantive freedom and equality. The doctrines of loss of earning capacity and the thin-skull rule serve to illustrate this larger point.

Finally, we conclude by considering the implications of our account for the organization of remedies law as a *field*. We argue that the bifurcated architecture developed in this Article, consisting of both remedies that look back, and those that take a second look, at the terms of the post-wrong interaction, should change the way we currently study, teach, and, indeed, think

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24 Farber, *supra* note 10, at 113.

25 *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105–06, 1106 n.34, 1116 & n.55 (1972). *Boomer* also affected other bodies of law, such as environmental law, which we set to one side.

26 *See infra* text accompanying notes 108–09.

of remedies law, including most immediately the definition and the scope of the make-whole formula.

I. REDISCOVERING *BOOMER*

Boomer has made a big splash in the theory and study of private remedies law, forcing legal theorists to take firm positions for or against it. The ensuing debate, briefly summarized in Section A, took the *Boomer* court to have enlisted the law of remedies in the service of aggregate social welfare by granting the remedy that would generate the most efficient allocation of resources. But *Boomer*'s express reasoning suggests a very different reading, which both its friends and its foes obscure. Previous commentators have already shown that, rather than engaging in social welfare maximization, *Boomer* applies the traditional doctrine of undue hardship to decide whether or not to grant an injunction.[27] We go further than that, arguing that *Boomer* makes it a powerful proving ground for the idea of substantive remedies.

Two key properties of the decision stand out: first, its emphasis on the *interdependence* between the plaintiffs and the defendant which stands apart from an interest in society's overall welfare or justice; and second, its insistence on taking seriously certain *differences* between the interacting parties as opposed to treating them in the abstract, that is, as mere *P*s versus *D*. These properties—interdependence and difference between the parties—form the centerpiece of our intervention in the longstanding debates over the lesson of *Boomer*. They will also figure prominently in developing the general idea of substantive remedies in the Sections that follow.

Before we begin, it is important to note that we take *Boomer* to be an exemplar of substantive remedies under the assumption that the wrongdoing on the part of the defendant against seven or some such particular homeowners, not the entire community, is *accidental*, rather than deliberate.[28] In particular, the wrong committed by the defendant is neither an upshot of deliberately mistreating the victims nor a calculated decision to place the plant next to these victims in order to buy them off by paying compensatory damages; were this the case, the court would likely not have awarded compensatory damages in lieu of injunctive relief.[29]

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27 *See* Douglas Laycock, *The Neglected Defense of Undue Hardship (and the Doctrinal Train Wreck in* Boomer v. Atlantic Cement*)*, 4 J. TORT L., no. 3, 2012, at 1. More recently, John Goldberg and Benjamin Zipursky have observed that private nuisance law, including *Boomer*, is best read as "[t]he harmonization of the plaintiff's and the defendant's rights." JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, TORTS 244 (2010). While we share Goldberg and Zipursky's relational reading of *Boomer*, we argue that, at bottom, *Boomer* neither attempts nor brings about harmonization among the rights of the contending parties. Instead, it attempts to do justice, what we shall call relational justice, and this justice focuses on the post-wrong terms of interaction, rather than the pre-wrong rights of these parties as implicitly defined by the tort of private nuisance.

28 We could not find any indication, not to mention evidence, in the decision to counter our assumption.

29 *See infra* text accompanying note 94; *cf. infra* text accompanying notes 114–18, 172.

A. *Happy Collectivization or a Wrong Turn?*

Mainstream economic analysis of private law remedies applies a *micro*-level analysis to *Boomer*, arguing that the court was correct in awarding compensatory damages in lieu of injunction because the costs of enjoining this plant exceed the benefits of allowing it to maintain its socially productive operation.[30] This is a micro-level economic analysis in the sense that it tackles the dispute by insulating it from the larger picture of industry-wide implications (for instance, whether there are other long-run consequences to letting the plant go business as usual).[31] Accordingly, other lawyer-economists have advocated a *macro*-level analysis in which the demands of efficient resource allocation are determined by reference to institutional concerns. Some would emphasize the long-term effects of watering down the right to exclude other similar plaintiffs[32] and others would use macroeconomic analysis to determine which remedy—injunctive relief or damages—makes more sense.[33] Plausibly, these diverse approaches have led lawyer-economists to conflicting assessments of the *Boomer* outcome.

We take issue not with the disagreement among lawyer-economists, but rather with the presupposition they all share: that the choice of remedy must be made by reference to the remedy's overall economic consequences for society at large.[34] This approach is now shared by scholars beyond the law and economics tradition.[35] But it is not without its critics.

Private law traditionalists conceptualize *Boomer* as an important, but deeply unfortunate, wrong turn. Such scholars view *Boomer* as objectionable because it collectivizes private nuisance law by turning the choice of remedy

30 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW § 310, at 68–72 (7th ed. 2007); A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damage Remedies*, 32 STAN. L. REV. 1075, 1079 n.10 (1980).

31 *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 135–73, 261–63 (1970); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 728–33 (1973).

32 *See* Henry E. Smith, *Exclusion and Property Rules in the Law of Nuisance*, 90 VA. L. REV. 965, 1040–45 (2004).

33 *See* YAIR LISTOKIN, LAW AND MACROECONOMICS: LEGAL REMEDIES TO RECESSIONS 196–97 (2019).

34 It may be protested against our analysis that cases like *Boomer* are ultimately a matter of public law. This is because the dispute between the plant and the neighbors is the outgrowth of a regulatory accident caused by ill-conceived zoning laws. But this criticism underappreciates the ineliminable place of interdependence and, so, relational justice in our lived experience. To be sure, we do not deny that some disputes can be avoided entirely by proper planning. We can designate industrial land use to some isolated areas to preclude any possible interference with homeowners' reasonable use of their properties. It is possible, though at times very costly, to reduce some of our conflicting activities in these and other ways. However, it is very unlikely that we can eliminate all of them, altogether. This is precisely what we mean by emphasizing the *fact* of interdependence. Accordingly, at some point *Boomer*-like disputes are bound to surface and with them the paradigm of relational justice—indeed, the only live question for the disputants in *Boomer* is one of remedies, not zoning.

35 *See, e.g.*, JOSEPH WILLIAM SINGER, PROPERTY 113 (3d ed. 2010).

into an exercise of cost-benefit analysis in the service of "considerations of community advantage or wealth maximization."[36] There are two problems with this transformation. First, this approach permits *Boomer* to persist as an instance of illegitimate authorization of a private entity, the defendant-plant, to "expropriate at will" the rightful entitlements of the plaintiffs.[37] Second, such a reading of *Boomer* departs from a defining feature of private law—that of operating within "legal categories that abstract from the particularity of the interaction."[38] Private law traditionalists are thus united in opposing every aspect of the *Boomer* decision, including its underlying welfarist theory, commitment to cost-benefit analysis, and choice of remedy.[39]

B. Boomer *Redux*

Alternatively, we argue that *Boomer* rests on a concern with the parties' rights, not with aggregate welfare. Moreover, we find in *Boomer* a conception of rights best cast in terms of relational justice. The theory of substantive remedies we develop in these pages is an immediate outgrowth of such a conception.

Indeed, contrary to what both parties in the preceding debate suppose, the *Boomer* court self-consciously rejects both the welfarist approach and the application of cost-benefit analysis to the dispute at hand. The *Boomer* court's approach to the private/public distinction nicely demonstrates the former point. The court is, of course, aware that every attempt at deciding such rights may carry consequences that far exceed the rights of the private property owners and the plant before it. The perspective of the "general public welfare" takes up the "public concern with air pollution," and the scope of this problem is not limited to the defendant, but rather represents an industry-wide challenge that requires "full public and financial powers of government."[40] But the court deems these society-wide consequences incidental to what it takes itself to be doing, namely, settling a "private controvers[y]," and "decid[ing] the rights of parties before it."[41]

The court sides with the private law perspective not only due to considerations of institutional capacity: that is, its inability to tackle the health, financial, scientific, and technological variables relevant to the question of air

36 Ernest J. Weinrib, The Idea of Private Law 195 (1995).

37 *See* Ernest J. Weinrib, Corrective Justice 104 n.53 (2012); *see also* Ripstein, *supra* note 11, at 126 n.9; Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. Legal Stud. 165, 200 (1974).

38 Weinrib, *supra* note 36, at 192.

39 One potentially important exception is George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537, 570 (1972). Fletcher, however, does not disclose whether the outcome of *Boomer* is desirable from a fairness perspective. *Id.*

40 *Boomer*, 257 N.E.2d at 871.

41 *Id.*

pollution.[42] But also, the court asserts that "its essential function"[43] is to "do justice between the contending parties."[44]

Furthermore, unlike its conventional welfarist reading, *Boomer* does not in fact subscribe to the positions both lawyer-economists and private law traditionalists ascribe to it. To begin with, *Boomer* does not question the primacy of injunctive relief in nuisance cases—it does *not* replace the status of injunctive relief as nuisance's primary remedy with cost-benefit analysis[45]—but rather implements a preexisting *exception* in the form of permanent damages in substitution of an injunction.[46] Moreover, and more importantly, cost-benefit analysis does not inform the legal analysis *even when* the exceptional situation of *Boomer* obtains.

There are two alternative ways to show the divergence between *Boomer* and cost-benefit analysis. First, choosing among remedies presupposes the existence of a wrong—private nuisance is a wrong predicated upon interference with the *reasonable* use or enjoyment of land.[47] Reasonableness, in turn, is a standard that, for lawyer-economists, cannot be specified independently of cost-benefit analysis. But must there be a wrong on a cost-benefit assess-

42 *See id.*

43 *Id.*

44 *Id.* at 873.

45 *Contra* POSNER, *supra* note 30, § 3.10, at 69, 71–72; WEINRIB, *supra* note 36, at 195 n.57.

46 Indeed, even the leading English authority on equitable remedies for nuisance cited by private law traditionalists as *Boomer*'s counterpoint leaves the door open for certain situations in which an injunction would be literally devastating for the defendant. *See* Shelfer v. City of London Elec. Lighting Co. [1895] 1 Ch. 287 (AC) 322–23; *see also* WEINRIB, *supra* note 36, at 195 n.56; Arthur Ripstein, *Civil Recourse and Separation of Wrongs and Remedies*, 39 FLA. ST. U. L. REV. 163, 201 (2011). In *Shelfer*, Lord Judge A.L. Smith articulated four conditions that are jointly *sufficient* to warrant damages in lieu of injunction: plaintiff's injury is small, it can be measured in monetary terms, small amount of damages can be deemed adequate, and injunctive relief would be oppressive to the defendant. *Shelfer*, [1895] 1 Ch. at 322–23. It is unclear whether *Boomer* meets these conditions (assuming that the injury is regarded as "small" in relation to the defendant's situation). More importantly, it has been acknowledged that these conditions are not necessary ones, so that in principle a *Boomer*-like situation may pass the discretionary bar of awarding damages in substitution of an injunction. *See* Jaggard v. Sawyer [1995] 1 WLR 269 (AC) 287; Fishenden v. Higgs & Hill, Ltd. [1935] All ER 435 (AC) 448 (Romer L.J.); J.A. Jolowicz, *Damages in Equity—A Study of Lord Cairns' Act*, 34 CAMBRIDGE L.J. 224, 248–51 (1975). The question of whether *Boomer* rightly presents its ruling in terms of rejecting the prevailing remedial doctrine in New York has thus been subject to powerful criticisms. *See* Richard A. Epstein, *A Clear View of* The Cathedral*: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2101 (1997); Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 226–28 (2012); Louise A. Halper, *Nuisance, Courts and Markets in the New York Court of Appeals, 1850–1915*, 54 ALB. L. REV. 301, 354–57 (1990); Laycock, *supra* note 27, at 17.

47 *See, e.g.*, Copart Indus., Inc. v. Consol. Edison Co. of N.Y., Inc., 362 N.E.2d 968, 971 (N.Y. 1977). As the *Copart* court acknowledges, private nuisance can be actionable under a theory of strict liability but only insofar as the interference takes the form of an abnormally dangerous condition or activity. *Id.*

ment? If the benefits of letting the plant operate clearly exceed the costs to the nearby property owners, then there should be no nuisance in the first place. And if so, there is nothing—no wrong—to remedy.[48]

Second, the court invokes a baseline of "large disparity" against which to determine the (exceptional) desirability of damages over an injunction.[49] The numbers cited to establish such a disparity—annihilating a $45 million investment and 300 jobs versus a total property damage of $185,000—render vivid the qualitative difference between mere cost-benefit analysis and the *Boomer* decision.[50] That is, the court is not interested in securing some positive surplus, not even a surplus with generous margins. Rather, it is the consequences that follow the *complete devastation* of the plant, which would necessarily amount to terminating all its employees' jobs and forgoing a mega investment, that calls for awarding the exceptional remedy of damages.[51]

C. Boomer *and Equity Distinguished*

Injunctive relief and the doctrine of undue hardship that supports damages in lieu of enjoining a nuisance are historical creatures of equity. But three reasons—formal, substantive, and functional—imply that *Boomer*'s potential significance is not, at least need not be, confined to equity or to equitable doctrines of private law remedies.

The formal reason is that the class of remedies we identify in Part III as substantive remedies cuts across the division between equity and common law. Substantively, one might suppose that a remedy of injunctive relief raises distinctive concerns due, in part, to its harsh consequences, which explains the need for a special, equitable treatment of cases such as *Boomer*, as opposed to most other cases of harm-based torts for which damages are typically the only form of remedy available. This suggestion is unwarranted because the difference in consequences between injunctive relief and damages is at best quantitative, rather than qualitative. Even an award of compensatory damages can bring about harsh consequences for poor defendants

48 Our argument can also be contrasted with the following two views. Gregory Keating argues that the (only) wrong done by the defendant is that of failing to repair the harm justifiably inflicted on the plaintiffs. On this view, "[h]arm ought to be avoided if it can be avoided, and amends must be made for its infliction if it cannot be avoided." Gregory C. Keating, *Nuisance as a Strict Liability Wrong*, 4 J. TORT L., no. 3, 2012, at 1, 5. Stephen Smith argues that, in essence, the *Boomer* court denied the plaintiffs' allegation that the defendant threatened their primary rights. *See* STEPHEN A. SMITH, RIGHTS, WRONGS, AND INJUSTICES: THE STRUCTURE OF REMEDIAL LAW 157 (2019). We argue, in contrast, that *Boomer* follows the traditional structure of private nuisance. The defendant has wronged the plaintiffs by creating an unreasonable interference with their rights to enjoy their property. The novelty of the decision is, therefore, at the level of the remedy, rather than the wrong.

49 *Boomer*, 257 N.E.2d at 872.

50 *Id.* at 873.

51 *Id.* at 872–73.

(as when a defendant would have to compensate the plaintiff for accidentally destroying a ridiculously expensive porcelain vase).

The most sophisticated way to resist our attempt to develop an account of substantive remedies beyond equity lines comes from Henry Smith's account of equity as functionally, rather than formally or substantively, a "second-order safety valve."[52] The function served by this safety valve, in this view, is to guard against opportunistic behavior defined in terms of taking unfair advantage of the existing set of first-order legal rules (typically, but not necessarily, common-law rules).[53] *Boomer* does not fit this functional pattern: it concerns an accident, rather than a deliberate decision to target the plaintiffs by reducing their property rights into mere costs of producing cement; indeed, *Boomer* involves a use-land conflict generated by *nothing more* than the physical proximity between the parties.[54] Smith acknowledges this much, but nonetheless insists that there are problems other than opportunism for which second-order intervention may be apt and perhaps even necessary, and that one such problem goes under the heading "conflicting rights" and is illustrated by reference to nuisance law, including *Boomer*.[55]

However, conflicting rights present themselves, after all, beyond the case of nuisance law, including in core areas of apparently first-order law of common law such as negligence law, products liability, and contracts.[56] At any rate, *Boomer* and the class of substantive remedies to which it belongs do not intervene in the second order, because there is no prior, first-order rules on which they are supposed to operate. The damages to which the plaintiffs in *Boomer* are entitled are not some last-minute intervention, so to speak, in their preexisting entitlement to injunctive relief.

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52 Henry E. Smith, *Fusing the Equitable Function in Private Law*, *in* PRIVATE LAW IN THE 21ST CENTURY 173, 183 (Kit Barker, Karen Fairweather & Ross Grantham eds., 2017).

53 *See id.* at 177–81.

54 *See supra* text accompanying notes 28–29. The distinction between deliberately and accidentally wronging the person or property of another stands on better grounds, *morally* speaking, than the distinction between intentional activity accidentally producing wrongful spillovers and accidental wrongdoing. *Contra* Richard A. Epstein, *Nuisance Law: Corrective Justice and Its Utilitarian Constraints*, 8 J. LEGAL STUD. 49, 65–66 (1979); Keating, *supra* note 48, at 19. The latter distinction is deeply embedded in tort law—for instance, the old distinction between the two basic forms of action, trespass and trespass on the case, tracks this distinction. But it fails to identify a qualitative *moral* difference between cases of negligence and *Boomer*-like nuisance, on the one hand, and cases of reckless indifference and deliberate wrongdoing, on the other. *See infra* text accompanying notes 111–21.

55 Smith, *supra* note 52, at 190–91.

56 There is another ambiguity in Smith's depiction of nuisance law in terms of solving a problem of conflicting rights which, on his account, calls for a second-order solution. Smith begins this account with a discussion of traditional nuisance law's approach to the choice of *remedy* and then criticizes a modern development of nuisance law—and especially the *Restatement (Second) of Torts* § 826 (AM. L. INST. 1979)—that does not go along with the idea of operating as a second-order intervention in existing legal rules. However, the development he criticizes (quite rightly we think) does not concern itself with remedies, but rather with the very different question of what counts as a nuisance to begin with. *See* Smith, *supra* note 52, at 190–91.

Damages in lieu of injunction can admittedly operate in the second order, but only at the get-go stage of developing remedies law. Thus, we could imagine a historical moment in which the only available remedy for nuisance was injunctive relief. The first time (or first couple of times) a court of appeals comes up with an exception in the form of damages makes it possible to conceive of this innovation as supplementing the first-order layer of rules with a second-order layer. This added layer will, at some point, be assimilated into the former layer (and it does not matter, for our purposes, whether the first-order layer is formally called law or equity).[57]

II. Substantive Private Law Remedies

Boomer is indeed a landmark case, but its claim to prominence arises out of two features that have so far slipped below the radar of legal scholars. Contrary to the teachings of the economic analysis of law, *Boomer* takes a single-mindedly relational approach, and in so doing implies that the defendant-plaintiffs' *interdependence* is a source of legal concern in and of itself; quite apart from its overall consequences for society as a whole. And contrary to the impersonalist commitment of private law traditionalists, *Boomer* decides the remedies question by adopting a non-abstract conception of the interacting parties—that is, the decision to award damages in lieu of an injunction is influenced at every turn by "the particularity of the interaction."[58] Thus, *Boomer*'s outcome is sensitive to the harsh consequences of eliminating property damage that is disproportionately small relative to letting this plant and its employees fall—evincing recognition of the significance of interdependence and interpersonal difference.

Surely, the significance of these two features is not limited to remedies for nuisance, or to the choice between injunction and damages. But *Boomer* can be viewed as Exhibit A of our account of substantive remedies: the underexplored, indeed unappreciated, but nonetheless necessary part of remedies law. A part dedicated to a second look, rather than looking back, at the parties' entitlements.

But first, our reading of *Boomer* calls for a more explicit articulation of its foundations. While *Boomer*'s abstract references to justice and fairness cannot serve as guideposts when we move beyond the distinct dispute at hand, reliance on *Boomer*'s notions of interdependence and personal difference can be much more informative.[59] These ideas can serve as the building blocks of

57 The two rules of remedy for nuisance—injunction and damages—could have been created simultaneously, in which case there is no space for two separate layers of legal rules. We take no stand on this historical question. *Boomer* was certainly not the first time in which courts awarded damages in lieu of an injunction on account of undue hardship. *See supra* note 46.

58 Weinrib, *supra* note 36, at 192.

59 Methodologically speaking, our dissatisfaction with *Boomer*'s obscure language of "do[ing] justice" fits nicely with our broader view that a successful legal theory need not be committed to take the express reasoning of judges at face value. Boomer v. Atl. Cement Co., 257 N.E.2d 870, 873 (N.Y. 1970). While any adequate legal theory must respect

a liberal conception of remedies law, predicated upon a commitment to self-determination and substantive equality.

The liberal conception of remedies in private law disputes is a subset of the broader legal category of private law, which makes it necessary briefly to lay out what *might* a liberal conception of this broader category amount to.[60] We then move to the centerpiece of the argument in which we present the basic pillars of substantive remedies. This Part concludes with a discussion of the implementation of substantive remedies in legal doctrine. In particular, we address the question of how should a "second look" be instantiated without undermining the parties' primary rights or general constraints such as those pertaining to the rule of law.

A. Relational Justice at the Level of Primary Rights

Talk of private law presupposes a distinction between the private and the public. In particular, this distinction is between two dimensions of our practical lives: the horizontal and the vertical ones.[61] The horizontal dimension picks out the primary rights and duties that define the terms of interactions between private persons—for instance, tort law's duty of care is owed to risk takers on account of being foreseeably vulnerable to the risk created by the duty holder, regardless of their nationality or membership in a certain political community. By contrast, the vertical dimension pertains to the rights and duties that define the interactions between political authorities and their subjects.

"[P]rivate law assumes the moral responsibility to determine just terms of interactions among private persons."[62] Its most basic organizing ideas are *substantive* freedom and equality.[63] To treat a person as substantively free is to enable her to make meaningful choices about the directions of her life,

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judges' express reasoning, there is no good reason to suppose that it must trump other considerations that bear on the explanation of law. *See* Avihay Dorfman, *Philosophical Foundations of the Law of Torts*, NOTRE DAME PHIL. REVS. (Jan. 21, 2015), https://ndpr.nd.edu/news/philosophical-foundations-of-the-law-of-torts/. There is more to the question of what is the law of private law remedies than the express reasoning of judges. In other words, although our interpretation of *Boomer* is more sympathetic to its reasoning than its conventional depiction, our account of private law remedies neither relies nor depends on *Boomer*'s reasoning.

60 We say might, rather than must, because our ambition is to explain the appeal of substantive remedies even to those who have not subscribed to any particular conception of private law, liberal or otherwise. In that, substantive remedies can provide another reason to support a liberal conception of private law along the lines we defend in the main text below and elsewhere. *See* Hanoch Dagan & Avihay Dorfman, *Justice in Private: Beyond the Rawlsian Framework*, 37 LAW & PHIL. 171 (2018) [hereinafter Dagan & Dorfman, *Justice in Private*]; Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 COLUM. L. REV. 1395 (2016) [hereinafter Dagan & Dorfman, *Just Relationships*].

61 *See* Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1396–97, 1413–15.

62 Hanoch Dagan & Avihay Dorfman, *Postscript to* Just Relationships*: Reply to Gardner, West, and Zipursky*, 117 COLUM. L. REV. ONLINE 261, 261 (2017).

63 *See* Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1413–20.

rather than merely to protect her from being subordinated to the will of another. And for parties in a private law interaction to relate as substantively equals, their different normative and factual situations (for instance, asymmetric information) must bear on the determination of the terms of their interaction. Terms of interactions that ignore the relevant differences may give the parties equal treatment, but fail to treat them as equals.[64]

Furthermore, putting substantive freedom and equality at the moral center of private law is critical in the light of two facts we mentioned in analyzing *Boomer*'s moral. First is the fact of interdependence. Our interdependent practical affairs can be the product of intentional planning (as in a contract) as well as accidental happenstance (as in a typical negligence case). The important point is that the pervasiveness of interdependence in our lives makes the demands of substantive freedom and equality particularly relevant and important for private law; any attempt to limit their purview to public law, including the most elaborate and generous one, is bound to create an enormous justice deficiency. For instance, private discrimination in the housing market is at bottom a *horizontal* wrong in the sense that no government-supplied housing for the victims could launder the injustice of private owners refusing to sell or lease their houses to other private persons on account of who they are.[65]

The second fact pertains to personal difference. It suggests that we all constitute our own distinctive personhoods on the background of our peculiar circumstances—that is, it is not only that we think differently, but we also pursue different ground projects, possess different traits, and confront different life's challenges. Against this backdrop, the thought that formal freedom and equality can render private law's terms of interaction sufficiently just must be resisted. Difference (and interdependence) may matter, and greatly at that.

Thus, for example, the question of how much care is required in the face of a physically or mentally disabled passerby can only be properly addressed when the relevant difference that exists between the risk creator and the passerby is brought to bear on the standard of due care.[66] In particular, this standard must address the problem of *vulnerability imbalance* that is distinctively formed when one person pursues an end that happens to place the physical security of another in danger.[67] The imbalance picks out the difference between death and serious injury, on the one hand, and constraints on setting ends and pursuing them, on the other. As a result, in determining the standard of care owed to a physically disabled passerby, contemporary tort law rightly insists that the risk creator "is obliged to afford that

64 *Cf.* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 227 (1978).

65 *See* Dagan & Dorfman, *Justice in Private*, *supra* note 60, at 174–79.

66 *See* Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1431–35; Avihay Dorfman, *Negligence and Accommodation*, 22 LEGAL THEORY 77, 111–14 (2016).

67 *Id.* at 1432.

degree of protection which would bring to the notice of the person so afflicted the danger to be encountered."[68]

Determining the terms of interactions based on the liberal commitments to substantive freedom and equality extends far beyond the standard of due care to capture primary rights, duties, and powers in areas such as torts, contract, property, and the law of restitution. Setting these terms right is crucial even in an otherwise perfectly just society—even there, private law should empower and guide people by establishing just terms of interactions.[69] This task is no less crucial in our imperfectly just (or simply unjust) society—when people whose rights have been (or are about to be) infringed seek remedial response. Because the facts of interdependence and difference are no less significant at this remedial stage, their normative implications should loom large on the terms of the post-wrong interactions between plaintiffs and defendants.

The main claim of this Part is that a normative framework of relational justice, among possible other liberal accounts of private law justice, requires a remedial scheme that further instantiates substantive freedom and equality. This scheme has a bifurcated structure so that remedies are split between taking a *look back* at the primary rights and duties of the interacting parties and taking a *second look* at the parties' interaction in order to determine the appropriate remedial response to rights violations. Looking back is a manifestation of robust continuity between rights and remedies; whereas second-looking represents some discontinuity between the two. In order to develop this claim, we first need to elaborate on the right/remedy interface.

B. Between Rights and Remedies

The notion of substantive remedies opposes two contrasting accounts of the relationship between rights and remedies—the traditional "make-whole" view and its disjunctive counterpart. Familiar as they are, both reductive views fail descriptively and normatively. Remedies respond to violations of just terms of interactions, and thus, contrary to the disjunctive view, cannot plausibly be understood independently of the rights that ground them.[70] But because private law's fundamental maxim of relational justice applies to the parties' remedial encounter just as much as it applies to their pre-wrong relationship, the traditional "make-whole" idea is no more defensible.

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68 Fletcher v. City of Aberdeen, 338 P.2d 743, 746 (Wash. 1959). The same need not, and indeed should not, apply in the inverse case of a physically disabled risk-creator. There, tort law typically imposes an unaccommodating, objective standard of care. *See* Dorfman, *supra* note 66, at 90–92, 112–13.

69 *See* Avihay Dorfman, *Relational Justice and Torts*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY 321, 325 (Hanoch Dagan & Benjamin Zipursky eds., 2020); Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1438–60.

70 *See* WEINRIB, *supra* note 37, at 98, 102, 106–08.

1. Avoiding Remedy Reductionism

The clearest articulation of the disjunctive approach is embedded in the celebrated Calabresi-Melamed framework. For Guido Calabresi and Douglas Melamed, liability rules—alongside property rules—belong to the second stage of resource allocation; that is, after making its initial choice of entitlements, the law of remedies needs to decide on the manner of protecting these entitlements.[71] This makes private law rights and remedies normatively independent; parallel instruments in the service of the public good.[72] For the remedial stage, Calabresi and Melamed's scheme offers a choice between two rules: first, a property rule compels "someone who wishes to remove the entitlement from its holder [to] buy it from him in a voluntary transaction in which the value of the entitlement is agreed upon by the seller"; and second, a liability rule allows one to "destroy the initial entitlement if he is willing to pay an objectively determined value for it."[73]

This framework informs some economic analyses of remedies law, in which remedies are legal incentives designed to maximize overall social welfare.[74] Different variations on the disjunctive view have also been developed outside the economic analysis of law, suggesting that some areas of remedies law (such as compensatory and super-compensatory damages) are better understood in terms of empowering private persons to enlist the court in the service of attaining publicly administered vindication of their infringed rights.[75] These latter accounts begin with the truism that some remedies, such as compensatory damages for bodily injury, might not make the victim whole.[76] One such account even analogizes the remedial stage in matters of awarding wrong-based damages to criminal law fines that purport to commu-

71 *Id.* at 107.

72 *See, e.g.*, ROBERT D. COOTER & ARIEL PORAT, GETTING INCENTIVES RIGHT: IMPROVING TORTS, CONTRACTS, AND RESTITUTION 12 (2014).

73 *See* Calabresi & Melamed, *supra* note 25, at 1092.

74 Thus, in a typical negligence dispute the kind and the size of the remedy should be determined based on its ability to bring about optimal deterrence by inducing potential wrongdoers to internalize the costs of their risky activities. The answer may be compensatory damages; but it can also point out to super-compensatory damages, under-compensatory damages, or none at all. *See, e.g.*, Robert Cooter & Ariel Porat, *Disgorgement Damages for Accidents*, 44 J. LEGAL STUD. 249, 249–55, 274 (2015); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 888–90 (1998); Richard A. Posner, *Common-Law Economic Torts: An Economic and Legal Analysis*, 48 ARIZ. L. REV. 735, 737 (2006). Essentially, it depends on the social gains the remedy can secure, rather than on the terms of the interaction it establishes between the wrongdoer and the victim.

75 *See* John C.P. Goldberg, *Two Conceptions of Tort Damages: Fair v. Full Compensation*, 55 DEPAUL L. REV. 435, 436 (2006); Stephen A. Smith, *Duties, Liabilities, and Damages*, 125 HARV. L. REV. 1727, 1728 (2012); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 695 (2003).

76 *See* Scott Hershovitz, *Corrective Justice for Civil Recourse Theorists*, 39 FLA. ST. U. L. REV. 107, 111–12 (2011).

nicate public acknowledgement of rights violations, as opposed to making the right-holder whole.[77]

The radically disjunctive view, in which prescribing remedies is exogenous to the parties' rights, cannot be correct.[78] It is true that "any significant bodily injury" is, to an important extent, "an irreparable injury" so that compensatory damages may not literally make the victim whole.[79] But this truism does not imply that apart from traveling back in time to eliminate past wrongdoing there is no second-best response that vindicates the legal rights the victim has had all along. Producing a second-best is part of what the concept of remedy means. The law of remedies aims at addressing departures from the dictates of private law's primary duties—it is the law's backup plan in case these duties have been ignored (inadvertently or otherwise). Therefore, the radically disjunctive view must be rejected.[80]

And yet, the traditional make-whole picture, according to which courts focus solely on the primary right of the plaintiff when deciding what remedy to award, does not follow. To begin with, the provision of remedies may often be complicated due to institutional considerations that may bear on how courts resolve disputes.[81] It is thus not clear whether there is (or has been) an account that casts the rights/remedies relation in the robust terms of transubstantiation or rubber stamp.[82] A more plausible description of a nondisjunctive relation between remedies and primary rights (namely: the traditional make-whole view) is therefore one of effort, rather than out-

77 *See* SMITH, *supra* note 48, at 202; Smith, *supra* note 75, at 1753–54. Smith comes to this conclusion based, in part, on his understanding of the point of the prepayment rule, according to which fully compensating the victim of a wrong prior to her bringing a suit does not count as a defense, so that the wrongdoer would be compelled to compensate the victim once again. Smith, *supra* note 75, at 1742, 1744–49; *see also* SMITH, *supra* note 48, at 196. However, it is unclear whether such an inference is warranted. The prepayment rule is better viewed as standing for purely *instrumental* reasons—it precludes real-life disagreements and violence that will likely occur when the enforcement of substantive rights can be made independent of court rulings. *See* Hanoch Dagan & Avihay Dorfman, *Against Private Law Escapism: Comment on Arthur Ripstein*, Private Wrongs, 14 JERUSALEM REV. LEGAL STUD. 37, 43 & n.24 (2016). For a thoughtful historical analysis finding support for casting tort remedies in terms of a private law analog of criminal punishment, see Goldberg, *supra* note 75, at 438–47, 459–62.

78 *See, e.g.*, HANOCH DAGAN, RECONSTRUCTING AMERICAN LEGAL REALISM & RETHINKING PRIVATE LAW THEORY 144–45 (2013). For other reasons to resist the public law conception of private law remedies, see, for example, Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1400–09.

79 Mark A. Geistfeld, *The Principle of Misalignment: Duty, Damages, and the Nature of Tort Liability*, 121 YALE L.J. 142, 163 (2011).

80 *See* Jules L. Coleman & Jody Kraus, *Rethinking the Theory of Legal Rights*, 95 YALE L.J. 1335, 1339–40, 1342–43, 1345, 1369–71 (1986).

81 *See* Smith, *supra* note 6, at 33, 39, 43–47, 49–52, 55, 57–60; *see also* Seana Valentine Shiffrin, *Remedial Clauses: The Overprivatization of Private Law*, 67 HASTINGS L.J. 407, 433, 436 (2016).

82 The rubber stamp metaphor comes from Smith, *supra* note 6, at 47.

come—remedies *purport* to enforce primary rights, while leaving some room for institutional considerations.[83]

The clearest articulation of this view is the corrective-justice approach to private law, and especially the Kantian variation on this theme.[84] The remedy, in this view, piggybacks (or even instantiates) the right and therefore its role is strictly one-sided: it focuses solely on the victim's pre-wrong right vis-à-vis the defendant, and thus only on the victim's post-wrong entitlement to be made whole again.[85] For the victim, *and for the victim only*, the remedy purports to make it as if her means had not been wrongfully damaged.[86] After the wrong, the wrongdoer is conceived as the agent of the victim's restoration and the remedy is single-mindedly victim oriented. Thus, although the corrective-justice approach emphasizes the relational structure of remedies in private law, there is nothing in the pre- or post-wrong condition of the defendant that *could* bear on its make-whole analysis.[87] In other words, it is relational, but only in a purely nominal sense as there is *nothing* in the defendant's condition that makes a difference in the legal analysis at the remedy stage.

Our reading of *Boomer* suggests that disregarding the parties' post-wrong relational predicament is troublesome. Courts should sometimes take a second-look at the primary rights of the plaintiff while deciding the remedy question. In particular, they should consider whether to refrain from fully enforcing the primary rights of the victims, say, on account of the substantial disparities in the consequences of insisting on a make-whole remedy. Take the *Boomer* example, where insisting on the make-whole approach would have amounted to entirely shutting down the defendant's plant and terminating all its employees in order to avoid a relatively small property damage to the plaintiffs.

Understanding *Boomer* as taking the form of a second-look remedy also distinguishes our analysis from another variation on the make-whole theme

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83 *Cf.* Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710, 753–57, 763 (1917).

84 The Kantian approach can accommodate—using the concept of systematicity—institutional limitations on the make-whole aspirations of remedies in private law. *Cf.* ARTHUR RIPSTEIN, FORCE AND FREEDOM: KANT'S LEGAL AND POLITICAL PHILOSOPHY 238, 251–52 (2009); Ernest J. Weinrib, *Private Law and Public Right*, 61 U. TORONTO L.J. 191, 196–97 (2011).

85 *See, e.g.*, WEINRIB, *supra* note 37, at 61, 88–89, 117; *cf.* John Gardner, *What is Tort Law For? Part 1. The Place of Corrective Justice*, 30 LAW & PHIL. 1, 11–12 (2011).

86 *See* RIPSTEIN, *supra* note 11, at 245–61.

87 In a recent study, Ripstein observes that the corrective-justice account of making the plaintiff whole is not about restoring "the condition of either [party] in relation to their own previous condition," but rather about reversing a wrongful transaction so as to restore "how things stand between the parties." Arthur Ripstein, *Corrective Justice*, *in* RESEARCH HANDBOOK ON PRIVATE LAW THEORY, *supra* note 69, at 255, 258. Once again, characterizing it in terms of reversing a transaction does not change the fact that there is nothing in the defendant's post-wrong condition that could make a difference in the legal analysis recommended by this corrective-justice approach.

recently defended by Daniel Markovits and Alan Schwartz. On that variation, remedies fully reflect back on the nature of the rights they enforce. For instance, a compensatory damages remedy reflects a primary right to the value of the thing, rather than to the thing itself.[88] We do not take issue with the distinction between right to value and right to the thing itself.[89] However, we resist Markovits and Schwartz's attempt to characterize the object protected by a primary right purely in terms of the remedy awarded for its violation. The fact that a default remedy takes the form of compensatory damages does not *necessarily* make it the case that the object protected by the primary right is its mere value.[90] While the default remedy for conversion is damages measured by the thing's value,[91] it is false to suppose that one could get away with deliberately taking a generic chattel and paying up front its market value to the right-holder.[92] Moreover, much of tort law resists this much: a deliberate attempt unilaterally to convert a duty of care (or any other duty whose violation triggers compensatory damages) into a liability rule typically gives rise to super-compensatory damages.[93]

The same is true with respect to a nuisance case in which a cement plant would unilaterally make a deliberate decision to target nearby neighbors by reducing their property rights into mere costs of producing cement. Unlike the accidental—viz., nondeliberate—wrongdoing in *Boomer*, the deliberate infliction of nuisance will be an instance meriting injunctive relief and possibly also an award of punitive damages.[94] Contrary to the near-perfect match between rights and remedies marshaled by Markovits and Schwartz, our approach to *Boomer* suggests that awarding damages in lieu of injunction reflects a *substantive gap* between the primary rights of the plaintiffs and the remedy to which they are entitled. This gap reflects remedies law's commitment to determining post-wrong terms of interactions among substantively

88 *See* Daniel Markovits & Alan Schwartz, Rights and Remedies in Private Law (November 2009) (unpublished manuscript) (on file with authors). One of us offered in the past a similar view. *See* Hanoch Dagan, *Remedies, Rights, and Properties*, 4 J. TORT L., no. 1, 2011, at 1, 4. As we note below, we do not disagree with the analysis Markovits and Schwartz offer in connection with remedies for breach of *contractual* interactions. *See infra* text accompanying note 108.

89 *Compare* ERIC A. POSNER & E. GLEN WEYL, RADICAL MARKETS: UPROOTING CAPITALISM AND DEMOCRACY FOR A JUST SOCIETY 30–79 (2018), *with* Hanoch Dagan, *Why Markets? Welfare, Autonomy, and the Just Society*, 117 MICH. L. REV. 1289, 1298–1300, 1305–06 (2019) (reviewing POSNER & WEYL, *supra*).

90 *See* Charlie Webb, *Duties and Damages*, 1 OXFORD STUD. PRIV. L. THEORY (forthcoming 2020). The tendency to reduce a remedy of compensatory damages to a regime of pay-as-you-go liability is common in the law and economics literature. *See, e.g.*, Ariel Porat, *Private Production of Public Goods: Liability for Unrequested Benefits*, 108 MICH. L. REV. 189, 199–200 (2009).

91 We refer to damages as conversion's *default remedy* in recognition of traditional, far less (then and certainly now) common actions such as replevin and, especially, detinue.

92 *See* Armstrong v. Bromley Quarry & Asphalt, Inc., 378 P.3d 1090, 1096 (Kan. 2016); Nacol v. Metallic Dev. Corp., 614 S.W.2d 172, 175 (Tex. Civ. App. 1980).

93 *See infra* text accompanying notes 111–21.

94 DOBBS, *supra* note 21, § 468, at 1338.

free and equal parties by taking a second look at their respective conditions. Simply put, *Boomer* exemplifies the idea of substantive remedy.

2. The Missing Category of Substantive Remedies

We argue that there is a fundamental reason, a noninstitutional one, that justifies discontinuities between remedies and rights. That is, private law's remedial apparatus should give effect to the same normative commitments that determine the pre-wrong terms of interaction among private persons. In other words, taking seriously private law's conception of just terms of interpersonal interactions should carry immediate implications not only for the doctrines that establish primary rights and duties such as the duty of due care,[95] but also for those that address their violations. The normative impact of substantive freedom and equality on private law cannot stop at the stage of determining what primary rights we have. It also informs the question concerning the proper remedies for cases of rights violations given the remedies' impact on the respective conditions of the parties, going forward.

One implication of this proposition, which goes beyond our current inquiry, deals with instances when private law remedies fail *effectively* to vindicate this commitment. Unlike civil recourse theorists who insist that private law remedies are *the* defining feature of private law (or of tort law only),[96] our conception of relational justice allows for nontraditional remedial schemes to supplement and, if necessary, supplant private law remedies as in the cases of workers' compensation schemes in lieu of some areas of negligence law.[97] What counts as "private law" cannot be determined exclusively by the entitlement of a victim to pursue her wrongdoer in a court.[98] Nor, you would recall, can it be determined exclusively by reference to the apparatus's legal source—the common-law system does not exhaust the universe of private law's legal sources.[99] Rather, alternative remedial apparatuses may function as responses to violations of private law's primary rights and duties

95 *See* Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1430–35; Dorfman, *supra* note 66, at 111–14.

96 *See* John C.P. Goldberg & Benjamin C. Zipursky, *Torts as Wrongs*, 88 TEX. L. REV. 917, 918, 973 (2010).

97 *See* Dorfman, *supra* note 69, at 326–27. Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1436–37; *see also* Hanoch Dagan & Roy Kreitner, *The Other Half of Regulatory Theory*, 52 CONN. L. REV. 605, 631–37 (2020).

98 *See* Hanoch Dagan & Avihay Dorfman, *The Value of Rights of Action: From Civil Recourse to Class Action*, JERUSALEM REV. LEGAL STUD. (forthcoming 2021) (manuscript at 14) (on file with authors). Furthermore, the civil-recourse test is widely overinclusive because it applies far beyond private law to quintessential public law areas such as constitutional rights law. *See* Avihay Dorfman, *Private Law Exceptionalism? Part I: A Basic Difficulty with the Structural Arguments from Bipolarity and Civil Recourse*, 35 LAW & PHIL. 165, 177–85 (2016). In their recent book, Goldberg and Zipursky do not repeat this claim. *See* JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, RECOGNIZING WRONGS (2020).

99 *See* Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1397; *see also* Sandy Steel, *On the Moral Necessity of Tort Law: The Fairness Argument*, OXFORD J. LEGAL STUD. (forthcoming 2020) (on file with authors).

insofar as they are best seen as giving effect to the twin commitments to substantive freedom and equality underlying relational justice.

Our focus here, however, is on those doctrines in which *courts* are responsible for remedying an infringement of a plaintiff's right. On its face, analyzing them from the perspective of relational justice should be trivial since these rights are already properly grounded in the liberal commitment of reciprocal respect to self-determination and substantive equality (or at least so we have argued in the previous Section). Why isn't it enough, then, for the law to confine itself to looking back at the normative implications that are already embedded in the primary rights themselves? Put differently, why isn't it enough to resort to the make-whole measure of reestablishing the plaintiff's rightful, pre-wrong condition? The answer we are about to give reveals a dimension of remedies severely obscured by the traditional understandings—this is the dimension through which courts take a *second look* at the parties' interaction by examining the justness of the *post-violation* terms of the interaction.[100] Second-looking expresses substantive gaps between primary rights and the remedies provided in response to their violations. A principle of second-looking gives rise to what we have been calling *substantive* remedies.

C. Second-Looking Remedies

Remedies help to enforce and further specify the primary rights and duties and, in this way, give effect to the pre-wrong terms of private law interactions. Enforcement requires a straightforward looking-back at the primary rights and duties of the parties. And further specification means that at times courts invoke the remedial stage to articulate in a more concrete way the content of the primary rights and duties so as to determine what it would really mean to engage in looking back at these rights and duties.

But remedies are also normatively important *in and of themselves*, that is, apart from functioning as look-back means with which to sustain and fill out the content of primary rights and duties. Substantive remedies operate at the post-wrong stage to ensure that parties to an interaction that literally went wrong relate at the remedial stage as substantively free and equal private persons. Because the fundamental commitment of private law to relational justice must not fade away at the remedial stage, private law should see to it that its remedial apparatus be adjusted accordingly. This is why liberal remedies law must have a second-look principle tasked with the provision of substantive remedies.[101] For rule-of-law considerations of finality of adjudication,

100 Our talk of "interaction," as in post-wrong interactions and just remedial interactions, is not limited to social relationships (say, among colleagues, neighbors, or even between mere acquaintances) as it can also capture legally constructed interactions among strangers, which is an instance of a juridical interaction or relationship.

101 Recall that, appearance to the contrary notwithstanding, second-looking does not operate in the second order. The remedies governed by the looking-back and second-looking principles make up the entire complex of the *first*-order law of private law remedies.

judgment, and law more generally,[102] our account of substantive remedies begins and ends with *second*-looking even if remedies law *could* implement a principle of third-, fourth-, or *n*th-looking.

The case for substantive remedies becomes particularly potent in the face of the two facts mentioned above—interdependence and personal difference.[103] These facts are crucial not only at the level of primary rights and duties as when the law sets the terms of the interaction, say, by determining the standard of due care. Indeed, interdependence is at its peak when a defective interaction between a duty-ower and a right-holder puts the parties in a victim/wrongdoer relation. At this point, the interests of the parties are firmly interlocked since, all else equal, the injury of the victim and its rectification are deemed the injurer's, rather than the state's, responsibility.[104] Furthermore, the relevant difference in the parties' factual and normative situations may loom large on the determination of the remedy and its size as the *Boomer* decision exemplifies. A theory of private law remedies should address the parties' post-wrong interdependence and personal difference and provide a systematic articulation of the implications of ensuring the just terms of their post-wrong interaction. This is why our theory emphasizes second-looking as an additional principle that, along with looking-back, captures how remedies law should work.

The most fundamental proposition of such a theory is that private law remedies should aspire to put the wrongdoer and the victim in a relation of substantive freedom and equality with one another. This account—in sharp contrast to the approaches we have just criticized—takes a distinctively relational approach to remedies law. Because remedies determine the terms of post-wrong interactions between wrongdoers and their victims, the question that presents itself is the terms' compliance with the demands of relational justice. Therefore, the organizing idea for the private law of remedies should be not one of restoring the victim to her pre-wrong situation. Rather, it is a relational one: the remedy must put the *parties* in a relationship of substantive equality among self-determining persons.[105]

Thus, disregarding the post-wrong condition of the defendant is no mere blind spot that lawyer-economists and corrective-justice theorists can effortlessly address by adding it into the equation. It represents a deeper difficulty: the normative frameworks they employ to explain and justify private law remedies fail to acknowledge, and often reject, liberalism's two most fundamental commitments to substantive freedom and equality. Just like the

102 *See, e.g.*, Timothy A.O. Endicott, *The Impossibility of the Rule of Law*, 19 OXFORD J. LEGAL STUD. 1, 9–11 (1999).

103 *See supra* Section II.A.

104 We say *all else equal* in recognition of situations, mentioned above, in which remedial responsibility is legitimately collectivized, as in workers' compensation schemes. *See supra* text accompanying note 97.

105 The operational aspects of implementing substantive remedies are taken up in Section II.D.

lawyer-economists' sole attention to social welfare,[106] the corrective justice's sole focus on the pre-wrong entitlement of the victim necessarily overlooks both the wrongdoer's self-determination and the inequality that results if, and when, the remedial response puts the latter in a relation of subordination to the former.[107]

In some cases, adding the defendant's post-wrong condition to the equation does not make a practical difference. At times, this is because making the plaintiff whole does not generate a post-wrong interpersonal injustice so that there is no need to apply a principle of second-looking. More importantly, there are two categories of cases in which the law of remedies may justifiably pursue its *looking-back* function single-mindedly that would result in disregarding the defendant's post-wrong condition: one category pertains to ex ante voluntary allocations of risks, especially contractual ones; the other refers to egregious misconduct on the part of the wrongdoer. We take each category in turn.

The main reason for our focus on adopting a principle of second-looking in and around tort, rather than contract, remedies has to do with the nature of the contractual form of interaction. As Justice Holmes famously noted, "unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured," and contract law's remedial rules by and large serve as majoritarian defaults.[108] We do not argue, to be sure, that all of contract remedies *must* belong to this category. But insofar as this category does apply, it suggests that the parties have—either explicitly or by not opting out of the pertinent default—already allocated the risks and the costs of their post-breach predicament. Remedies law should by and large simply respect this much and, so, withhold second-looking.[109] The flip side of the same coin is that in contract law what may seem, at first sight, as an instance of a second-look remedial response is oftentimes better analyzed as looking back at the parties' primary rights. The mitigation principle, which imposes on promisees the burden of taking cost-justified steps to mitigate (or avoid aggravating) the promisor's damages for breach of contract, is a prime example for this point.[110]

If the first category in which remedies law should only look back at the primary rights of the parties involves breakups in what started as a mutually

106 *See supra* note 74 and accompanying text. The rejection of the pair-wise perspective is vividly on display when lawyer-economists analogize a torts plaintiff to a private version of an attorney general. *See* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 676 (7th Cir. 2003) (Posner, J.); Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, *in* EXPLORING TORT LAW 333, 337 (M. Stuart Madden ed., 2005).

107 Recall that while the corrective justice theory of private law rights is famously relational, its account of private law remedies is only nominally relational. *See supra* text accompanying notes 85–86.

108 Globe Refin. Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1903).

109 This is where we substantively agree with Markovits & Schwartz, *supra* note 88.

110 *See* Charles J. Goetz & Robert E. Scott, *The Mitigation Principle: Toward a General Theory of Contractual Obligation*, 69 VA. L. REV. 967, 967 (1983).

consensual relationship, the second category, egregious wrongdoing, lies at the other extreme. This category takes up the case of a wrongdoer exhibiting (at minimum) reckless indifference of the plaintiff's right.[111] There are, to be sure, cases in which a defendant engages in deliberate but nonmalicious imposition on the plaintiff's right.[112] Setting them aside, cases of genuinely malicious wrongdoings justify ignoring the defendant's post-wrong predicament upon deciding the remedy.[113]

A straightforward example is the doctrine of punitive damages. Consider *Cashin v. Northern Pacific Railway*,[114] in which construction workers engaging in boulder removal decided to exercise far less care than legally required to protect nearby houses and their occupants.[115] Their failure was not merely one of inadvertence or lack of professionalism; instead, these workers "knowingly employed the method which . . . might cause injury or death . . . in order to speedily and economically dispose of the threatening boulder, believing that it was to the advantage of the defendant [employer] to do so and pay for the damage done."[116] The court approved an award of punitive damages on the basis of this finding.[117] On the relational-justice approach, a remedy of punitive damages is the functional equivalence of injunctive relief; more concretely, it is, and should be reconceived by courts as, *injunctive relief granted ex post*.[118]

It is clear that had the plaintiff, an occupant of a nearby dwelling house, known that her safety was being taken hostage by the defendant's cost-benefit analysis, she would have been able to ask a local court to either enjoin the blasting operation or instruct the defendant to implement the necessary precautions.[119] The underlying idea is one of relational justice: injunctive relief ensures against (gross) violations of the freedom- and equality-respecting terms of the interaction between the defendant, a risk-creator, and the plaintiff, the risk-taker. This idea cannot simply fade away after the fact when the risk has materialized into injury.

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111 On the connection between malicious behavior and reckless indifference (or some such), see *Pickett v. Crook*, 20 Wis. 358, 359–60 (1866).

112 *See, e.g.*, Vincent v. Lake Erie Transp. Co., 124 N.W. 221, 222 (Minn. 1910).

113 We say malicious *wrongdoing* because a purely malicious state of mind accompanying perfectly legitimate behavior should not trigger liability in a liberal legal order. *See* Corp. of Bradford v. Pickles [1895] 73 LT 353 (HL) 353 (appeal taken form Eng.).

114 *See* Cashin v. N. Pac. Ry. Co., 28 P.2d 862, 864, 868 (Mont. 1934).

115 The untaken precaution is that of "mud-capping" or "plastering" the boulders to prevent damage to nearby people and property. *Id.* at 867.

116 *Id.* at 870.

117 *Id.* at 870–71.

118 For an earlier development of this theme, see Avihay Dorfman, *What is the Point of the Tort Remedy?*, 55 Am. J. Juris. 105, 153–62 (2010); *see also* Mark A. Geistfeld, *The Tort Entitlement to Physical Security as the Distributive Basis for Environmental, Health, and Safety Regulations*, 15 Theoretical Inquiries L. 387, 400 (2014).

119 Note that the fact that blasting may have counted as abnormally dangerous activity does not relieve the defendant of exercising due (or even utmost) care. *Cf.* Gregory C. Keating, *Strict Liability Wrongs*, *in* Philosophical Foundations of the Law of Torts 292, 294 (John Oberdiek ed., 2014).

Just as it commands ex ante intervention in the form of injunctive relief, so does the idea of relational justice require ex post intervention to *reinstate* just terms of interactions. A stand-alone remedy of compensatory damages cannot do the work since it would merely *reinforce* the workers' strategy of reducing—and, indeed, commodifying—the life and limb of the plaintiff to "a mere cost of doing business."[120] Super-compensatory damages provide the anticommodification measure against the conversion of the workers' duty to respect the plaintiff as substantively free and equal person into a standard of pay-as-you-go liability. A remedy of punitive damages appropriately adopts a looking-back approach to determining just terms of interaction at the expense of implementing a second look.[121] Against this backdrop, we can now return to substantive remedies and the principle of second-looking to which they give rise.

D. Substantive Remedies in Action

The argument has so far established the significance of a freestanding inquiry into the post-wrong interaction between parties in a private law dispute. The inquiry is freestanding because the liberal maxim of reciprocal respect to substantive freedom and equality determines not only the pre-wrong terms of interaction, but also the terms that govern the remedial interaction between the plaintiff and the defendant. We have also demonstrated that this inquiry need not be conducted by vague references to justice and fairness á-la the *Boomer* court. We now look at the ways in which the examination of relational justice at the remedial stage can be worked out into remedies law. In particular, we address the substantive remedies toolkit, the way remedies law can adhere to the rule of law, and the four guidelines that the law of substantive remedies follows.

1. The Remedial Toolkit

A remedies law that does not allow any second look could simply look back at the parties' primary rights. But one that takes relational justice seriously cannot use such a straightforward scheme, since post-wrong considerations might affect the just result. In particular, post-wrong considerations of relational justice pick out a remedial ceiling as well as a floor.

Ceiling. Outside of the cases of contract and egregious misconduct noted above, giving effect to a victim's infringed right cannot come at the

120 Marc Galanter & David Luban, *Poetic Justice: Punitive Damages and Legal Pluralism*, 42 AM. U. L. REV. 1393, 1430 (1993); *see also* Mark A. Geistfeld, *Tort Law and the Inherent Limitations of Monetary Exchange: Property Rules, Liability Rules, and the Negligence Rule*, 4 J. TORT L., no. 1, 2011, at 1, 8–9.

121 However, concerns for the financial annihilation of the defendant in the case of punitive damages may place outer limits on the pursuit of looking back, though not necessarily for the sake of pursuing second-looking. *See, e.g.*, Dillard Dep't Stores, Inc. v. Beckwith, 989 P.2d 882, 887–88 (Nev. 1999); Sherman v. McDermott, 329 A.2d 195, 197 (R.I. 1974).

expense of denying the wrongdoer his or her self-determination and equal standing, going forward. Defining such a ceiling is important because the victim and the wrongdoer cannot relate as substantively free and equal if by redressing the setback to the victim the wrongdoer is required to make an excessive sacrifice of his or her basic ability to function as a self-determining and equal person. Awarding damages in lieu of injunctive relief on *Boomer*-like grounds of undue hardship is an obvious example. But the case for setting a ceiling is not exhausted by the excessive consequences of enjoining the defendant.

It is also necessary to protect (nonwillful) wrongdoers whose financial situation does not allow them fully to compensate the victim and maintain minimally decent self-determining lives. To appreciate the meaning of this maxim, we characterize the notion of the defendant's predicament by reference to three normatively different layers of vulnerability—concerning the defendant's subsistence, self-determination, and convenience.[122] Relational justice implies that remedies law should not (and, as we will see, by and large does not) limit its concern for the defendant's predicament to the first, most skeletal layer. Rather, a commitment to respect the defendant at the remedy stage as substantively free and equal calls for extending this concern to the second, self-determination layer as well.

To clarify this point, consider the differences between this ceiling and bankruptcy justification in terms of character and scope. Concerning character, private law remedies pick out the wrongdoer's predicament for the purpose of doing *relational* justice, namely, between him and the victim; bankruptcy, by contrast, focuses on the debtor's predicament vis-à-vis the competing claims of a multiplicity of creditors (and, additionally, on sustaining a fair distribution of debt-collection amongst the creditors). To this extent, relational justice at the remedial stage provides a reason for setting a ceiling which does not depend on the justifications underlying bankruptcy protections.[123] Concerning scope, bankruptcy protection often comes too late and does too little to address the nonwillful wrongdoer's predicament;[124] these shortcomings may or may not be justified from the bankruptcy perspective of doing justice between the debtor and the class of creditors, but they cannot satisfy the strictly relational demands of doing justice between the wrongdoer and the victim at the remedial stage.

Hence, private law remedies must assume the responsibility to ensure the ceiling's alignment with respecting the wrongdoer as an equal, self-determining person. The *Boomer* scenario of awarding compensation in lieu of an injunction is not the only context in which this responsibility can be redeemed in practice. Part III will show that the doctrine of crushing liability, the emerging trend toward abolishing the collateral source rule, and the

122 *See infra* text accompanying notes 193–204.

123 *Cf.* John C.P. Goldberg & Benjamin C. Zipursky, *Tort Law and Moral Luck*, 92 CORNELL L. REV. 1123, 1143 (2007).

124 *Cf.* Gilles, *supra* note 18, at 620–21.

availability of structured payments of damages awards can and should be reconstructed along similar lines.

To be sure, a fully operationalized ceiling also requires a principled treatment of incorporated defendants. A theory of incorporated persons that transcends their economic function is an urgent need of private law theory, and we cannot hope to offer it here. Thus, at this stage, we settle for the very rough distinction between, on one hand, incorporations which serve as a ground project of a natural person or group of persons (as in *Boomer*'s employees) and, on the other hand, ones that make no such service.[125]

Floor. Remedying the wrong must be consistent with recognizing the victim as an equal, self-determining person. This straightforward prescription sets out a floor below which private law remedies cannot go. For instance, it means that the size of compensatory damages awards in a negligence case must not discount the victim's loss of future earnings, say, merely on account of her gender or ethnicity (given that the average wage for women or minorities is below the average).[126] It also implies that a wrongdoer should be obligated to cover her victim's physical or emotional harm even when its magnitude was not reasonably foreseeable given the latter's thin skull.[127]

2. Between Precise Rules and Open-Ended Standards

Some scholarly work takes the "remedial discretion"[128] that such an expanded remedial toolkit generates to its seemingly logical conclusion. This approach celebrates open-ended remedial discretion that authorizes ad hoc tailoring of remedies to each case based on its particular merits.[129] However, it is objectionable for two independent reasons. The first reason derives from the substantial impact of remedies on the content of the primary rights they are designed to enforce,[130] which implies that remedial ad hockery breeds indeterminacy into primary rights, thus undermining relational justice. The second objection to ad hockery is not specific to the law of remedies or to private law, but rather relies on the rule of law. Ad hockery offends

125 Matters of legal personality and their impact on private law and theory are complicated further still. Some incorporated entities may fall neither here nor there (consider research universities as we know them). We leave this uncharted territory for another occasion.

126 *See infra* Section III.D.

127 *See infra* Section III.E.

128 EMILY SHERWIN & SAMUEL L. BRAY, AMES, CHAFEE, AND RE ON REMEDIES 4 (2d ed. 2018).

129 *See* Doug Rendleman, *The Triumph of Equity Revisited: The Stages of Equitable Discretion*, 15 NEV. L.J. 1397, 1425–40 (2015). For a sophisticated articulation of this position, based on the claim of an "acoustic separation" between rights and remedies, see Emily L. Sherwin, *An Essay on Private Remedies*, 6 CAN. J.L. & JURIS. 89, 104–11 (1993); Emily Sherwin, *Compensation and Revenge*, 40 SAN DIEGO L. REV. 1387, 1389–96 (2003); Emily Sherwin, What Civil Remedies Do 1, 14–15 (Oct. 21, 2013) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2343144.

130 *See* DAGAN, *supra* note 78, at 149.

against the rule of law because it effectively authorizes courts to exercise unconstrained power.[131]

Objecting to ad hockery, however, does not warrant the opposite approach, namely, that remedies law must always adhere to the rule of bright-line rules.[132] Regulating a wide range of states of the world is complicated, and an attempt to do so with a set of bright-line rules might generate counterintuitive complexity. Such complexity could undermine, rather than serve, law's guidance.[133] A better approach begins with the observation that there is ample conceptual space between ad hockery and bright-line rules within which legal rules and standards provide sufficiently clear guidance as to what the law requires. In principle, courts and legislatures can reshape the content of standards to eliminate the problematics of ad hockery without necessarily saddling with dogmatic bright-line rules.

Thus, legal standards can—and, often, do—escape their open-endedness when courts or legislatures reduce them to their basic elements. For instance, the otherwise obscure standard underlying the doctrine of strict liability for ultrahazardous activities is rendered intelligible when the question of what makes an activity ultrahazardous receives a principled answer, namely, when exercising reasonable care, or, for that matter, utmost care, will *systematically* fail to reduce the activity's risk to the level of reasonable safety.[134] On this approach (which is not limited to primary rights and duties), standards should be made to possess recursive structures that would enable courts and their addressees to identify more or less definitive answers to particular questions.[135]

In our case, the key to ensuring that standards maintain their recursive structure is the existence of basic factors capable of generating a stable framework with which to address questions of remedies at both the abstract and the more concrete levels of legal analysis. Four such factors emerge

131 *See* Hanoch Dagan, *Doctrinal Categories, Legal Realism, and the Rule of Law*, 163 U. PA. L. REV. 1889, 1902–03 (2015). Another rule-of-law worry pertains to remedial ad hockery's adverse effects on the ability of law to guide the behavior of its addressees. This worry may sometimes be valid, but it is not clear what "behavior" is adversely affected by remedial ad hockery apart from the one already mentioned in connection with indeterminacy of primary rights and duties (insofar as their contents rely, in some measure, on their remedial apparatus). *Cf.* Peter Birks, *Rights, Wrongs, and Remedies*, 20 OXFORD J. LEGAL STUD., 1, 23, 35–36 (2000).

132 Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1186–88 (1989); *see also, e.g.*, LARRY ALEXANDER & EMILY SHERWIN, THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW 18 (2001).

133 *See* Timothy Endicott, *The Value of Vagueness*, *in* PHILOSOPHICAL FOUNDATIONS OF LANGUAGE IN THE LAW 14, 23, 28, 30 (Andrei Marmor & Scott Soames eds., 2011); RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 48 (1990).

134 *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 20(b)(1) & cmt. h (AM. L. INST. 2010); Dorfman, *supra* note 66, at 117–19.

135 For discussion of informative standards (which may be viewed as a minimalist version of standards featuring recursive structures), see Hanoch Dagan, *Lawmaking for Legal Realists*, 1 THEORY & PRAC. LEGIS. 187, 198–99 (2013).

from the preceding discussion: voluntariness, the defendant's predicament, the plaintiff's setback, and third-party effects.

3. Four Factors

Voluntariness. The first factor performs a gatekeeping function. Voluntariness supports a look-back, rather than second-looking, approach to remedies law. It precludes the consideration of the defendant's post-breach predicament where either the parties allocated the pertinent risk among themselves in a contract or the defendant has maliciously wronged the plaintiff.[136] Once the gate is open, the idea of just remedial relation requires the law to focus on the parties' ex post relations, or more specifically the defendant's predicament and the plaintiff's setback. In other words, the next two factors explain what might trigger a second-looking approach to remedies law.

Defendant's predicament. This factor considers the condition of the injurer, and in particular the impact of liability on his or her ability to function as a substantively free and equal person (which, in the case of a defendant-corporation, can sometimes stand in for its employees and other persons whose ground projects are substantially implicated in the defendant's condition).[137] The *Boomer* court is certainly highly attentive to this impact.[138] There are other doctrinal manifestations as well. The defense of change of position is a straightforward case in point, according to which a claim for restitution of a conferred benefit can be reduced to reflect expenses that would not have been otherwise incurred by the defendant who is the recipient of the benefit.[139] Part III considers other doctrinal resources with which remedies law accommodates the injurer's condition.

One important consideration that bears on this factor is liability insurance. Can't insuring oneself against liability for nonwillful wrongdoing eliminate one's predicament? This question becomes especially important when the defendant's predicament is characterized in terms of facing a highly burdensome payment of compensatory damages. (And its importance should not be confused with an entirely different question concerning compulsory liability insurance.)[140] We argue that a defendant should be estopped from seeking accommodation for his or her post-wrong predicament if, but only if, purchasing liability insurance is sufficiently feasible. Feasibility in this context is a function of the availability of information concerning insurance options and, most profoundly, the costs of purchasing insurance—clearly, many potential wrongdoers may lack the wealth to obtain one. Further, the *extent* of the insurance coverage can pose a hurdle even to those who can

136 *See supra* text accompanying notes 108–21.

137 *See supra* text accompanying note 125.

138 Boomer v. Atl. Cement Co., 257 N.E.2d. 870, 873 (N.Y. 1970).

139 *See* Hanoch Dagan, *Autonomy, Relational Justice and the Law of Restitution*, *in* RESEARCH HANDBOOK ON UNJUST ENRICHMENT AND RESTITUTION 219, 225 (Elise Bant, Kit Barker & Simone Degeling eds., 2020).

140 *See supra* note 20 for more on compulsory insurance.

afford some insurance but, nonetheless, lack the means fully to insure themselves against a substantial amount of damages.

We leave for another occasion the next step of figuring out the actual threshold below which liability insurance counts as infeasible under our skeletal definition; this task moves away from theory to highly contextual analysis of economic factors that will surely vary among places and across activities. The peculiar arrangement of insurance markets makes the search for a threshold more complicated still. Indeed, most schemes of liability insurance, compulsory or voluntarily purchased, come unbundled: they apply to a particular context, such as homeowner liability insurance, or take up a particular activity as in the cases of auto insurance and professional malpractice liability insurance.[141] Finally, the challenge of measuring feasibility also has a distinctively legal dimension—the rule of law's reluctance to incorporate inputs concerning insurance feasibility on a purely ad hoc basis would require some measure of standardization.[142] For instance, first-cut distinctions might be helpful, say, between natural and incorporated persons, commercial and nonprofit organizations, laypersons and professionals, and between occasional and orderly engagement in certain risk-creating activities.[143]

Plaintiff's setback. Although our account insists that remedies law must not ignore the defendant's predicament, it still takes seriously both the nature and the extent of the plaintiff's injury. It is trite to observe that the law of private law remedies does not reduce the variety of injuries into one kind. For instance, tort law allows for recovery for pure economic loss only exceptionally,[144] whereas injuries to life and limb receive the opposite treatment;[145] and setback to the plaintiff's emotional well-being has also been on the rise for the last several decades, reflecting the modern conviction that mental health is no less important for sustaining self-determination than its physical counterpart.[146] These distinctions illustrate our claim that not all rights are made substantively equal in the eyes of the law and that this qualitative heterogeneity is facilitated by the substantial role remedies play in the

141 There are exceptions, such as umbrella insurance, which provides liability insurance for claims not covered by other policies. But its coverage is peripheral, rather than residual. The very fact that typically there is no one-policy-covers-all attests to the complexity of the current market for liability insurance and, by implication, the legal task of determining the threshold of feasibility.

142 *See supra* text accompanying notes 128–135.

143 It appears that tort victims' lawyers may be implementing this form of reasoning when determining the size of the damage award they claim on behalf of their clients. *See* Baker, *supra* note 19, at 297, 314.

144 *See* Robins Dry Dock & Repair Co. v. Flint, 275 U.S. 303, 308–09 (1927).

145 *See* RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 7 (AM. L. INST. 2010).

146 *See* Dillon v. Legg, 441 P.2d 912, 914 (Cal. 1968); RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 48 cmt. a (AM. L. INST. 2010). Along with negligent infliction of emotional distress, there exists a tort of intentional infliction of emotional distress. *See, e.g.*, Dickens v. Puryear, 276 S.E.2d 325, 327 (N.C. 1981).

enforcement of our interpersonal rights.[147] But they can also figure at the stage of considering the parties' post-wrong relations.

The reason for this is that the relative importance of addressing the different kind of injuries influences the *extent* to which an injury deserves a remedy. This is why courts are (justifiably) reluctant to take into account burdensome liability as a legitimate consideration when it comes to life and limb, a reluctance which (properly) fades away when it comes to purely economic loss.[148] Hard cases, of course, are easily imaginable, such as where the injury to the victim is economic but severe and so requires a substantial amount of compensation (or, in a nuisance scenario, an injunctive relief) which might come at the expense of respecting the wrongdoer as substantively free and equal person.[149]

Third-party effects. The preceding analysis, dealing with the three first factors—voluntariness, defendant's predicament, and plaintiff's setback—insulates the interaction between the parties at the remedial level from its effects on the rest of society. But remedies can carry important positive and negative implications for the *pre*-wrong stage by changing for everyone the prices of the activities or goods that are the objects of the interaction. A familiar case in point is the imposition of strict tort liability for certain product defects. Providing remedies for physical injuries resulting from products defects (including, in the case of manufacturing defect, independently of fault) will likely have any number of consequences. The price of the product might increase and its availability might go down; other effects concern transnational competitiveness and product innovation. Moreover, these consequences may count as good or bad along different dimensions. For instance, a price increase has a regressive impact which, from a distributive justice perspective, counts as bad. But the very same effect can be an asset, rather than a liability, when viewed from a welfarist perspective—it can correct for under- and over-estimation of product safety by consumers and in this way enable better informed purchasing decisions.[150]

We place these third-party effects as the last factor to be considered not coincidentally. This way of proceeding is appropriate not only methodologically but also substantively. An interaction governed by the private law is, as noted, a source of concern in and of itself, but nothing in our relational approach entails the *total* exclusion of countervailing considerations. Relational justice—the justice of private law—is one dimension within a comprehensive theory of justice and, so, does not swallow other dimensions of

147 *See* DAGAN, *supra* note 78, at 149.

148 *Compare* Stephen R. Perry, *Protected Interests and Undertakings in the Law of Negligence*, 42 U. TORONTO L.J. 247, 263 (1992), *with* Ultramares Corp. v. Touche, 174 N.E. 441, 444, 447 (N.Y. 1931).

149 *See infra* Section III.A.

150 *See* A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1459–60 (2010).

justice, such as distributive justice.[151] Hence, private law's remedial framework is not oblivious of third-party effects insofar as they implicate the pursuit of relational justice in violations of other dimensions of justice (say, when doing relational justice creates distributive injustice).

Considering third-party effects expresses our methodological commitment to what may be viewed as theoretical modesty—contrary to familiar accounts of the intrinsic value of private law, our account does not call for the categorical exclusion of any society-wide consideration.[152] We insist, however, that they must not undermine private law's distinctive responsibility to sustain terms of interactions among substantively free and equal persons. This responsibility may not be exhausted at the ex-ante level of deciding the substantive rights of the parties as their post-wrong terms of interactions are no less crucial to their ability to relate as substantively free and equal.

Finally, we do not deny that integrating these four factors into a unified legal framework with which to determine what remedies should there be and how should courts implement them is challenging. But the *Boomer* decision provides an attractive example, since it employs a framework of legal reasoning that adheres to private law's basic facts of interdependence and personal difference: private law is about, and for, establishing respectful interpersonal interactions among substantively free and equal persons.[153] The relational structure underlying this conception guides the *Boomer* court to emphasize the parties' post-wrong relations. In particular, it emphasizes the implications of the nature and extent of the injury and the condition of the tortfeasor against the backdrop of the available forms of remedy. In *Boomer*, the remedial choice-set consisting in injunctive relief and permanent damages forms that backdrop.[154] Choosing damages over injunction reflects the "large disparity" between the injurer's predicament and the plaintiffs' sufferings.[155]

III. Just Remedies

We now move from theory to doctrine and demonstrate how our account of substantive remedies already shapes parts of the private law of remedies. This Part tracks the distinction between determining the ceiling and the floor of just remedial relations.

We begin with three sets of ceiling-setting doctrines. They each follow *Boomer*'s legacy of accommodating the defendant's post-wrong condition.

151 *But see* Gregory C. Keating, *The Priority of Respect over Repair*, 18 Legal Theory 293, 319 (2012) (grounding his approach on distributive justice foundations). Our approach accommodates distributive considerations, but not at the expense of private law's basic commitment to relational justice.

152 *Compare* Weinrib, *supra* note 37, at 19, *with* Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1428–30.

153 *See* Boomer v. Atl. Cement Co., 257 N.E.2d 870, 871 (N.Y. 1970).

154 *See id.* at 873. The option of injunctive relief is further divided into immediate and postponed injunctions. *Id.*

155 *Id.* at 872.

These doctrines are, roughly speaking, akin to an excuse, as opposed to justification, since they do not presuppose the absence of a complete tort, but rather seek to accommodate the defendant's predicament *in spite* of his or her wrongdoing by reducing its consequences (in terms of liability).[156]

The last two Sections of this Part move from ceiling to floor. The fourth doctrine, loss of earning capacity, takes up the case of compelling the injurer to go beyond full compensation, thus showing that at times lifting the floor up is required in order to vindicate plaintiffs' equal respect. The fifth, and last, doctrine explains the eggshell-skull rule in terms of implementing a second look at the post-wrong interactions between the injurer and the victim in order to address the latter's predicament in a way that generates substantial disproportionality between the wrongful conduct and the resulting injury.

Our overall effort is to demonstrate that doctrines in and around remedies law can be reconstructed in terms of the basic commitment to establishing relationally just terms of post-wrong interactions. On these terms, the plaintiff and the defendant relate as substantively free and equal. We emphasize reconstruction to convey the sense in which our engagement with private law (judge-made or statutory) is neither merely descriptive nor is it purely idealist. Rather, we show how otherwise discrete doctrinal pieces could all form normative unity by giving effect to relational justice at the remedial stage. This oftentimes means refining the doctrines on which we focus, and at times even reforming some aspects of them. Such reformist takeaways are a typical yield of legal theory that is not purely descriptive.

To be sure, not every remedial doctrine that sets plaintiffs' recovery below or beyond the compensatory baseline truly amounts to implementing a principle of second-looking. As mentioned above, some such doctrines may be premised directly and exclusively on looking back at the parties' primary rights, properly conceived.[157] There are other doctrines that limit plaintiffs' recovery but that cannot be reconstructed as giving effect to relational justice. Nothing in our approach necessarily rules them out. Just as we do not claim that relational justice must exclusively underpin all primary rights in contemporary private law, it does not demand exclusivity respecting remedies law; consistent with our commitment to theoretical modesty, other valid considerations may have a place in remedies law if they do not undermine relational justice. Finally, there are also other doctrines that limit recovery, which cannot be normatively justified within this framework, such as medical malpractice caps that *categorically* limit the maximum amount of damages with *no* account of either the plaintiff's post-injury condition or the defendant's ability to secure the funds necessary to make the plaintiff whole.[158]

156 Our characterization of just remedial relations (including the *Boomer* decision) in terms of excuse contrasts with Keating's characterization of *Boomer* in terms of justification. Keating, *supra* note 48, at 13, 38. On the general idea of an excuse, see J.L. Austin, *A Plea for Excuses*, 57 PROC. ARISTOTELIAN SOC'Y 1, 12 (1956).

157 *See supra* text accompanying note 113.

158 *See, e.g.*, VA. CODE ANN. § 8.01-581.15 (West 2020).

Nothing in our account should be read as embracing these unjustified doctrines.

A. Crushing Liability

If imposing liability on a defendant is likely to bring down his or her livelihood (or calling or other ground project of his or hers), and the grounds for which liability is sought comes down to inadvertent neglect on his or her part, and if the damage done by this neglect to the plaintiff—a business organization—is purely economic, there exists a compelling reason to make some allowance for the defendant's predicament. Our framework of relational justice at the remedial stage makes sense of the doctrine of crushing liability in terms of this line of reasoning. Although this doctrine lies in liability, rather than remedies, we argue that it should stand functionally, if not formally, for a remedial response to the negligent infliction of economic loss. Making allowance for the defendant's predicament in the case at issue cannot be satisfactorily explained as a no-duty decision; nor can it turn solely on the type of the injury (economic loss) caused by the breach of the duty. Rather, the doctrine serves to excuse, in part or in whole, the defendant's otherwise tortious act.

To see this, consider the famous Cardozo decision *Ultramares Corp. v. Touche*.[159] It features a partnership of public accountants hired to prepare and certify a balance sheet representing the financial condition of a rubber importer company.[160] That company later utilized the sheet to "borrow[ ] large sums of money from banks and other lenders,"[161] including from the plaintiff. The defendant was fully aware that its audit would be used by many potential lenders.[162] Soon after the borrower was declared a bankrupt, the lender-plaintiff pursued the defendant on a theory of negligent misrepresentation (and the jury's verdict exceeded $2.5 million in today's inflation-adjusted value).[163] Despite its easily avoidable carelessness, and notwithstanding Cardozo's own liability-expanding decisions in *MacPherson*[164] and *Glanzer*,[165] the Court of Appeals held that the defendant is not liable for the negligently inflicted economic loss of the plaintiff.[166] The doctrinal hook on which this holding rested was that of "no duty."

A no-duty explanation has been defended on economic and noneconomic grounds, to no avail. Lawyer-economists suggest that account-

159 174 N.E. 441 (N.Y. 1931).

160 *Id.* at 442.

161 *Id.*

162 *Id.*

163 The 1926 verdict of the jury was $187,576.32, the inflation-adjusted equivalent of $2,754,489 in 2020. *Id.* at 443; *Inflation Calculator*, US INFLATION CALCULATOR, https://www.usinflationcalculator.com/ (Oct. 1, 2020).

164 MacPherson v. Buick Motor Co., 111 N.E. 1050, 1053 (N.Y. 1916).

165 Glanzer v. Shepard, 135 N.E. 275, 275 (N.Y. 1922).

166 *Ultramares*, 174 N.E. at 447; *see also* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 133–36 (2003).

ants are relieved of the duty not because it is burdensome—after all, accountants are not required to take more precautions than they already take toward their clients. Rather, the worry pertains to judicial error concerning breach of the duty, in which case accountants' potentially high liability would force overinvestment in precautions to avoid erroneous judgments of breach.[167] But this worry is exaggerated. Essentially, the standard of reasonable care in the case of accountants (as well as other professionals) is determined by reference to *professional custom*, that is, according to the prevailing custom among accountants, as opposed to more or less educated guesses by the jury.[168] A noneconomic case for no-duty in this context, in turn, concerns the need to set priorities among the duties accountants (among other professionals) owe. It is argued that a no-duty decision enables boundedly rational accountants to devote care and attention to their clients only (or mainly).[169] However, imposing an additional duty of care toward nonclients such as the plaintiff in *Ultramares* has absolutely no undermining impact on the accountant. This is a case of overdetermination in the sense that all that the accountant must do in terms of discharging care toward the nonclient is exercising reasonable care *toward its client*.

By contrast, we argue that the key to making sense of the crushing-liability doctrine lies in remedies, rather than duty, law. Indeed, it is important not to conflate that hook—"duty"—with the merit of the holding. It is the adverse consequences of imposing compensatory damages on the defendant that drives the analysis from beginning to end. The doctrine of crushing liability does not relieve the defendant of the duty to exercise the expertise and mastery required by his or her professional role as an accountant; rather, it *excuses* the defendant from facing at least some of the legal implications of breaching that duty.

Cardozo's worry was that of exposing the defendant "to a liability in an indeterminate amount for an indeterminate time to an indeterminate class."[170] But when this worry of crushing liability does not obtain—as when the specter of liability is restricted to a clearly delineated special relationship between the accountant and the lender—the court readily acknowledges the existence of a duty and, hence, imposes liability for the exact same misconduct and injury.[171] We can say that although public accountants are *always* duty-bound to exercise reasonable care and expertise when conducting an audit, they might be entitled to a special allowance—the crushing-liability doctrine—that operates to relieve them of liability for negligent misrepresentation.

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167 *See* POSNER, *supra* note 30, § 21.2, at 595.

168 DOBBS, *supra* note 21, § 242, at 632–33.

169 *See* John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of* MacPherson, 146 U. PA. L. REV. 1733, 1833 (1998).

170 *Ultramares*, 174 N.E. at 444.

171 *See* Walpert, Smullian & Blumenthal, P.A. v. Katz, 762 A.2d 582, 586–87 (Md. 2000); Credit All. Corp. v. Arthur Andersen & Co., 483 N.E.2d 110, 120 (N.Y. 1985).

Furthermore, this allowance operates ex post in a manner reminiscent of the notion of second-looking; in fact, it is designed so as to have virtually *no* practical effects on the exercise of care by the accountant. To begin with, the court would have allowed *full* recovery for fraud, as opposed to negligence, insofar as it implicates the defendant in "willfully deceitful" conduct.[172] This constraint on the accountant's conduct tracks the framework of Part II, especially the notion that a principle of second-looking should not be made available for willful misconduct. It suggests that accountants cannot self-consciously convert a duty of reasonable care into a license to conduct themselves unprofessionally because doing so changes the nature of their wrongdoing from accidental to willful wrongdoing. In other words, the doctrine of crushing liability departs substantially from a looking-back principle of remedies law without thereby changing the due-care standard of tort law.

Furthermore, Cardozo emphasizes that the case for relieving the defendant of crushing liability for purely economic losses would also dissipate completely when the primary concern is, instead, for "unreasonable risk of *serious bodily harm*."[173] On our account, the doctrine should be similarly muted when the plaintiff's economic grievance is so severe as to place his or her ground project, not to mention subsistence, on the line. Arguably, a threat of this sort explains why, crushing liability to the contrary notwithstanding, some courts tend to award damages for the pure economic loss suffered by commercial fishermen as a result of devastating and long-lasting consequences of oil spill.[174]

Finally, the *Ultramares* decision does not endorse any form of justice at the expense of, or in tension with, relational justice. Cardozo identifies the notion of crushing liability as the ground for not imposing liability on the defendant.[175] Contrary to the conventional wisdom, *Ultramares* makes neither explicit nor implicit reference to the nonrelational concern widely associated with floodgates arguments—that imposing liability would hyperinflate the number of cases making their ways to courts. According to that wisdom, the crushing-liability doctrine sacrifices justice in specific cases in order to conserve "the ends of justice" in the long run.[176] This wisdom, unlike Cardozo's decision, pits tackling *relational* injustice against *distributive* justice. By contrast, our account, which is implicit in *Ultramares*, makes such pitting unnecessary and indeed unwarranted. The demands of relational justice in remedies law are not subservient to those of distributive justice; furthermore, the relational-justice reason for relieving the accountants of liability does not turn on the prospects of a "mass of litigation."[177] The doc-

172 *Ultramares*, 174 N.E. at 447.

173 *Id.* at 445 (emphasis added).

174 *See, e.g.*, Union Oil Co. v. Oppen, 501 F.2d 558, 563–69 (9th Cir. 1974) (applying California law).

175 *See Ultramares*, 174 N.E. at 444.

176 Stevenson v. E. Ohio Gas Co., 73 N.E.2d 200, 203 (Ohio Ct. App. 1946).

177 *Id.*

trine of crushing liability matters not because it promotes distributive justice, but rather simply because it sustains relational justice at the remedial level.

B. Collateral Sources

The collateral source rule proscribes the introduction of evidence of collateral sources (such as plaintiff's first-party insurance) to reduce the defendant's damage payments by the benefits collateral to the tort action.[178] But the modern trend has been away from this rule and toward permitting defendants to submit evidence of collateral sources at trial.[179] This trend takes various forms—some states have abolished the collateral source rule with respect to medical malpractice only, others have retained the rule insofar as the insurance company is subrogated to the plaintiff's entitlements, and yet others have made no such conditions so that evidence of collateral benefits is generally admissible.[180] A child of a tort reform movement, the abrogation or limitation of the rule is often explained by reference to the interest in curbing overcompensation (if, and when, it occurs[181]).[182] By contrast, we offer a *re*-characterization of this emerging trend, putting forward a *very different* account of why abrogate and, accordingly, when doing so may be justified. The account aspires to offer a radical reorientation for the abrogation of the collateral source rule. Rather than shielding big corporations from liability, we argue that it should be utilized, subject to the criteria we provide below, to accommodate defendants facing conditions of genuine predicament.[183]

Indeed, the familiar liability-shielding argument from overcompensation, and the concomitant accusation that the collateral source rule provides the plaintiff with double recoveries and hence "windfall" profit,[184] fails a basic test of justice. As the Vermont Supreme Court acutely observed more than a century ago, "as between the insurer and the wrong-doer, in reason and justice the burden of making compensation to the injured party ought to be ultimately borne by the party thus in fault."[185] This observation clearly takes the heat out of the overcompensation rhetoric by making the straight-

178 *See, e.g.*, Martinez v. Milburn Enters., Inc., 233 P.3d 205, 208 (Kan. 2010).

179 DOBBS, *supra* note 21, § 380, at 1059. A further implication might be to *mandate* the deduction of collateral benefits from the damages award. *See* N.J. STAT. ANN. § 2A:15-97 (West 2020).

180 DOBBS, *supra* note 21, § 380, at 1059–60.

181 The question of whether the plaintiff has in fact received more than he or she needs to cover for the expected loss depends, in part, on the terms of the insurance policy (and especially subrogation rights).

182 Overcompensation can have several adverse consequences, including in particular increasing premiums for malpractice liability insurance. *See* Glen O. Robinson, *The Medical Malpractice Crisis of the 1970's: A Retrospective*, LAW & CONTEMP. PROBS., Spring 1986, at 5, 32.

183 *See infra* text accompanying notes 187–200.

184 Kevin S. Marshall & Patrick W. Fitzgerald, *The Collateral Source Rule and Its Abolition: An Economic Perspective*, 15 KAN. J.L. & PUB. POL'Y 57, 60–61 (2005); Note, *Unreason in the Law of Damages: The Collateral Source Rule*, 77 HARV. L. REV. 741, 752 (1964).

185 Harding v. Town of Townshend, 43 Vt. 536, 539 (1871).

forward point that the insurer and the defendant do not stand in any morally relevant relationship to each other—they are not "joint tortfeasors or joint debtors."[186]

But the Vermont court assumes that relational justice as between the defendant and the plaintiff at the post-wrong stage must *never* take into account the defendant's predicament.[187] With respect to negligence, as opposed to deliberate wrongdoing,[188] we deny this much, arguing that that assumption ought to give way if the following three conditions obtain: first, compelling the defendant fully to compensate the plaintiff will force the defendant to forgo the pursuit of a ground project of hers (such as dropping a course of action she rightfully deems consequential to her pursuit of ground projects such as law school education); second, the plaintiff is about to receive sufficient compensation from a collateral source; and third, abrogating the collateral source rule would not be utilized systematically (and, thus, opportunistically) by sophisticated defendants to undermine their responsibility to either exercise due care[189] or purchase, if feasible, liability insurance.[190] Against the backdrop of these three conditions, setting aside the collateral source rule ought to be permissible, with the *only* grounds of permissibility being that of accommodating the defendant's predicament.

Adopting this framework of remedial relational justice requires thicker analysis to determine, first, where to draw the principled line between predicament and mere inconvenience and, second, how to proceed with implementing the line drawn in particular cases. We see no reason to be skeptical about law's ability to tackle the task of reducing the notion of defendants' predicament into a set of informative, down-to-earth and relatively precise instructions for courts and, ultimately, juries. Recall the past experience of introducing comparative negligence to the tort of negligence in the face of substantial skepticism about the alleged impossibility of reducing the non-quantitative concept of negligence to percentages;[191] or, recall the then path-breaking decision of *MacPherson v. Buick Motor Co.* to abolish contractual privity's rigid constraint on tort liability for negligent infliction of personal injury.[192] Skepticism to the contrary notwithstanding, tort law has largely overcome these challenges.

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186 *Id.* at 538.

187 *Id.*

188 The distinction between accidental and deliberate wrongdoers is implicitly reflected in those statutory schemes that limit the abrogation of the collateral source rule to medical malpractice. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 231, § 60G (2020). But some statutory schemes make no such, implicit or explicit, distinction. *See, e.g.*, N.J. STAT. ANN. § 2A:15-97 (West 2020).

189 *See also supra* text accompanying note 170.

190 *See supra* text accompanying notes 140–43.

191 One of the most influential tort commentators of the day was sympathetic to the general reluctance on the part of many courts to embrace comparative negligence (in part for the reason mentioned in the main text above). *See* WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 455–56 (3d ed. 1964).

192 111 N.E. 1050, 1053 (N.Y. 1916).

The key to making good on the line-drawing task in connection with the defendant's predicament is a theory that helps to determine what counts as a predicament. Our account of private law in terms of a commitment to substantive freedom and equality has introduced such a theory. Elsewhere we claim that respect for a person's *ground projects* should be the guiding principle with which to tell predicament—a setback to one's ground project—from inconvenience—a setback that leaves intact the ability to pursue one's ground project.[193] For our purposes, it is enough to give a rough sense of the predicament/inconvenience distinction. Forgoing the pursuit of an academic career or some other calling counts, for example, as a predicament worthy of addressing (if, recall, the second condition obtains so that the plaintiff has received sufficient compensation from a collateral source); by contrast, giving up on an equally expensive leisurely activity (say, skiing on a vacation) results in inconvenience—including substantial ones—for which remedies law should make no allowance.[194]

However, ensuring the justness of the post-wrong relations must not undermine people's just terms of interactions,[195] which returns our argument to the third condition identified a moment ago.[196] That is, permitting a defendant, based on her post-wrong predicament, to submit evidence of collateral sources must not systematically erode the force of private law's primary duties. This worry comes up regarding a specific subset of collateral source cases, involving sophisticated and legally informed risk creators, with respect to which a regime that systemically reduces liability where plaintiffs are insured might lead up to underperformance of tort duties of care and to underinsurance,[197] which undercuts, rather than serves, the parties' compliance with the requirement of reciprocal respect to substantive freedom and equality.[198] In other words, adopting a *strategy* of taking less precaution in expectation of being partially excused of liability is a form of *non*-accidental wrongdoing for which no second-looking should be allowed on our account.[199] By the same token, adopting a strategy of purchasing less insur-

193 We further elaborate the notion of ground projects in Dagan & Dorfman, *Justice in Private*, *supra* note 60, at 193–94; Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1419–20.

194 *See* Dagan & Dorfman, *Justice in Private*, *supra* note 60, at 193–94; Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1419–20; *cf.* Union Oil Co. v. Oppen, 501 F.2d 558, 570 (9th Cir. 1974).

195 *See supra* text accompanying notes 78–82.

196 *See supra* text accompanying notes 189–90.

197 According to one empirical study (not specifically related to the collateral source rule), personal injury lawyers have worked out a policy of pursuing the opportunistically underinsured defendants beyond their insurance coverage to capture what these lawyers call "blood money." Baker, *supra* note 19, at 276, 297, 314.

198 *See* Bynum v. Magno, 101 P.3d 1149, 1167 (Haw. 2004) (Moon, C.J., dissenting) (quoting Bozeman v. State, 879 So. 2d 692, 705 (La. 2004)).

199 *See supra* text accompanying notes 114–21, 171.

ance coverage counts for setting aside the defendant's post-wrong predicament.[200]

One might suspect that the proposed reconstruction of the collateral source rule is either unnecessary or even undesirable due to the availability of bankruptcy and other legal protections. It may seem unnecessary because the defendant's predicament is already taken care of through bankruptcy law—consider garnishment and homestead exemptions from the otherwise collectable assets of the defendant-debtor. And it may even be undesirable because our approach distorts the delicate balance between the competing interests of debtors and creditors that these bankruptcy laws strike. This suspicion is unwarranted since it ignores the critical distance between our reconstruction of the collateral source rule and the various bankruptcy protections. As we observed above, bankruptcy protections are neither necessary nor sufficient parts of a complete ceiling shaped by the liberal commitment to the substantive freedom and equality of the defendant.[201]

In particular, bankruptcy protections render noncollectable certain *all-purpose assets* (viz., exempt income and homestead) and thus aim at securing a threshold of decent standard of living at the expense of tort-judgment creditors.[202] These assets are linked with the basic ingredients of *subsistence* such as having adequate shelter, food, means of transportation, and clothing.[203] Their purpose is to ensure that all people (tortfeasors included) could experience a *decent* life. By contrast, the notion of ground projects informing our reconstruction of the collateral source rule focuses on pursuing a *meaningful* life. And although standards of decent and meaningful life may partially overlap, they reflect qualitatively different categories of value. A liberal commitment to substantive freedom and equality insists not only on subsistence, but also on being able to lead the good life.[204]

C. Structured Payments

Monetary awards following tort judgments typically come in a lump-sum form, rather than periodic installments.[205] The common law's preference for lump-sum awards reflects various institutional considerations pertaining to the administration of the payment[206] as well as substantive considerations concerning moral hazard.[207]

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200 *See supra* text accompanying notes 140–43.

201 *See supra* text accompanying notes 123–25.

202 *See, e.g.*, 15 U.S.C. § 1673(a) (2018).

203 *See* Gilles, *supra* note 18, at 624, 632.

204 The question of what counts as the good life has received different philosophical articulations. Our account does not turn on any one of them and it can be made compatible with many liberal conceptions of the good life.

205 *See* Ellen S. Pryor, *After the Judgment*, 88 VA. L. REV. 1757, 1767 (2002).

206 POSNER, *supra* note 30, § 6.11, at 192.

207 Samuel A. Rea, Jr., *Lump-Sum Versus Period Damage Awards*, 10 J. LEGAL STUD. 131, 135–37 (1981).

That said, the tort reforms of the 1970s and 1980s have created a substantial opening for structured payments, including mandated ones.[208] Most states today provide for some form of period installments in lieu of a lump-sum amount.[209] The intended purposes underlying this trend focus, among other things, on reducing the severity of medical malpractice claims, tackling false complaints, and preventing unsavvy plaintiffs from misusing large sums of money.[210] It is unclear whether any of these purposes can and should be achieved by moving away from lump-sum awards toward periodic payments.[211]

Our account gives a novel orientation to the growing recognition of structured payments that can help reconstruct this doctrine as a laudable form of administering tort judgments. Concern for relational justice at the remedial stage counts against using lump-sum payments if, and only if, the following two conditions obtain: first, a structured payment helps to accommodate the predicament of negligent defendants; and second, it does not leave the plaintiff worse off relative to receiving a lump-sum award in its stead. Concerning the defendant's predicament, switching to structured payments could be consequential on one occasion in particular—when paying a lump sum up front will severely undermine the defendant's pursuit of his or her ground projects. Once again, inconvenience alone cannot bear the burden of justifying the payment deferral integral to the payment form of periodic installments.

Now consider the plaintiff's condition, and especially the effect of the timing of the payment on his or her ability to obtain adequate recovery. Periodic installments are an inadequate form of rectifying the wrong done with respect to some heads of damages. For instance, medical expenses accruing immediately after the injury, post-traumatic emotional harm, and property damage exemplify cases in which periodic installments might undermine adequate recovery. A case for periodic installments, therefore, should be usually limited to future medical expenses (including medical monitoring) and loss of earning capacity.

* * *

The three doctrines we have studied thus far—and, potentially, other practices (such as juries' forgiving stance toward individuals),[212] which we leave for another occasion—not only give a partial "pass" to wrongdoers; they also impose the burden for accommodating the post-wrong predicament onto their victims. From the traditionalist conception of private law, in which we have no affirmative interpersonal obligations, forcing a blameless plain-

208 *See* Pryor, *supra* note 205, at 1767, 1769.

209 Roger C. Henderson, *Designing a Responsible Periodic-Payment System for Tort Awards: Arizona Enacts a Prototype*, 32 ARIZ. L. REV. 21, 27–29 (1990).

210 *See* Pryor, *supra* note 205, at 1777–78.

211 *See, e.g.*, Henry E. Smith, *Structured Settlements as Structures of Rights*, 88 VA. L. REV. 1953, 1955 (2002).

212 *See supra* note 22.

tiff—rather than, for example, society as a whole—to accommodate the defendant's post-wrong predicament may seem to add insult to injury. But this conception of private law fails to account for our primary rights and obligations.[213] Likewise, it does not, and should not, typify the law of remedies.

To be sure, as we argued in Part II, there are good reasons to carefully circumscribe both the burden that can be legitimately imposed on plaintiffs and the kind of cases in which they can be called on to bear it. But taking private law's underlying commitment to relational justice seriously implies that a categorical insulation of the remedial stage from the interpersonal obligation of reciprocal respect to self-determination and substantive equality is unacceptable even when the beneficiary of the duty of accommodation is a tortfeasor.

D. Loss of Earning Capacity

We turn now to our fourth and fifth examples of second-looking remedial doctrines. They involve categories of cases that adjust the plaintiff's remedy *beyond*, rather than below, what a traditional view of making the plaintiff whole prescribes. Ordinarily, the idea that a tort victim must be made whole and that this is the tortfeasor's responsibility resonates well with a framework of relational justice. Thus, if a wrongful act causes serious bodily harm it is, all else equal, the entitlement of the victim to enlist the injurer in the service of *fully* compensating her for the medical expenses incurred by the ailing victim.[214] But all else is sometimes not equal. And the reason for this is that a measure of full compensation may not be sufficient to reestablish relationally just terms of interactions. Thus far we have mentioned the defendant's predicament as a ground for relieving the injurer of a standard of full compensation. We now turn to the opposite case of compelling the injurer to go beyond full compensation. This and the preceding deviations from full compensation are no mere aberrations. A commitment to substantive freedom and equality supports substantive remedies by setting the relationally just measure of compensation above (or below) that of full compensation. The case of lost-earning capacity casts this point into sharp relief.[215]

Making whole the victim's injured earning capacity invites a court to predict "what career path the plaintiff would have taken and what he or she would likely have earned over a lifetime."[216] At times, a prediction is made

213 *See* Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1451–59.

214 It seems that even opponents of the make-whole conception of compensatory damages in tort law would acknowledge this much. *See* Goldberg, *supra* note 75, at 451–52.

215 While we focus on the case of infants and their loss of earning capacity, our analysis has implications for related questions such as calculating the expected lifespan of the victim (which, in turn, affects the size of medical expenses as well as the victim's lifelong pain and suffering). We leave these developments to another occasion. *See generally* MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, THE MEASURE OF INJURY: RACE, GENDER, AND TORT LAW (2010).

216 Martha Chamallas, *Civil Rights in Ordinary Tort Cases: Race, Gender, and the Calculation of Economic Loss*, 38 LOY. L.A. L. REV. 1435, 1440 (2005).

relatively straightforward, as when the victim-plaintiff has already established a sustained career path. But at other times—as in a tort case featuring an infant suffering personal injuries—prediction turns on statistical evidence so as to make up for the lack of particularized information concerning the victim's earning capacity. Traditionally, courts engaged in this context in the troubling practice of drawing on immutable traits (especially race and gender) as a statistical proxy for the victim's future earning capacity.[217] Empirically, race and gender *are* strongly correlated with substantial differences in earnings (as well as other differences such as life expectancy). On this approach, infant victims suffering from a similar personal injury may be awarded very different sums of damages simply in virtue of their respective race and/or gender.[218] Happily, a recent trend is beginning to emerge, according to which race- and gender-based prediction of future loss of earning capacity should be abandoned.

One reason for this shift concerns statistical inaccuracies triggered by overemphasizing present patterns of discrimination in society at the expense of factoring into the calculation the future possibility of living in a far less discriminatory society.[219] But courts and commentators also rely on a noncontingent reason against drawing on race and gender: such proxies must give way to the demands placed on courts by the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the U.S. Constitution, as well as by federal and state statutory protections against discrimination. As state actors, courts are bounded by the constitutional and statutory rights of the litigants, tort-victims included, who come before them[220]—it is illegal for a court, the argument goes, to base tort damages on the traits of the plaintiff-victim as a member of some protected group.[221] Deploying public law—the Constitution and various civil rights acts—as an *external* constraint on the tort-law practice of determining damage awards along these lines implies that private law is the source of the difficulty: making tort victims whole under private law doctrine authorizes, indeed enforces, baseless inequalities.

By contrast, our private law framework of just remedial relations rejects the assumption, shared by both the traditional and the emerging trend, that tort law raises such difficulty. Its basic commitment to substantive freedom and equality rules out the problematic resort to gender and race, irrespective

217 *See* Jennifer B. Wriggins, *Damages in Tort Litigation: Thoughts on Race and Remedies, 1865–2007*, 27 REV. LITIG. 37, 61 (2007).

218 *See, e.g.*, Ronen Avraham & Kimberly Yuracko, *Torts and Discrimination*, 78 OHIO ST. L.J. 661, 676–77 (2017); Martha Chamallas, *Questioning the Use of Race-Specific and Gender-Specific Economic Data in Tort Litigation: A Constitutional Argument*, 63 FORDHAM L. REV. 73, 75 (1994); Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 97–105 (2011).

219 *See* McMillan v. City of New York, 253 F.R.D. 247, 249–51 (E.D.N.Y. 2008); Wheeler Tarpeh-Doe. v. United States, 771 F. Supp. 427, 455 (D.D.C. 1991), *rev'd on other grounds*, 28 F.3d 120 (D.C. Cir. 1994).

220 *See* Shelley v. Kraemer, 334 U.S. 1, 814 (1948).

221 *See* G.M.M. v. Kimpson, 116 F. Supp. 3d 126, 140 (E.D.N.Y. 2015); *McMillan*, 253 F.R.D. at 255–56; *see also* United States v. Bedonie, 317 F. Supp. 2d. 1285, 1319 (D. Utah 2004); Chamallas, *supra* note 216, at 1441.

of how much these traits happen to correlate with the victim's future earnings. Treating the victim as a genuinely self-determining, equal person is incompatible with tying future earning capacity with his or her gender (or race). Instead, determining future loss of earning capacity must begin with the normative assumption that, *for any self-determining and equal human being*, a career path should not be dictated by such traits or by the (unwarranted) negative value assigned to them by some members of society. Engaging in race- and gender-based damages computation at the post-wrong stage runs counter to the demands of relational justice. This traditional practice violates these *horizontal*, interpersonal demands, and not merely the vertical ones placed on courts vis-à-vis litigants.

Our account is no mere replication of the public law objection to using race-based and gender-based predictions of future earnings.[222] Rather, it preempts the most difficult challenge to this (public law) objection: the defendant's asking of "why me?" in the face of the state's commandeering support of private persons toward the ends of substantive equality and self-determination.[223] On one of its variations, "the hardest and most intractable challenge presented by the constitutionalisation of private law" is "the problem of identifying appropriate duty-bearers."[224] As Hugh Collins explains, "the project for the alignment of private law with fundamental rights," which have been "traditionally regarded" to apply only "to relations between the citizen and the state," "presents no obvious candidates for restrictions on who may be selected as duty-bearers."[225] Adding the cause of distributive justice will not do either as it, too, fails to answer the defendant's "why me?" question. That is, it is unclear what could be the basis for enlisting the defendant in particular in the service of ameliorating injustice in the *overall* distribution of resources and opportunities in society.[226]

This challenge is both important and cumbersome. Private law, like law more generally, is a justificatory practice. Because law claims to have the legitimate authority to create and enforce rights and duties, its prescriptions must be justified. For *private* law to meet this demand, it is usually not enough to demonstrate the desirability of the society-wide state of affairs that would result if the type of complaint a plaintiff raises were to generate the remedy sought. Rather, we—and the defendant most immediately—also need to be convinced that people in the defendant's category should be duty-bound to those in the plaintiff's predicament.[227]

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222 *Cf.* Henry E. Smith, *Mind the Gap: The Indirect Relation Between Ends and Means in American Property Law*, 94 CORNELL L. REV. 959, 962 (2009).

223 *Id.*

224 Hugh Collins, *The Challenges Presented by Fundamental Rights to Private Law*, *in* PRIVATE LAW IN THE 21ST CENTURY, *supra* note 52, at 213, 234–35.

225 *Id.* at 223.

226 *See* Avihay Dorfman, *Private Law Exceptionalism? Part II: A Basic Difficulty with the Argument from Formal Equality*, 31 CANADIAN J.L. & JURIS. 5, 11 (2018).

227 *See* DAGAN, *supra* note 78, at 110.

The state-action foundation of prohibiting race- and gender-based damage computations cannot justify to the defendant why *she* should be forced to be the agent of remedying the plaintiff's unjustified harsh predicament. By contrast, our theory of relational justice at the remedial stage, which is indigenous to private law, does offer such a justification by identifying the missing link of privity. Precluding the defendant from relying on such calculations is based, in our account, directly on the duty of reciprocal respect to substantive freedom and equality. The emerging nondiscriminatory practice regarding victims' injured earning capacity need not, therefore, depend on the policy or collective goals of the state. The commitment of the private law of remedies to ensure the parties' post-wrong just relationship provides it a conceptually secure and normatively principled foundation: it requires the defendant, rather than merely the court, to respect the plaintiff as a self-determining, equal human being at the remedial stage.

E. Thin-Skull Rule

Foreseeability with respect to the adverse consequences of one's action is partially constitutive of the degree to which a certain act might count as wrongful.[228] According to the thin-skull rule, the scope of tort liability incurred by tortfeasors extends broadly to cover harm even when its magnitude cannot be reasonably foreseeable as it reflects an idiosyncratic condition—the thin skull—on the part of the victim.[229] Such unforeseeability introduces *normative* discontinuity between the wrongdoing and the magnitude of the harm suffered by the victim: the exceptional magnitude of the harm that occurred cannot be cast in terms of the wrongful risk out of which it came about.[230] This means that the thin-skull rule deems the risk-creator liable even for adverse consequences that could *not* have figured ex ante in her (or any other reasonable risk-creator's) decision about the kind and the amount of precautions that should have been taken. It is, in other words, a rule of damages, rather than proximate causation.[231]

Consider the English negligence case of *Smith v. Leech Brain*, featuring a small spattering of molten metal that caused both a small "burn on his lip" and a terminal cancer which was attributed to the peculiar condition of the

228 The connection between foreseeability, duty, and liability is further explored in Avihay Dorfman, *Foreseeability as Re-Cognition*, 59 AM. J. JURIS. 163 (2014).

229 *See, e.g.*, Vosburg v. Putney, 50 N.W. 403, 404 (Wis. 1891). To be sure, the rule does not overcome an unforeseeable *type* of injury. Whereas the type must be foreseeable to satisfy the proximate-cause element, the scope of the injury need not be foreseeable if, and only if, the thin-skull rule applies. *See* Smith v. Leech Brain & Co. [1962] 2 QB 405, 415.

230 *See* Avihay Dorfman, *Can Tort Law Be Moral?*, 23 RATIO JURIS. 205, 225–26 (2010).

231 Indeed, the rule "kicks-in" only after the plaintiff has managed to prove that the defendant's wrongdoing has satisfied all the elements of the prima facie case of the tort, including proximate causation and (some) injury. Then, and only then, can the plaintiff argue that the size of the compensatory damages ought to reflect the full magnitude of the harm, including its unforeseeable aspects.

victim.[232] Explaining why the *full* cost of the injury should be borne by the negligent defendant may not find secure grounds in the primary duty of care it owed the victim, since such a duty cannot possibly aim at reducing unforeseeable risks.[233] Hence, were the *Smith* court to adopt only a principle of looking back at the primary right to bodily integrity of the victim, it would not have a reason to recognize his predicament as implicating the defendant's duty of due care and the liability for its breach. The victim's predicament might become legally cognizable only if, instead, the court takes a second look at the post-wrong interaction between the victim and the tortfeasor.

A framework of relational justice at the remedial stage and the resultant category of substantive remedies further develops this prescription by explaining, first, what is it in the post-wrong interaction that invites second-looking and, second, what is the proper scope of the thin-skull rule.[234] Concerning the first, the rule entitles the plaintiff, including when she could not have been aware of her special condition, to have her idiosyncratic situation determine *unilaterally* the post-wrong terms of the interaction with the tortfeasor. This way of treating the parties at the remedial stage reflects a concern for their ability to relate as substantively free and equal. Pitting the defendant's predicament against the plaintiff's setback reveals an important imbalance in their post-wrong conditions: compensating the thin-skulled victim is both a means to reclaiming (the economic equivalence of) her bodily integrity and an economic shortfall on the part of the tortfeasor. Thus, the monetary value of a damage award implicates the freedom interests of the parties in importantly different ways. Accordingly, if the parties are to relate as substantively free and equal at the remedial stage, the law must respond to this difference by holding the tortfeasor liable for the injury to the victim's thin skull. The thin-skull rule, in other words, builds a second-look mechanism into remedies law.

The preceding discussion contains the normative seeds for addressing the second question concerning the proper scope of the thin-skull rule. In particular, it supports extending the rule to capture thin emotional skull, but denies similar treatment to thin proprietary skull.[235] The extension to emotional condition that is unexpectedly and unusually fragile is explained by the normative significance of emotional well-being to leading a life as a genuinely free and equal agent, which—like bodily integrity—gets priority over

232 *Smith*, [1962] 2 QB at 408.

233 *See* DOBBS, *supra* note 21, § 188, at 465.

234 We leave further discussions of competing theoretical accounts of the thin-skull rule for another occasion. Representative accounts are Guido Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69, 96–98 (1975); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 195–97 (1973); Dennis Klimchuk, *Causation, Thin Skulls and Equality*, 11 CANADIAN J.L. & JURIS. 115, 132 (1998). See, more recently, Steve P. Calandrillo & Dustin E. Buehler, *Eggshell Economics: A Revolutionary Approach to the Eggshell Plaintiff Rule*, 74 OHIO ST. L.J. 375 (2013).

235 Limited space compels us to leave the case for or against extending the rule to what can be called *religiously* thin skull for another occasion.

the defendant's economic costs. This form of reasoning from the normative significance of bodily to emotional integrity receives ample support in the caselaw.[236]

By contrast, a framework of relational justice at the remedial stage cuts against extending the thin-skull rule to *things* whose unusually delicate condition is at least for the defendant unforeseeable. The need to decide whether unusually thin property entitles its owner to recover the entire property damage arises when the unusual magnitude of the damage could not have been reasonably foreseen due to some unexpected fragility on the part of the damaged property. The (very scarce)[237] caselaw and the few commentators to have taken up the thin-proprietary rule tend to, implicitly or explicitly, downplay the difference between the plaintiff's person and property.[238] Thus, in one of the few exceptional cases that prove the rule, according to which the thin-skull rule does not apply to mere stuff,[239] the court observed that "the evidence suggests that a building rather than a person may have had an 'eggshell skull'" and simply asserted that "[t]hat possibility alone does not foreclose liability for the injury."[240] Our principled method of approaching the matter provides a source of critical counterpoint. Moving from bodily (or emotional) integrity to property integrity affects how the law should assess the balance of freedom and equality between the interacting parties. That move transforms an asymmetric interaction, in which accommodating the plaintiff's bodily predicament is normatively prior to the resulting economic setback to the defendant, into a more symmetric one, in which the proprietary predicament of one may be normatively indistinguishable from the setback to the other. Hence, the thin-skull rule should not be extended to the property context.

CONCLUDING REMARKS

The field of remedies law, as leading remedies scholars acknowledge, is no mere "miscellaneous jumble."[241] Nor is it simply the historical upshot of the law vs. equity divide. After all, the remedial principle of second-looking, as Part II shows, is not reducible to a safety valve that operates in the second order, that is, on top of the default rules of the common law. And as Part III

236 *See, e.g.*, Bryan v. City of New Orleans, 737 So. 2d 696, 698 (La. 1999); Ragsdale v. Jones, 117 S.E.2d 114, 117–18 (Va. 1960).

237 RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL AND EMOTIONAL HARM § 31 cmt. d (AM. L. INST. 2010).

238 *See, e.g.*, *id.*; Richard W. Wright, *The Grounds and Extent of Legal Responsibility*, 40 SAN DIEGO L. REV. 1425, 1491 (2003).

239 Martin v. Cnty. of Los Angeles, No. B142528, 2002 WL 31117056, at *8 (Cal. Ct. App. 2002), is another one of those exceptions. *See* P.J. Rowe, *The Demise of the Thin Skull Rule?*, 40 MOD. L. REV. 377, 381 (1977).

240 Colonial Inn Motor Lodge, Inc. v. Gay, 680 N.E.2d 407, 416 (Ill. App. Ct. 1997).

241 Douglas Laycock, *How Remedies Became a Field: A History*, 27 REV. LITIG. 161, 262 (2008). *But see* Tim Kaye, *A Sound Taxonomy of Remedies*, 36 QUINNIPIAC L. REV. 79, 85 (2017).

further demonstrates, the second-look orientation embedded in our account cuts across the traditional divide between legal and equitable remedies to capture also the quintessential common-law remedy of compensatory damages.[242] Instead, modern remedies law amalgamates otherwise discrete pieces of doctrine, caselaw, and practical wisdom into a unified body of law. But what is the basic idea or ideas around which these pieces might come together?

Rather than adopting a common-denominator approach, according to which remedies law consists of the "general principles about the law of remedies that cut across substantive fields [of law],"[243] we have made the case for a novel architecture of the field. It begins with distinguishing private law remedies from its public law counterpart. Private law and its remedial apparatus, we argue, are best understood as governed by the basic idea of relational justice, namely, the commitment to determining terms of interactions among substantively free and equal persons. This idea, in turn, gives rise to a bifurcated architecture: one set of remedies *looks back* at, and indeed enforces or vindicates, the primary rights and duties of the parties; and another, hitherto neglected set, is tasked with implementing a *second look* at the respective post-wrong conditions of the defendant-plaintiff interaction so as to make it a just remedial relation.

A comparison of *Boomer*[244] and *Cashin*[245]—two canonical cases we have discussed—brings home the distinction between looking back and second-looking, and thus the architecture of remedies law. Both *Boomer* and *Cashin* affirm the idea of relational justice at the remedial stage. However, recall that this affirmation generates completely different outcomes—*Boomer* is associated with second-looking as it ends up ordering permanent compensatory damages in lieu of injunctive relief,[246] whereas *Cashin* propounds a look-back approach by awarding super-compensatory damages to prevent the defendant from treating the plaintiff as a mere cost.[247] This divergence can be explained by reference to two aspects that, taken separately, are highly significant to this Article's account of just remedial relations.

First, the two cases focus on qualitatively different underlying types of plaintiff's vulnerability, namely, to reasonable enjoyment of one's property and to life and limb, respectively. A liberal account of substantive freedom

242 It is of course true that equitable remedies are generally associated with allowing more judicial discretion than their common-law counterparts. *See, e.g.*, F. Andrew Hessick, *The Challenge of Remedies*, 57 ST. LOUIS U. L.J. 739, 745 (2013). But this observation also cannot be enough. First, equitable remedies do not invite "free-floating discretion" on the part of the judge. *In re* Chicago, 791 F.2d 524, 528 (7th Cir. 1986). Second, discretion in the case of common-law remedies does exist, say, in the rather wide discretion granted to the jury in determining damage awards. *See* DAN B. DOBBS, LAW OF REMEDIES: DAMAGES–EQUITY–RESTITUTION § 814(4), at 659 (2d ed. 1993).

243 DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES, at xxix (3d ed. 2002).

244 Boomer v. Atl. Cement Co., 257 N.E.2d 870 (N.Y. 1970).

245 Cashin v. N. Pac. Ry. Co., 28 P.2d 862 (Mont. 1934).

246 *Boomer*, 257 N.E.2d at 875.

247 *Cashin*, 28 P.2d at 871.

and equality cannot treat these vulnerabilities as though they are on a par.[248] It means that implementing a second-look orientation in the former case is hardly a reason to do the same in the latter given the kind of vulnerability that is at stake. Second, *Boomer*, recall, is a case of accidental wrongdoing. By contrast, *Cashin* features nonaccidental, malicious wrongdoing which, therefore, counsels against accommodating the defendant's predicament and in favor of enjoining its workers either prior to or, as it actually happened, after the fact.

Working out the implications of reconstructing remedies law in terms of a look-back/second-look architecture gives rise to two interventions we offered in the Article, concerning the questions of "what is" and "what should." A framework of just remedial relations renders more intelligible private law's adherence, *at the remedy level*, to the basic liberal commitment to interpersonal interactions among substantively free and equal persons. Otherwise unrelated doctrines are in fact instantiations of the same moral commitment. The other intervention is on display when our framework provides the normative resources necessary to reforming other doctrines (consider the damage head associated with loss of earning capacity) to make remedies law more loyal to that same laudable commitment.

248 *See* Dagan & Dorfman, *Just Relationships*, *supra* note 60, at 1431–35; Dorfman, *supra* note 66, at 111–14.