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RECOVERY FOR INFLICTION OF EMOTIONAL DISTRESS: TOWARD RELIEF FOR THE *AGUNAH*

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I

In 1994, Avraham and Sarah Cohen were married in accordance with the halakha. Children were born to them. After five years of marriage, tensions between the spouses began to surface, and the couple began to live separately under the same roof. Though the wife desired to engage in conjugal relations with her spouse, her husband willfully and unjustifiably refused to engage in sexual relations with her. For the sake of their children, both husband and wife remained outwardly married, but in actuality lived separately in the marital home for five years.

Given the moribund state of her marriage, in 2004 Sarah Cohen sought a bill of divorce (*get*) from Avraham Cohen, her husband of ten years. Both spouses, being observant American Jews, considered themselves bound as much by Jewish as by civil law. Both appeared before a *beit din*, a rabbinical court, and it was resolved that it was proper that the parties divorce. However, the husband initially refused to give his wife a bill of divorce. According to the halakha, dissolution of the matrimonial bond requires the voluntary agreement of both spouses, and failure of one party to assent to the divorce action precludes execution of the divorce. Coercing a recalcitrant spouse to grant a *get* produces a divorce that is arguably invalid (*get meuse*). Without a valid divorce, neither party may remarry without violating the norms of the halakha.

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As a result, in the case at hand, the wife became an *agunah*, a 'chained woman,' unable to remarry because of her husband's refusal to grant her a *get*. If she remarries without having received a *get* from her husband, she is, in the eyes of Jewish law, an adulteress. Any children born to her from a new relationship will be *mamzerim*, that is, offspring of a prohibited sexual relationship, and thus unable to marry most other Jews.[1]

Outraged and emotionally distraught due to her husband's intolerable behavior during their marriage, Sarah Cohen wants to file a rabbinical court claim against her husband for the infliction of emotional distress during the five years of separation prior to the court's directive recommending divorce. Her experience of mental anguish, she argues, was not the ordinary stress attendant on living in an imperfect world, but severe mental injury. Despite her emotional distress, however, she never utilized the services of a therapist, and thus did not submit a claim for therapeutic expenses. Although not a victim of spousal violence, her husband's insensitivity to her feelings and outrageous behavior inflicted severe emotional distress, she argues, and this distress ought to be sufficient grounds for recovery of damages. Can a psychologically-injured person recover damages when no physical harm accompanies the mental anguish? Prior to the granting of a *get*, can this *agunah* submit a claim against her husband in a rabbinical court for the period of their marriage during which she was precluded from engaging in conjugal relations or might such a course of action be taken as constituting a form of duress that could taint any subsequent get?

In the absence (to the best of my knowledge) of any novella, codified law, responsum or published rabbinical court ruling addressing this question, deciding between competing arguments is the decisor's prerogative. As I will show, a fourteenth century responsum by R. Isaac b. Sheshet (Ribash) recognizes such a claim in a ruling later codified as law by R. Meir Halevi Abulafia. I will show that a present-day rabbinical court's authority to address the claim of spousally-inflicted emotional distress can be grounded in various codified rulings and numerous responsa that address defamation of character and broken

1 Maimonides, *Mishne Torah* (henceforth, *Code*), Laws concerning Divorce 10:4; Laws concerning Forbidden Intercourse 15:7, 21; B. Schereschewsky, "Divorce," in M. Elon (ed.), *The Principles of Jewish Law* (Jerusalem: 1975), 414–15. A *mamzer* may marry another *mamzer* or a convert.

engagements, particularly a 1965 rabbinical court decision handed down by R. Joseph Elyashiv, widely acknowledged to be one of the generation's greatest Torah scholars. To establish the legitimacy of accepting a wife's claim for damages due to emotional distress without running afoul of the strictures against coerced divorce (*get meuse*), the positions of R. Solomon Daichovsky, R. Elyashiv, R. Moses Feinstein and R. Shilo Rafael will be adduced. The spectrum of views on this matter attests to the vibrancy of the halakhic process, which does not require us to gloss over differences and force disparate approaches into a Procrustean bed for the sake of forging a neat, coherent and persuasive position. This article will examine the relative strength, effectiveness, and plausibility of each argument applicable to our case, in the hope that these arguments will be tested within the framework of future rabbinical court decisions.

How does the halakha address liability for mental anguish in general, and its emergence due to a husband's refusal to engage in conjugal relations in particular? With these questions in mind, let us consider the following passage tractate Kilayim of the Jerusalem Talmud:

> If the owner struck opposite the eye [of his Canaanite slave] and blinded him, opposite the ear and deafened him, the slave does not go free . . . the slave could have escaped [before the blow]. The proof that this is correct is that it is stated: if he held him [preventing him from escaping], he is liable.[2]

The rule of non-liability in the case of fright and shock is predicated on the fact that the slave did not attempt to escape the consequences of the blow. As such, if he is held down by the injurer (*mazik*), and cannot escape the blow's impact, the injurer is liable. Commenting on this passage, R. Moses Margaliot concludes that if the owner holds him and frightens him, he is liable.[3] In his opinion, though frightening is equivalent to physically holding him down, liability for the ensuing mental anguish is incurred only if the injurer holds down the slave, and not if he merely frightens him. R. Meir Halevi Abulafia, the Rama, disagrees,

2 jKilayim 8:2. See I. Haut, "Recovery for fright, shock and emotional distress under Jewish law and some comparisons to common law," 14 *Jewish Law Annual* (2003), 121, 129.

3 *Pnei Moshe*, ibid. s.v. *teida shehu ken*. In fact, jBaba Kama 8:6 provides for recovery for embarrassment (absent physical impact) if the injured party is a great scholar. Such a provision is not found in the Babylonian Talmud.

arguing that if the injury could not have been prevented, there is liability for fright and shock even absent direct physical contact.[4]

On the other hand, the Babylonian Talmud states:

> Come and hear. If he hit him in the eye and blinded him; or on his ear and deafened him; the slave goes out free thereby. If he struck an object that was opposite his eye and blinded him [e.g., pounded on the wall opposite the slave's eye, causing him to become blind]; or if he struck an object that was opposite his ear and deafened him, he does not go out free. Is not the reason for this rule that assessment [of the plausibility that injury was caused by the blow] is required [and it is assumed that the said activity might not have caused the injury to the slave]? No. The absence of tort liability is predicated on the fact that he [the slave] frightened himself. As it was taught, if one frightens another he is not liable by the law of man, but he is liable by the law of heaven. If he blew [with a trumpet or the like] into his ear and made him deaf, he is not liable. But, if he held him and blew into his ear, and made him deaf, he is liable.[5]

Absent physical contact and physical damage, one who frightens another does not thereby incur liability. Relying on the talmudic rationale that the one who is frightened is a rational person and scared himself, the Rif,[6] R. Nissim,[7] Rashi,[8] R. Menahem Meiri,[9] R. Shimon b. Zemah Duran,[10] and R. Moses Feinstein[11] all conclude that every individual who ventures out into the world assumes the risk of injury, exposes himself to unexpected trauma,[12] and should try to be more thick-skinned rather than burden others with responsibility for his emotional weaknesses; failure to inure oneself to the routine stresses of existence bars recovery for any ensuing psychological injury. Translating this position into contemporary legal terminology, non-liability is due to contributory negligence. Hence, unless the fright

4 *Shita Mekubetzet*, bBaba Kama 91a, s.v. *uleinyan psak.*
5 bBaba Kama 91a; see also bBaba Kama 56a, bKidushin 24b. The disparate approaches of the two Talmuds are noted in *Hazon Yehezkel*, tBaba Kama 6:5.
6 Rif, bKidushin 9a.
7 Ran on Rif, bKidushin 9a, s.v. *keivan debar daat*
8 Rashi, bKidushin 24b s.v. *shani adam.*
9 *Beit Habehira*, bBaba Kama 56a.
10 *Responsa Tashbetz*,vol. 2, #114
11 *Igrot Moshe*, HM, vol. 1, #98
12 Though this rationale is offered by the Rama, as quoted in *Shita Mekubetzet*, Baba Kama 277, nevertheless, as the *Tosafot* on bBaba Kama 91a s.v. *lo* aptly note, tBaba Kama 9:26 contends that non-liability for mental anguish in the absence of physical impact is rooted in a *gezeirat hakatuv*, i.e. a Torah decree, and is not due to the victim's lack of self-control.

and shock was caused by physical impact, the injurer is exempt from liability.[13] The Maharshal[14] and the Rabad[15] argue that the fright and shock could not have caused the injury, since the generally accepted assessment (*omed*) is that that fright and shock do not suffice to cause emotional scarring. Others, such as the Rosh,[16] the Tur,[17] the Mordekhai,[18] and R. Meir of Rothenburg[19] argue that there is no liability for an injury that is caused indirectly. In talmudic parlance, this is a case of *gerama*, and the principle is, '*gerama benezikin patur*,' that is, there is no liability for indirectly-caused damage.

What emerges, then, from the Babylonian Talmud, is that non-liability for emotional stress is based on one of the following rationales: it falls into the category of *gerama*; there is no connection between the act and the injury; one must exercise emotional self-control with regard to the stresses of life.[20] A minority view, reflected in jKilayim and the Rama's position, claims that even without physical contact, there may be liability for emotional stress.

The common denominator of all these approaches is that shouting that engenders fright and shock in and of itself is an act (*maase*) that generates legal liability if accompanied by physical contact. In the absence of physical contact, the act of shouting only generates liability for fright and shock according to the laws of heaven. Hence, though a husband's refusal to engage in conjugal relations with his spouse may generate feelings of emotional stress, the absence of an act causing these feelings precludes liability even according to the laws of heaven. Hence with respect to indirect injury (*garmi/gerama*), the strict law of damages does not mandate recovery for emotional stress.[21]

13 Rashi on bBaba Kama 56a s.v. *hamavit; Code*, Laws concerning Wounding and Damaging 2:7; *Tur*, HM 420:22; *SA*, HM 420:25.
14 *Yam Shel Shlomo*, bBaba Kama 8:38
15 *Hidushei Harabad*, Baba Kama (Atlas edition), 223.
16 *Piskei Harosh*, Baba Kama 2:17.
17 See *Tur*, n. 13 above.
18 *Mordekhai*, on bBaba Kama 91a, sec. 95.
19 *Responsa Maharam of Rothenberg* (Prague ed.), #300.
20 For an elucidation of these views, see Haut, n. 2 above, 121.
21 E.g., liability by the law of heaven for indirectly-caused damage is predicated on an act's having been carried out, see *Responsa Tashbetz*, vol. 2, #114; *Responsa Rashbash*, #509. Hence, absent any act, there are no grounds for putting forward a claim. However, it could be argued that a claim could be put forward by adducing other principles relevant to damages, e.g., "indiscernible damage" (*hezek sheino nikar*).

II

Having discussed the black-letter law concerning damages, and having attempted to delineate the rules governing recovery for mental anguish, let us consider another dimension of recovery for mental anguish. Though the halakha mandates that those who decide legal questions do so in compliance with rules rather than on the basis of whim or bias, it countenances and indeed encourages the exercise of judicial discretion. Judicial discretion, a familiar notion in both halakhic and western legal thought, can be defined as the judge's "power to choose between two or more courses of action each of which is thought of as permissible."[22]

Addressing this second layer of halakhic law of damages, R. Aaron Schreiber declares:

> Jewish law, with its emphasis on rules, might mistakenly be understood as being positivistic and ignoring policy. It might be thought that a legal decision, especially by a court or other religious legal authority, is (and should be) reached on any issue of law simply by determining the applicable legal doctrines and principles. These would then be analyzed logically and deductions would be made therefrom until a "legal" decision would be reached. The legal decision would be dictated solely by the application of deductive logic to these *a priori* legal rules and principles, without regard to policy. . . . Policy, societal conditions and context would be overtly ignored.[23]

In fact, however, as we will show, the decisors sought to address the issue of recovery for emotional stress by moving beyond the formal rules of damages and invoking the arbiter's discretionary capacity, and specifically, the capacity to exercise 'emergency powers.'

Prior to the mid-fourth century CE, arbiters who had received ordination (*semikha* — 'the laying on of hands') were authorized to resolve both ritual and civil matters, including damages by individuals. Compensation is paid to an injured party for five elements of damage — *nezek* (loss of capacity to work), *tzaar* (pain), *ripui* (healing, viz., medical expenses), *shevet* (loss of income during convalescence), and *boshet* (shame and embarrassment) — will be assessed by the arbiter.

22 Henry Hart, Jr. and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge MA:1958), 162. See also Aharon Barak, *Judicial Discretion* (New Haven: 1989), 7–9.

23 Aaron Schreiber, "Positivism, policy, morality and discretion in Jewish law," 19 *Dine Israel* (1997/1998), 5, 9.

Imposition of these payments is conditional on the injury's having been caused by a physical act. After the lapse of the ordination process in the fourth century CE, non-ordained arbiters, namely, community leaders and lay arbiters (*beit din shel hedyotot*), were granted authority to resolve cases involving common injuries that caused the injured party a financial loss. However, the compensation for such bodily injuries that could be imposed by the said arbiters was limited to two elements — loss of income and medical expenses.[24] By law, then, claims of liability due to shame and embarrassment (*boshet*), for example, though arising from bodily damage ensuing from a physical act,[25] could not be submitted to a non-ordained arbiter for adjudication, since there was no loss of income.

Though certain matters are excluded from the jurisdiction of non-ordained arbiters, nevertheless, pursuant to normative halakha, ordained and non-ordained arbiters are empowered to exercise **exigency** jurisdiction both in matters of civil damages such as *boshet*, and in matters involving capital punishment,[26] under the talmudic rubrics of *"beit din makin veonshin shelo min hadin"* (a court may mete out punishment not prescribed by the Torah),[27] *lemigdar milta* (protective measures),[28] and *"hashaa tzerikha lekakh"* (the times requires it).[29] The arbiters' punitive powers are not limited to criminal matters, then, but encompass civil matters as well. To promote broader policy goals,

24 *SA*, HM 1:1–2; *Bah*, HM 1; *Shakh*, HM 1:7. Cf. *Piskei Harosh*, Baba Kama 8: 2.

25 *SA*, EH 83:1. Moreover, in cases of assault where no injury resulted, there may be liability for *boshet*, but there is no legal liability in the absence of a physical act of assault, see mBaba Kama 8:6 and *Rema*, HM 420:43.

26 *Responsa Rashba*, vol. 1, #612: vol. 3, #109; *SA*, HM 2:1; Rema, HM 2:1. Numerous responsa that take this position are cited in Aaron Schreiber, *Jewish Law and Decision-Making: A Study through Time* (Philadelphia: 1979). But cf. *Nimukei Yosef* on *Rif*, bBaba Kama 96b, bSanhedrin 52a; *Hidushei Haran*, bSanhedrin 46a; *Urim Vetumim*, HM 2:2, which maintain that given the demise of ordination, the court's jurisdiction is limited to imposing non-capital punishment.

27 bJebamot 90b; bSanhedrin 46a.

28 bJebamot 90b

29 bJebamot 90b. The phrase *"horaat shaa"* (temporary measure) is often invoked in such a situation, see Menachem Elon, *Jewish Law: History, Sources, Principles* (Philadelphia: 1994), 533–36; H. Ben-Menahem, *Judicial Deviation in Talmudic Law* (Chur, Switzerland: 1991), 173–79.

arbiters are authorized, in certain circumstances, to deviate from the letter of the law and impose actual and/or punitive damages.[30]

> Some of the basic policy goals in Jewish law as expressed in broad classifications at a high level of abstraction, are: to bring the spirituality and holiness to God down to earth and, through operative principles, to inculcate them into mundane matters and conduct in the finite world; to sanctify God's name . . . to preserve life and the law . . . to act for the benefit of individuals and society, by not harming them and making life pleasant; to preserve modesty and morality . . . to improve society by correcting inequities . . . to maintain public order. . . .[31]

Granting the arbiter discretion allows his decisions to be shaped by the aforementioned goals. In effect, the halakhic system encompasses exigency law, a juristic technique for effectively resolving problems for which the strict law has no efficient solution, so that the covenantal faith community's basic objectives can be realized.

But what constitutes an "exigency situation"? Three approaches to its definition can be found in the writings of the Later Authorities:

> Falk,[32] in his commentary on Karo, attempts to delineate express guidelines. He states if all the people are not dissolute as to certain matters, an individual may not be punished under this authority unless he is a habitual wrongdoer. . . . Shakh[33] views this analysis as an appropriate restatement of the principles as derived from the Talmud and as codified by the Tur. Falk's approach is cited with approval by . . . Netivot[34], and Beer Hagola[35] . . .
>
> Shaar Ephraim[36] . . . held that only if many people in the community are engaging in this type of conduct may an individual be punished.
>
> This opinion . . . is in conflict with the holding of Falk and Maharam[37]. For Falk holds that even where the majority of the people are not dissolute, if the individual is dissolute he may be punished by the court invoking its extrajudicial power. And Maharam holds that even if the community is

30 There is ongoing debate among contemporary scholars as to whether this extra-halakhic capacity is legislative or judicial in nature. My view is that the latter approach is the correct one; see H. Ben-Menahem, ibid., 146–48. Cf. Menachem Elon, ibid., 515.

31 See Schreiber, n. 23 above, 10, and see also J. David Bleich, *Contemporary Halakhic Problems*, vol. 4 (NY: 1995), xv–xix.

32 *Sema, SA*, HM 2:2.

33 *Shakh, SA*, HM 2:2.

34 *Netivot Hamishpat, SA*, HM 2:1.

35 *Beer Hagola, SA*, HM 2.

36 *Responsa Shaar Efraim*, #72.

37 *Responsa Maharam Lublin*, #138. See also *Kneset Hagdola*, HM 2:2.

> not dissolute or the individual is not dissolute, if a court feels that failure to punish this person may cause other people to feel that they might act in a similar manner with impunity, the court may impose extrajudicial sanctions on the individual. In short, as enunciated by Maharam, extrajudicial authority may be invoked by a court in any situation when it feels that sanctions are necessary to deter potential misconduct. Shaar Ephraim, by contrast, would limit the court's authority to situations where the community has, in fact, engaged in such misconduct.[38]

On all three views — namely, the views of R. Joshua Falk, the Shaar Efraim (R. Jacob Katz, 1616–1678) and the Maharam of Lublin — if the individual is a habitual wrongdoer with regard to a certain practice, or has frequently committed a transgression in public,[39] and many members of the community, by engaging in this misconduct, have shown themselves to be dissolute (*parutz baaveirot*), an emergency exists if the individual will continue violating the halakhic norm unless he is punished.[40] Under these circumstances, a rabbinical court may exercise extrajudicial authority (*lemigdar milta*) as a deterrent, to forestall the danger that others will emulate the wrongdoer's behavior if it goes unpunished.

Who is authorized to impose such extrajudicial sanctions? What types of non-ordained arbiters possess such authority? On the view of the Rosh,[41] R. Joseph Caro,[42] and the Maharshal,[43] such authority may be exercised by the greatest scholar of the generation. R. Joel Sirkes (the Bah), in the name of R. Yeruham,[44] holds that the greatest scholar of the generation may impose these extrajudicial sanctions even if he has not been accepted by the community. The Meiri,[45] R. Joseph Caro,[46]

38 E. Quint and N. Hecht, *Jewish Jurisprudence: Its Sources and Modern Applications*, (Chur, Switzerland: 1980), 174–75.

39 *Responsa Shvut Yaakov*, vol.1, #136.

40 This term is used in *Tur*, HM 2 and *SA*, HM 2:1. According to R. Jacob Katz, if the community is not dissolute, a court may not exercise such sanctions against a habitual wrongdoer, see *Responsa Shaar Edraim* #72 (43b).

41 *Piskei Harosh*, Baba Kama 9:5. See also *Beit Habehira*, bSanhedrin 52b; *Bnei Shmuel*, HM 2:2.

42 *SA*, HM 2.

43 *Yam Shel Shlomo*, Baba Kama 9:7. According to the Maharshal, in such matters, the scholar serves as a member of the community court.

44 Bah, *Tur*, HM 2.

45 *Beit Habehira*, bBaba Kama 94b.

46 *Beit Yosef*, *Tur*, HM 2; *SA*, HM 2:1. See also *Bnei Shmuel* HM 2:2.

R. Moses Isserles (the Rema),[47] R. Mordekhai Jaffe,[48] R. Joshua Falk,[49] R. Jacob Lorberbaum of Lissa,[50] and R. Jehiel Michel Epstein,[51] claim that exigency rulings can also be handed down by communal leaders, generally laymen, who have been appointed arbiters by their community (*beit din shel hedyotot*).

Given that the law authorizes such exigency rulings, some contend that laymen are empowered to impose severe penalties. Indeed, during the thirteenth and fourteenth centuries in the Spanish provinces of Catalonia, Majorca and Valencia, Jewish communities had an institution known as the 'board of inquiry into transgressions' (*berurei aveirot*). Authorized by the king of Spain, these lay courts would contract communal loans, sell communal property, render decisions regarding financial matters (such as taxation and wills) and personal status claims, and in certain communities even had the power to administer oaths to litigants and witnesses, and excommunicate offenders. Moreover, as numerous responsa by the Rashba, R. Isaac b. Sheshet and others attest, the *berurei aveirot*, as custodians of religious rectitude and order were authorized to mete out criminal and monetary sanctions for ritual and moral offenses that were eroding the communal fabric. As grounding for the institution of *berurei aveirot*, the halakhic authorities invoked the classic talmudic sources that provided for exigency authority in these matters.[52] Indeed, no rabbinical discussion of the legitimacy of criminal sanctions and fines for civil injuries so levied was deemed necessary.[53] Following in this tradition, R. Zemah b.

47 *SA*, HM 2:1.

48 *Levush Ir Shushan*, HM 2.

49 *Sema*, *SA*, HM 2:9.

50 *Netivot Hamishpat*, *SA*, HM 2:5.

51 *Arukh Hashulhan*, HM 2:2. See also *Responsa Tashbetz*, vol. 1, #161; *Responsa Binyamin Zeev*, #132, #303. On a present-day proposal to utilize the Knesset as a communal institution to nullify marriages, see Berachyahu Lifshitz, "Have the rabbis neglected marriage matters?" (Hebrew), *Kerem B'Yavne Jubilee Volume* (2004), 314. Though generally appointed by the community at large or by communal representatives such as "the seven elders of the city," such panels may be appointed by the majority of the rabbis in a given town, see *Responsa Igrot Moshe*, HM vol. 1, #13; E. Schlesinger, "The halakhic validity of the state-recognized rabbinical courts" (Hebrew), 45 *Tora Shebeal Pe* 45 (2005), 165, 171 [R. Elyashiv's opinion].

52 *Responsa Rashba*, vol. 3, #385,393; vol. 4, #311; *Responsa Attributed to Nahmanides*, #279; *Responsa Ribash*, #265; *Responsa Ran*, #41.

53 *Responsa Rashba*, vol. 1, #1187, vol. 3, #318.

Solomon Duran,[54] R. Joshua Falk,[55] *Halakha Pesuka*,[56] R. Zalman Nehemiah Goldberg,[57] and others[58] recognize the authority of lay communal arbiters to impose these types of sanctions in emergency situations.

Whether a contemporary rabbinical court has the extrajudicial authority to impose a criminal or monetary sanction, such as punitive damages, on a habitual wrongdoer who is part of a dissolute community where many engage in the same improper behavior will depend on whether a non-ordained panel of arbiters has the jurisdiction to wield this type of authority. The authority of a non-ordained panel of arbiters is predicated on both parties' willingness to submit their claims to this body. If one party refuses to accept the authority of a communal rabbinical court, the signing of an arbitration agreement (*shtar borerut*), which requires both parties to submit to the panel's authority, provides a way to resolve a claim by imposing damages.[59]

III

Let us now revisit our hypothetical case of a husband's denying his wife conjugal relations and thereby causing her mental anguish. Assuming a contemporary rabbinical court is empowered to have recourse to extrajudicial authority in exigency situations, it must be

54 *Responsa Yakhin Uboaz*, vol. 1, #126. See also *Responsa Rashbash*, #211.

55 *Prisha, SA*, HM 2.

56 *Halakha Pesuka*, HM 2:1, n. 13. See also *Mishpatim Leyisrael*, 42–43, 59–60.

57 Hanina Ben-Menahem, "Non-legislative punishment" (Hebrew), *Mishpetei Eretz — Jurist, Jurisdiction, Jurisprudence* (Hebrew), (Ofra, Israel: 2002),152, 159 n. 17.

58 *Beit Habehira*, bBaba Kama 94b; *Responsa Rosh*, rule 100:9; *Mordekhai*, Gitin 384; *Responsa Terumat Hadeshen*, #307; *Responsa Radbaz*, vol. 3, #480; *Nahalat Shiva*, Responsa, #66; *Divrei Geonim* 34:4. Though none of these sources explicitly endorse the said position, their argumentation and use of the term "court," supports this conclusion. For an explicit endorsement, see *Kneset Hagdola*, HM 2:19. A contemporary Israeli arbiter recently reached the same conclusion, see R. S. Daichovsky, "Monetary enforcement measures against parties who refuse to grant a get" (Hebrew) *Tehumin* 26 (2006), 173, 177.

59 There may be courts that subscribe to the view that extrajudicial powers are reserved solely for the greatest scholar of the generation or for communal officers who have been appointed as arbiters, yet nevertheless allow for tort recovery on the basis of the signing of an arbitration agreement (*shtar borerut*).

decided if the circumstances in question indeed constitute an exigency situation. Does a husband's refusal to engage in sexual relations constitute wrongdoing of the sort that creates an exigency situation that may entitle the victim to damages? Consider the following talmudic dictum:

> R. Eliezer b. Jacob said: A man must not marry a woman if it is his intention to divorce her, as it is said, "Devise not evil against your neighbor, seeing he lives securely by you" (Prov. 3:29).[60]

As the *Sefer Hahinukh* explains, in such a situation, the wife is considered a married woman, yet the husband views her as a divorcee.[61] Entering into a marital agreement requires both spouses to have the same mental intent vis-à-vis the marriage, viz., the intention to remain married to each other. A marriage that is factually dead, that is, where the spouses do not engage in conjugal relations, yet the husband either remains under the same roof, moves out of the marital home while remaining formally married for the sake of the children (or other reasons), or refuses to grant a *get*, is deemed a violation of the law by Maimonides, the *Tur* and the *Shulhan Arukh*.[62] R. David b. Samuel Halevi interprets the aforementioned talmudic dictum as follows: "Even though it is permissible to "devise evil," that is, to divorce one's wife, in accordance with the law . . . he who desires to do so should do so [soon], and not delay the divorce. Therefore the verse states, "he lives securely with you" — this is the essence of the prohibition.[63]

That is, a husband's unwillingness to have sexual relations with his wife, whether due to a personal vendetta, sheer hatred of his wife, or a desire to gain financial concessions with respect to a divorce he is contemplating, involves a violation of the injunction "devise not evil against your neighbor, seeing he lives securely by you."[64] The psychological consequences of violation of this norm, namely, mental anguish

60 bJebamot 37b; bGitin 90a.

61 *Sefer Hahinukh*, precept 455.

62 *Code*, Laws concerning Forbidden Intercourse 21:28, Laws concerning Divorce 10:21; *Tur*, EH 119; *SA*, EH 119:1–2; *Helkat Mehokek, SA*, EH 119:1; *Taz, SA*, EH 119:2.

63 *Taz*, ibid.

64 *Code*, Laws concerning Divorce 10:21; *Tur*, EH 119; *SA*, EH 119:1. See also *Beit Shmuel, SA*, 119:1; *Pri Hadash, SA*, EH 119:2. But cf. *Helkat Mehokek*, n. 62 above, and *Mishne Lamelekh, Code*, Laws concerning Divorce 10:21, which question this position.

(*tzaar*), are recognized by the halakha. Denying one's wife conjugal relations during an ongoing marriage where no divorce is impending, or she is unaware of any contemplation of divorce on her husband's part, prevents her from engaging in sexual relations with someone else, as she remains a married woman. The mental anguish involved in this situation to some extent parallels that facing the *agunah*, the 'chained' woman who is prevented from remarrying because of her husband's refusal to grant a divorce.[65]

Among a husband's monetary obligations and rights vis-à-vis his wife are the obligations to provide maintenance, pay for ransom and burial expenses; and the rights to articles his wife finds, and to be her sole heir.[66] Another halakhic consequence of marriage is the establishment of spousal property relations. One of the rules governing these relations is that "in financial matters (*mamon*), one's stipulation is valid." That is, in monetary matters such as spousal support, one may make stipulations contrary to biblical law.[67] However, where no such private stipulations have been agreed to by the couple, the biblical rules are default rules that govern the marital relationship. Do private arrangements extend beyond the realm of monetary affairs into the sphere of personal matters? Can a husband stipulate that he is under no duty to have intercourse with his wife? If the husband stipulates that he is under no obligation to engage in conjugal relations, such a stipulation is invalid.[68] Expounding the biblical verse "her conjugal rights he shall

65 On defining *tzaar* as emotional anguish, see n. 72 below. Causing such anguish also constitutes violation of the prohibition against causing pain to living creatures (*tzaar baalei hayim*), which applies to human beings as well as to animals, see bBaba Metzia 32b; *Responsa Rashba*, vol. 1, #252, #256, #257; *Drisha, Tur*, HM 272:15; *Sema, SA*, HM 272:13; *Responsa Betzel Hahokhma*, vol. 4, #125; *Responsa Divrei Hakhamim*, YD #1.

In addition to the psychological consequences of a husband's unwillingness to have relations with his wife, the court may declare him a rebel (*mored*), a possible consequence of which is that his wife may be granted an increase in the amount due her from her *ketuba*, see *SA*, EH 77:1; *Rema*, ad loc.

66 *Code*, Laws concerning Marriage 12:2–3.

67 bKidushin 19b.

68 *Tur and Beit Yosef*, EH 88; SA, EH 38:5; *Rema*, ad loc. Cf. jBaba Metzia 7:7; *Tosefta Kifshuta*, Kidushin 3:7, 947–48.

not diminish"[69] and the concept of *shiabud* (servitude) in the realm of conjugal relations,[70] the Netziv, R. Naftali Zvi Judah Berlin, writes:

> Reason tells us that man is so duty bound. It is, as we all know, for this purpose that a bride enters into marriage. . . . Hence, if he denies her sexual relations, she is deprived of her right. Sexual fulfillment is primarily the husband's duty and the wife's entitlement. Sexual relations are the essence of marriage and depriving a woman of this right creates *'tzaar gufa,'* that is, emotional pain.[71]

69 Exodus 21:10. According to some decisors, this injunction is contravened even if the husband, by refraining from relations, unintentionally causes his wife pain, see *Shita Mekubetzet*, bKetubot 48a, s.v. *haomer* (in the name of the Ritba); *Responsa Maharam Alsheikh*, #50. But cf. Maimonides, *Code*, Laws concerning Marriage 14:7; *Sefer Hamitzvot*, precept #262; *SA, EH* 76:11; *Responsa Mabit*, vol. 3, #131. On the differences between the view expressed in Maimonides' *Code* and that of the *Shulhan Arukh*, see *Adat Maoz*, EH 2:76:11.

70 In contradistinction to a husband's duty to engage in intercourse, a wife is bound to him (*meshuabedet*), but just as a wife becomes bound to her husband rather than acquiring title to his body, so the husband acquires servitude to her body. See bJebamot 65b; bNedarim 81b; bKetubot 71b and Rashi ad loc. s.v. *hamadir; Hidushei R. Abraham of Montpellier*, bNedarim 15b and Rashi ad loc. s.v. *deamar rav huna; Hidushei Rashba*, bGitin 75a and bNedarim 15b; *Responsa Mahane Hayim*, vol. 2, EH, #44; *SA*, EH 154:6; 1 PDR, 5. On the distinction between servitude and title vis-à-vis marriage, see J. David Bleich, "*Kiddushei ta'ut*: annulment as a solution to the agunah problem," *Tradition* 33 (1998), 90, 116. In fact, implementation of a *kinyan* to establish matrimonial ties articulates the parties' willingness to assume the duties and rights associated with marriage and by no means constitutes evidence that the husband has acquired title to his wife, see *Birkat Kohen*, 101–123; *Tora Temima*, Leviticus 22:11.

71 *Birkat Hanetziv*, Mekhilta de-Rabbi Ishmael, Mishpatim 3 (Horowitz-Rabin edition), 258–59. See also *Shita Mekubetzet* on bKetubot 63a. In fact, should a husband initially fail to address her desire for conjugal relations and then dutifully engage in relations, his behavior is construed as a fulfilment of a religious obligation by way of a transgression (*mitzva haba baaveira*), namely, transgression of the precept "her conjugal rights he shall not diminish" (Exod. 21:10), see *Shita Mekubetzet*, bKetubot 62b s.v. *vekatvu*. Moreover, the withholding of conjugal rights is construed as theft, see *Responsa Noda Biyehuda*, 1st edition, OH #35; *Responsa Minhat Hayim*, vol. 1, EH #18.

See too bJebamot 118a; Rashi, bKidushin 19b; Ran, bKidushin 19b; Rashbam, bBaba Batra 126b; *Taz, SA*, EH 38:7; *Beit Shmuel, SA*, EH 76:7 and *Baer Heitev*, ad. loc; *Levush*, EH 38:5; *Arukh Hashulhan*, EH 38:12. Nevertheless, a wife has no duty to engage in conjugal relations and may consent to

Withholding sexual intercourse (*ona*) causes emotional scarring and may have repercussions for the future of the marriage. This awareness of emotional hurt is underscored in other contexts. For example, the Talmud debates whether, given the tension and mental anguish that arises from spousal conflict, the execution of a divorce is a boon for the wife, or whether, notwithstanding marital tensions, the wife nonetheless prefers the gratification of her bodily desires (*niha degufa*) to divorce.[72] The talmudic conclusion is "it is better for two to dwell

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forgo her conjugal rights, provided her husband's obligation to procreate has been fulfilled, see *Tur SA*, EH 76:6; *SA*, EH 76:11; *Birkei Yosef*, EH 1:2. She is, however, entitled to change her mind and reinstate her right to conjugal relations, see *Lehem Mishne, Code*, Laws concerning Marriage 15:1; *Responsa Mahari Weil*, #1. Cf. *Responsa Raanah*, vol. 2, #44.

Many decisors have ruled that a husband's failure to engage in sexual relations involves contravention of a biblical prohibition ("her food, her clothing, and her conjugal rights he shall not diminish" [Exod. 21:10]), see *Code*, Laws concerning Marriage 12:2; *Tur*, EH 69; *Beit Yosef*, ad loc. According to R. Shimon Shkop, the status of the violation — biblical or Rabbinic — determines whether abstinence from conjugal relations is deemed to create severe emotional distress for the wife. R. Shkop's contention has been explained as follows: "All biblical prohibitions are proscribed because higher wisdom recognizes that this is as bad for Israel as poison, and the fact is that the prohibition and the warning exist because the matter is bad. . . . And Rabbinic prohibitions are the exact opposite. The matter is good . . . and the proof is that given the Torah did not proscribe it — it isn't bad — but rather, the Torah mandated that we listen to the rabbis" (*R. Ḥayim Shmuelevitz Memorial Volume* (Hebrew), [Jerusalem: 1979], 285). See also *Shaarei Yosher*, gate 1, ch. 10. Cf. *Sefer Yereiim* 191 and *Semag*, negative precept 81, which maintain that failure to fulfill this duty violates a Rabbinic prohibition. On the view espoused by R. Shkop, such a violation does not cause the said harm to the wife.

72 bJebamot 118b. The initiation of conjugal relations by the husband is for the wife's pleasure (*simhat ishto*), while a husband's pleasure is a beneficial consequence of imparting pleasure to his wife, see Deuteronomy 24:5 and Rashi ad loc.; bPesahim 72b; Rabad, *Baalei Hanefesh*, Shaar Hakedusha; R. Isaac of Corbeil, *Smak*, positive commandment 285. This need to instill joy applies to a pregnant and/or barren wife as well. As R. Moses Feinstein notes, "conjugal relations do not depend on the possibility of conception, but are part of a husband's obligation toward his wife, to give her pleasure and not cause her pain," see *Igrot Moshe*, EH vol. 1, #102. See also *Magid Mishne, Code*, Laws concerning Marriage 15:1.

If it is suggested that the proscribed pain is physical pain rather than emotional anguish, the halakhic literature indicates otherwise. The subtext to the duty to engage in sexual relations is reflected in the requirement that

together than to dwell alone" (*tav lemeitav tan du milemeitav armelu*). The underlying idea here is that a woman has a compelling desire for marriage, such that she will even accept a degree of routine quarreling and marital strife. The assumption is that, given that a woman's need for sexual relations through the husband's fulfillment of the "conjugal rights" precept is an existential fact and not conditioned by contingent social or cultural factors, a woman prefers to remain married.[73] Hence, a husband's refusal to engage in sexual relations undermines his wife's ongoing emotional stability.[74]

However, a wife may seek to opt out of a deteriorating relationship where the spouses do not engage in conjugal relations though residing under the same roof, or while de facto separated from each other. The husband's withholding of a *get* under these conditions results in an untenable situation:

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a husband refrain from sexual relations with his wife when intoxicated, angry at her, or intending to divorce her, see bJebamot 37b; *SA*, OH 240:3, 10. Similarly, the notion of bringing joy to one's wife entails recognition of the wife's right to emotional integrity and equanimity. Hence, the withholding of sexual relations, unless requested by the wife, is deemed to cause mental anguish, and serves, according to some decisors, as potential grounds for compelling a divorce. In the Maimonidean formulation, it is grounds for the claim 'my husband is repulsive to me' (*mais alai*), see *Code*, Laws concerning Marriage 14:8. Given that most decisors do not endorse this position as grounds for compelling a *get*, my proposal to recognize claims for *tzaar boshet* in cases of spousal refusal of conjugal relations (see below at nn. 167–69) may have the indirect effect of encouraging recalcitrant husbands to grant a *get*.

73 This understanding of the "*tav lemeitav tan du*" dictum was developed in a talk by R. Joseph Soloveitchik, "Surrendering to the Almighty," summarized in *Light*, 17 Kislev 5736 [1976], 11–15 and 18. Cf. *Igrot Moshe*, vol. 4, EH, #83. This is, however, a halakhic presumption, and not applicable to every marriage, see Bleich 1998, n. 70 above, 102–108. Whether the '*tav lemeitav tan du*' presumption assumes the need to engage in sexual relations, or can refer to a woman's desire for companionship and security, merits further analysis. On the notion of mental torment (*inui nefesh*) as denoting, in certain contexts, abstention from conjugal relations, see Genesis 31:50, bYoma 77b; Leviticus 16:29, bYoma 76a.

74 Note that the emotional harm ensuing from a wife's refusal to engage in conjugal relations is likewise deemed infliction of emotional distress on the husband, and is likewise a violation of the halakha, see *Code*, Laws concerning Marriage 14:9, 11–2.

> The daughters of Abraham remain grass widows with living husbands . . . they are left starving, thirsty, and destitute. And we should be apprehensive lest they become involved in objectionable conduct. . . . Moreover, these women are young and nubile [and will not be able to wait indefinitely].[75]

The Rabbis likened the situation of such a woman to that of a moribund individual in imminent danger of death (*goses*).[76] While withholding a *get* does not constitute murder per se, in the eyes of R. Joseph Henkin, the prohibition against it is a stricture ancillary to the prohibition against murder (*avizrayhu deretziha*).[77]

Moreover, the husband may compound the injury by dismissing the harm, arguing that one who suffers emotional pain has only herself to blame, and that emotional distress is a transient psychological and/or culturally conditioned behavioral pattern rather than an existential fact.

Given the wife's emotional distress, we are dealing with a husband who, in keeping his spouse from engaging in sexual relations, is a habitual wrongdoer who will continue to violate the law unless he is punished. If many in the community are dissolute (*parutz beaveirot*), in that they engage in similar misconduct, or are at risk of doing so, an exigency situation can be said to exist.[78] Under these circumstances, can

75 *Ginat Vradim*, EH 3:20. Though this description relates to a case where the husband disappeared, it also applies to the present-day *agunah* whose husband refuses to grant her a divorce.

76 Rashi, bJebamot 122a. Clearly, the analogy to someone about to die (*goses*) is metaphorical. Although the withholding of sexual relations generally does not lead to death, both the wife and the *goses* will likely experience emotional distress as a result of their respective conditions. In both cases, there is objective pain that is not self-induced; see Rashi, bSuka 25a, s.v. *tirda dereshut*.

77 *Kitvei Hagaon R. Yosef Henkin*, vol. 1, 115. R. Henkin describes a recalcitrant husband as a thief. As Berachyahu Lifshitz observes (in a personal communication), given that the husband is obligated to have relations due to his *shiabud* vis-à-vis his wife (see nn. 70–2 above), R. Henkin's characterization is apt. On emotional abuse as grounds for divorce in rabbinical writings and contemporary Israeli rabbinical court judgments, see E. Shochetman, "Violence against women as grounds for divorce" (Hebrew) in Aharon Barak and Aviad Hacohen (eds.), *Menachem Elon Jubilee Volume*, forthcoming; 54/168, Supreme Rabbinical Court (SRC) (Jerusalem), Nov. 17, 1994; 1-2-016788168 SRC, May 10, 2001.

78 See above at n. 40.

a rabbinical court today exercise extrajudicial authority to forestall the danger that, should the behavior of the husband in question go unpunished, others will emulate the offender? Let us first analyze the emotional distress being perpetrated by the husband.

Above, we noted that according to the strict law (*dinei nezikin min hadin*), there are five aspects of personal injury for which compensation is paid: 1. *nezek* (loss of capacity to work due to the permanent loss of a limb); 2. *tzaar* (pain resulting from physical contact); 3. *ripui* (healing, viz., medical expenses); 4. *shevet* (loss of income during convalescence); 5. *boshet* (shame and embarrassment).[79]

Under which category of damage does infliction of emotional distress fall? Though, according to the strict law of torts, the term '*tzaar*' is associated with physiological pain rather than emotional distress,[80] in the context of exigency jurisdiction, it can be taken to have its ordinary sense, that is, to encompass emotional distress. Alternatively, mental anguish could be categorized as '*boshet*.' In the psychological and philosophical literature, shame is intimately connected to the victim's sense of self and the presence of those who confirm one's self-esteem.[81] The halakha defines shame as the consequence of an injury generated by physical contact[82] witnessed by a third party.[83] On this view, shame is not simply the humiliated party's subjective feeling, which was generated by physical contact (such as a slap, spitting, and so on) between the parties, unrelated to any third party's awareness of the act, but rather, shame is the feeling of humiliation accompanied by the knowledge that others are aware of the event causing the victim's discomfiture, and the resulting diminution of his sense of worth? The Talmud asks whether, if the victim is unaware of the humiliation (as for

79 See above at n. 24, bBaba Kama 91a; *SA*, HM 420:3.

80 bBaba Kama 85a; *Piskei Harosh*, on bBaba Kama 8:1; *Tur*, HM 420:17 and *Beit Yosef* ad.loc; *SA*, HM 420:16. The position of R. Jacob Blau n this point is unclear, see *Pithei Hoshen*, vol. 6, 313 n. 32.

81 John Rawls, "Self-Respect, excellence, and shame," in R. Dillon (ed.) *Dignity, Character and Self Respect* (NY: 1995), 128; Gabriele Taylor, *Pride, Shame, and Guilt* (NY: 1985), 64.

82 bBaba Kama 91a. Cf. jBaba Kama 8:6, which provides for recovery for humiliation absent physical impact only if the victim is a great scholar.

83 *SA*, HM 420:7; Rema, *SA*, HM 420:8; *Responsa Rivevot Efraim*, vol. 6, #453; *Responsa Az Nidberu*, vol. 8, #63. But cf. *Tosafot* on bKetubot 65b s.v. *bezman*, which argues that the presence of a third party who witnesses the injury is not required.

instance, if, while asleep, someone disrobed him, and he subsequently died in his sleep, unaware of the incident), other parties who have been indirectly humiliated, such as family members of the directly humbled party, can sue for *boshet*?[84] Can the heirs sue for family humiliation? If liability depends on third party awareness, there should be no liability in such a case; if liability is grounded in the victim's feelings of shame, then given his unawareness, the injurer should be exempt. The Talmud's view is that though family members were indirectly humiliated, a *boshet* claim arises only if the victim himself experiences shame, and in the case of the disrobed sleeper, the injurer is exempt.[85]

But shame has a broader sense than that addressed by the black-letter halakha, as it can extend to the humiliated party's subjective feelings even in the absence of physical contact between the injurer and the victim, or where there are no third party witnesses. By law, someone expectorating mucus or phlegm that comes in contact with someone else's skin is liable to pay for shaming (*boshet*); if, however, the expectoration damages only the other party's clothing, he is exempt from paying compensation for *boshet*.[86] In the absence of physical impact, the court cannot hold the offender liable. Note that this is in line with the principle that holding someone down while shouting in his ear establishes liability.[87] Damages for expectoration of mucus that comes in contact with someone's clothing generates liability, not on the basis of the strict law, but on the basis of exigency law.

Yet breaking an engagement, which likewise does not entail physical contact, may conceivably generate liability for *boshet*. This has been

84 bBaba Kama 86b.

85 The Rosh's ruling, endorsed by the Rema and *Sema*, is that the victim's heirs cannot sue for *boshet*, see *Piskei Harosh* on Baba Kama 8:7; *Responsa Ribash*, #27 (cited by *Beit Yosef*, YD 343:7–8); Rema, *SA*, HM 420:35; *Sema*, *SA*, HM 420:43. Others contend that the Talmud did not take a definitive stance, hence we must refrain from extracting money from the tortfeasor, see *Code*, Laws concerning Wounding and Damaging 3:3; *SA*, HM 420:35.

86 *SA* and Rema, *SA*, HM 420:38. See D. Feldman, *The Right and the Good* (NY: 2005), 1–5.

87 *SA*, HM 405:1. Hence some authorities maintain that the law of damages does not mandate imposition of fines when an engagement is broken; see *Ketzot Hahoshen*, *SA*, HM 207:7; *Responsa R. Akiva Eger*, 2nd edition, #75; E. Shochetman, "More about damages of breach of promise to marry" (Hebrew), 9 *Mishpatim* (1978), 109, 120. But cf. *Beit Habehira*, bBaba Kama 90b and 91a, where it is argued that there is liability for *boshet* absent physical impact.

argued for,, not by adducing the jilted party's embarrassment that people are aware of what happened, but rather, on the grounds that breaking an engagement leads to a decline in the jilted party's social status, and reduced prospects for finding a spouse.[88] A different argument was put forward by R. Joseph Saul Nathanson:

> Shame is that which touches one's body. Therefore, when it does not touch his body, he is exempt. Yet an engagement has impact on the rational soul and is much worse than physical injury, hence with regard to broken engagements, even in the absence of physical contact, there is liability. And one who verbally embarrasses his friends will not have a share in the world to come, even though he did not physically injury him.[89]

On this view, verbal embarrassment (*boshet dvarim*) is not limited to verbal insults or defamation of character.[90] It also encompasses emotional distress unaccompanied by physical contact and unrelated to third party awareness, such as the emotional fallout generated by broken engagements.[91]

Antecedents for this type of *boshet* can be found in a Jerusalemite practice from talmudic times: if someone entrusted preparation of a meal to someone else, who spoiled it, the latter had to compensate the host for the insult to him and to his guests.[92] Liability for the host's embarrassment ensues from his being publicly embarrassed by the spoiled meal. Liability for guests' embarrassment is grounded in their mental anguish for the host who wanted to serve a delicious meal: the Talmud identifies these 'third-party' feelings as *boshet* too.

Analogously, the husband's misconduct may be taken to cause the

88 See 3 PDRJ, 205, 210; however, it was left an open question.

89 *Responsa Shoel Umeishiv*, 2nd edition, vol. 4, #69. See also *Ketzot Hahoshen*, HM 207:77. But cf. *Responsa Maharik*, root 29. On emotional anguish as a form of *boshet*, see also *Tosafot* on bKetubot 65b s.v. *bezman*, bNedarim 27b *s.v. asmakhta*, bKidushin 8b s.v. *mane*.

90 *SA*, HM 420:38; *Responsa Radbaz*, vol. 3, #480; *Responsa Hatam Sofer*, HM #181.

91 Cf. *Responsa Beit Yitzhak*, EH, vol. 1, #112, which claims that a broken engagement encompasses not just verbal embarrassment but a physical act (if, upon breaking the engagement, the party who terminates the relationship becomes engaged to someone else). *Ketzot Hahoshen* (*SA*, HM 207:7) argues that obligating oneself by executing an engagement document (*shtar shidukhin*), generates liability for *boshet*.

92 bBaba Batra 93b. The fact that the act in question generates *boshet* liability according to the laws of heaven (*dinei shamayim*), if not according to the laws of man, entails that the halakha recognizes embarrassment that does not ensue from physical contact.

wife distress that, from the halakhic perspective, gives rise to liability for *boshet*."[93] Just as a broken engagement by its very nature generates feelings of mental anguish, that is, *boshet*, unrelated to any physical contact or verbal remarks,[94] a husband's denying his spouse conjugal relations generates emotional stress, that, though there is no accompanying physical contact or verbal insult, should be categorized as *boshet*.

Given that intentional infliction of mental anguish is akin to *boshet dvarim*, can this claim be resolved by a rabbinical court? While, according to the strict law, there is no remedy in cases of *boshet* involving no physical contact, a rabbinical court, whether or not its members are ordained judges, does have the extrajudicial power, "in every locale and at all times," to benefit the community by imposing criminal sanctions and holding the wrongdoer liable for damages for *boshet dvarim*.

At first glance, such a conclusion might seems unfounded. The *Shulhan Arukh* rules that only ordained arbiters residing in the land of Israel can assess a specified penalty established by the Torah (*kenas katzuv*)[95] for personal injuries, and today, all arbiters are non-ordained and hence lack the authority to mete out such penalties.[96] How, then

93 Assuming that the husband intended to embarrass his wife. Lack of intent would exempt him from liability for *boshet*, see bBaba Kama 27a; *SA*, HM 421:1,11; *Beit Meir, SA*, EH 66:6.

94 *Beit Meir, SA*, EH 7.

95 Jewish law distinguishes between cases where the offender is liable to pay monetary compensation (*mamon*), and cases of offenses that incur fines (*kenas*). Whereas one who confesses to an act commission of which incurs liability for monetary restitution is obligated to pay, this is not so with regard to fines. Here, admitting to an act does not render one liable to payment of the fine, see bBaba Kama 64b, 75a. Given that a litigant's confession regarding humiliation is admissible in evidence, *boshet* payments fall into the category of *mamon*, see Rashi, bKetubot 42a; *Tosafot Rid*, bKetubot 41a; *Code*, Laws concerning Vows, 8:3. Nevertheless, in some talmudic and post-talmudic sources, *boshet* is arbitrarily designated a fine, see *Sema, SA*, HM 1:5; *Shakh, SA*, HM 1:3. Given that non-ordained arbiters may adjudicate only matters that occur frequently and involve a loss of money, injuries such as *boshet*, if they that do not occur frequently and do not entail a loss of money, are deemed to fall under the category of offenses incurring fines, and as such, cannot be adjudicated, see *Responsa Rav Natronai Gaon*, Brody edition, #329, #363; *Otzar Hageonim*, Baba Kama 64–68; *Tosafot*, bBaba Kama 84b; *Magid Mishne, Code*, Laws concerning Wounding and Damaging 5:6; *Beit Yosef, Tur*, HM 1. And see A. Radzyner, "Foundations of '*dine qenasot*' in talmudic law" (PhD dissertation, Bar Ilan University, 2001), 229–36.

96 *SA*, HM 1:1.

can a rabbinical court today award damages for *boshet*? As e have explained, on the strength of exigency law, even non-ordained arbiters are empowered to mete out penalties known as "fines imposed by the Rabbis" (*kenas hakhamin*), such as payments for *boshet*-related injury.[97]

The actual implementation of these powers concerning *boshet*-related injuries is not limited to talmudic era rabbinical courts, but has been applied in contemporary times.[98] For example, in 1965, invoking their exigency authority, members of the Supreme Rabbinical Court in Jerusalem, rabbis Abudi, Elyashiv and Goldschmidt, marshaled numerous responsa to support the position that damages for *boshet* can be awarded in the case of a broken engagement.[99] In the words of R. Elyashiv, who authored the decision:

> There is a consensus that a rabbinical court is empowered to impose corporal punishment or social shunning (*nidui*) until he assuages the [hurt] feelings, yet this will not be accomplished through *boshet* payments pursuant to the law, but rather, everything is resolved in accordance with the specifics of the matter, the times, and the arbiters' discretion.[100]

97 *Piskei Harosh*, Gitin 4:41; *Mordekhai*, bGitin 384. See Radzyner, n. 95 above, 281–82.

98 On rabbinical courts that imposed criminal sanctions on those who insulted and defamed their fellows, see *Responsa Rosh*, rule 71:1, 8, 9; *Responsa Rashba attributed to Nahmanides*, #240; *Responsa Havot Yair*, #62; *Responsa Tumat Yesharim*, vol. 1, #160. On the imposition of *boshet dvarim* fines for broken engagements, see *Responsa Avodat Hagershuni*, #74; *Responsa Givat Pinhas*, #74; *Responsa Hatam Sofer*, EH #134; *Responsa Rav Pealim*, vol. 2, EH #3; *Responsa Zera Emet*, YD #112; *Responsa Vayomer Yitzhak*, vol. 1, #121, Shochetman, n. 77 above, 120 n. 49.

99 5 PDR, 322.

100 Ibid., 327, reprinted in R. Joseph Sholom Elyashiv, *Collected Responsa*, vol. 2, #129. Whether R. Elyashiv's justification for invoking this exigency power rests on the court's status as a community court (see above at nn. 45–50 above) or a non-ordained panel of arbiters (see above at nn. 51–58), or is based on the signing of an arbitration agreement (see above at n. 59), is unclear from the ruling in question. But given that in other decisions, R. Elyashiv ascribes to the view that the Israeli rabbinical courts are communal courts, mandating submission to their authority (see 7 PDR, 225, 227 and E. Shochetman, *Civil Procedure in Jewish Law* (Hebrew), [Jerusalem:1988], 169, n. 34), it is clear that he deems the exercise of such authority by community courts fully legitimate. Moreover, given that a community court is a non-ordained panel of arbiters, R. Elyashiv would presumably conclude that any lay panel may exercise such powers. But cf. *Responsa Divrei Yoel*, YD #35:4.

Adopting R. Elyashiv's position, subsequent Israeli rabbinical courts have invoked their extra judicial authority and imposed *boshet* payments for broken engagements.[101]

It remains to identify the specific reason infliction of emotional distress by refusal to engage in conjugal relations serves as grounds for awarding *boshet* damages: is it a 'protective measure' (*lemigdar milta*), or is it due to "the needs of the time"? Is the emotional fallout from spousal refusal of conjugal relations like the mental anguish resulting from a broken engagement? On the one hand, this type of distress does not result from any physical injury or impact. Is it, then, like being spat on (where the spittle lands on one's clothing and does not touch one's skin), being called derogatory names, or being jilted by a fiancé? On the strength of a court's authority to invoke its exigency jurisdiction in all these aforementioned situations, the injurer can be fined.[102] It would seem that this should apply to our scenario as well. But the Talmud and halakhic authorities exhort us to refrain from making rules that impose a fine in one realm on the basis of laws pertaining to a fine in another realm. The halakhic authorities do have recourse to analogical reasoning to identify similarities and differences between cases (*medame milta lemilta*)[103] so as to address new situations, but does this allow us to establish a new rule governing a particular fine from a rule pertaining to another fine? For example, the Mishnah gives examples of liability for imperceptible damage.[104] The question then arises whether the laws governing the specified sorts of imperceptible damage can encompass other sorts of imperceptible damage. One school of thought argues that since monetary penalties are involved, the list cannot be added to, as this would constitute establishing a new penalty. Despite putative similarities between two situations, arbiters are not to derive new penalties by analogical inference from existing penalties. On this view, though absence of physical contact appears to be a common feature of spitting on someone else's clothing, defamation, and emotional distress due to spousal refusal to engage in conjugal relations, this putative analogy cannot serve as a basis for expanding the sphere of exigency law to encompass the latter.[105]

101 PDRJ, 3:209–10; 6:117, 119.
102 *SA*, HM 420:38.
103 bBaba Batra 130b.
104 mGitin 5:4.
105 *Yad Malakhi 550–551; Shakh, SA*, HM 385:1; *Tosfot Yom Tov*, Gitin 5:4.

On another opinion, however, the Talmud's rejection of analogical inferences from one penalty to another is applicable only in the context of black-letter halakha. With respect to matters falling under the rubric of 'protective measures' (*lemigdar milta*), however, analogical inferences are permissible.[106] On this view, if the injury caused by a broken engagement can be subsumed under the category of *boshet dvarim* by analogical inference, so too emotional distress due to spousal refusal to engage in conjugal relations can be classed as falling under *boshet dvarim*. The question, then, is whether breaking an engagement in a manner that humiliates the aggrieved party constitutes *boshet dvarim*? One responsist argues that breaking an engagement should be on a par with all types of *boshet*, including *boshet dvarim*, and the arbiter should handle it accordingly as a 'protective measure.'[107] Another contends that it is analogous to the case of spitting on someone's clothing. If a rabbinical court can invoke its extrajudicial powers to resolve a spitting incident even absent contact with the defendant's body, surely, on breaking an engagement in a manner that generates emotional scarring of the aggrieved party, liability should ensue.[108]

Having considered this debate, it is my opinion that, given that emotional distress due to spousal refusal to have conjugal relations may have more severe psychological impact than a physical act of injury, it should indeed be handled like *boshet dvarim* and spitting on clothing. The court's discretion to impose extrajudicial fines can provide monetary relief for this type of emotional anguish.

We saw that a husband's denying his wife conjugal relations contravenes the biblical directive, "Devise not evil against your neighbor, seeing he lives securely by you" (Prov. 3:29).[109] A husband's denying his spouse sexual relations occurs when the spouses reside under the same roof, and either have an ongoing marriage in other respects, or are de facto separated from each other and the marriage is factually 'dead,' but the husband is delaying the granting of a divorce. The lack of conjugal relations causes mental anguish (*tzaar*) as well as injury to the wife's sense of self (*boshet*), the latter not necessarily being a function of the public's perception of her worth. (As we saw above, by the strict law, damages for *boshet* are a function of public perception of an

106 *Responsa Shvut Yaakov*, vol. 1, #145.
107 *Responsa Avodat Hagershuni*, n. 98 above.
108 *Responsa Shoel Umeishiv*, n. 89 above.
109 See text at n. 60 above.

individual's social standing.) Contemporary rabbinical courts, by virtue of their power to exercise exigency authority, can adjudicate claims for such damages.

Moreover, the consequences of violating the prohibition against delaying the granting of a divorce extend beyond the halakhic recognition of *tzaar* and *boshet*, and indeed, beyond the realm of domestic relations. The distress generated by denial of conjugal relations also constitutes a kind of deception:

> Just as there is deceitfulness in buying and selling, so there is deceitfulness in verbal exchanges. One should not ask how much something costs if he dos not wish to buy it. . . . If someone is the descendant of converts, he should not admonished, 'remember your ancestors' deeds.'[110]

Causing unnecessary mental anguish is prohibited in both social and commercial contexts. Inquiring about a price when one has no intention of purchasing the object is termed 'deception' (*onaa*). Lest the biblical prohibition against deception (Lev. 25:14) be construed as applying only to fraudulent business transactions (*onaat mamon*), the Mishnah explicitly states that deception occurs in the realm of conversation as well (*onaat dvarim*). The mishnaic examples are edifying: the distress caused by needless verbal insensitivity in conversation is similar to the distress caused to a merchant whose hopes of making a sale are needlessly built up and then dashed.[111] In the halakhic literature, verbal deception has been characterized as the infliction of 'dread and fear' and 'pain and distress.'[112] [112A] The individual's emotional persona must be protected from unjustified verbal assault.

110 mBaba Metzia 4:10.

111 See bBaba Metzia 58b. See also *Sefer Yereiim*, 180; *Semag*, negative commandment 171; *Piskei Harosh*, Baba Metzia 4:22; *Responsa Hikrei Lev*, YD, vol. 4, #80, Y. Sofer, "On *onaat dvarim*" (Hebrew), *Mekabtsiel* 9, 41, 51. But cf. tBaba Metzia 3:25; Sifra, Behar 3:2; and Rabad on Sifra ad loc., which take the concept of 'verbal deception' to apply only to objectionable verbal inquiries.

112 See Maimonides, *Sefer Hamitzvot* 251; Rabad, *Shita Mekubetzet*, bBaba Metzia 58b; R. Jonah Gerondi, *Shaarei Teshuva* 3:24; R. Samson Raphael Hirsch, *Commentary on the Torah*, Leviticus 25:14–17. Cf. J. David Bleich, "*Onaat dvarim*," *Hadarom* 35 (1972), 140, 141. Others argue that not any insensitivity, but only deceptive speech, constitutes *onaat dvarim*, see *Or Hahayim*, Leviticus 25:17; *Sheiltot Rav Ahai Gaon*, Behar, Sheilta 113; *Sefer Hahinukh*, commandment 337.

112A *Tur*, HM 228; *SA*, HM 228: 3.

The open-ended nature of the prohibition against verbal deception (*onaat dvarim*) is articulated in *Sefer Hahinukh*:

> And it is impossible to provide specific details of every type of behavior that causes emotional distress . . . and one who transgresses this prohibition and behaves contrary to the directives propounded by the halakhic scholars violates a precept.[113]

Over seven hundred years later, R. Jacob Blau introduces his examination of verbal deception (*onaat dvarim*) by describing the many acts subsumed under this prohibition:

> One who creates noise in his home or in the street while the neighbors are sleeping . . . [and] one who resides on an upper floor and disturbs his neighbor on a lower floor is deemed to be causing pain. . . . If one needs to move or remove beds, it should be done during the day . . . and during the evening hours one should walk with light footwear and not run electric saws or washing machines and the like . . . and in this book, he discusses whether students in a study hall or yeshiva in a residential area can learn aloud . . . there is also discussion about eating food that produces a vile odor that may cause bad breath that is offensive to someone one is conversing with.[114]

On R. Blau's view, when one party to a relationship is deliberately inconsiderate of the other, he may be liable for *onaat dvarim*. In interpersonal relations, such as relations between neighbors, the respective parties' sense of self-worth is to be secured and enhanced, and care must be taken to avoid giving offense or creating mental anguish. And there is a special prohibition against *onaat dvarim* vis-a-vis one's wife.[115] A fortiori, a husband's denying his wife conjugal relations, being a direct assault on her sense of self-worth, is an instance of *onaat dvarim*.

With regard to 'verbal deception' (*onaat dvarim*), no act has been committed, but rather, the offense is merely verbal, and hence not justiciable according to the strict law.[116] It is thus exigency law that

113 *Sefer Hahinukh*, commandment 341(338).
114 *Pithei Hoshen*, vol. 4, 15:3.
115 *Tur*, HM 228; *SA*, HM 228: 3.
116 *Sema*, *SA*, HM 420:49. Articulating words is not deemed an act, see *Responsa Rashba attributed to Nahmanides*, #240, re the legal import of a blasphemer's words.

empowers a rabbinical court to impose fines for *onaat dvarim*.[117] Though our hypothetical scenario falls under the category of *boshet*, it also constitutes a violation of the prohibition against *onaat dvarim*. Shaming someone verbally entails 'verbal deception.'[118] In effect, a rabbinical court applying exigency law to a case of spousal denial of conjugal relations is at the same time addressing contraventions of the prohibition against *onaat dvarim*.

Given that every decision related to awarding damages for emotional scarring can be characterized as an emergency directive (*horaat shaa*), the rabbinical court must realize that the contemplated rulings are ad hoc determinations arising from exigency situations, and as such call for cool-headedness. As the Rashba puts it,

> With patience, deliberation and consensus, the community will be directed toward [fulfilling the will of] heaven. Every major act and mighty hand requires vigilance and the elimination of anger. The arbiter must worry that his fervent zeal for God will inflame his innards and do away with the correct and proper [judicial] comportment.[119]

Applying this to our scenario, the panel must first ascertain whether the husband is indeed a wrongdoer. Let us first consider the question of when a husband is deemed to be refusing to divorce his wife (*mesarev get*), and at what point his wife is deemed to be an *agunah*? If a married couple have been living in separate rooms in the marital home for three months and appear in front of a rabbinical court for the purpose of executing a divorce, what is the court's mandate? As long as there are prospects of reconciliation,[120] it is the court's responsibility to promote domestic tranquility (*shlom bayit*).[121] But if there is little likelihood that domestic harmony will prevail, a rabbinical court decision to rule with a view to fostering *shlom bayit* only serves to unduly lengthen the divorce proceedings. Unless the specifics of the marital situation dictate otherwise, the court should set a maximum

117 *Beit Yosef, Tur*, HM 1:12; *Darkei Moshe, Tur*, HM 2:5; Rema, *SA*, HM 2:1, 420:38.

118 Rashbatz, *Magen Avot*, mAvot 3:15; *Biur Hagra*, HM 420:49.

119 *Responsa Rashba*, vol. 6, #238. See also *Responsa Ribash*, #171.

120 *Responsa Ginat Vradim*, YD, vol. 3, #4; 12 PDR, 199–204.

121 10 PDR, 310, 313. In instances where it is clear that the husband's claim for *shlom bayit* is intended only to stretch out the rabbinical court proceedings, the court must issue a divorce judgment, see *Responsa Yaskil Avdi*, vol. 6, EH, #15; 21 PDR, 333, 362.

time of eighteen months to restore marital tranquility.[122] If a spouse moves out of the marital home and the couple is continuously separated for the entire eighteen months, or if the spouses are legally separated, the marriage is functionally over, and it becomes the court's task to persuade the couple to divorce.[123] This is done by issuing a divorce judgment that it is "proper" or "recommended" that "the parties divorce each other."[124] Once the judgment has been issued, the parties

122 R. Hayim Palogi, *Responsa Hayim Veshalom*, vol. 2, 35, 112. Some decisors contend that separation is not akin to divorce, but rather, its purpose is to ease spousal tensions and facilitate reconciliation, see *Responsa Umitzur Dvash*, EH #8; *Responsa Yaskil Avdi*, EH, vol. 6, #25, 45; *Responsa Noda Biyehuda*, EH, vol. 3, #89; 4 PDR, 267, 274. Cf. *Responsa Taalumot Lev*, vol. 3, #20, §4; *Responsa Sridei Esh*, EH #29.

In effect, irreconcilable differences between parties and the inability to restore *shlom bayit* serve as grounds for the parties' subsequent divorce, see *Responsa Radbaz*, vol. 4, #89; *Responsa Yaskil Avdi*, vol. 6, #96; *Responsa Yabia Omer*, vol. 2, EH, #10; R. Henkin, n. 77 above; *Igrot Moshe* YD, vol. 4, #:15; Tel Aviv District Rabbinical Court, 016948564-21-1; Haifa District Rabbinical Court, 051778991-22-1; 050562289-13-1; Netanya District Rabbinical Court, 8885. Whether marital breakdown due to irreconcilable differences culminating in a 'dead' marriage allows a court to compel a divorce is subject to debate, see *Responsa Divrei Malkiel*, vol. 3, #145; PDR 1:161, 162; 6:13; 9: 200, 211, 213; 10:168, 173; 9:149, 153; 20: 239, 275.

123 R. Palogi's stance, ibid., is intended to persuade rather than coerce the parties to execute a divorce, see 12 PDR, 198, 206. Cf. PDR 9:200, 211–212; 10:168, 173. Legal separation or de facto separation is a prerequisite for a rabbinical court ruling recommending that the spouses divorce. Living under the same roof in different bedrooms is not deemed separation in this context, see Z. Warhaftig (ed.) *Collected Rulings of the Rabbinical High Court of Appeals* (Jerusalem: 1950), 30. Nevertheless, Israeli rabbinical courts have at times recommended separate bedrooms in order to facilitate reconciliation in the hope of the couple's eventual return to shared quarters, see 4 PDR, 267, 274.

124 Though in the period of the Early Authorities, such judgments were formulated in terms of an "obligation to divorce" (*hiyuv legaresh*) rather than "compelling" divorce (*kofin legaresh*), Kaplan argues that today, rabbinical courts, in particular in Israel, use even weaker terms, saying that divorce is "recommended" or "a mitzva," see Yehiel Kaplan, "Enforcement of divorce judgments by imprisonment: principles of Jewish law," 15 *Jewish Law Annual* (2004), 57, 77–80, 134–38. A cursory glance at recent cases indicates that courts do in fact use the term "obligation to divorce" (*hiyuv legaresh*), see Jerusalem District Rabbinical Court, 1–21–9918 and 2–21–764; Tel Aviv District Rabbinical Court, 038416327–21–1; Petach Tikva District Rabbinical Court, 4927–21–1; Netanya District Rabbinical Court,

are to arrange for execution of the divorce (*sidur haget*). Should the husband refuse to give the *get* due to a personal vendetta, desire to use the *get* as a bargaining chip for financial concessions, or sheer hatred of his wife, at that juncture he is deemed a *mesarev get*. As noted, at this point, there are grounds for providing monetary relief for the wife, who is deprived of conjugal relations, and suffers the attendant emotional distress.

However, prior to addressing and awarding such a claim for infliction of emotional distress, the court must engage in mediation, so that either the victim may be assuaged with words of appeasement, or the injurer can voluntarily offer monetary recompense.[125] Adducing a Geonic precedent, various halakhic authorities argue that there should be recourse to appeasement "according to the issues at hand, the status of the one who perpetrated the humiliation, and the status of the victim of the humiliation."[126] Depending on the circumstances of the case and the religious and/or social status of the parties, the court will attempt to mediate an appeasement. Should attempts at mediation be unsuccessful, and assuming the standards for invoking exigency halakha have been met, the court will proceed to assess the damages caused by the husband's infliction of emotional distress. Given that the injuries are imperceptible, how does the court assess these damages? Post-talmudic sources indicate that the court does so by exercising judicial discretion. Defining this discretion in a negative fashion, some characterized the assessed damages as fines (*knasot*) that have no rationale, one decisor even saying, "I am astonished that the sages found any basis for arriving at these assessments."[127] Others, among

1–24–4564; Haifa District Rabbinical Court, 8952–21–1. On the need to avoid the locution "obligation to divorce," see *Responsa Yabia Omer*, vol. 2, EH #10.

125 Rema, *SA*, HM 1:5.

126 *Responsa Rav Natronai Gaon*, n. 95 above, #329; and see R. Sherira Gaon, *Responsa Shaarei Tzedek*, part 4, gate 1, #19; *Piskei Harosh*, Baba Kama 8:3; *Perisha, Tur*, HM 1: 12; *Levush*, HM 1: 5. Relying on the Geonic precedents and *SA*, HM 1:6, there is the option of imposing a ban or social shunning (*nidui*); after calculation of the approximate damages to be paid, the injurer is released from the ban, regardless of whether he has appeased his wife.

127 *Otzar Hageonim*, Baba Kama, #212, 65; *Responsa Shaarei Tzedek*, part 4, gate 1, #7; Rabad, quoted in *Shita Mekubetzet*, bBaba Kama 91b. According to R. Israel Isserlein, there is no prescribed formula (*mida kvua*)for estimating this type of award, see *Responsa Terumat Hadeshen*, vol. 2, #212.

them R. Joseph Elyashiv, describe the court's discretion in exigency situations in positive terms: "everything is resolved in accordance with the specifics of the matter, the times, and the arbiters' discretion."[128]

I am not, of course, claiming that the court decides on the basis of whim; rather, there is an authoritative decisional standard. *Boshet* is determined by the principle of proportionality, that is, in accordance with the relative status of the perpetrator and victim of the humiliation. In effect, defendant pay damages commensurate with their wrongs, and plaintiffs recover damages commensurate with their losses. A secular legal system might ask: ought not the husband to have foreseen the injury that would result from his conduct? Did the wife have an 'eggshell' personality,' resulting in unforeseeable mental injury? The halakhic system does not ask these questions. The doctrine that a husband's denying his spouse conjugal relations is a violation of the prohibitions against *onaat dvarim* and *boshet* enables the court to assume that long term abstinence from conjugal relations engenders anguish in every wife, and does not reflect psychological fragility, but is rooted in the very essence of her humanity. Similarly, the forseeability of the harm ensuing from the husband's failure to engage in sexual relations need not be proven in order to establish liability.

The *boshet* generated by spousal denial of conjugal relations cuts across all economic and social strata. It is incumbent upon the husband to be aware of his spouse's rights and his own marital obligations, and to be aware of the injury that will ensue from failure to fulfill his obligation to engage in conjugal relations (*ona*) while preventing his wife from severing the marital bond. Failure to be aware of these duties is grounds for liability for his wife's foreseeable emotional distress.

Though a court is to be guided by the relative religious and/or social status of the parties in assessing *tzaar-boshet* payments, such imperceptible injuries cannot be readily quantified and will result in wide variations in monetary awards.[129] Ought the court implement a policy of minimizing or maximizing these awards? The black-letter halakha sets a fixed *boshet* payment for certain injurious acts that are

128 5 PDR, 327, and see above at n. 100. A similar formulation is found in *Responsa Avodat Hagershuni*, #74; *Responsa Rav Pealim*, vol. 2, EH #3; *Kneset Hagdola*, HM 1:35.

129 *Tosafot*, bBaba Kama 86a, s.v. *keilu*. This conclusion also applies to common law, see C. McCormick, *Handbook on the Law of Damages* (St. Paul MN: 1935), §88, 318–319; .S. Atiyah, *Accidents, Compensation and the Law* (London: 1980), 213.

accompanied by physical contact: "If he spat and the spittle reached him, if he stripped his cloak from him . . . he gives him four hundred *zuz* . . . all in accordance with his dignity [viz., his status]."[130]

The Mishnah notes that an individual is deemed poor if he cannot pay for food and clothing for a year, which at the time came to 200 *zuz*.[131] In 2008, in New York City, using the Consumer Price Index, the 200 *zuz* amount would be equivalent to an annual outlay of $55,000 for food and clothing. Hence the statutory mishnaic compensatory damages for spitting or stripping off a cloak are $110,000 per occurrence, depending on the relative status of the parties. As understood by Talmud and later authorities, these monetary awards are the maximum sums that can be awarded for the said injurious acts.[132] The law adopts a policy of restraint (*lekula*) vis-à-vis compensation for damage claims, including those of *boshet*, limiting the compensation paid out.[133]

Though the goal of the law *stricto sensu* is to compensate the victim, while keeping the perpetrator's monetary liability within reasonable limits, exigency law is resorted to for punitive purposes and deterrence. Applying exigency law in cases where there is a claim of emotional distress due to the withholding of sexual relations serves two goals. As we saw, it imposes liability for a type of injury not covered by the strict law, namely, non-physical injuries unaccompanied by direct physical contact. But optimally, the system should not only compensate deserving victims, but also deter halakhically reprehensible behavior in the future. Referring to exigency rulings in terms of such rubrics as 'protective measures' (*lemigdar milta*) and 'the times requires it' (*hashaa tzerikha lekha*)[134] conveys the idea that the system is focusing on an immediate problem, and the imposition of sanctions is punitive. But deterrence is also critical. In the words of R. Natronai Gaon: "One may penalize monetarily at a minimum or at a maximum in order to prevent the increase of perpetrators in Israel, this is the tradition of

130 mBaba Kama 8:6.

131 mPeia 8:8–9; *Code*, Laws concerning Gifts to the Poor 9:13. Cf. *Or Zarua*, Laws of Charity, 14; *Tur*, YD 253; 253:2. Some argue that the value of the *ketuba* should be equal to one year's support, see *Responsa Beit Avi*, vol. 3, #137 and R. S. Daichovsky, PDRJ, 1–213655, Feb. 22, 2005.

132 bBaba Kama 91a; *SA*, HM 420:43.

133 bBaba Kama 58b; *Piskei Harosh*, Baba Kama 8:1, Baba Metzia 5:16.

134 See above at nn. 26–30.

rabbinic courts, and we learn from them; and this is our judicial practice."[135]

Given that the damages are not just compensatory, but punitive and deterrent, the amount of the award will be proportionate to the transgression in question. Taking into account the range of possible scenarios, awards for similar injuries may vary considerably from case to case. As the amount of the award is discretionary, wide variations in monetary awards will result. This variations in award is not unique to the halakhic system. In American law, for example, awards for spousally-inflicted emotional distress have ranged from $15,000 to as much as $500,000.[136]

IV

We have assumed that a court can hear a claim for infliction of emotional anguish prior to a wife's receiving her bill of divorce (*get*). But would submission of such a claim while her husband was refusing to grant the divorce render the divorce, when ultimately granted, unlawfully coerced (*get meuse*)? In our scenario, the wife, having lived, de facto, apart from her husband during five years of marriage, and subsequently having been denied a divorce by her recalcitrant husband for over three years, can she proceed to submit a claim for emotional distress she suffered during the five years of separation prior to seeking a divorce?

Let us address this through the lens of some medieval responsa and contemporary rabbinic writings. In his writings, R. J. David Bleich summarizes some early views and the normative halakha on the question of coerced divorce (*kefiyat get*) in other contexts:

> Rashba maintains that any coercion relating to execution of a *get*, even if self-imposed in the form of a voluntarily assumed penalty for nonexecution, renders a *get* invalid. . . . This view is disputed by R. Simon ben

135 R. Natronai Gaon, n. 95 above. The discretionary nature of the assessment, the fact that there is no mention of a policy of limiting awards, is stressed in PDR 3: 131, 151; 5: 322, 327 as well as in the responsa cited in n. 98 above. Some of these sources emphasize that the fine should be calculated on the basis of the status of the perpetrator and the status of the victim.

136 *Twyman v. Twyman*, 855 S.W. 2d 619, 620 (Texas 1993) [trial court award]; *Massey v. Massey*, 807 S.W. 2d 391, 395 (Tex. Ct. App. 1991), writ denied, 867 S.W. 2d 766 (Tex. 1993); *Chiles v. Chiles*, 799 S.W. 2d 127 (Tex. App.-Houston [14th Dist.] 1989), writ requested [trial court award].

> Zemah Duran, *Teshuvot harashbats (Tashbats)*, II, no. 68, who declares, "One who says, 'I will give 100 gold pieces to the king if I do not divorce my wife' may divorce his wife and there is no question in the matter, for since this obligation came of his own accord he divorces of his own will."[137]

In essence, Rashba's position is that a *get* is invalid when executed under duress even if such duress is indirect. Hence, duress compelling a person to fulfill a perfectly binding undertaking to pay compensation for failure to execute a religious divorce invalidates the *get* since it is simply an indirect means of securing compliance in executing the *get*. Those who disagree with Rashba maintain either that self-imposed duress does not constitute duress or that, since the enforceable demand is for financial compensation rather than for a *get*, [a *get*] executed under such circumstances is not to be regarded as executed under duress, i.e., so long as satisfaction of a lawful claim remains a viable option in order to avoid execution of the *get*, execution of the *get* in order to avoid payment of a just debt is regarded as a voluntary act motivated by the self-interest of the husband.[138]

R. Moses Isserles, *Even ha-Ezer* 134:5, cites both conflicting opinions and rules that a *get* should be executed in the absence of prior forgiveness of the penalty for non-execution, but adds that if a *get* has been executed under such circumstances it is valid even in the absence of prior forgiveness of the penalty, provided that the penalty was assumed voluntarily.[139]

Self-imposed duress (*onsa denafshei*) is the subject of much debate among the decisors. However, even under the sorts of circumstances in question, the *get* is valid ex post facto. The question we must address,

137 J. David Bleich, "Indirect coercion in compelling a get" 5 *Jewish Law Annual* (1985), 66–67. Though according to the Rashba, any voluntarily assumed penalty related to the execution of a *get* constitutes a forced *get*, some decisors maintain that even a self-imposed penalty unrelated to the execution of a *get* will render the *get* invalid, see *Responsa Betzalel Ashkenazi*, #15. Cf. *Torat Gitin*, EH 134:4; *Responsa Beit Efraim*, 2nd edition, EH #73; *Responsa Ein Yitzhak*, vol. 2, #33:1; *Hazon Ish* EH 99.

138 J. David Bleich, *Contemporary Halakhic Problems*, vol. 3 (NY: 1989), 337. Obviously, a voluntary monetary obligation assumed by the husband in exchange for granting a *get* is valid. E.g., a few years ago, the Supreme Rabbinical Court in Jerusalem validated a spousal agreement stipulating that in exchange for monetary payment, a husband would grant his wife a *get*, see 011588860–21–1, SRC, Mar. 6, 2005.

139 Bleich, ibid., 96. Cf. *Pithei Teshuva*, EH 134:10.

however, is whether a wife can initiate such a claim prior to receiving her *get*. To be sure, there are certain types of monetary fines or incarceration that do not raise concerns about coerced divorce (*get meuse*). As the Ribash pointed out, certain kinds of pressure are not sufficiently coercive to render a divorce invalid, provided the coercive element arises from circumstances that are independent of the divorce.

> The case . . . involved a person cast into debtor's prison for nonpayment of a debt. His wife's relatives offered to satisfy the debt on his behalf and thereby obtain his release from prison on the condition that he divorce his wife. Rivash finds no objection to execution of a get under such circumstances "for he was not seized in order to [compel] him to divorce [his wife] but on account of his debt; the *get* is not coerced but [the product] of free will."[140]

The Ribash's argument is that the husband was imprisoned for defaulting on a debt rather than as a means of compelling him to execute a divorce. Hence his release in exchange for executing a divorce does not constitute duress, and the *get* is not regarded as unlawfully enforced.

The Ribash takes the same approach in another responsum. A wife attempted to prevent her husband from leaving their locale lest she be denied her right to conjugal relations. Here, the coercion unrelated to execution of the divorce pertains to the husband's refusal — in effect — to have conjugal relations:

> We put him under *nidui* [a ban], or flog him until he agrees to cohabit with her. If he, of his own [free will], divorces her, in order to save himself from those [measures], it is not an unlawfully enforced *get*. For the court did not compel him at all to give the *get*, but rather, to fulfill his conjugal obligation to the best of his ability, just as he is obligated by law to fulfill the [other] commandments.[141]

140 Bleich 1985, n. 137 above, 67. This conclusion presumes that the sanctions are themselves legitimate, see *Responsa Mabit*, vol. 2, #138; *Responsa R. Bezalel Ashkenazi*, #15; *Hazon Ish*, EH 99:3; I. Breitowitz, *Between Civil and Religious Law: The Plight of the Agunah in American Society* (Westport CN: 1993), 26. Some argue that even if the husband was incarcerated due to a financial obligation not deemed a debt in the eyes of Jewish law, or the incarceration was impermissible in the eyes of a Jewish law, the divorce would be proper, see *Responsa Ribash*, #127; H. Izirer, "Duress in monetary, criminal, and divorce matters" (Hebrew), 5 *Shurat Hadin* (1999), 309–15.

141 *Responsa Ribash*, #127 (translation from Kaplan, n. 124 above, 102). and accepted by the Rema, *SA*, EH 154:21. The Rema extends the Ribash's conclusion, arguing that a rabbinical court can even indirectly coerce a husband and tell him "either resume conjugal relations or divorce your

Many authorities subscribe to the idea that coercion vis-à-vis another matter (*kefiya lidvar aher*) is permissible.[142] However, rabbis Chaim Zimbalist and Abraham Azulai added a caveat in a ruling handed down when they sat on the bench of the Tel Aviv District Rabbinical Court:

> A young woman had married a man who was serving a four-year prison term in Israel for drug offenses. The wife petitioned for a divorce on the grounds of nonsupport and loss of consortium. The Rabbinical Court of Tel-Aviv . . . directed the husband to execute the *get* but did not find any grounds . . . that would mandate the direct imposition of coercive sanctions such as additional imprisonment or fines. The issue before the court was whether it was . . . proper to recommend parole or reduction of sentence in exchange for the husband's executing a *get*. . . . On one hand, the *get* is the mechanism by which the prisoner may obtain his freedom, and if a person is told, "Sign the *get* or stay in jail," this resembles duress. Yet because the imprisonment was for completely unrelated offenses, the failure to give a get does not in and of itself result in direct coercion, but simply removes the . . . benefits of parole that would otherwise ensue.[143]

Under these circumstances, though the imprisonment was unrelated to the delivery of the *get*, any recommendation of parole would render the subsequent execution of a *get* tainted by duress. The linkage of the

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wife." Whereas the Ribash contends that a court's power of compulsion is limited to the restoration of conjugal ties, the Rema argues, pursuant to his understanding of the Ribash's position, that the court may, in articulating its 'coercive' directive, allude to divorce. Note that in the case addressed in the Ribash's responsum, the woman is seeking to remain married, and there is no concern about a coerced divorce. Here, the 'coercion by way of choice' (*kfiya bederekh breira*) differs from that applicable in the more typical case, where the coercive choice offered to the husband would be 'either support your wife or divorce her,' a form of coercion which would not invalidate the subsequent execution of a divorce. See *Beit Yosef, Tur* EH 134 in the name of Rashba; Beit Meir 117, *Pithei Teshuva* EH 154:4, 8; *Igrot Moshe*, EH I, #137; PDR 1:15, 19; 9:1542, 1551.

142 *Responsa Ribash*, #232; *Responsa Tashbetz*, vol. 1, #1; *Responsa Raanah*, vol. 1, #63. On why *kefiya lidvar aher* does not constitute coercion that renders a divorce invalid, see *Hazon Ish*, EH 99:1; *Responsa Bigdei Yesha*, #36:5; *Responsa Beit Efraim*, 2nd edition, EH, vol. 1, #73.

143 Breitowitz, n. 140 above, 24.

parole recommendation to compliance with a rabbinical court's directive to grant a *get* is regarded by these decisors as coercion.[144]

Others, including rabbis Solomon Daichovsky, Joseph Elyashiv and Shilo Rafael, see no objection to executing a divorce under such circumstances, since the husband was imprisoned for failing to repay a debt rather than as a means to compel him to divorce his wife. Since the imprisonment was unrelated to the husband's recalcitrance in giving a *get*, a release from prison in exchange for the execution of a *get* is not, they argue, to be construed as a form of coercion.[145]

A similar approach is upheld by R. Feinstein. As Breitowitz summarizes,

> In a responsum dated 5719 (1959), Rabbi Feinstein dealt with the following situation: a husband and wife were civilly divorced and the husband was ordered by a court to pay alimony. Failing to meet those obligations, the husband was imprisoned. The wife then agreed to drop her alimony claim (for arrearages) and procure his release if he would execute a *get*, which he did. Was this a *get meuse*? Rabbi Feinstein ruled that it was not, and such a *get* could be executed even *ab initio*. See *Igrot Moshe E.H. I*, 137.[146]

Thus R. Feinstein validates a *get* granted in exchange for escaping a monetary obligation unrelated to the execution of the *get*, namely, paying maintenance (*mezonot*).

Rabbis Daichovsky, Elyashiv, Feinstein, and Rafael concur in subscribing to the view expressed by R. Moses of Trani:

> A *get* is only considered unlawfully enforced when [the husband] is coerced with regard to the divorce. But if he is coerced with regard to a different matter, and in order to free himself from that coercion he divorces his wife, [the *get*] is not regarded as unlawfully enforced.[147]

144 They cite *Pithei Teshuva*, YD 134:11, which invokes *Torat Gitin*, as the source for their ruling. And see Bleich, n. 147 above, 99. Cf. *Responsa Tashbetz*, vol. 1, #1; *Mishne Lamelekh, Code*, Laws concerning Divorce 2:20; *Responsa Pnei Moshe*, vol. 1, #26; *Pithei Teshuva*, EH 132:6. Cf. *Responsa Ribash*, #127; *Responsa Raanah*, vol. 1, #63; *Responsa Pnei Yehoshua*, #75 and *Responsa Beit Efraim*, 2nd edition, EH, vol. 1, #73 who argue that mention of divorce does not invalidate any subsequent execution of *a get*.

145 3763/38, 11 PDR, 300, 302–307 (R. Daichovsky); 16 PDR, 271, 272–279 (R. Rafael), 275–276 (R. Elyashiv).

146 Breitowitz, n. 140 above, 135 n. 391. See also *Responsa Pnei Yehoshua*, vol. 2, #75.

147 *Responsa Mabit*, vol. 1, #22 (translation from Kaplan, n. 124 above, 104–105). Based on this responsum as well as *Responsa Mabit*, vol. 1, #76, this conclusion applies whether the husband is unwilling to pay the debt or

As long as the sanctions applied are, from the outset, intended to address a breach of an independent claim that is halakhically legitimate, and are not simply a means of pressuring the husband to grant the divorce, any subsequent execution of a *get* will be valid. Just as according to the Ribash, social shunning of one who fails to have conjugal relations with his wife does not create an invalid divorce (*get meuse*), so too compensating the wife for mental anguish engendered by denial of conjugal relations does not taint any subsequent divorce.

What about a sanction that is ostensibly independent of the *get*, but employed for purposes of compelling the *get*? Is the intent (*kavana*) to introduce an independent claim at a particular point in time relevant in determining whether a divorce is coerced? But how is intent to be

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incapable of paying it. See the reading of the Mabit's position put forward in *Responsa Simhat Kohen*, vol. 2, EH, #9.

On the consistency of these responsa by the Mabit with other responsa he wrote on the matter, namely, vol. 2 #138 and #206 and vol. 3, #212, see R. Zvi Gartner, *Kfiyat Get*, 376–77. R. Gartner's conclusion differs from my own. He contends that the Mabit's true position, expressed in vol. 2, #206 and vol. 3, #212, is that a husband's inability or unwillingness to satisfy an independent financial claim **does** taint any subsequent execution of a divorce, see R. Gartner, ibid., EH, #134, 379. Though the responsa on which R. Gartner bases his conclusion reflect a minority view, and stand in contradiction to the Mabit's responsa #22 and #76 (of vol. 1), on which I base my own reading of the Mabit, and though R. Gartner, in a written communication, acknowledges that this minority view is not supported by other Later Authorities, some contemporary decisors nonetheless concur with R. Gartner's understanding of the Mabit's position. See Bleich 1989, n. 138 above, 339; Izirer, n. 140 above, 312; Joseph Goldberg, "Duress unrelated to divorce" (Hebrew), 7 *Shurat Hadin* (2002), 353; *Responsa Mayim Tehorim*, EH #15; Uriel Lavi, "Arranging a *get* after the husband has been obligated to pay his wife monetary damages" (Hebrew), *Tehumin* 26 (2006), 160, 165. In endorsing R. Gartner's interpretation of the Mabit's view, these decisors argue that we must show deference to the minority view due to the seriousness of the halakhic consequences of an invalid divorce. See J. David Bleich, "Monetary agreement for the purpose of avoidance of *get* recalcitrance" (Hebrew), *Ohr Hamizrach* 41 (1992), 272–80.

In light of the internal contradictions in #138 as well as its inconsistency with two of the Mabit's other responsa, and the fact that other Later Authorities reject this position or uphold the reading of the Mabit's position I have endorsed, I see no reason to factor it into decision-making on this matter. Indeed, neither R. Feinstein nor R. Rafael invoke this view. Though *argumenta ex silentio* of this sort are inconclusive, this silence of major authorities does serve to support the lenient position.

ascertained — by noting whether anything is said about divorce when the independent claim is made, by judging the wife's **actions**, or by **inference from the circumstances**? Some argue that even if divorce is merely mentioned, this indicates that the intent of the independent financial claim is to induce the husband to grant the divorce. If divorce is not mentioned, we can assume that the intent of advancing the financial claim is to have it settled, rather than for it to serve as leverage toward procuring a *get*.[148]

Others contend that the focus must be the claim itself. Emotional distress generated by refusal to grant a divorce, financial coercion and blackmail on the part of the husband in the course of the negotiations, and the anguish arising from years of divorce litigation cannot serve as grounds for a monetary award. Claims for compensation for these injuries are related to the *get* and therefore contravene the requirement that the *get* be freely given. However, mental anguish due to the absence of conjugal relations is an independent claim, and therefore may be grounds for granting an award. The point in time at which the wife submitted the claim, or her verbal remarks linking the claim to receiving a *get* need not be considered by the court. As we saw, such a claim may be advanced even where divorce is not contemplated. In our scenario, a couple had been living separately under the same roof for five years. Though the wife would have liked to engage in conjugal relations with her spouse, her husband willfully refused to have relations. For the sake of their children, the couple remained outwardly married while in actuality living separately. In principle, at any time during this period of separation, the wife could have chosen to submit a claim against her husband for intentional infliction of mental anguish. For various reasons, she chose to refrain from advancing such a claim prior to deciding to be divorced, but the grounds for such a claim did exist throughout the five years of de facto separation. In other words, this claim is inextricably linked to the emotional stress engendered due to the absence of conjugal relations within their marriage, and not introduced merely for the sake of pressuring her husband to grant the divorce. The fact that subsequent to her years of anguish, the wife is being held hostage by her husband's recalcitrance, financial coercion and blackmail initiated by the husband ought not impact the legitimacy of her claim, and should not serve to invalidate

148 *Igrot Moshe*, EH, vol. 1, #137, s.v. *velo muvan; Responsa Ein Yitzhak*, EH, vol. 2, #33:1–6; Gartner, ibid., 379, 386.

any subsequent execution of a divorce. Her intent in advancing the claim at this time, three years after the court's issuance of a divorce directive, is halakhically insignificant.

Others disagree, and invalidate any *get* executed subsequent to the wife's recourse to such a claim for damages. They maintain that even though a self-standing claim, such as a claim for payment of a monetary debt or the amount specified in the *ketuba* is not linked to a request for execution of a divorce, nevertheless, if there is an established presumption (*umdena demukhah*), that these claims were put forward primarily to procure a divorce, any subsequent delivery of a *get* is invalid.[149] However, our situation is readily distinguishable from situations where such a presumption is warranted. In our case, even if the ostensibly independent claim for damages for emotional distress was motivated by the desire to procure a divorce, it is a claim, and not an existing obligation. In the other situations, the husband grants the divorce in exchange for the wife's agreement to release him from a financial duty, in effect saying to him, 'pay up or grant a *get*.' Our case deals with the advancement of a claim that may or may not result in the awarding of damages.[150] Since the consequences of the suit are not

149 *Responsa Maharashdam*, EH, #63; *Responsa Rav Pealim*, vol. 2, #3. In a recent decision handed down by Jerusalem Supreme Rabbinical Court, R. Zion Algrabli states:

> There is no reason for reluctance to submit to the court a claim for tort damages for *boshet* and the like due to one spouse's neglect of the other . . . even if the claim is procedurally linked to [i.e., submitted along with] a claim for divorce. However, it must be clear that the tort claim was not submitted for the purpose of pressuring the husband to grant a *get* . . . only a rabbinical court may determine whether this claim impacts the propriety of the *get* [7041–21–1, SRC, Mar. 11, 2008]

If, in the eyes of the court, the claim is self-standing and not intended to coerce the granting of a divorce, any subsequent granting of the divorce is proper. On the other hand, Ranaah, R. Akiva Eiger, *Pnei Yehoshua, Neot Deshe* and *Beit Efraim*, all contend that the intent is irrelevant and the subsequent divorce proper.

150 Many decisors contend that a husband who gives a divorce due to a threat is deemed to have been forced to grant the *get*, see *Responsa Rashba*, vol. 2, #276; *Responsa Mahari b Lev*, vol. 2, #77; *Responsa Shem Arye*, #93–94; *Responsa Avnei Nezer*, EH #178:2–3; *Pithei Teshuva*, EH 134:15 in the name of the Ridbaz. But these rulings are readily distinguishable from our case, since all deal with situations of "clear and present danger," i.e., these are cases where a husband is being threatened with harm, imprisonment, or

spelled out in advance, the putative 'coercion' is too remote to rise to the level of duress. Whereas the said authorities invoke an established presumption in the context of an existing independent outstanding debt, which does entail coercion of a *get*, in our case there is no such existing debt, but only the threat that a claim for damages may be presented to the court.

Moreover, on its face, the advancement of her claim for monetary damages in order to coerce her husband to grant a *get* is analogous to the case of a husband who receives money in exchange for a divorce, which does not render the resulting divorce a *get meuse*. As R. Shilo Rafael observes:

> One is allowed to release from imprisonment someone who is serving time for contempt of the rabbinical court [failing to produce information requested by the court], and condition his release on his giving his wife a *get*. For his imprisonment is not related to his recalcitrant refusal to grant

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death if he refuses to consent to a divorce, and hence all are indeed instances of unlawfully coerced divorced. By contrast, in our case, the husband is threatened by a monetary claim too remote to rise to the level of compulsion, and esp. since the amount of the potential award to the wife is, as we saw, highly variable. As the Tashbetz comments, "if he has a remote fear of financial loss and therefore desires to give a *get*, ought one label this a coerced *get*?"; see *Responsa Tashbetz*, vol. 2, #69. Indeed, the wife may threaten to submit a claim and never follow through with her threat, see *Mordekhai*, Gitin, #395; *Responsa Maharik*, #185; *Mikhtav Mieliyahu*, gate 7, #18. But cf. *Responsa Rashba*, vol. 1, #883; *New Responsa Ribash*, #27 and #32, and *Responsa Bezalel Ashkenazi*, #15, which argue that even a mere threat constitutes duress, see Kaplan, n. 124 above, 98.

Obviously, if the rabbinical courts do begin to award damages for this claim, and it comes to be a 'clear and present danger' akin to the threat of imprisonment, the threat that such a claim will be submitted may render execution of the *get* coerced. However, even were such an award to become commonplace, the amount of the compensation would not be known in advance, and hence the threat remains remote, see Breitowitz, n. 140 above, 248. Moreover, if a wife threatens her husband that she wants to cause him financial loss out of spite, and the husband, of his own initiative, decides to give her a *get*, her threat is not deemed duress, and the *get* is valid, see *Pithei Teshuva*, EH 134:11; *Igrot Moshe*, vol. 1, #137. A fortiori, in our case, a wife's submission of an independent claim for damages unrelated to the divorce ought not impugn the validity of a subsequent *get*. Similarly, if there has been no threat to submit such a claim, but because he fears that unless he grants the divorce, such a claim will be made, the husband grants the divorce, this is not deemed to be duress, see *Responsa Bnei Hayai*, HM, vol. 2, #81.

> the *get*, but is, rather, punishment for contempt of court, and he is redeeming himself by giving the *get*. And at the time R. Elyashiv agreed with me.
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> One can promise a prisoner that his term of imprisonment will be reduced by a third in exchange for giving a *get* ... and I hear from R. Elyashiv, long may he live, that it is clear that this is not considered a coerced divorce, and it is like [the case of] a wife who purchases her *get* for a certain sum of money — such a *get* is entirely acceptable (*kasher lemehadrin*).[151]

In various rabbinical judgments 'obligating divorce,' R. Elyashiv permits a husband whose wife does not wish to accept a bill of divorce to appease his recalcitrant wife by offering money in exchange for her accepting the *get*; the ensuing divorce is not deemed to be unlawfully coerced.[152] And responsa in *Tashbetz*, *Torat Gitin* and *Noda Beshearim* (R. Dov Berish Ashkenazi) attest to the not-uncommon phenomenon of wives absconding with their recalcitrant's husband's assets and releasing them only upon receiving a *get*. It is hardly, if ever, claimed that these were improper inducements that rendered the divorces coerced.[153] Financial inducements, whether to appease a recalcitrant husband or a recalcitrant wife, do not contravene the strictures against coerced divorce.

151 16 PDR, 271, 275–276. Whether R. Elyashiv and R. Rafael would agree that a husband's failure to heed the rabbinical court's ruling that he should divorce his wife constitutes contempt of the rabbinical court that may be punishable by imprisonment, and would agree to a release in exchange for his granting a *get*, is an open question. The logic of their positions would seem to imply such a conclusion, but they have not specifically addressed the question of whether failing to heed a court's divorce judgment constitutes denigration of the court, see below at nn. 159 and 169.

152 PDR 7:111, 8:36; 9:65. R. Abraham Sherman, a student of R. Elyashiv, subscribes to his position, see 2337, SRC, Dec. 27, 2004. See also *Responsa Rosh*, rule 35:2; *Responsa Yabia Omer*, vol. 6, EH, #10. For a contemporary exposition, see advisory opinion of R. Shimon Yaacobi, legal advisor for the Rabbinical Courts Administration, in Bagatz 2609/05, *Plonit v. Supreme Rabbinical Court et al.*

153 *Responsa Tashbetz*, vol. 4, #35; *Torat Gitin* 134:4; *Responsa Noda Beshearim*, #6. See also *Pithei Teshuva*, EH 134:11 in the name of the Rashbatz. Some authorities do say that if the wife has stolen large sums from her husband and is willing to return the money in exchange for a divorce, the subsequent execution of the divorce is indeed coerced, see *Responsa Tzemah Tzedek*, EH 262:3.

R. Ezra Batzri, a Jerusalem rabbinical court judge, analyzes the dynamics of such a situation as follows:

> Should a rabbinical court be aware that the husband is interested in divorcing his wife, his intent to extort monies from her . . . constitutes coercion by way of unjustified extortion of money from the wife. Essentially, [any steps the court takes] do not coerce him to divorce her, since he desires to divorce his wife. He is employing the divorce as a means to achieve things improperly . . . as long as the husband is not interested in peace and the court is aware that the purpose of delaying the *get* is not to foster peace with his wife, but on the contrary, to cause pain and take revenge on her or extort from her monies that do not rightfully belong to him — in such a situation, there is no apprehension that the divorce is coerced.[154]

In short, financial inducements to procure a divorce do not render the divorce coerced. In effect, a wife's willingness to waive an award for mental anguish in exchange for her *get* is no different than forgiving a debt or transferring cash for a delivery of a *get*. Hence, a wife's claim for damages for mental anguish due to her husband's denying her conjugal relations during the years the two were living under the same roof prior to the divorce ought to be permissible.[155]

Given that such a claim can be put forward, how does the court proceed? Once both the husband and the wife obligate themselves to submit to the court's resolution of the wife's claim for mental anguish,[156] the court proceeds to address the claim on the merits. Upon

154 18 PDR, 71, 81. See too *Responsa Heikhal Yitzhak*, EH #158; *Responsa Tiferet Tzvi*, EH #102; *Igrot Moshe*, EH, vol. 3, #44; Gartner, n. 147 above, 244; *Responsa Shema Shlomo*, vol. 1, EH #15:3; Haifa District Rabbinical Court, 050562289–13–1. The same rationale is given in the context of a wife harassing her loving husband to grant her a divorce, see *Arukh Hashulhan*, EH 134:22; Haifa District Rabbinical Court, 061391348–21–1.

155 Note that those authorities who argue that any discussion and/or arrangement to waive this claim in exchange for delivery of the *get* would render execution of the *get* coerced would insist that there be no discussion of the *get* when the claim is submitted.

156 The parties' signing of an arbitration agreement (*shtar borerut*) gives the court the authority to resolve this matter, see Rema, *SA*, HM 12:7; *Sema*, HM 12:18; Yoezer Ariel, "The halakhic need for a *shtar borerut*" (Hebrew), 14 *Tehumin* (1994),147, 152; *Mishpatekha Leyaakov*, 2:405–406; Zvi Lifshitz, "Compensation for verbal embarrassment" (Hebrew), 17 *Tehumin* (1997), 381, 388. Assuming this decision complies with the rules of secular arbitration procedure, it would be legally enforceable in a competent civil jurisdiction in the United States; see *Uniform Arbitration Act*, sec. 1.

deliberation, should the court rule in the wife's favor and hand down an award, it will direct the husband to pay this award. Should the husband refuse to pay the *tzaar-boshet* award, the award can be enforced in civil court. On the other hand, should the husband accept the rabbinical court's decision, he has the option of suggesting to his wife that in exchange for a divorce, she waive her entitlement to the monetary damages awarded her by the court; the resulting *get* will not be tainted by coercion.[157] However, to avoid any concerns that the divorce will be deemed coerced, the monetary award should be not be "excessive," and should be tenable given the husband's financial situation.[158]

What happens if a husband refuses to accept the court's decision concerning a wife's claim for mental anguish due to denial of conjugal relations? Upon the court's determination that the husband's refusal to comply is unwarranted, the court will issue a 'contempt of court' order

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To address claims for emotional distress, an arbitration agreement that will be halakhically binding on both parties as well as legally enforceable in civil courts should include the following clause:

> "The parties acknowledge that the Beth Din is authorized to resolve all disputes, including, but not limited to, a spouse's refusal to engage in conjugal relations, coercion of the other spouse to engage in conjugal relations, distribution of assets, spousal support, child support, child custody and a spouse's refusal to give the other spouse a Jewish divorce or receive a Jewish divorce from the other spouse."

Signing off on this clause can be construed as a threat that either spouse may in the future assert a claim for mental anguish due to having been denied conjugal relations during the period the divorce was withheld. As we saw, this type of threat will not impair the legitimacy of the subsequent execution of a *get* in order to stave off this claim or payment of an award for this claim. The divorce is valid provided that any monetary award, such as damages for *tzaar-boshet*, is self-standing and independent of the *get*. See R. Daichovsky, n. 168 below, 300, and idem, "Monetary steps of enforcement against m*esarvei get*" (Hebrew), 26 *Tehumin* (2006), 173–77.

157 See above at nn. 153–155. See also *Responsa Beit Efraim*, vol. 3, EH, #73 (288a–b); *Responsa Zera Anashim*, #36.

158 According to R. Isaac Herzog, a *get* executed in order to escape an exorbitant support obligation would run afoul of the strictures of a *get meuse*. However, if the stipulated sum is within the husband's ability to pay, his decision to grant a *get* is considered voluntary, see *Responsa Heikhal* Yitzhak, EH 1:1, 2. Analogously, as long as the *tzaar-boshet* award is neither unreasonable nor exorbitant, it will not render the divorce coerced.

(*shtar seruv*), with all its attendant consequences,[159] and a dispensation for the other party to initiate proceedings in civil court (*heter arkhaot*).[160] Alternatively, prior to the wife's request to have the court issue these rulings, she may ask her rabbi whether she can proceed to civil court without the permission of the rabbinical court, or, if a *heter arkhaot* is required, whether she may approach only the rabbinical court that dealt with her claim, or she is allowed to approach another rabbinical court to request permission to proceed to have her claim addressed in civil court. note that a *heter arkhaot* does not mean that the wife has carte blanche to advance any and all claims in civil court. Only if the claim is legitimate in the eyes of the halakha can it be asserted in civil court.[161]

159 Refusal to comply with a court decision or being declared in contempt of court (*mesarev ledin*) makes one subject to being placed under a ban (*nidui*), see *SA*, HM 11:1; *Igrot Moshe*, YD, vol. 3, #142:2; 11 PDR, 168–181; *SA*, YD 334:43; *Responsa Maharil Diskin*, rulings, 52; *Responsa Hatam Sofer*, HM, #177.

160 *SA*, HM 26:2; *Arukh Hashulhan* HM 26:5; *Responsa Rema*, #52; *Responsa Maharsham*, 4, #105. Others contend that generally or under certain conditions, a dispensation is not even required, see *Sefer Hateromot*, Gidulei Teruma, gate 62:3; Sefer *Hatumim*, HM *26:7; Kesef Hakodshin, SA*, HM 26 and *Responsa Tuv Taam Vadaat*, vol. 3, #261; *Responsa Maharil Diskin*, rulings, 13; *Responsa Maharsham*, vol. 4, #105. The customary practice today is to request permission from the court; see Asher Weiss, "Permission to litigate in civil court" (Hebrew), 5 *Kovetz Darkhei Horaa* (2006), 99, 102. Whether one requires permission from a panel of three *dayanim* or it suffices to receive permission from the presiding head of the court (*av beit din*) or a single *dayan* appointed by the community, is subject to debate; see *Responsa Maharsham*, vol. 4, #105; *Orah Mishpat*, HM 26:2; *Responsa Betzel Hahokhma*, vol. 4, #37. Whether one approaches a court or one's own rabbi, it behooves the authority to hear both sides of the matter prior to issuing any dispensation to litigate in a secular court, see *Pithei Teshuva*, HM 67:5; *Sefer Meishiv Bahalakha*, 38–40.

161 Should a party recover in civil court money he would have not been awarded in a rabbinical court, it is viewed as stolen and must be returned to the other party, see *Responsa Tashbetz*, vol. 2, #290; *Responsa Hut Hameshulash*, vol. 1, #19; *SA*, HM 28:3; *R. Akiva Eger*, HM 26:1. According to most authorities, this *heter arkhaot* is granted whether we are dealing with a claim that is provable (*hov barur*), e.g., by a creditor's producing an authenticated document of indebtedness, or whether the claim is disputed, e.g., a claim for injuries. See *Imrei Bina*, #27; *Yeshuot Yisrael* 26:2; *Responsa Orah Mishpat*, 26:2. In the opinion of *Netivot Hamishpat*, which argues that a disputed claim cannot be resolved in civil court, a claim for damages for mental anguish may not be resolved there, see *Netivot*

On being summoned to the civil proceeding, can the wife assert a claim against her husband for recklessly causing her severe emotional distress in connection with their years of divorce litigation? In fact, there have been a few instances of Jewish wives lodging claims in American courts against their Jewish spouses who wrongfully refused to grant a *get*, thus inflicting emotional distress.[162] Are such claims halakhically legitimate or do they risk tainting a subsequently executed *get*? Addressing a French court's award of compensation for a husband's failure to execute a Jewish divorce, contemporary decisors, following earlier authorities, have construed such an award as a classic example of financial compulsion (*ones mamon*), viz., indirectly securing compliance in executing a *get* by exerting financial pressure.[163]

The qualms expressed regarding the aforementioned claim do not apply to our claim for mental anguish due to denial of conjugal relations during marriage. As I have argued, such a claim is made solely to protect the wife's emotional integrity. Hence, just as a rabbinical court may deliberate on the merits of such a claim, so too such a claim, submitted to a civil court, may be addressed on the merits.[164] Furthermore, even if

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Hamishpat HM 26: Hidushim (8) and Biurim (3). However, I would suggest that a claim for damages for mental anguish is to be subsumed under the category of provable claims, given that the abstention from sexual relations is a halakhic fact, see above at n. 73.

162 *Roth v. Roth*, #79–192709-DO (Mich. Cir. Ct. Jan. 23,1980); *Perl v. Perl*, 126 A.D. 91,512 N.Y.S. 2d 372,1987 N.Y. App Div.; *Weiss v. Goldfeder*, New York Law Journal, Oct. 26, 1990; *Golding v. Golding*, 176 A.D. 2d 20,581 N.Y.S. 4,1992 N.Y. App Div.; *Giahn v. Giahn*, New York Law Journal, Apr. 13, 2000, N.Y. Supreme Ct.

163 In *D. v. France*, 35 Eur. Comm. H.R.D.R. 199 (1983), the husband had been ordered by a French court to pay his ex-wife 25,000 francs to compensate her for his refusal to deliver a *get*. See *Responsa Shevet Halevi*, vol. 5, EH #210; *Responsa Minhat Yitzhak*, vol. 8, #136; 7041–21–1, *Plonit v. Ploni*, SRC, Mar. 11, 2008. For a survey of civil jurisdictions worldwide that have awarded such compensation, see *Bruker v. Marcovitz*, 2007 SCC 54 (CanLII).

164 The tort of intentional infliction of emotional distress (IIED), independent of physical harm or impact, has been recognized in all US states, see Robert D. Sack, *Sack on Defamation: Libel, Slander, And Related Problems*, 3rd edition (NY: 2005), §13.6, pp. 13–45. It appears that no action for damages for precluding a spouse from engaging in sexual relations has ever been brought before an American court. Whether American courts would recognize such emotional harm is an open question. Many jurisdictions are increasingly recognizing IIED tort actions between spouses, see L. Karp,

Domestic Torts: Family Violence, Conflict and Sexual Abuse, vol. 1(rev. ed. 2005), 116. New York does not allow such claims, see *Xiao Yang Chen v. Fisher*, 843 N.E. 2d723 (N.Y. 2005). Some jurisdictions have concluded that the defendant's conduct failed to be outrageous enough to allow the plaintiff's claim for IIED, see *Hassing v. Wortman*, 333 N.W. 2d 765 (Neb. 1983); *Nagy v. Nagy*, 210 Cal. App. 3d 1262 (Cal. 1989); *Alexander v. Inman*, 825 S.W. 2d 102 (Tenn. 1991); *Ruprecht v. Ruprecht*, 599 A. 2d 604 (N.J. 1991); *McCulloh v. Drake*, 24 P. 3d 1162 (Wyo. 2001). Other states have held husbands liable for emotional distress, provided there was harassment or assault and battery, see Karp, 118–135. Recently, a court awarded damages for IIED to a wife whose husband refused to grant her a *get*, see *Tessler v. Zadok*, #2:08-cv-05695-R-RC (California District Ct., May 11, 2009).

Some states have, for public policy reasons, refrained from permitting such suits in general, and in particular, those that emerge from marital differences; see Linda Berger, "Lies between mommy and daddy: the case for recognizing spousal emotional distress claim based on domestic deceit that interferes with parent-child relationships," 33 *Loyola of Los Angeles Law Rev.* (2000), 459, 467–70; I. Ellman and S. Sugarman "Spousal emotional abuse as a tort?" 55 *Maryland Law Review* (1996), 1269, 1285–89; B. Redman, "Jewish divorce: what can be done in secular courts to aid the Jewish woman?" 19 *Georgia Law Review* (1985), 389, 422–23; R. Orsinger, "Asserting claims for intentionally or recklessly causing severe emotional distress in connection with divorce," 25 *St. Mary's Law Journal* (1994), 1253, 1293–94. In a written communication, Marc Stern, General Counsel of the American Jewish Congress, observes that given that certain states have a policy of precluding interspousal damage awards, a court may decline to enforce an arbitration award based on public policy grounds; see Aleem v. Aleem, 2008 WL 1945345 (MD 2008).

Numerous proposals for and against limiting recovery for emotional distress have been put forward. On the grounds for recognition of the tort, see *Restatement (Second) of Torts*, sec. 46, comments d, e, f and j (1965). As to the argument that First Amendment problems of entanglement of law and religion preclude the possibility that a civil court will offer relief to a recalcitrant spouse in the context of a Jewish divorce, it has been argued that there is a compelling secular interest to afford such relief, see S. Friedell, "The first amendment and Jewish divorce: a comment on *Stern v. Stern*," 18 *Journal of Family Law* (1979–1980), 525; Redman, 416–25; David Cobin, "Jewish divorce and the recalcitrant husband: refusal to give a *get* as intentional infliction of emotional distress," 4 *Journal of Law and Religion* (1986), 405, 425–29; Michelle Greenberg-Kobrin, "Civil enforcement of religious prenuptial agreements," 32 *Columbia Journal of Law and Social Problems* (1999), 359. On the other hand, Marc Stern of the American Jewish Congress contends that entertaining such claims entails entanglement of law and religion on two separate grounds: (a) Awarding such a claim involves addressing the threshold issue of whether the halakha mandates the granting or receiving of a *get*; (b) The granting of such an award amounts to the state's coercing an individual to comply with a religious act.

it can be demonstrated that the civil court will award more damages than a rabbinical court would, the wife may retain the entire award handed down by a civil court.[165]

V *Concluding Remarks*

We have focused on a particular type of contemporary *agunah*: the wife who seeks damages for mental anguish caused by her husband's keeping her from engaging in conjugal relations while a divorce is being withheld. This raises a question: given that the primary emotional trauma is due to her husband's recalcitrance in granting a divorce rather than the denial of conjugal relations, may the wife put forward a claim for damages for this period without rendering a subsequent divorce unlawfully coerced (*get meuse*)? More broadly, may a contemporary *agunah*, even one who shares a domicile with her husband, but decides to seek a divorce due to irreconcilable differences or spousal abuse, and is met by intransigence on the part of her husband, advance a claim for mental anguish incurred during the period of her husband's recalcitrance? We have argued that as long as the monetary obligation is not linked to the divorce, but independent, and the penalty will remain in place after the *get* has been granted, execution of the *get* will be deemed proper. In the words of *Torat Gitin*:

> If he obligated himself with a penalty, should he fail to divorce her by a specific date, and he retracted and refused to divorce her until after the stipulated date, once the stipulated date passes he becomes obligated to

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In Israel, given that the dissolution of Jewish marital ties is effected via execution of a Jewish divorce, the constitutional issue of establishment of religion does not arise. In fact, commencing with 2001, four judges have awarded tort damages against a recalcitrant spouse, see 19480/05, Jerusalem Family Court, Apr. 30, 2006.

165 *Kesef Hakodshin, SA*, HM 26:2. On the view of rabbis Daichovsky, Elyashiv and Z.N. Goldberg, prior to accepting an award from a civil court, one must ascertain the appropriateness of the amount of the award. Generally speaking, one must ask his rabbi whether the amount of the award would have been granted in a rabbinical court. If a rabbinical court would have awarded a smaller amount, then only that amount may be accepted, see M. Ralbag, "Litigating in civil court with the rabbinical court's permission," 25 *Tehumin* (2005), 249, 251–52. However, in our case, given that it is permissible to accept a civil court award for an amount larger than may have been awarded in a rabbinical court, there is no requirement that one's rabbi be consulted about the propriety of accepting the civil award.

> pay the penalty even if he divorces her. . . . And the court can mandate the penalty, and it is akin to coercing someone to pay his debt, and if he divorces her in order to free himself from paying the debt, the *get* is not deemed a forced *get*, as noted by the Rashbatz.[166]

The reasoning is that while monetary pressure is improper if the granting of the *get* will free the husband of his monetary obligation, if the penalty will have to be paid regardless of the giving of the *get*, then financial pressure is not the motivating factor in his granting the *get*, and will not taint its execution. The wife may be willing to waive her right to the money in exchange for the *get*. Such a waiver is proper and no different from what transpires when the court has mandated that a husband pay a debt unrelated to the divorce, such as the *ketuba* payment, and the couple mutually agree to waive payment of the *ketuba* in exchange for the *get*.[167]

In light of responsa dating back to the Ribash, and in light of *Torat Gitin*'s exposition of the law, R. Daichovsky argues that a wife may collect *tzaar-boshet* damages for the mental anguish caused by her husband's conduct. As these damages relate to the husband's conduct in the past, even if he decides to grant his wife a divorce, the damages stand and must be paid. And even if the wife waives her right to these damages, this decision will in no way impair the fitness of the *get*.[168] Should a husband refuse to submit to the rabbinical court's authority, a claim for damages due to *tzaar-boshet* may be submitted to a civil court,

166 *Torat Gitin*, EH 134:4.

167 See Bleich 1992, n. 147 above, 272–76.

168 R. S. Daichovsky, "Rabbinical courts and civil courts: thoughts on their overlapping boundaries in family matters" (Hebrew), *Moznei Mishpat* 4 (2005), 261, 295–98; idem 2006, n. 156 above, 173–77. But cf. *Shevet Halevi* and *Minhat Yitzhak*, n. 163 above, which argue that secular legislation mandating an award for a husband's recalcitrance in granting *get* is improper monetary pressure would taint subsequent execution of the *get*. Recent Israeli rabbinical court rulings have refused, on similar grounds, to mandate delivery of a *get* in the face of such tort claims presented by wives in the Israeli civil courts. See Tel Aviv District Rabbinical Court, 031783426, Aug. 4, 2005, 02786214–2, Dec. 6, 2006; Netanya District Rabbinical Court, 054568514, Jan. 29, 2007. However, given that the award is based on a free-standing obligation to compensate the wife for *tzaar-boshet*, these decisors may well concur with R. Daichovsky's view. On other potential challenges to R. Daichovsky's position, see Daichovsky 2005, 299–301.

and given the husband's failure to heed the rabbinical court's recommendation that he divorce his wife, R. Hadaya suggests that monetary penalties may be imposed on the husband for contempt of court.[169]

What is the purpose of providing an award for emotional distress to this present-day *agunah*? First, it is an opportunity to bring an action that provides public recognition of the intrinsic value of human dignity by formally acknowledging its violation. By invoking exigency halakha, the rabbinical court is attempting to mitigate the emotional suffering, and particularly, the humiliation, of a vulnerable victim, who is denied conjugal relations, and whose husband's intransigence prevents her from in receiving a divorce and remarrying. The avoidance of shame and psychological torment is a central principle of other realms of Jewish living.[170] For instance, despite the proscription against hurting and endangering oneself, to avoid shame and relieve mental discomfort, certain types of cosmetic and plastic surgery are permissible.[171] Protection of a woman's dignity should also be extended to her emotional persona. The awarding of these damages for mental anguish gives symbolic recognition to the significance of a wife's bodily and emotional integrity. Though monetary damages may not be equivalent to the emotional injury experienced, they can serve as a symbolic means of restoring a sense of personal security and autonomy.

Furthermore, a successful suit can publicly reprimand and economically penalize a recalcitrant husband who unjustifiably withholds conjugal relations (*ona*) and/or a *get*, thereby deterring others members of the community from committing the same offenses. Realizing that there may be a suit filed for this action, a husband may think twice

169 *Responsa Yaskil Avdi*, vol. 6, #96. In addition to being in contempt of court (*mesarev ledin*), the husband is also violating proscriptions against denigrating a Torah scholar and *dayan*, see *SA*, YD 243: 6–7, 334:47; HM 27:1–2.

In fact, serving as a *dayan* in the Israeli rabbinical courts, R. Daichovsky has, pursuant to Jewish and Israeli law, directed the civil authorities to imprison recalcitrant husbands. See S. Daichovsky, "Divorce enforcement" (Hebrew), 25 *Tehumin* (2003), 132, 138–43. The underlying premise of this position is that imprisonment in contemporary prisons does not render a divorce unlawfully coerced, see *Amud Hayemini*, #19 (R. Isaac Herzog's opinion); *Mishpetei Shaul*, #36; *Responsa Yabia Omer*, EH 3: #20:34.

170 See Alfred Cohen, "The valance of pain in Jewish thought and practice," *Journal of Halacha and Contemporary Society* 53 (2007), 25, 30–35, 47–50.

171 *Tosafot*, bShabat 50b s.v. *bishvil*; *Responsa Helkat Yaakov*, vol. 3, #11; *Responsa Mishne Halakhot*, vol. 2, #246–247; *Responsa Minhat Yitzhak*, vol. 6, #105:2.

before refusing to engage in sexual relations with his wife or withholding a *get*. Finally, if the suit is successful, the award will compensate the wife to some degree for the emotional loss caused by the said assaults on her psyche.[172]

For all these reasons, prior to endeavoring to resolve a divorce situation, the court should inform the parties that adjudicating spousal claims for emotional distress is within its purview.[173] Indeed, rabbinical courts should insist that resolving end-of-marriage issues includes addressing spousal claims for mental anguish. Should a party refuse to arbitrate such a claim, a court should decline to address the other issues pertaining to termination of the marriage. Failure to insist on an all-or-nothing approach simply encourages the already pervasive phenomenon of shopping around for the 'right' rabbinical court, namely, one that serves the husband's needs rather than addressing all the issues in an honest and forthright fashion. Just as the court should insist on hearing all claims associated with the end of marriage, a woman should insist that all of her claims be heard in court.[174]

172 The primary function of tort damages is to compensate the victim for injuries, restoring him to the position he occupied prior to the tortious act, see *Hidushei R. Hayim Halevi [Soloveitchik], Code*, Laws concerning Pleading 5:2; R. Israel Gustmann, *Kuntresei Shiurim*, Baba Kama, shiur 6. Compensation for medical expenses falls under this rubric, see *Magid Mishne, Code*, Laws concerning Wounding and Damaging 2:16; *SA*, HM 420:23. In contrast, *tzaar and boshet*, which are non-physical injuries, are compensated by imposing a monetary penalty, see *Code*, Laws concerning Wounding and Damaging, 3:3. Clearly, given that there is no possibility of restoring the wife's emotional persona to its state prior to the husband's denial of conjugal relations, the only compensation can be a monetary penalty.

173 In other words, the claim or the possibility of a future claim will be incorporated into the arbitration agreement accompanied by a provision empowering the rabbinical court to obligate the parties to deal with a husband's refusal to engage in conjugal relations, see n. 156 above.

174 Couples who intend to marry should execute a prenuptial agreement that reads:

> The parties agree that the Beth Din is authorized to decide all disputes, including a spouse's refusal to engage in conjugal relations during marriage, a spouse's coercion to engage his spouse in conjugal relations and a spouse's refusal to grant or receive a Jewish divorce (*get*), according to their discretion, pursuant to the circumstances, and obligate themselves to pay tortious damages such as *nezek*, *tzaar* and *boshet*, should they be imposed by the Beth Din.

On the other hand, a court's refusal to hear the claim — and if justified, to award damages — effectively bestows on the injurer a kind of 'halakhic entitlement' to cause the injury. The perceived weakness of the rabbinical courts can only lead to increased violation of the law, because others are seen to violate the law with impunity. Given the prevalence of the phenomenon of chained wives in contemporary society, it is not surprising that twentieth century decisors such as rabbis Herzog and Hadaya stress the obligation to heed the words of Torah scholars (*mitzva lishmoa ledivrei hakhamim*) regarding compliance with a court's issuance of a divorce judgment.[175]

These words of admonishment should be applicable to our situation as well. Failure to adjudicate a claim of spousally-inflicted distress (assuming the conditions elaborated on above are satisfied)[176] may undermine a community's trust and confidence in rabbinical authority in general, and rabbinical courts in particular.

Hopefully, the following incident recorded in the Talmud could not transpire in our day:

> R. Rehumi who was [studying at the school] of Rava at Mahoza, used to return home on the eve of every Day of Atonement.[177] On one occasion he was so engaged in his studies [that he forgot to return home]. His wife was expecting [him any moment, saying] 'He is coming soon, he is coming

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> The parties acknowledge that the Beth Din is authorized to resolve all disputes related to the distribution of assets, spousal support, child support, and child custody, as well as any other disputes that may arise between them.

In effect, the parties obligate themselves to pay tortious damages such as *tzaar* and *boshet* on the strength of this undertaking (*hithaivut*), rather than on the strength of the laws of damages.

175 *Responsa Heikhal Yitzhak*, EH, vol. 1, #1:5; *Responsa Yaskil Avdi*, 6:96.

176 Should the conditions be satisfied, yet the rabbinical court in question remain disinclined to invoke its exigency authority, another option is for the claim to be resolved on the basis of the laws of obligation (*hithaivut*).

177 According to bKetubot 62b, those studying Torah may leave their wives for a two or three year maximum. While at home, the frequency mandated for sexual intercourse was once a week. Today, the minimal frequency mandated for conjugal relations is twice a week; see bKetubot 61b; *Igrot Moshe*, EH, vol. 3, #28.

> soon.' As he did not arrive, she became so depressed that tears began to flow from her eyes. [At that moment] he was sitting on a roof. The roof collapsed under him, and he fell and died.[178]

And the *Shulhan Arukh* admonishes, "One must be mindful of [causing] anguish to one's wife, for her tears are ever-present."[179]

178 bKetubot 62b.
179 *SA*, HM 228:3.