

Conversation

Calabresi's and Maimonides's Tort Law Theories—A Comparative Analysis and a Preliminary Sketch of a Modern Model of Differential Pluralistic Tort Liability Based on the Two Theories

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I. CALABRESI AND MAIMONIDES: IS IT POSSIBLE TO CONDUCT A DIALOGUE BETWEEN THE THEORIES?

This Article's main argument is that the roots of contemporary utilitarian analysis can be traced back to Jewish law sources, and that

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the ancient model can assist us in presenting a preliminary sketch of a modern model of pluralistic tort liability.

Is it possible to create a virtual encounter and dialogue between two methods: the method of classic scholars of the economic analysis of tort law, such as Guido Calabresi—one of the founders of (tort) law and economics—and the method of Jewish tort law scholars, such as Talmudic sages and post-Talmudic decisors (Poskim), especially the “Great Eagle,” Rabbi Moshe Ben Maimon (Maimonides)?

Are the two methods compatible? The obvious answer appears to be negative, as the two methods are miles apart in time and space, geographically, mentally, and culturally. One method is contemporary. This method was initiated mostly during the last four decades, primarily by well-known law and economics professors from the most prestigious universities in the United States and the Western world. These researchers’ theories provide a response to the great challenges of the modern world of mass tortfeasors and victims of different nuisances resulting from mass industries. The other method was introduced by the great scholars of Halakha and Jewish philosophy who lived hundreds of years ago.

From the point of view of the theory of tort law it may be assumed, given the considerable differences that exist between the main economic analysis of law and the conventional approach to torts in Jewish law, that scholars of modern economic analysis of tort law and Jewish law scholars hold entirely different positions regarding the elements of tort liability. Indeed, at a first glance it is difficult to identify any points of contact between the two approaches.

On one side of the divide is the method of law and economics—based on a consequentialist approach to tort law—which attempts to increase aggregate welfare based on a cost-benefit analysis, seeks out deep pockets, and distributes loss.¹ This instrumental approach regards tort law as a tool for promoting economic and social goals. On the other side of the divide are the prevailing approaches in Jewish tort law, with their religious rhetoric concerning the prohibition against causing harm,² to a large extent similar to the deontological moral and social approaches aimed at compensating the victim and repairing the wrong (by the injurer himself), even if they are not efficient. This does not mean, however, that in the Talmudic law of

1. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 40-41 (1970) (expanding on deep pockets and loss distribution).

2. *See, e.g.*, TUR, *Dinei Nezikin, Hoshen Mishpat* 378 (Machon Yerushalayim 1993) [hereinafter TUR] (“Just as it is prohibited to steal or plunder another’s property it is also prohibited to damage his property even if he does not enjoy it, because he who damages it, whether by design or by mistake, must pay.”).

torts there are no economic fundamentals as well.³ Various studies have analyzed the ways in which Talmudic sages and scholars of Jewish law have coped with the conflict between efficiency and property rights.⁴ In the area of tort law, Yehoshua Liebermann pointed out the existence of a Halakhic framework and model for treating environmental conflicts.⁵ But it appears that these are specific tort issues that have a clear and direct relation to social welfare such as in the case of environmental tortfeasors. These should be regarded as exceptions to the overall dominant picture that emerges from Talmudic tort law, which rests tort liability primarily on deontological rather than utilitarian considerations.

Indeed, contemporary scholars who have analyzed the Talmudic law of torts, first and foremost Shalom Albek, found that the dominant approach in the Talmud bases the imposition of tort liability on *peshiah*,⁶ meaning the negligence of the tortfeasor,⁷ and it bases the liability on the failure or fault in the behavior of the tortfeasor who caused the injury. The concept of *peshiah* is somewhat similar, at least superficially, to the perception of fault that lies at the foundation of corrective justice. As stated by Albek:

The obligation of the tortfeasor [according to Talmudic law], whether he caused the damage bodily or by means of his property, is to make up the damage to the victim The tortfeasor must make damage payments to the victim to compensate him for his loss, whenever the damage was not

3. Indeed, it is possible to find a use of utilitarian considerations in the context of specific issues of private law in the writings of some halakhic authorities, as indicated by some scholars. See, e.g., AARON LEVINE, *FREE ENTERPRISE AND JEWISH LAW: ASPECTS OF JEWISH BUSINESS ETHICS* (1980); Dennis W Carlton & Avi Weiss, *The Economics of Religion, Jewish Survival and Jewish Attitudes Toward Competition in Torah Education*, 30 J. LEGAL STUD. 253 (2001); Yehoshua Liebermann, *The Coase Theorem in Jewish Law*, 10 J. LEGAL STUD. 293 (1981) [hereinafter Liebermann, *The Coase Theorem*]; Yehoshua Liebermann, *Economic Efficiency and Making of the Law: The Case of Transaction Costs in Jewish Law*, 15 J. LEGAL STUD. 387 (1986); Roman A. Ohrenstein, *Economic Thought in Talmudic Literature in Light of Modern Economics*, 26 AM. J. ECON. & SOC. 185 (1968).

4. See, e.g., LEVINE, *supra* note 3; Liebermann, *The Coase Theorem, supra* note 3.

5. See Yehoshua Liebermann, *Responsibility of the Firm to the Environment*, in *JEWISH BUSINESS ETHICS: THE FIRM AND ITS STAKEHOLDERS* 147 (Aaron Levine & Moses Pava eds., 1999).

6. SHALOM ALBEK, *THE MEANING OF TORT LAW IN THE TALMUD* (1962) (Heb.) (emphasizing this foundation in particular). A similar approach is accepted by many scholars of Jewish law such as Gulak, Zori, and others. See Zerach Warhaftig, *The Basis for Liability for Damages in Jewish Law*, *STUD. IN JEWISH L.* 211, 212 (1985) (Heb.) (discussing the controversy between generations of sages on the issue concerning the basis for payment of compensation for damages caused by one's property).

7. This is how Shalom Albek outlines this term. See ALBEK, *supra* note 6, at 33 (defining fault (*peshiah*): "According to our method we learned that there are three signs of fault, and wherever you find one sign you know that the other two are also present. The first: such behavior that the person must conceive that he is causing damage. The second: he did not behave in a proper human way. The third: he did not conceive of a common damage. And they are all but one, for it is the human way to conceive of common damage and to avoid it. Therefore, the tortfeasor should also have done so. And if he did not do so, he must pay . . .").

caused by bad luck but by the behavior of the tortfeasor.⁸

This does not mean, however, that in both the Talmudic and post-Talmudic law of torts there are no economic fundamentals as well. Nevertheless, scholars of Jewish law do not make much use of the economic analysis of the law, and certainly have no use for the utilitarian terms common in modern literature. And vice versa, proponents of the economic analysis of tort law do not integrate into their theories religious prohibitions and norms, as do scholars of Jewish law, and naturally, the two methods do not share identical views about morality and justice.

However, we point out that it is not only possible to conduct a dialogue between the two tort theories; the roots of contemporary utilitarian analysis can be traced back to Halakhic sources. We focus especially on the economic analysis of Maimonides's unique tort theory and compare it with the major utilitarian theories, such as those of Calabresi and Posner.

This analysis of the dialogue between modern economic analysis of tort law on one side, and Maimonides and other Halakhic scholars on the other side, produces a deeper understanding of both theories of tort law. At the same time, the analysis also yields results that most likely were not known to date, and a careful comparison of the writings in these two methods reveals a striking similarity between them, sheds light on each of them, and helps interpret each of them in a surprising way. Moreover, the analysis is expected to enable us to integrate them, if only in part, into a modern model of tort liability. Therefore, the work here is not only comparative; we intend to propose, among other things, a new meaning to Maimonides's tort theory, inspired by some of the elements of Calabresi's theory, especially the imposition of strict liability, without proof of fault or negligence, on the "cheapest cost avoider," in combination with elements of the theories of Posner and others.

Our research attempts to outline the exact points of contact and variance between the tort theories of modern scholars of economic analysis of tort law and Maimonides and other Jewish law sources, and thus gain insight into what is common and different between these two rich legal traditions. Analysis of the dialogue between these two methods produces a better understanding of each of them separately, and of the advantages and disadvantages of each one relative to the other. On one hand, we use modern, coherent, well-argued, and detailed law and economics theory to elucidate many Maimonidean and other Jewish law rules, which are naturally

8. *Id.* at 40.

formulated in less modern terms and are naturally less well-suited to modern reality. Both Talmudic and Maimonidean rules often lack clear and detailed argumentation, which is why they pose significant difficulties if interpreted according to the traditional commentary. On the other hand, some Jewish law sources, and especially Maimonides's unique tort theory, challenges even modern law and economics theory and mirrors it. The mirroring effect is instructive and well suited for the modern reality of the industrial world (which did not exist in ancient times) in which most of the claims are directed against large manufacturers, economic institutions, mass tortfeasors, and their insurers. Nevertheless, there is still a need to inject some degree of deontological considerations, in appropriate cases, to this theory.

Although at times scholars use considerations of efficiency in support of their arguments, most of them do not ascribe any independent value to an economic or utilitarian approach or perspective; from their point of view this is no more than some type of instrumental value. This Article, however, argues that Maimonides was not of this opinion but saw the value of a utilitarian approach as a guiding conceptual pattern and philosophical approach, although he did not refrain from integrating other values as well. In addition to pointing out the meeting points between the tort theories of modern scholars of economic analysis of tort law and Maimonides and other Jewish law sources, we also indicate the significant differences between them. These differences follow from the different and at times conflicting positions of Jewish law on one hand, and modern law and economics on the other, particularly with regard to tort law and in relation to law, morality, and justice in general.

Theoretical research often finds its way to practical application. It is possible, therefore, that on the basis of the proposed research, after designing and structuring, we can propose an applicative model that contains an outline of a theory of torts inspired by the writings of Maimonides and other Jewish scholars, and by contemporary prominent law and economics scholars such as Calabresi and Posner. Thus, we will present an initial outline of a sketch for a model built on the integration of considerations of efficiency and justice, granting precedence to each consideration depending on the type of activity creating the risk; in other words, a differential model of modern tort liability. In fact, contemporary law and economics analysis helps us understand the ancient Jewish sources. But at the same time our proposed new reading of the old Jewish sources will shed new light on those contemporary law and economics approaches and will provide an interpretation that highlights the complementarity of the seemingly contradictory economic approaches of no-fault (Calabresi)

and fault-based (Posner) regimes.

In Part II we present the main elements of Calabresi's economic approach and also Posner's economic fault-based approach and the Hand formula compared to Calabresi's approach.

In Part III we examine whether it is possible also to find a basis for the cheapest cost avoider and the best decision maker in Maimonides's theory, in which the main objective of tort law is prevention of harms. We also argue that the cheapest cost avoider is Maimonides's test for tort liability, although he also integrated some ideas similar to Posner's approach.

In Part IV we integrate various considerations—deontological and religious—found in both Calabresi's and Maimonides's theories with those of efficiency. We briefly discuss the attribution of Maimonides's approach to pluralistic theories that allow additional considerations, other than those of efficiency. Maimonides's tort theory consists of various objectives and considerations that operate in concert, without Maimonides perceiving any contradiction between them. Different objectives play a dominant role in different types of damage.

In Part V we point out the fact that Calabresi chose the approach of strict liability imposed on the cheapest cost avoider or on the best decision maker, whereas Maimonides proposed a differential liability, in other words, various types of liability that are sometimes less than strict liability, determined based on the substance of the event causing the damage, a prominent difference between the two approaches.

In Parts IV and V we present the main difference between the two approaches and attempt to explain it based on the historical background against which the two scholars developed their theories and on the circumstances of the dominant cases. Maimonides addressed the traditional situations of a single tortfeasor who is not insured (the institution of insurance did not exist at the time). There was no shortage of manufacturers, as almost everyone traded or produced something, but the phenomenon of large-scale manufacturing organizations, economically strong and in control, loss-distributors, and carrying insurance was not known. Although these conditions were fertile ground for the development of the objective of corrective justice, Maimonides did not hesitate to base his solutions, even under these conditions, on damage prevention and deterrence, at the same time mixing in considerations of morality. His approach, however, was greatly influenced by the prevailing conditions of the period.

By extrapolating from Maimonides's approach, we will ponder whether a strict liability regime in such circumstances is also applicable to the traditional cases of uninsured individual tortfeasors,

cases that exist even today, although the volume of claims against them has dropped significantly. We will also consider whether applying a strict liability regime against such individual tortfeasors, as best decision makers, might constitute excessive deterrence. Such excessive deterrence may lead to the interruption of essential activity, whereas regimes of differential liability, proposed by Maimonides for each group of cases, provide a better solution for achieving optimal deterrence by creating a range of responses to different behaviors.

In contrast, Calabresi belongs in the modern, post-industrial revolution reality. This is a world of many manufacturers and strong economic institutions that distribute losses, a world in which most of these activities are insured. In this reality of numerous accidents caused by the large volume of activity, most tort claims are filed against the loss-distributors. Indeed, a situation of this nature requires taking a close look at the need to prevent accidents arising from the large volume of activity and to reduce the cost of the accidents that could not be prevented.

Finally, in Part VI, we present a preliminary sketch for a model of differential tort liability based on the “best decision maker” in conjunction with liability that is not always absolute, but is rather mixed with fault and is at times fault-based, according to Maimonides’s suggested categorization of tort events into groups. The initial outline of the sketch for the model we propose will be designed primarily according to the tort theories of Calabresi and Maimonides. We note that Calabresi adhered to the approach of strict liability imposed on the cheapest cost avoider or on the best decision maker; whereas Maimonides, following the Talmud, proposed the imposition of various types of liability, which is at times less than strict, depending on the subject of the tort event, which we refer to as “differential liability.” Herein lies an obvious difference between the two approaches: the question of whether the doctrine of the cheapest cost avoider—that the two share it in principle—must necessarily involve strict liability (Calabresi) or whether in some cases it need not (Maimonides).

This pluralistic model affords us another benefit. Creating this model will yield an interpretation that unites approaches that have been considered contradictory for more than four decades—the strict liability no-fault of Calabresi’s cheapest cost avoider and best decision maker doctrines, and the fault-based approach of Posner’s Hand formula. Hence, the ancient sources, especially the novel reading of Maimonides, not only help us establish a new modern differential-pluralistic model, but also enable us to understand that according to the proposed new model each of these economic approaches, of

Calabresi and Posner, has its own room in different incidents of tortious events.

II. CALABRESI'S CHEAPEST COST AVOIDER AND BEST DECISION MAKER

A. *The Cheapest Cost Avoider*

Calabresi is generally credited with several contributions to modern tort law. His foremost contribution is repudiating the approach whereby the central objective of tort law is compensating for a damage caused in the past and bringing about a restoration of the original situation based on a conception of fault.⁹ According to Calabresi, the objective of tort law is to prevent 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.¹⁰ 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 it is necessary to assign liability for negligence, and argued that it does not promote deterrence. He 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 the choice 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 the accident and of prevention, and to reduce them.¹¹

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 where the total costs of the accident and the costs of preventing the accident will be smallest. In this way, tort law will achieve effective and optimal deterrence at the lowest cost, avoid accidents, and increase the aggregate welfare.¹² According to this

9. See, e.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test of Strict Liability in Torts*, 81 YALE L.J. 1055, 1056-59 (1972) (rejecting the Hand formula).

10. CALABRESI, *supra* note 1, at 69.

11. *Id.* at 70-71, 95 (distinguishing between general deterrence—of the market—and specific deterrence, wherein society must consider all the relevant parameters related to the accident and decide what it approves).

12. *Id.* at 26-31.

doctrine, strict liability is imposed on the person who can prevent the damage in the cheapest way. The objective of tort law in this approach is a reduction in the number of accidents and of the costs of those that occur. Calabresi developed a multistage test for identifying the cheapest cost avoider from a group of possible avoiders. This doctrine, however, suffers from several deficiencies, some of which Calabresi himself pointed out in a well-known article he wrote with Jon Hirschoff in 1972.¹³ Among the deficiencies and problems is the fact that in some cases the cheapest cost avoider will not act to reduce the damage because of information asymmetries and cognitive failures, whereas another party is more likely to act to reduce the damage. It is also possible to find cases in which neither party can be called the cheapest cost avoider in the present, but there is a possibility that the one that will bear the cost of the damage will become the cheapest cost avoider in the future. In this case it is not possible to impose liability if we seek the cheapest cost avoider because this party does not exist yet.

If we look beyond the horizon, however, it is possible and beneficial to impose liability that would reduce damages on the party that is likely to become the cheapest cost avoider in the future. For example, even if the manufacturer claims that the product it provides is the safest on the market, and that it is not possible to offer a safer product that contains more warnings, so that this manufacturer is not a cheapest cost avoider (and neither is the consumer), imposing liability on the manufacturer may cause him to become a cheapest cost avoider in the future. The assumption is that it is always possible to develop a safer product in the long term, and technological reality indeed proves that even if the product is considered to be absolutely safe, accidents do happen, and subsequently the manufacturer succeeds in improving the product's safety even though it was previously assumed impossible. Even if the manufacturer chooses not to do anything for the time being, there is a chance that if liability is imposed on him he will consider in the future the costs of the accident and of prevention. Furthermore, to achieve legal certainty and stability, it is preferable to define categories of cheapest cost avoiders and not test for liability in each individual case.

B. Calabresi and Hirschoff's Best Decision Maker

In light of the problems with the cheapest cost avoider test, Calabresi, together with Hirschoff, improved this test and devised the

13. Calabresi & Hirschoff, *supra* note 9.

similar-but-different test of the "best decision maker."¹⁴ According to this doctrine, liability is imposed on the entity that belongs to the group that is in the best position to reach

a decision as to which of the parties to the accidents is in the best position to make the cost-benefit analysis between accident costs and accidents 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.¹⁵

The choice of a group (that is, a category of cases rather than each case individually)¹⁶ saves litigation costs and does not require examination in each case of who the best decision maker is and what means of prevention were available. This choice also allows the best decision maker to know in advance that she is such, and to shape her behavior accordingly. The group is tested relative to other groups for the purpose of determining the behavior that characterizes it in general and evaluating the information available to it and its ability to act based on that information.¹⁷

In this manner, the best decision maker has an incentive to change her behavior and take the measures necessary to prevent the occurrence of the damage or to reduce the costs of the accident, in case the cost of these measures is less than the expected cost of the incident of tortious conduct, if it occurs. In other words, the party that, as a result of its general characteristics and not in any given case, is in the best position to determine how to reduce the costs of the accident and its prevention, and can act to reduce these costs, for example by purchasing insurance, is the best decision maker, and that party will be liable for the accident, not the cheapest cost avoider. Moreover, occasionally the best decision maker weighs the various considerations and reaches the conclusion that she herself is not the one who can prevent the damage but that some other party would. Nevertheless, liability is imposed on her and not on that other party, based on the rationale that the best decision maker should have the incentive to assist the party that is the cheapest cost avoider. For example, the best decision maker can transfer information to the cheapest cost avoider, including detailed warnings to the consumer

14. Calabresi & Hirschoff, *supra* note 9.

15. *Id.* at 1060-61 (describing the difference between the cheapest cost avoider and the best decision maker).

16. *Id.* at 1069-70.

17. *Id.* at 1070-71.

printed on the product, which will make the consumer more cautious. In this way the consumer can limit the damage, and the manufacturer can even “bribe” the consumer to do so,¹⁸ and thus not obligate himself.

In contrast, if the best decision maker has no way of causing the cheapest cost avoider to act to prevent the damage, imposing liability on her is not beneficial. On the other hand, imposing liability on the cheapest cost avoider can help because, although there are better deciders than she is, the threat that liability will be imposed on her is likely to cause her to prevent the accident. If so, liability is imposed on the party belonging to the group that can prevent the damage in the best and cheapest way, for example, the group of manufacturers as opposed to that of the consumers, or drivers as opposed to pedestrians, in order to cause a change in the nature of the conflicting activities and in their scope. It is a method of strict liability, based on deterrence, but different from that of negligence and fault. Liability is imposed on the best decision maker, because he is the one in the best position to weigh the costs of the accident against the costs of its prevention and the choice of how to invest minimal prevention expenses to achieve the result.

The best decision maker regime is different from fault-based liability, which is actually fault-based negligence. It differs also from the economic concept of negligence, where the failure to prevent the damage is defined as negligence and results in the imposition of liability. This is not strict liability; it is rather liability in those cases in which the cost of prevention is lower than the expectancy of damage, according to the Hand formula, with the additional test for contributory negligence provided by Posner.¹⁹ Thus, the center of gravity is transferred from a detailed legal debate of the question of what the injurer should have done and whether he invested in appropriate damage prevention, to a more certain and stable situation in which it is possible to know in advance whether or not liability is imposed, according to the identity of the best decision maker, so that the decision is in practice transferred to the market and not to the judge. The best decision maker must examine whether and how much to invest in prevention, knowing that if damage were to occur he bears its cost in any case, which is likely to affect his level of activity.

The best decision maker liability regime is different from the

18. See also CALABRESI, *supra* note 1, at 150-52.

19. Calabresi & Hirschhoff, *supra* note 9, at 1060-61, 74-76 (differentiating between the “best decision maker” and the Hand formula, also in the aspect of the level of activity). See also Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 29-34 (1972) [hereinafter Posner, *A Theory of Negligence*]; *infra* Part II.C.

“regular” strict liability regime, which determines that the injurer is always the one who is liable, irrespective of his fault and of the question whether he was in a better position than the injured to weigh the damage and prevent it. Under the best decision maker doctrine, it is not always the injurer who bears the strict liability, as at times the best decision maker happens to be the injured. In other words, strict liability is at the basis of the best decision maker regime, but the liability is not always imposed on the injurer, as shown below. In these cases the injurer does not bear the cost of the damage, and the loss should lie where it fell.

Calabresi and Hirschoff do not actually follow a pure regime of strict liability because there is no real incentive for the injured to prevent the damage if liability is imposed only on the tortfeasor. Although such incentives exist outside of tort law, and are at times relevant (such as the desire to protect one’s body, an employee’s desire to retain his job and to advance in it, and to avoid being labeled as someone who causes damage even to himself, and fear from criminal liability where applicable), but within tort law, 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 regime based on strict liability, but different from it. For example, although the manufacturer is typically the best decision maker when compared with 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.²⁰ This is because in such cases the manufacturer’s decision is not to take measures in advance to prevent rare and unusual use of the product, because even if he were to take such measures he would not be able to prevent the damage. Calabresi and Hirschoff emphasize that the reason the manufacturer is not liable in these cases does not have to do with the consumer’s contributory negligence (which is part of the fault-based regime, rejected by them), as it is possible that the user has a reasonable and efficient argument for using the product in an unusual way. The reason for absolving the manufacturer of liability in these cases is that this time it is the user who is the best decision maker. It is in his power to prevent the damage in the best way by refraining from inappropriate use, especially if it is dangerous.

Calabresi and Hirschoff point to additional cases where the best decision maker is not the injurer and liability is imposed on the

20. Calabresi & Hirschoff, *supra* note 9, at 1064.

injured consumer. These are the cases of side effects of medications or non-vital medical treatments, where the users of these medications and treatments are the best decision makers. By contrast, in the case of vital drugs and treatments the liability rests with the manufacturer because the consumer is not the best decision maker and can believe that he must take the medication or undergo the treatment despite dangerous side effects, as it is vital to his health and recovery. In these cases the manufacturer must weigh and take into account patients in various risk groups who cannot adequately weigh the risks themselves, and develop less dangerous drugs from the point of view of their side effects. Calabresi and Hirschoff even compare this situation with the original meaning of the assumption of risk theory, namely that the injured who freely and consciously chooses to expose himself to a known risk is not entitled to compensation. The reason for this does not have to do with fault, but with the fact that in such a case the injured could have weighed better the balance of cost and benefit. In these cases strict liability is imposed on the best decision maker (whether he happens to be the injurer or the injured) irrespective of whether the other party did what ought to be done.²¹

In two exceptions to the application of strict liability on the tortfeasor—the owners of the object and animal causing the damage—the courts did not determine in advance that damages are to be paid to the victim in the form of strict liability, which is always imposed on the tortfeasor. Rather, they determined who the best decision maker was, even though they did not always use this terminology specifically.²² Applying the best decision maker test may result in high litigation expenses. But Calabresi and Hirschoff are aware of it, and try to point out the equally high costs of other tests, such as the Hand formula.²³

C. Posner's Fault-Based Theory and the Hand Formula vs. Calabresi's Approach

Richard Posner, also one of the founding fathers of law and economics, based his approach on negligence rather than 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.²⁴ The formula is based on economic efficiency, with the

21. *Id.* at 1065.

22. *Id.* at 1066 (presenting two exceptions to imposing strict liability on the tortfeasor).

23. *Id.* at 1075-76.

24. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (7th ed. 2007).

understanding that society is not interested in preventing accidents at any cost and by investing infinite resources.²⁵ The tortfeasor is considered negligent when the burden (the cost of prevention) is smaller than the expected damage, which is the product of the probability of harm and of the degree of loss: $B < PL$. A person is considered negligent if he spends 80 to prevent damage expected to be 100, but not *vice versa*. Unlike the approach taken by Calabresi, if it were necessary to invest 100 to avoid a damage of 80, not only is he 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.²⁶ 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 also examine the ability of the injured person, not only of the tortfeasor, to prevent the damage at a cost that is lower than the expected damage.²⁷ Thus, it makes sense to examine also 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 results in a reduction of activity level on its part, and the matter does not reflect on the activity of the injured person, who is not the best decision maker under the circumstances. But according to Posner, if the farmer also makes an effort to prevent the

25. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85-88, 96-107 (1987).

26. Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 208 (1973) [hereinafter Posner, *Strict Liability*].

27. Posner, *A Theory of Negligence*, *supra* note 19, at 29-34.

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.²⁸ 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 the case in which both parties are trying to prevent the damage, because the farmers still have no incentive, as they will receive the compensation in any case. 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 Hirschhoff, 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 lawnmower example is move the stones.²⁹ According to Posner, imposing liability on the manufacturer, as suggested by Calabresi, is not effective in this case because this result eliminates the incentive of the consumer-operator to take steps to reduce the harm.

There are also differences between the two theories regarding the role of insurance and assumption of risk. In the example of the train, under strict liability the railway company completely covers the losses of the farmer, so he does not have to purchase insurance. The railroad company in fact serves as his insurance. Under a fault-based liability regime the farmer must take out insurance if he does not want to bear the losses, since in certain times, according to the Hand formula, he will be compensated partially if at all due to contributory negligence. With regard to assumption of risk, according to Calabresi, the injured party may be liable (but absolutely and not partially) only if it has been determined that he is the best decision maker. This may be possible by regarding him as having acted under an assumption of risk, i.e., the injured party himself, voluntarily and reasonably, chose to expose himself to a known risk, and therefore is not entitled to

28. Posner, *Strict Liability*, *supra* note 26, at 205-06.

29. *Id.* at 213-14.

compensation, not because of fault or contributory fault but because he is the best decision maker under the circumstances. Posner believed that Calabresi's multi-stage approach was motivated by a desire to try to identify the best decision maker under the circumstances, but the matter is not simple and in many cases it involves costs.³⁰ Posner argued that "[a] strict liability standard without a contributory negligence defense is, in principle, less efficient than the negligence-contributory negligence standard."³¹

III. PREVENTION, EFFICIENCY, AND THE BEST DECISION MAKER ACCORDING TO MAIMONIDES

A. The Main Objective of Tort Law: Prevention of Damage

Similar to Calabresi, who criticized traditional and accepted fault-based tort theories, Maimonides also deviated from the line of interpretation accepted by many Halakhic scholars who based tort liability on *peshia* (negligence or fault) on the part of the defendant³² and sought to base liability for damages caused by a person's property on another, unique basis. But many of the later Halakhic authorities (*ahronim*) and some contemporary scholars had difficulty identifying the theoretical rationale on which Maimonides's theory is based. In this chapter we offer a new interpretation of Maimonides's tort theory in *Guide for the Perplexed*, which, as we shall see, is close to Calabresi's cheapest cost avoider test, but also has elements similar to Posner's theory. Inspired by some of the foundations of modern law and economics—mostly Calabresi's tort theory—we can clarify Maimonides's various rules, which are difficult to explain otherwise.

1. The Cheapest Cost Avoider as Maimonides's Test for Tort Liability

It may or may not come as a surprise to discover that more than eight hundred years ago Maimonides suggested an approach that is very similar to that of Calabresi. According to this approach, the objective of tort liability (together with deontological considerations, not absent from Halakhic discussions, including those of Maimonides) is to reduce the costs created as a result of a tortious event. In *The Guide for the Perplexed*, Maimonides stated that the purpose of tort law is "to prevent damages" and not necessarily to compensate

30. Posner, *Strict Liability*, *supra* note 26, at 214-15.

31. *Id.* at 221.

32. See, e.g., TUR, *supra* note 2, Hoshen Mishpat 389:1 (where liability is based on the fact that a person did not guard his property, which caused damage, and therefore his behavior results in a fault). For a discussion of the controversy between Maimonides and Tur see AVRAHAM SHEINFELD, TORTS 169 (1992) (Heb.); Warhaftig, *supra* note 6, at 218-21.

for past damages, to repair that which is in need of repair, or to restore the *status quo ante*. Maimonides even presented a test of liability similar to, although not identical with, Calabresi's cheapest cost avoider test, even if Maimonides, naturally, did not use Calabresi's terminology of "the cheapest cost avoider." Needless to say, neither did he develop and justify his test with that special clarity and rationality that is reflected in Calabresi's theory. 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.³³

These words contain several of the fundamentals of the economic analysis of tort law, but naturally, Maimonides's 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" (according to Schwartz's translation), which practically appear to be lifted from one of the modern textbooks of the economic analysis of tort law.

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 efficiently and effectively prevent the causing of damage, even if (similar to Calabresi's test) 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."³⁴ Thus, Maimonides explains, liability is imposed on the owners of the animal that caused damage: "All living creatures that are the possession of man and caused damage—the owners must bear the cost, for it is their property that caused the damage."³⁵ In other words, the owner of the living creature is the cheapest cost avoider because the creature is his property ("their property caused the damage") and he has control over it (it is in his "possession"). Imposing liability on the owners of the beast was intended to make sure that the owners would watch over it so that it would not cause

33. MAIMONIDES, THE GUIDE FOR THE PERPLEXED 3:40, 574 (Michael Schwartz ed., 2002) [hereinafter MAIMONIDES, THE GUIDE FOR THE PERPLEXED].

34. *Id.*

35. CODE OF MAIMONIDES, Hilkhote Nizkei Mamon, 1:1 (Frenkel 1975) [hereinafter CODE OF MAIMONIDES].

damage to others, and as Maimonides says elsewhere, “and if they are not held liable for the damages caused by their beasts they will not watch over them and people will lose wealth.”³⁶ Like Calabresi, Maimonides does not think that the owner is always the cheapest cost avoider, so at times, for the same rationale, liability is imposed on the injured party and the damage is actually left where it fell.

Note that the explanation we offered above concerning the foundation of tort liability according to Maimonides is contrary to the explanation provided by several later Halakhic authorities.³⁷ For example, in his study “About the foundations of liability in tort law,”³⁸ Zerach Warhaftig explains Maimonides’s approach according to the common interpretation of later Halakhic authorities, known as the theory of “ownership and absolute liability” (as opposed to the second commonly accepted theory among many Halakhic authorities, which is the “fault-based theory”). Warhaftig infers from the *Code of Maimonides* that because “it was their property that caused the damage . . . it is the property connection that serves as the basis for their liability for the damage.”³⁹ According to Warhaftig and other commentators (especially rabbis of the 19th and 20th centuries), Maimonides adopts the “ownership theory,” which holds that the

basis for tort liability (for damages caused by one’s property) is the relation of ownership: as if the liability is imposed on the harmful object, and because an object cannot pay, liability is imposed on the owner of the object, whether he is at fault or not. One’s property is not only for one’s pleasure and use, but it also imposes liability and obligations on him.⁴⁰

According to this approach, “the right of ownership brings with it the duty concerning the risks associated with ownership. The owner of the property enjoys it, but must also bear the burden of losses that his property causes to others,” or in the words of Rabbi Weinberg, “at the

36. *Id.* at 8:5.

37. See, e.g., COMMENTARY OF R. HAIM HALEVI (SOLOVEICHIK) ON MAIMONIDES, *Hilkhot Nizkei Mamon* 4:11 (1997); RABBI YECHIEL WEINBERG, *RESPONSA SRIDEI ESH*, part 4, at 125-32 (Mossad Harav Kook 1961-69); RABBI ISER ZALMAN MELTZER, *EVEN HAEZEL*, *Hilkhot Nizkei Mamon* 1:1, para. 14 (1962).

38. Warhaftig, *supra* note 6, at 218-21. Note that the presentation of this distinction between these two “fault-based” theories and the “ownership” theories is not Warhaftig’s innovation. Some of the greatest heads of yeshiva in recent times have already laid the foundations of these two methods in detail and in depth. See, e.g., *EVEN HAEZEL*, *supra* note 37; RABBI SHINON SHKOP, COMMENTARIES OF RABBI SHIMON YEHUDA HACOHN SHKOP, *Bava Kama*, sec. 1 (Rabi Yuzhak Mevinashter ed., 1947); *HIDUSHEI HAGRANAT*, *Bava Kama*, sec. 1 (Oraisoh 1989); COMMENTARIES OF RABBI CHAIM TALAZ, *Bava Kama*, sec. 1 (Netzah 1991); COMMENTARIES OF RABBI SHMUEL ROZOVSKY, *Bava Kama*, sec. 1 (1996); RABBI WEINBERG, *supra* note 37; Rabbi Y.H. Sarna, *Foundations of Liability in Tort Law*, in *MEMORIAL BOOK FOR R. HAIM SHMUELEVITZ* 582-97 (1987).

39. Warhaftig, *supra* note 6, at 220.

40. *Id.* at 216.

basis of this responsibility is the view that a person's property is not only for his pleasure and use, but it also imposes obligations on him, and in this case, an obligation to pay for damages."⁴¹ In our view, these rather strained explanations of Maimonides's approach do not clarify what the basis of liability for damages is in general or for property damages in particular. Nor do they explain why Maimonides deviated from the common fault-based theory that was dominant in Talmudic and post-Talmudic sources. Most of these explanations have great difficulty justifying the various rules in the *Code of Maimonides* (where he enunciates rules without explanation) that appear to contradict the substantiated explanations of the "ownership theory."

Most importantly, although the explanations by Warhaftig and the rabbis of recent generations are captivating, they do not reflect Maimonides's approach in light of his explicit statements in *The Guide for the Perplexed*. These scholars and rabbis appear to have entirely ignored *The Guide for the Perplexed*. Maimonides argued there that liability depends on the answer to the question about who is the cheapest cost avoider. Although the cheapest cost avoider quite often is the owner, Maimonides frequently exempted the owner from liability in tort for property damages if it turned out that there was a more efficient avoider of damage. Indeed, those who proposed an "ownership theory" had particular difficulty explaining these laws, because they are contrary to a theory that imposes liability on the owner. Moreover, Maimonides's theory of tort liability caused many difficulties, and the commentators faced many dilemmas in finding the rationale behind his statements.⁴² Some of them were not willing to accept a rationale such as the "ownership theory" (and indeed, one must ask: why does ownership in itself justify the imposition of tort liability without fault on the part of the owner?).⁴³ Eventually, one of the later Halakhic authorities wrote candidly that it was impossible to find any logic in Maimonides's statements.⁴⁴

It seems to us, however, that there is no need to seek forced justifications for Maimonides's words, because his theory in the *Code of Maimonides* is made perfectly plain in light of the clear explanations he provides in *The Guide for the Perplexed*. It is possible to understand the laws according to the principle set out above, whereby

41. *Id.*

42. See, e.g., EVEN HAEZEL, *supra* note 37; COMMENTARY OF R. SOLOVEICHIK, *supra* note 37; RABBI WEINBERG, *supra* note 37, at 128 n.7, 130-32.

43. See, e.g., RABBI ELIEZER MENACHEM SHACH, AVI EZRI, *Hilkhot Nizkei Mamon* 1:1 (1975) (explaining Maimonides's approach according to the "fault-based theory" rather than the "ownership theory"); ROZOVSKY, *supra* note 38 (straining to clarify the differences between the two theories).

44. See RABBI OF SANTZ, *DIVREI YATZIV*, *Hoshen Mishpat* 71-72 (Sefah Haim ed., 2005).

Maimonides obligated the most efficient cost avoider to pay tort damages, and at times this was not the owner. Even the inference derived by Warhaftig and others is inaccurate, as they ignored the fact that Maimonides mentioned explicitly two bases (and not just one, as they wrote) for imposing compensation for damages caused by a living being. One basis is control: "because it is in the possession of a person;" the other basis is a property connection: "because their property caused the damage."⁴⁵ The combination of these two elements explains many laws in the *Code of Maimonides*.⁴⁶ From this explanation it follows that the requirement of ownership for the imposition of liability is very broad, and that it does not refer specifically to the formal owner of the damaging property, because at times even someone who has some form of property connection (and not necessarily one that comes to actual ownership) is liable because of a broad sense of ownership.⁴⁷ It also follows that this is the basis for liability only for damage caused by animals ("living beings"), and not necessarily for every type of tort liability, as many commentators believed. In other words, we must distinguish between different types of damages, as Maimonides states in *The Guide for the Perplexed*, 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 naturally damage caused directly by a person who harmed another's property.⁴⁸ 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 in *The Guide for the Perplexed* Maimonides includes in the subsequent chapter, as part of penal law.⁴⁹ Indeed, there is a significant difference between the various types of damages in Maimonides's theory: 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 damages another person's property.

Maimonides proposes a liability regime whose rationale is efficient

45. CODE OF MAIMONIDES, *supra* note 35, Hilkhot Nizkei Mamon, 1:1.

46. See RABBI NACHUM L. RABINOWITZ, MISHNEH TORAH BY MAIMONIDES WITH COMMENTARY YAD PESHUTA, Sefer Nezakim (2006), Hilkhot Nizkei Mamon 1:1, at 22.

47. This is according to Rabbi Rabinowitz, *id.*, who learned this from Maimonides's rulings that hold liable even those who have any monetary legal connection, such as guard (CODE OF MAIMONIDES, Hilkhot Nizkei Mamon 4:10), guardian (*id.*, 6:3), and even a plunderer, who has a certain monetary connection in the plundering he does, for "it is with the sanction of the plunderer and under his responsibility until it is returned" (*id.* 1:7).

48. MAIMONIDES, THE GUIDE FOR THE PERPLEXED, *supra* note 33, at 3:40.

49. *Id.* at 3:41.

damage prevention. If the tortfeasor has a connection with the property 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, as long as he has the ability to exercise effective control over its actions, because the property is in his possession and he is therefore considered the most efficient avoider of damages. He must guard himself and his property not to injure others, and for this reason alone (prevention) liability should be imposed on him.

We have seen so far that Maimonides talks about 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 about *optimal* deterrence, not merely deterrence, aimed at reducing the cost of accidents and the cost of accident prevention. In other words, this is not merely an attempt to prevent accidents, but also to reduce the costs of the accidents that do occur, in various ways, for example by changing the level of activities of the tortfeasor. Are these elements present also in Maimonides's work?

Maimonides does not use the modern concepts of optimal deterrence, and does not explicitly specify this element. But he sought deterrence that takes into account the costs of prevention, and therefore did not impose liability on those whose prevention costs are high relative to the costs of the accident. This may be inferred from *The Guide for the Perplexed*, where he wrote that the avoider of damage is liable only for damages "that the person can make sure and guard so as not to cause harm."⁵⁰ 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 Halakha from damages caused by the animal's feet or teeth as it was walking 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."⁵¹ 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 maximum or overdeterrence rather than optimal deterrence, because denying animals the right of passage in the public domain,

50. *Id.* at 3:40.

51. *Id.*

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 beast was exempt from liability for tooth and foot damage in the public domain, resulting in optimal deterrence.

From Maimonides's ruling in the case of the two neighbors living in the same house one can infer an element of reduction of the cost of accidents. The two neighbors lived in the same house: one on the first floor, the other on the second floor. Maimonides's ruling prohibited the neighbor on the first floor from placing an oven in his house unless it had a clearance of four cubits (about 2 meters or 80 inches) to the bottom of the second-floor apartment. In addition, Maimonides ruled that "even if he removed by that measure [of four cubits], if fire erupts and causes damage, he pays for the damage."⁵² This ruling is contrary to the Talmudic view,⁵³ whereby if a person made sure to remove harmful elements from his neighbor according to the measures determined by the sages, he is exempt from liability if nevertheless damage is caused to the neighbor. As explained by one commentator,⁵⁴ the reason that Maimonides deviated from this Talmudic view and ruled that removing the oven by the required measure still does not exempt the owner from paying damages caused by the oven is to provide incentives for owners of ovens to reduce the costs of accidents incurred by spreading fire. Therefore, Maimonides ruled that it is not enough to hold the owner of the oven liable for the damage caused by the fire, but he is obligated to make sure that the oven has the required clearance, and thus even if damage is caused, for which he is liable in any case, the cost of the accident is likely to be reduced because the required clearance has been observed.

This is similar to the modern examples that Calabresi addressed, in which society provides incentives to the best decision maker to install safety devices (better brakes, speed limiting device, special flashlight on the rear window that lights up when the driver presses the brakes and helps the car behind keep a safe distance) that prevent accidents or reduce their costs, should they incur. If strict liability is imposed, the driver is in possession of the information passed to him by the insurance company; at the same time, it makes economic sense for him to purchase the accessory because it reduces his insurance premiums. In this way, some accidents will be avoided, and in others that cannot be avoided, the injury will be lighter because a safe

52. CODE OF MAIMONIDES, *supra* note 35, Hilkhoh Shchenim 9:11.

53. *See, e.g.*, the method of Rabbi Shimon brought in the BAVA KAMA 20b.

54. CODE OF MAIMONIDES, *supra* note 35, Hilkhoh Shchenim 9:11, sec. 8.

distance has been kept.

2. Incentive for Preventing Damages: Imposing Liability on Risk-Causing Behavior

A good illustration of Maimonides's fundamental attitude toward prevention of damage is shown in his ruling in the *Code of Maimonides*. Maimonides suggests a far-reaching approach that mandates deterrence of risk-causing behavior even if it did not cause actual damage. He writes:

A beast that was grazing and broke away and entered fields and vineyards, even if it did not yet cause damage, its owners are warned three times. If he did not guard his beast and prevent it from grazing, the owner of the field has the right to slaughter the beast ritually and say to its owner: "come and sell your meat." For one is forbidden to cause damage willfully, with the intention of paying for the damage he causes. Even to bring about damage indirectly with this intention is forbidden.⁵⁵

Maimonides's rule is far-reaching, as it entitles the person who *may* sustain damage on the part of the beast, "even if it did not yet cause damage," to seek relief on his own and slaughter the beast. It is for this reason that Maimonides's ruling was opposed by some of the great Halakha sages, first and foremost among them Rabad.⁵⁶ In his reservations about Maimonides's ruling, Rabad writes that not only "such things have not been written in the Talmud," and they are Maimonides's innovations, but even in principle it is necessary to object to them, because "someone who has a herd of beasts, his entire herd is not slaughtered, but if he causes damage to the world, he will pay without any warning."⁵⁷ This is a classic controversy between two approaches: (a) Rabad's approach, which focuses on correcting the injustice caused to the injured by the injurer (a corrective justice type of approach), and as long as no damage was caused to the injured nothing should be done to the injurer so that only "if he causes damage to the world, he will pay;" and (b) Maimonides's approach that proposes deterrence and focuses on efficient means of "preventing damages," as an approach that is not prepared to accept the view that tort law relies exclusively on corrective justice, which brings into relief only the operation of tort law with relation to the past, minimizing the significance of its deterrent effect, with respect to

55. CODE OF MAIMONIDES, *supra* note 35, Hilkhot Nizkei Mamon 5:1.

56. Provence, 11th century.

57. RABAD, COMMENTS ON CODE OF MAIMONIDES, Hilkhot Nizkei Mamon 5:1.

the future.⁵⁸

It is possible to regard the Maimonidean ruling in this case as a type of regulation and as an imposition of a fine. Nevertheless, we can also perceive it as a type of preventive order that enables harm to the potential tortfeasor precisely by means of a preventive action by the potential victim, without the need to involve the authorities (inspectors or police officers). For the sake of the necessary immediacy, the potential victim even serves here in some way as the long arm of the authorities, as an agent of the court. Therefore, this is not a case of compensation for future damage, but more of prevention and perhaps regulation, also informing us with regard to Maimonides's approach to the prevention of damage and deterrence. According to Maimonides, it is possible to prevent the injurer, who in this case is the owner of a beast and the cheapest cost avoider (we assume, of course, that the neighbors placed a fence), from continuing the activity that can cause damage to another even if the beast has not yet caused such damage in practice, if it turns out that the owner of the beast is a "serial tortfeasor" who did not take serious supervisory measures and precautions with regard to his beast, despite having been warned three times, and he did not prevent his beast from entering private lands. This may be comparable to revoking the operating license of a business that does not meet safety regulations mandated by law.

As part of the discussion regarding Maimonides's ruling that it is permissible to slaughter a beast that entered a field more than three times even if it did not cause damage, we must emphasize that this is necessary both from a utilitarian point of view (prevention of future damage and incentive for the tortfeasor to reduce the level of his dangerous activities, in this case by fear that potentially injured parties will slaughter his beast), and from an ethical point of view (deontological considerations), which is why he mentions the prohibition against causing damage. It is possible that Maimonides's integration of deontological considerations as a basis for imposing liability on risk-causing behavior is likely to provide an alternative basis for liability, circumventing a possible argument that deterrence based on something other than damage that has actually occurred may be overdeterrence.

Maimonides believes that the prohibition against causing damage

58. Indeed, Aristotelian corrective justice approaches require actual damage as a condition for triggering tort laws, unlike Maimonides who talks about the prohibition against causing damage even in which no damage was caused. Such corrective justice approaches require payment specifically by the tortfeasor to the injured party. See, e.g. ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 5, 56-83 (1995).

serves also as a social tool that promotes efficient social behavior, that is, that the consequences of the prohibition to cause damage are not strictly religious and deontological but also utilitarian. Thus we learn another rule from Maimonides,⁵⁹ which suggests that caution in observing the commandments (he referred primarily to caution not to cause harm that is prohibited by Jewish law) plays a decisive role in preventing damage and in contributing to the welfare of society. It is possible to characterize Maimonides as someone who followed the path of an economic approach to damage prevention, primarily on the basis of the cheapest cost avoider. These considerations coexist with deontological-moral ones, which also characterize Maimonides's tort theory and are complementary to the economic considerations.⁶⁰

3. Maimonides's Best Decision Maker

Like Calabresi, Maimonides believes that liability must be imposed on the cheapest cost avoider. But as we have seen, in his later writings (and especially in his joint article with Hirschhoff), Calabresi improves the test for the imposition of tort liability on the party that is in the best position to weigh the costs of the damage and of its prevention. This 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 efficient prevention of damage (more of a "cheapest cost avoider") that was explicitly stressed as the basis for tort liability in *The Guide for the Perplexed*. But it appears that the foundations of the best decision maker can serve to elucidate several of Maimonides's rules, 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.

With regard to the imposition of liability for damages caused by a pit owned by partners, Maimonides said the following:

Pit of two partners The first covers it, and the second finds it uncovered and does not cover it: the second is liable. And until when is the second liable? Until the first one knows that the pit is uncovered so that he hires workers and fells cedars to cover it. And for all who die in the pit during this time, the second is liable alone. And for all who die in the pit after this

59. CODE OF MAIMONIDES, *supra* note 35, Hilkhhot Nizkei Mamon 8:5.

60. Cf. IZHAK ENGLAND, *THE PHILOSOPHY OF TORT LAW* 43 (1993) (explaining that the deterrent ability of tort law is limited, and it is necessary to consider also the deterrence resulting from social and criminal norms. This seems to be consistent with Maimonides's view concerning the careful observance of the commandments as a social norm conducive to deterrence).

time, both must pay.⁶¹

Maimonides indicates that a partner who finds that the pit is uncovered is alone liable for the damage as long as his partner is not aware of the fact that the pit is uncovered. The innovation of this rule is that although the first partner is also liable for the maintenance of the pit, if in the meantime “the second [partner] finds it uncovered and does not cover it: the second is liable” because he is also a partner. But in this case, why absolve the first partner until it becomes known to him that the pit is uncovered? According to the best decision maker test, the answer is self-evident: liability must be imposed only on the party that is in the best position to weigh the costs of the damage and of its prevention, and in this case it is clear that the best decision maker is the second partner, who found out that the pit was uncovered. The first partner lacked the *information* about the fact that the pit was uncovered, and therefore it is not right to hold him liable until he learns that the pit is uncovered and nevertheless does not take the necessary measures to cover the pit within a reasonable amount of time required to perform the repair. Thus, imposing liability for damage depends on the information about the damage as well as on the ability to efficiently prevent it.

This is not a fault-based liability regime, for if the tort lies in the existence of the open pit, there should be no difference between the liability of the first partner and of the second partner, as a person may be liable for omissions on his territory without his concrete knowledge. It is sufficient, for example, for a hole to be found in the fence of a building site and for a child to go through it and be injured to make the contractor liable for his omission, even if he did not know about it. The condition is that it is possible through the logic of fault and negligence to prove expectations, and the fact that the contractor should and could have known about the omission, even if he had no actual knowledge of it. In our case, the actual knowledge is what distinguishes between the two partners, and it can be attributed to a regime of best decision maker and not one of fault and negligence.⁶²

It should be emphasized that Maimonides did not adopt all the elements of Calabresi’s best decision maker rule, as far as the regime of liability imposed on the best decision maker is concerned. As noted, in Calabresi’s approach strict liability is always imposed on the best

61. CODE OF MAIMONIDES, *supra* note 35, Hilkhote Nizkei Mamon 12:7.

62. One may see this example as similar to the “the last clear chance” doctrine, which is employed in contributory negligence jurisdictions and has been replaced in some of them with comparative negligence. This doctrine means that: (a) a negligent plaintiff can argue that the defendant had the last clear chance, and thus mitigate his contributory negligence; and (b) a negligent defendant can argue that the plaintiff had the last clear chance to avoid the accident, and thus he should not be held liable. See RESTATEMENT (SECOND) OF TORTS §§ 479-80 (1965).

decision maker, whereas according to Maimonides, differential liability is imposed, which is not always strict and absolute but at times less than that.

B. Cases in Which the Damage Is Left with the Injured and No Liability Is Imposed on the Tortfeasor

As in Calabresi's work, there are exceptions to Maimonides's rule as well, meaning that the owner of the beast is not always considered to be the cheapest cost avoider. There are cases in which the liability should not be imposed on the owners, although they are often the cheapest cost avoiders.

1. Exemption from liability for tooth and foot damages caused by a beast in the public domain

Halakha exempts the owner of a beast that caused damage by perambulating in the public domain, using its feet or teeth (the reference of tooth and foot is to damage caused by eating and gnawing, as well as by trampling whatever the beast encounters on its way, except, for example, kicking). Maimonides explains the exemption, as usual, with a view toward considerations of tort liability:

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 commits negligence against himself and exposes his property to loss.⁶³

Using Calabresi's terms, it is possible to say that 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 cheapest cost 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 because of 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." Maimonides wrote elsewhere: "If [the beast] caused damage by tooth and foot, as is its wont, it is exempt because it has the right to walk there, and it is the way of the beast to walk and to eat as is its wont and to break the vessels."⁶⁴ Why did the sages allow the beasts to roam in the public

63. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, *supra* note 33, at 3:40.

64. *CODE OF MAIMONIDES*, *supra* note 35, *Hilkhot Nizkei Mamon* 1:8.

domain? Why did they not prohibit it, so that no damage occurs to others?

R. Nahum Eliezer Rabinowitz, 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 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 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.⁶⁵

The above rationale addresses not only the question of who the best cost avoider is, but also weighs the damage to the individual who may be injured by beasts walking through the public domain against the damage that would be caused to society if a blanket prohibition were issued against owners to lead beasts through the public domain. Although this rationale was not particularly emphasized by Calabresi, it was mentioned by other scholars endorsing the economic approach to tort law. These scholars discussed the risk that a reduction of useful activity is likely to cause to society in cases of overdeterrence, which could happen if the tortfeasor takes upon himself both the damages (the cost of the accident) and the cost of prevention, so that the price may be too high. In other words, it is inconceivable to prevent entirely animals from walking in the public domain because of the damage to aggregate social welfare in general. If this happens, it will reduce the level of desirable social activity, and it would have a chilling effect on such activities because people will be deterred beyond the optimum. Today they may choose, for example, not to drive or not to take trips that involve responsibility for children, and in the time of Maimonides, they may have chosen not to allow animals to walk in the public domain and thus significantly reduce economic

65. R. Nahum Eliezer Rabinowitz, *Liability for Property that Caused Damage*, 25 MAALLOT: COLLECTION COMMEMORATING EIGHT HUNDRED YEARS SINCE THE DEATH OF MAIMONIDES 71, 73 (2005) (Heb.).

activity of the transportation and the carrying of burdens.

Maimonides also considered the potentially injured party and the degree of his ability to prevent the damage, adding that whoever left something in the public domain shares the fault for the damage that occurred to him (“commits negligence against himself”, today a type of assumption of risk taking, or severe and very high contributory negligence), for he exposes his property to loss, and therefore it is proper to impose on him the liability for the damage and to exempt the owner of the animal of liability. In light of this, it is clear why the owners of animals were not held liable for teeth 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 commits negligence against himself and exposes his property to loss.”⁶⁶ Here, as with Calabresi, there is no division of responsibility between the parties for contributory negligence of the person leaving the object, but a decision one way or another about the full responsibility. In this case, the one who will assume the damage is the person who left the object that was damaged, because he was capable of preventing the damage better and at a lower cost. In Calabresi’s terminology, the one who places an object in the public domain is the cheapest cost avoider of the damage and the best decision maker, not the owner of the beast.

But despite the great similarity between the words of Maimonides at the beginning of the chapter in *The Guide for the Perplexed* and the test of the efficient damage 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 *commits negligence against himself*,” should be interpreted in light of economic-preventive considerations, because these are the considerations that underlie tort law. But his words seem to fit better the modern doctrine of “contributory negligence” according to Posner’s economic outlook than the economic concept of Calabresi (which avoids the use of the term “fault”), although there is no question of a division of liability.

Maimonides’s rule can be explained by either of the two economic methods of Calabresi and Posner. In the present case, 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.”⁶⁷ It is not inconceivable that Maimonides refers to economic-efficiency enhancing justice, and not, for example, corrective justice, “[f]or tooth

66. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, *supra* note 33, at 3:40.

67. *Id.*

and foot in the public domain is exempt because this is something that we cannot guard against.”⁶⁸ In other words, the cost of preventing an animal from passing through the public domain, at a time when this was something common and necessary, was very high. These are “things that is in its nature to do always”⁶⁹—an animal is used to ruining and eating everything in its way. As a result, the cost of preventing these actions in the public domain is high when animals are commonly passing through the public domain. 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. But Maimonides does not merely consider the prevention costs of the tortfeasor vis-à-vis the expected damage, but examines also the fault of the injured party, as he writes in *The Guide for the Perplexed*, “he who leaves something in the public domains commits negligence against himself and exposes his property to loss.”⁷⁰ His fault is leaving his property in the public domain without protection resulting in it being damaged. He could have not left it there (and thus lowered 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 taking according to the approach of the best decision maker, although the words “committed negligence against himself” appear to indicate a notion of fault. In any case, the approach appears to be economic.

2. *Difference between tooth and foot damages and horn damages*

Unlike the case of tooth and foot damage, according to the Halakha the owner of the beast is liable for horn damage (goring, biting, and kicking) even if the damage occurred in the public domain. Why is the owner liable for horn damage in the public domain when he is exempt from liability for tooth and foot damage there? 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 damage is everywhere the same [i.e., that there is liability for it even in the public domain].”⁷¹ Maimonides clarifies the law by carefully examining who the cheapest cost avoider is, the owner of the beast or the injured. In the case of horn damage, the cost of prevention of the damage by the owners is not high, and significantly lower than the

68. *Id.*

69. CODE OF MAIMONIDES, *supra* note 35, Hilkhote Nizkei Mamon 1:2.

70. MAIMONIDES, THE GUIDE FOR THE PERPLEXED, *supra* note 33, at 3:40.

71. MAIMONIDES, THE GUIDE FOR THE PERPLEXED, *supra* note 33, at 3:40.

costs of preventing tooth and foot damages, for the latter are considered “things that are in its nature to do always.”⁷² In other words, a beast is used to trampling whatever it walks through and to eating the food it finds along its path, and therefore the cost of preventing these acts in the public domains is high. By contrast, horn damage is defined as a change from the regular nature of the beast and as acts that “are not in its nature to always do.”⁷³ Thus, the cost of preventing the 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 impossible situation, but it is infrequent, and the owners have the ability to take reasonable precautionary measures that would prevent the beasts from goring and kicking.

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

This point is reminiscent of the imposition of liability on drivers and owners of vehicles as the best decision makers according to Calabresi and Hirschhoff, 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 has to do with the type of activity from an insurance perspective.⁷⁴ 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 because the driver receives information from the insurance company. In some places, the insurance premium varies with the level of the risk.⁷⁵ By means of the insurance, it is possible to verify the safety measures

72. CODE OF MAIMONIDES, *supra* note 35, Hilkhot Nizkei Mamon 1:2.

73. *Id.*

74. Despite appearances, there is no inherent tension between deterrence and insurance. Insurance increases information and increases the deterrence because in some cases premiums respond to the precautionary measures. *See, e.g.*, Landes & Posner, *supra* note 25, at 10; Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 Cornell L. Rev. 313, 313, 336-55 (1990).

75. CALABRESI, *supra* note 1, at 247-48, 252-53.

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 were it 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, which would result in a distributive and social problem.

Drivers are therefore better deciders than pedestrians are (even if both groups can work to reduce risks), because it is easier for drivers to evaluate the risks of accident, and they have the tools to do so. Therefore, 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. As a social rationale, it is more reasonable to "tax" (that is, to impose mandatory insurance on) driving rather than on walking. Walking is such a basic and everyday activity that it makes it difficult to accept a "tax" imposed on pedestrians. Moreover, there are weak populations among pedestrians who could not purchase insurance.

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 decider happens not to be the cheapest cost avoider. In this case, not only is it possible to change the 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 someone who 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 a beast will not suddenly decide to go wild and 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 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 themselves.

In this case, too, it would be possible to analyze matters following Posner's approach. The case is the opposite of that of tooth and foot. Because kicking and goring are less common actions of animals than eating or trampling in the course of walking, it is possible to prevent the accident with 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, for example, 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 will invest 10 to prevent an expected damage of 25 (5% of 500), and if he did not do so, he is negligent. But if the probability of such an accident is extremely low, say 1%, the opposite result from that mentioned by Maimonides will happen, because an economically-minded person would not invest 10 in order to prevent an expected damage of only 5 (1% of 500), whereas according to Calabresi, liability will always be imposed on him as a tortfeasor.

In sum, it is possible to determine that Maimonides imposes liability on the owner of the beast for horn damages that occurred even in the public domain because he is the best decision maker under the circumstances. He clarifies the result of not imposing liability on the owner of the beast 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 beasts 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 beast 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 beast gores and kicks, it is for the owner of the beast to be careful, because he is the best decision maker and the actions of the beast are less frequent, and in any case, the pedestrians walking normally in the public domains 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's rhetoric is closer to the Hand formula in cases of tooth and foot damage than in cases of horn damage.

IV. RESTRICTING CONSIDERATIONS OF EFFICIENCY BY DEONTOLOGICAL AND OTHER CONSIDERATIONS

A. Integration of Various Considerations with Those of Efficiency in Calabresi's Theory

There are two main approaches to analyzing the goals of tort law. The mixed-pluralistic approach analyzes the full set of tort law goals as a whole, as they relate to a given issue, and attempts to mediate between them in cases of contradiction. Generally, this approach tries to do so by identifying the dominant goal or goals in a group of cases and comparing them with the dominant goal or goals in another group of cases. Recognized goals in modern tort law include compensation, corrective justice, distributive justice, and optimal deterrence.⁷⁶ Many of the pluralistic approaches address the conflict between optimal deterrence and corrective justice; indeed, economic-utilitarian-consequentialist approaches are not always consistent with deontological-moral approaches. There are those who have tried to propose solutions or mediations for the tension between the different approaches and goals, some of them within the framework of tort law.⁷⁷ For instance, Izhak Englard presents the idea of complementarity as a way of combining corrective justice (his primary concern) with distributive justice in order to achieve harmony between them;⁷⁸ Gary Schwartz presents optimal deterrence as the primary concern, tempered only by corrective justice

76. For a discussion of the overall objectives of tort law, see PROSSER AND KEETON ON TORTS 20-26 (5th ed. 1984).

77. For the general difference between monistic and pluralist approaches, see also Gerald J. Postema, *Introduction: Search for an Explanatory Theory of Torts*, in PHILOSOPHY AND THE LAW OF TORTS 1, 2-15 (Gerald J. Postema ed., 2001).

78. ENGLARD, *supra* note 60, at 55; Izhak Englard, *The Idea of Complementarity as a Philosophical Basis for Pluralism in Tort Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 183 (David G. Owen ed., 1995).

considerations;⁷⁹ Mark Geistfeld attempts to select, as a byproduct of the social welfare function, the efficient choice most consistent with corrective justice;⁸⁰ and Fleming James Junior⁸¹ and Christopher Robinette⁸² support only a casuistic discussion of relevant goals in any given case.

The other approach is the monistic one, which focuses on a single goal of tort law, sometimes viewing the tortious, legal, and social picture only narrowly, ignoring the presence of other goals. Two such approaches are recognized today, corrective justice and optimal deterrence, but approaches based on distributive justice also exist, mostly in feminism.

Note that imposition of a regime of liability based on the cheapest cost avoider and of the best decision maker does not exhaust the similarities between the tort theories of Maimonides and of Calabresi. An additional interesting point of contact between them is with regard to the rejection of the position that emphasizes the advancement of efficiency and of the aggregate welfare as the normative overarching and exclusive objective of the law.

Calabresi is a monist, however. He believes in the superiority of one goal from among the many goals of tort law: efficiency, that is, optimal deterrence. This approach, as noted above, tests the result of the tort event and tries to prevent it, and tries to reduce the cost of the accident as a consequence of the preventive economic approach that focuses on maximizing the aggregate welfare. By contrast, the deontological corrective justice approach tests the morality of the act and focuses on repairing the past, that is, the injustice to the concrete injured by the concrete injurer. Theoretically, there is no greater monist than Calabresi. Calabresi is one of the founding fathers of law and economics in general, and of tort law and economics in particular. He is generally identified with the optimal deterrence approach, and specifically with that not involving fault-based liability.

But is Calabresi himself really a monist? Does his doctrine take

79. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801 (1997).

80. Mark Geistfeld, *Economics, Moral Philosophy, and the Positive Analysis of Tort Law*, in PHILOSOPHY AND THE LAW OF TORTS 250 (Gerald J. Postema ed., 2001).

81. Fleming James Jr., *Tort Law in Midstream: its Challenge to the Judicial Process*, 8. BUFF. L. REV. 315 (1959). This paper was based on the James McCormick Mitchell Lectures, delivered at the University of Buffalo School of Law, April 3-4, 1959. However, if one looks at Fleming James, Jr.'s work as a whole, it seems that he is close to being a monist devoted to compensation.

82. Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369 (2005). *But see* Christopher J. Robinette, *Torts Rationales, Pluralism, and Isaiah Berlin*, 14 GEO. MASON L. REV. 329, 360 n.179 (2007) (no longer advocating the application of the rationales to each case on its own merits, but instead advocating a process of grouping cases by doctrine in this article).

deontological considerations into account in any form? We shall see that the answer is a little more complicated, and that Calabresi involves other considerations in one form or another. This, too, is a point in which Maimonides and Calabresi have similarities and differences. Both support the prevention of damages, that is, the economic-utilitarian approach as a basis for tort law. Maimonides attributes considerable weight to deontological-moral considerations alongside economic-utilitarian ones, whereas Calabresi views the latter as more dominant, and decisively so—although it is possible that Calabresi’s later writings display a greater readiness to more closely integrate the two. In Calabresi’s earlier writings, however, there is no doubt that justice is no more than “the last stop on the journey”—that is, moral considerations need to establish a certain ceiling on the application of the economic approach, even if they are not considered an independent goal; in other words, for Calabresi, in his early writings justice serves as the upper limit for optimal deterrence.⁸³ Although Calabresi, as a monist, has no use for goals other than deterrence, other considerations can appear in two important situations. The first is in cases where his multi-leveled approach does not provide deterrence. Therefore deterrence should be abandoned in favor of other approaches or goals;⁸⁴ the second is in cases in which justice serves as an upper moral boundary and constraint rather than a goal, such that if a method of accident prevention leads to a highly unethical outcome in a particular case, it should not be adopted even if it is very efficient.⁸⁵

Calabresi qualifies his application of optimal deterrence with additional considerations, and in so doing he admits that some aims are appropriate to particular types of accidents, whereas others are appropriate to other types of accidents.⁸⁶ He further admits that the economic theory cannot truly present solutions to every issue related to the prevention of accident costs,⁸⁷ and also admits that in certain specific areas strict liability is less compatible.⁸⁸ In difficult cases, Calabresi definitely advises giving up on optimal deterrence where it

83. CALABRESI, *supra* note 1, at 293-300; Guido Calabresi, *Toward a Unified Theory of Torts*, 1:3 J. TORT L. October, 2007, at 1-2 [hereinafter Calabresi, *Toward a Unified Theory*]; Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1104-05 (1972); Calabresi & Hirschhoff, *supra* note 9, at 1180.

84. CALABRESI, *supra* note 1, at 152, 160.

85. *Id.* at 25-26, 31.

86. *Id.* at 15.

87. *Id.* at 18.

88. See, e.g., Guido Calabresi, *The Problem of Malpractice: Trying to Round Out the Circle*, 27 U. TORONTO L.J. 131 (1977).

is not effective and turning to other approaches.⁸⁹ Thus, for Calabresi, the value of justice is not the same as that of optimal deterrence because justice is not a “pure” and independent objective. This is not a pluralistic approach where the dominant objective is that of optimal deterrence and efficiency, but a monistic one that focuses entirely on optimal deterrence but recognizes a limit to its applicability and “stops”—especially if it encounters particularly unethical situations. It is true that Calabresi retains the paramount status of the objective of optimal deterrence and of economic efficiency, but he is prepared to qualify it when the result is highly immoral, and thereby he introduces a certain balance into his consequentialist theory, which derives from a deontological dimension.

It follows that for Calabresi there is no true, deep integration of deontological considerations. The combination is more similar to qualification by public policy. If an efficient action is very unethical, Calabresi’s approach, too, proscribes it.

In his early writings, and primarily in his later ones, Calabresi displays a greater willingness to recognize considerations of justice.⁹⁰ He also explains that there is a lack of clarity in the term “justice,” which can be defined in different ways.⁹¹ It seems that he is speaking primarily of distributive justice,⁹² not necessarily corrective justice,⁹³ and this is significant. Distributive justice, similarly to optimal deterrence, does not take into consideration the concrete injured or injurer, but is concerned rather with the use of tort law as a device; in other words, the two objectives, distributive justice and optimal deterrence, are instrumental. Calabresi and Hirschhoff even explain that in their eyes the concept of justice is comprised of distributive

89. CALABRESI, *supra* note 1, at 152, 160.

90. *Id.* at 25, 78, 81; Guido Calabresi, *Torts—The Law of the Mixed Society*, 56 TEX. L. REV. 519, 525 (1978).

91. CALABRESI, *supra* note 1, at 5.

92. Guido Calabresi, *The Complexity of Tort—The Case of Punitive Damages*, in EXPLORING TORT LAW 333, 334 (M. Stuart Madden ed., 2005); Calabresi & Hirschhoff, *supra* note 9, at 1077-84; Calabresi & Melamed, *supra* note 83, at 1114-15. But the relatively intensive discussion of distribution does not necessarily point toward its integration with efficiency considerations. *But see id.* at 1082-85 (calling for the courts not to ignore distributive considerations); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211 (1991) (criticizing the distinction between maximizing and distributive considerations, and adding that, when economists ignore distributive considerations, this represents a complete failure, and regretting that he did not sufficiently emphasize the importance of distributive considerations in previous writings); Guido Calabresi, *The Complexity of Tort*, *supra*, (arguing against pure monist approaches).

93. *See* Calabresi, *Toward a Unified Theory*, *supra* note 83 (providing rare statements for agreeing, if weakly, with the existence of corrective justice, as well as a historical description of how individuals began feeling that they deserve some compensation for harm done to them, after which corrective justice became compensation for this and for other indirect tortious behaviors). *See also* CALABRESI, *supra* note 1, at 302-03.

objectives and pure efficiency.⁹⁴ However, despite this softening or change in his position, Calabresi is still not a pluralist, not even one who attempts to truly integrate other goals but expresses a clear preference for one goal over another. In any case, distributive justice considerations do take up a greater portion of his later writings, and there is apparently less room for corrective justice and moral considerations, except as strictly limiting factors.

B. Integration of Various Considerations with Those of Efficiency in the Doctrine of Maimonides

1. Deontological considerations as parallel to efficiency—the philosophical basis

Maimonides views the efficient prevention of damages as a central consideration when determining tort liability, but he places it alongside numerous and varied other considerations. Some of the moderating factors mentioned by Calabresi appear in Maimonides's doctrine as well. But when we analyze the reasons behind these moderating factors we find fundamental differences between Calabresi's and Maimonides's approaches.

Let us first briefly discuss the meta-Halakhic philosophical basis for Maimonides's tort theory, which differs considerably from those of modern theoreticians in general secular law as a whole, and particularly from the economic approach to tort law. This basis will assist us in understanding Maimonides's method of ruling in tort cases and his inclusion of considerations of deontological morality in an approach that at first glance (and according to the sources that have been brought thus far) is one of damage prevention, based first and foremost on economic efficiency.

The purpose of the Torah is to repair mankind and bring it to a state of perfection. According to Maimonides, there are two stories that make up the building that is man, and the commandments are designed to construct both of them at once, as he states in *The Guide for the Perplexed*: "The purpose of the entire Torah is twofold, the perfection of the mind and the perfection of the body."⁹⁵ When Maimonides says "mind" he is referring to man's intellectual world, and when he says "body" he is referring primarily to man's political and psychological world (and not just his physical body).⁹⁶ But perfection of the mind is "undoubtedly a far greater" purpose,

94. Calabresi & Hirschhoff, *supra* note 9, at 1078.

95. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, *supra* note 33, at 3:27.

96. As emphasized by MICAH GOODMAN, *THE SECRETS OF THE GUIDE FOR THE PERPLEXED* 193 (2010) (Heb.).

according to Maimonides,⁹⁷ and the “second purpose, perfection of the body, takes natural and chronological precedence, and comprises the running of the country and the perfection of the status of its citizens as much as is possible.”⁹⁸ Therefore, “this purpose is emphasized more, and is the one that has been extensively detailed and whose details have been specified,”⁹⁹ in light of the fact that no lone individual can reach perfection and “no individual can reach it without political unity.”¹⁰⁰ Therefore, perfection of the body necessitates an organized socio-political structure, while perfection of the mind is of an individual character.¹⁰¹ What does perfection of the mind and body involve? Maimonides explains:

Perfection of the mind is obtained when a multitude of correct opinions are grasped as much as possible [P]erfection of the body is obtained when people can successfully live alongside each other. This is expressed in two ways: first, that they will no longer exploit one another, and no man can simply do what he likes and what he is able but rather is forced to act for the benefit of all; and second, that each man adopts attributes that affect their living together, such that the nation is in a state of harmony.¹⁰²

Maimonides later provides a concise description of perfection of the body: “Perfection of human beings with each other through ending the exploitation of one person by another and through the adoption of good and excellent traits, such that it will be possible for the men of the world to live permanently as one.”¹⁰³

Tort law, which is intended to normalize interpersonal relations, falls under the categories of Jewish law relating to perfection of the body, and is therefore intended to prevent individuals from harming one another. Tort law needs to work toward the perfection of society and to mold man’s characteristics, bringing him closer to internal balance and perfection. Perhaps Maimonides’s statements in the chapter discussing the purposes of tort law,¹⁰⁴ in which he identifies two purposes, “to eliminate injustice or to prevent damages,” correspond to the two types of “perfection of the body.” If so, aside from the goal of preventing damages, Maimonides presents the goal of

97. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, *supra* note 33, at 3:27.

98. *Id.*

99. *Id.*

100. *Id.*

101. See also R. NACHUM ELIEZER RABINOWITZ, *THE WAY OF TORAH—WRITINGS IN HALACHIC AND CONTEMPORARY THOUGHT* 51-52 (1999) (Heb.).

102. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, *supra* note 33, at 3:27.

103. *Id.*

104. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, *supra* note 33, at 3:40.

“eliminating injustice,” or “eliminating various types of injustice” (according to Kapach’s translation from Arabic). Indeed, in the same chapter of *The Guide for the Perplexed* that discusses the goals of tort law, Maimonides explains some elements of tort law according to these two goals of perfection of the body. For example, he explains that the laws of returning lost objects fulfill both these goals, social utility and the adoption of good traits, at once:

The idea behind returning lost items is clear. Aside from being an excellent trait for the perfection of society, it provides utilitarian returns measure for measure, because if you do not return another’s lost item he will not return yours, just as if you do not respect your father, your son will not respect you. There are many such examples.¹⁰⁵

If so, Maimonides combines a clear utilitarian rationale (“measure for measure”) with a clear socio-educational rationale: perfection of personal traits.¹⁰⁶

The same is true for tort law as a whole, which has two goals. The first is the utilitarian rationale of the prevention of damages emphasized in *The Guide for the Perplexed*. The second, which Maimonides emphasizes when he discusses tort law in various contexts, is socio-educational: the adoption of good and excellent traits. One typical example of the great importance that Maimonides assigns to the adoption of good traits can be found in his *Sefer Hamitzvot*, when he discusses the prohibition against one man cursing another.¹⁰⁷ Maimonides views the restriction the Torah places on cursing others as intended to mold the tortfeasor’s moral personality and prevent him from adopting negative traits such as vengeance and anger, which would cause him to harm others. Why did the Torah specifically express this prohibition as “Do not curse the deaf”? What is special about the deaf? Maimonides answers:

We would have thought that the Torah’s intention, in forbidding one to curse any man in Israel, is to prevent the pain and embarrassment he feels when he hears about it; but the cursing of a deaf man, because he cannot hear and therefore is not pained by it, would be no sin. The Torah therefore teaches us that this is prohibited, and warns us against it, because the Torah does not only look at the situation of the man who is

105. *Id.*

106. Likewise, Maimonides explains several tort laws according to both sides of the goal of perfection of the mind. For example, the laws of theft are aimed toward the perfection of personal traits, *id.* (“It is known that desire was forbidden because of lust, and lust because of theft”), and the laws of the decapitated heifer have a practical-utilitarian purpose of finding the murderer.

107. MAIMONIDES, SEFER HAMITZVOT, Prohibition 317 (Mossad Harav Kook 1972).

cursed, but also of the man who curses, who is warned not to turn his mind toward vengeance and not to become accustomed to anger.¹⁰⁸

According to Maimonides, this goal of teaching mankind good traits is an important one in and of itself, and should be applied even where no damage is done, such as in the case of the deaf man who cannot hear the curse and is not harmed by it, but it is nevertheless forbidden to curse him. The author of *Sefer HaChinuch* also notes that

Maimonides stated that the reason behind this commandment is so that the one who curses is not motivated by vengeance and does not become accustomed to anger . . . and it seems to me that he does not even recognize any damage done to the cursed by the curse; rather the Torah wishes to distance the one who curses from vengeance and keep him from becoming accustomed to anger . . .¹⁰⁹

Indeed, the reason adduced by Maimonides is not the only possible reason behind the prohibition on curses, and one can think of numerous, perhaps even more likely, reasons. But this only makes Maimonides's unique outlook, which he presents clearly and in detail,¹¹⁰ stand out all the more. He sees the prohibition against the cursing of the deaf as a prototype for the Torah's general orientation when it comes to tort law: "the Torah does not only look at the situation of the man who is cursed, but also of the man who curses." Indeed, the attention paid to the unethical behavior of the tortfeasor and not only to the status of the injured party is one of the more conspicuous attributes of Maimonides's theory of torts, and it is expressed in many contexts. Maimonides's viewpoint, in which he pays attention to the unethical behavior of the tortfeasor irrespective of the situation of the injured party, even differentiates his concept of justice from the Aristotelian-correlative concept of corrective justice, from the schools of Weinrib and others.

2. *The religious dimension: the prohibition against causing damages*

Similar to Calabresi, Maimonides believed that there are rights the exercise of which the law does not enable if they cause damage, because of moral considerations, even if they happen to be efficient from an economic point of view. But there appears to be a significant difference between Calabresi and Maimonides with regard to the nature of the ethical objective, its weight in tort law, and its scope. As

108. *Id.*

109. *Sefer HaChinuch*, in *THE CHAIM*, Prohibition 239, at 317 (Dov Shewel ed. 1990).

110. This is not at all typical of the *Sefer Hamitzvot*, in which Maimonides generally expresses himself with great brevity.

noted above, Calabresi retains the supremacy of the optimal deterrence and economic efficiency objectives, but is prepared to qualify that supremacy when the result is highly unethical (and naturally, the social-legal-general viewpoint is the one that determines which acts are unethical) and therefore he incorporates a certain balance in his utilitarian theory derived from the deontological dimension. Calabresi does not write about a moral *purpose* but rather about a moral *limitation* on the efficiency goal. By contrast, Maimonides regards the religious-moral prohibition against causing damage a most important component in his tort theory, together with the utilitarian objective of preventing damage. We already noted the emphasis that Maimonides places on the fact that “one is forbidden to cause damage willfully, with the intention of paying for the damage he causes. Even to bring about damage indirectly with this intention is forbidden.”¹¹¹ This is reminiscent of one of the rules of liability presented by Calabresi and Melamed, the third liability rule in favor of the tortfeasor, which states, in conjunction with the inalienability rules, that there are many circumstances in which one is permitted to cause damages and pay for those damages.¹¹² It is not likely that Maimonides would agree to apply this rule in general because of the prohibition against causing damages, except in extreme circumstances.¹¹³ In any case, this is how he rules with regard to a long list of tort events, that although the tortfeasor is not liable for the cost of the damage by law, he is “exempt by human law but is liable by divine law.”¹¹⁴

But note that the actual prohibition against causing damage is not a purely religious prohibition: at times it has real legal consequences. Thus, it is by force of the prohibition against causing damage that Maimonides permits the owner of the field to slaughter a beast that trespassed on his property several times, despite the fact that it had not yet caused damage.¹¹⁵ This is a preventive-detering measure against the owner of the beast who did not watch it adequately.

111. CODE OF MAIMONIDES, *supra* note 35, Hilkhoh Nizkei Mamon 5:1. From Maimonides's ruling it appears that at times one is allowed to cause damage in order to achieve important objectives, but then the injurer must also pay for the damage. For example, there are cases in which one has been allowed to create potential damage, when the activity as a whole is economically desirable. But if damage is caused, the tortfeasor must pay because he is the main beneficiary of the activity. *See, e.g., id.* at 13:3, 13:15.

112. Calabresi & Melamed, *supra* note 83, at 1116, 1119.

113. *See, e.g.,* CODE OF MAIMONIDES, *supra* note 35, Hilkhoh Nizkei Mamon 13:3, 13:15; Hilkhoh Hovel Umezik 8:2.

114. *See* CODE OF MAIMONIDES, *supra* note 35, Hilkhoh Nizkei Mamon 4:2, 14:14; Hilkhoh Edut 17:7.

115. *Id.* Hilkhoh Talmud Torah 6:14 (ruling that the person who does not repair the damage he caused deserves to be banished).

Similarly, from the prohibition against causing damage Maimonides derives the general order that the sages issued against the raising of small animals (such as goats and sheep) in the land of Israel in regions that contain fields and vineyards, because it is the nature of the beasts to enter the fields and vineyards and cause damage. And because one is prohibited from causing damage even if one intends to pay for it, the raising of small animals has been allowed only in places where they can cause no damage, that is, in forests and deserts.¹¹⁶ Note further that as shown above,¹¹⁷ Maimonides believes that the prohibition against causing damage serves also as a social tool that advances socially efficient behavior, that is, the consequences of the prohibition against causing damage affect not only the religious-deontological dimension but also the utilitarian one. It contributes also to social solidarity, the forging of civil responsibility, and concern for the other. It also advances the community spirit, which is a characteristic of Jewish law in general and of the philosophical theory of Maimonides in particular.

Nevertheless, it is important to stress that the religious-moral prohibition is a salient characteristic of Jewish law, which contains primarily a discourse of obligations and behaviors rather than rights, unlike most present-day Western legal systems.¹¹⁸ The religious obligations and prohibitions are addressed to the people who are instructed how to behave, as Justice Moshe Silberg of the Israeli Supreme Court explained: "Jewish law—if one may say so—is a law without judges. The law does not instruct the judge how to rule, it instructs him how to live."¹¹⁹ This conception of Jewish law, which is manifest in Maimonides's prohibition against causing damage without any sanction being imposed on the person who breaches the prohibition, differs greatly from the concepts espoused by some of the great theoreticians of Western law. It is especially different from the concepts espoused by the proponents of legal positivism such as John Austin¹²⁰ and Hans Kelsen,¹²¹ both of whom adhered to a position whereby the sanction plays a central role in the definition of the law. According to Austin, there can be no law without sanction,¹²² and the

116. *Id.* Hilkhoh Nizkei Mamon 5:2.

117. *Supra* Part III.

118. See Robert M. Cover, *Obligation: A Jewish Jurisprudence of the Social Order*, 5 J.L. & RELIGION 65 (1987) (enumerating the advantages of the regime of obligations in Jewish law and the manners in which it advances the social order).

119. MOSHE SILBERG, *THE WRITINGS OF MOSHE SILBERG* 490 (1998) (Heb.).

120. JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE* (1998).

121. HANS KELSEN, *PURE THEORY OF LAW* (1967).

122. AUSTIN, *supra* note 120, at 13-14 ("It is only by the chance of incurring evil, that I am bound or obliged to compliance. It is only by conditional evil, that duties are sanctioned or enforced.").

sanction plays a double role: first, it is intended to identify the order of the sovereign as an order that has mandatory validity; second, it is designed to create a motivation among subjects to observe the order because of their fear of punishment.¹²³ In Kelsen's theory there is also a necessary link between legal obligation and sanctions. In his opinion, the legal system is based on its ability to exercise a coercive order and enforce the execution of legal norms.¹²⁴ The imperative becomes a legal obligation because the law creates a link between execution or omission of a certain act, and the punishment of the individual at whom the demand is aimed.¹²⁵

In conclusion, although the prohibition against causing damages represents a significant element in Maimonides's writings, at the same time it is important not to overstate the importance of the prohibitive-religious element in Maimonides's tort theory. At no time do Maimonides or Talmudic sources point to a conception in which every payment for property damages must be regarded as a punishment based on the prohibition against causing damage; rather, these damages should be considered civil compensation. This conclusion is based partially on the difficulty in identifying a source in the Torah for the prohibition against causing property damage,¹²⁶ and Maimonides does not mention any such source.¹²⁷

It appears, therefore, that according to Maimonides's conception, the prohibition against causing property damage is an important element, although not necessarily the most important one (as perhaps other Halakha sages assumed),¹²⁸ present side by side with other elements that are no less important, such as the prevention of damage, optimal deterrence, emphasis on the moral conduct of the tortfeasor, and others.

123. Colin Tapper, *Austin on Sanctions*, 24 CAMBRIDGE L.J. 271, 281 (1965).

124. KELSEN, *supra* note 121, at 33.

125. KELSEN, *supra* note 121, at 115 ("If the law is conceived as a coercive order, than a behavior can be looked upon as objectively legally commanded [and therefore as the content of a legal obligation] only if a legal norm attaches a coercive act as a sanction to the opposite behavior.").

126. Indeed, there is no dispute that the Torah forbids one to damage another's property, but there is no such explicit warning in the Bible, the Mishnah, or in the Talmud. The question of the source of the prohibition on damaging property first appears amongst the *rishonim*, but it is discussed explicitly and in detail for the first time by the *ahronim* (see, e.g., the writings of R. KANIEVSKY, *KEHILOT YA'AKOV*, Bava Kama 1; *BIRKAT SHMUEL*, Bava Kama 2; *KUNTRES SHIURIM*, Bava Kama 1).

127. Compare to the prohibition against causing bodily injury, for which Maimonides explicitly notes the source of the prohibition. See *CODE OF MAIMONIDES*, *supra* note 35, Hilkhhot Hovel Umezik 5:1.

128. See, e.g., TUR, *supra* note 2.

C. Summary: A Pluralistic Approach (Maimonides) vs. An Approach That Emphasizes Utilitarian Considerations (Calabresi)

In addition to identifying the similarities and points of contact between the tort theories of Calabresi and Maimonides, we must also note the significant differences between them, as well as their different basic positions, tendencies, and backgrounds. And we should also point out the contrast between Jewish law and modern approaches to law and economics regarding tort laws in particular, and law, ethics, and justice in general. According to the proponents of law and economics, such as Calabresi, the law must create efficient incentives to prevent damage, and the emphasis is not on the moral dimension. It has nothing to do with the behavior of the tortfeasor or the shaping of his morals. In contrast, Jewish law, especially according to Maimonides's tort theory, places the emphasis not only on the prevention of damage but also on the moral dimension that has to do with 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.

Additional characteristics of Maimonides's tort theory are the tendency of Jewish tort laws, especially with regard to bodily injuries caused by people, toward punishment, and the distinction that Jewish law makes between damage caused by people themselves and that caused by their property. This distinction is also related to the proximity in punishments, especially with regard to bodily injuries, and to other matters as well. A clear expression of the moral tendency of tort laws can be found in the classification of the laws of physical injury as part of criminal law, because a person's body cannot be measured by economic values alone. A person's body is not his property but of someone greatly above him. Injury to the human body is perceived as an injury to "God's image." This conception is important in itself from a value-based perspective, and it is meaningful not only because of its practical affect on the attitude of society toward injury to the human body. Although the law of the injurer is not exactly "an eye for an eye," as Maimonides points out, this does not alter the essence of the injurer's act, "which is deserving of him losing a limb or being injured when he did it, and thus pay for his damage,"¹²⁹ because "all eternity, and all the money in the world cannot heal the wound of the injury we caused to man," as noted by the well-known philosopher Emmanuel Levinas.¹³⁰ Therefore,

129. CODE OF MAIMONIDES, *supra* note 35, Hilkhot Hovel Umezik 1:3.

130. EMMANUEL LEVINAS, WORKS OF EMMANUEL: FOUR ARTICLES FROM "DIFFICULT FREEDOM" (Eliahu Rahamim Zeini trans. & ed., 2002) (Heb.).

Maimonides's tort theory consists of various objectives and considerations that operate in concert, without Maimonides perceiving any contradiction between them. Different objectives play a dominant role in different types of damage. Therefore, it is important to pay attention to the legal classification used by Maimonides in *Sefer Nezikin* (The Book of Torts) in his book *Mishneh Torah—Code of Maimonides*. This is a detailed and sophisticated classification that has far-reaching consequences with regard to the various objectives of tort law. Below are some of its main characteristics.

First, in the *Code of Maimonides*, Maimonides combines rules of a purely civic character (for example, rules concerning the return of loss) with rules of a purely criminal nature (such as rules of murder). In general, it appears that Maimonides does not consider *Sefer Nezikin* to be an integral part of classic tort law, which he included in legal (*Mishpatim*) and property (*Kinian*) books, but rather situated in the space between civil and criminal law. We can also identify a gradual transition from rules of a more civil character, included in the first part of the book, for example rules of property damage and loss, to rules of a more punitive nature that are included in the last part of the book, such as rules concerning bodily injury and murder.

Second, the classification that Maimonides applies in *Sefer Nezikin* in *The Code of Maimonides* shows extensive use of certain parameters based on which he differentiates between various rules: (a) How was the damage caused? Was it caused by a beast owned by the person or as a result of a failure that the man caused by his actions? (b) Who suffered the damage? Was it a beast, property, or a person? (c) What damage was caused? Was it only property damage only or was it bodily injury? In light of these parameters, the tort laws are ordered from least to most serious. They begin primarily with rules concerning damage caused to property by property owned by the tortfeasor (property damage rules), and with damage caused by a person who robs or steals the property of another (rules of robbery and theft). They then move on to bodily injury (rules of bodily injury) and finally to homicide (rules of murder). In light of these parameters, Maimonides makes a basic distinction between damage caused by one's property (property damage) and damage caused by the man himself (cause of bodily injury and damage).

Within these rules there are secondary distinctions, such as those between rules of property damage, damage caused by beasts belonging to a person (ox damages), and damage caused by persons (pit and fire). Moreover, he distinguishes between an ox which gores another ox and one which gores a man. Among the rules of causer of

bodily injury and damage, he clearly distinguishes between the person who damaged another's property (tortfeasor) and the one who injured another's body.

Third, the various distinctions that Maimonides makes between the different types of damage based on the parameters mentioned above are also relevant from the point of view of the dominant goal of each one of them. For example, whereas the dominant goal in property damage is generally the prevention of damage and the imposition of liability on the cheapest cost avoider and best decision maker, in the case of damage caused by people deontological considerations have greater weight. Therefore, to this end Maimonides divides tortious events into two groups and in each group assigns dominance to a certain goal. In this regard, his approach is similar, at least structurally, to the suggestion Fleming James Jr. made in the late 1950s,¹³¹ and to a complementary suggestion made by Christopher Robinette in 2005,¹³² to map tortious events to typical groups and to implement the appropriate goals in each group. But it is difficult to say that Maimonides really combines such considerations with others. Rather, he gives preference to one goal over another, depending on the type of case.

Even the civil-criminal divide is manifest in the distinction that Maimonides makes between various types of damage. In cases of bodily injury the punishment aspect of compensation gains prominence and serves as ransom, regardless of whether the injury was caused by a person or by an ox. By contrast, in cases where the damage occurs to a person's property, the compensation is of a clear and purely civil nature, especially when the damage is caused by one's property and not by the person himself.

Nevertheless, although Maimonides presents a theory that is not one-dimensional by combining deontological considerations with those of efficiency, it is difficult to compare his approach with modern pluralistic approaches. Modern pluralistic approaches methodically provide solutions to cases of conflict and contradiction between these goals, whereas Maimonides places these goals next to each other and does not ignore any of them (he does so not merely to pay lip service, but truly gives each one its weight, and as in modern pluralistic doctrines, grants dominance to each goal in each of the two groups of cases, which are divided logically and artfully). It is difficult to find in his theory real and clear guidelines to different cases where applying both goals together leads to contradiction and conflict. Identifying

131. Fleming James Jr., *supra* note 81.

132. Robinette, *supra* note 82.

solutions in cases of a conflict caused by the application of different goals is perhaps the highest achievement of any pluralistic approach, and this dimension is missing in the Maimonidean theory. Thus, to some extent Maimonides's approach is indeed more pluralistic than that of Calabresi, which still has a monistic character. But compared with contemporary pluralistic theories, and certainly with monistic theories such as that of Calabresi, this theory offers less stability and legal certainty (to use present-day terminology).

Therefore, if we want to adopt the thinking of Maimonides and to offer a pluralistic theory that fully accommodates both deontological and utilitarian considerations we will have to adapt its framework to the present, including with regard to the examples and forces at work today, which are different from the type of uninsured tortious events that occurred in the days of Maimonides (events between individuals, without loss distribution, harm, or the involvement of industrial organizations). We will have to adapt the examples to the present also with regard to the highly specific solutions that the theory must offer in specific cases of conflict caused by the application of different goals, and by the need to introduce a clearer theory capable of resolving the conflict and giving preference to any goal in general, or within any specific group of cases in particular. But we cannot say that Maimonides's approach is not good or not successful; we can only say that compared with modern pluralistic theories it is less developed, and that compared with monistic approaches it may also be less stable. This theory is complemented by Calabresi's approach, at least in matters that are more suitable to modern times. A combination of the two approaches, with the addition of some original thinking, can produce a new pluralistic model.

V. STRICT LIABILITY OR DIFFERENTIAL LIABILITY ON THE CHEAPEST COST AVOIDER / THE BEST DECISION MAKER?

A. Calabresi's Approach: Strict Liability on the Cheapest Cost Avoider or the Best Decision Maker

Calabresi supports a strict liability regime imposed on the best decision maker, which is liability imposed on the defendant because of an undesirable situation created by his behavior, even if the behavior has merit and is socially desirable. The perspective focuses on the nature of the result created by the behavior and not on the nature of the behavior itself. This is an important incentive to reduce accidents and to reduce the cost of damages caused by accidents. But we saw that despite the fact that in Calabresi's theory, liability is absolute, it is not always imposed on the tortfeasor, but sometimes on

the injured party, so that it is not a strict liability regime in the pure and conventional sense. But in the classical sense of the regime, strict liability is always imposed on the tortfeasor, regardless of her fault. Based on Calabresi's doctrine, at times the tortfeasor is the best decision maker. Yet at other times it is the injured party who is the best decision maker and in possession of the tools and information needed to consider the damage and avoid it, which she did not do, and in this case the strict liability is imposed on her and she is not compensated.

The following question arises: Is it possible to apply the doctrine of the cheapest cost avoider or the best decision maker to other liability regimes? Is it necessary to reject the doctrine in a fault-based liability regime, as did Calabresi?¹³³ Is it possible to accept the foundation of the doctrine of the best decision maker, but apply it to liability that is less severe than the one he suggests, such as negligence, or to types of liability that are not pure absolute but contain elements of fault?

It is true that fault-based liability incurs litigation costs in one way or another, that is, the cost of examining the tortfeasor's fault and of examining the contributing fault of the injured party. Strict liability prevents such examination and saves litigation. If strict liability were imposed on a group of categories of tortfeasors or injured parties, as under the doctrines of the cheapest cost avoider or the best decision maker, every potential tortfeasor or injured party would know in advance what the decision would be with regard to the imposition of liability in her case, without the need for concrete clarification of the liability. Some argue that each of the other liability regimes is characterized by inefficiency in certain situations.¹³⁴ Litigation costs are involved also in the categorical determination of who is the best decision maker in each type of matter. Calabresi also admits that it will not be always easy to identify the cheapest cost avoider within a group of potential cheap cost avoiders.¹³⁵ At times it is difficult to predict which of two ways the best decision maker will choose in order to prevent or reduce future damage: will he take precautionary measures or will he reduce the scope of his activity, or even cancel it? Moreover, strict liability may result in overdeterrence and in the prevention of desirable activities. Stricter liability may increase investment in safety and in development, and reduce accident damage

133. Bernard A. Koch & Helmut Koziol, *Comparative Conclusions*, in UNIFICATIONS OF TORT LAW: STRICT LIABILITY 433 (Bernard A. Koch & Helmut Koziol eds., 2002) (distinguishing between strict liability and fault-based liability); Posner, *Strict Liability*, *supra* note 26 (making the same distinction).

134. Ariel Porat, *Tort Law*, in ECONOMIC ANALYSIS OF THE LAW 271, 288-90 (Uriel Procaccia ed., 2012) (Heb.).

135. CALABRESI, *supra* note 1, at 140-44, 152-60.

at a lower cost than that of the damage that was prevented. But it may also lead to increased production costs, either because of higher investment in safety or because of an increase in insurance premiums, resulting in higher prices and a possible reduction in the scope of manufacturing activity. Other problems have been raised regarding other liability regimes. For example, the fault-based liability regime has been criticized for having no effect on the level of activity, as mentioned above. In general, it is difficult to point at the superiority of one regime over another from the perspective of efficiency.¹³⁶

We are not trying to determine which liability regime is the best, and we do not presume to decide this issue. But we ask whether it is possible to combine the doctrine of the cheapest cost avoider or of the best decision maker with these regimes in order to achieve optimal efficiency. Put differently, are the problems in these regimes so grave and substantive that they must be disqualified, so that the doctrine must be applied to strict liability only? Has the challenge been met? Has anyone used different liability regimes, not only strict liability, to apply the doctrine of the cheapest cost avoider or the best decision maker, without adhering to existing regimes, such as negligence? The answer appears to be affirmative. It was Maimonides who “broke up” tort liability and offered different regimes for different categories of cases. Actually, Maimonides adapted the type of liability regime imposed on the best decision maker or on the cheapest cost avoider to the type of cases involved, and did not impose strict liability in each case, what we call a differential approach.

B. Maimonides’s Approach: Differential Liability on the Cheapest Cost Avoider / Best Decision Maker

Maimonides does not propose a fault or negligence based regime as the basis for tort liability. Warhaftig and Haut explained, however, that Maimonides supports absolute liability,¹³⁷ and if so, Maimonides’s and Calabresi’s methods are very similar to each other. But careful examination of Maimonides’s writing reveals that he is in favor of different regimes of liability for different categories of damage, as shown below. Maimonides’s approach is more complex than Calabresi’s, according to whom the best decision maker test always results in the imposition of strict liability on the best decision maker. Maimonides distinguishes between two questions: (a) on whom to impose tort liability; and (b) what regime of liability should be

136. Porat, *supra* note 134, at 283-86.

137. Irwin H. Haut, *Some Aspects of Absolute Liability Under Jewish Law and, Particularly, Under View of Maimonides*, 15 DINE ISRAEL 7 (1989-90); Warhaftig, *supra* note 6, at 218-21, 224-27.

imposed. According to Maimonides, the cheapest cost avoider and best decision maker tests determine only *who* should be liable. But having determined the *identity* of the cheapest cost avoider or of the best decision maker does not necessarily mean that strict liability is imposed on him because the level of that liability is topic-dependent. Often liability gravitates toward an optimal level that is higher than negligence but lower than absolute or strict liability—we can call it “mixed liability.”

We try to carefully define the regime of liability adopted by Maimonides with regard to three types of damage: (a) damage caused by a person to the property of another; (b) damage caused by a person who injures another; and (c) damage caused by property. In each of these three cases Maimonides proposed liability that is in the intermediate range between negligence and strict liability. Below we describe the hierarchy of regimes of liability, from the most serious one (closest to absolute liability), which Maimonides espouses in cases in which a person caused damage to another’s property, to a lower level of strict liability mixed with a consideration of fault in the case of a person who injures another, and to the lowest level of liability (closest to negligence), which Maimonides espouses with regard to damage caused by property. The rationale of the hierarchy is clear; it makes logical sense to impose a higher level of liability for damage caused by a person than for damage caused by his property, given that a person’s effective ability to control his own body and prevent damages caused by his body is much higher than his ability to control his property, for example, in the case of beast or pit damages. Control is meaningful in modern law as well, for example with respect to property damage (in some countries in the case of damage caused by dogs)¹³⁸ and to employee damages (vicarious liability, restricted to cases of control and employee compliance with the framework and mission of the job).

1. Damage caused by a person to the property of another: strict liability on the best decision maker and exemption for cases of force majeure

Regarding a person who causes damage to the property of another, we learn from the Mishnah that man is liable for all accidents he caused,¹³⁹ and the Talmud comments that the injurer must pay, whether the damage occurred unwillingly, under compulsion, or willfully.¹⁴⁰ Commentators were divided about the degree of

138. See, e.g., §41A of the Civil Wrongs Ordinance (New Version), 5732-1972, 2 LSI 12 (1972) (Isr.).

139. MISHNAH, Bava Kama 2:6.

140. Sanhedrin 72b.

unwillingness or compulsion that the injurer must show. Some maintained that he was liable if there was no complete compulsion, but in the case of complete compulsion (for example, if a man fell off the roof in an uncommon wind and caused damage)¹⁴¹ he was exempt.¹⁴² However, many interpreted Maimonides's opinion as a method whereby a man who injures must be held liable even in a case of complete compulsion,¹⁴³ that is, Maimonides ruled regarding the injurer based on a regime of strict liability. In his words:

He who damages another's property is liable for the full damage, whether it was by mistake or under compulsion, he is considered willful. How? He fell off the roof and broke the vessels or he tripped as he was walking and fell on a vessel and broke it: he is liable for the full damage.¹⁴⁴

Maimonides even holds both a sleeping man and a drunken man liable for the damage they caused.

The sources presented thus far indicate that Maimonides adopted a regime of liability that is similar to that of Calabresi at least as far as damages caused by a person to the property of another are concerned, that is, the imposition of strict liability on the best decision maker. But there appears to be a difference between them in the case of an exception (*force majeure*) to the strict liability of the best decision maker. Maimonides believes that even a person who causes damage to another's property is exempt from payment in cases that he defines as a "strike from heaven," as he ruled in a case on the liability of the man who climbed a ladder:

He climbed a ladder and a rung fell out under him and he fell and caused damage. If the ladder was not tight and strong, he owes. And if it was strong and tight and fell out or was eaten by worms, he is exempt because this is a strike from heaven. And the same applies in all similar cases.¹⁴⁵

Commentators had difficulty explaining this rule. Rabad¹⁴⁶ wonders

141. See TUR, *supra* note 2, Hoshen Mishpat 378:1-2 (exempting from liability a person who fell in uncommon wind and harmed another person's body or property).

142. See, e.g., TOSAFOT, Bava Kama 27b, s.v. *veshmu'el* (Vilna: Widow & Brothers Romm 1880-1886) (distinguishing between compulsion that is a type of theft, in which case liability is imposed, and compulsion that is a type of loss, in which case liability is not imposed); ROSH, Bava Kama 3:1 (Vilna: Widow & Brothers Romm 1880-1886); RAMA, Hoshen Mishpat 378:1 (1911-13).

143. See, e.g., MAGID MISHNEH in clarifying CODE OF MAIMONIDES, Hilkhot Hovel Umezik 6:1; SCHACH, Hoshen Mishpat 378:1 (explaining that in the opinion of Maimonides and of Shulchan Aruch he is liable also in case of complete compulsion). Nachmanides also rules according to this opinion in his commentary to Bava Mezia 82B, s.v. *veata*.

144. CODE OF MAIMONIDES, *supra* note 35, Hilkhot Hovel Umezik 6:1.

145. *Id.*, at 6:4. See also CODE OF MAIMONIDES, *supra* note 35, Hilkhot Nizkei Mamon 14:2 (providing an additional example of a strike from heaven).

146. CODE OF MAIMONIDES, *supra* note 35, Hilkhot Hovel Umezik 6:4.

how it is possible to define the breaking of a rung or the fact that it has been eaten by worms an act of heaven. It is true that it can be considered compulsion, but Maimonides has already ruled at the beginning of the same chapter of *Code* that the injurer is liable even if he was under compulsion, and brought examples of the injurer falling off the roof, even in conditions of uncommon wind, or sleeping. All these injurers are under compulsion, and nevertheless they are liable. What is the difference between these injurers under compulsion and the one who climbs a ladder and a rung breaks under him?¹⁴⁷

It is clear that Maimonides carefully distinguishes between compulsion and “a strike from heaven,” and that if a man climbs a ladder and a rung breaks under him when the ladder was tight and strong, this is not compulsion but a “strike from heaven.” But the question arises again: how do we define a “strike from heaven” and what is the difference between it and regular compulsion? Among the writings of contemporary rabbis there are various definitions for exemptions on account of a “strike from heaven.”¹⁴⁸ Some defined this as the highest possible level of complete compulsion “where it was clear that the damage was from heaven,”¹⁴⁹ or in the more modern formulation of a contemporary rabbinical judge: “which was an entirely uncommon act, and could not imagine such a thing in any way.”¹⁵⁰ Rabinowitz offers a clear definition of a strike from heaven, which matches the use Maimonides made of the term on several occasions:

[T]he definition of “strike from heaven” includes two components. On one hand it is a very rare phenomenon, a miraculous event that occurs very rarely. On the other hand there is the possibility of another force involved in the occurrence, which cannot be predicted how and when it operates.¹⁵¹

147. KESEF MISHNEH, *Hilkhot Hovel Umezik* 6:1 (Frenkel ed., 1975), which by virtue of the said issue derived from the halakha of the one climbing a ladder wrote that according to Maimonides in cases of absolute necessity the tortfeasor should be exempt. But the interpretation of Kesef Mishneh does not seem consistent with the simple language of Maimonides's rule 1, which holds the tortfeasor liable even when he was constrained (and Maimonides did not distinguish between different constraints, as inferred by Maggid Mishneh). By contrast, rule 4 exempts the tortfeasor from liability in the case of a strike from heaven, which is not defined as a constraint in Maimonides's method. *See also* RABBI DAVID BEN ZIMRA, *RESPONSA RADBAZ* part 5, art. 1 (Friedberg ed. 2007).

148. *See, e.g.*, RABBI DAVID BEN ZIMRA, *RESPONSA RADBAZ* part 5, art. 1 (Friedberg ed. 2007); EVEN HAEZEL, *Hilkhot Hovel Umezik* 6:1 (1962); OR GADOL, *Bava Kama*, Sec. A, p. 21B s.v. *vehinei* (Shraga Faibel Gerber ed., 1961).

149. *See* ARUCH HASHULHAN, *Hoshen Mishpat* 378:3 (explaining Maimonides's opinion).

150. SHEINFELD, *supra* note 32, at 251 n.5 (basing the test on expectation and fault).

151. R. NAHUM ELIEZER RABINOWITZ, *YAD PSHUTA LEHILKHOT HOVEL UMEZIK* 6:4, at 143. (Maalyot 2007).

In light of all this, Rabinowitz seeks to settle Rabad's question and explain the difference between the cases of compulsion when one falls off the roof in uncommon wind and when the rung breaks on a ladder. According to this explanation, Maimonides imposes liability only in the case of such compulsion that if the injurer had acted with proper caution, the damage would have been prevented. But:

[O]ur case is different because "it was strong and tight," he looked and checked the ladder and saw that the rungs were tightly held and there was no sign of weakness of the rungs and that they were strong, *so what else could he have done?* It is not him who removed the rung, and this is nothing but a strike from heaven, which is unforeseeable, that the tight joint suddenly loosened or the rung was eaten by worms from inside in a way that was not visible from the outside It is because of the rareness of such an occurrence that we treat it as if an external force is involved in it, such as that the fact that it was eaten by worms inside has no visible sign outside.¹⁵²

According to this explanation, although Maimonides believes that the injurer should be held liable for unforeseeable damage as well, this is only in cases in which he could have prevented the occurrence by taking proper cautionary measures,¹⁵³ and it means strict liability; but it is not *absolute* liability, because the injurer who caused unforeseeable damage but took all required cautionary measures should not be liable as in this case the damage is a strike from heaven.

It is assumed that Calabresi disagrees with Maimonides on this point, and in his opinion strict liability should be imposed on the tortfeasor as the best decision maker, even in the case where he climbed a ladder and a strong and tight rung fell out, because there is no end to the investment in safety and testing to prevent damage. It is reasonable to assume that Maimonides is trying to achieve optimal deterrence by imposing liability that is not entirely strict, and leaves open the option of exempting tortfeasors from liability in cases in which there is no practical way of preventing the damage.

Although it appears that the difference between the approaches of Calabresi and Maimonides touches strictly upon a small example of "a strike from heaven," differences appear to be more significant than meets the eye. In Calabresi's opinion, strict liability means that the best decision maker must consider bearing the liability if any damage

152. *Id.* at 142-43 (emphasis added).

153. See also CHAZON ISH, Bava Kama 11, 100:21 (making a similar clarification, regarding Nachmanides's approach, who, like Maimonides, imposes liability for damage caused under compulsion because according to this approach, "it appears that he admits that in the case of complete compulsion the injurer is exempt, unless the man who caused the damage *took every measure to exercise caution*, even if the damage is entirely not common").

occurred, even if the damage is unpredictable and even if in practice he had no opportunity under the circumstances to prevent the damage, and his only option was to invest in measures to prevent the damage in the future. This is the balance of optimal efficiency, and a shift to the right or to the left erodes this principle. It is on this point Calabresi and Maimonides part ways.

Maimonides proposes a type of liability that falls within the range between negligence and strict liability, closer to strict liability. This type of liability exempts the injurer who did everything he could do in order to efficiently prevent the damage but the damage occurred nevertheless, in which case it must be defined as a strike from heaven. The nature of the liability regime proposed by Maimonides can be clarified further by comparing the strike from heaven exemption according to Maimonides with the *force majeure* exemption granted by some modern tort law to damage caused by an uncommon natural event. Izhak Englard offers two possible definitions of the term *force majeure*. The first views it as a natural occurrence that a reasonable person could not have foreseen and that could not be avoided. This is a strict concept, being far from simple negligence, and the test is not the degree of reasonableness of the behavior but man's physical abilities. The second views it as a natural occurrence that a reasonable person does not consider because the likelihood of it happening is small, and which cannot be prevented by taking regular cautionary measures. This concept of *force majeure* is very close to lack of negligence because the test is based on the behavior of a reasonable person regarding natural occurrences.¹⁵⁴

It appears that the first approach is closer to Maimonides's regime of liability,¹⁵⁵ which is certainly of a higher level than negligence, and the test is the person's effective physical ability to prevent the damage. But even according to the first approach (and in our opinion it reflects quite accurately Maimonides's position), this is not an absolute liability of the injurer because he is exempt from liability for damage he could not have foreseen and that cannot be prevented.

In sum, with regard to a person who causes damage to the property of another, Maimonides adopts a regime of strict liability of the best decision maker, with one exception in the case of *force majeure*.

154. IZHAK ENGLARD, TORT LAWS 196-99 (Gad Tedeski ed., 2d ed. 1976) (Heb.).

155. Yet this is not necessarily consistent with the approach of other decisors. See SHEINFELD, *supra* note 32, at 251 (referring to the relation between the above two approaches mentioned by Englard and the position of Jewish law).

2. *Damage caused by a person who injures another: strict mixed liability with a basis of fault*

Regarding someone who causes bodily injury to another, Maimonides again proposes a regime of entirely strict liability: "People forever cause accidents, whether by mistake or willfully, awake or asleep, or drunk, if he caused bodily injury to another . . . he pays using his best assets."¹⁵⁶ Note, however, that unlike in the previous rule concerning the man who caused damage to another's property, in this case Maimonides does not include compulsion in the rule concerning the man who causes bodily injury to another. Why was it omitted from the rule of the man causing bodily injury to another?

Some explained that this is not an indication of a difference between Maimonides's position on a person who causes damage to another's property and one who causes bodily injury to another, as both are subject to the same law.¹⁵⁷ But some inferred that there is a difference in principle between the man who causes bodily injury to another and the one who causes damage to another's property:¹⁵⁸ the level of liability of the man who causes bodily injury is lower than that of the man who causes damage to property because he is not liable for situations of compulsion, whereas the man who causes damage to property is liable in cases of compulsion as well.

Why does Maimonides propose a regime of strict liability for the best decision maker in the case of the man who damages another's property, and a regime of a lower level of strict liability (exempt under compulsion) for the person who causes bodily injury to another? It appears that Maimonides regards bodily injury to another as a wrong of the punishable tort type, and considers the compensation paid by the person causing the bodily injury (or at least some components of it) to be a type of fine. Therefore, Maimonides requires minimal *mens rea* to impose liability on someone who causes bodily injury (as is required for the imposition of criminal liability), and exempts those who were under compulsion and where no such mental element exists.¹⁵⁹ In any case, the liability of the man who

156. CODE OF MAIMONIDES, *supra* note 35, Hilkhot Hovel Umezik 1:11.

157. The interpretation is found in the works of several contemporary scholars. *See, e.g.*, R. RABINOVICH, YAD PSHUTA, Hilkhot Hovel Umezik 1:11, s.v. *ben shogeg* (Maalyot 2007); Asher Gulak, *Gdarim Mishpatiim Bayad Chazaka Lerambam*, 6 TARBITZ 383 (1935); Haut, *supra* note 137, at 32; Warhaftig, *supra* note 6, at 224. The various interpretations of the question regarding the laws of the injurer and of the man who causes bodily injury vary; some argue that both are exempt in case of compulsion (Gulak) and others argue that both are liable even in the case of compulsion (Rabinovich, Haut, and Warhaftig).

158. *See* LEVUOSH MORDECHAI, Bava Kama, Sec. 43.

159. According to Maimonides, an example of someone who is exempt from payment (or at least from a portion of the payment) is one who falls off the roof in uncommon wind, such as a

causes bodily injury to another is not absolute, unlike that of the person who causes damage to another (where the compensation payments are not a type of punishment),¹⁶⁰ because the fault implicated is typical of a punishment type of liability.

3. Property damage: negligence in its economic sense, or shifting the burden of proof

Regarding damages caused by one's property, such as his beast, it appears that although Maimonides proposes a regime of the cheapest cost avoider and best decision maker, he does not adopt a regime of absolute or strict liability imposed on the avoider or decider. Rather, he imposes at most mixed liability (if not fault-based liability in its economic sense, of the Hand formula type), or shifting the burden of proof. Based only on Maimonides's statement, "[t]o provide great incentive to avoid damages a man is held liable for *all damage* caused by his property,"¹⁶¹ it may appear that Maimonides proposes a regime of absolute liability for damage caused by property. But careful examination of the detailed rules in *Code of Maimonides* shows clearly that Maimonides does not propose a pure regime of absolute or strict liability in cases of damage caused by one's property.

According to Maimonides, the owner of the beast is obligated to guard his beast carefully.¹⁶² But if the owner does everything that is required of a good guardian, and nevertheless damage occurs, he is to be exempt from payment. Thus, Maimonides rules that if he

[b]rought cattle into the pen and locked the door on them so that it can withstand a regular wind, and they got out and caused damage, he is exempt; but if the door could not withstand a regular wind, or if the walls of the pen were unstable, it means that he did not lock them in properly, and if they got out and caused damage, he is liable.¹⁶³

He rules similarly that the owner or guard of beasts is exempt from damages caused by the beasts if they were "guarded carefully,"¹⁶⁴ which means guarding that requires the constant presence and the

storm that brakes out suddenly, or someone who has a stone in his pocket and the stone causes damage, and the man did not know it was there or knew but forgot. In these cases, the injurers are exempt from payments of a criminal nature because they were under compulsion, but owe the damage component. For details, see CODE OF MAIMONIDES, *supra* note 35, Hilkhote Hovel Umezik 1:12, 15.

160. LEVOUSH MORDECHAI, *Bava Kama*, Section 43.

161. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED*, *supra* note 33, at 3:40.

162. CODE OF MAIMONIDES, *supra* note 35, Hilkhote Nizkei Mamon 4:4.

163. *Id.* at 4:1.

164. *See id.* at 4:1.

attention of the guard:¹⁶⁵

An ox that the owners properly tied up with a rope, and it broke loose and caused damage If it is *muad* [inclined to misbehave], [the owner is] exempt, as it is said, "and the owners did not guard it" (Exodus 21:29). And if they did guard it, [they are] exempt, because [the ox] was guarded. Similarly, if it caused damage through an act that it is inclined from the outset, such as eating the type of food it usually eats, or [objects] by treading on them, [the owner is] exempt from payment.¹⁶⁶

It appears that the exemption granted by Maimonides to someone who guarded his beast carefully is not because he is not at fault of any behavior in the simple sense of the term,¹⁶⁷ as opposed to its meaning based on the Hand formula of economic negligence, which is definitely likely to be consistent with Maimonides's approach. According to Maimonides, the basis of liability in the case of property damage is not the fault or inappropriate behavior of the owner of the property but efficient prevention of damages.¹⁶⁸ In other words, the objective of tort law is to prevent the causing of damage, and therefore the owners of damaging property or those by whose action damage was caused are held liable "to guard them so that they cause no damage."¹⁶⁹ If the man guarded his beast properly and nevertheless damage was caused by it, there is no reason to hold him liable for any damage caused by the beast because he did everything in his power to prevent the damage. In other words, imposing absolute liability on the owners of beasts for every damage caused by their beasts, including damage that would not have been prevented by careful guarding, does not necessarily prevent the occurrence of damages. Furthermore, it is possible that it will cause overdeterrence, which will result in the owners of beasts incurring costs that they have no effective way of preventing, whereas tort laws commonly seek to promote optimal deterrence rather than overdeterrence, of the type that does not impose excessively high damage and prevention expenses.¹⁷⁰ Therefore, there is ample logical reason for the exemption that Maimonides grants to those who guarded their beasts carefully but whose beasts caused damage nevertheless.

165. See R. NAHUM ELIEZER RABINOVICH, YAD PSHUTA, *Hilkhot Nizkei Mamon* 4:4.

166. CODE OF MAIMONIDES, *supra* note 35, *Hilkhot Nizkei Mamon* 7:1.

167. Such is the approach of TUR, *Hoshen Mishpat* 399:1, where liability is based on the fact that the person did not watch over his damaging property. It has been noted already that this is not Maimonides's opinion. See, e.g., Warhaftig, *supra* note 6; SHEINFELD, *supra* note 32, at 169.

168. See MAIMONIDES, THE GUIDE FOR THE PERPLEXED, *supra* note 33.

169. *Id.* at 3:40, 574.

170. CALABRESI, *supra* note 1, at 26-31.

Presumably, according to Calabresi, the result will be different, and the owner of the beast will pay in any case as the best decision maker, because there is no limit to the improvement of the ways of prevention. Imposing liability on him as the best decision maker will at least provide an incentive for him to think of better ways of prevention in the future, even if he believes that at present it is not possible to guard better and to prevent the damage. By contrast, one may argue (and we do not necessarily agree) that imposing liability on the tortfeasor for unexpected damages promotes overdeterrence, and therefore it is not advisable and should be avoided, leaving the injured party to bear the damage. This claim may support Maimonides's approach, unless Calabresi also agreed that the injured party is the cheaper cost avoider whenever the damage or he himself (the injured party) is unpredictable.

The question that arises is whether Maimonides exempts owners for property damage based on a fault-based regime. There are two ways in which Maimonides's position can be interpreted. One of the later Halakhic authorities explains that although the owner is exempt for damages caused by his property if he guarded it properly, this exemption does not mean that the result is the same as for negligence, i.e., in a fault-based regime. The difference between the theories has important consequences for the question of who bears the burden of proof.¹⁷¹ According to Maimonides, this shifts the burden of proof that no damage was caused to the injurer. By contrast, according to the fault-based regime theory, the burden of proof is generally on the injured plaintiff, who must prove that the damage was negligently caused by the injurer.

Clearly, these are not merely procedural differences of imposing the burden of proof, but they have many implications for the reduction of the costs of the legal investigation carried out according to the two theories. This is one of the reasons why Calabresi opposed the fault-based liability theory and objected to the high cost of investigating each case in court. We believe that even Calabresi agrees that the costs of legal investigation according to Maimonides's theory, which places the burden of proof on the injurer (who must prove that he

171. See ROZOVSKY, *supra* note 38, at art. 1, § 2, s.v. *vehine*, suggesting that the consequence of the two main theories of tort liability, the negligence theory (*peshiah*) and the ownership theory (concerning property that caused damage, the theory attributed to Maimonides by the *ahronim*) has to do with the question of who bears the burden of proof. If liability is based on the fact that the property in his ownership caused damage (as in the theory of Maimonides according to the *ahronim*), then the owner must bring proof that he guarded properly in order to be exempt (the opinion of HAZON ISH, Bava Kama 7:7). But if it is negligence that creates the liability for payment of damages, then the injured party must bring proof that the owner committed negligence with respect to guarding in order to hold him liable for payment. This is what the author of PNEI JOSHUA, Bava Kama 56B, believed.

guarded properly in order to be exempt from payment), are lower than the costs of the fault-based regime, that is, even if both regimes are more costly, according to Calabresi, than the strict liability regime.

In our opinion, however, there is a more plausible way of explaining Maimonides's theory, whereby he proposes property damages under a regime that is very close to negligence, as it is reflected in the Hand formula, and is different from shifting the burden of proof. There appears to be great similarity between this approach of Maimonides and another approach developed by Posner and proponents of law and economics, who support negligence rules because they provide incentives to the injurer to take precautions when the cost of the measures taken is lower than that of the damage caused by the behavior of the injurer.

In our case, whoever tied his animal properly took the necessary precautions to prevent damage. But if damage occurred nevertheless, it was a rare occurrence because only rarely will the animal be able to break free, and therefore even if the rate of the damage is high, the probability of its occurrence is low. In this case, it is sufficient to have tied the animal properly in order to prove a presumption of no negligence.

We raised concerns about overdeterrence in cases of strict liability that could lead to a decline in desirable activities. Those who wish to impose an absolute liability regime for damages caused by owners of beasts face a similar difficulty. It is reasonable to assume that this regime will cause real injury to the related industries. It is possible that there is a difference between guarding a beast, especially at a time when animals were of great importance for their owners and were used as beasts of burden, as well as for their meat and milk, and the case of a manufacturing process or driving a car. In the case of manufacturing that can be dangerous and can cause damage, reality has proven over the years that it is possible to reach ever greater safety even if at any given time it may appear that the product has reached a maximal level of safety. Nevertheless, there may be an incentive here to impose liability on the manufacturer. Even if he can prove that at the moment there is no possibility of reaching a higher level of safety, he has an incentive to employ experts whose function is to improve the safety of the product further and to develop a safer product in the future. By contrast, it is possible that the owner of the beast who guarded it in the best possible way cannot, at a given time or in the future, guard it any better, and there is no possibility for providing real incentives to him to do so if we determined that he already guarded properly. In the case of animals, unlike cars, for example, in a situation in which there is no insurance and no loss

distribution, holding the owners liable on the basis of strict liability could result in overdeterrence.

This explanation takes us from the individual to the general, that is, to a more general explanation of all the differences between Maimonides and Calabresi, as reviewed so far. These differences are manifest in the consistency with which Calabresi imposes liability on the best decision maker, whereas Maimonides follows an approach of differential liability. According to Maimonides's method, liability is indeed imposed on the best decision maker or on the most efficient cost avoider. At times, however, this liability is close to absolute; at other times, it is close to fault and negligence; at still other times it is an intermediate level of liability, depending on the type of the case at hand.

C. Possible Explanation of the Differences: The Historical Background, Circumstances, and Nature of the Injurers

Although the bases of liability for Maimonides and for Calabresi are similar—the cheapest cost avoider and the best decision maker—the content of the imposition of liability changes. Calabresi is consistent in consolidating the content of strict liability imposed on the best decision maker, whereas for Maimonides, liability is differential and imposed on the cheapest cost avoider, depending on the type of case, with some limited exceptions where the liability approaches strict liability. In the case of an injurer, however, Maimonides imposes mixed liability with an element of fault (a type of punishment) on the cheapest cost avoider, and tips the scale toward fault-based liability. In torts caused by a person's property, the issue is negligence in the economic sense or the shifting of the burden of proof.

How can this be explained? Maimonides is consistent with regarding the basis of the liability—the cheapest cost avoider and the best decision maker—but why does he not apply a similar content of strict liability or other liability consistently? And why does Calabresi insist on strict liability for all types of damages and in all cases? These approaches are significantly closer to each other in substance than they appear to be, and the differences stem from, among other things, the period-related examples they cite. Maimonides and Calabresi act in very different historical circumstances, which are reflected in the examples and the cases they bring and result in a difference in their rulings. Furthermore, we can say that it is reasonable to suppose that if Calabresi were operating within the reality of Maimonides's time, and vice versa, their approaches would have been even closer.

Calabresi focuses on industry, with its employers and employees, producers and consumers, drivers and pedestrians, physicians,

surgeries, and hospitals. In classic Calabresian examples, it is easy to find mass tortfeasors with deep pockets, risk managers and entities calculating damages and economic viability of their businesses. In such circumstances, it is easier to impose strict liability on those who can prevent the damage in a cheaper and more effective way, or to transfer information to the cheapest cost avoider as a best decision maker. Even if occasionally liability is imposed on large entities that employ economic calculations and risk managers, completely and fully without a dimension of fault and negligence, it is likely that this imposition will not bring about the cessation of their activity or diminish their viability. At most it would result in better risk management and a more serious effort to prevent damages, which is useful to society as a whole. It appears that Calabresi is not afraid of disincentives to engage in social and economic activities or of overdeterrence. For him, even if at present no concrete good way can be pointed out to prevent damage, liability should still be imposed on the best decision maker, because it will give him the incentive to design better ways to prevent future damage. He can do so, for example, by hiring an engineer whose job is to create a safer product, even if at the time it appears that this modification is not possible: on the one hand it is not possible to create a safer product than the present one, and on the other this product cannot completely prevent damage when it is being used. This is a price that Calabresi is prepared to have large organizations pay. This is especially true in cases of mass torts (such as mass exposure to pollution or radiation) and serial torts (such as medical malpractice recurring in the same institution), which were practically non-existent in Maimonides's time. Even when the injured party is the best decision maker, as in cases of non-standard use or less essential treatments, such as cosmetic treatment, it is the best decision maker who has the ability and time to obtain the information (especially in the internet age), and he has the best control over the prevention of damage.

Calabresi also presents a multi-step process for determining the cheapest cost avoider, admitting that at times it is not possible to pick him out of a group of potential cheapest cost avoiders.¹⁷² It seems that this multi-step selection is even more complex in the case of the best decision maker test, which examines in every given situation not only the best decision makers themselves, but also their ability to motivate and "bribe" the cheapest cost avoiders to prevent the damage. Maimonides worked in a simpler reality, which usually allowed identification of the cheapest cost avoider from a limited list

172. CALABRESI, *supra* note 1, at 140-44, 152-60.

of two or three actors, given the time in which he lived and the types of cases he handled.

Calabresi works in the period of insurance, perhaps the most significant distributor of loss in society, alongside employers. Most of the activities at the basis of tort claims today are insured activities. Calabresi supports the insurance market, and as we have seen, it fits his thesis. Insurance directs behavior and provides information, and it is compatible with optimal deterrence according to his approach. Calabresi identifies the best decision maker and prevents damages through him. In this reality it is much easier to impose strict liability. In most cases the direct tortfeasor does not pay anyway; the insurance does. His participation takes the form of the premium payments (and the premium increases with more dangerous and less careful behavior), the deductible, the cancellation of no-claim discounts, the criminal liability if the tort has criminal aspects to it, the risk of being fired or denied promotion in the case of employees, and so on. Similarly, Calabresi operates in a reality of liability of employers, who in many cases are insured and are loss distributors. At times the state obligates them to purchase insurance to distribute losses and protect the rights of workers. Calabresi also operates within a reality of state regulation. At times the legislator regulates the field, for example by introducing a requirement to purchase a certain safety device to help prevent damage, even if it is not economical for the driver or for the manufacturer. The legislator enforces the regulation through insurance (insurance is not underwritten until it has been proven that the insured purchased the device in question) or through the state mechanisms (such as denying a vehicle test without proof of a required device having been installed). This reality helps prevent damages.

Maimonides experienced a completely different reality, which to a certain degree exists even today, albeit only in a minority of cases. Maimonides issued his rulings in a reality of damages caused mainly by individuals to other individuals: an ox belonging to one person gored another, ate his produce, or trampled on it; a person fell on another or on his property; a person damaged another in his sleep; a person's animal roamed freely on another's premises; a person was not careful enough and water or a fire from his field passed into the neighboring field; and similar damages between immediate neighbors. Maimonides hardly addressed a reality of mass and serial torts, of large and powerful entities causing massive or serial damages to numerous private individuals. Maimonides spoke of masters and slaves, not about employers and employees. It is important to note that in our time many claims are against employers, based on

vicarious liability. In some countries employers carry mandatory insurance, so that each claim against an employer means necessarily a claim against an insurance company. Maimonides does not deal with the reality of insurance and torts caused by mass production and modern industry, which is only natural, as the time of Maimonides precedes by centuries that of the industrial and consumer revolutions; neither did the practice of insurance exist, or at least it was not as common in his time as it is in ours.¹⁷³

Indeed, the difference between Maimonides and Calabresi's periods can be illustrated tangibly by various examples that each of them brings. Maimonides's examples, mostly from the Talmud, relate to a traditional agricultural society. The issues concern mainly the torts caused directly by a single person or his beast to another single person. In this situation compensation is paid directly from the tortfeasor's pocket to the pocket of the damaged party. By contrast, Calabresi presents examples taken from the world of modern concepts: means of mass production, damage caused by defective products, and producer-consumer relationships, including, for example, damages caused by controlled explosions in construction or industry, road accidents and work accidents, liability of employers employing numerous workers, and more. What is common to most of these activities is that they are usually insured. Insurance is therefore the mechanism by which compensation is paid.

In the world of Maimonides there was no insurance and there are no significant loss distributors. The damage fell in its entirety on the injured person or on the tortfeasor, and therefore careful thinking was required in each case about what kind of liability should be imposed on the best decision maker. Neither was there regulation. It should be remembered that during most periods, Jewish law developed clearly as a non-state or extraterritorial law; therefore it contains almost no regulation to help prevent damages.

Maimonides believed that the main purpose of tort law is to prevent damages, and not necessarily to correct an injustice or to restore the *status quo ante*. As noted above, there is considerable innovation therein. In Maimonides's day, the cost of strict liability was occasionally too heavy. In a world in which a domestic animal was the equivalent to a private vehicle, a truck, or a motorcycle of today, the imposition of strict liability on the owner of an animal that caused damage, in every case and under all circumstances, without the owner of the animal being able to distribute the loss over other members of

173. Indeed, the Halakhic decisors of recent generations needed to expand on the questions involved in the application of modern tort law in a context of modern reality in which the tortfeasor and/or the injured party are insured. See, e.g., SHEINFELD, *supra* note 32, at 332-35.

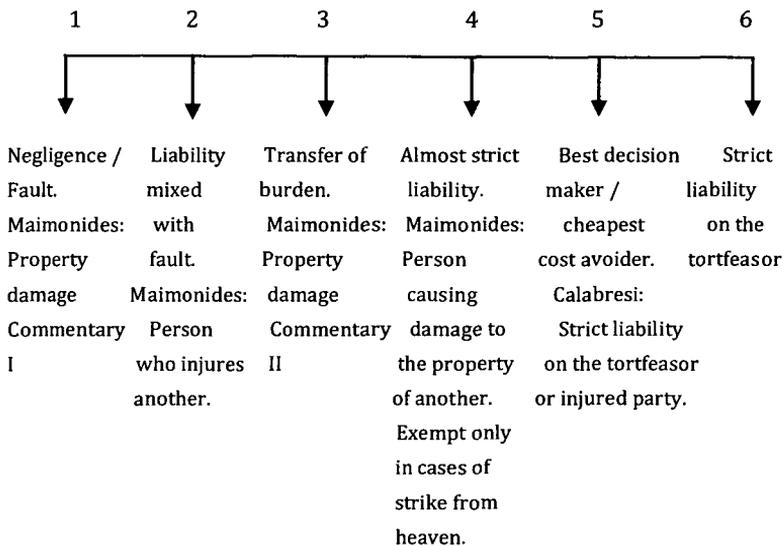
the community (as does the driver with respect to other drivers through the loss distribution mechanism of insurance), could lead to a real disincentive to own an animal. It is difficult to control an animal, at times more so than a car. Paying full compensation exacts a heavy toll in case of strict liability. In the reality of those days, for people who had a strong need for transportation, milk, meat products, etc., not owning an animal could deliver a deathblow to all economic activity. Full payment as an expression of strict liability of the owner, repeatedly for every damage caused by the animal, would reduce the level of activity and leave ownership of animals only to the rich, something that is undesirable both from the economic and the social-distributive point of view.

In any event, within the reality in which Maimonides operated, the fact of a person exercising control over the damage had great significance. Because Maimonides's aim was to prevent damage, he was prepared to impose strict liability or almost strict liability on the cheapest cost avoider to the extent to which he is capable of exercising control over his actions. Therefore, when it comes to someone who himself causes damage to another's property, Maimonides chooses to regard him as the best decision maker and imposes on him almost strict liability. The only exemption is the case of *force majeure* ("a strike from heaven"), where a person has truly no control. When he has control over his actions a strict and absolute liability must be imposed on him, without examining his fault in each case. In this case Maimonides is very similar to Calabresi. It is true, however, that when the issue is bodily injury caused to another, Maimonides imposes liability mixed with an element of fault on the cheapest cost avoider. He deviates from the rule of strict liability, but in this case there is a specific and local explanation and an element of quasi-punishment is added, which is characteristic of Maimonides's theory and Jewish tort law in general at this point, in its intermingling with criminal law. In this case Maimonides requires a specific *mens rea*, an absolute requirement in criminal law that is hardly ever present in tort law (except, for example, in intentional torts in common law).

In contrast, in the case of damages caused by a person's property, Maimonides cannot afford to impose strict liability on the owner of the property as the best decision maker. He is still the cheapest cost avoider in most cases, but in this case he needs to be treated more leniently. The sources concerning this matter suggest imposing liability on the cheapest cost avoider in these cases under a fault-liability regime in the economic sense. This resembles the Hand formula, and enables the best decision maker who caused damage to

defend himself if the required prevention expenses were higher than the expected damage, as in the cases of the binding of the animal and of the uncommon wind, etc., or according to another interpretation, by shifting the burden of proof. Either way in the case of damage by a person's property, Maimonides's approach is far removed from that of Calabresi, and here the differences between the periods and the examples gain their fullest expression. Note that here too the matter involves the imposition of liability on the cheapest cost avoider, but Maimonides locates the optimal point on the opposite side of the scale from Calabresi: it is negligence, or shifting the burden.

It is therefore possible to understand differential liability in this way, which for Maimonides (unlike Calabresi) is not necessarily strict in each case:



VI. A PRELIMINARY SKETCH OF A MODERN MODEL OF DIFFERENTIAL PLURALISTIC LIABILITY: DIVISION INTO GROUPS OF TORT AND INTEGRATION OF NON-ABSOLUTE LIABILITY WITH A BEST DECISION MAKER REGIME

Inspired by the tort theory of Maimonides and using some elements taken from the tort theory of Calabresi, one can offer an integrated model based not on "economic only" or "deontological only" considerations. Below we outline a preliminary sketch of a modern model of differential pluralistic liability.

We do not claim that the model proposed below is necessarily the best, or that Calabresi's model is unsound, nor that our model is more efficient economically. Our goal is merely to present a pluralistic

model based on the theory of Maimonides as it was interpreted and described in this paper, primarily in light of our understanding of Calabresi's and Posner's theories.

A. The Best Decision Maker in Conjunction with Liability that is Not Only Absolute

The best decision maker or the cheapest cost avoider is a logical doctrine for the purpose of preventing damage. We saw that Maimonides adopted a similar doctrine and examined who was the most effective avoider in a series of categories of tort cases (although Maimonides did not use the terminology of Calabresi or the sophisticated and detailed analytical methods of this theory). It is impossible to truly and reasonably explain a large part of his sources in matters of tort, especially in the *Code of Maimonides*, in any other way; moreover, in *The Guide for the Perplexed*, Maimonides explicitly explains that the goal is indeed to prevent damage, and thus to reduce the costs created as a result of a tortious event, and not necessarily to compensate for past damages. His test for preventing damages resembles the modern cheapest cost avoider or best decision maker test, namely: the imposition of liability is intended to provide an incentive to prevent tort events, and liability is imposed on those who can most efficiently and effectively prevent causing damages, even if there is no fault attached to their acts.

But we do not have to fill the content of these doctrines precisely with strict liability, as Calabresi did. It is true that strict liability is more stable and certain. It does not entail long discussions on questions of fault, and indeed Calabresi's, unlike other economic approaches (such as Posner's approach and the Hand Formula) or non-economic approaches (such as corrective justice approaches), shook off the question of fault. We believe, however, that there is room to take into account Calabresi's theory, at least in some categories of tort cases, also using other liability regimes that are either fault-based or mixed.

For Maimonides, liability is differential and rests with the cheapest cost avoider, depending on the type of case.

In cases of damage to other people's property, a very limited exemption is granted to the best decision maker (only in cases of *force majeure*), and the liability is therefore strict and almost absolute. In cases of bodily damage to other people (today's tort of assault or battery), Maimonides imposes on the cheapest cost avoider liability that is mixed with the concept of fault (a type of punishment), and adds considerations of fault in determining liability for the cheapest cost avoider. With regard to damages caused by one's property

(monetary damages), we are dealing with negligence in its economic sense (the Hand formula), or shifting the burden of proof. How can we explain this divide?

Maimonides hesitates to impose strict liability in all cases, especially in those groups of cases in which imposing such liability may result in overdeterrence and the cessation of the activities of some who are engaged in a business that contributes positively to society. One may say that this indicated a great difference between Maimonides's and Calabresi's approaches. But, as a matter of fact, these approaches are closer to each than they appear to be. As we have seen, the differences stem also from very different historical circumstances, which are reflected in the examples they cite and use as bases for their approaches. Calabresi focuses on industry in a modern world, which involved mass tortfeasors with deep pockets, and sophisticated risk management. These circumstances serve as a suitable background to impose strict liability on those who can prevent the damage in a cheaper and more effective way, or, according to the development of the idea, made by Calabresi and Hirschhoff, to transfer information to the cheapest cost avoider as a best decision maker. It is likely that imposing liability on large entities that manage risk will not bring about the cessation of their activity, but makes them better risk managers and better damage preventers; thus, efficiency is achieved, with no fear from overdeterrence. Also, insurance, which did not exist in Maimonides's times, is perhaps the most significant distributor of loss in society, since most of the activities at the basis of tort claims today are insured. Insurance plays a significant role in Calabresi's thesis, directing behavior and providing information, and it is compatible with optimal deterrence according to his approach. Similarly, Calabresi operates in a reality of employer liability where, in many cases, employers are insured and are loss distributors, and also within a reality of state regulation that is sometimes enforced by mandated insurance.

Maimonides operated with the reality of damages caused mainly in an agricultural society by individuals to other individuals or damages between immediate neighbors. These examples still exist today, but they are only a minority of tort cases. In these situations, in which compensation is paid directly from the tortfeasor's pocket to the pocket of the damaged party, with no significant loss distributors and no regulation, imposing liability on the tortfeasor as a matter of strict or absolute liability regime was not always efficient, and could easily result in overdeterrence and the disincentive and even *de-facto* the cessation of useful and needed social activities, such as having an ox or a goat.

Therefore, even though Maimonides believed that the main purpose of tort law is to prevent damages, and not necessarily to correct an injustice or to restore the *status quo ante*—a considerable innovation—he combines in his best decision maker approach also deontological content of *Peshia* in certain types of cases. The keyword in his thesis is control. Strict liability or almost strict liability is imposed on the cheapest cost avoider to the extent to which he is capable of exercising control over his actions. Given this, we can understand the divide mentioned above. Someone who himself causes damage to another's property, is regarded as the best decision maker and the liability that is imposed on him is almost strict. The only exemption is the case of *force majeure*. When he has control over his actions, strict liability is imposed on him without examining his fault in each case, similar to Calabresi's model. In the case of a bodily injury caused to another, the liability imposed is mixed with an element of fault on the cheapest cost avoider. For the deviation from strict liability there is a specific explanation and an element of quasi-punishment is added—a specific *mens rea*, which is a sign for the Jewish tort law's intermingling with criminal law. But when the damage was caused by a person's property, strict liability on the owner of the property as the best decision maker may result in overdeterrence. He is still the cheapest cost avoider in most cases, but the liability imposed in these cases is a fault-liability regime in the economic sense that resembles the Hand formula, and that enables the best decision maker who caused damage to defend himself if the required prevention expenses were higher than the expected damage, or according to another interpretation, by shifting the burden of proof.

That being the case, theoretically, Maimonides's and Calabresi's approaches are much closer than they appear, although they are certainly not similar. The main difference between them is that Maimonides teaches us that following the model of the best decision maker or of the cheapest cost avoider does not necessarily mean always imposing strict liability.

We believe that this perspective can be a beginning for a preliminary outline of pluralistic tort liability that is differential: the best decision maker or the cheapest cost avoider is the basis for liability, and Calabresi's approach plays a central role in this model. But its implementation is not only through the imposition of strict liability on the best decision maker or on the cheapest cost avoider. In some of the tort event groups this will be indeed the result (perhaps with the exception of *force majeure* cases), where there is also almost complete identity between Calabresi's approach and that of the proposed model; but in the case of some of the other tort event

groups, reduced liability is imposed on the best decision maker or on the cheapest cost avoider, with a certain touch of fault.

Below we examine the tort event groups for which strict liability is appropriate and those for which reduced liability is appropriate. The differences between the approaches of Maimonides and Calabresi, which stem, among other things, from different backgrounds characteristic of the two periods in which they lived and worked, can be highly relevant for devising a new pluralistic approach. This approach considers placing one type of emphasis on certain considerations and on certain types of liability in traditional cases (which are also common today) involving individual uninsured tortfeasors, and a different type of emphasis on other considerations and on a different type of liability in other, larger-scale cases, which are more typical in our time—cases involving large corporate tortfeasors, risk managers, and calculated, insured loss distributors. In this way, Maimonides's and Calabresi's approaches can help create a pluralistic approach that does not necessarily contradict the rationale underlying the original approaches.

B. Dominance of Considerations of Efficiency and Absolute/Strict liability in Claims Against Insured Economic Institutions that Distribute Losses

In the reality illustrated by Calabresi, it is appropriate to implement strict liability on the best decision maker. When examining employers and employees, producers and consumers, drivers and pedestrians, physicians and patients one against the other, it is easy to see that in each pair, barring exceptional cases such as improper use of products, the former are the best decision makers, and it is easier to impose liability on them, even absolute liability. These are loss distributors with deep pockets, risk managers who calculate damages and economic efficiency and who do not themselves pay for damage. At most, after considering potential damages based on information received from the insurance companies (and all these entities are insured), they increase slightly the price of the products they offer (a kind of self-insurance) in order to purchase insurance.

This is indeed an ideal situation for imposing strict liability on those who can prevent the damage in a cheap and effective way, or on those who can pass information to the cheapest cost avoider in their capacity as best decision makers. In this case, there is less danger (although it still exists) of halting activity because of low efficiency. According to Calabresi, imposing strict liability on the best decision maker in such cases for reasons of efficiency causes people to exercise greater caution and to invest prudently and wisely into the prevention

of damage. Recall that even in cases in which it would be impossible to indicate a good way of avoiding the damage, the tortfeasor would not be exempt from liability, which would be imposed upon him as the best decision maker in order to motivate him to design more effective ways of preventing future damage. This is even more true in cases of mass and serial torts.

In all these situations it makes sense, at least from the point of view of applying the doctrine of the best decision maker or of the most efficient cost avoider, to impose strict liability based on utilitarian considerations of efficiency. Moreover, the imposition of strict liability in these situations does not necessarily contradict the deontological considerations, because in a situation in which the tortfeasor does not pay out of his own pocket and treats the prevention of damages as an additional expense in the chain of expenses, there is no reason to restrict his liability on a deontological basis (and impose it only if there is fault), as long as he does not pay himself.¹⁷⁴ Considerations of efficiency should prevail here, according to the theory of the best decision maker or of the most efficient cost avoider. Using the cheapest cost avoider and the best decision maker theories result in optimal deterrence—and not over-deterrence—according to Calabresi.

As far as labeling the tortfeasor's actions as immoral, today this approach belongs not to tort law but to other laws, especially criminal law. As far as tort law is concerned, if a person pays for the damage, he is exempt from liability. Liability does not stay with him for life and is usually not relevant in future cases. In this group of cases, Calabresi's approach and the understanding of Maimonides's approach in light of Calabresi's prevail. Note that in some of the types of cases presented by Maimonides the result is similar to that of Calabresi's—absolute liability on the cheapest cost avoider or best decision maker. We suggest, therefore, that this will be the outcome—or at least the dominant consideration in reaching a decision as to the imposition of tort liability—mainly in cases of claims against insured economic institutions that distribute losses. In these cases, we think that Maimonides also would have agreed, had he operated in this period, to the imposition of strict liability on the cheapest cost avoider or best decision maker.

174. Cf. Ariel Porat, Eyal Zamir & Barak Medina, *Law, Economics, and Morality* 41 Hebrew Univ. L. Rev. 415 (2011) (Heb.), criticizing EYAL ZAMIR & BARAK MEDINA, *LAW, ECONOMICS, AND MORALITY* (2010). Zamir and Medina agree that imposing no-fault liability in situations in which there is insurance does not violate deontological limitation. See Eyal Zamir & Barak Medina, *Law, Economics and Deontological Ethics—A Reply to Ariel Porat*, 41 HEBREW UNIV. L. REV. 439 (2011) (Heb.).

C. Dominance of Deontological Considerations and Differential Liability in Claims Against Not Necessarily Insured Individuals, and Liability Based on Intent and Fault in Cases of Assault

Maimonides operates within a reality of damages that occur mainly between individuals, unlike the classic examples of Calabresi. But these old examples are not entirely irrelevant for our time. The bull has been replaced by the car and perhaps by the dog. Water and fire spreading from one field to another remain, as do other nuisances such as noise, odor, etc. It is true that the number of tort claims of this type has decreased dramatically. Today a large part of tort claims are against employers and insurance companies, characterized by the types of activities mentioned above. Nevertheless, classical and private tort acts are not altogether absent nowadays. In these situations, when actions are not necessarily insured and the defendant's losses are not distributed, the invariable imposition of strict liability under all circumstances on the best decision maker or on the cheapest cost avoider can be problematic. There should be room for considerations of fault, morality, and non-strict liability. In these cases there may be a serious disincentive to engage in certain activities if strict liability is imposed when there is no insurance and no loss distribution.

In these situations, as noted, we can understand the imposition of strict, almost absolute liability on the person who has personally damaged another's property. But liability should not be quite absolute and allow for exemption in the cases of *force majeure*, and it should be taken into account that the liability rests on his shoulders and not on the insurer's.

When it comes to damage to the human body caused by injuries inflicted by another person (today's tort of assault or battery), Maimonides's proposal to impose strict liability mixed with an element of fault on the cheapest cost avoider, for punitive-like reasons and for the integration of the tort and criminal rationales, seems logical. When dealing with such damages, it is not advisable to consider the human body in economic terms only. Therefore, the laws of damages caused to the human body emphasize deontological considerations that support the imposition of fault-based liability (especially those with a tort-criminal flavor). Here and only here, Maimonides demands a moral element, and even in modern law, in certain legal systems, there is an element of intent for the tort of assault. This element of intent is not found in the case of damage to property or damage by property, and not when the activity causing the risk is organized and insured, as in cases of bodily injury caused by road accidents or defective products. In the latter cases it makes

sense to emphasize efficiency considerations and to impose strict liability on the best decision maker or on the cheapest, most efficient cost avoider.

To summarize, for cases of damages caused by a person's property (monetary damages), the differential scale suggests a greater proximity to the fault-based liability regime, and more concretization in examining the cases in question, that is, not being afraid of bearing the costs of the examination of a specific case. But in cases of physical damages inflicted by a person (the tortfeasor) on another's property, the liability is of a higher level, namely strict and almost absolute liability. In this case, the level of generalization increases and the level of concretization decreases, and is preserved only in individual cases. In cases of injury, that is, assault, the rationale is rather punitive, owing to the nature of the law and its connection with the penal code in this matter.

VII. CONCLUSION

Calabresi's approach helps clarify Maimonides's rules, which many scholars had difficulty explaining because of his deviation from the principle of fault. We do not claim that one can identify the best decision maker as early as eight hundred years before Calabresi. But the study of Calabresi's theory greatly clarifies the tort theory of Maimonides and reveals a legal giant who long ago incorporated in a part of his theory economic approaches for the prevention of damage, similarly to another legal giant, Calabresi. In another part of Maimonides's theory, his approach is similar to other economic approaches of negligence, mostly of another contemporary legal giant—Richard Posner, combined with deontological and other considerations. These legal giants are not wrestling with each other. Calabresi and Posner help us understand the ancient Jewish sources, and at the same time shed new light on their own approaches.

This work presents a preliminary outline of a model of tort liability based mainly on the analysis of the approaches of Maimonides and of Calabresi. This outline highlights a certain split between (a) the need to implement strict and almost absolute liability, and efficiency considerations in some tort cases, and (b) to apply liability that is not absolute but rather fault-based, as well as deontological considerations in other tort events. The former considerations apply especially to cases in which insurance is dominant, when it is possible to identify a deep pocket, and when loss is distributed. The latter considerations apply especially in classical traditional tort law cases dealing with a private tortfeasor who is uninsured, has no deep pockets, and whose losses are not distributed. This is the starting

point for an outline of a model of differential liability based on a combination of the approaches of Maimonides and Calabresi, also with influences of Posner's approach. This outline is also an attempt to understand, on the one hand, the difference between the approaches in light of their respective historical periods, and on the other, to introduce a single model of tort liability that is suitable in our time both with regard to categories of damages in the industrial and developed world, and to the classical categories of damages that have decreased considerably in volume but have not altogether disappeared from the scene.

In the next stage of discussion, it is necessary to fill these preferences with content. It is possible to end up with an absolute division, so that in some cases absolute importance is assigned to utilitarian considerations and in others to deontological considerations, which will be manifest in the differential nature of the liability regime selected for each group of cases. But we think that it will be necessary to follow a pluralistic and more complex road, creating a theory of balance originating in the details of *dominance*: What would be the actual result in cases in which some considerations are taken to be more dominant than others, given that we are dealing, in these cases, with less dominant application of the other types of considerations? In other words, even in torts involving large and sophisticated tortfeasors—insured tortfeasors with deep pockets whose losses are distributed—it may be possible to have at least some space for deontological considerations. We must therefore show how and when. Moreover, in cases of private tortfeasors, and of traditional tort events, it may be possible to have at least some space for utilitarian considerations, and we must also show the measure of these considerations.

We will also need to consider various intermediate cases, such as a private individual tortfeasor who is insured and whose losses are distributed, *vis-à-vis* an organization that by virtue of its type is supposed to behave as a large insured institution and a best decision maker, but does not do so in practice because of its size, for example a small contractor employing two or three workers, or a small manufacturer.¹⁷⁵

We must also think about the quasi-punitive implications of Maimonides and about whether these implications should exist in intentional torts, which form a basis for punitive damages, and in cases dealing with the essence of the prohibition to do harm. We must also think of consequences in cases of serial tortfeasors who may

175. Cf. Roland N. McKean, *Products Liability: Trends and Implications*, 38 U. CHI. L. REV. 3, 4 (1970).

deserve special treatment under tort law (as in the theory of Maimonides), and not only, for example, under criminal law, where previous actions are important for the present verdict. This proposal may be improved, for example, by new observations about the attitude toward the tort liability of serial tortfeasors, for example with regard to the solution of punitive damages¹⁷⁶ or with regard to recognizing increased risk only for serial and mass tortfeasors.¹⁷⁷

Following the initial outline presented here, such a proposal may be entirely original, but can also rely on suggestions raised in the past, with various new improvements and perspectives, taking into account a possible integration between the theories of Maimonides and Calabresi, in light of the period in which we live today, in order to provide a solid basis for modernized approaches following the approaches of these legal giants.

Such a new or modernized pluralistic approach does not necessarily clash with the rationale underlying the original approaches of Calabresi and Maimonides, but derives maximum benefit from them. It also may contribute to the understanding that a pluralistic approach may serve as a bridge between what seems as contradictory law and economics fault-based and no-fault approaches.

176. See A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869 (presenting the multiplier approach, and explaining that from an economic perspective serial tortfeasors are not always sued and do not always end up paying damages for the results of their actions. Therefore, correctly calculated punitive damages, in cases in which the tortfeasor has been sued, will eventually result in optimal deterrence and not in overdeterrence); see also James Andreoni et al., *The Carrot or the Stick: Rewards, Punishments, and Cooperation*, 93 AM. ECON. REV. 893, 894 (2003); Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 464 (2004).

177. See 4693/05 Carmel Hospital v. Malul (8.29.2010) (Isr.).

