POST-JUDGMENT BARGAINING WITH A CONVERSATION WITH THE HONORABLE PROFESSOR GUIDO CALABRESI*

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INTRODUCTION

A common view holds that, according to prominent scholars of law and economics, such as Ronald Coase or Guido Calabresi and A. Douglas Melamed, "judgments that misallocate resources leave unrealized value on the bargaining table" and that this value should be taken up and redistributed in the course of post-judgment bargaining ("PJB").[1] Ward Farnsworth, however, presented an approach according to which acrimony, bitterness, and a resistance to treating entitlements as transferrable commodities can make bargaining between parties difficult, rare, or impossible.[2] Farnsworth argued that economists, who tend to focus on strategic

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1. Kyron Huigens, *Law, Economics, and the Skeleton of Value Fallacy*, 89 CALIF. L. REV. 537, 555 (2001) (reviewing BEHAVIORAL LAW AND ECONOMICS (Cass R. Sunstein ed., 2000)) ("If, due to high transaction costs or other market failures, this bargaining cannot be expected to take place, then it is incumbent on courts to recognize the economically rational outcome and to effect it in the judgment.").

2. Ward Farnsworth, *Do Parties to Nuisance Cases Bargain After Judgment? A Glimpse Inside the Cathedral*, 66 U. CHI. L. REV. 373, 421 (1999), *reprinted in* BEHAVIORAL LAW & ECONOMICS 302 (Cass R. Sunstein ed., 2000).

bargaining behavior, often overlook acrimony as a basis for reluctance to bargain even when it is considered economically efficient.[3] According to him, the models adopted by the economists have given rise to potentially misleading notions about PJB behavior,[4] leading us to believe that parties to a lawsuit can, at least in principle, continue bargaining after the court renders judgment.[5] The results of Farnsworth's research show that none of the parties engaged in the twenty cases of nuisance he researched bargained after entitlements protected by property rules were awarded.[6] Most of the time, the parties did not even try to trade the entitlement protected by a property rule for the one protected by a liability rule (damages).[7]

Farnsworth surveyed nuisance disputants after the initial decision and found almost without exception that the parties and their attorneys failed to even consider the possibility of bargaining in the shadow of the law because the individuals were frequently bitter toward each other, and no bargain ever came to fruition.[8] Thus, Farnsworth's findings indicate that parties sometimes do not bargain around court rulings, trying to sell the entitlement protected by a property rule, because the litigation process generates enmity and animosity between the litigants.[9] Some scholars have argued that the courts do a good job allocating the entitlement and make the correct and efficient choice at the outset, and therefore there is no need for the parties to bargain after a

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3. *Id.*

4. *Id.* at 391.

5. *Id.* at 373–74 ("If bargaining is not too costly, the rights at stake in a case inevitably will end up in the hands of the party willing to pay the most for them. The literature explores how the law might facilitate such bargaining or, where transaction costs are prohibitive, mimic the results of a bargaining process."). Farnsworth also refers to some prominent studies in this regard. *See* Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1099–100 (1995); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1094–97 (1972); Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 19, 27–28 (1960); Keith N. Hylton, *A Missing Markets Theory of Tort Law*, 90 NW. U. L. REV. 977, 993–1006 (1996); Louis Kaplow & Steven Shavell, *Property Rules Versus Liability Rules: An Economic Analysis*, 109 HARV. L. REV. 713, 754–55 (1996); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 445–47, 466–75 (1995); Saul Levmore, *Unifying Remedies: Property Rules, Liability Rules, and Startling Rules*, 106 YALE L.J. 2149, 2166–67 (1997).

6. Farnsworth, *supra* note 2, at 382, 384.

7. *Id.* at 384. For the fundamental differentiation between property and liability rules, see Calabresi & Melamed, *supra* note 5, at 1092.

8. Farnsworth, *supra* note 2, at 382–84.

9. *Id.* at 413.

judgment is given.[10] In contrast, Farnsworth reported that the lawyers for the parties, who were interviewed in the course of the research, did not think that there would have been bargaining even if the judgment had gone in the opposite direction.[11]

This Article presents a case with a different outcome: a civil suit for compensation for refusal to divorce (that is, the refusal of a husband to grant a *get*—the Jewish divorce bill to his wife). The parties—spouses in conflict—feel extreme animosity toward one another because the husband unilaterally refuses to divorce his wife and religious family law has no remedy for the woman. The woman sues her husband in civil court hoping to use the compensation that she is awarded, after the court allocates the rights, in her negotiation with her husband for a deal in which she renounces the compensation if he agrees to divorce her. Here, PJB works in practice, contrary to the cases studied by Farnsworth, as shown by a recent empirical study.[12]

In the case of refusal to divorce, a civil judgment that awards damages serves as an incentive for the parties to bargain after the judgment is given. This is the case even if the court did an excellent job, and perhaps *because* it did such a good job in allocating the entitlement. It appears that damages awarded in secular court by civil law[13] do give the wife bargaining power to circumvent religious family law and achieve a change in marital status. This is clearly a case of successful bargaining after a final disposition by the court, between parties that show perhaps as great an animosity toward each other as can be imagined: separated spouses in a broken marriage, where the husband refuses to release his wife from the marriage and disables her from moving on with her life.

The present Article does not seek to disprove Farnsworth's findings on the absence of bargaining after judgment in cases of animosity between parties to a nuisance, nor does it support the classic economists' thesis of the inducement for PJB between parties to a nuisance. This Article describes a different reality from the one presented by Farnsworth in which successful PJB takes place between hostile parties, although not in nuisance cases. From the normative point of view, the Article offers possible explanations for the discrepancy between the findings in Farnsworth's study and the

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10. *Id.* at 417 (presenting some of the opinions on and raising doubts about whether judges simply award entitlements to those who would pay most for them).

11. *Id.* at 384.

12. Amihai Radzyner, *Arranging* Gets *After Tort Actions and the Policy of Publication of Rabbinical Court Judgments*, 35 HEBREW U. JERUSALEM L. REV. 5 (2015) (Isr.); *see infra* Part III.

13. The term "civil law" is used here to describe tort and contract law, as opposed to public law, family law, and criminal law. The reference is not to European civil law as opposed to common law.

reality of successful PJB in some family disputes, trying to determine, by inductive reasoning, in which cases PJB between hostile parties can be expected and in which cases it cannot.

Thus, the Article assumes that the fundamental economic literature of Coase and of Calabresi and Melamed is inclusive and does not provide parameters for determining when it is efficient to negotiate in a situation of animosity after the allocation of rights and when it is not. Even if Farnsworth's critique is methodologically sound, which some scholars have questioned,[14] it is too inclusive and does not distinguish between different types of hostile parties, some of which are expected to negotiate after the allocation of rights and some of which are not. Farnsworth's aim was not to present clear parameters that would indicate when PJB is likely to take place, because his article is a plea for particularism. He only argued that sometimes animosity can confound the results that economic theory might predict and that it should be taken into account.[15] The counterexample of a civil claim for refusal to divorce enables us to describe both (1) the general difficulties of the classic economic approaches of Coase or of Calabresi and Melamed and (2) the possibility of the generality that can be mistakenly assumed from Farnsworth's critique of these classic economic approaches. Going one step further, the discussion enables us to formulate parameters for determining when negotiations can be expected after a judgment that allocates rights, based on an understanding that both approaches are valid but must be qualified and examined in order to establish which type of case each one is better suited for. Thus, it seems that the approach presented in the current Article complements both the classic economic theories and Farnsworth's findings.

The possibility of PJB might also affect the strategy followed by the parties and their lawyers, as well as the judges' decisions whether to try to advise the parties to reach some compromise under the auspices of the court or some agreement outside the court, as in alternative dispute resolution ("ADR") proceedings, if they perceive that there is a chance for negotiation.

Taking a broader view, I maintain—arguing from an economic or behaviorist perspective—that in certain types of cases it is always efficient to take one course of action and not another, or vice versa, is a generalization that should be avoided. A cautious approach suggests that in many cases more than one course of action may be pursued, and it is necessary to examine in each case which course of action is expected to produce the best outcome. One should also understand that PJB is not always desirable for the parties. Indeed,

14. *See infra* Subpart I.B.
15. Farnsworth, *supra* note 2, at 391.

although from an objective point of view it seems rational and efficient to negotiate, for some parties not negotiating sometimes appears extremely rational.

This Article proceeds as follows: Part I explores the problematic character of bargaining after judgment, primarily according to Farnsworth in nuisance cases. Part II addresses bargaining in the family arena. I explore the case of successful bargaining after judgment to overcome the refusal to grant a Jewish divorce. I explain that the damages awarded in the civil action may be used as leverage and as a basis for a possible transaction between the bitterly hostile spouses. The wife-plaintiff agrees to renounce the damages in exchange for the husband-defendant renouncing his financial demands (entirely or in part) and granting the Jewish divorce. Part III examines when PJB can be expected and when it cannot. The examination is conducted by presenting a list of parameters that provide reasons for the differences between Farnsworth's findings in the nuisance case study and the cases of *get* refusal. The inductive conclusion to be presented in Part IV is that some of this reasoning does explain the differences, making it possible to predict the cases in which bargaining between hostile parties can be anticipated, in the spirit of the classic economists, and those in which bargaining is less likely, in the spirit of Farnsworth's findings.

The Article ends with a conversation with the Honorable Professor Guido Calabresi, who discusses the possible implications of the Calabresi and Melamed framework that Farnsworth criticizes. Calabresi talks about PJB in cases of nuisance and *get* refusal, explaining why we can understand and accept both what Farnsworth and the present Article conclude.

I. THE PROBLEMATIC NATURE OF POST-JUDGMENT BARGAINING BETWEEN HOSTILE PARTIES: FARNSWORTH'S STUDY AND ITS CRITICS

A. Farnsworth's Study

In his research, which provides some nonexperimental empirical support for the endowment effect argument,[16] Farnsworth maintains that economists often presume that parties that do not

16. *See, e.g.*, Jeremy A. Blumenthal, *"To Be Human": A Psychological Perspective on Property Law*, 83 TUL. L. REV. 609, 630 (2009) ("Substantial research on the endowment effect, for instance, shows that people value what they have more than what they do not, and thus are less willing to part with a possession than rational bargaining might predict."); Owen D. Jones & Sarah F. Brosnan, *Law, Biology, and Property: A New Theory of the Endowment Effect*, 49 WM. & MARY L. REV. 1935, 1939 (2008) (defining the endowment effect as "a psychological phenomenon that appears to underlie some seemingly irrational pricing of property and to thereby impede efficient exchange").

get what they are seeking in a judgment want to bargain subsequently, based on the assumption that bargaining is efficient and therefore possible.[17] Economists also presume that nuisance cases provide a good example of this because they are excellent fact patterns representing situations in which the courts must choose between entitlements.[18] Farnsworth argues that, for the most part, the economic literature has been based on speculation about how parties are expected to behave after a judgment is given and that "the literature never discusses actual cases and what happened when they were over."[19] He points out that economists often focus their efforts on studying the effects of strategic behavior with regard to bargaining, neglecting to take into account bitterness and resistance to considering entitlements as transferable commodities.[20]

Farnsworth studied empirically actual nuisance cases and their aftermaths and described what actually happened in practice.[21] He sought out cases that appeared to have low impediments to bargaining and in which property was clearly delegated to one side.[22] Farnsworth explained that he

> used cases that ended with the award of a property right to one side or the other, because those are the cases Coase and others most often have discussed; because those are also the cases most often said to present a likely occasion for bargaining after judgment; and because property rights are the most common remedies in nuisance cases.[23]

Much of the information was garnered from Westlaw and Lexis (all cases had been appealed) and from speaking with the lawyers who worked on the cases.[24] Farnsworth's results show a sizeable difference between the classic economists' theory and practice: in the twenty cases he researched, none of the parties made trades after the judgments were handed down.[25] Most of the time, no attempt to negotiate was even made.[26] The lawyers he interviewed said that the cases tended to preclude bargaining because the individuals were frequently bitter toward each other and that many of them did not feel that a dollar value could be attributed to the rights one

17. Farnsworth, *supra* note 2, at 375–76, 384.
18. *Id.* at 374, 376.
19. *Id.* at 379.
20. *Id.* at 391, 421.
21. *Id.* at 381.
22. *Id.*
23. *Id.* at 381–82.
24. *See id.* at 381–83.
25. *Id.* at 384.
26. *Id.*

party or the other felt had been violated.[27] Even if people would have been willing to accept money in exchange for a violated right, neither party offered a price, so no bargain ever came to fruition.[28] Thus, Farnsworth found that in none of the cases he analyzed did the parties engage in post-judgment entitlement trades nor did their lawyers believe that negotiations would have occurred if the cases had been decided differently.[29]

Farnsworth explains that because of the reluctance to bargain, caused either by animosity or by a refusal to put a price tag on rights, these cases show that an astronomical price would be required to shake parties out of their bitter stupor and make them interested in purchasing or selling.[30] This has the odd effect of "driving up the price the winner would be willing to accept and driving down the price the loser would be willing to offer," making bargaining less likely.[31] Farnsworth explains further that the parties produce an endowment effect, which is also an important barrier to PJB in real-life lawsuits, when individuals avoid placing a cash value on the rights at stake.[32]

According to Farnsworth, it appears that acrimony is crucial in reducing bargaining and deterring negotiations because there simply is no market that reduces the need for personal interaction, enabling people to mend social feelings more quickly.[33] Instead, they are often drawn away from social settings, with the litigating moves carried out behind the scenes.[34] Well-established markets might have helped in some of these situations. By creating norms that signal interactions as being ordinary and eliminating bargaining around many of the complicated social elements that would otherwise be involved, markets allow the parties to reach a bargain without (or with less) animosity.[35] Nevertheless,

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27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* at 393.
31. *Id.*
32. *Id.* at 394, 413 ("[The endowment effect] refers to the increased value a person may assign to a good just because they own it—because, in other words, it has become part of their "endowment"—though the phenomenon also has been shown to be correlated with certain other attributes that goods may have, such as uniqueness. In any event, I believe that the parties' valuations in these cases exhibit a similar pattern, but for reasons that are more complicated and that are rooted more deeply in the details of the contexts in which the parties' disputes arose than the fact that one of them owns the rights and the other does not. Specific features of the parties' relationships to each other, and of their relationships to the rights at stake in their disputes, made bargaining unappealing." (footnotes omitted)).
33. *Id.* at 396, 398, 403; *see also infra* Subpart III.B.
34. Farnsworth, *supra* note 2, at 396.
35. *Id.* at 404.

Farnsworth argues that this observation is tautological: the impediment is social norms, and all a market does is change these norms.[36] Competitive markets are an excellent way of reducing impediments to bargaining, but Farnsworth believed that in the cases he examined the impediment to bargaining is that the parties do not *want* to bargain, and markets can help remove impediments only when people *do want* to bargain.[37] It cannot even be argued that such behavior is irrational; it may be quite rational from a social perspective, even if it is not so economically.[38]

According to the lawyers interviewed in Farnsworth's research, their clients considered bargaining to be a "bribe."[39] Farnsworth explains that many people react negatively to bribing, for example, in the case of the hypothetical idea of paying spectators in a movie theatre to remain quiet, because people do not like paying for things they feel entitled to (which may reverse the entitlement).[40] He explains that paying the loud moviegoers might make them feel that they are entitled to make noise and were giving up that right in return for a fee, whereas a quiet moviegoer might feel entitled to be in an environment free from excess noise.[41] Therefore, the parties that were awarded a right are disinclined to give it up, and the parties that have lost are equally disinclined to "bribe" the other parties and purchase the right they believed they should have won.[42]

Farnsworth concludes that the nature of the adversarial system has a social effect that may breed bitterness, and that when litigants frame a suit as a question of whose rights are being violated, people are less likely to be willing to bargain, at least based on what transpires from these cases.[43] He concludes that, despite what Coase or Calabresi and Melamed may suggest, at least in some of these cases the parties should bargain around the court's ruling in order to allocate the relevant entitlement most efficiently—feuding hostile parties act in a non-Coaseian way and do not negotiate after the judgment.[44] This contradicts the expectation that, in a Coaseian world of purely rational economic parties, injunctive rights would be transferred and sold with some regularity.[45] Instead, because of resistance to commodification of the rights they consider to be at stake, parties would not sell their rights after judgment unless paid

36. *Id.* at 405.
37. *Id.*
38. *Id.* at 410.
39. *Id.* at 400.
40. *Id.* at 400–01.
41. *Id.* at 401.
42. *Id.* at 400–02.
43. *Id.* at 413.
44. *Id.* at 414.
45. *Id.* at 373–74.

an astronomical amount, referred to as an acrimony or commensurability premium.[46] Thus, parties that received nuisance abatement injunctions did not use them to leverage a larger settlement, or any settlement at all, with the other parties and failed to trade the injunction in exchange for a high payment.[47]

Generalizing his conclusions, Farnsworth argues that, however modest the sample and methodology used in his study may be, he hopes that the examples he brought "will encourage a measure of caution on the part of economic modelers who generalize about the consequences of using property rights and liability rules as remedies."[48]

Farnsworth admits that his sample was too small and the methodology too informal to support sweeping generalizations about how courts should resolve nuisance disputes.[49] Nevertheless, he does argue that, despite limitations and objections to his study[50]:

> [T]he consistency of the results in these cases is striking, and seems sufficient to support a more modest conclusion: stylized economic descriptions of nuisance litigation and its aftermath have omitted consequential dimensions of human attitudes and behavior. The omissions are important because they have caused the models to generate potentially misleading predictions about behavior after judgment. So while it is not possible to say that parties never bargain after judgment in nuisance lawsuits, it is possible to say that there are serious and potentially fatal obstacles to bargaining after judgment—obstacles that deserve consideration in the literature of remedies, and that courts interested in efficiency ignore at their peril.[51]

He concludes by warning not to implement the solution of the classic economics literature in such cases of nuisance because the outcome may be problematic.[52]

B. Is Farnsworth's Criticism of the Classic Economic Approach Justified?

Several criticisms have been voiced against Farnsworth's research and its results. As expected, most were from law and economics scholars. Some were not convinced by Farnsworth's

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46. *Id.* at 392 (explaining the difference between acrimony and commensurability premiums).

47. *Id.* at 381–84, 421.

48. *Id.* at 423.

49. *Id.* at 391.

50. *Id.* at 414–20 (grappling with some possible arguments about the limitations of his research and answering some potential objections to it).

51. *Id.* at 391.

52. *Id.* at 421.

handling of the limitations of the study;[53] others supported the study, if only partially;[54] and yet others mentioned cases of PJB that eventually broke down.[55]

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53. *See, e.g.*, Ian Ayres & Kristin Madison, *Threatening Inefficient Performance of Injunctions and Contracts*, 148 U. PA. L. REV. 45, 52 n.19 (1999) ("If the Farnsworth result were generally true, then one might reasonably doubt whether plaintiffs ever seek injunctions in order to extract supercompensatory payments from the defendant. Besides the aforementioned counterexamples . . . there are strong reasons to question whether one can make a generalization from these twenty observations. Farnsworth only examines appellate decisions. As he acknowledges, the litigants that fail to settle by this point in the litigation might be strongly predisposed toward acrimony and distaste for bargaining. And even to the extent that one can generalize the result, our proposed reforms, by more explicitly stating when an injunction is alienable, may encourage negotiations among litigants who may have otherwise failed to consider negotiation." (citation omitted)); Huigens, *supra* note 1, at 555–56 ("[Farnsworth] is another member of the younger generation of legal economists who sees the implications of the Coase Theorem's demise, but does not see them clearly. . . . Farnsworth's essay relies on a small, unscientific sampling of actual nuisance cases to argue that post-judgment bargaining is unlikely ever to take place.").

54. *See* ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN 29–32 (Bruce Patton ed., 2d ed. 1991) (presenting a common sense intuition described in mediation literature that anger interferes with bargaining even at a cost to oneself); Blumenthal, *supra* note 16, at 621 ("Moreover, when asked whether alternative ways existed to resolve the controversy, fewer than ten percent of subjects thought of any 'bargaining' or 'negotiation' of the sort that the Coase Theorem would predict."); *id.* at 621 n.69 ("These results are reminiscent of Farnsworth's findings with real-life nuisance cases [and contrary to Coase Theorem predictions]."); *id.* at 630–31 (referring to a few similar but not identical studies on bargaining in general and the influence of emotions on bargaining, negotiation, and litigation decisions, in the property context in particular); Rachel D. Godsil, *Viewing the Cathedral from Behind the Color Line: Property Rules, Liability Rules, and Environmental Racism*, 53 EMORY L.J. 1807, 1821 (2004) ("While this study has obvious methodological limitations, on its own and particularly when paired with other recent work in cognitive science, it compels a rethinking of Coasean assumptions about appropriate remedies in nuisance cases."); Peter H. Huang, *Reasons Within Passions: Emotions and Intentions in Property Rights Bargaining*, 79 OR. L. REV. 435, 470 (2000) ("One can see how emotions that are independent of strategic beliefs change the standard analysis [of the economists] in a straightforward way."); Byron Kahr, *The Right to Exclude Meets the Right to Ride: Private Property, Public Recreation, and the Rise of Off-Road Vehicles*, 28 STAN. ENVTL. L.J. 51, 93 n.129 (2009) (referring to Farnsworth's study after arguing that "there are problems with assuming people will behave in an economically rational fashion, especially where the cost of accurate information about legal entitlements is high" and emphasizing that Farnsworth suggested that in property disputes "adverse parties do not behave in an economically rational fashion"); Rebecca Taibleson, *Negative Reciprocity and Law*, 35 LAW & PSYCHOL. REV. 1, 13 (2011) (presenting similar observations regarding an efficient breach in contract law as Fisher & Ury *supra*); *see also* Eric A. Posner, *Law and the Emotions*, 89 GEO. L.J. 1977, 2006–10 (2001) (agreeing in principle with the outcomes of Farnsworth's research and

The aim of the present Article is neither to support Farnsworth's thesis nor to refute it, but merely to examine a nonnuisance case in which the results seem to be different in order to try and show when PJB is anticipated and when it is not. In the case cited here of refusal to divorce, PJB is induced and conducted in practice, consistent with the economic schemes described by Coase and by Calabresi and Melamed. These analytical economic theories adopted too general an approach, arguing that parties will always negotiate after the rights have been allocated by the court if it is efficient to do so and if transaction costs are low.[56] This approach is too inclusive and it does not specify the factors that may be used to characterize the cases in which hostile parties are expected to bargain and the cases when they are not. Farnsworth's critique may be correct, but it is problematic to generalize it because Farnsworth's aim was merely to study nuisance cases, and his study does not examine various parameters in cases of animosity. His article appears to be a plea for particularism, and he did not intend to present such parameters, although he did offer at least some generalizations. His criticism of the classic economic approaches must be restricted and his research complemented in order to construct a bridge between his approach and that of the classic economics. One must distinguish between cases that are consistent with the classic economic approach, and where PJB may be conducted despite the animosity, from those where animosity prevents PJB after the allocation of rights by the court.

Thus, the case of refusal to divorce does not prove that the classic economic approach is right and Farnsworth's is wrong; it merely illustrates that reality is more complex than portrayed by both approaches. Thus, there is no attempt here to state that a certain outcome is likely in each nuisance case and a different one in each refusal to divorce case, nor is there an intention to support or

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suggesting that when a defendant's behavior provokes enmity between himself and a plaintiff courts would not award the plaintiff a property right as a remedy, because emotion is unlikely to interfere with bargaining, and instead suggesting that monetary damages are a superior remedy when hard feelings are present); *id.* at 2007 n.79 ("[I]t is, after all, common knowledge that parties to lawsuits settle more often than they litigate, and it would be surprising that whatever factors interfere with bargaining would increase sharply at the time of judgment."). *But see* Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 212, 256–60 (2002) (arguing that usually courts should embrace the approach of ignoring enmity, and award property rights even if enmity will foreclose PJB).

55. Leslie Rosenthal, *Economic Efficiency, Nuisance, and Sewage: New Lessons from* Attorney-General v. Council of the Borough of Birmingham, *1858–95*, 36 J. LEGAL STUD. 27, 55–56 (2007) (examining the postlitigation history of an 1858 English nuisance case concerning pollution of the River Tame caused by sewage from the city of Birmingham).

56. *See* Farnsworth, *supra* note 2, at 373–74.

refute the conclusions of empirical research. Assuming that we can find instances of PJB, and not only in cases of refusal to divorce, and that we can find instances in which no such negotiation takes place, and not only in cases of nuisance, I wish to suggest parameters based on which it is possible to understand when each outcome is expected. The objective of the present Article, therefore, is to characterize each group of cases involving hostile parties in an attempt to determine when the situation is likely to lead to negotiations.

II. SUCCESSFUL POST-JUDGMENT BARGAINING BETWEEN BITTER SPOUSES: THE CASE OF REFUSAL TO DIVORCE

A. Civil Actions for Refusal to Grant a Get (the Jewish Divorce Bill): A Case Study

Anne and Ben, both thirty-one, are a Jewish couple living in a Western country. They have been married for seven years. They were married both in Jewish and civil ceremonies. Anne and Ben are not religious, but they undertook a religious marriage ceremony because it was culturally expected. Friction between the two began immediately after marriage. Four years later, Anne filed for divorce in a private rabbinical court.[57] The rabbinical judges instructed the parties to try to reach a reconciliation. Following two more years of lengthy hearings, the rabbinical court ruled that Ben must divorce Anne, but Ben refused to grant her a *get* (the Jewish divorce bill).[58] The rabbinical court has various means of coercion but does not use them except in rare cases.[59] The divorce must be granted by Ben of his free will, lest it be considered *halakhically* (that is, according to Jewish law) coerced and thus invalid.[60] As long as he refuses to grant the *get*, Anne cannot divorce and start a new life. Anne rents an apartment. At the last hearing, Ben informs the rabbinical court that if Anne renounces her right to half of their condo (which has a market value of $270,000) and adds another $50,000 in cash, he will agree to grant her the *get*. Anne does not have the amount requested and does not want to give up her half of the condo. The rabbinical judges explain to her that if she does not agree to pay

57. See *infra* notes 67–72 and accompanying text for a detailed description of the powers of a rabbinical court.

58. THE CODE OF MAIMONIDES, BOOK FOUR: THE BOOK OF WOMEN 165 (Leon Nemoy ed., Isaac Klein trans., Yale Univ. Press 1972).

59. *See* Susan Weiss, *Three Methods of Divorce (Rigid Fundamentalism, Extortion, Violence)*, 13 ERETZ ACHERET 42 (2002) (Isr.) (describing how the Israeli rabbinical court judges deal with divorce cases).

60. THE CODE OF MAIMONIDES, *supra* note 58; 18.B THE TALMUD OF BABYLONIA: GITTIN fol. 49b (Shaye J.D. Cohen et al. eds., Jacob Neusner trans., 1992).

these amounts she is likely to remain "tied down" (*agunah*) for many years. This means she cannot remarry and have children because under Jewish law it is not possible to end the marriage by a judicial decision without Ben's consent. Anne also knows that even if she succeeds in obtaining a civil divorce, in the current situation she cannot obtain a religious divorce, and therefore she will not be able to remarry in a religious ceremony.

Anne failed to obtain what she wanted, which is a change in her marital status, awarded in rabbinical court. The practice of refusing to grant a *get* is legitimate under religious family law, even if not desirable, as long as the rabbinical court has not issued an order obligating Ben to divorce Anne. The rabbinical court can issue various decrees, but it lacks the power to enforce them or to render a decision that dissolves the marriage, and the couple remains married as long as the husband does not divorce the wife of his free will. The situation seriously harms Anne's rights and infringes on her autonomy because she cannot break free from the chains of a marriage that de facto does not exist anymore. Moreover, according to Jewish *Halakha*, Anne cannot live with another man while married to her husband, even if this marriage is broken.[61] If she does, she will be considered an adulterer—a serious sin that may affect, among others, her monetary rights. If she has children with another man, they might be considered *mamzerim*—that is, illegitimate children according to *Halakha*, which means that they cannot be married *halakhically* except to other *mamzerim*.[62]

Anne decides to resort to private civil law—tort law or contract law—to try to change the incontrovertible result of religious family law, and files a civil action. She argues that Ben harms her rights and asks the court to award her damages. Anne hopes to obtain a high compensation, which she could then trade for the *get*. She believes that if a high compensation is imposed on Ben, it will not make financial sense for him to continue to refuse granting her the *get* and—after their bargaining power is equalized or almost equalized, ending the one-sided financial extortion—a deal may be reached between the contending spouses in which she renounces the

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61. 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 Law*, 46 VAND. J. TRANSNAT'L L. 823, 848–49 (2013).

62. *See* Pascale Fournier et al., *Secular Rights and Religious Wrongs? Family Law, Religion and Women in Israel*, 18 WM. & MARY J. WOMEN & L. 333, 349 (2012); Alan C. Lazerow, *Give and "Get"? Applying the Restatement of Contracts to Determine the Enforceability of "Get Settlement" Contracts*, 39 U. BALT. L. REV. 105, 106 (2009); A. Yehuda Warburg, *The Propriety of Awarding a* Nezikin *Claim by* Beit Din *on Behalf of an* Agunah, TRADITION, Fall 2012, at 55, 56, http://traditionarchive.org/news/_pdfs/0055-0071.pdf.

compensation and he renounces his financial demands (or most of them) and grants her a divorce.

In practice, despite the *halakhic* fear that in this way the *get* may be invalid because it was not given out of the husband's free will but as an outcome of monetary coercion, negotiations are conducted after the judgment for damages has been issued and transactions of this type—the *get* being traded for renouncing the damages—are completed, as recently shown in an empirical study, demonstrating a successful PJB.[63]

B. Background and Analysis

Let us consider this test case and its background. The application of religious norms by state legal systems is highly problematic in countries that have retained colonial-era practices because they apply only a portion of religious law, religious family law, which does not support fundamental human rights in the same way as liberal laws do.[64] In some countries, like Israel, these religious laws constitute the state law in matters of divorce.[65] In other countries, like the United States, they constitute nonstate law, and divorce cases are adjudicated before the private courts of the various religions, with judgments enforced at times by civil state courts.[66] The private religious courts have the authority to issue orders (e.g., that the husband should divorce his wife), but they lack the power to enforce them.[67] One important area of conflict between Western societies and religious law is that some countries—the United Kingdom, Israel, and several others—still operate under a system in which there is no full separation between church and state.[68] In the United States the situation is different.[69] Some countries can cope with this conflict partially by committing

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63. Radzyner, *supra* note 12.

64. Adam S. Hofri-Winogradow, *A Plurality of Discontent: Legal Pluralism, Religious Adjudication and the State*, 26 J.L. & RELIGION 57, 58, 62, 81–82 (2010) (describing the application of religious norms conflicting with legal order); Shmueli, *supra* note 61, at 825.

65. 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) (discussing the application of religious norms in Israel).

66. Shmueli, *supra* note 61, at 833, 864–65.

67. *See* Michael S. Berger & Deborah E. Lipstadt, *Women in Judaism from the Perspective of Human Rights*, *in* HUMAN RIGHTS IN JUDAISM: CULTURAL, RELIGIOUS, AND POLITICAL PERSPECTIVES 77, 99 (Michael J. Broyde & John Witte, Jr. eds., 1998); Fournier et al., *supra* note 62, at 349–50; Amanda Williamson, *An Examination of Jewish Divorce Under the Family Law Act 1975 (Cth)*, 11 JAMES COOK U. L. REV. 132, 134 (2004) (Austl.).

68. *See generally* CHRISTIAN JOPPKE & JOHN TORPEY, LEGAL INTEGRATION OF ISLAM 17, 18 (2013) (explaining the struggle for predominance between religion and state in European nations not found in North American countries).

69. Shmueli, *supra* note 61, at 868.

themselves to the defense of religious freedom even if there is no separation between church and state.[70]

Rabbinical courts deal with matters of marriage and divorce, including *get* refusal, but have no jurisdiction over civil actions—not even actions for damages for *get* refusal. In some countries, rabbinical courts act as state agents and in others they act as private, nonstate agents.[71] Civil actions for *get* refusal submitted to a civil, secular state court may collide over jurisdiction with religious courts in matters of divorce, with respect to various issues related to the substance of *get* refusal and its legitimacy from the legal-religious, as opposed to legal-secular, points of view.[72]

As noted, under Jewish law, a divorce may not be obtained without the husband granting it out of his free will.[73] Thus the husband—Ben, in the above case—holds the key to the primary remedy: the divorce. The religious court can order him to grant the divorce and attest to its validity but cannot itself change the marital status in practice. Therefore, if Ben refuses to divorce, Anne cannot receive the remedy of a valid divorce. At the same time, Ben causes nonpecuniary (nonmonetary) emotional damages, such as humiliation or loss of ability to remarry.[74] Several *halakhic* solutions have been offered to the problem of women such as Anne, who are refused a *get*, but there has been no overall consensus among the rabbis and decisors on this matter.[75]

Civil law has stepped in to adjudicate *get* refusal by considering it a tort or a breach of contract. In countries in which civil marriage and divorce are recognized by the state, as in the United States, Canada, and most European countries, it is possible to regard the refusal to divorce as a breach of the marital contract, and the plaintiff can be awarded damages by virtue of contract law, not only

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70. *See, e.g.*, *id.* at 864 n.166 (discussing Canada's approach to the conflict between church and state).

71. *Id.* at 852–53.

72. *Id.* at 857.

73. *See* THE CODE OF MAIMONIDES, *supra* note 58 and accompanying text.

74. Lazerow, *supra* note 62, at 108–11; Shmueli, *supra* note 61, at 845.

75. IRVING A. BREITOWITZ, BETWEEN CIVIL AND RELIGIOUS LAW: THE PLIGHT OF THE *AGUNAH* IN AMERICAN SOCIETY 41–75 (1993); MICHAEL J. BROYDE, MARRIAGE, DIVORCE, AND THE ABANDONED WIFE IN JEWISH LAW 23–24 (2001); *see* Judah David Bleich, *A Proposal to Solve the Problem of a Recalcitrant Husband*, 31 TORAH SHEBA'AL PEH 124 (1990) (Isr.). *See generally*, MONIQUE SUSSKIND GOLDBERG & DIANA VILLA, *ZA'AKAT DALOT: HALAKHIC* SOLUTIONS FOR THE *AGUNOT* OF OUR TIME (Golinkin et al. eds., 2006) (including the opinions of several rabbis on how the *agunah* problem may be resolved); AVIAD HACOHEN, THE TEARS OF THE OPPRESSED: AN EXAMINATION OF THE AGUNA PROBLEM (Blu Greenberg ed., 2004) (offering an in-depth analysis of the idea of *kiddushei ta'ut*, which is marriage entered into on the basis of error, as a possible solution).

of tort law.[76] In tort law, liability is not based on prior agreement.[77] This situation has the potential to intensify the conflict in matters of the separation of church and state. Some courts worldwide have ruled that a husband's refusal to grant a *get* unless his wife agreed to a property settlement giving him virtually all of their property does not subject him to tort liability unless the wife proves intentional infliction of emotional distress ("IIED"), which requires outrageous conduct.[78] This would also entangle the court in exploring the sincerity of any spouse who refused to grant a *get* upon religious grounds. In other countries, it is enough to prove negligent infliction of emotional distress ("NIED").[79]

Relying on contract law, some American court rulings enforced prenuptial agreements to arbitrate all postmarital religious obligations undertaken in the *ketubah* (Jewish marriage contract).[80] In the same manner, if there is a prenuptial agreement that specifies the sum that the husband should pay to his wife as maintenance for each day of separation (e.g., $100/day, according to the common prenuptial agreements of the Rabbinical Council of America—RCA), the agreement can be enforced by the secular courts if breached by the husband.[81] Defendants in the United States have claimed that a civil court dealing with these types of issues indirectly breaches, if not directly, the separation between church and the state and in doing so infringes on the Constitution.[82] This claim becomes especially true if the awarding of damages indeed results in a change in the marital status by giving the plaintiff the power to bargain for a change in family-religious status. This was impossible in the family-religious arena before bringing the civil action. Matters of marriage and divorce—and especially practices that are legitimate, even if not desirable—under religious family law cannot and should not be litigated by civil courts as part of tort or contract actions. Furthermore, by awarding damages, civil law may harm family autonomy, cultural rights, and freedom of religion and disrupt the delicate balance between various branches of law and the courts. It would be different if civil courts dealt with practices that are not legitimate under religious law. Nevertheless, according to American case law, such an agreement does not violate the First Amendment because it is merely consent to refer the matter of a religious divorce to a nonjudicial forum,[83] although I

76. Shmueli, *supra* note 61, at 864–73.
77. *Id.* at 870.
78. *Id.* at 878, 892.
79. *Id.* at 892.
80. *Id.* at 865–66.
81. *Id.* at 865 n.168.
82. *Id.* at 857–58.
83. *Id.* at 866; Lazerow, *supra* note 62, at 115.

believe the last word has not been said in this matter. Some European courts, however, have ruled that prenuptial agreements are contrary to public policy.[84] Moreover, not all Jewish sectors embrace these agreements, notable dissenters being the ultra-Orthodox.[85]

C. Damages as Leverage for Bargaining After Judgment: Renouncing the Damages in Exchange for the Get

PJB in a case like Anne and Ben's differs markedly from Farnsworth's nuisance cases. Civil actions for *get* refusal, like the one initiated by Anne, may be leveraged to obtain the primary remedy of change in family status. In this way, civil law can shape religious family law by directing spouses like Ben to reconsider their harmful acts. Tort and contract law convey the message that when the outcome of religious family law is not compatible with liberal human rights regarding status, civil law seeks to eliminate harmful practices by awarding damages, even at the cost of confrontation with religious family laws and courts, within certain limits.

Anne refuses to give Ben half the condo and to add cash in order to purchase her *get* in rabbinical court because she believes that she is entitled to the *get*. This would be her opinion even if she had the ability to pay, and *a fortiori* because she does not. Because rabbinical courts cannot declare the couple divorced, an act that depends on the husband's will, a dead end is reached, at which point bargaining can be resumed in the civil law arena.

These actions, however, are more than mere actions for damages. Civil actions for *get* refusal are particularly sensitive and difficult because of the possibly complicated interactions between the civil and religious laws and between rabbinical and civil courts.[86] Most of these actions attempt to obtain the *get,* the primary remedy, indirectly, through a transaction in which the recalcitrant spouse grants the *get* in exchange for waiving the damages awarded.[87] The compensation serves to change religious family law de facto when it reaches a dead end.

The classic case of refusal, as in Ben's case, is an attempt to extort money for granting the *get*. The trade mentioned above appears to be possible only if Ben's aim is to extort as much money as he can in rabbinical court for granting the *get*. The trade is less likely to occur if the husband refuses to grant the *get* for purely ideological reasons and is therefore not willing to sell it even in exchange for the damages awarded to his wife in civil court (he

84. Shmueli, *supra* note 61, at 869.
85. *Id.* at 868.
86. *Id.* at 858, 880.
87. *Id.* at 850.

might eventually do so if forced to pay large sums of money). In any case, damages for this tortious act of the husband have a value in themselves, even if a transaction is not completed and the woman remains *agunah*.

The initiative of using private tort or contract law to induce a transaction that would eventually change the marital status may create not only a clash between secular and rabbinical courts but also between the laws applied in each of them. Indeed, the civil action may create a *halakhic* problem: forgoing damages in exchange for the *get* may constitute monetary coercion, which may render the *get halakhically* invalid.[88] In countries like Israel, where the rabbinical court is a state court, these issues are debated against a background of a longstanding jurisdictional struggle between rabbinical and secular civil courts.[89] Rabbinical courts regard the decisions of civil courts to award damages that enable the damages-for-*get* transaction between the spouses as interference in matters of divorce, in which they have exclusive jurisdiction.[90] These actions are therefore the subject of harsh debate. Indeed, in Israel the rabbinical courts have threatened plaintiffs that they would not honor the exchange transaction and would not allow the divorce because it was not granted out of the husband's free will but as a result of financial coercion.[91] Women-plaintiffs like Anne have been

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88. Talia Einhorn, *Jewish Divorce in the International Arena*, *in* PRIVATE LAW IN THE INTERNATIONAL ARENA 135, 138 (Jürgen Basedow et al. eds., 2000); Yehiel S. Kaplan, *Enforcement of Divorce Judgments by Imprisonment: Principles of Jewish Law*, *in* 15 THE JEWISH LAW ANNUAL 57, 65–70, 105–06 & n.123, 119, 135–36 (Berachyahu Lifshitz ed., 2004); Yehiel S. Kaplan & Ronen Perry, *Tort Liability of Recalcitrant Husbands*, 28 TEL AVIV U. L. REV. 773, 782, 802, 804 & n.110 (2005) (Isr.) (translation provided by author); Benjamin Shmueli, *What Have Calabresi & Melamed Got to Do with Family Affairs? Women Using Tort Law in Order to Defeat Jewish and Shari'a Law*, 25 BERKELEY J. GENDER L. & JUST. 125, 139 (2010); Warburg, *supra* note 62, at 56; Williamson, *supra* note 67, at 134.

89. Blecher-Prigat & Shmueli, *supra* note 65, at 280 (presenting the jurisdictional split over issues of family law in Israel); Fournier et al., *supra* note 62, at 342–45 (raising difficulties in family law adjudication and the conflicts inherent in a dual-jurisdiction system with a division between secularism and religion).

90. File No. 7041-21-1 High Rabbinical Court (Mar. 11, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Rabbi Eliyahu Hayshrik, Speech Before the Bar Ass'n Tel Aviv Dist.: Tort Awards and their Effect on Divorce Law (Feb. 17, 2009); Rabbi Eliyahu Hayshrik, Speech Before the 9th Annual Conference of the Israeli Bar Ass'n, Eilat, Israel: Nor Shall They Learn War Anymore (June 1, 2009); Rabbi Uriel Lavi, Speech at the Family & Society Conference at Hebrew University, Jerusalem, Global, Regional, and Local: Law, Politics, and Society in Comparative Perspectives: Does the Family Court Act with Restraint When It Decides Damages Against Husbands Who Refuse a Get? (Dec. 12, 2008).

91. File No. 7041-21-1 High Rabbinical Court (Mar. 11, 2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

told that unless they cancel the civil judgment in civil court or withdraw the action where a judgment has not yet been given, divorce procedures in the rabbinical courts are suspended.[92] After they cancel the civil judgment or withdraw the action, the rabbinical courts proceed to handle the divorce, with no promise that in the end a *get* will be granted.[93] For this reason, civil actions may allegedly become a barrier to obtaining a *get* rather than facilitate it. Despite this rhetoric, however, in many cases the *get* is granted despite the damages—indeed because of them—at least in some panels of the rabbinical courts, as Amihai Radzyner shows in his empirical study.[94] Indeed, Radzyner surveyed a series of cases where trading a *get* for renouncing the damages obtained in civil action for *get* refusal occurred under the auspices of Israeli rabbinical courts.[95] In his empirical study, Radzyner reviewed eleven cases of tort claims in which the rabbinical court threatened that a *get* would not be arranged as long as the tort claim is in effect, and despite the rhetoric of rabbinical judges that this transaction creates a *halakhic* problem of a coerced *get*, in ten of the cases the *get* was granted.[96] In a portion of these, the husband paid the compensation in addition to granting the *get*, so that the compensation was not traded for the *get*.[97] This study shows actual PJB in cases of *get* refusal.[98]

Despite these problems, in the last few years, first in Europe and the United States and recently also in Canada and Israel, civil law was introduced to adjudicate *get* refusal by considering it a tort or breach of contract. Subsequently, defense arguments were denied and a handful of civil actions for *get* refusal have been accepted.[99]

It follows that in practice the transaction is successful in many cases and that, despite various problems, PJB takes place and in some of the cases reaches the desired end for the plaintiff, that is, an exchange of the damages for the *get*. Even if a settlement is not reached because of *halakhic* or other problems, in many cases

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92. *Id.*

93. *Id.*

94. Radzyner, *supra* note 12.

95. *Id.* at 18–40.

96. *Id.* at 18–51. For Radzyner's analysis see *id.* at 53–59. For his conclusion see *id.* at 77–84.

97. *Id.* at 41–42, 44, 47, 84.

98. Note also that there is no binding precedent in rabbinical court rulings, and therefore every panel sees itself free to rule according to the *halakhic* opinions it adopts, including minority opinions. *See* Blecher-Prigat & Shmueli, *supra* note 65, at 287.

99. *Id.* at 283–84 (noting the recent emergence of successful civil tort actions by women who have been refused a *get* by their husbands); *see* Shmueli, *supra* note 61, at 853–54 (discussing the rise of breach of contract actions for *get* refusals in Israel and Canada).

negotiations are conducted so that the deep animosity between couples like Anne and Ben does not prevent them from bargaining after a judgment that allocates the rights that have been given.

D. Application of Calabresi and Melamed's Second Rule: Liability Rule in Favor of the Plaintiff

Calabresi and Melamed's "four rules," known also as "the Cathedral," distinguish between property rules (issuing an injunction), liability rules (awarding damages through tort law), and inalienability.[100] Under a property rule, property cannot be alienated without the consent of the owner of that right, whereas under a liability rule, consent is not required, but the victim must compensate the tortfeasor at a level set by the state.[101] The third type of protection of entitlement is the rule of inalienability, which means that the transfer of certain types of rights is prohibited or limited for various reasons.[102]

In our case, the damages awarded in the civil action based on the liability rule may be used to buy the property right in order to force a change in the religious family status, which is settled in rabbinical court. Calabresi and Melamed's second rule, a liability rule in favor of the plaintiff, can explain the interaction between primary and secondary remedies belonging to a different area of law.[103] In fact, the law protects the woman's right to divorce through a liability rule, which conforms in principle to the pattern of Calabresi and Melamed's second rule. The damaged party cannot achieve the primary remedy she seeks (the divorce), and the tortfeasor is not coerced to desist from his activity. Therefore, the damaged party pleads for the secondary remedy of damages.

In Calabresi and Melamed's examples, the primary remedy (injunction) is in property law and the secondary remedy (a liability ruling of damages) is in tort law. In our case, the primary remedy (marital status) is in family law, although it is still a property right, and the secondary remedy (damages as a liability ruling) is in tort or contract law. Civil law attempts to extricate the parties from the dead end they reached under religious family law by inducing the husband to grant the divorce in exchange for waiving the damages. The woman uses the damages to buy the equivalent of an injunction, that is, a change in marital status.[104]

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100. *See* Calabresi & Melamed, *supra* note 5, at 1092–93.

101. Susan Rose-Ackerman, *Inalienability*, *in* 2 THE NEW PALGRAVE DICTIONARY OF ECONOMICS & THE LAW 268, 268 (Peter Newman ed., 1998).

102. Calabresi & Melamed, *supra* note 5, at 1111.

103. *Id.* at 1115–19.

104. For different theoretical bases for acknowledging these actions, see Yifat Bitton, *Feminine Matters, Feminist Analysis and the Dangerous Gap Between Them*, 28 TEL AVIV U. L. REV. 871 (2005) (Isr.) (basing these actions on

Rule two is a balanced solution if the state does not want to confront undesirable religious practices. The state does not prohibit the practice and upholds the property right of the tortfeasor to do harm, but it offers victims damages under liability rules to help them recover or purchase the property right. In our case, as in the case of rule two, a property right exists. The civil court does not challenge that right but subjects it to an opposing liability right, in this case, damages. Therefore, the husband's property right, which originates in religious family law, is limited by tort law. The civil court cannot infringe on his right to refuse the status change in rabbinical court, but it can uphold his wife's right to damages, in the spirit of rule two.

Basing the award of damages in these cases on Calabresi and Melamed's framework can be considered an innovation because it enables civil courts to award damages for a practice that is still considered legitimate—although not desirable—according to religious law.[105]

III. PARAMETERS INDICATING WHEN POST-JUDGMENT BARGAINING CAN BE EXPECTED

In this Part I discuss several possible explanations for the differences between the results of Farnsworth's research regarding the absence of PJB by comparing it with cases of *get* refusal, where the outcome is usually different. The aim is to reach an inductive conclusion about the conditions and the types of cases when PJB can be anticipated and those when it cannot.

A. Enmity as Transaction Costs that May Prevent Post-Judgment Bargaining

Farnsworth explained that in the cases he examined, the reluctance to bargain was caused either by animosity or refusal to put a price tag on rights.[106] Both reasons are relevant to our case, in

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feminist-distributive grounds) (translation provided by author); Shmueli, *supra* note 61, at 840 (basing the acknowledgment of the actions also on legal pluralism and stating that acknowledging these actions is compatible with the goals of tort law); Shmueli, *supra* note 88, at 134–35 (proposing acknowledgment of these actions on the basis of Calabresi & Melamed's rule two).

105. *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, 82–86 (2015) (differentiating between different cases of civil actions for *get* refusal, only in some of them does rule two completely apply).

106. Farnsworth, *supra* note 2, at 392–93.

which hostile parties do deal, bargain, sell, and buy rights after judgment.

Is acrimony between the parties considered to be a transaction cost that may thwart the possibility of negotiation after the judgment? Farnsworth explains that it matters whether we consider bitterness and reluctance to deal as a transaction cost.[107] He presents the work of several scholars who have argued that parties can negotiate around damages and injunctions when transaction costs are sufficiently low.[108] Farnsworth selected cases that met the requirements for low transaction costs: small number of parties involved (to reduce the likelihood of coordination or holdout problems) and a single issue at stake.[109] Farnsworth asked whether the obstacles to bargaining, namely the parties' acrimony and distaste for bargaining, are properly thought of as transaction costs.[110] If yes, those costs are high, and according to the Coase theorem, the court allocated the entitlements correctly because this is where the entitlements stayed.[111] If, however, these are not transaction costs, the cases at hand are inconsistent with the Coase theorem because the court allocation would have been final regardless of how the court allocated the entitlement.[112] Farnsworth tends to believe that enmity between parties to a nuisance is part of transaction costs.[113]

This is an elegant assumption by Farnsworth, and an innovation due to the fact that he identifies animosity as a significant and genuine source of transaction costs. Indeed, to be exact, the economic approaches do not claim that the parties will negotiate in all cases following the allocation of rights in court, but that this is what happens in the absence of transaction costs, or at

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107. *See* Farnsworth, *supra* note 54, at 217–18 (presenting a different definition of "transaction costs").

108. Farnsworth, *supra* note 2, at 378–79.

109. *Id.* at 381–82.

110. *Id.* at 406–10; *see also* Mark Kelman, *Comment on Hoffman and Spitzer's Experimental Law and Economics*, 85 COLUM. L. REV. 1037, 1038–39 (1985); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1291 (2003); Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 97 (2004).

111. *See generally* Coase, *supra* note 5 (arguing that when transaction costs are zero, the allocation of resources is efficient regardless of the initial assignment of property rights).

112. Farnsworth, *supra* note 2, at 407. Some argue that when transaction costs are high, the court should allocate the entitlement to the party that would have been willing to pay the most for it, circumventing the bargaining failure. *Id.* at 375. Such a model does not quite fit with the examples in Farnsworth's research, however, and assumes that the transaction problems lie with the inability of the parties to communicate effectively. *See id.* at 407–10.

113. *Id.* at 408; *see also* Farnsworth, *supra* note 54, at 211–13.

least when transaction costs are low. In the cases described by Farnsworth, the costs of negotiation toward a deal are high, in the form of the suffering that granting legitimacy and satisfaction to the other causes to the owner of the right.

If this is the explanation of the difference between cases of enmity and cases of nuisance in which there is no special enmity, this explanation appears to be consistent with the conclusions of the classic economists,[114] and there is no controversy. But if distaste is a barrier against negotiations and it is considered to amount to high transaction costs that may act as a disincentive to transacting, the same should be true in the case of *get* refusal as well. In this case there are also a small number of parties involved, only the two spouses, and a single issue is at stake. Allegedly, Anne, who won the civil legal case and was awarded damages, wants to negotiate a deal and exchange the damages for the *get* in the same way as a neighbor who won a judgment might want to sell the property right to the neighbor who lost, and the loser might want to buy the right from the winner. Therefore, we must look for other reasons for the difference.

It appears, therefore, that negotiating in the *get* cases is compatible with Calabresi and Melamed, who propose negotiation when it is efficient. Transacting between bitter spouses can be compatible with the Coase theorem, unlike in the nuisance cases presented by Farnsworth, especially given that there seem to be no high transaction costs because there are only two parties involved. The difference, therefore, may be elsewhere, or else we need examine the cases at a higher resolution, where we can perceive the difference between two types of enmity, so that Farnsworth's statement about enmity being a barrier may be true in some cases but not in all. Thus, we may reach the conclusion that despite the fact that enmity is considered a transaction cost, in some cases PJB is held despite these transaction costs.

Another possible explanation that may lead us to an inductive conclusion is that in some cases, even if there are transaction costs (because of enmity or other reasons), negotiations nevertheless take place following the court ruling simply because of the high social benefit of such negotiations. Occasionally, the social benefit of reaching a deal as a result of PJB is extremely high, as in cases of *get* refusal: the woman is liberated, her family is relieved, society at large gains, and even the husband is eventually freed. In these and other cases it is possible to overcome the high transaction costs. In cases where transaction costs are high and no great social benefit is

114. Richard A. Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757, 759, 764 (1975) (listing the classical economists in the field of law and economics and their contributions).

attached to reaching a deal, especially if the continuation of the damaging activity does have social value (as in the case of some nuisances), these high expenses can prevent negotiations and reaching a deal.

B. Lack of Market as a Possible Barrier to Negotiations

Farnsworth argued that the fact of distaste being so dominant in obstructing bargaining can be explained by the absence of a market that reduces the need for personal interaction.[115] However, in the *get* refusal case there is no market either. Ben cannot sell the divorce in the open market. The limited range of people with whom one can transact creates problems of inequality in bargaining power that do not exist in other relations where other alternatives are available. Nevertheless, although in the *get* refusal case the acrimony is great and there is no market, the parties can be induced to bargain successfully.

People do not like paying for things they feel entitled to having (which may reverse the entitlement).[116] The husband believes that he has exclusive power over the divorce because this is a right given to him by Jewish family law. Nevertheless, a bargain is reached in many cases despite the fact that neither party wishes to bargain (for each party believes in its right without a need for negotiating) and despite the fact that, according to Farnsworth, the refusal of the parties to bargain may constitute a serious impediment to

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115. Farnsworth, *supra* note 2, at 396, 398.

> By an absence of vigorous (or "thick") markets, I am referring to the fact that the parties in these cases were able to deal only with each other and that there often were no good substitutes for the goods involved in their disputes. In a robust market (as I will use the term), there is competition for goods and they have ready substitutes. In suggesting that the lack of bargaining in these cases may be related to the absence of markets for the rights involved, I am not referring only or even primarily to the problems usually thought to be presented by thin markets, such as the possibility that an absence of competition might permit both sides to hold out for payments much greater than their true reservation prices. The obstacles to bargaining presented in these cases—or at least those problems in the forefront of them—do not appear to involve strategic behavior or the fear of it. Rather, I argue that markets may reduce the incidence and significance of the acrimonious attitudes of the parties in these cases, and that markets bring with them (and are made possible by) a set of values and a way of thinking about entitlements that the parties in these cases did not share. The cognitive and normative function of markets, as well as their practical function, is to encourage the kinds of transactions that did not occur after judgment in these cases.

Id. at 395 (footnote omitted). Farnsworth also addresses the issue of the absence of markets as a cause and effect of the distaste for bargaining. *See id.* at 403.

116. *Id.* at 401.

bargaining.[117] Eventually, Ben negotiates after Anne is awarded damages that equalize or at least improve her bargaining power, and Anne negotiates because for her the damages are not an end in itself but only a tool to obtain the divorce.[118]

Naturally, this is not what happens in all cases of civil actions for *get* refusal for various practical reasons having to do with the circumstances in which bargaining is less relevant.[119] In practice, however, many of these civil actions succeed and end in negotiation and then divorce because in the classic cases the woman-plaintiff has the will to bargain after the judgment, and the relatively high amounts of damages awarded enable it to happen.[120]

It means that a lack of market cannot assist in determining the likelihood of PJB. Therefore, the reason for the difference between the outcomes is not the lack of market, but something else.

C. *Calculating vs. Emotional Parties*

There may be differences in the points of view of classic law and economics scholars, such as Coase or Calabresi and Melamed, and scholars such as Farnsworth. The classic economists assume that people, in principle, are calculating, act rationally, and seek to obtain whatever they can out of a given situation, even in cases of deep acrimony between the parties—or at least the cases of deep acrimony were not excluded from their economic analyses.[121] Other economic or behavioral points of view exist, however, that focus on animosity and other factors that have the potential to make people

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117. *Id.* at 405.

118. This may be the case in nuisance disputes as well, at least in principle, because what the victim seeks is peace and quiet, not money. *Cf. id.* at 398 (stating that cash payment cannot be used to buy the peace and quiet disturbed by a neighbor's barking dog).

119. For example, it is possible for a woman to bring an action for damages with no intention of negotiating and bargaining after the judgment simply because she no longer wishes to divorce her husband and remarry or because she does live with a partner and is interested only in compensation. This is one of the core arguments of Yifat Bitton. *See* Bitton, *supra* note 104. A woman may also bring action against the estate of her late husband for refusal to render a *get* in the past, in which case there is no room for bargaining, only for compensation. *See* File No. 19480/05 FamC (Kfar Sava), Doe v. Doe (Apr. 4, 2006), Nevo Legal Database (by subscription, in Hebrew) (Isr.); Shmueli, *supra* note 61, at 854–55. Husbands may be unwilling to bargain, if, for example, the damages awarded are not high enough and their demands exceed the amount awarded in compensation to the woman, or if the refusal to divorce is based on ideological motives (such as pure revenge).

120. This happens despite the *halakhic* fear of a coerced *get*. *See* Radzyner, *supra* note 12.

121. *E.g.*, Posner, supra note 114, at 761.

less calculating and sophisticated as well as less rational and more emotional.[122]

This explanation can shed light on the differences between the theories of Coase and of Calabresi and Melamed, who do not consider animosity to be a crucial component and believe that people remain rational and efficient even in situations of hostility (or at least do not explicitly rule out this possibility)[123] and Farnsworth, who found that the animosity of the parties affected their rationality.[124]

This distinction, however, cannot satisfactorily explain the difference between Farnsworth's study and civil actions for *get* refusal because the animosity between the parties is present in both types of cases, and in the case of *get* refusal, we can assume that parties are often motivated by emotions. Therefore, we have reason to anticipate a similar outcome in both cases.

Moreover, it may be argued that the fact that the spouses are in the midst of a divorce conflict, represented by lawyers in an array of financial, custody, and other disputes, can cause them to act in a highly rational fashion. But it is not clear what the difference is between this case and a typical nuisance case, even when animosity exists between the parties—that is, spouses would not necessarily act differently compared to neighbors; neighbors are also represented by lawyers, who should cause them to act rationally. Yet, the opposite can also be true: in divorce conflicts the feelings of enmity can run deep and the spouses may behave in an especially irrational manner, as opposed to many nuisance cases in which the parties act rationally even if they are in a situation of sharp enmity. It is not clear why the alleged irrationality induces spouses in conflict to reach PJB, unlike the neighbors who were studied by Farnsworth. It may be possible to state that irrationality results in superfluous litigation and the inability to back down, at some point, after the court has had its say regarding the allocation of rights. But at times it may be irrational not to try to negotiate after the

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122. *See* R.H. COASE, THE FIRM, THE MARKET, AND THE LAW 1–5 (1988) (criticizing economists who did not look into the causes that affect human behavior); Yaacov Schul & Ruth Mayo, *Searching for Certainty in an Uncertain World: The Difficulty of Giving Up the Experiential for the Rational Mode of Thinking*, 16 J. BEHAV. DECISION MAKING 93, 93–95 (2003) (examining the question whether behavior can be directed, when are behaviors more calculated, and when are behaviors more experiential); *cf.* Eldar Shafir & Amos Tversky, *Thinking Through Uncertainty: Nonconsequential Reasoning and Choice*, 24 COGNITIVE PSYCHOL. 449, 469–70 (1992) (demonstrating that people act more irrationally when faced with uncertainty).

123. *E.g.*, Steven G. Medema, Juris *Prudence: Calabresi's Uneasy Relationship with the Coase Theorem*, 77 LAW & CONTEMP. PROBS., no. 2, 2014, at 65, 88–89.

124. Farnsworth, *supra* note 2, at 421.

judgment allocating the rights and offering a fertile ground for a deal that is efficient for both parties, resulting in not bargaining when there is good reason to bargain.

It is therefore necessary to examine the reason for the difference for the fact that according to Farnsworth, hostile parties are less rational in the nuisance cases he examined, whereas parties no less hostile are highly rational in cases of *get* refusal. It means that this parameter also cannot properly distinguish between cases in which PJB can be expected and cases in which it cannot.

D. The Extent to Which Hostile Parties Wish to Maintain Working Relations Following the Allocation of Rights

It is conceivable that if the parties wish to reach a certain working relationship after the litigation ends, the chances of negotiation after the allocation of rights are greater. For example, feuding neighbors may be interested, despite the conflict between them, to maintain some relations because they will continue to run into each other daily. Future orientation may promote negotiations despite the enmity. The reason may be not only personal but also community related: if the two parties belong to the same church, synagogue, golf club, work place, etc., they may have an interest in maintaining normal relations following the conflict, and there may also be social pressure within the community to do so. But this argument is less relevant if it is clear that it will be impossible to maintain normal relations in the future, for various reasons (for example, despite the physical proximity the parties were strangers before the feud, or they are not individuals but at least one of them is a business enterprise). The situation is never unequivocal, however. At times, even hostile neighbors are interested in maintaining certain relations following the judgment and for this reason decide not to negotiate but to accept the ruling of the court as final, or at most, appeal the decision. But they choose not to take further action so as not to extend the conflict even further.

In the case of spouses, whether or not they have children can make the situation less equivocal.[125] If they have no children, they may be compared to neighbors who are not interested in

125. Benjamin Shmueli, *Tort Litigation Between Spouses: Let's Meet Somewhere in the Middle*, 15 HARV. NEGOT. L. REV. 195, 247, 252 (2010). Whether the spouses have children is a decisive factor in determining the possibility of a couple in the process of tort litigation undertaking a preliminary ADR process before filing the claim. *Id.* It is also within the authority of the court that litigates the tort case to mandate that the couple undertake ADR, either before litigation or in the course of it, in which case the court suspends the hearings while the ADR is being conducted. *Id.* Several parameters are presented; having children is a dominant parameter in favor of the mandatory ADR process, based on the desire to maintain proper relations after the divorce for the benefit of the children. *Id.*

maintaining normal relations but wish to maximize their rights at the cost of not resolving the feud, and they may choose to go their separate ways after the court has its say.[126] If the couple has children, they may be interested in maintaining normal relations at least to some degree, because they cannot sever all relations between themselves; they will meet when they transfer the children from the custody of one parent to the other, at family events, and they must make joint decisions about the children.

Nevertheless, reality may impose different outcomes. One can imagine the following cases that deviate from the above analysis. First, parties that are not interested in maintaining normal relations nevertheless want to negotiate following the allocation of rights by the court in order to maximize their rights differently. Second, parties that in principle may be interested in maintaining relations in the future, but the right under dispute is more important for them than future relations are (for example, spouses that have children, despite their awareness that it is important to maintain normal relations, are prevented by their enmity from considering the future and are focused on maximizing their rights in the present). It is possible to imagine couples that think that it is precisely litigation between them that can help reach agreements that will benefit the children and everyone else. This may be contrary to an accepted norm (which must still be proven) that litigation harms the relationship. But if many issues are settled in court they may exert a positive influence on the relationship, and perhaps, in the course of litigation or afterwards, the parties will end the conflict, maybe entirely, in a compromise or an extrajudicial agreement. Third, spouses who have no children and have no interest in a continued relationship after the divorce, but still want to negotiate for the *get*.

Therefore, the willingness to preserve a certain level of relations, even if it has some logical rationale, does not appear to sufficiently explain the differences between the outcomes of the nuisance and the *get* refusal cases, and therefore cannot be a dominant parameter in determining the likelihood of PJB.

E. Ongoing Litigation Between Repeat Players vs. One-Shotters

It seems that although in both nuisance and *get* cases the bitterness runs deep, there is a difference in the nature of the procedures. In some, if not most, of the nuisance cases, the animosity and dispute may last for many years, but once the issue has come to a final judgment we can assume that this ends the

126. Although the spouses, unlike the neighbors, do not go their separate ways because the damages awarded in civil court for *get* refusal open the door for continued negotiation—that is, the exchange deal.

litigation between the parties. If circumstances change, a neighbor may apply to the court again, but in the absence of such a change, we can assume that res judicata ensures that the judgment is final. At most, an appeal takes place, but recall that in Farnsworth's research this move has already been exhausted.[127] The parties often honor the court ruling. In some cases, they are relatively pleased with the results; in other cases they are less satisfied but still honor the decision in principle, and neither they nor their lawyers seek to circumvent it, even legitimately, by negotiations.

By contrast, parties that renew their litigation, unlike "one-shotters,"[128] are more sophisticated and rely on many stages of litigation, as well as on the period following it, for achieving the best possible result. This is why they are not willing to settle for the allocation of rights in the legal process.

Litigation between spouses is usually ongoing, with many stages, and in the case of *get* refusal it is conducted in two courts, rabbinical and secular. We can assume that because of the nature of the complicated and ongoing relations between the parties, and at times the fact that they are represented by the same lawyers during the various procedures, it makes sense for them to bargain despite the acrimony. The lawyers help the parties act with deliberation and patience, and often encourage them to take the long view and negotiate, knowing that they are involved in a multistage litigation and not a one-time action. Repeat players are generally more calculating and ready to conduct negotiations if these are efficient.

Moreover, couples have much more information about one another than do parties in most cases of animosity, including neighbors. If during their marriage they kept no special secrets

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127. Farnsworth, *supra* note 2, at 382–83.

128. *See, e.g.*, Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974) (identifying two key players in the legal system—one-shotters and repeat players—and asking whether reform can be achieved by one-shotters taking coordinated action). Galanter examines the question "under what conditions can litigation be redistributive, taking litigation in the broadest sense of the presentation of claims to be decided by courts (or court-like agencies) and the whole penumbra of threats, feints, and so forth, surrounding such presentation." *Id.* at 95–96 (footnote omitted). Galanter regards repeat players as a large unit that makes use of the legal system frequently, and whose interest in each individual case is relatively low. He uses this distinction in order to protest the limitations of the court in leading to a change. *Id.* at 99–100. Whereas the one-shotter is interested in the material result of the specific case, the repeat player takes a strategic view of the case and focuses on its overall legal outcome. *Id.* at 101. This combination results in precedents being established for the benefit of the repeat player who has the resources to manage his affairs based on his long-term objectives. *Id.* at 100–03. In this way, the legal system increases the advantages of the repeat player and enables him to exercise a stronger indirect influence. *Id.* at 103–04.

from one another, they may have as much information as one can have about another party, which is also an important factor in possible negotiation.[129] Indeed, people who were or are married know each other better than strangers, or even neighbors, do, and therefore may have more information about the other.

Prenuptial agreements signed by spouses contain information that is not available in nuisance cases. This information may be a good basis for litigation when one spouse claims the other breached the agreement. Breach of prenuptial agreement has been a basis for many contract actions in the United States based on sections that entitle the woman to a high amount of maintenance in cases of separation.[130] These sections were intended to forestall possible resistance to divorce.[131] Note that these types of actions have been challenged in the United States as infringing on the First Amendment because they represent an interference of a civil court with the freedom of religion of the husband-defendant.[132] Most of these motions have been denied in the United States, but in Europe husbands have at times prevailed using this defense argument.[133]

Thus, the civil action in the *get* case is usually only one part of the litigation puzzle between the spouses. Naturally, in most cases the primary aim is the divorce. Other issues of interest—including alimony, custody, children's maintenance, division of property, and more—provide sufficient common ground for litigation, before or even after the divorce. Indeed, civil action for *get* refusal is not merely a stage in the negotiations but an important strategic step on the way to achieving the *get*. By contrast, in nuisance cases the lawsuit may be the one and only legal procedure taken by one neighbor against the other, which can explain the difference in the incentive to bargain in the two cases.

In the case of multistage legal actions, or at least of those that take a long time and have long-term effects and not merely immediate ones, an additional element must be taken into consideration, namely the dynamics of the balance between the parties, which can change in the course of these relationships. For example, children grow up and stop receiving support payments. In nuisance cases, various events can affect the property in question, such as external incentives, changes in tax policy, environmental regulations, and more. Thus, it is possible that the willingness to negotiate should not be evaluated immediately following the

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129. Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 973 (1979).

130. Shmueli, *supra* note 61, at 865–67.

131. *Id.*

132. *Id.* at 867; Lazerow, *supra* note 62, at 115.

133. Shmueli, *supra* note 61, at 869.

judgment, and it can change over the years according to circumstances, in all types of cases.[134]

Thus, in various cases (and not only in family conflicts) in which the process involves several stages and the actors are repeat players with a great deal of patience over the long term, we can expect more PJB. By contrast, in the case of one-shotters and single-stage cases, with at most one appeal, we can expect less PJB.

F. The Nature of the Right to Be Exchanged: Greater Expectation of Post-Judgment Bargaining in the Case of Existential Rights

In cases such as the *get* refusal cases, there is a commodification of a right of the family status type that can be viewed as a personal-existential right. In a situation of this type, individuals definitely seek ways to negotiate and trade their right.

There appears to be a discrepancy here between the social and the personal points of view. From the social point of view, we do not always want personal and existential rights to be traded precisely because they are personal. Thus, when it comes to commodification, personal rights are less suited for trading ex ante. If in practice harm occurs ex post (as in the case of organ harvesting despite the prohibition against it), it has a retrospective price, which is determined in a tort claim for the harvesting damage.[135] From a personal point of view, however, the parties involved often want to trade in their personal rights. For example, a couple that has no children may want to purchase one, at times at any cost. Although many potential sellers would never agree to sell personal rights,[136] there are others, such as mothers in difficult emotional or economic conditions, who are willing to sell a newborn child. The state, however, for various reasons would veto such a sale, creating a situation of inalienability—that is, of absolute nontransferability of rights or of severe limitations imposed on it. The same is true for trading in body organs for transplants. Individuals are willing to negotiate the purchase of something that is more valuable for them than anything else. In matters of property and of money, however, even if it is very important to them, as in the case of nuisance involving their neighbors, they may be willing to renounce

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134. *Cf.* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 35–36, 44 (Harvard Univ. Press 1998) (1994) (presenting the stag-hare and chicken games as a basis for the foundation of legal rules and negotiations).

135. Indeed, the commodification of some items is prohibited in most cases. For example, the right to one's body is inalienable, although a price can be put on it ex post facto. *See* Calabresi & Melamed, *supra* note 5, at 1108–09; Shmueli, *supra* note 105, at 54 n.81.

136. *See, e.g.*, Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1484–85 (1989) (arguing that there are attributes that are "so closely connected to the person that their alienation would injure personal identity").

eventually the right if they lose it in court and if the court rules that they were wrong. They may resign themselves to the existing situation and not try to change the judgment, as indeed Farnsworth pointed out in his study.

The *get* is an existential personal right because it involves a situation that is impossible to live with. Therefore, there is a desire to trade for it although from the social point of view trading personal rights may be considered undesirable. The *get* is not merely an existential right but one that has no substitute, unlike the cases of nuisance, for example, where the party that suffers from the situation can choose to move somewhere else (despite severe injury to his property rights). There is a difference, however, between other existential rights and the *get*, which is routinely traded and has a given price in rabbinical court, every time the husband tries to extort money for granting it. The price is greatly distorted at times because it is determined almost unilaterally by the extortion of the husband, who is in a vastly advantageous bargaining position relative to his wife. On occasion, the rabbinical court limits the demands of the husband, but in practice, because the husband has exclusive control over the granting of the *get*, the rabbinical court cannot issue a judgment dissolving the marriage. The key, including the price, is in the hands of the husband. This is the source of the great importance of the judgment issued by the civil court, which sets a more realistic price for the *get*. The civil judgment determines how much the husband must pay for not granting the *get* based on the assumption and the knowledge that in most cases the judgment will advance negotiations and renunciation on the part of the woman of the damages in return for the granting of the *get*. This answers, in practice, the question of how much the woman is willing to pay for the *get*. Before the civil judgment, Anne did not possess the required amount (or perhaps she did, but she did not deem it right to pay it in exchange for the *get*), and her bargaining position was weak. The sums awarded to her by the civil judgment greatly improve her bargaining power, making it possible for her to trade for the *get* and offer a clear price, or at least one that can serve as a starting point in the negotiations between the parties. Often this ends up being the closing price because renunciation of the damages is exchanged for the *get* without any further demands. Ben may nevertheless make additional demands (more money, renunciation of half the apartment, or the forfeiture of other rights), but in many cases, because of the economic blow he sustained with the awarding of high damages in civil court, he is satisfied with renouncing his demands in return for the woman's renunciation of her damages and granting the *get*.

Thus, the motivation to trade for the *get* is present at the personal level. Unlike other personal and existential rights, there is a social recognition of the right to trade for it, perhaps contrary to expectations, partly because the *get* is being traded in practice in

rabbinical courts and partly because of the important social-distributional need to equalize the bargaining powers of the husband and the wife.

Naturally, there may be cases in which the owner of a negotiable property right that has a market is not eager to sell it because for him it has special sentimental value. At times, this can result in an especially high asking price for its sale, and at other times there may be a complete unwillingness to sell at any price. Conversely, a negotiable right can be so valuable for someone who wishes to buy it that it acquires the character of a personal right, even if for most people it is not such.

Nevertheless, it appears that in the case of trading in personal rights there can be an important difference between the party that is interested in buying the right and the one that wants to sell it. The more personal the right is, the greater the motivation to purchase it (the *get*, the kidney for transplant, or the newborn) and the higher the price the buyer is willing to pay for it—for "what is money when compared to these existential rights?" But at the same time it appears that the motivation to sell is lower, because "what is money compared to the sense of power or revenge or having a baby?" In a situation of this type, the mechanism of the market may appear to be inefficient because the exchange rate is too complex. It is not clear what the value of the *get* is. It is impossible to assess its value the way we assess the value of an apartment, a car, or a nuisance. It is precisely at this point that the award of damages plays an important part because it injects a measure of order and makes a determination in the matter.

To the extent that there is a difference in the motivation of buyers and sellers, it is quite clear why Anne wants to fight for her right to buy the *get* and end her status of *agunah*. But why does Ben agree to sell it and to renounce his personal right, which, as noted, is not always a matter of money? Several explanations are possible. One is that the fact of him having forced Anne to buy the *get* helps him renounce his position of control, because he has already achieved superiority by harassing her for years, first in rabbinical court and then in civil court, before she was able to obtain the divorce. This is true even if he is not pleased with the judgment that imposes payment of damages on him, although, as noted, in most cases he ends up not paying the damages but exchanging the *get* for them.

Note that Anne was harmed in practice and is genuinely entitled to compensation for the injury she suffered. Eventually, she exchanged the compensation for a *get* and was left with no compensation for the years of suffering in order to obtain the *get*. There is some benefit for the husband even if the deal eventually caused him to renounce his original claim. Moreover, he can still make the granting of the *get* contingent upon receiving a certain payment or upon Anne renouncing some other rights to which she is

entitled. If the demand is reasonable (say, $10,000), Anne is likely to compromise.

Another explanation is that Ben's stubbornness diminishes not only because of the extensive litigation (which appears to be the rule in all divorce cases) but also because of the innovative use of the secular-civil court, which imposes high damages on him and causes him to begin negotiating as the cost of his stubbornness keeps rising. The more ideological his refusal is, however, and the more determined he is to take revenge on his wife, the higher his patience and lower his inclination to negotiate are. But when the damages are substantial and the civil court forces high expenses on him, it is more likely that he will begin negotiating. This is especially true given the fact that there is no uniform price for *get* refusal, and one of the parameters in determining the damages is the length of the period of refusal. Case law generally sets a price on each month or year of refusal[137] unless a price was set in advance in a prenuptial agreement.[138] Furthermore, there is no case of res judicata as far as the refusal in the future is concerned. Case law has determined that following an award of compensation for *get* refusal, it is possible to continue claiming payment for subsequent periods of refusal[139] because this is a continuing tort and each additional day of refusal increases the husband's costs.[140]

The situation in the case of the nuisance example is different. Although we take most seriously one's right to live free from nuisances—to breathe clean air, and to drink unpolluted water—as noted, there are alternatives here, and in a worst case scenario the neighbor who is the object of the nuisance can move somewhere else. By contrast, a woman in Anne's position, who is locked in a marriage that has de facto ended a long time ago, cannot remarry and have children and cannot exercise her autonomy over her body and soul. Therefore, the only path open to her is to continue negotiating in order to try to obtain the *get*, either at a much lower price or at the same price but in a way that would bring her the

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137. *See, e.g.*, FamC (Jer.) 19270/03, (2004), Nevo Legal Database (by subscription) (Isr.); Shmueli, *supra* note 105, at 88.

138. A contract by which the husband obligates himself to pay compensation for every day of refusal through the alimony laws. *See supra* note 81 and accompanying text.

139. *See, e.g.*, File No. 18561/07 FamC (Jer.) S.D. v. R.D. (2010), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

140. Some judgments have even awarded damages for future refusal, so that the woman does not have to file a new action but can turn directly to the Registrar of Execution of Judgments if the refusal continues. Some courts avoid awarding damages for future refusal for fear that such a ruling might result in a coerced *get*, when it is granted. *See, e.g.*, File No. 24782/98 FamApp (Tel Aviv), N.S. v. N.Y. (2008), Nevo Legal Database (by subscription, in Hebrew) (Isr.).

amount she needs to pay in order to buy the *get*, by means of a civil suit.

Moreover, in the nuisance example, even in the case of animosity, the rights are in principle negotiable and easier to express in monetary terms—for example, the value of a nuisance in the form of pollution, smell, noise, or the decline in the value of the residence as a result of the nuisance. Similarly, if the nuisance is removed, the removal can also be easily translated into money—for example, by estimating the investment into the establishment and betterment of the nuisance. The judgment that allocates the rights in this case is less dramatic than in the case of *get* refusal. There is no social issue with commodifying such rights (except perhaps in circumstances when continuation of the nuisance damages the environment). In many cases, if a party continues to refuse to negotiate, it incurs no special costs, which makes it easier to stand on one's principles and not compromise, and the party that prevails in the allocation of rights in court does not have to pay for its victory.

Thus, somewhat paradoxically, it is precisely the accumulating cost incurred by the *get* refuser for refusing to negotiate that can bring him to the negotiating table, whereas the absence of a similar accumulating cost in some of the cases of nuisance does not serve to encourage PJB. In other words, increasing the transaction costs in the case of refusal to negotiate is likely to cause the tortfeasor to begin negotiations in order to reduce costs and minimize damages, even to initiate them after damages have been imposed on him, all the more so if the damages continue to apply in the future. This ongoing cost does not normally apply in cases of nuisance—although it is possible to allocate not only property rights in conflicts between neighbors (e.g., a cease and desist order for stopping the nuisance or an order that allows its continuation),[141] but also damages, including future damages for continued nonremoval of the nuisance, which again is likely to encourage the parties to negotiate in nuisance cases as well in order to reduce rising transaction costs.

Thus, transaction costs in themselves are not a differentiating parameter in cases of animosity following the allocation of rights in court. But accumulating transaction costs, in classic cases of *get* refusal as well as in part of nuisance cases, can become a key parameter in bringing the parties to the negotiating table.

If so, existential rights are more likely to be achieved through PJB than other nonexistential rights.

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141. Indeed, this is what happened in some of the nuisance cases studied by Farnsworth. *See supra* Subpart I.A.

G. Summary

Hostility between any parties to litigation can thwart efficient PJB, or alternatively, result in a determination that under the circumstances it is not efficient to initiate such PJB. One would expect similar outcomes regarding possible PJB in cases of nuisance between neighbors and between spouses in a rift that cannot be mended; in both cases there is deep acrimony that may prevent negotiations because of mutual distaste, even when negotiations could be efficient. The Article explains the difference in the outcomes between the hostile neighbors in Farnsworth's study, who are reluctant to bargain after judgments, and the bitter spouses in cases of *get* refusal, who are ready to bargain and trade the *get* for damages awarded in civil court. The Article tries to reach general conclusions to assist in predicting whether PJB is anticipated in any given case, and in this way to complement both Farnsworth's findings and the classic economic theories.

The Article reached the following inductive generalizations:

- In cases in which there is no special acrimony between parties, there is no reason not to anticipate PJB when it might be efficient to do so, as when transaction costs are low. This is compatible with the basic notions of economists.[142]

If there is animosity between the parties, the situation is different:

- Even high transactions costs, owing to enmity or other reasons, should not deter PJB if the social benefit to the parties involved, to third parties, and to society as a whole are very high.[143]

- Although parties show great distaste toward each other, if the civil litigation is only one piece of a puzzle of litigation that has different aspects and is conducted in various courts, bargaining may be motivated by taking into account the overall picture and future litigation, especially if it is a case of prolonged, multistage litigation.[144]

- Some parties litigate for many years before a single judgment (not even an array of issues), and it is possible that they are worn out by the legal process. This can be yet another reason for not starting negotiations about trading the right after the court

142. *See* Farnsworth, *supra* note 2, at 373.
143. *See supra* Subpart III.A.
144. *See supra* Subpart III.E.

had its say, even if doing so would be efficient, because they are not interested in continuing the litigation.[145]

- If the litigation is over existential rights, there may be additional incentives for negotiating from the personal point of view. Society, from its own point of view, at times prohibits the commodification of this type of right and does not allow trading in it. With regard to the *get*, however, the situation is different. This is probably because the *get* is already being traded routinely in rabbinical courts, and under conditions that are clearly discriminatory against women, so that improving the woman's bargaining position through a civil judgment to enable more equitable negotiating is definitely a social-distributional objective.[146]

- At times there is a difference between the motivation to buy a right and the lower motivation to sell it. It is necessary to examine in which cases both parties are interested in PJB, not only one of them.[147]

- Taking a broader and more general view, it makes sense to avoid generalizations, including general economic arguments according to which in certain types of cases it is always efficient to take a given course of action and not another, as well as behaviorist arguments according to which a given course of action is never efficient. From a cautious perspective it appears that in many cases both approaches make sense and there is no need to rigidly adhere to either one, but to examine in detail when each given outcome is expected. For example, law and economics offers a general menu of expectations rather than a fixed pattern that fits all possible cases.[148]

CONCLUSION

The comparison between the successful PJB in the case of civil actions for *get* refusal and the unsuccessful one in the case of nuisance between acrimonious parties may be explained by the nature of the litigation between hostile parties and the nature of the right to be exchanged in the anticipated transaction. If the relevant judgment is merely part of an ongoing litigation between spouses who litigate various aspects of divorce, maintenance, custody, etc., we expect the parties to overcome their reluctance and try to make the most of the civil action in order to improve their post-judgment terms as much as they can. This may be a sufficient reason for

145. *See supra* Subpart III.E.
146. *See supra* Subpart III.F.
147. *See supra* Subpart III.F.
148. *See supra* Subpart III.C.

bargaining, despite the animosity. By contrast, in the case of a one-time litigation over property rights which are not personal, it is possible that the bitterness of the parties trumps efficiency and spurns bargaining for gains that may be realized by selling the property right.

This possible explanation for the different findings in Farnsworth's study and in intraspousal civil actions (together with other possible explanations) can lead us to the generalizations regarding the likelihood of PJB, not only in cases of nuisances or divorce. Indeed, moving from particular examples to general ones, that is, to categories of cases that resemble those of nuisance and those of *get* refusal, we can use these examples to determine when negotiations are expected following a judgment that allocates the rights, and when they are not.

The objective of this Article was not to show that negotiations in nuisance cases do not take place following the allocation of rights by the court, whereas in *get* refusal cases they do. Clearly, the opposite may be true: a victim of a nuisance who demands a cease and desist order but receives only damages may try to use the compensation to buy the right, and in practice achieve the effect of the cease and desist order through bargaining. There are also cases in which, in practice, compensation paid for *get* refusal is intended for damages proper and not in order to be traded for a *get*.

Therefore, if we generalize inductively, we need to examine not whether the case is one of nuisance or *get* refusal, but what the basic objective of the litigation in the case of deep animosity between the parties is. Is it intended to conduct negotiations or to result in a final allocation of rights? The examples of nuisance and *get* refusal are merely test cases. As such, they can help characterize the groups of cases to which they belong and shed light on the motive for initiating the legal action.

Follow-up studies should be able to provide clear answers to additional questions that can be examined within each category of cases. Among these, the question whether differences exist between cases in which the civil court allocates the right to the damaged party (the victim of nuisance, the spouse refused a *get*, or any other victim) as opposed to those in which the right is allocated to the damager (the causer of the nuisance, the refusing husband, or any other tortfeasor). Perhaps we ought not generalize and talk about negotiations after the allocation of rights in general, but check to whom the right was allocated by the court, and the extent to which it affects, if at all, the chances for negotiations after the allocation of rights, in all categories of cases, and whether categories of cases differ in this matter. If they do, the question arises whether it is possible to explain the differences and to add parameters that would predict when PJB is expected and when not. But this is the subject of a different, probably empirical, study.

Furthermore, it is possible that just as the comparison made in this Article between two different cases—nuisance and *get* refusal—produced intriguing insights, a comparison between these two cases and others from other areas of law, when deep animosity between the parties is or is not present, will result in a list of additional parameters and even more accurate characterizations of cases in which PJB is more or less to be expected.

In any case, it seems that the classic economic approach of Coase and of Calabresi and Melamed is too general. It does not distinguish between cases in which it is less efficient to negotiate after a judgment that allocates the rights and those in which, despite efficiency in principle, the parties choose not to negotiate (or cases in which it may be efficient not to negotiate). Moreover, it is possible to state that even if Farnsworth's criticism of the classic economic approach is accurate in nuisance cases, one should not generalize his findings by claiming that cases of deep animosity between the parties prevent bargaining (and indeed, we have seen that there are cases in which the result happens to be the reverse).

Therefore, the Article formulated general conclusions about conditions in which parties negotiate after judgment and those when they do not and explored some reasons for the differences between the two cases. Beyond the theoretical importance of characterizing the groups of cases and dividing them into those in which PJB is expected and those in which it is not, there is also a practical benefit to the enterprise. A practical implication may be the possible influence of PJB on the strategy followed by the parties, the lawyers, and even the judges. All the parties involved would know in advance how to address cases in which it makes sense to encourage PJB and those in which there is no likelihood for such negotiation to take place, and where the allocation of rights by the court appears to end the case as well as the relations between the parties. When PJB is anticipated, even between hostile parties, it may be prompted by lawyers and judges, and can influence the decision of the party whether to bring the action or not. The outcome may be different if PJB between hostile parties is less likely to happen and the judgment is likely to be the final interaction between the parties. In such cases, all the parties involved must take into account that the judgment will be the last chance for interaction between them, and their rights and interests will be fully expressed in this procedure. For example, knowing that the chances for PJB are quite small, the lawyers may choose a less delicate approach vis-à-vis the other party. When more bargaining is anticipated, the parties may choose a milder approach toward the other party, and may even elect to renounce one procedure for strategic considerations of future ones. Naturally, the lawyers may choose an aggressive approach even in the case of ongoing negotiations for different strategic reasons. In cases of ongoing litigation between repeat players and in cases of personal and existential rights, the parties can overcome their

mutual distaste and bargain. Furthermore, in this case the judge can be induced to refer the parties to extralegal, ADR procedures and to suspend the legal procedures until the outcome of the ADR becomes clear.[149] By contrast, PJB between hostile parties is less likely to occur in cases of a one-time litigation between one-shotters and when nonexistential rights are at stake.

Farnsworth asks to what extent similar attitudes toward cash exchanges exist in other nonmarket contexts.[150] The issue of civil actions for *get* refusal answers this question at least regarding one area outside of nuisances, providing yet another glimpse at the Cathedral. It also helps pinpoint the cases in which PJB, even between hostile parties, is likely to be induced by lawyers and judges and those in which it is not.

IV. A CONVERSATION WITH THE HONORABLE PROFESSOR GUIDO CALABRESI[151]

A. Possible Implications of the Calabresi and Melamed Framework

Calabresi thinks that it is always nice and sometimes even surprising to see the endless spectrum of the four rules.[152] He thinks that the reason for the intensive discussions on the four rules is that from all the things he has written, it was the least fully developed. He could not imagine that it would be implemented in fields like religious family law, law and religion, *Shari'a* law, and Jewish law.

Many articles tried to implement cases and ascribe them to one of the four rules, and some even presented new rules (rules five and six).[153] Calabresi thinks rule two—the liability rule in favor of the damaged party—is indeed as good a way of defining intrafamilial civil actions for practices that are legitimate under religious family law, although maybe not the only way to do so.

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149. Shmueli, *supra* note 125, at 233–39 (discussing the use of quasi-mandatory extrajudicial processes).

150. Farnsworth, *supra* note 2, at 421.

151. This Part is based on a series of interviews, including Interview with Judge Calabresi, Senior Judge, Court of Appeals for the Second Circuit, in New Haven, Conn. (Feb. 13, 2015); Interview with Judge Calabresi, Senior Judge, Court of Appeals for the Second Circuit, in New Haven, Conn. (Sept. 9, 2014); Interview, Judge Calabresi, Senior Judge, Court of Appeals for the Second Circuit, in New Haven, Conn. (Apr. 18, 2014).

152. *See supra* Subpart III.D.

153. *See, e.g.*, Ian Ayres, *Protecting Property with Puts*, 32 VAL. U. L. REV. 793, 795–97 (1998) (presenting rules five and six); James E. Krier & Stewart J. Schwab, *Property Rules and Liability Rules: The Cathedral in Another Light*, 70 N.Y.U. L. REV. 440, 470–73 (1995) (describing the "double reverse twist," which reverses the reverse damages, as an alternative to rule four); *see also* Ronen Avraham, *Modular Liability Rules*, 24 INT'L REV. L. & ECON. 269, 272 (2004) (summarizing the rules of the Calabresi/Melamed framework).

The four rules involve the possibility of protecting the same legal entitlements, sometimes via a primary remedy and sometimes via a secondary remedy. Using rule two we can explain a situation where the plaintiff cannot achieve the primary remedy of the status, namely to be married again or to divorce, and the tortfeasor is not compelled to cease his activities. Thus, in the cases of the intrafamilial civil actions for *get* refusal, the damaged party is not provided the main remedy she seeks, and therefore pleas for a secondary remedy of damages. Here, the primary remedy is in family law, and the secondary remedy is in tort and contract law. As explained above, in the case of the *get* refusal, it is not the end of the story. Civil (tort and contract) law tries to address the "dead end" in religious family law in current cases, by trying to cause the husband-defendant to reconsider his tortious act and incentivize him to sell the *get* in exchange for his wife's concession of the damages.

In terms of the Calabresi/Melamed framework, we may want to say regarding the liability rule—not like most people say, and that may also include Calabresi and Melamed originally—that it is not simply there to mimic or mirror the market (i.e., to say what is a market price and to do so when there is no market).[154] The sizes of damages that are given are not by any means necessarily or desirably what a market price would be if there was a market. One of the reasons for the liability rule that is given is that we cannot or do not have a market here, so we want to do the equivalent of what would be in a market. You cannot go out and negotiate with everybody who is going to hit you with a car, so we simulate what a market price would be. That is neither empirically nor theoretically true, that is, there are certain situations where the damages given are meant to be as close to what a market price would be.[155]

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154. More accurately, it determines the market price that would have been present had a free market been possible. *See* Guido Calabresi, *A Broader View of the Cathedral: The Significance of the Liability Rule, Correcting a Misapprehension*, 77 LAW & CONTEMP. PROBS., no. 2, 2014, at 1, 5 n.20 (referencing Hylton, *supra* note 5, at 980); Eugene Kontorovich, *The Constitution in Two Dimensions: A Transaction Cost Analysis of Constitutional Remedies*, 91 VA. L. REV. 1135, 1143–44 (2005); Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1864 (1987).

155. Calabresi, *supra* note 154, at 5–6 ("[W]here . . . a libertarian market was either not possible or too expensive to justify its use . . . the liability rule was to be employed to bring about the result that the free market would have achieved had it been available. In this view, the liability rule was there to accomplish as nearly as possible what the parties would have done had they been able to contract, to shift entitlements entirely consensually."). The aim of this article was "mainly . . . to correct an error that many system builders have made: that is, of viewing the liability rule . . . as a 'second best' way of mimicking markets when markets 'will not work,' or 'are not available.'" *Id.* at 1. Calabresi focuses there on "how [the] social-democratic way of organizing

But there are other situations where instead the damages that are given come closer to prohibiting the activity. There will be many activities, however, that society ought not to prohibit entirely, though damages may need to be sufficiently high to achieve a strong deterrence. In such circumstances, the liability rule sometimes is used to approximate inalienability to prevent an entitlement from shifting. By assessing punitive damages or extra damages and making them a part of the liability rule, the legal system seeks to make that entitlement almost inalienable without formally forbidding its shift. In essence, these systems operate as punitive damages or runaway juries,[156] and so on. They can play a role when society does not want, on one hand, to confront directly religious practices such as *get* refusal, but on the other hand, does want to deter and set a high price in order to make potential husbands avoid these practices.

But there are other times where we want to induce the entitlement change as with purely emotional damages or solely economic damages,[157] allowing an entitlement transfer below market price. This is the social democracy,[158] the polity deciding whether it wants to further or impede the transfer of the entitlement. Indeed, there are times where society wants to give less than market damages in order to encourage entitlement transfer. The realm of eminent domain expresses this concept in the most dramatic and easiest way.[159] Take, for example, countries that allow takings by eminent domain while compensating only value in use, not market value.[160] This encourages takings of land that are less developed, such as an estate in order to make way for an airport.[161] Conversely, when a private developer was given eminent

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law and entitlements fixes the size of the liability," and analyzes "what the collectivity means to do when it decides the size of the tab to be assessed when entitlements are shifted." *Id.* at 5.

156. That is, where a legal system gives juries free rein to set compensatory damages at levels that are far greater than those that would make the victim whole.

157. *See* DAN B. DOBBS, THE LAW OF TORTS § 302 (2000) (discussing emotional harm); Anita Bernstein, *Keep It Simple: An Explanation of the Rule of No Recovery for Pure Economic Loss*, 48 ARIZ. L. REV. 773, 784 (2006).

158. Calabresi, *supra* note 154, at 5 (arguing that the broad use of liability rule by a society defines that society as social democratic).

159. *Id.* at 10–12 (demonstrating the idea of allowing an entitlement transfer below market price with respect to eminent domain).

160. *Id.* at 10 & n.32 (demonstrating from cases of takings for public purposes in Italy and referring to Giuseppe Franco Ferrari, *Fundamental Rights and Freedoms*, *in* INTRODUCTION TO ITALIAN PUBLIC LAW 255, 271–72 (Giuseppe Franco Ferrari ed., 2008), which discusses the divergence between market value and compensation paid in Italian cases of expropriation).

161. *Id.* (demonstrating from a family experience in Italy of the polity deciding to build an airport and taking lands for this purpose by eminent

domain to take individual properties in eastern Connecticut for redevelopment purposes,[162] the project was heavily criticized as not falling within public purpose. The Supreme Court disagreed with this criticism,[163] but there was substantial public outcry. When the case was before the Supreme Court, Justice Kennedy said, "Wouldn't we feel a lot better in this case if instead of having them pay the market price of the houses, we had them pay three or four times? So we said: Yes, you can do it, we won't prohibit it, but you have to pay more."[164]

The liability rule is actually a middle ground between contract and regulation, and it is a way for a social-democratic state to achieve its policy objectives. So Calabresi thinks these intrafamilial actions can also be an excellent example for this notion. The size of damages is a way of furthering what are the perhaps secular social democratic values without going to the extent of full coercion, which is what alienability or regulation would do, and yet further the desirable values. In this play of the size of damages, one can ask himself whether we want to further certain social goals or to play neutral. One can be religious in a multireligious or a secular society, but then there are costs—although not full costs arising to the level of inalienability—to a person who follows a religion that goes against society's other values. Here, apart from what the market price to the different parties is, there is a value that the polity, the society, gives on whether we want this shift to happen or not. And so it can set the damages with that in mind, both negative and positive.

Hence, the size of the liability rule may be very dramatic and influential, not technical. Moreover, the *get* case makes the costs of activities, as viewed by that society, clear to the people who are performing them. We all tend to underestimate, undervalue, or even ignore costs that we do not bear or that are not spelled out.

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domain); *cf.* Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931, 955–57 (1985) (discussing a few rationales for coercing a specific type of use).

162. Calabresi, *supra* note 154, at 11. Calabresi presents the case of expropriation of private homes in New London, Connecticut to further a redevelopment scheme. *Id.* The public purpose was the commercial improvement and upgrading of the area for the benefit of the city. *Id.* But the immediate beneficiaries of the right to take the property by eminent domain were private developers. *Id.*

163. Kelo v. City of New London, 545 U.S. 469, 489 (2005) (upholding the taking).

164. Transcript of Oral Argument at 22–23, *Kelo*, 545 U.S. 469 (2005) (No. 04-108) ("Are there any writings . . . that indicate[] that when you have property being taken from one private person ultimately to go to another private person, that what we ought to do is to adjust the measure of compensation, so that the owner . . . can receive some sort of a premium for the development?").

Sometimes people who are performing these practices are not just being mean, they do not really understand what the costs of their deeds are. One of the functions of the society is to impose knowledge of costs. We may think in terms of companies that produce products; this is one of the reasons for liability—just to let them know that there are these costs, otherwise they might think it is not terribly important. And especially when these costs are to some extent emotional, social, and so on, as in the case of many intrafamilial torts. It is very hard for people fully to appreciate.

Therefore, in acknowledging a refusal to grant a *get* as a tort, and determining the size of the damages, society may fulfill its important function of letting people know of the emotional and other costs affiliated with these conducts. Indeed, the awareness to the costs of these practices is a very important task of these civil actions.

B. Post-Judgment Bargaining in Cases of Nuisance and Get Refusal: Farnsworth and Shmueli's Approaches

Calabresi believes that the present Article written in response to Farnsworth is an important addition to the literature on PJB.

As mentioned, the liability rule is not simply there to mimic the market—that is to say what is a market price, and to simulate it when there is no market—and actually to point out the market price that would have been present had a free market been possible. If someone thinks of a liability rule that mimics a price and that is set there only to be what a market would be had there been a market, indeed there is a problem to negotiate, as in the situations demonstrated by Farnsworth. But if a liability rule, as a penalty price assessment, is set to mimic the market, we sometimes want this to happen and indeed in these situations people bargain after a judgment is given.[165] Therefore, we can understand that if the liability rule is simply there to mimic the market, then Farnsworth's critique against the classic law and economics literature may be justified. But, if there are different purposes for the liability rule, then the results may be different, based on why we are using the rule. If so, there are situations where what Farnsworth demonstrated indeed happens. In these cases, society is less interested in inducing people to react in a certain way, but in other situations (as in the *get* cases) an assessment is done because people are being induced to do something, as husbands are induced to grant the *get* after the wife is awarded damages in the civil judgment. In *get* refusal cases it seems that the ruling body does not want to

165. Calabresi, *supra* note 154, at 6 (explaining that the liability rule tries to accomplish "as nearly as possible what the parties would have done had they been able to contract, to shift entitlements entirely consensually").

make the *get* alienable as a matter of a direct rule. If so, in order not to make the Jewish marriage void, the price of the assessment is used in order to indirectly achieve the same thing. Instead of inalienability, the damages awarded come closer to prohibiting the activity, although society does not want to entirely prohibit it or make the right inalienable.[166]

By imposing greater than actual damages on a party that refuses to negotiate, we may be creating more than just an incentive and almost an obligation to negotiate. According to Calabresi, Farnsworth claims that we cannot force anyone to negotiate but we do want to create a strong incentive to negotiate, even if the party is angry. It simply costs the angry party too much not to negotiate, but when he enters into negotiation, the negotiation wins out.

Is this considered coercion, which may be a ground for inalienability? Calabresi explains that it depends on what we mean by "coercion." One can coerce a result, or charge so much without coercing that the mere cost makes it very coercive, but nevertheless, this is not the state ordering one to do something. In a way, the state says: "We care enough that you could almost say that the social cost, not necessarily the cost to this individual, is so high that many of us are upset by it, therefore, we charge it to you." This is how traditional economists would tend to view it and say: "Maybe people are hurt." Calabresi does not care which method we choose; either way, we are not coercing because we are not placing a criminal stigma on the person who refuses to do what he must do.

At the same time, Calabresi finds that some scholars who have regarded coercion as an impediment to alienability[167] tend to adopt a position that is too black or white, on or off; either there is coercion or there is not. Susan Rose-Ackerman has shown that inalienability means many things.[168] So does coercion. It ranges from "you must do it or we will give you a penalty that is so great, for example, throwing you in jail, that you really must do it," to saying "you must do it, and you are a criminal if you do not, but the penalty that you pay as a criminal is relatively small, so you may choose to be a criminal and live with the stigma." According to Calabresi, this is still on the coercion side, because we state explicitly that the refuser is violating the law. The next step is to use a negative financial incentive instead: "You do not become a law breaker; you are still a citizen without a stigma, but you must bear the consequences and pay an amount that is going to make it very likely that you will do it, but without outright forcing you." On one hand, the inducement

166. As in the cases of punitive damages or runaway juries. *See supra* note 125 and accompanying text.

167. Shmueli, *supra* note 105, at 75–77 (presenting these opinions and explaining why the *get* is not inalienable).

168. Rose-Ackerman, *supra* note 161, at 931.

to do it is very great, but on the other, one still has a choice not to do it. Calabresi places this case slightly on the liability rule side rather than on the coercion side, but it is a close call. The next step is for society to pay a very large amount to the person who wants to buy you out to make the buyout possible—a sum that he cannot refuse, which is difficult to view as coercion, and which we almost never call coercion. Can you call a very large inducement to do something coercion?

Consider the following carrot offered to the husband: "If you do not grant a *get*, you pay damages. If you do, however, you receive some compensation." That is a sophisticated stick-and-carrot combination because it says "here are your costs up to a certain point, beyond which you create external benefits and deserve compensation for it." In Calabresi's opinion, the idea to define intrafamilial civil actions for practices that may be legitimate under religious family law—actually the "stick"—as an implementation of rule two, that is liability rule in favor of the damaged party, is indeed acceptable and innovative. His idea of the "carrot" is actually a reversed rule two. And to the extent that one causes some damages but also some external benefits if he does the opposite, then one might have this more sophisticated rule two and reversed rule two. Reversed rule two can be relevant especially given the fact that there is no social benefit in the husband's refusal, differently from cases of nuisances, for example, where the tortfeasor may do something to the benefit of the society and not only harm his neighbor. It is with no doubt that making the husband grant the *get*, even while compensating him, increases aggregate welfare. True, we do not generally allow people to retain the external benefits of their tortious acts. Doing so is often difficult, but it may be valuable to say that if one does not do something there are costs, and if one does there are benefits because of what it suggests to others.

Calabresi also notes that there is a difference between coercing or semicoercing a *result* and coercing or semicoercing a *process*. We can say: "Before this happens, you must mediate or negotiate." This happens in labor law;[169] it is coercion to negotiate. The fact that it is found in some laws suggests that it is possible to prevail upon people to participate in a process, although they cannot be dictated what to do once they join. Calabresi suggests that there are situations in which we charge people enough, so while we do not *obligate* them to go enter a process, we *induce* them and give them an incentive to do so. Calabresi thinks it is highly desirable and

169. At times in other areas too, such as family or tort law. *See, e.g.*, Shmueli, *supra* note 125, at 247 (discussing mandatory ADR proceedings in some cases of tort litigation between spouses).

suggests that it may be more likely to be successful than forcing one into the process because he may respond: "Well, all right, they made me do it, I will go, I will look at the person for a moment, and say that I am sorry and I reject it, and go out." But if instead he enters the process because it costs him too much to stay out of it, and to some extent he chooses to do it, the process may be more effective. If we view the situation in this way, we find that the law presents situations in which what is being induced is a negotiation.[170] In some cases, for example in *get* refusal, damages are paid or a person pays to buy the *get*. There may be situations when one is angry with the other party and does not want to talk, but if we think we can get them together to talk, and coerce or semicoerce the process (not the result, though), it may be feasible to do so after a judgment allocating the rights has been given, as shown in this Article.

At times, however, the parties indeed like the outcome of the judgment that allocates the rights, and as Farnsworth shows, they do not want to negotiate, which may affect what they choose to do. In other words, Calabresi thinks that although liability rules may be used in the market, at times people would not be interested in bargaining because they are satisfied with the legal outcome, and as far as they are concerned this outcome is more efficient than bargaining in the market.[171] Therefore, Calabresi finds that we can understand and accept the conclusions reached by both Farnsworth and the present Article.

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170. For example, the contract rule according to which one does not receive a certain level of damages beyond expectation when circumstances have changed; an individual who has made a deal, after which things change and he does not want to comply, may be left in an impossible situation. The rule makes that person try to negotiate. There are some cases in which the other party tries to negotiate when that party would not negotiate in a contract context where the greater than proper damages are given if a person fails to negotiate.

171. *Cf.* R.H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386 (1937) (explaining why people choose to run business rather than trading in the market, although the latter might be sometimes cheaper than the former).

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