Increasing Oppressed Women's Bargaining Power through Private Law Incentives: Using Carrots and Sticks to Combat Refusal to Divorce

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A consequence of religious Jewish marriage is the problem of divorce (*get*) refusal in order to extort money from the spouse refused a *get*. This is a worldwide phenomenon. Rabbinical courts use their power sparingly, for fear that a *get* granted as a result of a pressure will be considered coerced and thus invalid. Solutions require thinking beyond religious family law.

Several private law strategies may offer solutions. Both sticks and carrots can theoretically incentivize refusers to give a *get*. The existing solutions are in reality sticks, as the refuser is threatened with various sanctions that affect his pocket/liberty. The aim of civil (tort/contract) suits against the refuser is to trade a proportion of compensation awarded for the granting the *get* in the rabbinical court. But both tort and contract lawsuits have many problems, some of these are inherent and some result from this type of solution sometimes being contrary to the Jewish law. This situation requires the consideration of additional channels that are more inclusive, quicker and cheaper.

Ostensibly there is room for carrot solutions, which grant the refuser some financial return for giving the *get*; however, this gives rise to issues such as the morality of awarding a prize for negative behavior or moral hazard. Appropriate answers exist to some of these problems. Nevertheless, the reality is that neither stick nor carrot solutions are capable of solving the problem; each of them has advantages and disadvantages. This situation gives rise to the creation of combinations of sticks and carrots that may be able to solve the problem. These combinations exploit the advantages of the sticks and the carrots and sift out most of their disadvantages, and also distribute the loss more equally.

The proposed mechanism will be built primarily on the basis of a few theories from the field of law and economics. A dialogue will thus be created with theories of law and economics in an arena in which they are not applied frequently: that of the disintegrating family unit. The conclusion will be also general, i.e., it will be relevant to examining effective incentives to cause a person to desist from an activity that creates negative externalities, and refusal to divorce will serve merely as a test case.

It will be also possible to extrapolate from the specific to the general. From this aspect, the Article has several contributions to make. First, the example that will be discussed – that of refusal to divorce – is universal, and it is relevant anywhere in the world where there are Jews. Second, the Article has a contribution to make to legal and social sciences literature on the subject of incentives in general, and sticks and carrots in particular. Third, the Article will present a unique case of integration of a social sanction within a legal mechanism. Fourth, the Article might constitute a model for the possible dissolution of partnerships, not only in the family, but also in the dissolution of business partnerships when deciding on the disposal of an asset that cannot be divided, as well as of a bilateral monopoly where there is room for a governmental-regulatory solution rather than one deriving from private law. Fifth, the Article strengthens the connection between law and economics on the one hand and family law on the other – a connection that is considered to be less natural than that between law and economics and other branches of law. Above all, however, the Article is an attempt to increase the bargaining power of oppressed women, victims of refusal to divorce.

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INTRODUCTION

A consequence of religious Jewish marriage is the problem of divorce (*get*) refusal in order to extort money from the spouse refused a *get*. This is a worldwide phenomenon. What is the best way to combat for this problem?

This will serve as a test case for cases in which a person performs an action vis-à-vis another and causes a negative externality. Society, and the law as an agent of society, are interested in stopping him from performing this negative action. What is the most suitable tool for doing so? Will the threat of a stick (e.g. society punishing the performer or the injured party using private law and bringing a civil action against the wrongdoer) be the efficient and best tool for putting a stop to the harmful action? Will it in fact be the offer of a carrot – a reward or a positive incentive – that will motivate the cessation of the harmful action? Alternatively, will the best course in such a case be to present an approach that combines carrots with sticks?

What are the costs of each such approach? What elements of each are more moral and more just? Which of them causes less distributive distortion? From which kitty will the money be paid if the carrot, or the carrot combined with the stick, is used? These and other questions will be examined in this Article, through the test case of refusal to divorce in the Jewish sector from a global perspective. The insights that will be presented will apply to other cases that are not necessarily connected to intra-familial relationships.

Gerrit De Geest and Giuseppe Dari-Mattiacci explain that due to the difficulty in defining carrots and sticks and the differences between them with precision, insufficient normative attention is paid to

the use of carrots vis-à-vis sticks.[1] In their opinion, carrots and sticks are not merely mirror images of each other,[2] and they attempt nevertheless to propose definitions:

> Carrots and sticks are both transfers of wealth that induce the citizen to comply with a rule. A carrot is a payment to the citizen (by the lawmaker) that is made if the citizen has been monitored and found complying. A stick is a payment by the citizen (to the lawmaker) that is made if the citizen has been monitored and found violating.[3]

At the same time, the case that will be discussed in this Article – of an attempt to put a stop to a negative action that has already begun – is more complex. In this case, if the choice is made to use the stick, then indeed its use is consequent upon a violation of the law; if, however, the carrot method is chosen, it must be understood that a carrot is not offered here as a prize for complying with the law, but for desisting from violation of the law (although it is possible to say, of course that desisting from the violation is in a certain sense also the beginning of compliance with the law).

Similarly, the enterprise in this Article will be broader, i.e., to examine the use of tools that are not necessarily governmental; for instance, a civil suit for compensation brought by the victim against the person performing the negative externality is an example of the private use of a stick, although the platform that is invoked to realize the right is a state law and the action is adjudicated in the state courts. The stick, too, is not necessarily a governmental one, although in many cases, as shall be discussed below, use of sticks and carrots takes place in a governmental context, for example, the use of subsidies as opposed to fines in various contexts.

Brian Galle explains that choices between carrots and sticks are typical of various facets of our lives, even though the classical case in which these choices are made is nuisance and environmental regulation; in fact, these choices present themselves for discussion wherever the mechanism of the costs outweighing the externalities is used.[4] Below, however, private mechanisms for awarding carrots for the purpose of creating an incentive to desist from negative behavior or to prevent it in advance will also be examined. Therefore, broader definitions must be examined, which are suitable for cases of terminating a negative action as well as treatment that is not necessarily governmental.

Galle himself defines a carrot as opposed to a stick in a broader manner than the definition provided by De Geest and Dari-Mattiacci, although the definition still remains in the governmental arena; however, his definition brings the differences between a carrot and a stick into sharper focus:

> I define a carrot here as a welcome change against a given, usually pre-existing, policy baseline; a stick is simply an unwelcome change in the opposite direction. . . . [T]he phrase "against a given policy baseline" is important, since for my purposes it is all that separates the two. . . . [G]ranting carrots enriches recipients at the cost of the general public, and that has implications for the strategic behavior of parties who might be awarded carrots. Using sticks enriches the public at the cost of those menaced with the stick, and has the opposite strategic incentives. My framework can therefore be used to compare any two levels (including zero) of price instruments to each other, since the relative effect of moving from one to the other is the same regardless of direction.[5]

Galle also stresses that the possibility of providing definitions notwithstanding, the distinction between carrots and sticks is nevertheless sometimes difficult.[6]

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[1] Gerrit De Geest & Giuseppe Dari-Mattiacci, *The Rise of Carrots and the Decline of Sticks*, 80 U. CHI. L. REV. 341, 353-54 (2013).

[2] *Id.* at 393.

[3] *Id*. at 354-55 [References omitted]. See also Donald A. Wittman, *Liability for Harm or Restitution of Benefit?*, 13 J. LEG. STUD. 57, 61-62 (1984) (drawing a clear division between use of sticks for the purpose of prevention of negative externalities and sticks in order to motivate positive externalities).

[4] Brian Galle, *The Tragedy of the Carrots: Economics and Politics in the Choice of Price Instruments*, 64 STAN. L. REV. 797, 800-01 (2012).

[5] *Id*. at 803-05.

[6] *Id.* at 804-05.

In all events, the question of what is preferable and effective, if at all, in order to incentivize a person to do good and to cease doing bad – stick or carrot – is a subject of dispute, and there is no single definitive, authoritative answer.[7]

In the social sciences literature there are varied examples of positive or negative incentives that succeed in reducing the incidence of certain negative behaviors or motivations to adopt such behaviors, even if only in the short term; there are also opposite examples.[8] Alongside claims that from the point of view of efficiency, there is no difference between carrots and sticks, there are those who argue that the effects, not only moral but also economic of carrots are different from those of sticks, and that usually, the use of carrots is not sufficiently effective and it is also incompatible with justice and the proper distribution of wealth.[9] As opposed to this, there are those who argue that sticks work less well from the point of view of distributive justice on poor households;[10] on the other hand, according to certain views, recourse to sticks in the context of poor households is liable to entail over-deterrence, or possibly even under-deterrence, since there is no real possibility of deterring a poor person with monetary penalties.[11]

At the same time, there are indeed many who claim that sticks are usually more effective than carrots, and sticks are therefore preferable in general, and in the legal system in particular,[12] and that frequent use of carrots is not effective enough and may even lead, albeit only in certain situations, to a real "tragedy".[13] Similarly, scholars argue that carrots encourage moral hazard,[14] i.e., they encourage people to act in an undesirable way in the future in order to obtain money to desist from that action, thus encouraging others to create similar future negative externalities in the hope of receiving payment to desist.[15] Nevertheless, the argument is also made that no firm conclusions should be drawn on the matter, for there are nuances and factors which, if present, render carrots preferable.[16] Note also that even though legal systems are traditionally reliant primarily on sticks (due to the lower transaction costs and risk in the event that the stick is successful and therefore not actualized),[17] there are indications that in recent years they, too, are moving over to the use of carrots in various areas.[18]

In the framework of this Article it is not possible to cover the entire field of incentives in general and a comparison of sticks and carrots in particular, and others have recently produced an excellent survey on the subject.[19] Nevertheless the Article will examine whether in the test case of attempting to

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[7] See, e.g., Uri Gneezy, Stephan Meier & Pedro Rey-Biel, *When and Why Incentives (Don't) Work to Modify Behavior*, 25 J. OF ECON. PERSPECTIVES 191, 199 (2011); De Geest & Dari-Mattiacci, *supra* note 1. And see Galle, *supra* note 4, at 797 (arguing that the basic literature on sticks and carrots focused on a relative limited context – nuisance, and there too, the discussion in not exhausted).

[8] Gneezy et al, *supra* note 7, at 193-94 (adding that some of the motivations to change behavior are internal, but some are external, such as prizes or a penalties).

[9] *Id.* at 801-02, 806, 817 (also presenting the argument that economically, the two structures are the same. *Id*. at 805).

[10] *Id.* at 817-18.

[11] *Id*. at 817-19 (debating with Kaplow and Shavel, who think that use of sticks on poor households leads to under-deterrence).

[12] De Geest & Dari-Mattiacci, *supra* note 1, at 343; Galle, *supra* note 4, at 797, 849; Giuseppe Dari-Mattiacci & Gerrit De Geest, *Carrots, Sticks, and the Multiplication Effect*, 26 J. L., ECON. & ORGANIZATION 365, 367-68 (2010) (arguing that the relative cost-effectiveness of sticks is a reason to prefer them. But according to Galle, *id*. at 799 n. 7, there are additional factors in examining preferences). For a general discussion of the efficiency of sticks versus carrots, see also: IAN AYRES, CARROTS AND STICKS: UNLOCKING THE POWER OF INCENTIVES TO GET THINGS DONE (2010); Howard F. Chang, *An Economic Analysis of Trade Measures to Protect the Global Environment*, 83 GEO. L.J. 2131 (1995); Wittman, *supra* note 3; Saul Levmore, *Waiting for Rescue: An Essay on the Evolution and Incentive Structure of the Law of Affirmative Obligations*, 72 VA. L. REV. 879 (1986); Giuseppe Dari-Mattiacci, *Negative Liability*, 38 J. LEGAL STUD. 21 (2009).

[13] Galle, *supra* note 4.

[14] See: Chang, *supra* note 12, at 2150-64; Jonathan Baert Wiener, *Global Environmental Regulation: Instrument Choice in Legal Context*, 108 YALE L.J. 677, 726-27, 755-56 (1999); Galle, *supra* note 4, at 802-03.

[15] Galle, *supra* note 4, at 812. See also Henry E. Smith, *Ambiguous Quality Changes from Taxes and Legal Rules*, 67 U. CHI. L. REV. 647, 698 (2000).

[16] Galle, *supra* note 4, at 802.

[17] De Geest & Dari-Mattiacci, *supra* note 1, at 372.

[18] *Id.* at 343-44.

[19] See, e.g.: De Geest & Dari-Mattiacci, *supra* note 1 (describing the fundamental differences between carrots and sticks) and the references in *supra* note 12; Gerrit De Geest, Giuseppe Dari-Mattiacci & Jacques J. Siegers, *Annullable*

terminate negative activity whereby a spouse refuses to divorce, and from a religious perspective unfairly retains the key to divorce and does not allow his spouse to break free from a broken marriage, the better instrument to use against him is the stick, the carrot, or some hybrid mechanism conducted in a few rounds.

In Chapter I, the test case of refusal to divorce in the Jewish sector will be presented. In Chapter II, the main stick solution will be presented: civil tort or contractual suits that are brought by victims against the refusers with the aim of improving their bargaining power and ultimately obtaining the divorce in exchange for waiving their compensation in the framework of post-judgment bargaining. In Chapter III, carrot solutions will be presented. Chapter IV is devoted to a discussion of the comparison between carrot and stick solutions in our context, with a view to examining which of them would be more effective, more suitable for use as a solution to the problem of refusal to divorce or whether only a combination between the two incentives will achieve the goal. Chapter V will discuss ways to combine carrots with sticks in practice, largely as a ramification of theories of law and economics, and as a basis for a proposal for an optimal combined model which will be presented together with a preliminary feasibility model.

The article will offer new insights into our understanding of the effects and functioning of sticks, carrots, or combinations of them as inducement mechanisms. From the methodological aspect, the proposal will set out research tools combining pure jurisprudential legal techniques with behavioral and traditional law and economics ones. The research offers a methodological innovation: the study of the effects of different incentive mechanisms, aiming to propose new carrot solutions and a set of combinations of sticks and carrots. Hence, the Article will deal with a real-life application of a specific, marriage law-related issue of carrots and sticks, but it allows for applications beyond those matters. The broad conclusion will be that from a pluralist perspective, each incentive – stick and carrot – has its advantages and disadvantages. Sometimes the best solution will be a combined-hybrid sequential vertical mechanism. Such novel solutions to combat the phenomenon of refusal to divorce will be fashioned in the spirit of theories from the field of law and economics. The combination of various tools of sticks, carrots and particularly sticks combined with carrots will expand the toolbox available to the victims of acts which create negative externalities such as refusal to divorce.

I. TEST CASE: THE USE OF STICKS AND CARROTS TO COMBAT REFUSAL TO DIVORCE IN THE JEWISH SECTOR

The reality of Jewish religious divorce brings with it a painful problem of refusal to divorce, namely *get* refusal [a *get* is a Jewish bill of divorce]. The husband-refuser retains the *get* with the aim of extracting a financial benefit in return for his consent to the divorce and to give his wife a *get*.[20] The rabbinical court – either private, acting as an arbitrator, which is the situation in most countries, or governmental, acting by virtue of state authority in Israel, in which there is no separation between religion and state and religious law governs personal status[21] – can do nothing other than to order the

Bonuses and Penalties, 29 INT'L REV. L. & ECON. 349 (2009) (explaining the difference between 'normal' carrots and sticks, which are applied if monitoring finds that a particular action takes place, and 'annullable' carrots and sticks, which are applied unless monitoring finds that a particular action has taken place).

[20] This is a type of rent-seeking behavior, because the refuser is trying to gain from his spouse, i.e. to increase his share in the wealth and motivate his spouse to spend her resources to prevent the extraction without reciprocating any benefits to society or to the creation of wealth. See, generally: Anne Krueger, *The Political Economy of the Rent-Seeking Society*, 64 AMERICAN ECON. REV. 291 (1974); Gordon Tullock, *Rent Seeking*, 4 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS, PALGRAVE MACMILLAN 147-49 (1987). There are also those whose intention in refusing is not to extract money. These will not be discussed here.

[21] Adam S. Hofri-Winogradow, *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, 26 J.L. & RELIGION 57, 58-59, 62, 80-82 (2010); Benjamin Shmueli, *Civil Actions for Acts that are Valid According to Religious Family Law but Harm Women's Rights: Legal Pluralism in Cases of Collision between Two Sets of Laws*, 46 VAND. J. TRANSNAT'L L. 823, 825, 833, 865-64 (2013) [hereinafter: Shmueli 2013]; Ayelet Blecher-Prigat & Benjamin Shmueli, *The Interplay between Tort Law and Religious Family Law: The Israeli Case*, 26 ARIZ. J. INT'L & COMP. L. 279, 283 (2009); Michael A. Helfand, *The Future of Religious Arbitration in the United States: Looking*

husband to divorce his wife; it cannot issue a divorce decree that does not have the consent of both parties, or that is not based on a recognized ground of divorce. Indeed, a rabbinical court ruling ordering the divorce is not constitutive, i.e., it does not create the divorce, and it does not change the status of the spouses and terminate the marriage; the marriage ends only when the couple themselves end it.[22] Private rabbinical courts lack enforcement powers, whereas state rabbinical courts in Israel use the enforcement power available to them by virtue of the law only sparingly, for fear that the *get* that will be given as a result of financial pressure on the husband ("monetary compulsion") will be considered unlawfully coerced and therefore invalid, since the husband must consent to give the *get* of his own free will.[23] The *halakhah* [=Jewish law] permits a series of steps to be taken to enforce the *get* after an order has been issued compelling the husband to give the *get*, and in some states these have been fashioned into modern sanctions which affect the liberty of the refuser and his property (e.g. imprisonment, solitary confinement, stay of exit order); however, even the halakhic tools which may be used by the rabbinical court to compel are limited under Jewish law, and, for various reasons, the rabbinical courts do not invoke these enforcement sanctions sufficiently.[24] In any case, there is no consensus amongst the rabbinical decisors about a major halakhic means of solving the problem.[25] Therefore, it is necessary to think outside the box of religious family law for a solution to the problem.

Releasing the woman from the chains of her marriage is an extremely important social and human mission, and it is difficult to watch the state – even one in which there is an official separation between church and state – standing by and not intervening: non-intervention in such a situation in fact amounts to intervention, in that it sends out the extremely problematic social message that a person who is harmed and exploited does not merit active aid on the part of the state, particularly if the state has made it possible, one way or another, to contract a religious marriage. It should be mentioned that there are also husbands who become victims of *get* refusal, even though the situation is not completely reciprocal.[26]

How can this phenomenon of *get* refusal be fought with weapons from outside the realm of religious-family law? Action can be taken in the public sphere, and an attempt can be made to narrow the jurisdiction of the rabbinical courts.[27] However, proceedings such as these drag on for many years, and it is difficult to enlist broad support in the legislature. There have been attempts to solve the problem by way of the laws of maintenance, or sanctions in the division of property, by way of pre-nuptial agreements formulated to combat refusal as a preventative measure and more. For various reasons, the existing means of combatting *get* refusal are applied in only partial fashion, and even those that are applied are not always successful. Consequently, we must examine solutions that are more sensitive, sophisticated and indirect.

In several jurisdictions (such as New York State), in which there is civil marriage, special *get* laws have been enacted.[28] This is a specific, local solution that has not been adopted globally, not even in the U.S., and indeed it cannot constitute a universal solution for different reasons.

Through a Pluralist Lens, OXFORD LEGAL HANDBOOK ON GLOBAL LEGAL PLURALISM (Paul Schiff Berman ed., forthcoming 2018) (discussing religious arbitration of private rabbinical courts in the U.S.).

[22] MOSHE SILBERG, PERSONAL STATUS IN ISRAEL 102-03 (1961); PINHAS SHIFMAN, FAMILY LAW IN ISRAEL 164 (1988).

[23] Code of Maimonides, Laws of Divorce 1:1.

[24] Avraham Be'eri, *Rabbenu Tam's Shunning Measures: Novel Approaches to Ways to Force a Husband to Divorce his Wife*, 18-19 JEWISH LAW YEARBOOK 65 (1992-94).

[25] For halakhic solutions that have been proposed, see, e.g.: IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE AGUNAH IN AMERICAN SOCIETY (1993); MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW: A CONCEPTUAL UNDERSTANDING OF THE AGUNAH PROBLEMS IN AMERICA (2001).

[26] In certain circumstances a husband can marry a second wife or even live together with a woman without being married to her, and he will not be considered an adulterer. See Benjamin Shmueli, *Refusal to Divorce – Is it a Feminine, Masculine, or Independent Cause of Action? Between Distributive Justice, Corrective Justice, and Empowering the Spouse Refused a Divorce*, 39 TEL-AVIV L. REV. 545 (2016). According to a halakhic regulation promulgated about 1000 years ago, the wife must agree to accept the *get*, and she cannot be divorced against her will, as had been the situation prior to the regulation. See Meir Berlin, "Ban of Rabbenu Gershom" 17 ENCYCLOPEDIA TALMUDIT (2009). Consequently, women who refuse to accept a *get* from their husbands become *get* refusers. See Shmueli, *id*.

[27] See, e.g., AYELET SHACHAR, MULTICULTURAL JURISDICTIONS: CULTURAL DIFFERENCES AND WOMEN'S RIGHTS (2001) (presenting different solutions in the public sphere).

[28] BROYDE, *supra* note 25; Shmueli 2013, *supra* note 21, at 873-83 and the references there. On English law see: Divorce (Religious Marriages) Act, 2002.

The need to examine sensitive, indirect solutions is even more pressing in Israel, with its problematic reality of one state law that circumvents another state law. The religious law that is circumvented is the family-personal law in matters of marriage and divorce. Solutions within civil family law cannot simply and easily circumvent another state law, which is part of the status quo – albeit problematic, but long-standing and delicately balanced.

The existing and the proposed solutions from outside the area of Jewish-religious family law will be examined individually and as juxtaposed to each other, with a view to determining the best, most effective solution. Some of the proposed solutions are of the stick type, i.e. imposing sanctions on the refuser, and others are in the category of carrots, i.e., rewards and positive incentives for the refuser to give the *get*. After doing so, the Article moves to examine whether there is room for desirable, hybrid alternatives that will maximize the utility of the steps that the law can offer for combatting the phenomenon of *get* refusal.

II. STICK: CIVIL ACTIONS IN ORDER TO TRADE THE COMPENSATION FOR DIVORCE

According to Jewish law, the husband, almost unilaterally, holds the key to divorce, for he must give the *get* of his own free will.[29] Accordingly, in many cases of refusal, the refuser attempts to obtain financial benefits. In fact, he seeks to extract his wife in order that she waive her share of the common property or other rights in exchange for being given the *get*. The victim cannot and/or does not want to pay anything in order to buy her freedom. In such a situation, if there is no additional legal intervention, she has two options, both of them bad: the one is not to pay and to remain chained to an unwanted marriage, and the other is to give up and pay large sums in order to buy her freedom.

The stick in the case of *get* refusers, which has been used in various states throughout the world for years, is civil actions, which the victims of *get* refusal bring against the refusers.[30] These actions seek to classify *get* refusal as an actionable tort or a breach of contract which entitle the victim to compensation for her damages, particularly emotional distress: *get* refusal causes humiliation, a breach of autonomy, inability to marry, to bear children (for the children of the (female) victim of *get* refusal from another man will be considered illegitimate (=*mamzerim*) according to Jewish law) and to engage in sexual relations.[31]

Contract and tort suits are the accepted private law solution today to attempt to extract the *get* when the victim of refusal has met a dead end. This solution is indirect but effective in some cases, aimed at taking the sting out of refusal based on financial extortion and making it unprofitable. But this is a solution in the framework of which the victim, in the context of private law, must conduct her battle independently. Such an action has two deterrent goals, one general and one concrete. The general goal is to create a negative incentive to refusal, when the refuser knows that refusal has a price and it is not worthwhile nor effective to refuse. Thus the action, or even only awareness of the possibility of bringing the action, may deter him and serve to prevent harm or at least to reduce harmful behaviors. The concrete aim is to deter in a specific instance and to act against a person who has already actually refused: if a civil action has been brought against the refuser, it will be possible to aim for a trade in the framework of which the refuser will give the *get* whereas the victim will waive the compensation that she was awarded. In order for the solution to work, relatively high compensation would need to be awarded, in order to enhance the bargaining power of the victim, and to incentivize the refuser to make a trade in the framework of which the refuser will drop his financial demands and give the *get* in the rabbinical court, and the victim, on her part, will waive the compensation she was awarded in the civil court; otherwise, even a risk-averse refuser is liable to take the risk of paying and to wait to extract a much larger sum in the rabbinical court in exchange for giving the *get*. Consequently, the divorce

[29] See *supra* note 23.

[30] Shmueli 2013, *supra* note 21, at 825, 833, 864-65.

[31] Relations with another man are considered adultery, and may adversely affect the woman and her rights on various levels in the rabbinical court. See: Shmueli 2013, *supra* note 21, at 845, 848-49; Pascale Fournier, Pascal McDougall & Merissa Lichtsztral, *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333, 349 (2012).

cannot always be achieved by this means. This, therefore, is a stick solution, i.e., a deterrent to the refuser, who knows that if he does not give the *get* he is liable to pay compensation.

However, even though recourse to civil actions to obtain a *get* indirectly looks like a successful start-up, many problems have been linked to such actions. First is the above-mentioned concern about a coerced *get* as a result of that trade, for financial pressure on the refuser is applied outside of the rabbinical courtroom and not in accordance with the precise halakhic rules under which in relatively rare cases a *get* will be regarded as valid in spite of financial pressure.

Similarly, whereas in some states this solution strengthens the position of private rabbinical courts, in that it enables a civil court to enforce the decisions of a private rabbinical court which has no powers of enforcement, in Israel this solution actually weakens the state rabbinical courts and in fact circumvents their decision not to compel the giving of the *get* in the majority of cases. Consequently, these actions now stand at the forefront of the jurisdictional battle that anyway exists between these state tribunals. The claim is that the civil court is intervening in the exclusive jurisdiction of the rabbinical court on matters of divorce, even if it does so in an indirect manner and in the framework of an action which is within the exclusive jurisdiction of the civil court.[32] This outcome led the Chief Rabbinical Court in Jerusalem to rule that if a woman refused a *get* has merely filed a tort action, even if the process has not ended and compensation has not yet been awarded, all proceedings to arrange her *get* in the rabbinical court will be stayed.[33]

However, in most jurisdictions in which the practice of bringing such actions exists there is no jurisdictional battle, for there is a separation, even if only partial, between church and state, and rabbinical courts in those jurisdictions are private, rather than governmental, institutions. In the U.S. there is even a certain cooperation between the rabbinical courts of the Beth Din of America – a private rabbinical court that operates as an arbitration tribunal and the civil, state courts. But it must be recalled that even if there is no battle for jurisdiction, the concern over a coerced *get* still exists.[34] However, where there is a separation between church and state, and the rabbinical courts are not governmental but private, acting as arbitrators, other typical problems arise. For example, the intervention of the civil judiciary in religious matters, which, it is argued, is against the First Amendment to the American Constitution has been regarded as problematic.[35] However, in the U.S. it has been ruled that this does not constitute a violation of the First Amendment. A pre-nuptial agreement is a civil contract for all intents and purposes, even if it was signed in the framework of a religious proceeding. Indeed, the action in contract is in most cases for breach of a pre-nuptial agreement, which stipulates maintenance payments upon separation. There are pre-nuptial agreements that require the husband to pay increased maintenance payments to his wife in the event of separation (for any reason whatsoever).[36] The husband who signs such an agreement knows that if he refuses to give his wife a *get*, he has undertaken in advance to pay considerable sums which accumulate over time, and if he does not pay, he will be sued for breach of that provision. This is a contractual suit which is not dependent upon proof of fault and which is based on prior agreement and signed by the husband. For example, in the community of the Rabbinical Council of America (RCA), which has adopted the agreement of the Beth Din of America, as is accepted in many parts of the world such agreements are very common, to the point that almost no rabbi in this community will agree to conduct a wedding if the couple does not sign an

[32] Uriel Lavie, *Arranging a Get After Holding the Husband Liable to Pay Compensation to His Wife*, 26 TEHUMIN 173 (2006) (arguing that such actions should not be recognized at all); Shlomo Dichovsky, *Monetary Enforcement Measures Against Recalcitrant Husbands*, 26 TEHUMIN 173 (2006) (arguing that the jurisdiction in such cases should be transferred to the rabbinical court).

[33] File (Chief Rabbinical Court) 1-21-7041 A. vs. B (Nevo, 3.11.2008). And see Amihai Radzyner, *Arranging* Gets *after Tort Actions and the Policy of Publication of Rabbinical Court Judgments*, 45 HEBREW U. JERUSALEM L. REV. 5 (2015) (arguing that there is a difference between rhetoric and substance, and in practice these actions are effective. In all the cases that he investigated in the end the *gets* were given despite the civil actions, and in some of the cases, compensation was actually received together with the *get*, and the woman did not withdraw the civil action).

[34] Shmueli 2013, *supra* note 21, at 826, 832-34, 853, 857-58, 868, 874.

[35] *Id.* at 866, 869; Alan C. Lazerow, *Give and "Get"? Applying the Restatement of Contracts to Determine the Enforceability of "*Get *Settlement" Contracts*, 39 U. BALT. L. REV. 103, 115 (2010).

[36] Lazerow, *supra* note 35; Shmueli 2013, *supra* note 21, at 864-73.

agreement containing a provision granting the wife-to-be the right to relatively high maintenance payments, around $100-$150 for each day of separation.[37] Therefore, a husband who violates an undertaking in a pre-nuptial agreement to pay a large sum for each day of separation is subject to the jurisdiction of a civil court, like in any other instance of breach of contract.[38] In other, European, states such lawsuits are considered to be morally dubious and contrary to public policy.[39]

Another problem is that this is a very expensive and long process. The victim must hire a lawyer, submit an action and conduct it, pay a fee, undergo cross-examination, and there is no certainty as to the amount of damages that will be awarded, if at all, and whether the award will be large enough for the purposes of a trade. Then the parties negotiate in order to sign an exchange agreement. The plaintiff should apply to the court for recall of the civil judgment, and then the parties should apply to the rabbinical court for the *get*. A lengthy period usually elapses, all of this is done. The costs are high, and the outcome of some of the stages is not always certain. In addition, the loss here cannot be distributed except to the two parties themselves, in that there is no insurance or other mechanisms for its dispersal.

In a tort action, fault must be proven, and in various states it is also necessary to prove intent to commit a tort (e.g., in the U.S.: IIED – intentional infliction of emotional distress) in these suits (which is one of the reasons for preferring contract actions;[40] moreover, the husband might not refuse formally, saying rather that he is indeed ready to give the *get*, but he has certain conditions for doing so; he will thus make it difficult to prove his fault and liability for not giving the *get*, and may even ascribe the liability to the wife who "chains herself."[41] In that respect, a contractual action would appear to be a good solution: it does not require proof of fault, and it is based on prior agreement of the husband himself. If the aforementioned provision in fact exists in a pre-nuptial agreement, proceedings can be shorter and litigation of complicated, difficult questions of fault and breach of duty of care can be avoided. Similarly, calculation of the damage is simple in the contractual action – multiply the number of days of refusal by the amount that appears in the agreement.

However, the contractual course of action still entails problems. First it is truly relevant only when a pre-nuptial agreement has been signed; if not, other paths must be sought, contractual or tortious. Thus, for example, a large proportion of the ultra-Orthodox population around the world does not sign pre-nuptial agreements, for various reasons,[42] and amongst the secular, religious and Conservative communities, too, such agreements are not wide-spread.

Second, in Israel, opposition on the part of the rabbinical courts may be expected, even if only because the jurisdiction in the Israeli agreements, at least, does not necessarily lie with the rabbinical courts; it may lie with the family-civil court or with any arbitrator of the parties' choice (in the American agreements, the rabbinical court – which is private and in any case is acting as an arbitrator – has exclusive jurisdiction). For this reason, the Israeli rabbinical courts may make adjudication of the *get* proceedings contingent upon non-enforcement of the agreement.[43]

Third, as in tort actions, here too there is ultimately a concern about a coerced *get*, for beneath the innocent exterior, as it were, of these maintenance provisions lies exactly the same purpose, of hitting the husband where it hurts – in his pocket – in order to equalize the parties' bargaining power.

Fourth, and beyond all this, in certain states in which there is separation between church and state, it has been argued that the civil court cannot entertain such actions, since they are actions in a religious context and affect status, whereas civil courts are competent to deal only with purely financial aspects, for example, those entailed by civil marriage.[44] The counter-arguments has been that even if the source

[37] Shmueli 2013, *supra* note 21, at 856; http://www.rabbis.org/news/article.cfm?id=105862, 9.22.2016.
[38] See Lazerow, *supra* note 35, at 115; Shmueli 2013, *supra* note 21, at 866.
[39] Shmueli 2013, *supra* note 21, at 866.
[40] *Id.* at 870, 892-93, 895.
[41] See, e.g., Amihai Radzyner, '*She Chains Herself': On Attaching Conditions to Giving the* Get *and on Halakhic Innovation*, forthcoming in MENACHEM ELON MEMORIAL VOLUME (Arye Edrei et al., eds.).
[42] See Shmueli 2013, *supra* note 21, at 868.
[43] *Id.*, at 886.
[44] *Id.* at 870.

of the obligation lies in religious law, in practice this is a financial obligation that is backed by an agreement that is civil for all intents and purposes.[45] Thus, for example, in most jurisdictions in the U.S., these counter-arguments were accepted and such actions were in fact approved,[46] whereas in certain European states these arguments were rejected, and together with them, these actions.[47]

Above all, even if a civil suit constitutes a successful course of action, it leaves the victim of refusal after the trade with the *get* and usually without compensation, whereas in an ideal world she should have both rights: the right to receive the *get* and the right to receive compensation for her emotional distress, and there is no real reason that the victim should succumb to extortion and waive the compensation.[48]

If so, the stick – the civil action, which is still one of the central civil weapons for combatting *get* refusal has its own problems. New thinking is required, along different channels, in order to devise more effective, comprehensive and faster-acting solutions. The loss should also be distributed not only over a narrow market comprising husband and wife but over the whole population, or at least over all those participants in the activity who are exposed to the risk of refusal, i.e., all the couples who are married in accordance with Jewish law.

III. CARROT: A FEE-FUND FOR POSITIVE PAYMENT TO THE REFUSER

Carrot solutions grant the refuser a reward in the form of wiping out existing debts or granting a sum of money from funds in a positive manner in order that he give the *get*. They are likely to be effective, for their purpose is to reach a similar outcome with fewer stages and costs. These solutions do, however, involve moral and other problems.

Two carrot solutions exist already, but they are only local and very limited in their scope.[49] Therefore the focus will be on one global carrot solution which has been proposed in short recently by Professor Guido Calabresi,[50] but it has not yet been adequately analyzed. According to this proposal, the payment would be made from a special fee-fund to be established and administered by the State (by a new body to be set up by the rabbinical courts) or, in countries which separate church and religion, by the community to which the couple belong. The fund would be made up from a special marriage

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[45] *Id.*

[46] *Id.* at 868-69. And see *Light v. Light*, 2012 Conn. Super. LEXIS 2967 [12.6.2012].

[47] Shmueli 2013, *supra* note 21, at 869-70. See also: Talia Einhorn, *Jewish Divorce in the International Arena*, *in* PRIVATE LAW IN THE INTERNATIONAL ARENA – LIBER AMICORUM KURT SIEHR 135, 147 (Jürgen Basedow, Isaak Meier, Anton K. Schnyder, Talia Einhorn & Daniel Girsberger eds., 2000). In Israel no such arguments have been raised, due to the fact that marriage and divorce according to religious law are part of state law, and there is no separation between religion and state, certainly not on these subjects.

[48] Moreover, in many cases a trade will be part of the divorce agreement that is signed, and this is something appropriate in itself; however, in the framework of this agreement the refuser can still extract money in exchange for the *get*: usually less than he originally intended. Hence, the practice in many cases is that the victim still pays something in order to receive the *get*, rather than receiving compensation for the harm that has been caused to her.

[49] These solutions do not exist explicitly in the Israeli law but rather, by virtue of the law (see HCJ 104/06 *Center for Women's Justice v. Rabbinical Courts Administration* (Nevo, 9.19.2010), esp. para 4; Conference of Rabbinical Court Judges 2015 (Shimon Yaakobi & Yehiel Freiman eds., 2016, http://www.rbc.gov.il/DocLib1/Kenes2015.pdf). The first local, limited solution is activated by the National Insurance in Israel (NII). The rabbinical court can ask the NII to wipe out the maintenance debt of a *get* refuser, in order that he agree to give the *get*. In this case the NII still pays the maintenance, but wipes out the husband's debt only after the husband gives the *get*. There are several cases annually, usually involving people who would apparently not pay anyway (bankrupts etc.). The solution operates in a limited sphere, and it does not apply to the opposite case, i.e., of husbands whose wives refuse to accept the *get*, for there, maintenance debts are not relevant. Such a solution is obviously not relevant in states in which there is no national insurance mechanism, and also, possibly, in countries in which there is a separation between church and state. Ultimately, therefore, this solution cannot be comprehensive. *Id.* The second local, limited solution is positive payment made to the refuser from the budget of the Rabbinical Courts Administration in Israel in order that he desist from his refusal and give the *get*. A budgetary regulation provides for a fund, called the "*Agunot* Fund", that is applied to the release of the victims of *get* refusal. In hard cases of refusal only, rabbinical court judges can submit a request to a committee, which may approve awards to the refusers of amounts of up to approximately $2,500. Here too, the awards are made only after the *get* has been given. *Id.*

[50] Federal Judge, former Dean of the Yale Law School and one of the founding fathers of the Law and Economics school, in a response in the last chapter of: Benjamin Shmueli, *Post Judgment Bargaining with a Conversation with the Honorable Judge Prof. Guido Calabresi*, 50 WAKE FOREST L. REV. 1181, 1226-27 (2015).

fee – not high, say between $50 and $100 – levied on couples who marry according to Jewish law, as a type of tax. The purpose of the fund would be to stop *get* refusal. Calabresi explains that in fact we would not be forcing the husband to give the *get*, but we would certainly be incentivizing him to do so, even somewhat aggressively. From his point of view, even though we do not usually pay someone to desist from his wrongful behavior, if the situation is such that there will be expenses if we do not pay, and significant benefits if we do, this is an efficient line to take.

The concerns about the immorality of rewarding refusal in the form of a positive payment to the refuser (which is less tolerable than waiving compensation that the refuser must pay the victim as in the stick model), about incentivizing refusal and about fraud notwithstanding, Calabresi believes that it will be more efficient to pay the refuser directly than to award the victim compensation and wait for it to be traded for a *get*. According to him, the system can tolerate a certain amount of fraud, and at most this will be factored into the amount of the fee, raising it a few dollars, thus distributing the loss. In any case, the insurance system, too, deals with such concerns, usually successfully: it is set up to investigate fraud, and the loss is distributed to those insured, with part of the policy payments being used for tracking by investigators; alternatively, the system – as Calabresi explains – simply internalizes, absorbs and tolerates a certain amount of fraud, at least as long as this amount is not unreasonable.

It seems that the carrot may achieve the *get* more easily than the stick. Nevertheless, it would appear that only a large payment will incentivize desisting from the refusal, for otherwise, the refuser may believe that in the rabbinical court he can extract higher amounts. If the balance in the fund is insufficient, it will not be possible to make large payments. The more couples who marry Jewishly, the more money there will be in the fund. However, the more that payments are made to refusers, the less there will be for each refuser, unless the fund is subsidized. A ceiling should possibly be set in order to guarantee payment in every suitable case, but a ceiling will not always help in creating an incentive to trade, if the refuser believes that he will extract much more in the proceedings in the rabbinical court.

The carrot seems to be efficient. Not many factors or processes are involved, the costs are relatively low, the loss is well distributed over all the couples who undergo a religious marriage, there is no need to prove fault, and the payment is made quickly when the refusal stops. True, the victim does not receive compensation for her damages, but neither does she need to bring a civil action and exchange the damages awarded for the *get*.

However, incentive for refusal, as a moral hazard, is a concern in light of the information about the very fact of the existence of the fund, thus increasing the number of recalcitrant husbands. There may be also a crowding out effect:[51] in our case, the concern is that over time, there will be a demand for ever-greater payments for consent to give the *get*, as refusers become accustomed to the idea that they deserve to be paid for desisting from their refusal.

Following on from the problem of moral hazard, there is a concern about fraud on the part of the couple who might really intend to divorce, but will put on a show of refusal in order to receive and divide up payment from the fund However, as stated, a certain component of fraud will be taken into account by the system, for the sake of the commendable social purpose, and the fee will be raised a little for this reason. According to Calabresi, the administrators of the fund will investigate the case before making the payment, and deciding on the amount. In any case, he says, laws that try to prevent fraud in one place will not prevent its appearance elsewhere.[52]

[51] That is, a concern that if we use incentives, people will not do the morally or socially right thing, but will act only according to the incentive, and thus will not volunteer to donate blood if they can be paid for doing so, or they will feel more comfortable picking up the children late from the day-care center if a small penalty is imposed for being late, because now they will not have pangs of conscience. See Gneezy et al, *supra* note 7, at 199-202 (dealing with incentives for prosocial behavior).

[52] According to Calabresi, Guest Statutes (e.g. Ala. Stat. Sec. 32-1-2 or Neb. Rev. Stat. Sec. 25-21, 237) in the U.S. failed. These are laws that attempted to avoid fraud of the type involving a person who was injured in a car and claimed that the driver was negligent, the latter agreed and his insurance paid the victim. These laws failed because if a person wishes to cheat, he will succeed in another way. For example, the passenger could say that he purchased the petrol (Conversation with the author, New Haven, Connecticut, 2.13.2015).

Other main problems are these: there is no resounding social condemnation here of refusal, and no recognition on the part of society of the suffering of the victim; the power remains in the hands of the refuser and the position of the victim has not improved; there would appear to be a moral problem since the sinner profits. On the other hand, in this carrot solution the refuser himself participates in establishing the fund and in the payments from it (as in the insurance mechanism). Although the sum is fairly symbolic, this might somewhat alleviate the moral problem vis-à-vis the limited carrot models. Lastly, one should examine whether a carrot solution also raises concern about a coerced *get*.[53]

IV. A View Towards a Desirable Mechanism: Sticks, Carrots or A Hybrid?

A. Between Carrots and Sticks: Which Incentive is Preferable in Combatting Refusal?

After presenting stick and carrot solutions, this chapter attempts to examine which of them is preferable in putting an end to the negative externality, and also in preventing potential refusers from becoming actual refusers. The outcome of this examination will not be unequivocal, which raises the question of whether a combination of the two – stick and carrot – is preferable.

1. The moral problem

A clearly moral problem exists in offering a carrot with the objective of putting an end to an act that constitutes an externality that is negative and harmful to society: the sinner is rewarded, and sinners who know that payment can be received for desisting from that sin will not be prepared to do so unless they receive the carrot. One of the dangers that has been discussed in the literature is that offering an incentive for an act that should be voluntary may reduce the number of people who are prepared to volunteer.[54] For example, according to some opinions, offering incentives in the education system is equivalent to actual bribery and is therefore morally wrong, for one of the goals of a school is to enhance the importance of internal motivation without recourse to external motivation.[55] Some scholars have also argued that prizes for behaviors such as not polluting the environment can lead to the opposite results and act as disincentives,[56] and if a carrot is being offered in order to stop negative externalities, there will be a crowding out effect, i.e., fewer and fewer potential lawbreakers will be prepared to desist from their negative actions without receiving payment.[57] On this point of view, payment for an act such as giving the *get*, which society understands as something that must be done in order not to imprison the spouse in an unwanted marriage, is indeed liable to be perceived as immoral. This problem must be solved.

2. The burden of executing the solution

The civil actions that generate large compensation awards for victims which can be traded for a *get* are in fact a private law solution, which definitely can play a role alongside attempts to bring about change

[53] "Carrot" means a benefit for the refuser, and not a threat or compulsion, and therefore it apparently involves no "monetary compulsion". However, sometimes great efforts are made to realize the incentives, and there is a feeling that not realizing them is equivalent to failure; this might be conceivably considered as a type of compulsion, on the assumption that subsidies and "reductions" of various sorts sometimes create the same incentives as punishments and fines, and on the assumption that people are risk-neutral. In the past there were discussions of whether reducing the prison sentence of the refuser by one third in exchange for giving the *get* was liable to entail a coerced *get* and various opinions were expressed. See: Joseph Goldberg, Coerced *Get* 36-39 (2003); Lavie, *supra* note 32, at 163-64; Shlomo Dichovsky, Lev Shome'a Leshlomo 142-51 (2014); Shlomo Dichovsky, *Recommending Reduction of Sentence as a Means of Compelling a Get*, 1 Tehumin 248 (1980). It is still difficult, however, to compare a situation in which a person does not receive something to a situation in which he is threatened that something which he believes belongs to him will be taken from him. A negative incentive affects the ability to choose, whereas a positive incentive does not. According to some views, there is no compulsion as long as the refuser has a choice whether or not to divorce. See Goldberg, *supra* note 53, at 262. Thus, there are different opinions, but it is clear that a carrot is less problematic from this aspect. Also, one can imagine that if the fund were to be administered by the rabbinical courts, there would be no external interference in their authority, and they would be able conduct matters without fear of a coerced *get*.

[54] Gneezy et al, *supra* note 7, at 192.

[55] *Id.* at 195.

[56] *Id.* at 199.

[57] *Id.* at 193-94, and *supra* note 51 and the accompanying text.

in the public sphere and suitable enforcement on the level of religious family law. It would appear that this stick is readily available at present, and if victims of *get* refusal were to use it frequently it may eventually no longer be necessary due to its adequate deterrent effect. However, the fact that the victim must conduct another – civil – action, in the civil court, with all that is involved, undoubtedly places a considerable financial and psychological burden on her. Such a stick also requires the victim to execute a post-judgment transaction aimed at obtaining the *get*. True, the state helps in that it provides the legal platform – recourse to tort law and contract law in the civil court. Nevertheless, the burden is substantial, and this makes the threat of litigation not fully credible. In addition, some spouses who refuse to grant divorce may lack current resources, making them essentially judgment-proof. The carrot, on the other hand, eliminates all these problems either completely or partially. The carrot mechanism, bureaucratic as it may be, appears to be cheaper and quicker than a civil action. Therefore, from this aspect the carrot solution is preferable.

3. Efficiency considerations

There is much economic logic in carrot solutions, and they may serve as an effective incentive aimed at obtaining the *get* in any specific case. If the aim is also to prevent such cases ex ante and not only to operate on a case-by-case basis, the carrot – at least on its own – is problematic, because it sends the message to the refuser that he can only gain and not lose. As opposed to this, sticks are more effective in that they sometimes succeed in deterring people in advance from refusing; however, they are not always successful in achieving the desired outcome, they take time (until the judgment, and in post judgment bargaining – until a deal is reached) and they are costly. Nevertheless, it must be recalled that carrots still cost money, for a positive payment is made to the refuser and remains with him, whereas sticks do not cost money since no money is actually transferred to the refuser; rather, what is involved is a kind of waiver in relation to collecting on a financial right.[58] If the sticks are well planned and the citizens comply, it is possible to save significantly on costs, for not only is no money distributed, but the mechanism of the stick is also not actually implemented, and it remains as a threat only.[59] On the other hand, the mechanism for enforcing sticks when necessary is expensive, and the administrative costs (of litigation and execution) are high. Indeed, according to some behavioral literature, carrots impact behavior more strongly than sticks, because although it is apparently possible to create the same incentive as that of the carrot by enlarging the stick (increasing the fine), nevertheless it is cheaper to deter by psychological means than by increasing the sums that will have to be transferred from one person to another, which entails higher transaction costs.[60] In any case, in relation to our matter, things do not seem to be unequivocal: on the one hand, even if the civil actions succeed in deterring some potential refusers from actually refusing, a situation of absolute deterrence that renders recourse to lawsuits unnecessary will still not have been achieved; and on the other hand, carrots have their own characteristic problems.

4. The size of the carrots and the sticks

From the empirical literature it emerges that if a carrot is to be awarded, it must be substantial: symbolic carrots have not had the desired effect, and it has been proven that it sometimes would have been better in such circumstances not to give a carrot at all: "Pay enough – or don't pay at all".[61] An incentive that is too small is liable to create a false representation that the bad behavior is not really so bad, and that it can be bought for a small price.[62] In our context, a carrot that is not sufficiently large will not convince the refuser to give the *get*, although the size of the carrot may be subjective, for a poorer refuser might be convinced more quickly by a smaller carrot than would a well-to-do refuser. With respect to sticks

[58] Galle, *supra* note 4, at 809-10.

[59] De Geest & Dari-Mattiacci, *supra* note 1, at 345.

[60] Adi Libson, *Missing Inaction: Internalizing Beneficial Omissions*, 32 YALE L. & POL'Y REV. 427, 438-45 (2014).

[61] Uri Gneezy & Aldo Rustichini, *Pay Enough or Don't Pay at all*, 115 QUARTERLY J. OF ECONOMICS 791 (2000); Gneezy et al, *supra* note 7, at 191-93.

[62] And *cf.* Uri Gneezy & Aldo Rustichini, *A Fine is a Price*, 29 J. LEGAL STUD. 1 (2000), albeit with respect to repeat players; Gneezy et al, *supra* note 7, at 194.

– too small a stick will not set the wheels of the trade in motion, for it will be worthwhile for the refuser, even one who is clearly risk-averse, to pay up and wait to extract more in the rabbinical court. A large stick can have the desired effect but it gives rise to a real concern about a coerced *get*.

In summary, it cannot be said definitively which incentive is preferable for use in the context of civil solutions in the battle against *get* refusal. There are clear advantages and disadvantages to the use of each. Consequently, the best thing would seem to be to combine the stick – which is insufficiently deterrent and has not succeeded in eliminating the problem despite many years of use – with the carrot, but not necessarily to *replace* it with a carrot, due to the drawbacks of the carrot and the advantages of the stick. It will be necessary to examine how the drawbacks of carrots, including the moral problem may be neutralized.

B. In Praise of a Combination of Carrots and Sticks

A combination of sticks and carrots may well lead to the optimal solution that makes full use, insofar as possible, of the advantages of the models that are chosen and avoids their disadvantages. A combination can offer mechanisms that are more effective than carrots alone and sticks alone, and that are also more moral than use of carrots alone.

Although a great number of scholars have analyzed the significance of sticks versus carrots, the advantages of each and the suitability of each for certain real-life situations, many of them have not considered or not addressed the possibility of combining the two.[63] Others have offered various proposals for combining sticks and carrots and arriving at a hybrid system.[64] For example, one suggested combination is to distribute carrots to one part of the population and to use sticks on the other part, in order to overcome the distributive problem.[65] Thus, for example, it was proposed to impose environmental regulation in certain cases on only part of the relevant lands.[66] With respect to health insurance in the U.S., too, the law employs carrots and sticks differentially for different parts of the population: poorer populations receive subsidization to purchase their health insurance, whereas all the rest are liable to a sanction, i.e., to pay more or be fined if they do not purchase health insurance.[67] With a view to achieving a balance between rewarding the provision of a cheap medical service on the one hand, and concern about medical negligence lawsuits due to the lower quality of a cost-cutting cheap service on the other, proposals have been made combining carrots and sticks by incorporating a certain insurance mechanism into the existing U.S. healthcare system.[68] Regarding the policy of payments and taxes, too, a hybrid path has been proposed in certain cases.[69] Another example is of sanctions in the form of fines and punitive damages for the purpose of deterring elements who offer bribes, who try to defraud the authorities or who willfully harm citizens; however, it has been proposed, somewhat provocatively, to also enact statutory carrots that would remove or reduce these sanctions under certain conditions, with the aim of reducing corruption and fraud and gaining the cooperation of those elements.[70] According to the proposal, unless the sticks are combined with carrots, we are left with cases in which the sticks by themselves are not always effective.[71]

Galle warns against combining sticks and carrots carelessly.[72] Indeed, this is not a wonder-drug, and it is not always possible to present a stable combination that optimizes the benefits and dismisses

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[63] See, e.g., De Geest & Dari-Mattiacci, *supra* note 1, at 392.

[64] Galle, *supra* note 4, at 849.

[65] *Id*.

[66] Stefanie Engel, Stefano Pagiola & Sven Wunder, *Designing Payments for Environmental Services in Theory and Practice: An Overview of the Issues*, 65 ECOLOGICAL ECON. 663, 669 (2008).

[67] Galle, *supra* note 4, at 801.

[68] Erin E. Dine, Comment: *Money Will Likely Be the Carrot, but What Stick Will Keep ACOs Accountable?*, 47 LOY. U. CHI. L.J. 1377 (2016).

[69] Smith, *supra* note 15, at 695-96.

[70] Victor E. Schwartz & Phil Goldberg, *Carrots and Sticks: Placing Rewards as well as Punishment in Regulatory and Tort Law*, 51 HARV. J. ON LEGIS. 315 (2014).

[71] *Id.* at 363.

[72] Galle, *supra* note 4, at 831.

the drawbacks of each of its component. But in our context, there are definitely combinations that might be suitable.

V. COMBINING CARROTS WITH STICKS IN PRACTICE: A PROPOSAL FOR A VERTICAL MODEL

This chapter presents a solution which links the stick and the carrot in a multi-part incentives structure that enables the award of a prize to the refuser, which will be more effective than a stick alone. Indeed, sometimes a combination is better than a lone solution and is able to utilize the benefits of a number of solutions and disarm the disadvantages. The combinations that were presented in the last chapter in the commercial world were for the most part horizontal or simultaneous, i.e., a policy whereby a carrot is offered to one part of the population at the same time as another part is threatened with a stick, or the two mechanisms are used simultaneously on the entire relevant population with the aim of achieving the best over-all results. The combinations that will be presented in the first section of this chapter are vertical in nature, and they will serve as a basis for a desirable model. The second section will present a preliminary feasibility model, and in the third section possible difficulties in applying the proposed model will be addressed.

A. The Proposed Model: The Carrot-Becomes-a-Stick Combined with Social Sanction

1. The Carrot-Becomes-a-Stick

We seek a sequential, vertical, two-stage combination of carrots and sticks, in which the second stage will eventuate only if the first stage is not successful. Such a connection, in which a carrot will occupy the center of the first stage, to be followed by a threat, that is, a stick if the carrot does not succeed due to obstacles placed by the refuser, might be very valuable, in that all the relevant parties will know what the default is if the first stage – which all the parties will probably want to succeed – does not do so. This default will serve as an incentive for them to try to comply with the conditions for the application of the first stage. This construction might be particularly suited to an activity such as *get* refusal, which is of a negative nature only.

There are law and economics approaches which make this basically desirable connection between two stages in some conditional way. However, it must be stressed that the purpose of invoking theories of law and economics in this Chapter is only to extract basic ideas for building the skeleton of a model suited to our purposes; the intention is not to copy real economic models, that include a set of basic assumptions that are not always suited to the cases of *get* refusal, or to make full use of them on a one-to-one basis. Therefore, the outlines of those economic models have been adopted, but the details have been adapted to the test case.

A combination of liability rules, which offers two possibilities rather than only one, can promote a solution for the *get* refusal problem. In their famous article of 1972 on the four rules or "the Cathedral," Calabresi and Melamed discussed several means through which the law protects the entitlements, enabling their realization and enforcement.[73] They formulated four property and liability rules, in favor of the damaged party or of the damaging party.[74] Over time, other rules were added, such as Rules 5 and 6.[75] Ronen Avraham calls them "modular liability rules" which, when combined,

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

[74] *Id.* at 1115-21.

[75] On adding rules 5 and 6, see: Ian Ayres & Paul M. Goldbart, *Optimal Delegation and Decoupling in the Design of Liability Rules*, 100 MICH. L. REV. 1, 6 (2001) ("Rule 5: the court permits pollution to continue but also grants the Polluter the option to stop polluting and to receive damages from the Resident; and Rule 6: the court permits the Resident to enjoin the pollution but also grants the Resident the option to waive this injunctive right in return for damages from the Polluter. These 'put-option' rules - like their 'call-option' counterparts - are still 'liability rules,' designed to compensate the initial entitlement holder for any nonconsensual transfers of that entitlement rather than to deter such transfers altogether. The two differ only in that put options allow the initial entitlement holder to force nonconsensual transfers, whereas under the more traditional call-option liability rule the initially unentitled party can force transfers."); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440 (1995); Ian Ayres, *Monsanto*

grant a pair of possibilities rather than only one.[76] Rules 2 and 4 of Calabresi and Melamed have been interpreted as a call option, i.e., an option for the compulsory acquisition of the right from its owner in exchange for a pre-determined sum.[77] In rule 2, the call option in the case of a nuisance is that of the polluter to purchase the resident's right to clean air, whereas in rule 4, the call option is that of the resident.[78] Rules 5 and 6 also deal with granting options, but instead of a call option, they grant a put option, which is the choice of whether to leave the entitlement or to force the person who is not the holder of the right to purchase it from him.[79] Avraham presents a new modular rule – 6+5 – which comprises a combination of the implementation of rule 6 and thereafter, the implementation, cumulatively, of rule 5,[80] and which may suit our case, with certain changes. In the example of nuisance, the resident-victim has the put option to compel the transfer of the right, i.e., he is the one to decide whether to force purchase, that is, to be paid a nonnegotiable amount and suffer from the pollution or not, in which case the polluting plant must stop its emissions; the polluter has a subsequent call option to sell the right back to the resident, at his discretion, i.e., to compel the purchase of the right and to receive compensation from the victim in exchange for ceasing the damaging activity or to retain the right and continue to pollute.[81] The process begins, therefore, with the victim's option to realize the right vis-à-vis the polluter, and moves over to the opposite option. Ian Ayres and Paul Goldbart present a similar path regarding the "dual-chooser rules", stressing that "a common law put rule can be seen as a two-stage process: in the first stage, the defendant intentionally takes, thereby signaling a willingness to face the plaintiff's put option in the second stage. Such two-stage liability regimes exemplify what we call dual-chooser rules because both litigants have an impact on the ultimate allocation."[82]

For our purposes, the combination presented above will be implemented slightly differently from the rules presented by Ayres and Goldbart or Avraham. Thus, for example, the opening position in our case is that the victim is interested in a deal to obtain her *get*, and in most cases that is the only reason for her embarking on this course rather than any desire to receive compensation from the refuser; moreover, nothing will happen unless the parties reach an agreement to trade, but there does not seem to be any way to actually *compel* the victim to make such an agreement. However, the modular or the "dual-chooser" rules may create an opening for devising a different rule that combines the two different models presented above – the carrot (the fee-fund) and the stick (civil action) – whereby both parties participate in a vertical, two-round "game", bargaining in order to trade the entitlement for a price determined by the authorities becomes possible, and an optimal socially desirable outcome may be reached.

One combination of the said carrot and stick is the possibility of resorting to a civil suit as a residual process, i.e., to be invoked only if the refuser does not decide to accept the money from the fund within a set time, and at that preliminary stage the victim must agree not to bring a civil suit against him for the meantime. In such a situation, the refuser has a preliminary option – a choice which is his alone, to take the money from the fee-fund and give the *get*, in fact a put option of the right. If he refuses to accept the money within the set time, this means that he has waived that option. Now the victim will have the option of suing the refuser and using the compensation award to purchase the *get*. The refuser will be under a certain pressure to sell the *get* at this stage, for if he does not do so he will have to pay money to the victim; however, it will not be possible in such a case to compel him to so. A vertical two-stage construction such as this will incentivize the refuser to accept the payment from

Lecture, Protecting Property with Puts, 32 VAL. U. L. REV. 793 (1998); Ronen Avraham, *Modular Liability Rules*, 24 INT'L REV. L. & ECON. 269, 272 (2004); Henry E. Smith, *Property and Property Rules*, 79 NYU L. REV. 1719, 1794-95 (2004).

[76] Avraham, *supra* note 75. Note that the Modular Liability Rules model tackles the problem of incomplete information (namely, that the parties' valuation of the entitlement is unknown to the social planner), and as such, it brings along with it a full set of assumptions which do not necessarily apply to divorce refusal.

[77] *Id*. at 272; Ayres & Goldbart, *supra* note 75, at 5.

[78] Avraham, *supra* note 75; Ayres & Goldbart, *supra* note 75, at 5.

[79] Ayres & Goldbart, *supra* note 75, at 5.

[80] Avraham, *supra* note 75.

[81] *Id*. at 269.

[82] Ayres & Goldbart, *supra* note 75, at 33-34 (see also *id*. at 10. In practice, there is a certain similarity between the dual-chooser rules and the modular liability rules, as the authors themselves stress at p. 1, note **).

the fund at the first stage, for he knows that his situation will worsen at the second stage, in which he might ultimately be left in a situation in which he gave the *get* and received no payment at all.

A combination rule such as this provides the refuser with two options for selling the *get*, both of them within his discretion. At the first stage, an offer is made to the refuser to accept payment from the fund in exchange for giving the *get*. The victim, apparently, has no deciding voice at this stage; only the refuser decides whether or not to accept the offer and sell the *get* in exchange for the payment from the fund (and this may attest to the fact that the *get* that is given is not coerced, for the refuser has a choice, albeit relatively limited). The course begins, therefore, with the refuser's own decision as to how he will act, even though the threat of the stick is well known to him. That information as to what can be expected in the future is a key point here. If the refuser has decided not to respond to the offer, the second stage, in which the victim is active, will kick in, but sale of the *get* will still not be forced on the refuser. Neither will the victim be forced to purchase the *get* with the compensation that she was awarded in the civil suit (for she can decide to keep the damages and not to go ahead with the exchange transaction). In that case, there is no "rolling over" of the decision from one party to the other, for the refuser has the right to decide at each of the stages, but the victim, too, has the right to decide at the second stage (of course her consent to the whole process, including her agreement not to sue at the first stage, is needed). The threat of the second stage, of which the refuser is already well aware at the first stage, can remove the sting from his choices and in many cases cause him to agree to accept the payment from the fund at the first stage. A two-stages vertical proposal such as this may be effective, certainly more than alternative recourse to the model of the stick alone or that of the carrot alone.

Clearly, in an ideal world it would be necessary to ensure that the victim remains with both remedies and does not trade one for the other or forgo one so that the fund will pay the refuser to give her the other. However, in the present state of affairs, this seems unlikely to happen, and the civil suits solution is not necessarily preferable, due to the fact that the victim has to conduct the suit, incurs many expenses, and ultimately forgoes the money she was awarded. Here, if the mechanism succeeds it is possible to obtain a similar result in considerably less time and without the victim incurring expenses.

This modular combination has an advantage even if it does not tie up all the ends; nevertheless, there is room to think about additional ways which will incentivize the refuser to accept the carrot from the fund, even if he is not sure that the victim will actually sue him civilly if he rejects the payment from the fund. Simply, when WTP (willingness to pay) < WTA (willingness to accept),[83] that is, when the refuser would not accept a sum less than x, and the fund cannot give him x or more, he may not accept the carrot. We look for a way in which it will be possible on the one hand to incentivize the refuser to accept the carrot and stop refusing, but at the same time to threaten him even more strongly with sanctions, beyond the threat of suing him in torts, if he does not accept the carrot. Moreover, there are still problems with the modular solution. Too much power remains in the hands of the refuser. Furthermore, the modular solution does not advance the possibility of conducting serious negotiations before the external incentives (the carrot or the stick) enter the picture, for the refuser has nothing to lose if he becomes subject to the model and takes the carrot (at most, he will gain less than he would have if he had extracted the victim in the rabbinical court for a higher amount). Therefore, there is room to improve this proposal further by invoking an additional approach of law and economics that will create a better link between the carrot and the stick. This approach will try to provide a basis for a golden mean solution according to which, on the one hand, there will be an incentive to accept the carrot and desist from refusal, but there will also be something to deter him from doing so and convince him to give the *get* without embarking on that vertical path. In other words, the vertical path must be both rewarding but also deterring at the same time.

[83] See Cass R. Sunstein, Essay: *Lives, Life-Years, and Willingness to Pay,* 104 COLUM. L. REV. 205, 229-30 (2004) (comparing WTA to WTP).

Indeed, we can take this one step further along the lines of the reversible rewards theory propounded by Omri Ben-Shahar and Anu Bradford.[84] Ben-Shahar and Bradford propose that one party, the enforcer, who is interested in channeling the conduct of the other party, the potential violator, establish a fund, and to the extent that the other party fulfils its requirements, monies from that fund will be transferred to them as a carrot. If he does not fulfil the demands, the fund will be transformed into a stick, i.e., the money in the fund will be directed to the application of sanctions against the violator, and to that purpose only. The fund is one-sided, and cannot be directed to the enforcer. The authors explain that this proposal has a double effect from the point of view of incentives for the potential violator, and it is relevant, and even critical, in cases in which sticks alone are not effective, because their costs (litigation costs of both parties, costs of enforcement etc.) are higher than the harm that they prevent, and carrots alone are also ineffective, for their cost, too, is higher than the harm that they are designed to prevent.[85] In that case, reversible rewards can achieve deterrence at approximately half the cost.[86]

The authors' proposal rests on two bases. The first is that of the double effect, by virtue of which the same resources can be used to fund both the carrot and the stick.[87] The second basis is the use of a pre-commitment device, which solves the problem of the credibility of the threat without additional cost by strengthening the mechanism of transforming the carrot into a stick. This cannot be said of cases in which the same funds can be used for other purposes or retained by the enforcer, for then, there is no certainty that they will be used for stick purposes, i.e., to carry out the threat in case of failure of the carrot. Ben-Shahar and Bradford add that their proposal is relevant in cases of specific and concrete violations, and less so in relation to cases of systematic, generic violations where, in fact, it would be necessary to award the prize each time anew.[88] They warn of a possible problem of moral hazard if there are a great number of repeat violations.[89]

The authors illustrate the possibility of implementing their proposal at different levels. These levels include public law as well as private law,[90] but family law is not among them. The idea can be implemented in our context in two ways, and only the kernel of the idea will be invoked.

Let us begin with the first mechanism. A joint private account could be opened by the spouses, as a type of mutual pre-commitment. To do so, however, one of the limitations that Ben-Shahar and Bradford imposed must be removed. Their proposal referred to a one-sided account. The question arises as to why it would not be possible to create such a mechanism in which the division of roles is not clear from the beginning but only in retrospect, and the parties prepare themselves for all eventualities, such as in a case of landlord and tenant: the tenant is liable to be the violator, for example, by not vacating the apartment or by leaving it in an unreasonable condition, but the landlord, too, might be a violator and cause harm to the tenant during the period of the lease and not act in accordance with the contract, not make repairs in a satisfactory manner or within a reasonable time etc. Indeed, in the said case, the account could be two-sided: each spouse could fulfill the rule of enforcer or violator, and the money, which will be provided by the joint contributions of the couple, will be held in trust, and not by one of the parties. If one spouse becomes a violator, he will receive the whole amount that he deposited (or half the amount in the fund, if the monies were deposited by both spouses) from the trustee of the fund; if he persists in the refusal, the whole sum – comprising the contributions of both spouses – will be used against him. If neither spouse is a violator, the monies will be divided between them at the end of the relevant period (in our case, upon divorce).[91] In fact, it is entirely possible, although not

[84] Omri Ben-Shahar & Anu Bradford, *Reversible Rewards*, 15 AM. L. & ECON. REV. 156 (2012) (presenting the reversible rewards model. It should be noted here also that this model brings along with it a full set of assumptions which do not necessarily apply to divorce refusal).

[85] *Id*. at 160-61.

[86] *Id*. at 157.

[87] *Id*. at 163.

[88] *Id*. at 160.

[89] *Id*. at 175-76.

[90] *Id*. at 158, 181-82.

[91] Note that the refuser is not offered the entire amount held in the fund, but only the amount of his own deposit, in order not to constitute too great an incentive to refuse initially.

essential, to implement the proposal of reversible rewards by including an appropriate clause in a pre-nuptial agreement.

It will also be noted that if the refuser is not offered, from the outset, the whole sum that has accumulated, but only the part that he deposited in the fund, there is no difference here between a person who divorced without refusal and one who began as a refuser and his share was offered to him. But this is precisely the ideal outcome – a person who refuses is not supposed to receive his part of the fund, for that part is given only upon the event terminating the marriage. Therefore, a person who divorces without refusal receives his share; if a person refuses, he is offered the opportunity of giving the *get* and being in the same position as a person who did not refuse, but only for a limited time. If he does not give the *get* within that period, his share will be transferred to the victim at the second stage. At this second stage the victim may use the money to bring a civil action against the refuser, although she is not obliged to. She may use the money for other legal proceedings against the refuser. In any event, in order for the threat to be credible, the victim must use the money for legal proceedings *against the refuser*. The refuser will thus know that if he refuses to accept the money from the account and the *get* is not given or accepted, then even if the victim does not bring a civil suit, that money will be used against them in various proceedings on different levels. All the information concerning the victim's possibilities of using the money from the fund against the refuser might put pressure on the latter, in that he knows that the money that he does not accept will in fact be used against him. Thus the refuser is incentivized to accept the offer of payment even more than in the modular solution.

Nevertheless, it must be assumed that the balance in the account will not be large, and often it will ultimately not succeed in incentivizing the giving of the *get*. As stated above,[92] studies indicate that a carrot that is not sufficiently substantial will not usually be effective; that is certainly relevant in our context, and particularly when the refuser has an option of receiving – through extraction of the victim – a significantly larger sum than that which is offered to him from this account. Why? The payment from the account depends on the economic situation of the spouses prior to setting up that account, and on the amount that was invested initially. It is possible, in legislation or in set texts of pre-nuptial agreements, to fix relatively high sums to be deposited in order to constitute a suitable carrot for preventing refusal in the future, or as a deterrent stick if the spouse refuses. However, unlike liquidated damages of various types or special provisions relating to increased maintenance in pre-nuptial agreements, the aim of which is to combat refusal, and which are all enforced by bringing an action *ex post*, here the sum must *actually* be deposited *ex ante*. Not every couple is able to deposit large sums in this account. It will of course be difficult to legislate an obligation for every couple who wishes to marry to deposit a specific, large sum that would eventually be sufficient to incentivize the giving of the *get*, for both distributive and practical reasons. However, the mechanism could be linked to the couple's wages, and a certain percentage could be deducted, as in the case of pension. If no refusal is involved in the couple's divorce, they will benefit from the fund and receive whatever sum has accumulated in it in addition to the interest, and thus it will be possible to achieve a higher amount. This is a type of progressive tax, which may also correct distributive distortions.[93] This proposal may therefore be relevant in certain cases, but at least in some cases it will not constitute a sufficient deterrent.

The second mechanism that could be created is to improve the mass fee-fund, making it into a type of reversible reward.[94] The monies that are designated for payment to the refuser will be handed

[92] See text near note 61.

[93] It could be decided that at a later age, e.g., pension age, when the risk of refusal diminishes significantly (although it does not disappear), the fund could be opened.

[94] True, in the framework of their proposal, Ben-Shahar and Bradford, wishing to avoid moral hazard, were not in favor of funds consisting of deposits from many people, and of needing to pay anew in every case of violation. Rather, they advocated private funds in which there would be a deposit in a specific case. It would seem that the basic concern about serial payments to the same violator, as could happen, e.g., if the tenant fails to vacate every time that he rents an apartment and receives money in serial fashion, would not only be allayed somewhat but dispelled completely. A fund that will pay to violators-refusers will not cause refusers to behave in serial fashion. Presumably it would be very rare to find a person who refuses to give a *get* for many years, receives money from the fund and divorces, then remarries and once again refuses to divorce.

over in their entirety to the victim if the refuser refuses to accept them and give the *get*. Hence, at the second stage, the mechanism continues to operate in a similar fashion to the above mechanism of a private account established by the couple: if the violator does not accept the money from the fund, the money will be used to take legal action against him. The victim should in fact agree to the whole process, in order to activate it. Here, because the fee-fund is made up of small payments from many couples, it is possible to accumulate large sums of money for use as carrots and as sticks, and the fund will not be limited to the amounts that the couple themselves deposited. Of course, it will be necessary to set criteria for deciding how much to pay and in which cases, and to ensure that the fund is not depleted – matters that belong anyway to the mechanism that is the basis for the carrot model.

One way or another, if these proposals are also contractual by nature, it may be assumed that there will be no problem of a coerced *get*, since the parties themselves agreed in advance to set up this fund and they took into account that if they are in breach they will in fact be penalized.[95]

These two proposals based on reversible rewards would therefore seem to be more efficient than a threat alone, i.e., a stick, and not only more efficient than a carrot alone.

If so, an activation of the modular or dual-chooser rule along the lines of a reversible reward will create a fund consisting of fees levied on all those who marry in accordance with Jewish law, which offers a carrot that will eventually become a stick. This will occur after new legislation on the subject, if the state administers the fund. If the state does not administer the fund, e.g., due to the separation of church and state, communities or private rabbinical courts in these jurisdictions should be permitted to administer it.

2. Vagueness of the Criteria for Receiving the Carrot

If the parties do not reach agreement at the pre-mechanism stage, the refuser will become subject to the proposed mechanism, like it or not. From the fund that is established carrots will be distributed to refusers according to vague criteria. It will not be clear to the refuser whether he will receive a carrot, when he will receive a carrot and what the amount of the carrot will be. Vagueness of the criteria combined with an individually-tailored carrot, rather than a general, fixed carrot that is offered to all refusers, may be the secret to the success of this course and may prevent distributive distortions. Vagueness of the criteria for receiving the payments can help in achieving efficiency, despite problems of good government and transparency. If the criteria would be clear, every potential refuser would ensure that he or she comes within the bounds of these criteria in order to receive payment, possibly incentivizing many people to become refusers. Indeed, there are cases in which the absence of clear criteria, as a deliberate course of action, is inevitable.[96] This would not be the first situation in which it is recommended that vague criteria appear in the law. For example, if people were to know exactly when their debts would be discharged under the laws of bankruptcy, they would act and plan accordingly from the outset; they would accumulate debts and discharge them by law. We are indeed interested in giving bankrupts a second chance by way of discharging of debts, but this is only retroactively, regarding a person who has fallen into debt in the course of his business dealings and is not able to recover and to repay his debts.

3. Shaming as a Social Sanction: A Type of Stick within the Carrot Stage

The model is not yet complete. Another component of sanction is required at the carrot stage. Without such a component, a large proportion of the refusers will accept the carrot at the first stage, and it will be an incentive to refuse. The moral problem of giving sinners a carrot remains, even if some of the refusals will end relatively quickly through use of these vertical mechanism. A proposal for a social

[95] In fact, this is similar to other provisions of liquidated damages that appear today in pre-nuptial agreements aimed at combatting potential *get* refusal. Unfortunately, in certain parts of the world those agreements are not popular.

[96] Yuval Feldman & Shahar Lifshitz, *Behind the Veil of Legal Uncertainty*, 74 L. & CONTEMP. PROB. 133 (2011) (explaining that there are times when the law wishes to conceal not the existence of a law *per se*, but its details, because information as to the details would have a negative effect on people's behavior).

sanction at the carrot stage fulfils this function perfectly. This proposal will be discussed briefly here, and it merits separate and distinct elaboration.

Upon activation of the mechanism of allowing the refuser to receive money from the fund, his name will be published in a permanent blacklist of *get* refusers on a special website, and even if he gives the *get* it will not be possible to erase his name from the list. The list will be open to view not only by potential spouses, but also by relatives, neighbors, potential employers etc. The refuser will receive proper advance warning in writing about all these ramifications to enable him to give the *get* before the mechanism is activated. Continuing on from social sanctions such as banning or excommunication which are available to the rabbinical courts all over the world, and which are sometimes invoked even today, a list of refusers can be compiled and published on official websites that are accessible by the public, which will constitute shaming under the auspices of the law, i.e., a type of socio-legal stick.[97] Because such mechanisms do exist in Jewish law and even in Israeli non-religious law in the form of concrete court rulings,[98] it may not be so revolutionary if such a law enabling a permanent list of refusers were to be enacted, even if only in states in which there is no separation between religion and state.

Of course, the idea must be examined in light of the principles of violation of privacy etc., particularly in family matters, in which the names of parties are usually confidential due to a concern that the children of the couple will be hurt, but it must be recalled that at stake are two no less important values – the liberty of the victim and her autonomy. In any case, rather than contending with problematic constitutional balances, if the mechanism of the fund is administered by the rabbinical court, it will in fact not be necessary to enact a special law, and even in states in which there is a separation between church and state, the actual consent of the parties to arbitrate in the rabbinical court will prevent the refuser who underwent shaming from claiming a violation of privacy or of due process, or libel on the part of the rabbinical court, for turning to arbitration constitutes consent to all the known remedies that are awarded by the court, including such shaming.[99]

What is the social and legal justification for such shaming under the aegis of the law? In brief, the damage that was caused to the weak party can end by shaming the strong party through publicizing the fact of his exploitation and abuse of the weak party. The alternatives that exist in any case do not work well, and they too harm the refuser – his property, his liberty. It is precisely institutionalized shaming, regulatory shaming, that is more suitable in cases of *get* refusal than private, "partisan" shaming, done by the victim and which could "legitimize" counter-shaming of the refuser and those close to him, and cycles of revenge. It is therefore also important that the shaming be done by an institutional-regulatory mechanism, rather than allowing the victim herself to do the shaming under the aegis of the law. In addition, when the shaming is done by the mechanism, and not simply that the mechanism allowed the victim of refusal to do so, in many cases this will spare the victim the feeling that she is guilty.

Nevertheless, if the sanction of shaming seems too harsh, it could be done in stages. At the first stage, the default could be that the name of the refuser litigating in the rabbinical courts could be disclosed rather than remaining confidential, as they are in many cases. The name of the refuser will be confidential only if he so requests, and the rabbinical court will have to provide special reasons for so doing (such as possible harm to the couple's children). If the refuser persists in his refusal, at some point in time (which might, for example, be several months after activation of the mechanism), the refuser will be included in the blacklist that is published on the internet. Today, the shaming that is sometimes done, if only rarely, by the rabbinical courts worldwide, is directed mainly at religious refusers in their communities, and presumably the disadvantages of such shaming will outweigh its

[97] This was in fact done lately in New York city and also by the Israeli rabbinical court (Chief Rabbinical Court File 975433/10, 4.12.2016). This is also possible even by a state civil court, if the victim agrees, according to Directive 2.24 sec. 8 of the Israeli State Prosecutor (11.10.16, http://www.justice.gov.il/Units/StateAttorney/Guidelines/02.24.pdf). But here I refer to a permanent list and not to a concrete court ruling of a gag-order as is usually done in certain states regarding family affairs.

[98] *Id*.

[99] *Cf*. Helfand, *supra* note 21, Part IIIB (explaining that U.S. courts are dismissive of arguments that communal pressure gives rise to a duress defense in contracts, thus concluding that "[a]fter all, the parties chose to remain within these communities, rendering the consequences of that choice fundamentally volitional," criticizing that conclusion by calling to "a more flexible judicial approach to claims of coercion," and referring to a few U.S. court rulings in this regard).

usefulness if it is directed at a person who does not live within a particular community. The regulated mechanism proposed here will operate in general, and will extend the use of this sanction to those other refusers who are not Orthodox and do not necessarily live in communities like those Orthodox Jews who belong to synagogues. If there is no gag order, it will be possible to access the data banks and know the identity of the refuser. However, most people do not access legal data banks. If the mechanism reaches the second, more difficult stage, or positive publication of the refuser's name on the internet list, the shaming will be more effective, for every potential spouse or employer will be able, by means of a simple search, to examine whether the candidate facing them is or was a *get* refuser. It will also be possible to decide that the information should not be available on the internet by means of a simple search through a search engine, but that it may be obtained by means of a special request under freedom of information laws or under a specific law to be determined.

In all events, knowledge of this situation already at the pre-mechanism stage will cause many potential refusers to desist from their refusal and it will make it possible for others, who might be considering *get* refusal in order to extort financial from their spouses, not to reach that situation.

4. The Importance of the Preliminary, Pre-activation Stage

This mechanism, which begins with a carrot combined with shaming, and continues with a stick if the carrot is not taken, should encourage many refusers to give the *get* before it is actually activated. Indeed, if the mechanism conveys the correct message, many refusers will desist already at preliminary, pre-activation stage and will give the *get* because they do not want to be subject to a mechanism whereby they can only lose, since it involves sticks such as shaming as well as the carrot payments becoming a stick and being transferred to the victim. The less rational refusers who are only able to see the payment that awaits will become subject to the mechanism, and it is for them that it exists. In this situation, the money in the fund will be sufficient to pay the refusers, for only a portion – hopefully a small portion – of refusers will fall within the sphere of operation of the mechanism.

What is this pre-mechanism stage? The refuser will receive advance warning of some two months before he is subjected to the mechanism. During this time, he can conduct negotiations with the victim. Even though the refuser knows that the key to the *get* is in his hands, he also knows that if the negotiations do not result in consent to give the *get* within those two months, he will enter the path of the mechanism, from which there is no return. This could be a significant enhancement of the victim's bargaining power. The victim, on her part, can agree to the transaction at this stage, and pay a smaller sum in exchange for the *get* than was first demanded of her, or she may prefer to wait for the carrot stage, at which she is required to pay nothing since the money comes from the fund. In that event, however, if she chooses to wait she loses time which is liable to be valuable; moreover, if the refuser does not eventually accept the money from the fund and the second stage is activated, the process of obtaining the *get* may drag out possibly for a significant period. This interim period is likely to be a very tempting one from the point of view of obtaining the *get*, even though it may be assumed that the victim still has to buy the *get* for payment at this stage whereas entering the mechanism would mean that it is the fund, and not the victim, which would be paying.[100]

5. An Option of Activation of the Carrot by Stages

The mechanism could provide an option of activation of the carrot by stages, its value decreasing over time. Thus, for example, it could provide that the refuser will receive $25,000 from the fund if he gives the *get* within two months. If he gives the *get* in the third or fourth months, he will receive $15,000. If the refuser gives the *get* in the fifth or sixth months after the mechanism has been set into motion, he will receive only $5000. After six months the carrot is valued at zero, and it becomes a stick for use in legal proceedings against the refuser. It is possible fix an interim period, say another two months, in which the refuser can still come to an arrangement with the victim and give her a *get* in exchange for

[100] And if the mechanism reaches its second stage and the victim bring a civil action, this would be funded by the monies of the carrot that were not taken by the refuser.

$0. After those two months, and when eight months have elapsed from the beginning of the process, all the money – $25,000 in the present example – will be given to the victim as a stick. In any event, after this period of eight months, the carrot will turn into a stick, i.e., the money that was designated for use as a carrot will become a stick that is used in legal proceedings against the refuser to obtain the *get*.

6. Summary: The Important Points of Reference of the Mechanism

The mechanism includes three important points of reference. The first is those preliminary months in which the refuser is able to conduct negotiations without the stigma and the shaming involved in activation of the mechanism, but under some degree of pressure to give the *get* at this stage while still profiting (although presumably considerably less than is the norm today, when the refuser's bargaining power is much greater than that of the victim). The second reference point is the actual activation of that one-way mechanism, in which an offer is made to the refuser to accept the carrot within a certain period of time and the value of the carrot may decrease at certain fixed intervals, but this also entails permanent shaming. The third point in time is the activation of the stick and the transfer of the whole sum that was offered to and rejected by the refuser into the hands of the victim for the purpose of legal action against him. This is not the end of the story. If the victim brings a civil action against the refuser and wins her case, the winnings can be used as the basis for a transaction exchanging the compensation for the *get*; otherwise, not only will the refuser not have received a payment at the carrot stage, and not only has he watched ruefully as the money was transferred to the victim to be used against him, but he is also subject to another stick – the payment of compensation as a result of that civil action.

B. A Preliminary Feasibility Model

The proposed private fee vertical model can be practical and applicable, and it can be compared to pension mechanisms, for example. As can be seen from the preliminary feasibility model appearing in the **Appendix**, the fee-fund proposal could also materialize, and even a cautious, conservative process could result in a fee of $80 from every couple marrying in accordance with Jewish law being sufficient to constitute a positive balance in the fund, and allow for the payment of a carrot of an average of $25,000 for each refuser.[101] Clearly, not each refuser will receive such a sum. Even if such a sum were to be offered to each refuser, some refusers would not accept it because the value of the carrot decreases progressively, and therefore only a refuser who agreed to give the *get* in the early stages of the operation of the mechanism would receive the whole sum. Refusers who did not give a *get* at the early stages of the process will receive a much smaller sum. A refuser who has reached the stage of the stick once again causes an outlay of the entire sum from the fund, since this sum goes to the victim. The required fee, in the amount of $80, is in fact nothing but an increment to the fee that presently exists for registering for marriage, i.e., opening a marriage file.[102]

The statistics on which the model is built examine over the course of time the numbers of those marrying Jewishly in the State of Israel, the numbers of those divorcing and the number of new refusers each year, with an outlook for many years hence.[103] Of course different expenses were taken into account. Such a fund will have expenses both for setting up the mechanism and for its ongoing administration. The assumption is that secretarial and office services amount to several thousand

[101] The calculation of $25,000 was made according to an assessment whereby the value of refusal according to the rulings in tort law fluctuated between $5,000 to $12,000 per year of refusal, and the average duration of refusal was estimated at between 3 and 5 years. Thus the value of average refusal, if only for the purposes of tort law, is about $25,000. See Benjamin Shmueli, *Commodifying Personal Rights and Trading the Right to Divorce: Damages for Refusal to Divorce and Equalizing the Women's Power to Bargain*, 22 UCLA WOMEN'S L.J. 39 (2015) (presenting various models for calculating the tort compensation).

[102] Today, in Israel for example, the fee is around NIS 700, which is approx. $180. Our suggestion is to add $80 to this fee, rounding it up to NIS 1000 (approx. $260).

[103] The sum in the table has been linked to the index of the average growth in each relevant area. The statistic relating to the number of refusers at any time, from which is derived the number of new refusers each year, is subject to dispute and changes depending on the source, and therefore, in this context two different scenarios, based on two different sources (the Central Bureau of Statistics and the reports of the Rabbinical Courts Administration).

dollars per month, and payment must also be made to the members of the committee who will convene once a month to decide on cases of refusers,[104] and at least several hundred dollars for office costs and sundries. Deduction of these costs from the income will still leave the fund in a position where it will be possible to distribute respectable carrots to refusers, even in its first year of operation, according to the first scenario as demonstrated in the table in the Appendix.[105]

The cautious assumption will be that rational refusers will not want to become subject to the mechanism. The mechanism will be activated against non-rational refusers, and they have been estimated in the feasibility model to amount to 20% of all refusers – a rationality coefficient of 80% (presumably in practice, the percentage of non-rational refusers will be much smaller). Refusers who are "on the seam" will want information about the extent to which those activating the mechanism are serious, and therefore they, or possibly some of them, will not conclude an arrangement at the pre-mechanism stage in the first year of its operation. But then they will "look and be hurt", and as a result, in subsequent years, other refusers, who will have information about the credibility of the fund and its various stages will act rationally and reach agreements at the pre-mechanism stage. Nevertheless, the number in the column of non-rational refusers who will become subject to the mechanism remains static – 20%, for the sake of caution. In reality, this means that after the first year of activation of the fund, the surpluses remaining in the fund will apparently be much higher that what appears in the table at present. The model assumes that every such refuser will receive the full payment, even though presumably, some refusers will wait and the carrot will therefore be reduced, and some, who are particularly stubborn and not at all rational, will not take the carrot and will arrive at the stage of the stick, and the victim will be given the whole sum in order to use it against the refuser.

The fund will therefore be in surplus in the first scenario, even on the assumption that the model is not successful in the sense that the number of refusers each year remains as it was before the mechanism was activated. We can assume that the number of potential rational refusers will gradually decrease over time, even dramatically – although the number of stubborn, non-rational refusers nevertheless will remain stable, the number of rational refusers will decrease as a result of deterrence once the mechanism becomes active. Some of the potential rational refusers will reach an arrangement at the pre-mechanism stage and some of them will be deterred from the outset. That means that much smaller amounts will be distributed from the fund compared to the amounts presented in the table and the fund will be in positive balance under the second scenario too, and the balance will be even greater under the first scenario. For the sake of caution, the numbers of rational refusers have been decreased in the Table by 3% each year. Presumably the decrease will in fact be significantly greater and faster, and the increase in the balance will be significantly higher. If that is the case, it would mean that we have been successful in dealing with rational refusers, which was the objective from the very beginning.

According to the second scenario, too, according to which the fund does not have a positive balance at present (it will have a positive balance within 30 years), in practice the huge costs that the state and the parties will save must be factored in, thus significantly increasing the aggregate welfare. Some of those costs that will be saved are difficult to calculate at this stage. These include: multiple hearings in the civil-state courts on the sticks in the form of civil suits; multiple hearings in the rabbinical (private or state) courts; costs of lengthy litigation (which can be huge), court fees (at least a few hundred dollars) and legal fees; costs of enforcement; and allowances paid by certain states to the victims of *get* refusal, such as guaranteed minimal income allowances. The effect of factoring in these costs will be that even according to the second scenario, in fact the balance in the fund will be positive, even if only from the general aspect of aggregate welfare. In this situation, the positive balance in the

[104] Let us assume that there are five members of the committee, each of whom will receive expenses amounting to $1500 per monthly meeting.

[105] The expenses involved in establishing the fund might amount to several hundred thousand dollars, and even one million dollars, and here it must be assumed that it will be possible to take loans (even from the government, where there is no separation between church and state, through the instrument of government debentures), and to distribute the repayment of the loans over several years (10 years in the table); even then, there will be surpluses in the fund, if only according to the first scenario. It is of course possible to make payments from the fund only after several years, after the costs of setting up the fund have been recouped.

fund according to the first scenario is in fact far greater than the amount shown at present in the table in the Appendix.

C. Addressing Possible Difficulties

1. Why should the state, the community or the rabbinical court actually pay the refuser?

We do not wish to reward a sinner. However, in our context, there is good reason for attempting to apply a combined solution which begins with a carrot that is paid by an official or communal body.

One can agree that the best thing to do in the present reality is to increase the use of sanctions of the stick type that are available to the rabbinical courts, and in Israel, by virtue of the law as well, including the sanctions of deprivation of liberty (imprisonment and solitary confinement, stay of exit order), and other sanctions that affect a person's property (revocation of various licenses, attachment of bank accounts and more). However, in many cases this has not happened. Various other solutions that have been proposed, such as increasing the use of suitable pre-nuptial agreements, have not succeeded to an extent that would halt the phenomenon of *get* refusal. Additional means are therefore required.

Beyond the solutions on the public plane and on the level of religious and civil family law, which should be supported and promoted, from the perspective of private law these are cases of a person who causes harm and a person who is injured. The role of private law in this context is not as an attempt to deal with problems like the jurisdiction of the rabbinical courts or to promote halakhic solutions; rather, it involves the question of how it is possible to prevent in advance the situation from arising between the damager and the injured party, and to enable the status quo ante to be restored by awarding damages if the *get* is not given at the first stage. The point of departure of the solutions is therefore different, even if the direction is the same – extricating the *get* from refusers.

Neither have the civil actions brought about a revolution, at least not a total one, and excellent research into their de facto success notwithstanding, it must be recalled that the burden that this solution places on the shoulders of the victim is almost unbearable, and the solution itself is fairly indirect. Normally, after years of suffering due to the refusal and the various court proceedings, the victim must gain hire the services of a lawyer at her expense, pay the fee, prove her claim, undergo cross-examination and wait, usually several years, until judgment is rendered. Even if the action reaches the finishing line successfully, she must hope that the refuser will agree to trade the *get* for waiving the compensation. Even if her plan is successful, we still cannot say that the damager fully internalized the harm, since the victim will in fact be waiving compensation that is due to her by law in exchange for the *get*. Even though this course of action should be supported, the civil action is actually not much different from a situation in which the victim succumbs to extraction and brings her own money or that of her parents to purchase her *get* at an earlier stage, as many women in fact do. True, one may say that the victim who waives the compensation awarded to her in the civil action does not actually put out money (except for her legal expenses and time). But in fact she does lose money that she is entitled to receive – such a victim ought rightly to both receive her *get* and retain the compensation at the end of the day, for the pain and suffering she has experienced and the severe violation of her autonomy and liberty. These do not disappear even when the refuser finally decides to give the *get*. Moreover, the pitiable practice is that even in cases in which the plan is successful, often, in the framework of the divorce agreement that is finally signed, the victim will still add extra funds in exchange for the *get*, for the refuser may not be satisfied merely with her waiver of the compensation awarded in the civil suit. If the victim's plan should not succeed, she will remain with the compensation award (if she is able to collect it) and without a *get*.

In addition, under the proposal it will not in fact be the state, the rabbinical courts or the community who pay, but potential refusers and victims – those who participate in the activity, as in most insurance mechanisms. But those bodies will take an active role in collecting the funds and administrating the mechanism by virtue of which the payments are made to refusers. If we adopt the first, private fee solution, this problem is further allayed.

If so, this seems to be a balanced solution in the current circumstances; what is more, if the part of the solution whereby the carrot may turn into a stick, we will not be losing the advantages of the stick solutions, primarily the effective threat, sometimes without needing to actually resort to the sanction itself.

Moreover, it must be recalled that the model does not simply offer a carrot to the sinner. The carrot is combined with shaming, and is intended to deter and to incentivize to come to the negotiating table at the pre-mechanism stage, starting out with more equal bargaining power. The refuser will be aware that if he does not give the *get* now, his situation will only get worse.

In all events, the payment to the refuser is made from the point of view of private law, as opposed to that of distributive justice and feminism, the supporters of which would apparently not agree with payment for *get* refusal; they may, however, be ignoring the fact that this is in effect what happens in the civil action – the refuser is forgiven his monetary debt. Their position also ignores the efficiency of the mechanism, and the fact that it is liable to save the victim many years of suffering and heavy financial outlays.

2. Concern about incentivizing every spouse to refuse

The concern about incentivizing every person who knows that a carrot is waiting for him in exchange for desisting from his refusal was raised above in the discussion of the model of the fee-fund. The concern exists in relation to the second, fee-fund proposed mechanism as well.[106] However, this concern can be allayed significantly, from several aspects.

First, it is to be expected that not every spouse will embark on a path of refusal, even if he is offered a carrot. It is true that there are disagreements about the definition of *get* refusers, but the fund, particularly if it is run by the rabbinical court or in cooperation with it, will operate only with respect to a person who has been ordered, in an official decision of the rabbinical court, to give a *get*. This often happens only after years of litigation. Presumably a person will not persist in his refusal simply to receive money from the fund, if theoretically it can take many years until a decision ordering him to give a *get* is issued, particularly if he knows that the sum is limited, and he might be able to extract an even larger sum from the victim in the rabbinical court.

The second aspect is the vagueness of the criteria for determining the size of the carrot. If there is no certainty with respect to the amount that the refuser will receive from the fund, he is liable to suspect that refusal will not be worth his while, since the sum might be low. Because he is entering a track from which there is no return and which has a blacklist of refusers that would damage his reputation, and a stick awaits further down the road if he does not take the carrot, calculations of profitability are likely to cause that refuser, particularly if he is risk-averse, to be incentivized to give the *get* and not to fall within the framework of the mechanism. If the administrators of the fund have sufficient information, the amount of the carrot can be adapted to the situation in order to achieve optimal deterrence and provide the greatest chance that the refuser will indeed take the money from the fund. This means that if the administrators of the fund knew that the refuser, who is poor and has many debts, may well be satisfied with a carrot of x and that is the amount that he actually hopes to extract from his spouse, then giving him this amount or a bit more than x would make him agree, because WTA> WTP. Of course, if the refuser is rich and has no debts, the situation will be different; but still – we must remember – he wants to extract money from his spouse, so a deal may be achieved. Thus, since the carrot is tailored individually for the specific case at hand, on the one hand the payments made from the fund will not be too large and there will be no wastage of resources where the refuser could have been satisfied with less and given the *get*. On the other hand, those payments will not be so low as to render them ineffective. In the latter situation the refuser might decide to wait and to extract larger sums later on, aware that the stick is impending, if the stick is not large and he believes he can absorb and bear it in anticipation of a higher payment from the victim at a later stage. However, the information here must be one-sided, i.e., the administrator of the fund must have information about the

[106] In the first, private mechanism each spouse will eventually receive his/her share in any event.

parties, but the refuser must not know what kind of carrot awaits him, in order to prevent his manipulations in the form of continuing refusal (and with respect to a potential refuser – prevention of calculation of the profitability of beginning to refuse). Indeed, that uncertainty would sift out many potential refusers who will not wish to move over to the refusal track and to the mechanism which contains shaming, because they do not know if it will be worth their while. We must remember that even if he eventually gives the *get* the system would not allow him to turn back the clock and remove himself from the blacklist. He will therefore have much to lose and not only to gain.

Such a construction may well significantly reduce the danger that normative people will choose to refuse and to wait for the carrot in exchange for desisting from refusal. Most normative people will not want to risk their future by appearing on a permanent blacklist of refusers. This can also explain the apparent problem of payment from the fund being made only in particularly hard and problematic cases of refusal, and not in less problematic cases. A person would have to be a real money-lover if he is prepared to wait to receive a carrot in an amount that is not certain and which might be low. In all events he will be included in the blacklist which potential spouses or employers can examine at any time to check out his past.

In this way the moral problem of rewarding a wrongdoer will also be alleviated in large part. If the refuser crosses the threshold and an indelible label is attached to him and he is unable to turn back the clock, he will definitely have what to lose. Even if one believes that the moral problem is still greater here than with respect to a stick solution alone, nevertheless it must be admitted that the proposal is significantly more moral than using only a carrot, and that in any case according to the proposal, there will be a necessary transition to a stick if the carrot is not successful.

3. Concern that some refusers will not care about shaming

There may be a concern that there will be refusers who will not care about shaming, as long as they get the money. This shaming is an important part of the proposal, providing it with balance, for without it there is indeed room for concern about incentivizing mass refusal. Presumably, however, most normative people, if not all, will not want to find themselves on the blacklist, and this will incentivize them to give the *get* before they appear there. It is for refusers who are presumably not rational and therefore not too numerous that the mechanism is designed. For rational potential refusers the mechanism will exist for the purpose of deterrence only. Moreover, the estimation that most potential refusers will be deterred by shaming and will not become subject to the mechanism will ensure the economic survival of that mechanism. The fund will retain sufficient amounts to pay non-rational refusers who nevertheless become subject to the mechanism.

4. Why is shaming alone not sufficient?

One may ask why shaming alone, if it is effective, would not be sufficient, thus saving all the expenses of the two-stage vertical mechanism. Admittedly this could happen; but reality proves that shaming by itself, as only one alternative tool in the toolbox of rabbinical courts worldwide, is not enough. If shaming is not mandatory and part of a regulatory mechanism, it is not a sufficient deterrent, especially if rabbinical courts use it only rarely. Moreover, in some cases in which shaming was used as a practical remedy, refusers became tougher and persisted in their refusal. One of the presumed reasons is that spouses, usually husbands, sometimes wish to exploit the situation and extort money and assets from their spouses in the divorce process. Therefore, an incentive that involves giving them money or taking their money, i.e., a carrot or a stick, may work. A combination between the two incentives, combined with an element of shaming, may constitute a more efficient tool than using either remedy alone.

5. Concern about fraud

This concern too was raised in relation to the model of the fee-fund. In the mass fund solution, the concerns are not any less, *inter alia* because honest people will not like the idea that they are paying into a fund from which dishonest people will benefit. However, suitable responses to this concern are available here as well. First, in order to be in a situation in which it is possible to perpetuate such a

fraud, a great deal of time must sometimes pass in litigation until an order to give a *get* is issued. A normative couple will not embark lightly on such an adventure involving several years of litigation and substantial costs for the sake of only half the carrot, of whose value they are not certain. Secondly, here too, if the fake refuser has what to lose, he will not conspire with the fake victim in order to receive money and divide it. The couple will indeed obtain money, but only the fake refuser will remain tainted by the refusal by appearing on the blacklist. This is not reasonable, certainly not for a partial carrot. Thirdly, the system can tolerate a certain amount of fraud, and at most the amount of the fee will be raised by a few dollars. If good people know that the few extra dollars that they pay will help the system fight the cheats, this may help them, mentally, to invest those few extra dollars, for such a situation is certainly preferable to one in which many cheats exploit the fund. Another, fourth response is the possibility of simply imposing fines on couples, for the benefit of the state, if a fraud perpetrated by them is discovered.

6. Distributive aspects

Both suggested mechanisms may entail distributive problems. In the first, private account solution, rich refusers may not be deterred and may not stop refusing. They may prefer to continue refusing, simply because they value the revenge and enjoy making their spouses miserable, and they can afford to pay. Poor refusers cannot afford to do so. This may also be the case in relation to the second, fee-fund mechanism, but there is an element of shaming there that may make also rich refusers think again and be deterred, not only financially. Also, in a large number of cases involving the first mechanism, the money in the private account will not be a sufficient deterrent, simply because a couple who married only a few years prior to the refusal will not have a significant amount in the fund. Even after years it is not sure that the amount will be sufficient to deter and direct the behavior in the desirable direction. If so, from distributive and also deterrence aspects, the second, fee-fund mechanism might be preferable to the first one. We should also remember that the solutions are not mutually exclusive, and they can work simultaneously. And we should also bear in mind that all other recognized solutions that are in use involve different distributive problems as well. If nothing is done, the refuser often wins. If a civil action is submitted and the damages awarded are not high enough, they might not be sufficient either in order to effect a transaction exchanging the *get* for the damages. A distributional problem may therefore exist in relation to every existing and suggested solution.

7. What Can We Learn from a Specific Test Case?

Seemingly, the case study of refusal to divorce in the Jewish sector is a specific, even esoteric example, which does not necessarily teach us anything about using incentives in general, and carrots and sticks in particular. Can one extrapolate to incentives in general, and a hybrid combination of incentives in particular? The answer is positive, and moving from the particular to the general is possible from several aspects.

First, although the example is specific, it constitutes a universal problem, relevant anywhere in the world where Jews are to be found.

Second, the case study constitutes the implementation of a vertical combination between carrots and sticks. The Article therefore has a contribution to make to the legal and social sciences literature on incentives in general, and on carrots and sticks in particular. Most of the hybrid combinations found both in the literature and in practice are horizontal. Although it is suggested in the literature, as we saw in the writings of Avraham, Ayres and Goldbart, and Ben-Shahar and Bradford, a vertical combination of different incentives is still not common compared to a simultaneous, horizontal one. All the above-mentioned scholars referred to classic examples, such as nuisances, landlords and tenants, and others. Implementation of the efficient vertical combinations in family relations as well strengthens the line of thinking.

Third, an attempt is made in this Article to examine the appropriate time and manner in which to handle cases of parties with sensitive relationships, and cases of repeat players, and the appropriate use of financial as opposed to emotional elements, and to reach conclusions on the matter: when it is better to implement an incentives mechanism of sticks alone, carrots alone, or combined mechanisms, and

what is the nature of the ideal combination. The Article has addressed problems involved in the use of the carrot alone, and particularly that of countering the moral problem of awarding a prize to the sinner; it has also dealt with problems of efficiency and of costs in using the stick alone.

Fourth, a wide array of hard problems could benefit from the kinds of sequential incentive models offered in this article. Indeed, the methodology and the analysis offered in this Article may constitute a model and make their contribution to issues that arise in other branches of law, including: (a) possible dissolution of partnerships, not only in the family but also business partnerships, when it must be decided what to do with assets that cannot be divided. The solutions that have been offered here may be relevant, alongside the literature dealing with related matters, such as BMBY (Buy Me Buy You) transactions. According to this literature, there is no specific market price for the asset, or the value to the parties is higher than the market price (such as in the case of a residential apartment or a house in which the parties lived), and the efficient purchaser is one of the parties or the spouses. The solution may be a type of bilateral tender, whereby each party deposits an envelope containing the sum that he is prepared to pay to purchase the share of the other, and the winner will be the party who offered more[107]; (b) The mechanism of the private fund can be incorporated into the literature dealing with bilateral rather than unilateral guarantees, that are typical of certain transactions; (c) Cases in which a similar, bilateral monopoly, bargaining structure is in place. As authors such as Kaplow and Shavell have noted,[108] private solutions are especially difficult in situations of bilateral monopoly, making the possibility of effective government solutions especially important.

Fifth, the Article presents a unique combination of a social sanction in the form of shaming under the aegis of the law within a system (family law) in which names are usually confidential.

Sixth, the connection between law and economics on the one hand, and family matters on the other is less natural as compared to other areas of law and life in general. Indeed, connecting law and economics to family matters is considered less natural than connecting law and economics to branches of law such as contract law, tort law, property law, corporate law and even criminal law. There is an advantage in bringing together these two fields, not only in theoretical but also in practical fashion. Doing so contributes both to the literature on family law and law and economics, and also to the rich literature on incentives in general, and their combination, which is usually horizontal.

CONCLUSION

In this article, an attempt has been made to design creative viable legal solutions in order to ameliorate the pressing problem of women refused a *get* – the *agunah*. This was a test case for dealing with the question what is the best means by which to stop a person from harming another, from the perspective of negative externality: is it the stick, the carrot or possibly a combined multi-staged mechanism? The test case was the search for efficient solutions to the problem of extracting money from a spouse in exchange for divorce and through abuse of the power held by the refuser. The advantages and drawbacks characteristic of both incentives were discussed, and the intermediate conclusion was that the best solution is to expand the toolbox, and not to choose one solution alone.

In discussing the question of when the incentives are efficient and when they are not, Gneezy, Meier and Rey-Biel convey the following message:

> . . . [W]hen economists discuss incentives, they should broaden their focus. A considerable and growing body of evidence suggests that the effects of incentives depend on how they are designed, the form in which they are given (especially monetary or nonmonetary), how they interact with intrinsic motivations . . . Incentives do matter, but in various and sometimes unexpected ways.[109]

In such an attempt to design creative and vovel legal solutions in order to ameliorate the problem of refusal to grant a *get*, a combined solution has been presented here in the spirit of the theories of

[107] See, e.g., Thomas Rice & Aaron M. Kaufman, *Buy-Sell Agreement Is an Executory Contract*, 31-10 ABIJ 8 (2012).

[108] Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713 (1996).

[109] Gneezy et al, *supra* note 7, at 192.

law and economics, namely a combination of carrot and stick with an element of shaming in a manner that is intended to eliminate as many of the existing drawbacks of the two means as possible and to fully exploit the advantages. For all rational potential refusers, the mechanism of carrot-becoming-a-stick would serve merely as a deterrent, and would induce them to negotiate, before the activation of that mechanism, from a more equal standpoint.

In fact, the proposal claims that while it is morally problematic to reward wrongdoing, this solution might incentivize divorce more efficiently. It may also distribute the loss more equitably and would transfer the burden of handling the problem from the victim to the state. After describing the rewards-based solutions currently applied under existing law, the study considered two combinations of punishment-based and reward-based strategies. These options were derived from cutting-edge contributions to economic analysis of law – modular liability rules, dual-chooser rules and reversible rewards. The article aimed to identify and produce the optimal combined regime of sticks and carrots to solve, or at least significantly ameliorate the intractable *agunah* problem. While the bare outlines of some of the procedures of the proposed vertical mechanism have been sketched by others, the details and application to family law are all new to the proposal.

The preliminary feasibility model that has been presented does not presume to take into account all the variables. However, one can conclude and say that from preliminary assessments, it appears that the mechanism will do its job and will constitute a deterrent, if not immediately then at least after several years of activation. The deterrence will act on rational refusers, and will cause them not to refuse from the outset, or to refuse for only a short time and to reach an arrangement at the pre-mechanism stage. This could be really good news for victims of *get* refusal and for society in general.

The combination of carrot, shaming under the auspices of the law and stick would seem capable of contributing to a satisfactory response to the problem of refusal to divorce. Even if it will not be possible to implement all the details of the proposal and each and every state, there is value in implementation of parts of it as an addition to the toolbox available for the purpose of combatting refusal to divorce. Thus it will be possible, for example, to decide that the victim will receive payment from a particular fund for the purpose of covering the costs of legal representation and her other expenses – in other words, a one-sided carrot. This will not always be effective, because it must be assumed that the refuser will be more incentivized to give the divorce bill if the money was offered to him but rejected and it was then transferred to the victim, than if the victim received benefits already at the outset. Similarly, in various places the world over, free legal services are in any case offered to victims of *get* refusal by human rights or women organizations. Also, the remedy of shaming under the auspices of the law could be implemented as a matter of routine, even without using a carrot, to deter potential refusers.

Balanced structuring of this unique model with several stages, even if it cannot in itself solve the problem of refusal to divorce, could enrich that toolbox and help confronting the difficulties involved in the use of carrots alone, and primarily the moral problem of rewarding the sinner; it would also help with various problems of efficiency and costs engendered by the use of sticks alone.

The Article attempted to make a significant contribution to the literature on carrots and sticks, especially in presenting a vertical combination between the means. A dialogue has been created with theories of law and economics in arenas in which they are not applied frequently: that of the disintegrating family unit and law and religion.

The idea presented in this Article of a “vertical game” of different external incentives in a few rounds may also have a practical impact beyond the case of refusal to divorce and family law.

In addition, this idea be developed further in the future. Thus, for example, if the victim ought not to have to confront the refuser directly in a private (tort or contractual) process, even at the second stage of the carrot that becomes a stick, with all the financial and emotional costs that are involved, an attempt can be made to create additional variations on the mechanism. For example, if the refuser chooses not to accept the carrot – the money from the fund – and the stage arrives at which the stick of a civil action is used against him, the victim could be given the option of selling the civil action to the fund (a type of champerty); it would then be the fund that conducts the action against the refuser.

If the refuser ultimately gives the *get*, the victim will return the money that she was paid for the sale with the addition of a certain handling fee. The advantages are clear – the fund will be a repeat, professional player, and its staff will not suffer personally in conducting the suit as would the victim. For this purpose, it will be necessary to overcome the problem whereby in many states it is not possible to transfer a tort claim, or else to try to assume some form or other of an insurance mechanism which allows for such a sale, as in the various insurance laws that exist in different states, or simply to concentrate on a contractual suit if that is possible. Furthermore, further research could deal with the question of whether there is room for real insurance in such matters – insurance which would need to circumvent problems such as non-applicability due to a deliberate act.

The Article has a global contribution to make from several aspects, and it is possible to extrapolate from the particular test case it discusses to the general. The Article contributes to the legal and social sciences literature on incentives in general, and carrots and sticks in particular. It also presents a unique combination of a social sanction in the form of shaming under the aegis of the law within a legal system. It might constitute a model for the possible dissolution of partnerships, not only in the family, but also in the dissolution of business partnerships when it must be decided what to do with an asset that cannot be divided. It may also contribute to the literature on the bilateral monopoly. The article also strengthens the connection between law and economics on the one hand, and family matters on the other. Above all, however, the Article is an attempt to increase the bargaining power of oppressed women, victims of refusal to divorce.

Appendix

Year	Number of couples marrying according to Jewish law	Total fee in USD	Total in USD	Cumulative amount in fund (before payment) in USD	Number of couples divorcing	1st Scenario: Absolute number of get refusers	2nd Scenario: Absolute number of get refusers	1st Scenario: Rate of refusal	2nd Scenario: Rate of refusal	Rationality coefficient
2015	37,424	80	2,993,958	2,993,958	11,114	44	200	0.39%	1.80%	80%
2016	37,956	80	3,036,513	6,030,472	11,409	43	199	0.38%	1.75%	80%
2017	38,496	80	3,079,673	9,110,145	11,712	43	198	0.37%	1.69%	80%
2018	39,043	80	3,123,446	12,233,591	12,023	43	197	0.36%	1.64%	80%
2019	39,598	80	3,167,842	15,401,433	12,343	43	197	0.35%	1.59%	80%
2020	40,161	80	3,212,868	18,614,301	12,671	43	196	0.34%	1.55%	80%
2021	40,732	80	3,258,534	21,872,835	13,007	42	195	0.33%	1.50%	80%
2022	41,311	80	3,304,850	25,177,685	13,353	42	194	0.32%	1.45%	80%
2023	41,898	80	3,351,824	28,529,509	13,707	42	193	0.31%	1.41%	80%
2024	42,493	80	3,399,465	31,928,974	14,071	42	193	0.30%	1.37%	80%
2025	43,097	80	3,447,784	35,376,758	14,445	42	192	0.29%	1.33%	80%
2026	43,710	80	3,496,789	38,873,547	14,829	42	191	0.28%	1.29%	80%
2027	44,331	80	3,546,491	42,420,038	15,223	41	190	0.27%	1.25%	80%
2028	44,961	80	3,596,899	46,016,937	15,627	41	189	0.26%	1.21%	80%
2029	45,600	80	3,648,024	49,664,961	16,042	41	188	0.26%	1.17%	80%
2030	46,248	80	3,699,876	53,364,837	16,468	41	188	0.25%	1.14%	80%
2031	46,906	80	3,752,464	57,117,301	16,906	41	187	0.24%	1.11%	80%
2032	47,573	80	3,805,800	60,923,101	17,355	40	186	0.23%	1.07%	80%
2033	48,249	80	3,859,894	64,782,995	17,816	40	185	0.23%	1.04%	80%
2034	48,934	80	3,914,757	68,697,752	18,289	40	185	0.22%	1.01%	80%
2035	49,630	80	3,970,400	72,668,152	18,775	40	184	0.21%	0.98%	80%
2036	50,335	80	4,026,833	76,694,985	19,274	40	183	0.21%	0.95%	80%
2037	51,051	80	4,084,069	80,779,054	19,786	40	182	0.20%	0.92%	80%
2038	51,776	80	4,142,118	84,921,172	20,311	39	181	0.19%	0.89%	80%
2039	52,512	80	4,200,993	89,122,165	20,851	39	181	0.19%	0.87%	80%
2040	53,259	80	4,260,704	93,382,869	21,404	39	180	0.18%	0.84%	80%
2041	54,016	80	4,321,264	97,704,133	21,973	39	179	0.18%	0.82%	80%
2042	54,784	80	4,382,684	102,086,817	22,557	39	178	0.17%	0.79%	80%
2043	55,562	80	4,444,978	106,531,795	23,156	39	178	0.17%	0.77%	80%
2044	56,352	80	4,508,157	111,039,952	23,771	38	177	0.16%	0.74%	80%
2045	57,153	80	4,572,234	115,612,186	24,02	38	176	0.16%	0.72%	80%
2046	57,965	80	4,637,222	120,249,408	25,050	38	175	0.15%	0.70%	80%
2047	58,789	80	4,703,134	124,952,542	25,716	38	175	0.15%	0.68%	80%
2048	59,625	80	4,769,982	129,722,524	26,399	38	174	0.14%	0.66%	80%
2049	60,472	80	4,837,780	134,560,304	27,100	38	173	0.14%	0.64%	80%
2050	61,332	80	4,906,543	139,466,847	27,820	37	172	0.13%	0.62%	80%

Year	1st Scenario: Number of rational refusers who therefore accept the carrot	2nd Scenario: Number of rational refusers	1st Scenario: Amount for payment to refusers in USD	2nd Scenario: Amount for payment to refusers in USD	1st Scenario: Cumulative payment in USD	2nd Scenario: Cumulative payment in USD	1st Scenario: Amount remaining in fund after payment of	2nd Scenario: Amount remaining in fund after payment of	Current expenses in USD	Repayment of setting-up loan of $1 million at 3% interest for	1st Scenario: Amount remaining in fund after payment of	2nd Scenario: Amount remaining in fund after payment of
2015	35	160	870,000	4,000,000	870,000	4,000,000	2,123,958	(1,006,042)	132,000	117,231	1,874,727	(1,255,273)
2016	35	159	866,316	3,983,062	1,736,316	7,983,062	4,294,156	(1,952,590)	132,000	117,231	4,044,925	(2,201,821)
2017	35	159	862,648	3,966,196	2,598,964	11,949,258	6,511,181	(2,839,113)	132,000	117,231	6,261,950	(3,088,344)
2018	34	158	858,995	3,949,401	3,457,958	15,898,659	8,775,633	(3,665,067)	132,000	117,231	8,526,402	(3,914,298)
2019	34	157	855,357	3,932,677	4,313,316	19,831,336	11,088,117	(4,429,903)	132,000	117,231	10,838,886	(4,679,134)
2020	34	157	851,735	3,916,024	5,165,051	23,747,360	13,449,250	(5,133,059)	132,000	117,231	13,200,019	(5,382,290)
2021	34	156	848,129	3,899,442	6,013,179	27,646,802	15,859,656	(5,773,967)	132,000	117,231	15,610,425	(6,023,198)
2022	34	155	844,537	3,882,930	6,857,717	31,529,732	18,319,969	(6,352,047)	132,000	117,231	18,070,738	(6,601,278)
2023	34	155	840,961	3,866,488	7,698,678	35,396,219	20,830,831	(6,866,710)	132,000	117,231	20,581,600	(7,115,941)
2024	33	154	837,400	3,850,115	8,536,078	39,246,334	23,392,896	(7,317,360)	132,000	117,231	23,143,665	(7,566,591)
2025	33	153	833,854	3,833,812	9,369,932	43,080,146	26,006,826	(7,703,388)	132,000	-	25,874,826	(7,835,388)
2026	33	153	830,323	3,817,577	10,200,255	46,897,723	28,673,292	(8,024,177)	132,000	-	28,541,292	(8,156,177)
2027	33	152	826,807	3,801,412	11,027,062	50,699,135	31,392,976	(8,279,098)	132,000	-	31,260,976	(8,411,098)
2028	33	151	823,306	3,785,315	11,850,368	54,484,450	34,166,569	(8,467,513)	132,000	-	34,034,569	(8,599,513)
2029	33	151	819,820	3,769,286	12,670,188	58,253,736	36,994,773	(8,588,775)	132,000	-	36,862,773	(8,720,775)
2030	33	150	816,348	3,753,325	13,486,536	62,007,061	39,878,301	(8,642,224)	132,000	-	39,746,301	(8,774,224)
2031	33	149	812,891	3,737,431	14,299,427	65,744,492	42,817,874	(8,627,192)	132,000	-	42,685,874	(8,759,192)
2032	32	149	809,449	3,721,605	15,108,876	69,466,098	45,814,224	(8,542,997)	132,000	-	45,682,224	(8,674,997)
2033	32	148	806,022	3,705,846	15,914,898	73,171,944	48,868,097	(8,388,949)	132,000	-	48,736,097	(8,520,949)
2034	32	148	802,608	3,690,154	16,717,506	76,862,098	51,980,246	(8,164,346)	132,000	-	51,848,246	(8,296,346)
2035	32	147	799,210	3,674,528	17,516,716	80,536,625	55,151,436	(7,868,474)	132,000	-	55,019,436	(8,000,474)
2036	32	146	795,826	3,658,968	18,312,542	84,195,594	58,382,443	(7,500,609)	132,000	-	58,250,443	(7,632,609)
2037	32	146	792,456	3,643,474	19,104,997	87,839,068	61,674,057	(7,060,014)	132,000	-	61,542,057	(7,192,014)
2038	32	145	789,100	3,628,046	19,894,097	91,467,114	65,027,075	(6,545,941)	132,000	-	64,895,075	(6,677,941)
2039	31	145	785,759	3,612,683	20,679,856	95,079,797	68,442,309	(5,957,632)	132,000	-	68,310,309	(6,089,632)
2040	31	144	782,431	3,597,385	21,462,287	98,677,182	71,920,582	(5,294,313)	132,000	-	71,788,582	(5,426,313)
2041	31	143	779,118	3,582,152	22,241,405	102,259,334	75,462,728	(4,555,201)	132,000	-	75,330,728	(4,687,201)
2042	31	143	775,819	3,566,983	23,017,224	105,826,317	79,069,593	(3,739,500)	132,000	-	78,937,593	(3,871,500)
2043	31	142	772,534	3,551,879	23,789,758	109,378,196	82,742,037	(2,846,401)	132,000	-	82,610,037	(2,978,401)
2044	31	141	769,262	3,536,839	24,559,020	112,915,035	86,480,932	(1,875,083)	132,000	-	86,348,932	(2,007,083)
2045	31	141	766,005	3,521,862	25,325,025	116,436,897	90,287,161	(824,710)	132,000	-	90,155,161	(956,710)
2046	31	140	762,761	3,506,949	26,087,786	119,943,845	94,161,622	305,563	132,000	-	94,029,622	173,563
2047	30	140	759,531	3,492,098	26,847,318	123,435,944	98,105,224	1,516,598	132,000	-	97,973,224	1,384,598
2048	30	139	756,315	3,477,311	27,603,633	126,913,255	102,118,891	2,809,269	132,000	-	101,986,891	2,677,269
2049	30	139	753,113	3,462,587	28,356,746	130,375,842	106,203,559	4,184,463	132,000	-	106,071,559	4,052,463
2050	30	138	749,924	3,447,924	29,106,669	133,823,766	110,360,178	5,643,081	132,000	-	110,228,178	5,511,081