CHAPTER 4

CONSEQUENTIALIST CONSIDERATIONS IN THE 

GUIDE FOR THE PERPLEXED

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A. CONSEQUENTIALISM, LAW AND ECONOMICS, AND MAIMONIDES

The present chapter discusses the consequentialist considerations emphasized by Maimonides in the Guide, Part 3, Chapters 40-41. In these chapters, Maimonides undertakes a comprehensive theoretical analysis of the main biblical and talmudic principles of tort law and criminal law. According to Maimonides, these two fields of law are closely related. Some of the consequentialist rationales that Maimonides suggests for the tort and criminal laws are innovative, like many other innovative philosophical insights and rationales included in the Guide.

“Consequentialism” has a variety of meanings, only some of which appear to be reflected in some way in the Maimonidean theory. Consequentialism often refers to a normative theory which asserts that the only factor that ultimately determines the morality of an act or a rule (or anything else) is its consequences.\(^1\) Their common features notwithstanding, there is a wide array of aspects in which the various consequentialist theories differ, the first of which is in the underlying theory of the good in general – in which concepts of equality, culpability and desert may or may not be included\(^2\) – and of human well-being in particular.\(^3\) Human well-being in the utilitarian version of consequentialism is the enjoyment of positive mental states and the avoidance of negative ones; according to welfare economics and some other consequentialist theories, what is important is the satisfaction of people’s actual or ideal preferences; in yet others, the achievement of good health, meaningful social relations, knowledge and other such objectively-defined elements is what constitutes well-being.\(^4\) The various theories also attribute different degrees of importance (or none at all) to the question of the distribution of well-being in society, and that of future generations,\(^5\) and different focal points are selected as appropriate for analysis (actions, rules, motivations and others.).\(^6\)

One simple conclusion from the above is that for Maimonides, the consequentialist element is in no way the only element by virtue of which the morality of an act or a rule must be examined, for we saw in Chapter 3 that deontological elements occupy a significant place in his theory, alongside the consequentialist aspect on which this chapter will focus.

Moreover, adoption of a primarily law and economics agenda raises a particular question as to its relevance to Maimonides, who is known for his conceptual-philosophical orientation.\(^7\) Despite looking at torts as a whole, law and economics, as it is commonly understood, reflects the US Legal Realist\(^8\)

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\(^2\) Ibid., at 19, and the references there.

\(^3\) Id.

\(^4\) Id.

\(^5\) Id., and the references there.

\(^6\) Id., and the references there.

\(^7\) Maimonides’ efforts “to bring about the unity of practice and concept, external observance and inner meaning,” as argued by Isadore Twersky, *Introduction to the Code of Maimonides (Mishneh Torah)* (New Haven: Yale University Press, 1980), at 371, is reflected by what the comprehensive *Code of Maimonides* “takes within its purview, in other words, not only the laws but the theological stimuli and ethical underpinning which suffuse the legal details with significance and spirituality.”

\(^8\) On the relations between law and economics and legal realism see, e.g., the typical argument made by Morton J. Horwitz, “Law and Economics: Science or Politics?” 8 *Hofstra L. Rev.* (1980) 905 (“Law-and-economics emerges to fill the intellectual vacuum left by Legal Realism”). See also Matthew C. Stephenson, “Legal Realism for Economists”, 23 *Journal of Economic*
movement’s anti-conceptual (or legal-formalist) jurisprudential orientation, in according primacy to economics and efficient outcomes. At the same time, we will see that although Maimonides’ works do not relate to all the consequentialist aspects as they are defined in contemporary theories, one cannot ignore the consequentialist elements that constitute an important – though, as stated, not exclusive – part of his theory.⁹ In his well-known book, Twersky already noted the extent of socially-oriented explanations in Maimonides’ various works.¹⁰

In the context of those socially-oriented explanations, Twersky emphasized the difference between Maimonides’ Code and the Guide of the Perplexed, saying that indeed those social explanations are to be found here and there in the Code, but they are found in much greater abundance in the Guide. He writes: “… [y]et when we turn to the Moreh (the Guide), we are at first unprepared to realize to the extent to which the alleged social benefit or social objective of laws is suggested as the rationale of laws.”¹¹ In this sense, Twersky argues, “the Maimonidean Code of law is not an excessively socially oriented document. Social concern and socially determined modes of abstraction and rationalization are far greater in the Moreh.”¹²

The different orientations of the Code and the Guide were discussed by Twersky at length and in depth. He showed that the Guide was oriented towards identifying the social utility of the laws of the Bible, unlike the Code. He also discussed the internal contradictions and the differences between the two works. Indeed, in the wake of Twersky’s work, we will pay utmost attention in this chapter to the differences between the two books. As is known, the Guide speaks in a different idiom from the Code. The Guide is a philosophical and theoretical composition (part of the Greco-Arab philosophical discourse of that time), and in many ways it does not even attempt to account for talmudic (as opposed to biblical) law – particularly the law of torts, whereas the Code is a detailed codex (usually based on the talmudic and post-talmudic sources) which includes halakhic rules to be applied in daily life. For this reason, traditional Jewish law has largely ignored the “policy” statements found in the Guide, especially in cases where the argument is not supported by the halakhic positions adopted in either the Code or in the Talmud.¹³

In relation to our subject as well, we will discover that whereas in the Code, as we saw in Chapters 2-3, no special tendency to emphasize the societal and consequentialist aspects on the is evident in Maimonides’ discussion of tort law, he did place great emphasis on these aspects in his explanation in the Guide of the reasons for tort law and criminal law, as we shall see below. Indeed, in the beginning of

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⁹ Several authors have dealt with various economic aspects of Maimonides’ theory. See, e.g., Walter E. Block, “Jewish Economics in the Light of Maimonides”, 17 The International Journal of Social Economics (1990) 60; Joshua D. Angrist & Victor Lavy, “Using Maimonides’ Rule to Estimate the Effect of Class Size on Scholastic Achievement”, 114 The Quarterly Journal of Economics (1999) 533-575. However, as far as we know, Maimonides’ overall approach to law and economics in general, and to law and torts in particular, has not been studied.

¹⁰ Twersky, supra n. 7, at 443-447.

¹¹ Ibid., at 445.

¹² Id.

¹³ Twersky already explained, supra n. 7, at 437, that Maimonides, when he wishes to propose reasons for the laws, “is not constrained by Midrashic explanations; he ranges freely and imaginatively in aligning laws with the ethical-intellectual goals he has defined or in correlating them with the historical-sociological conditions he reconstructed. Needless to say, not only does he uninhibitedly reject Midrashic explanations, but he resourcefully provided reasons in cases where the Midrash is silent.”
Chapter 3:40 of the *Guide*, Maimonides mentioned that his goal there is to rationalize the rules included in the Book of Torts in his *Code*. Nonetheless, some rationales of torts and criminal law presented in the *Guide* are not mentioned explicitly in the *Code* or in the talmudic and post-talmudic literature that preceded Maimonides. However, as shown in Chapter 5, the *Code* does contain some expressions and views which may be viewed in retrospect as an initial preliminary approach to the fully-developed consequentialist approach found only in the *Guide*.

The definition of consequentialism excludes, for example, ethical egoism – the view that an act is right if and only if it leads to the best outcomes for the actor.\(^\text{14}\) We see that Maimonides too would agree with this exclusion, for he emphasizes that one of the objectives of the Torah in its entirety is not to permit a person “to act according to his will and up to the limits of his power, but [to be] forced to do that which is useful for the whole….\(^\text{15}\)

Now we move on to the definition of various methods of analyzing “economics”. According to Zamir and Medina, analysis of economics is conventionally either positive or normative: under the former, rational choice theory – the assumption that people act rationally – explains and predicts human conduct and social outcomes.\(^\text{16}\) One type of rationality is cognitive (alternatively known as *thin* rationality): formal criteria such as completeness and transitivity dictate individual preferences, and individual decisions are based on all available relevant information and no irrelevant information, on correct use of the rules of probability and more.\(^\text{17}\)

Maimonides does not go into the well-known dispute concerning cognitive rationality, but from what he writes, as quoted below, it may be deduced that people act according to a second type of rationality, i.e., motivational rationality (which Zamir and Medina also call *thick* rationality). The assumption of this rationality is that individuals act to maximize their own well-being; they do not act out of genuine altruism, nor out of a sense of idealism nor of duty when such duty conflicts with their own self-interest.\(^\text{18}\)

Maimonides certainly made no mention of such a comprehensive definition. However, it is evident that Maimonides, who was an avowed rationalist,\(^\text{19}\) was indeed aware of a person’s motivational rationality in maximizing his well-being, and of the role of law in restraining this motivation and harnessing it to the public welfare. As he says in the *Guide*, the reasons for laws pertaining to property are clear, and their purpose is to serve as an “estimation of the laws of justice with regard to the transactions that of necessity occur between people,”\(^\text{20}\) and *inter alia*, “lest one of them should aim at increasing his

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\(^\text{14}\) Zamir & Medina, *supra* n. 1, at 18.

\(^\text{15}\) *Guide of the Perplexed* 3:27, 516 (Michael Schwartz ed., 2002 (Heb.)) (hereinafter referred to as “the *Guide*” or “*Guide*”).


\(^\text{17}\) Zamir & Medina, *supra* n. 1, at 11-12 and the references there.

\(^\text{18}\) Id.

\(^\text{19}\) We dealt with this point in Chapter 2 C(4).

\(^\text{20}\) *Guide* 3:42, 591.
share in the whole and at being the gainer in all aspects”\textsuperscript{21} so that the gain should not be wholly that of one party, but that the laws will be directed at “mutual help useful for both parties.”\textsuperscript{22} In addition, the imposition of monetary sanctions is intended to deter people, and it is based on the assumption that they are rational and are solicitous of their finances no less than they are solicitous of themselves and their relatives, as Maimonides says in the \textit{Guide} in relation to killing an animal with which a human being has lain carnally. He explains this in terms of his consequentialist orientation:

\[\ldots\text{ so that its owner should watch over and take care of it, just as he takes care of his own family, in order that he should not lose it. For men are as solicitous for their property as for their own selves; some of them even prefer their property to themselves. However in most cases they hold both in equal esteem.}\textsuperscript{23}\]

As such, even though Maimonides does not deal with this subject at length, he definitely bases his reasoning here on the rational behavior of most people who seek to maximize their assets.

Did Maimonides expressly advocate another consequentialist theory which is current today? Normative (or welfare) economics may be a candidate. Under this theory, which focuses on incentives for future behavior, the desirability of acts, rules, policies etc. are determined on the basis of their consequences alone, hence it is a consequentialist theory. Moreover, it is a welfarist theory in that the effect of an act, rule, policy etc. on an individual’s well-being is the sole determinant of its desirability. Preference satisfaction, i.e., that well-being is a function of the fulfilment of desires, and each person’s welfare carries equal weight, is the basis of the theory of good underlying normative economics.\textsuperscript{24}

Here, too, it is difficult to say that Maimonides examined the desirability of laws solely in light of their consequences, and we have certainly not found in his writing any complete, detailed theory of the welfare which the law must aspire to maximize. Nevertheless, it is clear that like the consequentialist theories that focus on incentives for future behavior, in the \textit{Guide} Maimonides, too, explained the law of tort and criminal law as laws that are tested in light of their abilities to bring about the hoped-for consequences. Thus, for example, according to Maimonides in the \textit{Guide}, the purpose of tort law is “to prevent damage,”\textsuperscript{25} and in order to achieve this preventive consequence, Maimonides says that in order “[t]o provide great incentive to prevent damage, man is held liable for all damage caused ….”\textsuperscript{26}

In the next chapter of the \textit{Guide} Maimonides accords great weight to consequentialist considerations in the sense of creating incentives for future behavior, explaining that the purpose of the penal sanctions and the punitive damages is to deter the tortfeasor.\textsuperscript{27} Indeed, this text of the \textit{Guide} appears to express – possibly better than any other Maimonidean text, or any other classical halakhic text – the use of consequentialist theory and the emphasis on preventive measures in probably the entire corpus of

\begin{itemize}
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Id.
\item \textsuperscript{23} \textit{Ibid.}, 3:40, 575.
\item \textsuperscript{24} Zamir & Medina, supra n. 1, at 12 and references there.
\item \textsuperscript{25} \textit{Guide} 3:40, 574.
\item \textsuperscript{26} Id.
\item \textsuperscript{27} Id., 3:41, 579-580.
\end{itemize}
medieval rabbinic sources. Unlike other cases in which one can point to some basic (as opposed to modern) economic analysis of law in Jewish medieval texts, as we will see below in this chapter, in relation to the issue of punitive damages it seems that more than 800 years ago, Maimonides indeed presented an original and relatively highly-developed economic analysis. In doing so, he sought to solve one of the most difficult and fascinating puzzles that have challenged Jewish sages for generations, providing a comprehensive rational explanation, based on consequentialism and considerations of optimal deterrence, to the laws of sentencing and damages in halakhah.

In Maimonides’ writings it is also possible to find certain aspects of the welfarist rhetoric, albeit in somewhat limited fashion. As we saw in Chapter 3, Maimonides emphasizes that one of the objectives of the Torah as a whole is perfection of the body, i.e., the creation of a just society. This is effected by two means:

… The first thing consists in every individual among the people not being permitted to act according to his will and up to the limits of his power, but being forced to do that which is of utility to the whole. The second thing consists in the acquisition by every human individual of moral qualities that are of utility for life in society so that the affairs of the city may be ordered.28

This is not the place for a detailed comparison between the above statement and various contemporary theories of welfare – we will deal with this in later chapters. For our purposes, however, it is clear that Maimonides emphasizes social utility, as Twersky showed, particularly in the Guide. This finds expression both in the overall reason he offers for the classes of laws of the legal parts of the halakhah and in the particular reason given for the specific legal rulings. Thus, for example, Maimonides offered a patently social-utilitarian rationalization of “the monetary laws that are connected to people’s transactions with each other,” and as he says in the Guide, “the utility of this class is clear and manifest. For these property associations are necessary for people in every city, and it is indispensable that rules of justice should be given with a view to these transactions, and that these transactions be regulated in a manner that has utility.”29 For the Jewish criminal law, too, Maimonides proposed a clearly social-utilitarian reason:

The utility of this is clear and manifest, for if a criminal is not punished, injurious acts will not be abolished in any way and none of those who design aggression will be deterred. No one is as weak-minded as those who deem that the abolition of punishments would a merciful on men. On the contrary, this would be cruelty itself on them as well as the ruin of the order of the city. Mercy is to be found in His command, may He be exalted: ‘Judges and officers shalt thou make thee in all thy gates’ (Deut. 16:18).30

Indeed, deterrence occupies a central place in Maimonides’ criminal theory, as we will see below.31

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28 Ibid., 3:27, 516.
29 Ibid., 3:35, 548-549.
30 Id.
31 Section (b)(2).
Emphasis of the social-consequentialist dimension is also evident in relation to the reasons for the laws included in the Book of Torts in the *Code*, as explained by Maimonides (3:40), one of the central objectives of which is the “prevention of damage”. The utility of the commandment to return lost property was explained by Maimonides both on the societal level and on the consequentialist level, that “while this is an excellent moral quality from the point of view of good relations, it is also of utility because there is reciprocity. For if you do not return a thing lost by somebody else, the thing lost by you will not be returned.”\(^{32}\) In the *Guide* Maimonides also explained in a consequentialist and pragmatic fashion the laws pertaining to the breaking of the neck of the heifer (*eglah arufah*, Deut. 21), which is a religious ritual of slaughtering a heifer, performed by the elders of the city in which the body of a murdered person was found. According to Maimonides’ explanation in the *Guide*, this precept is not considered to be a ritual of atonement – contrary to what Scripture and the *Code* seem to be saying\(^ {33}\) – but as a means of finding the murderer. In other words, the commotion surrounding the heifer, the activity and the utterances etc. will stir the people to search for traces of the criminal.\(^ {34}\) Moreover, the severity of the punishment meted out to a person who strikes his father and mother and curses them was explained by Maimonides as being due, *inter alia*, to “… its destroying the good order of the household, which is the first part of the city [i.e., the basic unit of society].”\(^ {35}\) Indeed, the importance of family loyalty and social solidarity is also evident in other places in the *Guide*, where Maimonides places the emphasis mainly on the consequentialist aspect – and not necessarily the religious one – that underlies the precepts pertaining to preservation of the family unit.\(^ {36}\)

In this chapter, we will therefore examine the consequentialist elements in Maimonides’ tort theory, basing ourselves primarily on what he wrote in the *Guide*. We will discover that even though this is not a comprehensive theory according to all the criteria of contemporary literature for examining the theory, the element of consequentialism in Maimonides’s theory is nevertheless solid and basic, even if it is accompanied by other elements that cannot be overlooked. On the subject of punitive damages and criminal sanctions, this element is greatly stressed, more so than in other contexts. In fact, Maimonides’ general approach to the objectives of tort law, particularly as evinced in the *Guide*, seems to reveal a very important – in fact, major – consequentialist objective, that passes like a golden thread through the laws of tort found

\(^{32}\) *Guide* 3:40, 576.

\(^{33}\) See Laws of Murder 10:2, where Maimonides speaks of *kapparah*.

\(^{34}\) *Guide* 3:40, 577. Twersky, *supra* n. 7, at 446, wrote incisively: “This explanation, so novel in its pragmatism, had an interesting history in the rabbinic literature.” He continued (on pp. 446-447) with a few more examples of societal explanations in the *Guide*.

\(^{35}\) *Guide* 3:41, 583-584.

\(^{36}\) This, for example, emerges from what Maimonides writes in the *Guide* (3:49, 637-638), explaining the foundations of family law in consequentialist-societal, and not necessarily religious, terms. After quoting Aristotle in his *Nicomachean Ethics* on the value of friendship (“And I say that it is known that man requires friends all his life”) as well as on the value of family loyalty and social solidarity, Maimonides adds: “The same thing [the importance of friendship] may be found to a much greater extent in the relationship with one’s children and also in the relationship with one’s relatives. For fraternal sentiments and mutual love and mutual help can be found in their perfect form only among those who are related by their ancestry. Accordingly a single tribe that is united through a common ancestor – even if he is remote – because of this love one another, help one another, and have pity on one another; and the attainment of these things is the greatest purpose of the Law.” On this social basis Maimonides (*id.*) explains the prohibition on harlotry, for it will not be known who is the father and the family of a child born of a harlot and therefore he will not have relatives who can help him. Another explanation offered by Maimonides there for the prohibition on harlotry relates to its negative consequences: “… for if harlots were permitted, a number of men might happen to betake themselves at one and the same time to one woman; they would inevitably quarrel and in most cases they would kill one another or kill the woman, this being – as is well known – a thing that constantly happened.” And he concludes: “To prevent these great evils and to bring about this common utility, namely, knowledge of the line of ancestry, harlots … are prohibited.”
in his writings. After discussing this important aspect of Maimonides’ tort theory we will conduct a comparative examination of the similarities and differences between this theory and the modern theories of law and economics in tort law, including the theories of some of the proponents of the economic analysis of law in general and of tort law in particular, as well as modern approaches to punitive damages.

B. THE STARTING POINT: CONSEQUENTIALIST CONSIDERATIONS IN MAIMONIDES’ TEXTS

1. Prevention of Damages and the Effective Ability to Control Test (EAC)

   In the *Guide* Maimonides explains the reasons for the laws of tort – laws that are set out in the Book of Torts in the *Code* – and he says that “they are all concerned with the removal of wrong and with the prevention of damages.” Note that Maimonides explicitly mentions two objectives: “the removal of wrong” looks backward, i.e., after the damage has already occurred, it seeks to put right the wrong that has been done – a type of corrective justice; whereas the second looks forward, and it nature is preventive – “the prevention of damages”, and it is more similar, as we shall see below, to the consequentialist conception that is typical of the proponents of the economic analysis of law. It will be stressed that the second objective – prevention of damage – on which Maimonides focusses primarily in his explanation in the *Guide* of the foundations of tort law, constitutes a significant component in the array of considerations of tort liability, to such an extent that in the opening to his explanation of the details of the tort laws, Maimonides accords this objective the attribute “of justice”. Today we might define this as “preventive justice”, i.e. that the consequentialist objective of finding the effective way of preventing the damage can be considered as no less justified than the corrective objective of compensating for wrongs after they have occurred.

   As elucidated in the previous chapter, in his *Guide* Maimonides viewed the prevention of damages as only one – although central – consideration in determining tort liability. Maimonides placed this idea alongside the corrective justice consideration (mentioned above) and numerous and varied other considerations (some of them mentioned in the *Code*), especially deontological and religious ones, in addition to some distributive considerations. As we have shown, Maimonides places emphasis both on the prevention of damages and on the deontological-moral dimension which explains the behavior of the tortfeasor, as part of the overarching objective of “perfection of the body” and shaping the good morals of people living together in society.

   It will be stressed that the fact *per se* that Maimonides presented different objectives for tort law should not surprise us. Maimonides’ point of departure in Part 3 of the *Guide* was that every commandment and every rule has a rational explanation. In other words, he himself did not fashion the rules according to a particular principle, but he aspired to explain the existing law – Scriptural and Oral –

37 *Guide* 3:40, 574.
38 *Id.* “These laws contain considerations of justice to which I will draw attention.” A detailed discussion of all Maimonides’ considerations of justice (corrective, distributive and preventive) as compared to modern scholars will be undertaken in Chapters 7-8.
39 Cf. Gary T. Schwartz, “Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice”, 75 Tex. L. Rev. (1997) 1801, 1832-33 (seeing optimal deterrence in tort law as “more just” than corrective justice, which he calls “protective justice”. In his view, deterrence involves not only economic-utilitarian but also ethical and moral principles. We expand on Schwartz’s approach in Chapter 8).
40 See, e.g., *Guide* 3:42, 591 regarding the issue of liability of watchmen.
on the principle that it had an essential logic and was not merely an arbitrary matter. Maimonides holds that it is possible to find a material reason for each and every law and also for the “hukim” (those laws for which it is hard to find a rational reason). In this aspect there is a fundamental difference between many contemporary approaches and that of Maimonides: today, the intellectual effort is largely devoted to fashioning tort laws according to a principle or principles, i.e., a normative approach; in the Middle Ages, however, the effort was directed at explaining the existing laws. The result is that in Maimonides’ eyes, there is no problem in explaining a particular law according to different principles, provided that they are rational. Since he does not aspire to abstract, unified concepts and principles, he has no difficulty in basing a particular law on multiple reasons. On the contrary: the more rational explanations there are, the better. Therefore he can base a particular law on the idea of redress, of general deterrence, of individual deterrence or on the idea of perfection of attributes (conquering the evil instinct) as well as on various religious reasons. The fact that Maimonides may explain the same law according to several reasons manifests a certain flexibility e.g., a more open, less dogmatic mode of analysis.

In enumerating the objectives of tort law in the Guide, Maimonides emphasized primarily the consequentialist element of preventing damage, without detracting from other elements mentioned in the Guide and in his other works. We would stress that we are not claiming that all the details of tort law can be explained by consequentialist rationalization, as proposed by Maimonides in the Guide for the rules pertaining to tort law. Maimonides’ statement in the Guide that the causes for the commandments “have in view the utility of a given commandment in a general way, not an examination of its particulars” is well known. Of course, there are other major elements that determine liability in torts which are mentioned in the Code but not in the Guide. A good example of this is causation, which constitutes a special problem in talmudic halakah, as we saw in Chapter 1 of this book. Thus, the adoption of the distinction commonly accepted by scholars of Jewish law between two types of indirect damage – garmi and gerama – led to a significant decrease in the number of cases in which tort liability was imposed as compared to modern law. Admittedly, as we saw in Chapter 3, Maimonides has a unique approach to causation, which can be seen in his rulings in the Book of Torts in the Code. His method, as we saw,

43 Cf. Twersky, supra n. 7, at 437, who wrote that the fact that in the Guide, Maimonides raises an abundance of reasons and explanations that have no source in the midrashic literature “sheds some light on the question of certitude or conjecture in the rationalization of the law and also on the significance of its entire enterprise. Halakhah, of course, is uniform in its objective determinacy, but the experience accompanying its implementation is quite variable in its subjective understanding.”
44 For example, see the many reasons he gave for punishment in the text infra near n. 115.
45 In this context it should be mentioned that quite a few of Maimonides’ supporters, who defended their Master’s method vigorously, were insistent on the relative nature of the reasons for the commandments. In their view, Maimonides never presumed to construct an absolute system of explanations; rather, he sought to construct a possible system, which would be, at one and the same time, both useful and meaningful. For an extensive discussion of the question of whether the reasons for the commandments as set out by Maimonides are absolute or relative, see Twersky, supra n. 7, at 401-403.
47 There is some basis for the opinion that the concept of limiting causation was influenced, inter alia, by Roman law, with which the sages were familiar. For a comprehensive study of this subject, see Boaz Cohen, Jewish and Roman Law: A Comparative Study, vol. II (New York: The Jewish Theological Seminary, 1966) 578-609.
significantly reduces the problems involved in the subject of causation and imposes tort liability in many more cases than would occur according to the common approach of most of the scholars of Jewish law. No discussion of causation appears in the Guide. What is emphasized in the Guide, however, are the consequentialist elements on the basis of which Maimonides seeks to impose tort liability. These elements will be analyzed below.

a) The General Rule of Liability

In the Guide Maimonides deviated from the line of interpretation accepted by many halakhic scholars who based tort liability on peshiah (negligence or fault) on the part of the defendant and sought to base liability for damages caused by a person’s property on another, unique basis. But many of the later halakhic authorities (Aharonim) and some contemporary scholars had difficulty identifying the theoretical rationale on which Maimonides’ theory is based, as we saw above. Below we offer a new interpretation of Maimonides’ tort theory as set out in the Guide.

In the Guide, Maimonides states that the purpose of tort law is “to prevent damages” and not necessarily to compensate for past damages, to repair that which is in need of repair, or to restore the status quo ante. According to Maimonides:

To provide great incentive to prevent damage, a man is held liable for all damage caused by his property or as a result of his actions, so that the man will pay attention and guard it lest it causes damage. Therefore we are held liable for the damage that our beasts cause, so that we may guard them. The same is true for fire and pit, which are the product of human action, and he can make sure to guard them so that they cause no damage.

These words contain several of the fundamentals of the consequentialist (economic) analysis of tort law, but naturally, Maimonides’ work does not contain all of the elements present in the modern literature. Particularly instructive is his use of the terms “incentives” and “prevention of damage”, which almost appear to be lifted from one of the modern textbooks of the economic analysis of tort law, and definitely is not characteristic of writing in his time. According to Maimonides, the imposition of liability is intended to provide an incentive to prevent tortious events. Liability is imposed on those who can most effectively prevent the causing of damage, even if there is no fault attached to their acts, and as Maimonides stresses, “a man is held liable for all damage caused by his property or as a result of his actions.”

48 According to Maimonides’ method, there appears to be no fundamental distinction between gerama and garmi, as can be seen from his language in Laws of Wounding an Damaging 7:7: “If one causes damage to another’s property indirectly, he must pay full compensation from his best property as must others who do damage. Although it may not be he himself who ultimately inflicts this damage, he is nevertheless held liable, seeing that he is the original cause of it.” And see Siftei Kohen, Hoshen Mishpat 418:4, which attributed to Maimonides the opinion that gerama in tort and the law of garmi are one and the same, as opposed to the opinion of most authorities.

49 See Laws of Wounding and Damaging 7:7-14. For an extensive discussion of this topic, see Chapter 3.

50 Guide 3:40, 574.

51 See Chapter 2.

52 Guide 3:40, 574.

53 Id. From Maimonides’ formulation in the Guide it can be deduced that in his opinion, strict liability should be imposed on the effective damage avoider. However as we shall see in Chapter 6, a careful analysis of what is written in the Code shows that
It will be noted that not only is there no mention in the *Guide* of the element of ownership as a basis for liability in tort; but ownership is mentioned only in the context of the damages caused by animals and not in the context of damages caused by fire or a pit or by humans: in relation to these, Maimonides writes that they are the “product of human action.” The basis for liability stems from one of the meta-objectives of tort law – the prevention of damage – by virtue of which we impose liability on the person who can prevent the damage in the most effective manner.

Imposing liability on the owners of an animal was intended to ensure that the owners would watch over it so that it would not cause damage to others, and as Maimonides says elsewhere, “Should they not be held liable for damage caused by their animals, they would not take care of them and thus would inflict loss on other people’s property.”

The same applies to the imposition of liability on a person for a mishap occurring through his own act (such as a pit or a fire) which stems from the fact that they (the pit or the fire) are “the product of human action” and therefore “he can make sure to guard them so that they cause no damage”, i.e., he is the most effective damage avoider and therefore he must bear the liability.

In other words, we must distinguish between different types of damages, as Maimonides states in *The Guide*, where he distinguishes between damages “caused by the person’s property,” which are “the damage caused by our beasts” (tooth, leg, and horn damages), and damages “caused by human action,” which are “fire and pit” and of course, damage caused directly by a person to another’s property. Maimonides also distinguishes between damage caused by a person or by his property to another’s property, and bodily injury caused by a person, such as wounding and killing, which he includes in the subsequent chapter of the *Guide* as part of penal law.

It will be noted that Maimonides’ distinction in the *Guide* between damages caused by a person’s property and damages caused as a result of his action is not identical to the talmudic distinction between “damages caused by property” and “damages inflicted by a person.” The difference is this: according to the Talmud, damage caused by fire and a pit are included in “damages caused by property” and only damages caused directly by a person himself are included in the category of damages inflicted by a person; this distinction was actually adopted by Maimonides in the *Code*. In the *Guide*, on the other hand, Maimonides deviated from the talmudic classification that he had adopted in the *Code*, and instead he included fire and pit in the damages that are caused by a person’s action. From where did Maimonides derive the said distinction? It would appear that Maimonides based his distinction on the scriptural verses.

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Maimonides did not always impose strict liability, but sometimes adopted a differential liability regime.

54 We already saw in Chapter 2 that according to the common interpretation of the *Code* (the “yeshivah reading”), ownership lies at the basis of tort liability in Maimonides’ approach (“the theory of ownership”).

55 Laws of Property Damages 8:5.

56 *Guide* 3:40, 574.


58 See e.g., *Bava Kamma* 4a.

59 In his distinction in the Book of Torts between Laws of Property Damages (which includes damage caused by animals as well as bit and fire damages) and Laws of Wounding and Damaging (which includes damage caused directly by a person himself).
We have already mentioned Jackson’s claim that in some of the formulations at the beginning of the Book of Torts in the Code, Maimonides followed the formulations in the scriptural verses rather than in the Talmud. It appears that here too in the Guide, Maimonides adopted the distinction that appears in the Bible between a person’s liability for the damages caused by animals that belong to him, in respect of which the Bible states in the book of Exodus that the perpetrator of the damage is “an ox” or “a man’s ox” and the person liable for the damage is “the owner of the ox” or “its owner”, and damages caused by a pit and a fire, in respect of which the Bible states that the perpetrator of the damage is the person who dug the pit or lit the fire – “And if a man shall dig a pit” and “he that kindled the fire shall surely make restitution.” This is consistent with Maimonides’ tendency in Part 3 of the Guide to explain laws as they appear in the Bible (and not necessarily in accordance with their talmudic interpretation) – a phenomenon that recurs often in the two chapters of the Guide that we have discussed in the present chapter.

Indeed, as discussed in Chapter Six, the various types of damages in Maimonides’ theory differ significantly: damage caused by a person’s property (property damages), damage caused by a person who injures another (bodily damage), and damage caused by a person who harms another person’s property.

In sum: in the Guide Maimonides proposes a liability regime whose rationale is effective damage prevention. If the tortfeasor has a connection with the object that caused the damage, he must compensate the victim. The connection may be ownership of an animal, but it can also be some other degree of relationship (pit or fire), as long as he has the ability to exercise effective control over it, which we call the Effective Ability to Control Test (EAC), because the object that caused the damage is under his control and he is therefore considered the most effective avoider of damages. He must guard himself and his property so that they do not injure others, and for this reason alone, i.e., prevention, liability should be imposed on him.

In light of one of the meta-objectives of tort law – the consequentialist objective appearing at the beginning of the Guide 3:40 – “the prevention of damages” – later in the same chapter Maimonides explains the reason for the fact that an ox that kills a person by goring is subject to stoning and an animal with which a human has lain carnally is killed. As for killing an animal that kills a man, Maimonides emphasizes that this “is not to be regarded as a punishment for it – an absurd opinion that the heretics impute to us – but as a punishment for its owner.” It will be noted that Maimonides deviates here from the accepted interpretation of the Sages according to which this is a legal-halakhic action, based

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60 See Chapter 2.
61 Exod. 21:28-32.
62 Ibid., 21:35-36.
63 Ibid., 21:28.
64 Ibid., 21:36.
65 Ibid., 21:33.
66 Ibid., 22:5. Some Bible scholars (such as Finkelstein and Otto) argued that the Bible in the Mishpatim portion suggests a different distinction, i.e., between the “law of things” and the “law of persons”. However, Jackson has shown that the biblical verses do not support this distinction. See Bernard S. Jackson, Wisdom-Laws: A Study of the Mishpatim of Exodus 21:1-22:16 (Oxford: Oxford University Press, 2006), at 266-270.
68 Lev. 20:15-16.
69 Guide 3:40, 575.
on the principle “as the owner is put to death so is the ox put to death,” and apparently, as Aharon Kirschenbaum says, this is evidence of the exalted value of human life, to the extent that criminal liability is imposed on the animal that kills, as emerges from the halakhic sources. However, according to Maimonides in the Guide, the Bible prescribed that the ox be stoned only in order to incentivize the owner to guard it, and in his words, “For this reason it is forbidden to use its flesh, so that its owner should take great care in watching over it and should know that if it kills a child or an adult, a free man or a slave, he will obligatorily lose its price; and if he has been warned about it, he must pay compensation over and above the loss of its price.” All this means is that Maimonides is explaining the matter according to his method whereby the purpose of tort law is to prevent damages and to provide incentives for the effective damage avoider, and in this case, the effective damage avoider is the owner of the ox that is stoned. In other words, according to Maimonides the reason is utilitarian. It is interesting that Jackson explained the biblical law, too, on a utilitarian basis, although slightly different from that of Maimonides, and not on the basis of punishment of the ox, as other scholars claimed. It may be that Maimonides’ explanation too, which deviates from the common interpretation whereby this constitutes punishment of the ox, relates to the literal reading of the scriptural law that stresses that “the owner of the ox shall be innocent.” “This is also the reason for killing a beast with which a human being has lain,” adds Maimonides, and explains according to his consequentialist approach, “so that its owner should watch over it and take care of it, just as he takes care of his own family, in order that he should not lose it, for men are as solicitous for their property as for their own selves.” The monetary sanction is intended to deter people, and it is based on the assumption that they are rational and that they care about their property.

b) Exceptions: Cases of Exemption from Liability

There are exceptions to Maimonides’ general rule of liability, which means that the owner of the animal is not always considered to be the most effective damage avoider. In fact, however, these are not exceptions from the Maimonidean rule; rather, they represent the consistent application of the consequentialist rule of liability proposed by Maimonides in the Guide. In this the explanations offered by Maimonides differ from the common talmudic explanations for cases of exemption from tort liability, such as in tooth and horn damages in the public domain and the innocent ox that gored: the talmudic explanations appear to have been based on considerations other than general talmudic tortious ones, and as such they must be seen as aberrant laws that are not necessarily consistent with the normal rules. As is known, there is a real difficulty in identifying the rational jurisprudential considerations underlying the talmudic laws of tort, to the extent that recently, Avishalom Westreich expressed doubts as to the very existence of such laws.

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70 See Sanhedrin 36b.
71 Aaron Kirschenbaum, Jewish Penology (Jerusalem: Hebrew University Magnes Press, 2013), 228-229 (Heb.). Also see the sources cited there.
72 Kirschenbaum, id., wrote: “However, it seems that Maimonides does not deal sufficiently with the application of the term punishment to an animal: why are rules derived from this formal analogy, ‘As the owner is put to death so shall the ox be put to death?’”
73 Jackson, Wisdom Laws, supra n. 66, at 256-266. See esp. 257: “My view remains that the stoning of the goring ox is a purely utilitarian measure designed to ensure that it will not kill (a person) again.”
74 Exod. 21:28.
75 Guide 3:40, 575.
considerations, writing that the contents of talmudic law relating to various tort topics (cases of exemption in tort) rely on a reading of the text that creates “a halakhic system that is totally separate from other considerations that are relevant to the rest of tort law. To be blunt, this is not an internal legal theory but a theory the crux of which is neutralization of the jurisprudential dimension of this branch of the halakhah.” 76 In his critique of Westreich’s approach, Benny Porat posed the following penetrating question: “If the principle of tort liability does not lie at the base of aberrant rules … what therefore is their legal logic?” 77 Porat issues a call “to attempt to explain the meaning of the aberrant laws by invoking various rationales, such as considerations of economic efficiency, social-juridical considerations, ethical principles, religious objectives and more.” 78 Discussion of the difficulties involved in finding the legal rationales that underlie talmudic tort laws is beyond the scope of our research. However, the very existence of these difficulties provides additional, significant support for our decision to present, as a representative Jewish law model, the tort theories of Maimonides (and not those of the Talmud) – a decision that was explained at length in Chapter 1 – for Maimonides’ orientation to rational-philosophical-conceptual thinking is well known. Indeed, as we shall seek to show below, Maimonides’ tort theory, the underlying rationales of which (both in relation to the laws governing liability in tort and to the aberrant laws) were explained clearly in his Guide, is perfectly suited to serve as a rational and coherent model that may well respond to the important abovementioned challenge thrown out by Benny Porat to provide a rational explanation of the laws of tort in their entirety (and not only the exceptions) by invoking considerations of economic efficiency and social considerations.

Thus, there are cases in which liability is not imposed on the owners, although they are often the effective damage avoiders as they are in a position to control their property. Let us look at some examples.

Halakhah exempts the owner of an animal that caused damage using its teeth or feet while passing through the public domain (i.e., damage caused by eating and gnawing, as well as by trampling whatever it encounters on its way. Maimonides explains the exemption in line with his consequentialist view

There is a measure of justice in the rules I draw attention to, for tooth and foot in the public domain is exempt, because this is something that we cannot guard against, and they rarely cause damage there. Whoever leaves something in the public domain is at fault (posheah) toward himself and exposes his property to loss. 79

Maimonides believes that no liability should be imposed on the owner of a beast that caused damage in the course of its regular passage through the public domain because he is not the most effective damage avoider. The reason is that on the one hand, the cost of preventing the damage, if it were to be imposed on the owner of the beast, is very high due to the difficulty involved in preventing damage caused by an

77 Benny Porat, “What is a Scientific Explanation in Jewish Law? Thoughts on the Article of Avishalom Westreich”, 26 Shenaton Hamishpat Ha’ivri (5769-5771) 237, 238 (Heb.).
78 Id.
79 Guide 3:40, 574.
animal passing through the public domain; on the other hand, the expected damage is relatively light because “they rarely cause damage there,” (and it will be noted that Maimonides’ statement in the Guide to the effect that damages from foot are rare is in direct contradiction to the Talmud, according to which – “foot – its damage is common”). Maimonides wrote elsewhere: “If the animal causes damage in a normal way by tooth or foot, its owner is exempt because it had the right to walk there [in the public domain] and it is natural for an animal to walk about and feed normally or to break things as it walks along.”

Maimonides also considered the potential victim and the extent of his ability to prevent the damage, adding in the above text of the Guide that whoever left something in the public domain shares the fault for the damage that occurred to him, for he exposes his property to loss, and therefore it is proper to impose on him liability for the damage and to exempt the owner of the animal from liability. In light of this, it is clear why the owners of animals were not held liable for tooth and foot damage in the public domain: it was the responsibility of the injured party to remove or guard his produce. In this case, the person who will assume the damage is the one who left the object that was damaged, because he was better able to prevent the damage than the owner of the animal. In other words, the person who places an object in the public domain is the most effective damage avoider, not the owner of the beast.

Why did the sages allow the animals to roam in the public domain? Why did they not prohibit it, so that no damage would occur to others?

Maimonides does not address this question in the Guide. Nevertheless, Rabbi Nachum L. Rabinovitch, a contemporary commentator on Maimonides, clarified the economic rationale at the basis of the exemption granted to owners for tooth and foot damage in the public domain according to Maimonides:

There is a type of damage that can occur, but if a prohibition is imposed on the owners, the limitations on economic activity will be intolerable. For example, in an agricultural society such as the one in ancient times, if it had been prohibited to lead beasts through the public domain except in cages or in chains, it would have imposed a great burden on the raising of cattle and on the cultivation of land, which was carried out using the labor of beasts. The result would have been much greater public damage than the damage that may be caused to private property by beasts that eat or crush the fruit in the public domain. Therefore, not only was the shepherd allowed to lead beasts through the public domain, but under certain circumstances the beasts were allowed to walk by themselves there.

The above rationale not only addresses the question of who is the most effective damage avoider, but it also weighs the damage to the individual who may be injured by animals walking through the public domain against the damage that would be caused to society if a blanket prohibition were issued against owners leading their animals through the public domain. In other words, it is inconceivable to entirely

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80 See e.g. Bava Kamma 3a.
81 Laws of Property Damages 1:8. The relationship between Maimonides’ statements in the Guide and in the Code (and between the terms “the way (ke-darko)” and “common (matzuy)”) will be discussed below in Chapter 5 E.
82 R. Nachum L. Rabinovitch, "Liability for Property that Caused Damage", in Zvi Haber ed., 25 Ma’aliot – Maimonides’ 800 Years Commemorative Volume (Ma’aleh Adumim, 2005) 71, 73 (Heb.).
prevent animals from walking in the public domain, because of the damage to aggregate social welfare in general. To do so would reduce the level of desirable social activity, and it would have a chilling effect on such activities because people would be deterred beyond the optimum level. The equivalent today would be choosing not to drive or take school or youth movement trips for fear of liability. Some activities ought not to be prohibited, in order not to harm the aggregate welfare. In the time of Maimonides, this was the case in relation to animals walking in the public domain: it would not have been logical, from a societal point of view, to prohibit such activity, even though it could sometimes cause harm.

As opposed to the case of tooth and foot damage, according to the halakhah the owner of the beast is liable for horn damage (goring, biting, and kicking) even if the damage occurred in the public domain. Why does the rule here differ from that of tooth and foot damage in the public domain? Maimonides explains that “[The owner of the beast] can prevent horn damage and such, and those walking in the public domain cannot protect themselves against this damage. Therefore, the rule regarding horn is everywhere the same [i.e., that there is liability for it even in the public domain].” Maimonides clarifies the law by carefully examining who is the most effective damage avoider — the owner of the beast or the injured party. In the case of horn damage, the cost of prevention of the damage by the owners is not high, and it is significantly lower than the costs of preventing tooth and foot damages, for the latter are considered “where it caused the damage by an activity which it is its way to do always, in accordance with the custom of its species.” In other words, it is usual for an animal to trample whatever it walks on and to eat the food it finds along its path, and therefore the cost of preventing these acts in the public domain is high. By contrast, horn damages are defined as departures from the regular nature of the animals and as acts “which it is not its way to do always.” Thus, the cost of preventing such damage, if it is imposed on the owners, is not particularly high, for only on rare occasions does a beast gore. In other words, this is not an inconceivable situation, although it is infrequent, and the owners have the ability to take reasonable cautionary measures that would prevent the animals from goring and kicking.

At the same time, Maimonides adds that people passing through the public domain who are likely to be injured as a result of the exceptional behavior of the animal “cannot protect themselves against this damage” (horn damage), because they have no control over the behavior of the animal. Moreover, it is reasonable to assume that simply walking in the street cannot be considered a case of assumption of risk, or even contributory negligence, even if at times this activity proves to be dangerous. Obviously people have no alternative, and it would not have been reasonable to impose liability for the simple activity of walking in the public domain.

c) Splitting the Liability between the tortfeasor and the injured party

Jackson wrote with some justification that “[t]he goring ox must count as the most celebrated animal in legal history.” The Bible imposes full liability on an ox owner only if he had formal notice that his ox

83 Guide 3:40, 574.
84 Laws of Property Damages 1:2, according to the translation of Bernard S. Jackson, “Maimonides’ Definitions of Tam and Mu’ad”, 1 Jewish Law Annual (1978), at 168.
85 Id.
86 Jackson, supra n. 66, at 256. And see his extensive discussion of the biblical law of the goring ox, ibid., at 255–290.
had gored on previous occasion; the Talmud calls this an ox that is \textit{mu’ad}. According to the \textit{halakhah}, the owner of an innocent ox (\textit{tam}) is liable only for half the damages.\footnote{Exod. 21:36.}

Various explanations have been given by modern scholars for the puzzle of the innocent ox, namely, why does the owner pay only half damages. David Daube, for example, suggested that in ox injury cases it is difficult, if not impossible, to know who was at fault.\footnote{David Daube, \textit{Direct and Indirect Causation in Biblical Law}, 11 \textit{Vetus Testamentum} (1961) 246, 259.} Reuven Yaron used Daube’s insight to explain that the defendant pays only half the damages in a crude attempt by the law at loss sharing,\footnote{Reuven Yaron, \textit{The Laws of Eshnunna} (1969), at 193.} and Steven Friedell used Daube’s insight (the loss sharing rationale) to explain why the owner of the innocent ox is held to strict liability.\footnote{Steven F. Friedell, “Some Observations on Talmudic Law of Torts”, 13-14 \textit{Dine Israel} (1986-1988) 65, 89.} Indeed, the loss sharing rationale or any other of the suggested explanations may provide a reasonable explanation for the biblical\footnote{We are not dealing here with the possible explanations of the biblical law. For a detailed discussion see Bernard Jackson, \textit{supra} n. 66, at 276-290.} or talmudic laws of \textit{tam}.\footnote{For a summary of the possible explanations of the talmudic texts, see Avishalom Westreich, \textit{Hermeneutics and Developments in the Talmudic Theory of Torts As Reflected in Extraordinary Cases of Exemption} (PhD thesis, Bar-Ilan 2006) (Heb.).}

In the \textit{Guide}, Maimonides suggests a different explanation. He says that when imposing liability on the owners in cases of horn damage, there is a distinction between an innocent ox (\textit{tam}) and an ox that had gored habitually and is declared \textit{mu’ad} [foreswarned].\footnote{The Bible imposes full liability on the owner of an ox only if he had formal notice that his ox had gored on previous occasions. See Exod. 21:36.} If the act is exceptional, he is liable for half the damage. But if the tortfeasor continues to injure and the ox is \textit{mu’ad}, he is liable for the full damage. From the context of what Maimonides writes in the \textit{Guide}, and from the fact that it follows the discussion of tooth and foot damages, it would appear that in his opinion the owner of the \textit{tam} ox pays half damages for damage that was caused as a result of goring by the ox, because he cannot be deemed to be the effective damage avoider: since it is not the way of the ox to gore frequently, his owner does not know what caused the ox to gore that one time and how to prevent such infrequent behavior in the future. In this case it is preferable to split the liability between the owner of the ox and the victim, for the injured party, too, ought to have taken precautionary measures on his part and been wary of the ox even if it was not considered a \textit{mu’ad} ox, in view of the reality that nevertheless there are cases in which oxen gore. This is not so in relation to a \textit{mu’ad} ox, for in that case, the owner is aware of the fact that his ox goes in certain circumstances, and he can therefore effectively prevent the ox from goring in similar situations in the future.

Indeed, talmudic sages disagree as to whether the obligation to pay for half the innocent horn damages is a monetary-tort type of liability or a fine.\footnote{\textit{Bava Kamma} 15a.} The opinion that Maimonides endorses in his \textit{Code} as the rule is that half damages are defined as a fine.\footnote{Laws of Property Damages 2:7.} In the Talmud this opinion was justified by the assumption that oxen do not gore without a reason and therefore they do not require special guarding. The liability of the owner of an innocent ox that gored does not follow from the essence of the law, because by
that standard he should be totally exempt from payment. Nevertheless, the Torah imposed on him payment for half the damage so that he would watch his animal in the future.97

This explanation of the law of half damages, as presented in the Talmud, does not appear in express form in the Guide, but it does not necessarily contradict the Guide. It is possible that according to the Talmud as well, imposing liability on the owner of the tam ox is intended to achieve a certain degree of deterrence, though not over-deterrence. R. Nachum Rabinovitch’s explanation of some of the economic considerations of horn damages seems to be sound. He says that there are unforeseeable damages that nevertheless cannot be regarded as entirely the result of an unavoidable mishap (ones gamur), such as damages caused by the goring of a tam ox. Even though animals that graze are normally tame, the Torah sought to require their owners to exercise increased caution to prevent damage from abnormal behavior such as their becoming unruly and striking out. Full payment was not imposed, because the damages are infrequent and unforeseeable; even the half damages is a fine imposed prospectively rather than a punishment for what has occurred,98 due to the difficulty of determining which measures could be taken without undue detriment to agricultural activity. In the case of an ox that gores, however, the victim is not able to take preventive measures, and therefore the owner cannot be entirely exempted, as he is in the case of tooth and foot damages in the public domain. Owners do not intend to cause damage; however, they clearly prefer to keep their animals despite the potential for damage rather than protecting themselves from any prospective obligation for damages by ridding themselves of their animals – a solution that would harm society as a whole.99

In modern terms, it is possible to say that according to the rationalization presented in the Guide the imposition of liability for horn damage reflects optimal, but not over-deterrence of the effective damage avoider in order he use effective monitoring and means of prevention without causing a complete disruption of socially and economically desirable agricultural activity.

However, it would appear that in one central aspect there is nevertheless a difference between the talmudic law and Maimonides’ explanation in the Guide. Regarding the former, the rule of half damages imposed on the owner of the tam ox that gored would appear to be an exception that deviates from the regular rules of liability in talmudic tort law,100 particularly according to the view that the payment is defined as a fine rather than a civil law monetary liability; according to Maimonides’ explanation in the Guide, however, this is not an exceptional rule, but rather, it derives from the rule of liability whereby in each case, one must identify the effective damage avoider. The very imposition of tort liability on the owner of the ox in relation to both tooth and foot damage as well as damages caused by a tam ox are intended to serve as a type of deterrent and to create an incentive for preventing the damage, and there is no difference, with respect to this rationale, between payment of full and payment of half damages. Why should the owner of the tam ox that gored be liable for only half damages? The reason is that it cannot be said in this case that the owner of the ox, rather than the victim, is the effective damage avoider, for the

97 Bava Kamma 15a.
98 See Laws of Property Damages, where Maimonides writes: “All who pay half the damage pay a fine.”
99 Rabinovitch, supra n. 82, at 73.
100 See Westreich, supra n. 93.
act of goring is still defined as an aberrant act that does not follow the normal pattern of behavior of the tam ox, and therefore the owner pays only half damages.

2. Maimonides’ Consequentialist Analysis of Criminal Sanctions and Punitive Damages

   a) Deterrence as the Major Goal of Punitive Damages

In the context of penology, the core of the doctrine of utilitarianism or consequentialism, as formulated by its founder, Jeremy Bentham, is the war on crime in an attempt to prevent or reduce it. The doctrine of utilitarianism states that elimination of evil in its myriad forms is not confined to dealing with wrongdoing after it has occurred. The most important doctrine of utilitarian penology is the prevention of crime and to deter people from engaging in crime (general deterrence), as well as to teach the transgressor a lesson that will prevent or deter him from repeating his wrongdoing (specific deterrence). Utilitarian elements may also be found in Jewish law, but they receive particular emphasis in the Guide (3:41). As he does with respect to the important objective of tort law as discussed in the section above, so too with respect to criminal sanctions and punitive damages in tort, Maimonides in the Guide emphasizes the preventive-consequentialist objective, even more strongly, to the extent that it may be said that for Maimonides, deterrence is the major goal of punitive damages, even though there are other goals as well, as we shall see.

First, it is important to note that in modern law, a certain discomfort is evident regarding the exclusive division that the traditional theory makes between criminal law and civil law. Various jurisprudential topics, including the subject of our discussion – punitive damages in tort – are considered to be hybrid sanctions. Many developments in modern Western case law and legislation have led scholars to recognize this intermediate type of middleground jurisprudence – a type in which civil and criminal characteristic are co-mingled. This intermediate type is an integral part of Jewish law, which from its inception embraced such “hybrid creations”, namely, the laws of fines (dine kenasot), which constitute a third theoretical type in Jewish law, the definition of which is simple: payment that the court imposes on the defendant as a punishment for his deeds and not as compensation for the damage caused to the victim.

Thus, when discussing the question of punitive damages in Jewish law we must bear in mind that in Jewish law there is a certain co-mingling of criminal penalties and tort damages, and as such there is no clear distinction between criminal sanctions and punitive damage in torts. The premise is that Jewish law rarely awards punitive damages, but there are definitely some instances in which such damages are

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102 Kirschenbaum, supra n. 71, at 104-107.
103 Other topics: compensation for criminal offences, extra stringency in the laws of evidence for certain civil actions, offences for which the law does not require a component of malice for a conviction, criminal trials which are initiated by private individuals etc.
105 Kirschenbaum, supra n. 71, at 474-477.
106 The close connection between tort law and criminal law was discussed at length in Chapter 3.
awarded.\textsuperscript{107} Indeed, the general trend in Jewish law is to use punitive damages sparingly, and as Maimonides writes in the \textit{Guide}, the rule is that “for damage caused by one’s property one is charged in the same amount as the damage,”\textsuperscript{108} i.e., payment for the damage caused equals the amount of the damage.

Note that according to biblical law, the fine is paid to the victim and not to the state as in modern times (also by virtue of Jewish law being extra-territorial law), and that is another manifestation of the co-mingling of criminal and tort sanctions.\textsuperscript{109}

Under Jewish law punitive damages are imposed if the acts are especially severe or when it is necessary to teach the tortfeasor a lesson. These situations include general economic considerations of deterrence, such as double payment by the thief in the case of “normal” theft,\textsuperscript{110} four- or five-fold payment of the amount of the damage in the special case of theft of an ox or a sheep and its slaughter or sale,\textsuperscript{111} and compensation to a woman who was raped,\textsuperscript{112} seduced,\textsuperscript{113} or whose honor was impugned.\textsuperscript{114} What all these cases have in common is the severity of the acts.

Aharon Kirschenbaum’s important comment is pertinent here: in view of the complexity of the reasons for criminal behavior, it is not surprising that there is a mixture of justifications for criminal punishment in the \textit{halakhah} and of its objectives.\textsuperscript{115} A classical representation of this differential approach is to be found in the writings of Maimonides, who presented different, co-existing objectives of punishment.\textsuperscript{116} Indeed, similar to what we saw in the previous section regarding the determination of two objectives of tort law in the \textit{Guide} (removal of wrong and prevention of damages), in relation to punishment and imposing punitive damages, too, Maimonides mentioned two objectives in the \textit{Guide}, and thus the doctrine of redress and the utilitarian-consequentialist approach find expression in the one chapter (3:41). On the one hand, punishment must be administered in the spirit of “an eye for an eye”, open retribution, clear revenge: “If he has injured the person’s body, he shall be injured in his body, and if he has injured him in his property, he shall be injured in his property …. For necessarily there must be a soul for a soul.”\textsuperscript{117} On the other hand, however, in the passage quoted and analyzed below which appears later in the same chapter of the \textit{Guide}, Maimonides emphasizes the element of deterrence, stating that the magnitude of the

\begin{itemize}
  \item \textsuperscript{107} For an extensive discussion of the policy lines in imposing punitive damages see Yuval Sinai, \textit{Application of Jewish Law in the Israeli Courts} (Jerusalem: Israel Bar Press, 2009) 195-209 (Heb.).
  \item \textsuperscript{108} \textit{Guide} 3:41, 578.
  \item \textsuperscript{109} And therefore laws of fines, like laws of property, are a function of an action brought by the injured party. If no action is brought by the injured party, there is no legal process. See Kirschenbaum, \textit{supra} n. 71, at 476.
  \item \textsuperscript{110} Exod. 22:6; Maimonides, \textit{Laws of Theft} 4:1.
  \item \textsuperscript{111} Exod. 21:37; Maimonides, \textit{ibid.}, 1:16. We discuss the difference between normal and special theft and robbery according to Maimonides in the next section. For an extensive discussion of these matters in biblical law, see Bernard S. Jackson, \textit{Theft in Early Jewish Law} (Oxford: Oxford University Press, 1972).
  \item \textsuperscript{113} Exod. 22:16; \textit{Code}, \textit{ibid.}, 1:3.
  \item \textsuperscript{114} Deut. 22: 13-21; \textit{Code}, Laws of the Virgin Maiden 3.
  \item \textsuperscript{115} Kirschenbaum, \textit{supra} n. 71, at 714.
  \item \textsuperscript{116} \textit{Ibid.}, at 714-715.
  \item \textsuperscript{117} And in this context, the contrast between the literal text of the Bible (Exod. 21:24), which refers to physical punishment – literally “an eye for an eye”, and the normative talmudic law, which prescribes that the tortfeasor will pay monetary compensation to the injured person – “an eye for an eye – money” and not “an actual eye for an eye” – as determined by the majority of \textit{Tannaim} in the discussion in \textit{Bava Kamma} 63b-64a. For a comprehensive, up-to-date summary of the topic of “an eye for an eye” in Judaism, see Kirschenbaum, \textit{supra} n. 71, at 901-954.
\end{itemize}
punishment is determined in accordance with the need for deterrence in relation to the act. In the Code, as opposed to this, the emphasis is on rehabilitation and atonement in the context of punishment.\textsuperscript{118}

We have already mentioned that Maimonides proposed a clearly societal-utilitarian explanation for the criminal laws in the Bible, saying that –

The utility of this is clear and manifest, for if a criminal is not punished, injurious acts will not be abolished in any way and none of those who design aggression will be deterred. No one is as weak-minded as those who deem that the abolition of punishments would be merciful on men. On the contrary, this would be cruelty itself on them as well as the ruin of the order of the city. On the contrary, mercy is to be found in His command, may He be exalted: ‘Judges and officers shalt thou make thee in all thy gates’ (Deut. 16:18).\textsuperscript{119}

Indeed, deterrence occupies central stage in Maimonides’ penal theory in the Guide, as we shall see below.

In the Guide Maimonides discusses the optimal level of punishment and presents four parameters or conditions for considering criminal sanctions.\textsuperscript{120} Because of the mingling between criminal sanctions and punitive damages in Jewish law, these parameters are very relevant to the issue of punitive damages, and it seems that in this chapter of the Guide Maimonides intends to apply them to tort events as well. Maimonides writes:

A preliminary remark: whether the punishment is great or small, the pain inflicted intense or less intense, depends on the following four conditions.

1.\textit{The severity of the crime}. Actions that cause great harm are punished severely, whilst actions that cause little harm are punished less severely.

2.\textit{The frequency of the crime}. A crime that is frequently committed must be suppressed by severe punishment; crimes of rare occurrence may be suppressed by a lenient punishment considering that they are rarely committed.

3.\textit{The amount of temptation}. Only fear of severe punishment restrains us from actions for which there exists a great temptation, either because we have a strong desire for these actions, or are accustomed to them, or feel unhappy without them.

4.\textit{The facility with which the act may be done secretly, and unseen and unnoticed}. From acts performed with such facility we are deterred only by the fear of a severe and terrible punishment.\textsuperscript{121}

Maimonides suggests that when determining the sanction we must consider the severity of the acts (retribution and utilitarianism),\textsuperscript{122} but even more importantly, the dominant goal of the sanction is

\textsuperscript{118} See e.g., Laws of Wounding and Damanging 5:9; Laws of the Sanhedrin 13:1; \textit{ibid.}, 17:7; Laws of Witnesses 12:3-10; and in the background: Laws of Repentance.

\textsuperscript{119} \textit{Guide} 3:35, 546-547.

\textsuperscript{120} \textit{Guide} 3:41, 580.

\textsuperscript{121} Id.

\textsuperscript{122} According to Kirschenbaum, \textit{supra} n. 71, at 780, and he apparently means that the severity of the offence impacts on the severity of punishment either due to the element of retribution, that is, the punishment fitting the crime, or because the magnitude of the loss caused to society requires a severe punishment in order to prevent the occurrence of the damage, i.e., utilitarianism.
deterrence. This can be achieved with reference to three additional key elements: the frequency of the act for which we want to impose a penal sanction (general deterrence); the degree of temptation that the person who commits the offense is facing (specific deterrence); and the ease with which the offense is committed without being noticed or its perpetrator caught by the legal authorities (deterrence-utilitarianism).

Below\textsuperscript{123} we discuss how Maimonides uses the various components of deterrence to explain the rationale behind those cases in which punitive damages are imposed. Even if we regard the first parameter mentioned in the \textit{Guide} as deontological, the other parameters mentioned there strongly emphasize the consequentialist-societal element. In this, Maimonides takes into account not only the implications and considerations of a single act, but also the implementation of sanctions for their deterrent effect, in creating incentives both for potential tortfeasors to avoid harming and for potential victims to take precautions against tortious acts.

Later in the same chapter in the \textit{Guide} Maimonides invokes both deontological and consequentialist explanations in rationalizing the severity of the punishment for smiting and cursing one’s father and mother, which he says is “because of the great impudence of the thing and its destroying the good order of the household, which is the first part of the city”.\textsuperscript{124} This explanation has a deontological aspect which relates to the severity of the deed (the impudence) alongside a consequentialist-societal aspect (harming the social order).

The great weight that Maimonides attributes to the consequentialist-deterrent aspect is illustrated and emphasized below,\textsuperscript{125} in his explanation of the difference between a thief and a robber and between the stealing of sheep and cattle.

\textit{b) A Test Case: Payments of a Thief as Opposed to a Robber}\textsuperscript{\textsuperscript{\textsuperscript{126}}}

Biblical law establishes a special set of rules dealing with property theft.\textsuperscript{126} It distinguishes between the case in which the stolen property [an animal] is in the hands of the thief and the case in which the stolen property is no longer under the control of the thief who slaughtered it (to eat the meat) or sold it. In the first case, the thief must pay double compensation to the property owner.\textsuperscript{127} If the stolen property is already beyond the thief’s control, however, the compensation he must pay is significantly higher: four-fold for stealing sheep and five-fold for stealing cattle.\textsuperscript{128}

Biblical law mentions various offences of theft.\textsuperscript{129} According to the post-biblical-tannaitic sages\textsuperscript{130} there is a clear distinction between theft (\textit{gneivah}) and robbery (\textit{gezeilah}).\textsuperscript{\textsuperscript{131}} This distinction was
emphasized by Maimonides as well. Similar to theft, robbery is an act of taking property from a person without his consent. The basic difference between robbery and theft is that the thief acts secretly, while the robber acts in the open; robbery involves the use of force (or the potential for the use of force), whereas theft does not contain an element of violence. There is, of course, a connection between the two elements of robbery – openness and force. By its nature, the use of violence requires the presence of a person at whom the violence is aimed. As such, robbery is usually carried out in the open rather than secretly. Nevertheless, from a societal perspective, the violence that underlies robbery exacerbates the deprivation of property, according to Maimonides’ first parameter. Thus, if the perspective is strictly a moral one, the compensation for robbery should be at least as high as that for theft. Somewhat surprisingly, however, the Bible imposes payment on the robber only for the value of the property, whereas the thief pays double.

These biblical laws raise a cluster of questions: (a) Why does the Torah impose double payment on the thief but not on the robber (who pays compensation only for the damage itself)?; (b) Why is a four-fold payment imposed on a thief who stole a sheep if he benefitted from the theft by slaughtering or selling the animal, rather than a double payment as in the case of regular theft?; (c) Why is a five-fold payment imposed on a person who stole cattle, and not a four-fold payment?

These questions are among the most challenging in Jewish law, and many sages throughout the ages, as well as present-day scholars, have searched for the rationale underlying the various rates of compensation imposed in different cases of theft, and underlying the differences between theft and robbery. Various solutions have been proposed, but it seems difficult to find a rational and convincing one, especially from the point of view of a contemporary jurist. Maimonides proposes a unique solution in the Guide: all the details of the laws are clearly explained if the primary aim is to achieve deterrence.

It will be stressed that we are not necessarily arguing that Maimonides’ rationale explains the biblical law in a more satisfactory manner than other explanations, and we do not wish to go into the details of the dispute between scholars and the sages on these questions, or to determine which is the best explanation. What is important to us here is to describe Maimonides unique method, which includes consequentialist elements mentioned in modern approaches to economic analysis of the laws of punitive damages, such as the approaches to be presented and discussed below, although there are some important differences, as shall be elaborated below.

It is true that in the modern literature there are attempts to propose an economic analysis of the payments of the biblical thief (double, four-fold and five-fold), such as the interesting article of the scholar, economist and jurist Moshe Bar-Niv. However, it would appear that the economic-

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132 And therefore Maimonides was careful in the Code to distinguish between laws of theft and laws of robbery.
133 Jackson, supra n. 111, at 26. And according to Maimonides, Laws of Theft 1:3.
134 Jackson, ibid., at 28. And also according to Maimonides, id., and in Laws of Robbery 1:3.
136 Infra, section C(2).
consequentialist underpinnings of the rules are not as prominent in the classical sources from before the time of Maimonides. Quite the contrary: other reasons (moral, religious and theological) were given in the talmudic literature and by the medieval commentators.\textsuperscript{138} It is important to note that Maimonides was not the first who, in explaining the payments of the thief, adopted an interpretation containing various consequentialist characteristics. It is possible to find interpretations that are based on economic considerations in the works of two important sages\textsuperscript{139} – also, like Maimonides, living in Egypt – who were active before Maimonides’ time: Philo of Alexandria\textsuperscript{140} and R. Sa’adia Gaon.\textsuperscript{141} Indeed, the tendency to provide rational-philosophical explanations is common to all three – Maimonides, Philo and R. Sa’adia Gaon – and it is also known that Maimonides held R. Sa’adía in high esteem and was sometimes even influenced by his work.\textsuperscript{142} Nevertheless, it must be emphasized that there is a great difference between Maimonides and the other two. Whereas the economic element in the work of Philo and R. Sa’adía Gaon is very partial and undeveloped, and the interpretations they offer do not necessarily deviate from what appears in the Talmud,\textsuperscript{143} Maimonides in the \textit{Guide} presents a comprehensive consequentialist theory, relatively well developed for those times, which does not have a basis in the Talmud;\textsuperscript{144} rather, it explains the differences in the level of punishment for the different cases on the basis of the principle of deterrence. This is something entirely new, and it does not exist in any way in the halakhic sources that preceded it – not in the Talmud, nor in the writings of R. Sa’adía Gaon or Philo.

\begin{enumerate}
\item\textsuperscript{138} For a summary of the different interpretations and the difficulties involved in each, see Bar-Niv, \textit{ibid.}, at 212-222. See also Jackson, \textit{supra} n. 111.
\item\textsuperscript{139} And one could add a third sage, Rabbi Hananel, whose explanation mentioned \textit{infra} n. 168 is based on the economic aspect (benefit derived from the theft), although somewhat less noticeably than that of the two that will be mentioned now.
\item\textsuperscript{140} In explaining why the Torah sought to distinguish between the slaughter and sale of the ox and the slaughter and sale of the sheep, Philo points to the different economic utility to man from cattle and from sheep: “The ox contributes more to man than to sheep. The latter provides man with four benefits: milk, cheese, wool and lambs; the ox [furnishes] five; [three of which are the same as those of the sheep] milk, cheese, and the offspring; an in addition [two are peculiar to itself] ploughing and threshing” (Philo, \textit{The Special Laws}, Book 4:3 (“On Theft”). Bar-Niv, \textit{supra} n. 137, wisely commented that even though this explanation is not convincing (and see Nehama Leibowitz’s critique of this explanation, \textit{supra} n. 135, at 366-367), it demonstrates the great importance of sheep and cattle as a source of wealth in the biblical period. Sheep and the cattle were the main suppliers of vital goods and services, including clothing, food and labor. It would appear, adds Bar-Niv, that the utility of the oxen as a source of labor is what gave them added importance. Accordingly, he suggests, the harm to the owner from the theft of an ox was graver than that of a sheep, because it denied him not only a supply of food but also his ability to plough the fields and produce additional food.
\item\textsuperscript{141} See the statements attributed to R. Sa’adía Gaon that are cited in Ibn Ezra’s Commentary to Exodus (see Nehama Leibowitz, \textit{supra} n. 135, at 366 whereby the amount of compensation for the ox is greater “due to the greater harm that will be done to the owner of the ox than the owner of a sheep, because he will plough with it.” According to R. Sa’adía’s explanation, therefore, we find that the different amount of compensation for the ox and for the sheep represents the different economic contribution of each. According to Bar-Niv, \textit{ibid.}, at 236, with whom we agree, R. Sa’adía Gaon’s explains the biblical law as being aimed at achieving a higher level of deterrence if the contribution of the stolen property to one’s livelihood is greater. In this sense, says Bar-Niv, the biblical law can be seen as being amenable to modern economic analysis, whereby when the forbidden act causes greater economic damage, it must be dealt with by the appropriate form of compensation and deterrence.
\item\textsuperscript{142} See Robert Brody, \textit{Rav Sa’adyah Gaon} (Littman Library of Jewish Civilization, 2011).
\item\textsuperscript{143} Thus, for example, it seems that the passage from Philo cited in n. 140 above is very similar to what R. Meir says in \textit{Mekhilta} 106 (“He came and saw how precious was labor before the Creator of the Universe. An ox which labors – the payment is five-fold, and a sheep, which does not labor – the payment is four-fold”). And see Bar-Niv, \textit{supra} n. 137, at 235-236.
\item\textsuperscript{144} Although it is possible to find several expressions in the Talmud that bring to mind various aspects of Maimonides’ interpretation, such as the statements in \textit{Bava Kamma} 67b-68a, “because he became rooted in sin” or “because he has sinned repeatedly,” which were uttered in the context of the difference between theft which entails double payment and slaughter and sale, which entail four- and five-fold payments. Indeed, as we shall discuss below near n. 162, Maimonides used the frequency of the act as a central element of his analysis of these rules, but there is a significant difference between the Talmud and the consequentialist theory of Maimonides.
\end{enumerate}
Similar to other subjects in which the societal aspects are far more prominent in the *Guide* than in the *Code* and the talmudic literature, in relation to the payments of the thief, too, societal aspects do not receive much emphasis in the *Code*, whereas in the talmudic literature, other explanations – which surprisingly receive no mention in the *Guide* – are offered that are totally unconnected to the consequentialist elements so strongly emphasized in the *Guide*. This is another example of the originality of the societal-consequentialist reasoning appearing in the *Guide* in explanation of tort law and criminal law in general, and of the double, four-fold and five-fold payments in particular.

Maimonides’ position is special and even very uncommon for his time. He dealt with this issue in light of his fundamental consequentialist approach, whereby criminal sanctions are imposed in view of the ultimate goal, which is to achieve deterrence. Maimonides writes:

A robber is not ordered to pay anything as fine (Lev. v. 24); the additional fifth part (of the value of the robbed goods) is only an atonement-offering for his perjury. The reason for this rule is to be found in the rare occurrence of robbery: theft is committed more frequently than robbery, for theft can be committed everywhere; robbery is not possible in towns, except with difficulty; besides, the thief takes things exposed as well as things hidden away; robbery applies only to things exposed; against robbery we can guard and defend ourselves; we cannot do so against theft; again, the robber is known, can be sought, and forced to return that which he has robbed, whilst the thief is not known. On account of all these circumstances the law fines the thief and not the robber.147

Maimonides’ explanation of the difference between a robber and a thief is different from the theological explanation of the Talmud, and it is based on the last three (of four) of the above-mentioned parameters of deterrence.149

What Maimonides says also fits in with the social, tribal structure of the biblical period. As Bar-Niv argues, robbery in a society in which people lived within their protected, domestic circles was probably quite difficult and quite risky. A robber might encounter physical resistance from those guarding the property, or be subject to persecution and revenge on the part of the victims. Even a robber who lived outside of the village or the tribe would be likely to arouse concern or suspicion. A robber who was a

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145 See Laws of Theft 1:4-7. Nevertheless, in Laws of Theft in the *Code*, too, we find formulations that are consequentialist in nature relating to certain matters. See e.g. Laws of Theft 5:1, which explains that the prohibition on buying from stolen goods from the thief is based on the fact that such a purchase motivates the thief to steal. And see infra, end of section B.

146 See Mekhilta Mishpatim 12; Tosefta Bava Kamma 7:3; Bava Kamma 79b (which cited other reasons for dealing more severely with the person who steals an ox than with one who steals a sheep: R. Meir says, because the ox works in the field, and the thief deprived him of his labor, and R. Yohanan Ben Zakkai explains, because of human dignity – he carries the sheep on his shoulders and is debased, but the ox walks by itself).


148 See Bava Kamma 79b, which offers a religious-faith-based explanation by R. Yohanan Ben Zakkai for the question that was asked by his students: Why was the Torah more severe with the thief than the robber? He answered them, “This one equated the honor of the servant [the person] to the honor of his master [God].” In other words, both the thief and the robber are transgressors of the Law of the Torah, but what the thief does is worse, at least in terms of the relationship between man and God; in terms of contemporary law one could say that the *mens rea* of the thief on the religious plane is at a more serious level than that of the robber. On the difficulties of this explanation see Bar-Niv, *supra* n. 137, at 214-216.

149 It seems that the parameter of the severity of the act is less relevant to our discussion because there is no difference in this regard between robbery and theft, as in both cases the result of forfeiture of the object is similar.
member of the community might be identified as he was committing the robbery, leading to his capture. In other words, robbery in this social structure was dangerous due to expected injury and the relatively high probability of getting caught.150

Indeed, under these social conditions, the act of robbery involves a relatively high potential cost to the robber, expressed in both the direct cost of performing the robbery and in the risk involved in capture and restitution. A robber would also be aware that precautions may be taken to guard against robbery, which may motivate him to rob less or only in cases when he expects to encounter less resistance. It is therefore reasonable to assume that the prevalence of acts of robbery in the biblical period, as Maimonides himself writes, was relatively low, which means that the deterrent effect against performing a robbery was relatively strong. The thief, on the other hand, is aware of the low risk of getting caught, and he is therefore prepared to take a chance and proceed with the theft.151 Therefore, potential robbers who are calculating and manage their risk even at a rudimentary level would choose other, more efficient ways. One of them is theft. Indeed, the arguments about the relative rarity of the act of robbery do not apply to acts of theft. The nature of theft is such that the thief comes in secret and therefore does not expect to clash violently with the owner or protector of the property.

Maimonides’ consequentialist analysis might indeed receive support from a comparison of the thief to the robber from the point of view of their incentive, i.e. a cost-benefit analysis.152 It can be demonstrated that the anticipated cost to the thief of his act of theft is lower than that of the robber, because the chances that the former will be caught are lower than those of the latter. Hence the expected outcome is that in a regime in which the legal sanction for theft and robbery is identical, there will be more acts of theft. In fact, what we have here is a rational rule of cost-benefit according to which the greater the anticipated cost of executing the forbidden act – and for our purposes, the cost involved in committing the theft and its consequences, including the chance that he will get hurt, cost of tools, allocation of time, planning etc. – relative to the anticipated profit, the lower the motivation and inducement to commit the offense. If so, the lower the value that remains in the hands of the thief after deducting the anticipated payment that he will have to make, so too will his tendency to commit the act decrease. Hence, the greater the compensation that is awarded, the lower will be the thief’s gain and the profitability of the theft.

Moreover, Maimonides’ approach is also unique because not only does it consider the risk management of the tortfeasor, but also the precautions the potential victims can take. Maimonides’ reasoning that “[a] Man can guard against a robber, be careful and prepare for him; this is not possible with respect to the thief”153 warrants attention. Hence, the possibility that the robber’s potential victims are prepared for him and that they can take precautions against him serves as a partial defense against robbery and as a certain preventive measure. No such prevention is usually possible against theft, which could be another reason for imposing four- or five-fold compensation payments on the thief to cover other

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150 Bar-Niv, supra n. 137, at 221-222.
151 Ibid., at 217.
152 According to Bar-Niv’s analysis, ibid., at 221-222.
instances of theft that he is likely to have committed. Maimonides appears to introduce an important economic element here: imposing a certain degree of obligation on the injured party to take preventive measures against damage. To Maimonides it makes sense to create an incentive for a person to guard more against a robber than against a thief because the cost of protection against a sophisticated and cunning thief is probably higher than the cost of protection against robbery.

Indeed, Maimonides attests to the fact that acts of theft were relatively common, which gave rise to the need for a special rule distinguishing between the different acts of appropriating property, and creating legal sub-categories under this class (double, four- and five-fold payments for different kinds of theft), based on the required level of deterrence and the creation of incentives for both potential tortfeasors and victims.

c) Four- and Five-Fold Payments for the Theft of Sheep and Cattle

The thief may be liable for double, four-fold, or five-fold payment, with the multiplier of the compensation depending, as noted, on the object of the theft and on the thief’s handling of the stolen property. As mentioned in the previous section, a series of problems arises with respect to the law of four- and five-fold compensation. Why was this special law enacted specifically for sheep and cattle? And why is there a distinction between compensation for sheep and for cattle?

Maimonides offers an explanation of the four- and five-fold payments based on the prevalence of sheep and cattle stealing during the relevant biblical period. According to Maimonides’ consequentialist interpretation, the more common a tortious act is, the more severe should be its punishment in order to deter its commission, in accordance primarily with the second parameter (the frequency of the act). Maimonides writes:

It is right that the more frequent transgressions and sins are, and the greater the probability of their being committed, the more severe must their punishment be, in order to deter people from committing them; but sins which are of rare occurrence require a less severe punishment. For this reason one who stole a sheep had to pay twice as much as for other goods, i.e., four times the value of the stolen object: but this is only the case when he has disposed of it by sale or slaughter (Exod. xxi. 37). As a rule, the sheep remained always in the fields, and could therefore not be watched as carefully as things kept in town. The thief of a sheep used therefore to sell it quickly before the theft became known, or to slaughter it and thereby change its appearance. As such theft happened frequently, the punishment was severe.154

As such, the consequence from the point of view of compensation and its reason is that –

The compensation for a stolen ox is still greater by one-fourth, because the theft is easily carried out. The sheep keep together when they feed, and can be watched by the shepherd, so that theft when it is committed can only take place by night. But oxen when feeding are very widely scattered, as is also mentioned

in [the Book of Nabatean] Agriculture, and a shepherd cannot watch them properly; theft of oxen is therefore a more frequent occurrence.\textsuperscript{155}

Hence, Maimonides’ approach to the matter is essentially deterrent, i.e., because this act (stealing an ox) is relatively common, it is appropriate to treat it with severity,\textsuperscript{156} not because it is highly objectionable from a moral point of view but because of its very frequency. Maimonides’ explanation of the difference between stealing sheep and stealing an ox is different from the explanations mentioned in the Talmud.\textsuperscript{157}

As noted by Bar-Niv,\textsuperscript{158} it appears that according to Maimonides’ approach there is no more inherent harm in stealing sheep and cattle than stealing any other chattels. However, because of the higher societal damage resulting from the large number of cases of theft of sheep and cattle, it is necessary to treat these thefts more severely, so that the profitability of stealing sheep and cattle will decline and the scope of this prohibited activity will decrease. Indeed, it seems that the aim is to provide incentives for the potential thieves not to steal. Here incentives to the owner to take precautions would be less efficient due to the frequency of the thefts and due to the fact that the sheep graze in open fields, which makes the theft easier and taking precautions more difficult in these circumstances. That may explain the difference between different types of theft. It is not the case that the theft of sheep and cattle is morally more reprehensible than other types of theft. Theft is theft. The difference must be rooted in something else. Maimonides accounts for the high incidence of this type of theft by the fact that cattle and sheep are naturally difficult to guard. In ancient times sheep and cattle fed mainly by grazing. To this end, the sheep and cattle were scattered in the field. Often, depending on the condition of the grazing areas and on the season of the year, it was necessary to travel with the animals to remote areas, making it much easier for the thief to steal.

From what Maimonides writes we see, therefore, that the reason that compensation for the theft of cattle is higher than for the theft of sheep lies in the different costs of guarding cattle and sheep. The Torah dealt more severely with the theft of cattle because it is harder to guard cattle than sheep. In fact, the severity of the rule regarding the cattle stems from two factors, which are in fact a cause and its derivative: the difficulty in guarding that leads to high costs of guarding, and these stem from the greater frequency of thefts. Therefore the raising of cattle becomes more expensive, and the products of the cattle and the services that they provide increase in price.

In many ways Maimonides adopts what we would call today an approach of optimal deterrence. This approach assumes that the perpetrators of the prohibited acts behave rationally. In other words, the decision whether or not to steal is an economic cost-benefit decision and it is a function of the profits expected from the theft.\textsuperscript{159} Indeed, following Bar-Niv’s explanations,\textsuperscript{160} we can demonstrate that

\textsuperscript{155} Id.
\textsuperscript{156} Maimonides is not of the opinion that the distinction between sheep and cattle is based on the physical differences between the types of animals, but on the existence of deterrent elements only. On the conception whereby the difference between cattle and sheep in biblical law expresses a difference between different types of animals (large and small) see Jackson, supra n. 111, at 100–101.
\textsuperscript{157} See the reasons of R. Yohanan Ben Zakkai and R. Meir mentioned in n. 148 supra.
\textsuperscript{158} Bar-Niv, supra n. 137, at 230.
\textsuperscript{159} Ibid., at 230 (“The decision equation that motivates the thief is: the return expected from the theft compared with the expected cost of the theft. If the above condition is met, the person is liable to perform the theft”).
Maimonides’ reasoning regarding the theft of sheep and cattle is consistent with modern economic concepts and risk management of potential tortfeasors.

How is it possible to reduce the number of thefts? One way is by increasing the means of guarding, with the result that the cost of committing the theft increases, inter alia because the thief must invest more time and resources into commission of the theft when greater security is in place. Accordingly, when the level of security is higher, the level of thefts decreases. However, increasing security measures requires the allocation of resources, and this means directing those resources to guarding instead of to the production of other goods and services. It may, however, be possible to achieve a similar reduction in the level of thefts in another way, which was adopted in biblical law according to Maimonides’ explanation, namely, by means of increased deterrence which expresses itself in higher compensation payable by the thief. Increasing the compensation lowers the anticipated profit on the part of the thief, and in any case, it reduces the profitability of the theft. Bar-Niv correctly wrote that the advantage of the biblical approach according to Maimonides’ explanation lies in the fact that it aspires to achieve a reduction in the level of theft with a no-cost formula – i.e. by means of greater efficiency.161

According to Maimonides, biblical law seeks to preserve the cheaper methods of raising sheep and cattle, and prevent their theft by increasing the cost to the thief through an increase in compensation.

Apparently, this interpretation provides a good explanation for increasing the compensation imposed on sheep and cattle thieves vis-à-vis thieves of other assets. But biblical law imposes such compensation on the thief who slaughtered or sold the stolen property, and not on every thief. Is this interpretation (and its economic aspects) consistent with the basic argument of the prevalence of theft?

The Talmud explains that the law deals severely with a thief who slaughtered and sold the sheep, obligating him to pay four- and five-fold, as opposed to one who merely stole and who pays only double, “because he [the former] became rooted in sin” or “because he has sinned repeatedly.”162 Indeed, Maimonides too invokes the frequency of the act as a central element in his analysis of these laws in the Guide, and this element is also mentioned in the Code, though in a relatively modest way.163 However, unlike the Talmud, which seems to use the expression “became rooted in sin” as a justification for administering severe punishment as retribution for a person who transgressed repeatedly and in increasing measure164 – the sin is serious from a religious point of view and it should therefore be severely punished – Maimonides regards the frequency of the act (of slaughtering and selling) as the element that affects the need for deterrence from the consequentialist aspect (and not retribution), separate from the religious dimension.

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160 The analysis in the following paragraph is based on Bar-Niv, ibid., at 230-231, 236-237.
161 Ibid., at 237. The higher efficiency is achieved, so he says, due to the fact that we do not raise the costs of guarding – what is called today transaction costs; the costs of guarding to not create positive economic value per se, and their whole purpose is to prevent unwanted acts. And therefore, if it is possible to achieve the prevention of the undesirable act at a lower cost, the aggregate social welfare will clearly be higher.
162 Bava Kamma 67b-68a.
163 And see, e.g., Laws of Robbery and Lost Property 3:6 (which is severe in relation to a person who is a serial robber, and imposes a fine on him).
164 As per the commentaries of most of the commentators who concur with Rashi, Bava Kamma 67b, s.v. because he became rooted, i.e., put down roots, meaning that his sinning grew stronger, for he had already transgressed a first and a second time.
Maimonides explains: “The thief of a sheep used therefore to sell it quickly before the theft became known, or to slaughter it and thereby change its appearance.”\textsuperscript{165} This statement of Maimonides may be explained in two ways. According to the first possibility, the answer to the question of why the punishment is more severe in the case of the thief who slaughters and sells than for one who does not do so lies in the level of deterrence that is required: the thief is afraid of being caught, and it is more common for him to slaughter and sell than to keep the stolen sheep, in order to reduce the chances of the theft being found in his possession.\textsuperscript{166} He therefore requires deterrence at a higher level (four- or five-fold punitive damages) in order to stop him from slaughtering and selling. According to this explanation there is no difference between “professional” thieves and those who are committing theft for the first time. There is, however, another possible explanation of Maimonides’ statement.

According to the second explanation, we must distinguish between two types of thieves: those who steal as an occupation and those for whom stealing is an exceptional event. This distinction makes economic sense. As Bar-Niv explains, a professional thief deserves to be held liable for punitive damages which are more than double. If he slaughters and sells, this means that this is his \textit{modus operandi} – he is used to doing so, he is a serial criminal, and he takes measures to ensure that no signs of the theft remain in his vicinity.\textsuperscript{167} This additional parameter obscures the theft and displays regularity in its commission. This may also have been the intention of the Talmud, according to one explanation of the expression “because he became rooted in sin.”\textsuperscript{168} It may also be possible to explain Maimonides’ statement in the \textit{Guide} in this way, although such an interpretation would be largely speculative, since Maimonides does not distinguish explicitly between the professional and the non-professional thief.

It follows from this second explanation, that the purpose of biblical law in imposing punitive damages is to deter the professional thieves of sheep and cattle, who know immediately what to do with the stolen property, i.e., to conceal it and the evidence, perhaps similar to car thieves in our day and age, who immediately transfer stolen vehicles to be dismantled, leaving no trace behind. The value of a functioning car may be much greater than that of its parts, but in a situation in which many vehicles are stolen and immediately disassembled, the chances of being caught are small, and therefore the profit may ultimately be greater. In the same way, a live animal is probably worth more than its meat, but if it is

\textsuperscript{165} \textit{Guide} 3:41, 579.
\textsuperscript{166} Bar-Niv, supra n. 137, at 224, discussed harnessing the robber’s fear of being caught to create appropriate incentives, proposing the idea that a fine (deterrence at a high level of four- and five-fold) for slaughter and sale is designed to deter the thief from slaughtering or selling the animal, and instead, to retain it, which raises the probability of the stolen animal being discovered (for it is impossible to identify it after it has been slaughtered and its meat sold).
\textsuperscript{167} Bar-Niv, supra n. 137, at 228. (adding and explaining that a professional thief will not normally sell the stolen property on the open market, for fear that it will be identified as stolen. He will sell it in secret, and therefore the sale is usually at much lower than market price. See id., at 232. We would add that repeated sales at low prices increases demand for such items, and this fact, too, may motivate professional thieves to continue stealing and selling secretly, and this is another good reason for imposing heavy fines on the professional thief).
\textsuperscript{168} R. Hananel, in his commentary to \textit{Bava Kamma} 67b, explains the word “\textit{nisharesh}” on the basis of the Aramaic in the sense of gain, meaning that the thief gained and benefitted from the theft, for he sold it to another. Under this explanation the economic element – the profit – is the decisive factor, and the interpretation is similar to the second explanation that will be cited below, according to which the professional thief who derives profit should be dealt with severely. If this is indeed how Maimonides should be interpreted, it may well be that he relied on R. Hananel’s explanation in the Talmud, as he does in many places.
slaughtered (or sold) and out of the thief’s hands, and if the thief, due to the slight chances of being caught, repeats this process many times, the possibility of preventing additional tortious events is small.

We agree with Kirschenbaum who wrote that the fines of four- and five-fold payments were designed to deter professional cattle and sheep thieves whose intention was to make large profits, for such thefts are ultimately destined for the preparation of meat for consumption, the preparation of animal parts for various industries, or simply for sale on the market. The Torah is interested in punishing the main perpetrator of such wholesale criminal trade, in all its aspects, and to frighten him and deter him from stealing the ox or the sheep.\textsuperscript{169}

To sum up this section: the clearly consequentialist aspects of Maimonides’ approach in the context of the laws of theft and robbery find expression in three principal ways, the first two of which are mentioned in the \textit{Guide} and the third in the \textit{Code}: 1. Deterrence of thieves and robbers; 2. Incentives for potential victims, too, to prevent theft; 3. A first-instance prohibition on buying from thieves or robbers, if it is known that the item is stolen, in order to reduce the chances of theft, and this in fact is in order not to support criminals and cause them to continue stealing in that they see that they have a market, for this would be reaping the fruits of their wrongdoing, which will motivate them to keep stealing.\textsuperscript{170} Maimonides thus lends support to one of the meta-objectives of tort law in general – the prevention of damage – by presenting a normative arrangement that tackles the problem from all angles, and provides an incentive for both the tortfeasor and the injured party, as well as imposing a prohibition on one who purchases from the tortfeasor who stole.

C. A COMPARATIVE LOOK: SIMILARITIES AND DIFFERENCES BETWEEN THE \textit{GUIDE} AND CONTEMPORARY LAW AND ECONOMICS SCHOLARSHIP

As noted in the Introduction to this book, there is room for a dialogue between Maimonides’ theory and contemporary ones, but it is important to examine the substance of the dialogue carefully. Not every encounter between the theories is feasible methodologically. For example, it is not acceptable to conduct an intensive dialogue that creates the impression that pre-modern Jewish law and modern methods are on the same plane and converse in the same language.

What, then, is the appropriate meeting point between contemporary and pre-modern legal theories? From the perspective of Jewish law, and specifically from the Maimonidean point of view, there may be good reason to examine various phenomena in the area of torts using the tools of modern methods, including those of law and economics. It is obvious that halakhic sages, including Maimonides, had no knowledge of modern economics and of the method of law and economics. They did not use the categories of this method in their thinking, and they did not formulate their views to fit its principles and details. Nevertheless, it is possible that in certain cases the halakhic authorities adopted intuitively a

\textsuperscript{169} Aharon Kirschenbaum, “Studies in Agency for a Criminal Act (Part I)”, \textit{4 Dine Israel} (1973) 55, 78 (Heb.). On this basis he explains why the principal perpetrator of the offense is liable even if the actual act of slaughtering or selling was not done by him but by his agent. And contrary to the normal rule that the principal is not liable for an offence committed by his agent.

\textsuperscript{170} Laws of Robbery and Lost Property 5:1.
position for which modern scholarship would supply a good explanation. In our opinion, this is particularly evident in the case of Maimonides’ tort theory.

Revisiting Maimonides’ texts in the *Guide* in light of the contemporary methods can provide us with a new contemporary interpretation of Maimonides’ tort theory. This interpretation rationalizes and clarifies Maimonides’ various rulings, which are difficult to explain otherwise. Indeed, a careful comparison of Maimonides’ explanation in the *Guide* with the writings of some of the prominent contemporary scholars of the economic analysis of tort law reveals a somewhat surprising similarity between them.

Once again let us stress: Maimonides’ tort theory, as we saw in the previous chapter, also contains deontological aspects which bear much similarity to the conceptions of corrective justice, as well as patently religious aspects such as the prohibition on causing damage. Naturally, these aspects are not found in the doctrines of most of the exponents of law and economics. Nevertheless, insofar as the consequentialist aspects are concerned, the analysis below will point out interesting parallels between Maimonides’s theory and those theories, and will identify the similarities and differences between them.

1. **Calabresi, Posner, and Maimonides’ Test for Tort Liability**

   The main elements of the tort theories of the fathers of the economic approach were presented at length in Chapter 1. In this section we will deal only briefly with several aspects of the tort theories of two of these fathers of the economic analysis of law: Guido Calabresi and Richard Posner, comparing them to Maimonides tort theory as emerges from the particular chapter in the *Guide* (3:40) that was analyzed above. The consequentialist part, which is an integral and dominant part of that theory, may be compared to several of the basic economic analyses of the founding fathers. We are referring primarily to Calabresi’s strict liability no-fault doctrines of the cheapest cost avoider and best decision maker, and to elements of Posner’s fault-based Hand formula, as well as others.

   We compare the Maimonidean theory primarily to that of the fathers of (tort) law and economics since Maimonides did not present a well-developed economic analysis of tort law in his consequentialist parts of the theory, but rather, a basic economic way of thinking lacking many of the modern elements which are found in later, more fully-developed theories in this field. As such, one can at most compare Maimonides’ theory to the theories of the founding fathers, which, naturally, are relatively basic in comparison to recent economic analyses of law. Although the approaches presented by Calabresi and Posner are sophisticated when compared to that of Maimonides, they nevertheless seem to be the most suitable modern economic analyses of (tort) law for comparison with Maimonidean theory.

   a) **Calabresi’s Cheapest Cost Avoider and the EAC Test**

   Guido Calabresi is generally credited with several contributions to modern tort law, as described in Chapter 1. Below we will mention only those contributions that seem to have some parallels in

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171 In the preceding section.
172 Section B(1).
Maimonides’ theory.\textsuperscript{173}

Calabresi’s foremost contribution is in his repudiation of the approach whereby the central objective of tort law is to compensate for damage caused in the past and to bring about a restoration of the original situation based on a conception of fault.\textsuperscript{174} According to Calabresi, the objective of tort law is to avoid the costs resulting from a tort event, or at least to reduce them as much as possible as part of a theory postulating a need to reach optimal deterrence, based on the understanding that it is not possible and not desirable to try to prevent all accidents, because the cost would be infinitely high.\textsuperscript{175} Calabresi is perceived as one of the first theorists to lay out broad considerations of efficiency. Several decades ago he opposed the fault-based method that dominated tort law at the time, whereby liability was imposed for negligence, and argued that this method does not promote deterrence.

Calabresi’s approach seems to be quite similar to that of Maimonides. According to this approach, as we have seen, the objective of tort liability (together with deontological considerations that are not absent from halakhic discussions, including those of Maimonides) is to reduce the costs created as a result of a tortious event (“to prevent damages” in the words of Maimonides in the \textit{Guide}). Hence, like Maimonides, Calabresi too criticized traditional well-accepted fault-based tort theories and argued that one of the two main objectives of tort law is to avoid the costs resulting from a tort event. It should be emphasized again that, as we see below, Maimonides did not deviate totally from the fault-based negligence test. There are also other similarities between the tort theories of the two.

Calabresi focused on general deterrence (market deterrence), which assumes that no one knows what is better for the individuals in society than the individuals themselves. Therefore, as long as they are aware of alternatives available to them and of their costs, society must allow them to choose between these alternatives. Individuals will act rationally and use the information at their disposal to calculate the efficiency of the various alternatives, to internalize the costs of accidents and of prevention, and to reduce them.\textsuperscript{176}

Maimonides too placed great emphasis on general deterrence, as we saw, not only in relation to tort law but also in relation to criminal punishment; and in light of the principle of deterrence, actual liability and also the question of whether punitive damages will be imposed are determined to a large extent. Maimonides’ analysis would appear to assume that tortfeasors and potential injured parties are rational and choose between alternatives on the basis of a cost-benefit criterion. On the basis of this assumption one can understand the entire array of incentives for potential tortfeasors and injured parties which in Maimonides’ opinion underlie Jewish tort law.


\textsuperscript{174} See, e.g., Guido Calabresi & Jon T. Hirschoff, "Toward a Test of Strict Liability in Torts", 81 Yale L.J. (1972) 1055, 1056-59 (rejecting the Hand formula).


\textsuperscript{176} \textit{Ibid.} at 70-71, 95 (also distinguishing between general deterrence – of the market – and specific deterrence, whereby society must consider all the relevant parameters related to the accident and decide what it will approve).
Let us now examine the similarity between Calabresi and Maimonides in relation to the question of who should bear tort liability.

There is much similarity between Maimonides’ EAC test from Chapter 3:40 of the Guide and Calabresi’s theory. In what follows we argue that both ideas are quite similar, even if Maimonides, obviously, did not use Calabresi’s terminology. Needless to say, Maimonides did not develop and justify his test with the special clarity and rationality that is reflected in Calabresi’s The Costs of Accidents (1970) and later articles.

According to Calabresi, the different fault-based methods do not achieve optimal deterrence and the prevention of accidents or of their costs. In The Costs of Accidents Calabresi developed the test known as the cheapest cost avoider, whose objective is to reach an optimal point of deterrence at which the total costs of the accident and the costs of preventing the accident will be smallest. In this way, tort law will achieve efficiency, i.e., optimal deterrence at the lowest cost, avoid accidents, and increase the aggregate welfare. According to this doctrine, strict liability is imposed on the person who can prevent the damage in the cheapest way. It should be emphasized that the cheapest cost avoider liability test is different from the “regular” strict liability regime, whereby the tortfeasor is always the one who is liable, irrespective of his fault and of the question of whether he was the cheapest cost avoider. Under the cheapest cost avoider doctrine, it is not always the tortfeasor who bears strict liability, as at times the cheapest cost avoider happens to be the injured party. The objective of tort law according to this approach is to reduce the number of accidents and the costs of those accidents should they occur. Calabresi developed a multi-stage test for identifying the cheapest cost avoider from a group of possible avoiders.

It may or may not come as a surprise to discover that even without having been exposed to Maimonides’ approach as expressed more than eight hundred years ago in the Guide, Calabresi suggested an approach that is in many ways similar to that of Maimonides. Calabresi’s cheapest cost avoider test is indeed similar, although not identical, to Maimonides’ EAC test of liability, although of course, Maimonides did not use Calabresi’s terminology of “the cheapest cost avoider”. It should be recalled that according to Maimonides’ test, liability is imposed on those who can most effectively prevent the causing of damage, even if there is no fault attached to their acts, similar to what Calabresi wrote some eight hundred years later.

However, the tests are not identical. As we saw above, Maimonides argued that the imposition of liability depends on the answer to the question of who can avoid the accident more effectively. The most important element of the EAC test is control, and the person who has (actual or potential) control over the cause of the accident is considered the most effective avoider of the damage. Note that control is significant in modern law as well. The most effective avoider is usually also the cheapest cost avoider, but not always, as the Maimonidean test depends on control, unlike the Calabresian test. According to Maimonides, the fact that the property is in a person’s possession and therefore under his control is the

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177 Ibid., at 26-31.
178 For example with respect to property damages (e.g., in some countries in the case of damage caused by dogs: see, e.g., sec. 41A of the Civil Wrongs Ordinance (New Version), 5728-1968, 10 LSI 266, (1968) (Isr.), and with respect to employee damages (e.g., vicarious liability, restricted to cases of control and employee compliance with the framework and mission of the job).
reason why he is considered the most effective avoider of damages. As we explained, he must guard himself and his property so as not to injure others, and for this reason alone – prevention – liability should be imposed on him. Calabresi would probably explain this in a slightly different way from Maimonides: an owner of a living creature is the cheapest cost avoider because the creature is in the possession of the owner, and therefore his costs for avoiding the damage are relatively low compared to others. Nevertheless, as we have said, Maimonides did not develop and justify his test with that special clarity and rationality that is reflected in Calabresi’s theory.

We have seen so far that Maimonides discusses deterrence and the prevention of damage. But what is special about any economic theory – that of Calabresi and of others – is that it also considers the cost of preventing damage to be a social harm. Therefore, proponents of the economic theory of law talk not merely about deterrence, but about optimal deterrence, which is aimed at reducing the cost of accidents and the cost of accident prevention. In other words, this is not only an attempt to prevent accidents, but also to reduce, in various ways, the costs of the accidents that do occur, for example by changing the level of activities of the tortfeasor. Are these elements also present in Maimonides’ work?

Maimonides does not invoke the modern concepts of optimal deterrence, and does not specify this element explicitly. But he looks for deterrence that takes into account the costs of prevention, and therefore does not impose liability on those whose prevention costs are high relative to the costs of the accident. This may be inferred from the Guide, where he writes that the damage avoider is liable only for damages “that the person can make sure and guard so as not to cause harm.” But if a person has no ability to prevent effectively the occurrence of the damage, he is exempt from liability. To illustrate this point, Maimonides offers the example of the animal owner who is exempt by the halakhah from damages caused by the animal’s feet or teeth as it walked in public domain: “For tooth and foot in the public domain is exempt, because this is something that we cannot guard against, and they rarely cause damage there.” Why is it that it is not possible to prevent damage caused by tooth and foot? After all, the owner can avoid such damage by preventing the animal from walking in the public domain. The explanation appears to be that deterrence of this type is considered to be over-deterrence rather than optimal deterrence, because denying animals the right of passage in the public domain, especially in the ancient world, involves prevention costs that are too high and harmful to social welfare, whereas the cost of the damage they prevent is relatively low (tooth and foot damage is relatively rare). Therefore, the owner of the animal was exempt from liability for tooth and foot damage in the public domain, resulting in optimal deterrence.

The cheapest cost avoider doctrine, however, suffers from several drawbacks, some of which Calabresi himself mentioned in a well-known article he wrote with Jon Hirschoff in 1972. In light of problems with the cheapest cost avoider test, Calabresi and Hirschoff improved this test and devised the similar-but-different test of the “best decision maker”. According to this doctrine, liability is imposed on the entity belonging to the group that is in the best position to reach –

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179 Guide 3:40, 574.
180 Id.
181 Calabresi & Hirschoff, supra n. 174.
182 Id.
[A] decision as to which of the parties to the accident is in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made. The question for the court reduces to a search for the cheapest cost avoider... The issue becomes not whether avoidance is worth it, but which of the parties is relatively more likely to find out whether avoidance is worth it.\textsuperscript{183}

The best decision maker test is different from the fault-based liability test of negligence. It differs also from the economic concept of negligence, to be discussed in the next section, whereby failure to prevent the damage is defined as negligence and results in the imposition of liability. The best decision maker must examine whether and how much to invest in prevention, knowing that if damage occurs he in any case bears its cost, which is likely to affect his level of activity.

The best decision maker liability test is similar to the cheapest cost avoider test in that they are both different from the “regular” strict liability regime. Under the best decision maker doctrine, as under the cheapest cost avoider doctrine, it is not always the tortfeasor who bears strict liability, as at times the best decision maker happens to be the victim. In other words, strict liability is the foundation of the best decision maker regime, but the liability is not always imposed on the tortfeasor. In these cases the tortfeasor does not bear the cost of the damage, and the loss should lie where it fell.

Unlike Calabresi’s “cheapest cost avoider” test, which has some parallels in Maimonides, as we saw, his later “best decision maker” test involves not only the efficient ability to prevent damage but primarily the information available on the expected damage and its associated risks. Can we find a parallel for this in Maimonides? Maimonides makes no mention of a “best decision maker” as distinct from the effective prevention of damage (more of a “cheapest cost avoider”) that was explicitly stressed as the basis for tort liability in the \textit{Guide}. But it appears that the foundations of the best decision maker can serve to elucidate several of Maimonides’ rules in his \textit{Code}, indicating that he also attributes decisive importance to the question of who has the information to weigh better than others the costs of the damage and of its prevention. In the following chapter, Chapter Five,\textsuperscript{184} we will see interesting parallels to the best decision maker in the \textit{Code}.

The similarity between Calabresi’s modern tests and the rationalization offered by Maimonides in the \textit{Guide} is also evident in the cases of exemption from tort liability.

As in the case of Calabresi, there are exceptions to Maimonides’ rule as well, meaning that the owner of the animal is not always considered to be the most effective damage avoider (the Maimonidean test) or the cheapest cost avoider and the best decision maker (the Calabresian tests). There are cases in which the liability should not be imposed on the owners, even though they are often the effective damage avoiders, the cheapest cost avoiders or the best decision makers. To be precise: according to Calabresi’s approach, like that of Maimonides, these are not exceptions, but simply cases in which the cheapest cost avoider or the best decision maker does not belong to the group of tortfeasors, but rather to those who suffer injury,

\textsuperscript{183} \textit{Ibid.} at 1060-61 (describing the difference between the cheapest cost avoider and the best decision maker).

\textsuperscript{184} Section 2.
and this means that the damage will fall entirely on the shoulders of the injured party, and he will receive no compensation. Indeed, as we have seen, Calabresi does not follow a common standard of strict liability because there is no real incentive for the potential victim to prevent the damage if liability is imposed only on the tortfeasor. In other words: under a regime of strict liability imposed exclusively on the tortfeasor, there is no incentive for the victim to prevent damages, which is a good reason for developing a standard which, although based on strict liability, is nevertheless different from it.

For example, although the manufacturer is typically the best decision maker as compared to the consumer, and liability is imposed on him if he could have prevented the damage or reduced the cost of the accident by appropriate expenditures, the manufacturer is not liable if the consumer uses the product in a different and unusual way that deviates entirely from its original purpose and endangers him, such as a person who uses a large lawn-mower, designed only to cut grass, for other purposes – albeit important ones – such as riding on it to the post office to dispatch an important letter or to the hospital carrying a wounded person. The lawn-mower may be capable of driving on the road, but when the blade breaks and the owner is injured, he himself is the best decision maker. If the blade broke as a result of cutting the lawn in a rocky area, however, the owner of the lawn-mower is not the best decision maker: rather, the manufacturer, who ought to have striven to design a machine that would avoid damage in such cases, is the best decision maker.185 In the case of riding the lawn-mower on the road, it is true that it is the manufacturer’s decision not to take advance measures to prevent damage in cases of rare and unusual use of the product, based on the consideration that even if he were to take such measures he may not succeed in preventing the damage. Calabresi emphasizes that the reason the manufacturer is nevertheless not liable in these cases is not related to the consumer’s contributory negligence (which is part of the fault-based regime, rejected by him), as it is possible that the user has a reasonable and efficient argument for using the product in an unusual way. The reason for exempting the manufacturer of liability here is that in these cases, it is the user who is the best decision maker. It is within his power to prevent the damage in the best way by refraining from inappropriate use, especially if such use is dangerous.186 Calabresi even compares this situation with the original meaning of the assumption of risk theory, namely that a victim who freely and consciously chooses to expose himself to a known risk is not entitled to compensation.187 The reason for this is not related to fault, but to the fact that in such a case he could have weighed the balance of cost and benefit better. In these kinds of cases strict liability is imposed on the best decision maker (whether he happens to be the tortfeasor or the injured), irrespective of whether the other party did what ought to have been done.

As we said in the previous section,188 Maimonides has a similar explanation for the *halakhah* holding an owner of an animal liable for horn damage in the public domain when he is exempt from tooth and foot

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185 Calabresi & Hirschoff, *supra* n. 174, at 1064. According to Calabresi, even if the act is important, the owner of the lawn-mower will not receive compensation because he is the best decision maker, whereas according to the standard of contributory negligence it is very possible that he would be compensated, even if only partially, if the purpose for which he acted was sufficiently important that most people would have done the same. In Chapter 1 we explained the various approaches to contributory negligence, and they will be mentioned briefly also in the next section, which deals with Posner’s approach and the Hand formula.

186 As seen in Chapter 1, Calabresi mentions additional cases where the best decision maker is not the tortfeasor and liability is imposed on the injured consumer.

187 Calabresi & Hirschoff, *supra* n. 174, at 1065.

188 Section B(1)(b).
damage there: he explicates the law by carefully examining who the effective damage avoider is – the owner of the animal or the injured party.\textsuperscript{189}

Using Calabresi’s terms, it is possible to say that Maimonides believes that no liability should be imposed on the owner of an animal that caused tooth and foot damage in the course of its regular passage through the public domain because he is not the cheapest cost avoider or the best decision maker. The reason is that on one hand, the cost of preventing the damage, if it were to be imposed on the owner of the beast, is very high owing to the difficulty of preventing damage caused by a beast passing through the public domain; on the other hand, the expected damage is relatively light because “they rarely cause damage there.”\textsuperscript{190} In the case of horn damage, however, the cost of prevention of the damage by the owners is not high, and it is significantly lower than the costs of preventing tooth and foot damages. This is because it is the way of an animal to trample whatever it walks through and to eat the food it finds along its path, and therefore the cost of preventing these acts in the public domain is high. By contrast, horn damage is defined as a departure from the regular nature of the animal. Thus, the cost of preventing the damage, if it were to be imposed on the owners, would not be particularly high, for only on rare occasions does an animal gore.

As we saw, Maimonides also took into consideration the potential victim and the degree of his ability to prevent the damage, adding that whoever left something in the public domain “is at fault (posheah) toward himself” – in today’s terms, a type of assumption of risk, or severe and very high contributory negligence – for he exposes his property to loss, and therefore it is proper to impose on him liability for the damage and to exempt the owner of the animal from liability. In light of this, it is clear why the owners of animals were not held liable for tooth and foot damage in the public domain; on the contrary, it is the responsibility of the injured party to remove or guard his produce because “whoever leaves something in the public domain is at fault (posheah) toward himself and exposes his property to loss.”\textsuperscript{191} Here, as with Calabresi, there is no division of responsibility between the parties for contributory negligence on the part of the person leaving the object, but a decision one way or another about the full responsibility.

In this case, the person who will assume the damage is the one who left the object that was damaged, because he was better capable of preventing the damage and at a lower cost. In Calabresi’s terminology, the one who places an object in the public domain, not the owner of the beast, is the cheapest cost avoider of the damage and the best decision maker.

At the same time, as we saw,\textsuperscript{192} Maimonides adds that people passing through the public domain who are likely to be injured as a result of the exceptional behavior of the animal “cannot protect themselves against this damage” (horn damage), because they have no control over the behavior of the animal. Moreover, it is reasonable to assume that simply passing in the street cannot be considered a case of assumption of risk or even contributory negligence, even if at times such passing turns out to be dangerous. Naturally people have no alternative, and it would not be reasonable to impose liability for the

\textsuperscript{189} Id.
\textsuperscript{190} Guide 3:40, 574.
\textsuperscript{191} Id.
\textsuperscript{192} Id.
simple activity of walking in the public domain. This last point is reminiscent of the imposition of liability on drivers and owners of vehicles as the best decision makers according to Calabresi and Hirschoff, whose explanations involve insurance and regulation, which did not exist in the Middle Ages. According to Calabresi, there are two main considerations for imposing liability in this case. One consideration is distributive — it is more correct to impose liability on drivers than on pedestrians. The second consideration concerns information and the ability of a person to direct behavior through insurance and regulation. In other words, because driving is a regulated activity (as opposed to walking, which is not regulated and cannot be supervised efficiently), it is more effective to insure driving than walking, and to impose liability on the driver rather than on the pedestrian, even if the latter, for example, jumped out in front of a car. Driving is a regulated activity in that the driver receives information from the insurance company. In some places, the insurance premium varies with the level of the risk.193 By means of the insurance, it is possible to verify the safety measures that each driver purchased, which places the driver in a better position than the pedestrian to weigh the costs of prevention against those of the accident. It is also possible to set standards (e.g., air bags, ABS, etc.), whereas it is not possible to determine whether or not a person crosses the road cautiously because it is difficult to distinguish among various categories of pedestrians based on their potential for accidents. Imposing insurance on pedestrians would result in a problematic uniform insurance, as all pedestrians would be paying the same amount, without regard to the degree of risk. The degree of risk cannot be tested, which would result in a problematic externalization, because the entire cost of accidents would have to be shouldered by the pedestrians. And even if it were possible to test this risk, insurance of this type would still be differential, based on the degree of risk that the pedestrian poses to himself, even if considered as part of a group, so that children, the sick, the disabled, and the elderly would most likely pay more, again resulting in a distributive and social problem.

Drivers are therefore better decision makers than pedestrians (even if both groups can act to reduce risks), because it is easier for drivers to evaluate the risks of accident, and they have the tools to do so. Imposing liability on drivers is likely to cause them to change their behavior, whereas pedestrians are not likely to change their behavior in any case, as they are already affected by the risks posed by vehicles, and they are likely to exercise similar care whether or not liability is imposed on them.

The parameter of whether or not an activity is regulated (for example, by the possibility of insuring it) serves as a good foundation for the test of the best decision maker, even if that decision maker happens not to be the cheapest cost avoider. In this case, not only is it possible to change drivers’ behavior because their activity is regulated and covered by insurance (an example that the Talmud and Maimonides did not address with regard to the person leading his animal through the public domain), but it is also difficult from a social point of view to tax such everyday behavior as walking in the public domain, even if the walking can be dangerous. Maimonides explains that there is no logical reason for imposing liability on whoever walks in the public domain in a customary manner and is injured by a goring or kicking beast. Such a person cannot be regarded as a best decision maker, and in any case his behavior will not be changed if he were recognized as such. All he can do is hope that an animal will not suddenly go wild and

193 Calabresi, supra. 175, at 247-48, 252-53.
cause harm. This is in complete contrast with those leaving their property in the public domain, who expose their property to loss (in the case of common tooth and foot damages), and who must therefore be regarded as the best decision makers. These need not pray for good fortune but rather, protect their possessions and not leave them without supervision in the public domain. Unlike pedestrians in the public domain, the latter have logical alternatives, namely to place their vessels elsewhere and thereby reduce the level of their activity or carry them on their persons.

This is the place to address the similarities and differences between Maimonides’ position on the matter of liability for innocent (tam) ox damage194 and Calabresi’s best decision maker theory. On the one hand, as we saw in the case of Calabresi, one can suggest that the rule regarding the tam ox also expresses a social view according to which it is necessary to provide incentives to the owner of the animal and to guide his behavior to take precautions and to think creatively about developing such methods, even if at the time it may seem to him that he did everything possible to prevent the damage. In any case, if it transpires that the owner of the animal does not properly watch over it, and it repeats the goring at least three times,195 the animal is declared likely to gore (forewarned), in which case the owner pays the full cost of the damage because he is a serial tortfeasor who is not deterred by payment of half-damages.196 On the other hand, we must bear in mind the differences between Maimonides’ innocent ox rule and Calabresi’s best decision maker theory. The major difference is that the owner of the ox is not liable for the full horn damage caused by an innocent ox but pays an amount reduced by half. Unlike Calabresi, Maimonides does not impose complete strict liability for the damage lest it cause an excess of deterrence that could result in the disruption of economically and socially desirable agricultural activity. This difference follows from an even more significant difference between Calabresi and Maimonides that is discussed below, regarding the appropriate type of liability: strict liability for the best decision maker (Calabresi) as opposed to liability that is more than negligence but less than strict (Maimonides).197

The example of horn damage by a tam ox can serve as a test case in which it is difficult to determine unequivocally who can optimally prevent the cost of the damage caused by goring because it is a rare and unforeseen damage. As noted by Rabinovitch, “it is not possible to define precisely what cautionary measures can help without detriment to the possibility of maintaining the agricultural activity.”198 In cases of this type it may be preferable to divide liability between the tortfeasor and the injured party, thereby establishing an appropriate balance between creating an incentive for the owner of the animal to find ways of preventing the unforeseeable damage and between causing over-deterrence by the disruption of activity. On the other hand, the division of liability provides an incentive also to the potential victim to take reasonable precautionary measures in order to avoid the results of unforeseeable damage.

Of course, not all the differences between Maimonides and Calabresi are differences in fundamental jurisprudential conceptions, and it may well be that they are also connected to the different historical

194 Supra, section B(1)(c).
196 For clarification of this matter, see the discussion about serial tortfeasors in the next section.
197 We expand on this in Chapter 6.
198 Rabinovitch, supra n. 82, at 73.
backgrounds and circumstances in which they operate (for example, we saw that for Calabresi, the subject of insurance constitutes a major consideration, whereas in Maimonides’ time there was no insurance and the tortfeasor would pay for everything himself).  

b) Posner’s Hand Formula and Maimonides

Despite the great similarity between what Maimonides writes at the beginning of Chapter 3:40 in the Guide introducing the EAC test and the Calabresian test of the cheapest cost avoider, later in the chapter Maimonides did not use Calabresian terminology when explaining the exemption for tooth and foot. The phrase that Maimonides uses, “whoever leaves something in the public domain is at fault (posheah) toward himself and exposes his property to loss,” may admittedly be explained as assumption of risk, i.e., a situation in which a person enters into a dangerous situation intentionally and of his own initiative and as such he is the cheapest cost avoider and possibly also best decision maker, according to Calabresi’s approach which is based on strict liability. From the point of view of the rationale, this, of course, cannot be discounted; but it is hard to avoid the fact that Maimonides nevertheless used the phrase “is at fault (posheah) toward himself,” which is associated with elements of peshiah-negligence; therefore, the similarity between Posner’s approach and the Hand formula and between Maimonides’ theory must also be examined, particularly the component of one who leaves things in the public domain as being negligent vis-à-vis himself, liable for the entire damages – a type of contributory negligence in the magnitude of 100%. If so, these statements of Maimonides would seem to fit the modern doctrine of “contributory negligence” according to Posner’s economic outlook no less than the economic concept of Calabresi (which rejects the use of the term “negligence”) and possibly even more, although there is no question of a division of liability in Maimonides’ case, which may be more in keeping with Calabresi’s strict liability regime.

In Chapter 1 we discussed at length the main characteristics of Richard Posner’s tort theory; below we will summarize only those elements that relate to the contributory negligence and comparative negligence doctrines, emphasizing the difference between Calabresi’s and Posner’s theories.

As explained in Chapter 1, even though we use a general term – contributory negligence – there are actually a few terms in use for a situation in which the injured party contributed to the injury inflicted on him. In England, France, Germany, and the US, liability in such situations is governed by what is termed the “comparative negligence rule”, i.e., the negligence rule coupled with the defense of contributory negligence. Comparative negligence is a relative defense which reduces the compensation according to the part of the fault of the injured party. What is this reduction? In most jurisdictions, even if the injured party was himself negligent, he will still receive compensation, but his part in the damage will be deducted, so that if his part in the damage was 40%, he will receive compensation of only 60%; today, this is the commonly accepted meaning of comparative negligence. In fact, the negligence of the injured party is compared to the negligence of the tortfeasor, and the compensation to the injured party is reduced in accordance with his own negligence. In a minority of jurisdictions, the older doctrine of contributory negligence (which is different from comparative negligence, in that there is no comparison between the

199 We will deal with distinctions such as these in Chapter 6.
negligence of the two parties in causing the damage) still prevails. According to this doctrine – the source of which presumably lies in the claim of lack of clean hands of the injured party in that he has the nerve to sue when he has even a small part in the damage – the injured part will not be receive any part whatsoever of the compensation if he was negligent too, and if he had a part in causing the damage – with no comparison to and irrespective of the negligence of the tortfeasor.\textsuperscript{200} In a number of Common law jurisdictions, however, the critical point is 50%: if the contributory negligence exceeds 50%, the injured party will receive no compensation at all, and if it is less than 50%, he will receive full compensation.\textsuperscript{201}

As stated, the term contributory negligence in fact does not allow for a person who contributes to the damage – even in a small way – to receive compensation: it is a type of all or nothing calculus. The fault of the injured party here is critical, and if present it means that he will receive no compensation at all. The situation of comparative negligence relates to division of the damage between the tortfeasor and the injured party, in the sense that the proportion of moral fault of the injured party, as assessed by the court, is deducted from the compensation to which he is entitled, so that if his contributory negligence is 40%, he will receive compensation amounting to only 60% of his damages.

Posner’s improvement of the Hand formula was accompanied by an economic calculation of the extent of contributory negligence of the injured party. Below we will refer to the relative defense in the sense of Posner’s Hand formula as “contributory negligence”.\textsuperscript{202}

Posner, also one of the founding fathers of (tort) law and economics, based his approach on negligence rather than on strict liability. Hence, his economic approach is different from both corrective justice and strict liability. Posner relied on the Hand formula, which compares the costs of prevention with the expected cost of the harm in order to determine culpability.\textsuperscript{203} The formula is based on economic efficiency, with the understanding that society is not interested in preventing accidents at any cost and by investing infinite resources.\textsuperscript{204} The tortfeasor is considered negligent when the burden (B, the cost of prevention) is smaller than the expected damage, which is the product of the probability of harm (P) and of the degree of loss (L): $B<PL$. A person is considered negligent if he spends 80 to prevent damage expected to be 100, but not \textit{vice versa}.


\textsuperscript{201} As explained in Chapter 1, this is a kind of “modified” comparative negligence. In one form, only a plaintiff whose negligence does not exceed that of the defendant, i.e., it is no greater than 50% of the negligence as a whole, will be entitled to compensation; in another form of “modified” comparative negligence, only a plaintiff whose negligence is less than that of the defendant – less than 50% of the total – is entitled to compensation.

\textsuperscript{202} It seems that each of the frameworks (contributory negligence or comparative negligence) can fit the Hand formula. Whether one is applicable will depend on the jurisdiction. For instance, contributory negligence states would bar liability, even if the Hand formula runs true, if a plaintiff is also negligent.


versa. Unlike the approach taken by Calabresi, if it was necessary to invest 100 to avoid a damage of 80, not only is the person who did so not negligent but he does not pay the 80 either – he pays nothing. According to the strict liability approach, he will pay 80 because liability is absolute and without fault. The difference is therefore a distributive one: whether or not the injured party will be compensated.

Another difference between Posner’s fault-based theory and Calabresi’s best decision maker is with regard to changes in the level of activity. The best decision maker must assess if and how much to invest in prevention, knowing that if damage occurs he will be liable in any case, which may affect the level of his activity and lower it if necessary (for example, by driving less if driving can cause accidents). However, negligence does not change the level of activity of the tortfeasor because more driving does not mean negligence, but it may well affect the level of activity of the injured person, unlike strict liability, and the injured party may reduce the level of his activity or transfer it, in order to prevent damage on the part of the tortfeasor. This is also a form of damage prevention, according to Posner’s improvement of the Hand formula, whereby we examine not only the ability of the tortfeasor, but also that of the injured person, to prevent the damage at a cost that is lower than the expected damage. Thus, it makes sense to also examine the fault or contributory negligence of the injured party and impose liability on him (in fact, to leave the damage where it fell) or to reduce the liability of the tortfeasor in accordance with the liability of the injured person toward himself. In a case of a train passing next to an agricultural field and creating sparks that ignite the field, according to Calabresi, imposing strict liability on the railway company would result in a reduction of the level of activity on its part, without affecting the activity of the injured person, who is not the best decision maker under the circumstances. According to Posner, however, if the farmer also makes an effort to prevent the damage, for example by removing his crops from the tracks, so as not to be subject to contributory negligence, the railway company will act to prevent what the farmer was unable to prevent.

In his opinion, if the railway company must always pay, as an expression of the strict liability of the best decision maker, the farmers will be indifferent to whether they harvest crops or receive compensation for their destruction. This is true even in a case in which both parties are trying to prevent the damage, because the farmers, who will receive the compensation in any case, still have no incentive. The situation changes when we consider contributory negligence because it incentivizes farmers to prevent the damage.

Note also that under a best decision maker regime, even if a manufacturer claims that his product is the safest, liability is imposed on him, as mentioned above. In this case, therefore, the liability is imposed on the best decision maker even if he is not the cheapest cost avoider, but we estimate and perhaps hope that he will become the cheapest cost avoider in the future. According to Calabresi and Hirschoff, there is no escape from imposing strict liability on him, if the goal is true prevention, even if at the moment it does not seem possible to produce a safer product. Posner believes that it is necessary to apply here a fault-based regime with contributory negligence, and all the consumer needs to do to prevent the damage in the lawn-mower example is to move the stones.

207 Posner 1973, supra n. 205, at 205-06.
manufacturer in this case, purely in order to incentivize him to develop the product in the future even though at present it is considered safe, as suggested by Calabresi, is not effective because this result eliminates the incentive of the consumer-operator to take steps to reduce the harm. Posner argued that “[a] strict liability standard without a contributory negligence defense is, in principle, less efficient than the negligence-contributory negligence standard.”

Now we come back to Maimonides’ rationalization of the exemption for tooth and foot damages and the difference between these and horn damages, mentioned above. It appears that Maimonides’ rationalization can be explained by either of the two economic methods of Calabresi and Posner. We saw in the previous section how Maimonides’ approach could be explained by Calabresi. However, his approach may well be closer to that of Posner: “There is a certain amount of justice in these laws, and I will draw attention to it” – it is not inconceivable that Maimonides is referring to economic efficiency-enhancing justice, and not, for example, to corrective justice, “For tooth and foot in the public domain is exempt because this is something that we cannot guard against.” In other words, using Posner’s Hand formula, the cost of preventing these actions in the public domain (B) is high when animals commonly pass through it. The possibility of reducing the level of this activity was not a real one given that animals were the exclusive means of transportation and transfer of cargo. On the other hand, Maimonides also asserts that tooth and foot “rarely cause damage there,” meaning that the probability of harm (PL, in terms of the Hand formula) by tooth and foot in the public domain is relatively low compared to the cost of prevention (B). But Maimonides, like Posner, does not merely consider the prevention costs of the tortfeasor vis-à-vis the expected damage, but examines the fault of the injured party as well, as he writes in the Guide: “He who leaves something in the public domain is at fault (posheah) toward himself and exposes his property to loss.” His fault lies in leaving his property in the public domain without protection, resulting in it being damaged. He could have not left it there (thus lowering the level of his activity, even if it is convenient for him to place his property there) or taken it with him. As noted, this may be regarded as assumption of the risk according to the approach of the best decision maker, although the words “is at fault (posheah) toward himself” appear to indicate a notion of fault. Either way, the approach appears to be economic.

It would also be possible to follow Posner’s approach in analyzing Maimonides’ rationalization of the liability of the owner of the animal for horn damages, even if they occurred in the public domain. Because kicking and goring are less common actions of animals than are eating or trampling in the process of walking, it is possible to prevent accidents by means of prevention costs that are not particularly high relative to the cost of tooth and foot damage, for example, by restraining the animal. Let us assume that the cost of prevention is 10. On the other hand, the damage caused by kicking and goring may be particularly high, say 500. Therefore, even if the probability that such accidents will happen is not high, let us say 5% of cases, the expected damages can be considerable. An economically-minded person

209 Ibid., at 221.
210 Guide 3:40, 574.
211 Id.
212 Id.
213 Id.
214 Id.
will invest 10 to prevent an expected damage of 25 (5% of 500), and if he did not do so, he is considered to be negligent. But if the probability of such an accident is extremely low, say 1%, the opposite result from that mentioned by Maimonides will ensue, because an economically-minded person would not invest 10 in order to prevent expected damage of only 5 (1% of 500), whereas according to Calabresi, liability will always be imposed on him as a tortfeasor.

Indeed, as we saw in the previous section, one can say that Maimonides imposes liability on the owner of the animal for horn damages that occurred even in the public domain because he is – in Calabresi’s terms – the best decision maker under the circumstances. Maimonides justifies not imposing liability on the owner of the animal for tooth and foot damages for exactly the same reason. His considerations are consistent with the central rationale of the best decision maker in general, particularly with regard to not imposing liability on pedestrians because they are not considered to be the best decision makers. Similar to Calabresi, Maimonides does not assess the concrete situation but explains the meaning of the Talmud based on a group test, involving the group of the owners of animals versus the group of the people who walk in the public domain and the group of people who leave their vessels and their fruit in the public domain, in various situations. When the animal eats or tramples in the public domain, which are regular and common acts, the best decision maker is the owner of the fruit that was eaten or trampled, because he should have prevented the results of a likely and foreseeable act. By contrast, in cases in which the animal gores and kicks, it is for the owner of the animal to be careful, because he is the best decision maker and such actions of the animal are less frequent, and in any case, the pedestrians walking normally in the public domain have no practical way of avoiding such occurrences. In both cases we see that it is possible to examine the situation using the Hand formula of economic negligence. Maimonides’ rhetoric is closer to the Hand formula in cases of tooth and foot damage than in cases of horn damage.

It would seem that in the explanation of the talmudic rule, different scholars have different understandings with regard to contributory negligence, and it is not possible to formulate an unequivocal approach to the Jewish law on this subject; what is clear, however, is that negligence on the part of the injured party does not create an automatic presumption of exemption from payment – in whole or in part – on the part of the tortfeasor in every case. With respect to Maimonides’ approach, however, as expressed in the Guide, the situation appears to be clearer. When Maimonides discusses the matter of a person who “is at fault (posheah) toward himself” in the Guide, he presents a rationale that is clearer and more general than that which is presented only in specific contexts in the Code and in the talmudic sources. Maimonides regards this as a central element in determining who will bear the liability – the tortfeasor or the injured party. This approach falls somewhere between contributory negligence and comparative negligence, and in fact it is reminiscent of pre-modern Common law approaches. On the one hand, this is not a matter of all or nothing. On the other hand, it is also not a matter of precise division by percentage according to the fault of the injured party, but of imposing liability on the defendant only if his

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215 Friedell, supra n. 91, at 97-98, 108. For Friedell’s comprehensive discussion of the topic see ibid., at 97-110.
216 See Laws of Wounding and Damaging 1:11.
217 J. Bava Kamma 2:8.
negligence was greater than that of the plaintiff. In this approach, the mid-point – 50% – is determined. Whoever was negligent beyond this mid-point of 50% will bear liability for the entire amount of the damages. Accordingly, contributory negligence in a lesser proportion will not entail any reduction of compensation, and if it exceeds 50% there will be no compensation at all.

Interestingly, there are modern legal systems that advocate an almost identical solution. Thus, for example, some systems talk of severe contributory negligence only. In Israel’s Liability for Defective Products Law 1991, the orientation of the Common law is preserved, for the basic principle of this Law is absolute liability of the manufacturer, but one of the few defenses in the Law – which means that the liability thereunder is not entirely absolute, even though it is not negligence either – is that of contributory negligence, although only gross contributory negligence can reduce the compensation in any way. A low level of contributory negligence will not entail a reduction of the compensation by a correspondingly low proportion, as is the case with comparative negligence. Thus we see that this approach is very similar to that of Maimonides, although contemporary law gives the court discretion to decide in each case if the case is one of gross contributory negligence, whereas Maimonides is more formalistic and sets the point at 50%. In practice, it appears that the approaches are almost identical, for it may be assumed that according to Maimonides’ approach too, this 50% is only an estimation and there is no possibility of actual measurement in each case.

The payment of only half damages in the case of the innocent ox (tam), too, may be explained by Posner’s contributory negligence doctrine, although the wording of Maimonides’ rationalization of the half damage payment in his Guide does not necessarily reflect Posner’s theory; it speaks rather in terms of EAC, regarding both the tortfeasor and the injured party as effective damage avoiders in a similar way. In Posner’s terms, therefore, it may be said that in relation to the tam ox, the degree of negligence of the injured part is similar to that of the tortfeasor, and there is always a contributory negligence of sorts

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218 Friedell, supra n. 91, at 97-98, 108. Friedell presented this view with respect to talmudic sources, and in this he disagreed with the approach of Albeck, who held that if both parties were negligent, the compensation is divided between them. See ibid., at 101-106. Friedell says that Albeck has a problem understanding the Tosafot, which was the basis of his approach. According to Friedell, the talmudic view that he himself is presenting emerges primarily from the approach of the Tosafot, which must be understood correctly, even though it is not entirely clear that this is indeed the approach in the Talmud, due to the scant talmudic discussion of contributory negligence. See ibid., at 100; Albeck, who understood the matter differently, did not fully support the approach of Tosafot. See ibid., at 105-107. For Albeck’s response, see: Shalom Albeck, “Response”, 13-14 Dine Israel (1986-1988) 231, 232-33. Friedell indeed held that most probably, the talmudic approach is that the defendant is liable only if he was more negligent than the plaintiff, as part of the general privity of the Talmud to limit tort liability. See ibid., at 109. In Friedell’s view, even in cases of greater negligence on the part of the plaintiff – more than 50% – all in all there were cases in which the defendants were nevertheless held liable, because compromises are preferable to litigation in Jewish law, and it was preferable to make a partial payment to the plaintiff. See ibid., at 110. In our view, when Friedell wrote this he was not aware of Maimonides’ formulation in the Guide; one would imagine that had he had that text available to him, it would probably have supported his conclusion. In our view, however, this conclusion is at most correct only with respect to characterization of Maimonides’ method, for as we have said, characterization of the talmudic approach on this question is not unequivocal, and could be taken in several directions.

219 See, e.g., Shulman et al., supra n. 201, at 627-706 (describing the laws of defective products in the USA).

220 Section 4(b) of the Defective Products (Liability) Law 1980, S.H. 1980, 86 [Isr.]. The section states as follows: “It will not be a defense to an action against a manufacturer that negligence of the injured party contributed to the damage, but if the injured party was grossly negligent, the court may reduce the amount of compensation having regard to the extent of his negligence.”

221 Even though according to Posner’s approach, it is possible to insert into the formula not only the negligence but also the contributory negligence and to obtain an accurate result with respect to the amount of reduction.

222 Guide 3:40, 575.

223 Maimonides’ approach was presented in section B(1)(c).
of 50%, similar to those pre-modern Common law approaches or the relatively modern approaches of gross negligence.

If so, the rationale underlying Posner’s contributory negligence may be suited – to some extent or another – both to the cases in which the tortfeasor is exempt from liability and as an explanation of the rule of the tam ox.

Admittedly, it is important to recall that the standard of care required of the owner of a tam ox according to most opinions in the talmudic literature is that of strict liability, and not negligence, as in other property damages. Under this standard, if the tam ox gores, then even if the owner guarded it in an appropriate manner he will bear strict liability and pay half damages. This is as opposed to the mu’ad ox, for which the required standard of care is at a lower level than the tam ox, according to some views in the Talmud. We will explain briefly this complicated rule concerning payment of half damages in the case of a tam ox. According to the Talmud, the maximum payment for a tam ox that gored will always be at the rate of half the damage and no more – in other words, it is not a matter of all or nothing, but rather, this is the “all” that is payable. According to the talmudic view that is accepted as law, the owner of the tam ox must make this payment of half damages in every case and irrespective of his negligence. This rule whereby the mu’ad ox requires guarding at a level that is inferior whereas the tam ox is subject to strict liability seems very surprising to the commentators on the Talmud, and it seems strange to modern eyes as well – how can one justify a rule that imposes absolute liability for a payment at the rate of only half the damage? According to the common talmudic interpretation it seems that the special law of payment for the damages of a tam ox stems from the definition of payment of half damages of the tam ox as a fine, i.e., although most tam oxen are tame and do not usually gore, nevertheless the Torah fined the owner for half damages if the tam ox did in fact gore, in order to encourage owners to guard their oxen better. On this conception it may be possible to understand why half damages are paid wherever damage is caused, i.e., strict liability, irrespective of the negligence of the owners. It is important to create a permanent and uniform deterrent at the level of half damages so that the owner will invest, at least, in creating reasonable safeguards in order to reduce the chances that the tam ox will gore.

In the Guide, however, there is no reference to the required standard of care in relation to different sorts of property damage and other kinds of damages (damages caused by a person to property, and injuries that a person causes to another person), for the discussion in the Guide is extremely general and does not go into the details of the laws. In the Code, as we shall see in the following two chapters,

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224 See e.g. the opinions of the sages mentioned in the Mishnah and in the talmudic discussion in Bava Kamma 45b-46a.
225 See e.g. M. Bava Kamma 6:1 (which exempts the owner of sheep who put his sheep into an enclosure and locked the gate properly: if they nevertheless escape and cause damage, he is exempt).
226 Mainly according to the opinion of R. Judah in M. Bava Kamma 4:8. Various reasons were given in Bava Kamma 45b-46a for the difference in the standard of care for a tam ox and a mu’ad ox.
227 Understanding the law governing the tam ox is a complicated matter, which has been attempted by many scholars and commentators, and this is not the place to discuss the various explanations that have been offered. A full understanding would require extensive discussion, which would deviate from the objective of this endeavor, which is to understand Maimonides’ tort theory. And as we have said, Maimonides in the Guide did not discuss the level of the standard of care that is imposed on the owner of an ox that gores. Neither did he explain, in the Code, the reason for imposing strict liability for damages caused by the tam ox. Therefore we will not enter into this discussion beyond what we have said above.
Maimonides does indeed elaborate on the details of the required standard of care for each type of damage, and even rules in the same way as those talmudic sages who held that there is a different standard of care for the owner of a tam ox as opposed to the owner of a muʿad ox. Below we will resume our discussion of this subject at length.

In the following Table, which deals with the general rule of liability, i.e. on whom to impose tort liability and with the specific topic of contributory negligence, we will illustrate similarities and differences between Maimonides’ tort theory as reflected in the Guide 3:40 (without going into the differences in the required standard of care in relation to different types of damage, which are specified in the Code only and not in the Guide), and between the theories of Calabresi and Posner.

**Table 1: The Rules of Liability and Contributory Negligence according to Maimonides in the Guide 3:40 compared with Calabresi and Posner**

<table>
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<tr>
<th>Comparison with Calabresi and Posner</th>
<th>Comparison with Calabresi’s Theory: Cheapest Cost Avoider and Best Decision Maker</th>
<th>Comparison with Posner’s Theory: Negligence from the Economic Aspect and the Hand formula</th>
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<td><strong>Maimonides’ Approach</strong></td>
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<tr>
<td>1. The basis for liability of the tortfeasor: EAC Test – effective damage avoider test.</td>
<td>Maimonides’ approach is similar to Calabresi’s doctrines, particularly that of the cheapest cost avoider.</td>
<td>Maimonides’ approach is less compatible with Posner’s theory, although in certain matters, as we shall see in Chapter 6, Maimonides imposes on the effective damage avoider a standard of care of negligence or close to negligence (in the framework of his differential approach that will be presented there).</td>
</tr>
<tr>
<td>2. Tooth and foot damages in the public domain (the owner is exempt) – analysis of the talmudic issues according to Maimonides’ approach (“is at fault toward himself”)</td>
<td>Calabresi’s doctrines – strict liability imposed on the tortfeasor or on the victim according to the question of who is the cheapest cost avoider or the best decision maker – are compatible with Maimonides’ explanation. From the points of view of the consequence of liability for all or nothing – strict liability either of the tortfeasor or the victim, is less suitable from the point of view of the rhetoric of peshiah (used by Maimonides).</td>
<td>The doctrine of contributory negligence of Posner and the Hand formula – division of liability between the tortfeasor and the victim and reduction of compensation for the victim at the rate of his contribution to the injury caused to him – is compatible with Maimonides’ explanation more in terms of the rationale of “is at fault toward himself” which is more suited to negligence, as well as mention of the elements of a rate of damage that is not high and the fact that it is not frequent (Hand formula). However, from the point of view of the result of dividing liability, his approach is less compatible</td>
</tr>
</tbody>
</table>

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228 As described in Chapter 6.
229 Laws of Property Damages 7:1. For a discussion of the relationship between the Code and the Guide with respect to the tam ox, see Chapter 5, section E.
The comparison between the approaches of Maimonides and Posner reveals a wide disparity between the rationale of effective control in Maimonides’ theory and negligence in Posner’s theory.

3. A *mu’ad* ox who gored in the public domain – the owner must pay full damages.

Maimonides asks, who is the effective damage avoider, the owner of the ox or the passers-by (“regarding which precautions can be taken in all places and …those who walk in public places cannot take care” i.e. the emphasis is on effective control, rather than on the question of who was negligent).

Maimonides’ approach is very similar both in its result and in its rationale to Calabresi’s approach, particularly the cheapest cost avoider, but possibly also the best decision maker, as in the example of drivers and pedestrians, due to the element of control.

4. The rule of the *tam* ox who gores and whose owner is liable for half damages – Maimonides’ explanation.

Calabresi’s doctrines of all or nothing are not compatible with the rule of the *tam* ox with respect to the result of half damages. With respect to the rationale, it is possible to provide, according to Maimonides’ approach, an intermediate explanation whereby there is a type of strict liability for half the damages only (as explained in detail above).

Posner’s doctrine is compatible with the rule of the *tam* ox in the rationale of division of liability between the tortfeasor and the injured party. It is partially compatible from the point of view of the result, for according to Maimonides, the division of liability is fixed – 50% for each party (similar to the approach of pre-modern Common law systems and certain modern approaches of severe contributory negligence), and according to Posner, contributory negligence reduces the compensation to the victim at a varying rate, depending on the level of his contribution to the damage.

2. The Multiplier Approach, The Societal Redress Extra-Compensatory Damages Approach, and Maimonides’ Test for Punitive Damages

As we shall see in this section, some of Maimonides’ arguments in his *Guide* regarding punitive damages and criminal sanctions that have been presented above have surprising parallels in the studies of contemporary scholars, some of them strongly affiliated with the economic analysis of law, and in judgments of the courts. Particularly instructive is the comparison between the above statements by Maimonides and the modern law and economics literature, which contains several economic justifications of criminal sanctions and punitive damages. The most common justification, especially valid in tort situations, is that punitive damages may help increase deterrence. In Chapter 1 we presented the models offered by contemporary scholars and by the US Supreme Court in a series of judgments given in the last decade on the issue of punitive damages. In this section we examine the similarities and differences between these contemporary approaches and the Maimonidean model, and the innovations in Maimonides’ model compared to the contemporary legal reality.

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230 *Supra* section B(2).
a) Maimonides and Possible Parallels in Contemporary Criminal Law

Do the four sentencing considerations presented by Maimonides in the Guide\(^{231}\) have parallels in modern Western law? We may compare this with contemporary attitudes of increased stringency in criminal law (concerning sentencing as well as grounds for denial of bail, etc.), and possibly in civil law, in cases of serial torts.

In general, Maimonides’ approach resembles those of Cesare Bonesana Beccaria,\(^{232}\) Gary Becker,\(^{233}\) and Jeremy Bentham.\(^{234}\) The cost-benefit analysis that for a punishment to produce the effect required, it is sufficient that the evil it occasions should exceed the good expected from the crime, including the calculation of the certainty of the punishment, is found in Beccaria’s writings.\(^{235}\) Bentham explains that “as there are always some chances of escape, it is necessary to increase the value of the punishment, to counterbalance these chances of impunity.”\(^{236}\)

As to the imposition of criminal sanctions and punitive damages, consequentialist-deterrent approaches are less interested in the question of why the injured party should “gain” by receiving more than the amount of the damage. They are more interested in the question of optimal deterrence of the offender or tortfeasor, i.e., to make him pay an amount commensurate with the damage, not less, as was the case before the imposition of punitive damages, but no more either. Relying on the ease with which the offense is committed, without being noticed or the perpetrator caught by the legal authorities (Maimonides’ parameter 4) and on the frequency of the act (parameter 2) as considerations for payment beyond the amount of the damage, even to the injured party (and not only or necessarily to a community fund or to a special fund for victims of the same type of tortious act) certainly indicates an economic approach that is similar to the contemporary economic approach of punitive damages. Such an approach helps prevent tortious events by broadcasting the message that it does not pay to perpetrate the tortious act if eventually the payment for it is significantly higher than the amount of the damage. Payment of the damage only (recovery) in a situation in which there is an incentive to repeat the tortious act serially makes the perpetration profitable.

For example, a person who knows that the inspector visits the same place only once a week randomly will calculate the cost of the offense against the gain from it. If parking the car at no cost for an entire week on the street costs more than the fine for one day, he will do so repeatedly (assuming that he is not concerned with being labeled a criminal). If he has to pay four or five fines every week, he will think twice.

In criminal law, one such parallel to Maimonides may be found in the writings of William Paley.\(^{237}\) Paley emphasized what appear to be the same principles stressed by Maimonides, and enumerated the following factors to be taken into account in determining the degree of severity of the punishment for any

\[^{231}\text{Guide 3:41, 580}\]
\[^{232}\text{Cesare Bonesana Beccaria, An Essay on Crimes and Punishments (2nd ed., 1812).}\]
\[^{235}\text{Beccaria, supra n, 232, at 94.}\]
\[^{236}\text{Bentham, supra n. 234, at 402.}\]
given crime: (a) the facility with which the act can be committed; (b) the difficulty in detecting the act; (c) the danger the act presents to the community. Based on these parameters, Paley unreservedly supported capital punishment for stealing sheep and horses, not because these thefts are by nature more heinous than many simple felonies that are punished only by imprisonment or transportation (banishment) but because sheep and horses were property more vulnerable to theft. Based on this consequentialist approach, the terror of capital punishment is needed to protect against this felony.238

There are also two English verdicts adopting a similar line of reasoning to that of Maimonides in explaining the law of four- and five-fold compensation.239 In 1964, an English farmer was sentenced to three years imprisonment for stealing a sheep. The court reasoned that such offences disturb the relationship of trust that is vital between neighboring farmers in the valleys where cattle graze together in the open fields.240 In 1975, a man “of good character” was sentenced to six months imprisonment for filing three false tax returns, resulting in a loss of £176 to the Revenue Department. The court reasoned that this type of offense was prevalent and therefore it required a deterrent penalty because it was not easily detectable.241

Thus, parallels were found in the Common law literature both to some of the four parameters proposed by Maimonides for deciding on punishment, and to punitive damages at the four- and five-fold level. Below we will mention more significant similarities, both from the point of view of the way of thinking and regarding the outcome, between Maimonides’ analysis of the difference between payments of the thief and the robber on the one hand, and on the other hand, the modern approaches in the American literature to punitive damages, which are a type of intermediate subject between tort law and penal law.

b) Maimonides’ Approach to the Difference between a Thief and a Robber: Between the Multiplier and the Societal Redress Extra-Compensatory Approaches

Above we examined briefly Maimonides’ approach to punitive damages. In this section we will discuss the fact that Maimonides’ approach to the difference between a thief and a robber is found on the scale between two modern approaches to punitive damages – the multiplier and the societal redress extra-compensatory approaches.

First we present some of the major contemporary scholarly approaches to punitive damages.242 Under certain circumstances, as we have seen, courts have recognized the right to include a punitive element in civil tort law, i.e., awarding damages that do more than compensate the individual victim, often in order to express repugnance towards particularly serious, intentional and heinous acts. In other

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238 Paley, id.
240 Thomas, id.
241 Id.
242 The different approaches were presented in detail in Chapter 1. Here we only mention those which are relevant to the comparison with Maimonides.
words, in certain circumstances, courts have the power to award damages the objectives of which are punishment, education and deterrence in civil law.\textsuperscript{243}

However, there are different approaches to the rationale of punitive damages in contemporary scholarship and case law. Some traditional approaches indicate that punitive damages are most likely to be awarded in cases where the harm or potential harm is very serious or the tortfeasor’s behavior is reprehensible.\textsuperscript{244} Since according to many traditional views, punitive damages should be uncommon and should be awarded only for malicious, intentional torts, it follows that such damages should be awarded only in those cases in which both deterrence and punishment are particularly important.\textsuperscript{245} At the same time, recognition of punitive damages according to the traditional approaches has been the subject of significant criticism, the argument being that the civil context is not suitable as a forum for awarding punitive damages, and that the mingling of the criminal principles with the civil is wrong.\textsuperscript{246} Other scholars have recently focused on revenge and the dignity of the victim, as part of victims’ rights.\textsuperscript{247} Such an approach, unlike the instrumental, economic and societal approaches which will now be addressed, does not and cannot take into consideration other injured parties, but only the plaintiff-victim, for this is a matter of personal revenge for personal suffering experienced by the plaintiff.

In the last two decades, scholars have also presented several approaches that regard punitive damages as a way to provide redress for the victim and/or as a societal compensation goal. According to some of these approaches, punitive damages are in fact extra-compensatory damages for the plaintiff; however, from the defendant’s standpoint these damages are what s/he must pay in the eyes of society, which wants to suppress this behavior but not through criminal (or quasi-criminal) sanctions. Let us examine a few major approaches that advocate this line of thought.\textsuperscript{248}  


\textsuperscript{246} See, e.g., Anthony Sebok, “Punitive Damages in the United States, in Punitive Damages in European Law”, in: Helmut Koziol & Vanessa Wilcox (eds.), Punitive Damages: Common Law and Civil Law Perspectives (Tort and Insurance Law) (Vienna/New York, 2009) 155, 174-175 (arguing that under the theory that punitive damages vindicate public rights, the damages take on a “quasi criminal form”); Colby 2003, supra n. 245, at 602 (discussing the argument that the mingling of criminal principles with civil ones, which punitive damages necessitates is wrong); Matthew Parker, “Changing Tides: The Introduction of Punitive Damages into the French Legal System”, 41 Ga. J. Int’l & Comp. L. (2013) 389, 413-14 (presenting the main arguments against that mingling, stating that “because punitive damages serve as a form of criminal-like sanction, critics maintain that they should be abandoned, and proper recourse for the vindication of public rights should be in a criminal court… punitive damages increase the possibility of further upsetting the moral balance by over-penalizing tortfeasors for their wrongdoing”); David G. Owen, “A Punitive Damages Overview: Functions, Problems, and Reform”, 39 Vill. L. Rev. (1994) 363, 382-383 (explaining the problem also from an evidential aspect. Owen argues that given the lower burden of proof in the civil arena, and the possibility of multiple lawsuits with punitive damage awards from a single tort incident with multiple victims, the civil context may not be best suited as a forum for the provision of social redress or for the vindication of social rights).


\textsuperscript{248} As mentioned, other approaches were presented in detail in Chapter 1.
John Goldberg argued that “notwithstanding the dominant tendency among modern scholars to treat tort law as an instrument for attaining public goals such as loss-spreading or efficient precaution-taking, it is still best understood as a law of redress.” David Owen argued that punitive damages “offer victims of aggravated wrongdoing robust redress for the panoply of losses that were aggravated by the flagrancy of a wrong.” He emphasized that their role is not simply to punish or deter, but to recompense victims and redress wrongs.

Margaret Jane Radin may have been the first to focus on redress. She argued that redress provides a more useful framework for understanding punitive damages, forcing the wrongdoer to recognize that what s/he did was wrong. She suggested that redress seeks to “symbolize public respect for the existence of certain rights and public recognition of the transgressor’s fault in disrespecting those rights.” Matthew Parker explained that Radin’s argument was that redress is not necessarily about monetary restitution, but rather it acts to affirm the public recognition of certain rights and wrongs, and therefore there is a certain incommensurability between the harm caused by a tort and the corresponding damage award.

Catherine Sharkey argued that –

Punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case.

Sharkey therefore suggests that in cases of intentional torts, “societal damages” should be awarded. These are actually extra-compensatory damages awarded to the plaintiff, but from the defendant’s standpoint this is merely what he must pay, because society is interested in reducing this type of behavior, but not through criminal sanctions.

One might think that punitive damages would lead to over-deterrence. However, the multiplier approach – the common economic analysis of law for punitive damages – suggests otherwise. Since

251 Ibid., at 192-93.
253 Ibid., at 56, 61, 85.
254 Ibid., at 61.
255 Parker, supra n. 246, at 404.
many injured parties, for a variety of reasons, do not actually sue, and many tortfeasors end up not paying; merely requiring tortfeasors to pay for the damage they cause would result in under-deterrence.

For example, a tortfeasor causes with sufficient certainty a harm of ten dollars to each of six persons, but due to some non-substantial reasons only two of them are expected to bring actions against him. This tortfeasor is expected to internalize a cost of twenty dollars only, even though the cost of the negative externalities of his acts is sixty dollars (ten dollars for six persons). Consequently, Polinsky & Shavell explain that enforcement of punitive damages increases the level of deterrence afforded to potential (mostly serial and mass) tortfeasors, ultimately resulting in optimal deterrence—provided the correct amount of punitive damages is awarded. In other words, if in those cases in which tortfeasors already pay damages they are subjected to punitive damages by reason of having acted in a deliberate and reprehensible manner, then even though this represents a certain overpayment locally, in total these tortfeasors will be paying at most for the aggravated wrong they caused, which would create optimal deterrence (or something proximate to optimal deterrence) and not over-deterrence.

As Polinsky & Shavell explain, if tortfeasors take this possibility into account in advance, it will lead to greater efficiency in their actions and consequently to increased aggregate welfare. In the above-mentioned example, if the tortfeasor would be found liable with a two-in-six (=one-in-three) chance, damages should be $60 – the $20 harm (10x2), multiplied by 3 (=1/333). The total damages should be $60: $20 represents compensatory damages and the remainder, $40, is the optimal amount of punitive damages. As there is a problem in examining this data and predicting, even approximately, in which cases litigation will ensue and in which cases it will not, the question arises whether these formulae can in fact be applied in practice. According to this approach, the award of punitive damages cannot be deemed over-compensation, but is rather a measure intended to preclude under-deterrence and under-enforcement, thereby displaying an element of efficiency.

Similar approaches were invoked in federal courts fairly recently by two judges who are among the founding fathers of the school of tort law and economics, and whose economic approaches to tort law were presented above. In Ciraolo v. City of New York, Judge Guido Calabresi used the same substantial approach as the multiplier, calling it “socially compensatory damages”. In Mathias v. Accor Economy Lodging Inc.,
Judge Richard Posner also applied the multiplier approach in practice. These judgments were delivered prior to recent developments in the Supreme Court where the multiplier approach was denied in practice.

Under the multiplier approach, the basis for punitive damages is an attempt to reach optimal deterrence and not under-deterrence or under-enforcement; it is not (necessarily) based on the fact that the act is malicious and reprehensible, as opposed to the accepted rhetoric and traditional approaches on this matter.

At first glance, punitive damages seem incompatible with the goals of compensation and corrective justice, since they exceed the boundaries of compensation and retribution. A judgment in which compensation is determined in order to affect the incentives of tortfeasors in other cases is not compatible with corrective justice or compensation. This is not a case of restoring the status quo ante, but rather of giving a form of advantage – even a windfall – to the plaintiff, in order to incentivize him to bring a suit. It is therefore impossible to accept the approach whereby over-compensation in one case covers under-compensation or non-compensation in another case, while also accepting the notion of extra-compensatory damages for the plaintiff in order to incentivize him to file suit. Therefore, if corrective justice were dominant, there would be no room for the routine award of punitive damages, at least not according to the multiplier approach. According to corrective justice views, punitive damages should be awarded in regard to the two parties only, ignoring third parties – including those who may have suffered from the same acts of the tortfeasor.

After having examined the major approaches of the scholars concerning punitive damages, it remains to examine where it is possible to place Maimonides’ approach, as it manifests itself in relation to the difference between a thief and a robber. It seems to us that it can be placed between the multiplier and the societal redress extra-compensatory approaches.

A detailed economic analysis of the Maimonidean consequentialist rationalization of punitive damages was presented above, and we will now refer only to the major elements which are important for our comparison to contemporary approaches for punitive damages. Note that Maimonides does not focus on the non-economic, deontological explanations that are common today when imposing punitive damages, which consider the maliciousness of the action. Maimonides focuses on results and on deterrence. For example, the ease of performing the act (parameter 4 in the Guide) refers to the many cases in which the perpetrator does not pay for his actions because he is not caught. This serves as a disincentive to engaging in the negative behavior. This is usually also related to the frequency of the act (parameter 2), because the attractiveness of performing a prohibited act when it is easy to do so is great and its frequency is likely to increase.

As mentioned, the primary reasons for non-payment lie in the difficulties of identifying the tortfeasor, suing him, and enforcing the judgment against him. The higher the probability that the tortfeasor will avoid payment, the greater the need becomes to increase the rate of payment when it is

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265 Mathias v. Accor Economy Lodging Inc., 347 F.3d 672 (7th Cir. 2003).
266 See Calandrillo, supra n. 243 (presenting an overview of the denial of the multiplier approach in U.S. Supreme Court judgments. And see also Chapter 1 of this book).
exacted—when a thief is caught and is sued in torts—in order to maintain optimal deterrence. The texts analyzed above show clearly that Maimonides was aware of the aforementioned economic justification, which emphasizes the issue of enforcement, as he writes at the end of this statement: “The robber is known. It is possible to search for him and to expect the return of what was taken; but the thief is unknown.”268 But from Maimonides’ statements it transpires that deterrence does not depend only on enforcement capability (the economic explanation mentioned above) but on other factors as well. It is possible that Maimonides provides a broader answer to the question of when to impose on the thief payment for more than the value of the theft. Indeed, as noted above concerning punitive damages in general, in practice the incidence of the act may be higher in the case of theft than of robbery, and the temptation (parameter 3) greater to come under cover of darkness and steal, without confrontation, especially under community conditions where if he was caught he would be subjected to severe community punishments such the ban and banishment. Moreover, given that the acts are carried out in secret, it is logical that the thief continues to steal until he is caught, so he steals more and more, whereas the robber is likely to be caught sooner and thus able to carry out fewer acts of robbery. In this situation the thief has a greater incentive to steal because his act pays more.

Furthermore, it is reasonable to assume that until the thief is caught he would have caused damage several times, so that the amounts of payments imposed on him are significantly higher than the amount of the damage due to the factor of deterrence against him and other existing or potential thieves, in view of the profit realized from theft until capture. Otherwise, if he had to return only what he had stolen, it would pay for the thief to steal several times until caught. If he knows in advance that he will have to return more,269 theft becomes less profitable, and it may be a way to prevent the tortious event, because deterrence is optimal. The option of engaging in robbery is not suited to everyone’s character and strength. It is also less attractive from the point of view of profitability, in addition to the fact that exposure to the chances of being caught and being subject to severe community punishments, such the ban and banishment, are higher.

This Maimonidean approach recalls the multiplier approach, but it also does not ignore the societal redress underlying the extra-compensatory damages. The multiplier may be relevant according to certain parameters of efficiency. Thus, for example, because the chances of apprehension of the thief are smaller than those of the robber in Maimonides’ view, the burden of compensation should be increased in the case of the thief, and this brings to mind the multiplier approach. In fact, a higher multiplier is required for the thief than the robber, just as the serial or mass wrongdoer will pay more than one who is not a serial or mass wrongdoer. In order to deter the thief, therefore, a higher fine must be imposed on him; the robber who does not come under the cover of darkness, on the other hand, is easier to discover; as such he is naturally subject to greater deterrence even without juridical intervention, and therefore a smaller fine will suffice in his case. The other side of that coin is to say that the imposition of a stiff fine in the form of punitive damages was not designed for the enrichment of the injured party but rather, to achieve a social

269 And possibly this doubling of the amount is based on the assumption that he is probably caught about half of the time he steals, and/or that he can conceal about half the stolen property.
purpose of reduction of the level of thefts in society by way of reducing the profitability of engaging in theft, whereas engaging in robbery is in any case less worthwhile due to the chances of being caught.

There is no doubt, however, that these are not the only interests informing Maimonides’ approach. Maimonides, as will be recalled, also discusses the parameter of the severity of the offence, which affects societal welfare, more reminiscent of the societal redress approach underlying extra-compensatory damages. This parameter defines punitive damages as compensation for harm to society and not only for the injury to the specific victim. This transpires, for example, from the example given by Maimonides in the Guide for the severity of the biblical punishment for a person who strikes and curses his father and mother: “…because this thing is destroying the good order of the household, which is the first part of the city [the basic unit of society].” Indeed, as we saw at the beginning of the chapter, the importance of family loyalty and social solidarity is also attested in other places in the Guide in which Maimonides emphasizes mainly the societal-consequentialist – rather than the religious – aspect underlying the rules relating to preservation of the family unit. We therefore find that according to Maimonides, imposition of punitive damages is not based solely on deterrence but also on the principle of societal redress.

However, there is also another component of Maimonides’ approach to punitive damages, one which is special and possibly even unique as compared to modern approaches; Maimonides’ approach cannot be described fully without relating to this component, as we shall see below.

c) The Uniqueness of Maimonides Approach in Incentivizing the Injured Party to take Precautions as a Precondition for High Punitive Damages

Maimonides presents an approach that is founded on economic elements as well as elements of societal redress, and it is different from the existing modern approaches in another component as well, i.e., the incentivization of the injured party and not just the tortfeasor. The multiplier approach concentrates strongly on providing incentives for the tortfeasor not to commit a wrong, or else he will be required to compensate the injured party who sues him also for cases in which he was not “caught”. The societal redress approach, too, deals with social harm, and provides incentives for the wrongdoer to refrain from doing wrong, or else he will be required to pay more than the damage he caused to the plaintiff, due to the overall societal harm he has caused. On Maimonides’ approach, however, the provision of incentives for the victim is also stressed. This arises from Maimonides’ explanation of the difference in the level of punitive damages for robbery – whether the robber pays only for what he stole – and for theft, where the thief pays double compensation. The reason for this, according to Maimonides, is that when the victim of robbery does not take sufficient action to prevent the damage, he receives lower punitive damages. Maimonides tries therefore to incentivize the victim as well, and does not provide incentives only for the tortfeasor or the criminal to refrain from their despicable acts, unlike the focus of the modern approaches.

The statement that a type of “fine” or tax is imposed on the victim who himself did not do enough to prevent the injury is very important, and it is a statement on the consequentialist-economic plane. We

270 Bar-Niv, supra n. 137, at 223 presents it thus.
272 Section A.
certainly do not wish to say that Maimonides here manifests progressive economic thinking – rather, this is a consequentialist line of thought. The victim will get less if he did not plan appropriately to prevent potential harm to himself, and he was injured.

It may be possible to equate this to the case in which the injured party even sought the damage, in the sense of an eager victim, if he was able to assess that he would receive several times the value of the damages, i.e., a case which in the modern literature is referred to as moral hazard,\textsuperscript{273} even though this is not discussed in the context of punitive damages as far as we know. Such a case could be very relevant as a basis of moral hazard, particularly in the event of high punitive damages, in which case the victim at times really does prefer to suffer harm and to sue for punitive damages.\textsuperscript{274} The compensatory damages here are not withheld from the victim. He will receive them, but he will not receive punitive damages, as opposed to a victim who was capable of preventing the damage and tried to do so.

The said windfall serves as the incentive for the injured party to file a suit, i.e., that he receives compensation which is apparently intended for others who did not sue. From the point of view of efficiency and of incentives for the tortfeasor this appears to be the right thing, but possibly less so from the perspective of corrective justice. Accordingly, Maimonides provides incentives for the victim more than do the other approaches to punitive damages in general, as well as the multiplier and the societal redress approaches to which his approach is similar. In this aspect Maimonides’ approach may be more helpful, in the appropriate cases, for preventing the harmful event from the point of view of incentives for the injured party as well as the tortfeasor.

To sum up what we have seen till now: in modern approaches there is at most a positive incentive for the injured party to sue after the event. He will receive compensation, but he has no incentive to try to do his part to prevent the damage in advance even where he can do so, and he does not invest effort in this. He may even have a certain incentive not to prevent the damage if, in view of the type of activity and the fact that many victims do not sue, he might be awarded more than the damage he has suffered. Maimonides provides an incentive for the victim, as well, to prevent the damage. He will still receive compensation, but less as compared to an injured party who was not in a position to prevent the damage, and who will also be entitled to double, punitive damages.

As we explained above, Maimonides’ approach takes into consideration not only the risk management of the tortfeasor, but also the precautions the potential victims can take. His approach may resemble the determination that the injured party is the best decision maker according to Calabresi and Hirschoff, or that there is contributory negligence on his part according to other economic approaches such as the Hand formula. Let us now elucidate these two matters.


\textsuperscript{274} In cases of serious bodily injury he might not do so, due to concern about physical harm, but in other cases it is possible that he will.
A good way to deal with incentives for the victim, particularly if he can be classified as an eager victim, is by means of doctrines of liability, such as contributory negligence. This matter has hardly been discussed in the context of punitive damages, even though Robert Cooter does deal with it briefly.\(^{275}\) Can this incentive for the injured party indeed be translated into a kind of contributory negligence, in the sense of the Hand formula? True, there is no reduction of compensation from the capital, as in the Hand formula, following the division of liability, but compensation is deducted from the component of punitive damages (which may be reduced to zero) and this can be similar in principle.

If the kernel of Maimonides’ approach is adopted, then, based on the modern rationale of the multiplier approach or that of societal redress, there is nothing to prevent reducing the compensation due to contributory negligence, while at the same time awarding punitive damages.\(^{276}\) In such cases, the contributory negligence is deducted from the real (non-punitive) damages awarded to the injured party, because he has a part in the damages. This is not necessarily inconsistent with him being awarded, concurrently, punitive damages as an economic deterrent for the tortfeasor according to the multiplier approach, or in order to make the tortfeasor put right the societal wrong, which he must do in any case, irrespective of any possible fault of the injured party as well, according to the societal redress approach. Thus there is no contradiction between a reduction of the real compensation alongside the award of punitive damages. The objectives are different, and can “exist” separately. Note that as we saw, in Maimonides’ method everything is done in relation to the component of punitive damages – both the actual addition of the punitive damages and the deduction due to contributory damages from that addition. The implication of the modern approaches, however, would seem to be that the deduction for contributory negligence here – as in every case of contributory negligence – would be from the real damages, together with a concurrent award of punitive damages. On the level of principle, it presumably makes no material difference from which component – that of real damages or that of punitive damages – the deduction is made, for in both cases the compensation to the injured party is reduced, and the difference may be purely theoretical.\(^{277}\)

\(^{275}\) Robert D. Cooter, “Economic Analysis of Punitive Damages”, 56 S. Cal. L. Rev. (1982) 79, 96-97 (dealing with the propriety of allowing liability insurance to cover punitive damages, arguing that “when punitive damages are awarded in addition to compensatory damages, victims are usually overcompensated. Thus, even if critics are correct and such insurance leads to an increase in injuries, victims who receive compensatory plus punitive damages may be better off than if they never suffered the accident at all. If both parties are better off as a result of insurance, it should not be prohibited.” Ibid. at 96. Cooter also deals with the problem of the eager victim: “Generally, a defense such as contributory negligence will prevent inadequate precaution by victims.” Ibid. at 97. However, he does not relate to the problem beyond this, i.e. beyond the ramifications of punitive damages as absolute liability on the part of the person who is in breach of contract, which if imposed together with compensatory damages, are liable to create excessive protection against breach, ibid. Of course, in order to prevent a situation of an eager victim, the punitive damages could be placed in a special state fund for the benefit of victims, but we are not dealing with this at present.

\(^{276}\) Unless, for example, it is a matter of a deliberate act on the part of the tortfeasor, in which case the court may consider not ruling that there was contributory negligence, thus also giving expression to the traditional approaches to the heinousness of the act and the intention of the tortfeasor.

\(^{277}\) One may question this conclusion of negative incentive for the victim by way of reducing the compensation or a kind of contributory negligence and ask whether, when there is an intentional act on the part of the tortfeasor, which is not directly aimed at a particular victim, it is possible talk about deterrence of the victim. Precautionary measures that will be taken by a victim in such situations will only divert the criminal to commit the crime elsewhere, and therefore such measures are a social waste, for the crime will be committed in another place. This would seem to be the economic justification for not recognizing contributory negligence in criminal law, and there is a certain logic to this. However, it would appear that if every potential victim (for example, a homeowner whose apartment can be broken into would take care and would adopt precautionary measures), there would be no other place to which to divert the crime.
It is therefore possible that the logic of the economic approach to contributory negligence is similar to the economic logic that guided Maimonides.

Finally, we will examine the possibility of equating Maimonides’ approach, which provides incentives for the victim (and not only for the tortfeasor) not only to the economic rationale of contributory negligence, but also to the rationale underlying Calabresi and Hirschoff’s best decision maker, as presented above, which imposes liability on the tortfeasor and rejects the notion of contributory negligence.

It may be that providing incentives for the injured party by denying punitive damages in the event that he did not take precautionary measures is a type of application of the best decision maker doctrine, whereby the injured party is the best decision maker due to his ability to adopt precautionary measures, albeit in a manner differing in two parameters from that presented by Calabresi and Hirschoff. The first parameter is, of course, that compensation in general is not denied altogether as a result of the best decision of the injured party, but only the punitive component; nevertheless, the entire punitive component is deducted, and not only a part thereof, as in the case of comparative negligence. The second parameter deals with the identity of the groups that are examined. Whereas the best decision maker doctrine traditionally examines groups of tortfeasors vis-à-vis groups of injured parties, Maimonides here in fact examines different groups of injured parties, as to their ability to adopt preventive measures. Maimonides compares different groups of victims: the victim of a robbery is a better decision maker than the victim of a theft, and therefore, if he did not adopt preventive measures he is still awarded compensation but not punitive damages from the tortfeasor, unlike the case of the victim of the robbery, in order to incentivize him [the victim] to adopt such measures.

Thus we find that there is a certain degree of logical similarity to the doctrine of the best decision maker, even though the application is different from that of Calabresi and Hirschoff.

D. CONCLUSION

In this Chapter we discussed the major consequentialist elements in Maimonides’ tort theory, based primarily on what he wrote in the \textit{Guide}. We saw that even though this is not a consequentialist, comprehensive theory conforming to all the extant criteria, the element of consequentialism in Maimonides’ theory is solid and fundamental, notwithstanding the concurrent existence of other elements that cannot be ignored. In the matter of punitive damages and criminal sanctions, this element is strongly emphasized – more so than in other cases. We also saw that Maimonides’ general approach to the objectives of tort law, mainly as emerges from the \textit{Guide}, reveals an extremely important – central, in fact – consequentialist objective that runs like a common thread through the tort law in his corpus. We also presented a comparative examination of the similarities and the differences between this theory and the modern theories of law and economics regarding torts, including the theories of some of the fathers of the economic analysis of law in general and of tort law in particular, as well as the similarities and differences between Maimonides’ tort theory and modern approaches to punitive damages.

\textsuperscript{278} Even if he is not a better decision maker than the perpetrator himself, who is not exempt from paying the compensation himself.
Reading Maimonides’ texts in the *Guide* analyzed in this chapter in light of contemporary methods can provide us with a new contemporary interpretation of Maimonides’ tort theory. A careful comparison of Maimonides’ explanation in the *Guide* to the writings of some of the prominent scholars of contemporary scholarship of economic analysis of tort law reveals a somewhat surprising similarity between them.

In this chapter, therefore, many aspects common to Maimonides’ tort doctrine and modern theories were examined, both with respect to tort liability in general and with respect to its proximity to criminal law and the subject of punitive damages. Over and above the comparison to the doctrines of the fathers of law and economics in torts – Calabresi and Posner – with respect to tort liability, we also saw a certain proximity between the consequentialist approach of Maimonides and the modern approaches to punitive damages. We saw a certain similarity between his approach and the economic multiplier approach, but in our view, an even greater similarity to the idea of societal redress in extra-compensatory damages – an idea that also embraces moral elements – that characterizes the modern approach of Sharkey. We also saw a relative innovation in the context of the modern theories of punitive damages. Beyond Cooter’s brief statement, we did not find anyone who dealt with the question of contributory negligence and reduction of compensation following the negligence of the injured party within the context of punitive damages, and it seems that Maimonides definitely did discuss such a construction. Indeed, Maimonides also examines the role of the injured party and not just that of the tortfeasor in the damage, and not only in the regular case of tort liability but also in the case in which punitive damages are awarded and it must be decided whether to reduce this component due to the contribution of the injured party himself to the damage.

Maimonides’ tort theory is constructed, in our view, on three different levels. On the first level are the two objectives of tort law. The more predictable objective is the deontological aim of removing wrong (a type of corrective justice, discussed in Chapter 3), and the second, which is surprising in view of the period in which it was first conceived, is the social-consequentialist objective of preventing damages (which has some similarity to basic approaches of the economic analysis of the law), which was analyzed in this chapter. These objectives, presented by Maimonides in the *Guide* (3:40), constitute the foundation-stone of his tort theory.

At the second level stands the Maimonidean test of liability, a test that is substantively different from all the tests that have been suggested to date in the common interpretation of Maimonides and the Talmud. This test is based on a reading from the *Guide*. In the *Guide*, Maimonides departed from the line of interpretation accepted by many halakhic scholars who based tort liability on *peshiah* (negligence or fault) on the part of the defendant; rather, he sought to base liability for damages caused by a person’s property on a different, unique basis, which we call “the effective ability to control test” – the EAC test. According to the Maimonidean EAC test, we argue, liability is imposed on the effective damage avoider. This level has been discussed at length in this chapter.

At the third level is what we call the Maimonidean differential model, which will be discussed in the Chapter 6. But before this, and after fully understanding the *Guide*’s EAC test and how the rules of liability are rationalized by the consequentialist view of the *Guide* – with the assistance of contemporary law and economics methods – we return in the following chapter to revisit the earlier texts of the *Code*. 