

“We Imagine the Past to Remember the Future”—Between Law, Economics, and Justice in Our Era and According to Maimonides

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PREFACE

First of all I can't resist welcoming you to this, my law school, a place where I have been continuously as a student and teacher for almost sixty years, and to welcome you especially because it was the first of the great law schools in the United States which was also open to Jews as students and faculty members. A tradition, an openness that the rest of this university, like most other universities, and law schools did not have, and which has made me very proud to be a part of this school.

Second, a personal matter as to the joy being here this afternoon. Many years ago, Bob Cover, the great scholar, asked me about a correspondence between great *Ashkenazim* Rabbis in the Middle Ages and some people in Italy whom he said were known as the *Zekenim* of Lugo, the Elders of Lugo, and did I know of them. I said: “yes, I descend from them, they are my ancestors, that is who I am.” These are the people who were also the ancestors of Guido Tedeschi, Gad Tedeschi in Israel, my mother's cousin. And I thought perhaps there was a correspondence, a dialogue between them and Maimonides. Of course there wasn't. So instead of having it then, it is particularly nice to have it here today in some way. And I thank Benjamin (Benny) and

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A response to Yuval Sinai & Benjamin Shmueli, *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*, 26 YALE J.L. & HUMAN. 59 (2014), following a lecture at a panel on “Tort Law in a Comparative Context,” the 17th International Conference of the Jewish Law Association, Yale Law School, August 1, 2012.

Yuval very much for thinking of it.¹

My third point is a caveat: There is a danger always of reading ancient texts and ancient scholars in modern ways. We can't help it. If you look at what Benny and Yuval say people said of Maimonides in the nineteenth century, you see that they tried to make him a fault scholar,² because the nineteenth century was so concerned with fault. And so today, there is nothing strange about reading Maimonides to be a precursor, presager of law and economics, because so much of what is going on in this area of law is that way. Is it right or is it not? Alex Bickel often said (quoting Namier³): "we imagine the past to remember the future,"⁴ and there is something of that in what is going on today. But that again helps us to understand things which were there, though how known they were to the people who lived there, in their own time, is less clear.

Now, despite this caveat, there clearly is a lot in what Maimonides was doing which can be viewed as profoundly modern. And to the extent that Benny and Yuval say,⁵ I think correctly, that some of the things that I said seemingly first in the United States in the last half of the last century were presaged and said first by Maimonides, I have got to say that that gives me much more pleasure than my dear friend Yizhak Englard's finding that some of the things were said by some German in the nineteenth century. For any number of reasons I am much more pleased to be presaged by Maimonides.

EMPIRICAL DIFFERENCES IN TIME AND THEIR IMPLICATIONS

So I come to substantive comments. And here I think it is very important, as in certain places Benny and Yuval have said, to distinguish between particular results in particular situations that Maimonides described, and approach, because particular results may differ depending on the empirical situation of the time.⁶ So that there is nothing strange with people in the 19th century using "assumption

1. Yuval Sinai & Benjamin Shmueli, *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*, 26 YALE J.L. & HUMAN. 59 (2014), following a lecture in a panel on "Tort Law in a Comparative Context," the 17th International Conference of the Jewish Law Association, Yale Law School, August 1, 2012 [hereinafter Sinai & Shmueli].

2. *Id.*

3. LEWIS B. NAMIER, *CONFLICTS: STUDIES IN CONTEMPORARY HISTORY* 69-70 (1942) ("When discoursing or writing about history, [people] imagine it in terms of their own experience, and when trying to gauge the future they cite supposed analogies from the past: till, by double process of repetition, they imagine the past and remember the future.").

4. ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 13 (1970) (quoting Namier's discussion of history with approval in an analysis of judicial lawmaking).

5. Sinai & Shmueli, *supra* note 1 at 76.

6. Sinai & Shmueli, *supra* note 1.

of risk” to conclude that the workers should be the bearers of the loss, in situations in which they thought of them as better able to avoid the harm. Conversely, in the twentieth century we moved to the opposite view. For a judge that is a problem because a judge has to deal with all the old precedents, and that is why Fleming James, my teacher, wanted to get rid of assumption of risk as a doctrine, and substitute for it the same thing under another name, so that the precedents would not be there and we could use the new empirical viewpoint.

And so when one describes Maimonides’s treatment of the ladder accident as an act of God or the question of whether respondeat superior should apply as to slave and master, one must realize that all of those things may well have been due to empirical differences between that time and now. As such, they are much less important than whether one is asking the same kind of question or not.

Distributional consequences can also be very different in different times. Benny and Yuval have pointed this out, both in terms of the availability of insurance and of other things,⁷ and have correctly explained that these differences might well lead one to conclude that Calabresi would do what Maimonides argued for had Calabresi been there then.

ARE THERE DIFFERENCES BETWEEN THE DIFFERENTIAL LIABILITY AND THE CHEAPEST COST AVOIDER DOCTRINES?

I would rather focus on the differences that Benny and Yuval have pointed out between Maimonides’s point of view and mine; because I think in fact they are less great than might appear.

First, as to the “differential liability approach”: now, there are two different ways of looking at that. One is that there were some areas in which Maimonides seemed to rely on fault more than on strict liability while Benny and Yuval say I relied on strict liability (whether on injurer or on victim) throughout. That isn’t a completely accurate characterization. That is, from the beginning I thought that there were some areas where strict liability did not work. Medical malpractice was one of them.⁸

The question of whether those areas are big or small is again an empirical one, not a difference in approach. More important, does Maimonides’s partial liability approach allow splitting between parties? Can we split between one party and another and use fault to some extent and non-fault to some extent as well? Here one must

7. *Id.* at 126.

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

consider that when I started writing, I was writing in a context, an Anglo-American and American context especially, which was very peculiar. The context of tort law in the United States at that time was one of "all or nothing." One put the loss on one party or one put it on the other. One did not split. That was a very deep common law tradition—the reason for it is hard to say, but it was always there—and it was in that context that I was writing.

Later on I wrote a little article in *Indiana*⁹ in which I said that things were happening in American Tort law that were as important a change as the coming of insurance had been at the beginning of the 20th century. This was the coming of splitting. Tort law, now and in the future, had to be analyzed in view of the fact that it no longer required an "all or nothing" placing of the loss on one side or on the other.

This was partly due to the coming of, so-called, comparative "negligence." But it also followed from any number of other things, statistical cause being one of them. Indeed, I have been saying in my teaching—I haven't written it—that we may even get to a kind of science fiction of partial proximate cause. In time we may no longer say "you are the proximate cause" or: "you are not." There may come to be situations in which we will say, "you are more of a proximate cause" or "less," and therefore split to some degree. And it is of this that one finds some presages in Maimonides.

But more important is the question of what comparative negligence compares. We call it comparative negligence but it isn't. In the United States, what is called comparative negligence is also comparative responsibility. And this has been said by court after court.¹⁰ And sometimes it is even comparative non-fault. Indeed, the law of New York has expressly said that one may split according to comparative non-fault.¹¹

When one does that, there is also the possibility of employing a comparative responsibility in which one takes into account whether one party is, because of its negligence, the cheapest decider, the least cost avoider, the best decision maker, and the moment one does that

9. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 859 VAL. U. L. REV. 30 (1996).

10. See, e.g., *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1459 (6th Cir. 1993); *Moffat v. Caroll*, 640 A.2d 169, 175 (Del. 1994). See also, RESTATEMENT OF TORTS (THIRD): APPOINTMENT OF LIABILITY § 8 (2000).

11. See Laws of 1975, Ch. 69, codified at N.Y. C.P.L.R. 1411-13 (MCKINNEY 1975). The Report of the Judicial Conference explained that in the new statute the phrase "culpable conduct" was "used instead of 'negligent conduct' because this article will apply to cases where the conduct of one or more of the parties will be found to be negligent, but will nonetheless be a factor in determining the amount of damages." 21 ADMIN. BD. of the Judicial Conference ANN. REP. 240 (1976).

one has a system, which is extraordinarily like Maimonides, in which because somebody is at fault, he becomes, to some extent, the best decision maker and damages are split. For that reason, in my recent teaching, I say that when people say “comparative negligence has won over non-fault, and non-fault-splitting,” they are too simplistic. Rather, comparative negligence may represent a more sophisticated splitting in which non-fault combines with fault to form the basis for determining who is the better decision maker. And it may well be that it is this approach that has been winning out in the United States. And this approach is also extraordinarily like Maimonides.

Rather than going into details, I would say one other thing about splitting. Be careful, because to the extent that too much splitting, or even too much consideration of the possibility of splitting, becomes extremely expensive in an administrative sense we may choose not to do it. Thus Judith Kaye, the great Chief Judge of New York, in *Hymonovitz*,¹² a decision applying statistical cause, said that there are some things we won’t let the defendant prove, because it is just too costly to do it. So the question of whether when one is dealing with only two people, as Maimonides was, it was cheap enough to do it but in other circumstances it may not be, is again an empirical question, not one of “approach.”

ON DEONTOLOGICAL CONSIDERATIONS

Finally, on deontology. Well, I don’t talk deontologically, but that doesn’t mean that much of what I have written doesn’t have elements in it that are very similar to deontological analysis. For instance, I have written in “Toward a Unified Theory of Torts”¹³ that at any given moment there will be expectations that arise from systems that were established because of their economic consequences. These expectations lead people to believe that they have a right to recover. And, as a result of this, we think they should recover even though in that situation their recovery isn’t economically justified.¹⁴ I have analyzed the great opinion of the 18th century, *Scott v. Shepherd*,¹⁵ the flying squib, in these terms and suggest that this is why the case had to come out as it did.

And here I might ask, did such “expectations” arise in this way, or did they arise—not from economic reasons—but directly for deontological reasons? Who knows? Consider the old debate: is the

12. *Hymonovitz v. Eli Lilly & Co.*, 73 N.Y.2d 487 (1989).

13. Guido Calabresi, *Toward a Unified Theory of Torts*, 1:3 J. TORT L. 1 (2007).

14. *Id.* at 6.

15. 3 Wils. 403, Common Pleas (1773) 96 Eng. Rep. 525 (K.B.)

reason for Kosher that certain meats were dangerous, as Maimonides himself wrote in *the Guide for the Perplexed*,¹⁶ and it was efficient to prohibit them, or were they prohibited for independent reasons? Today it doesn't matter. Such rules come to have a life of their own. For a long time Catholics didn't eat meat on Friday. The original reason for this pretty clearly was to give a subsidy in a certain century to the fishing industry in Portugal. But this didn't matter after a while. The rule got a life of its own. Thus, one can talk of such things deontologically or one can talk of them using other words, but it isn't really that different.

More important is the fact that often if we are to do truly sophisticated economic analysis, we must take into account not just the effect among the parties to a deal but also to people outside the deal. People sometimes say that, "even if someone is willing to sell his or her body or take a risk," such behavior cannot be permitted. They give paternalistic reasons or say it is against God's will. I don't much think that that's what going on. I think these are other ways of saying that there are many people who are offended, who are hurt morally, if someone sells himself or herself into slavery. And to ignore these costs, which traditionally economists have not taken into account, is a mistake. It is a pure mistake in economics. That's what I am writing about now, because these are as much costs as any direct harm to me. It is as much part of my utility function that I am offended by the fact that you have sold yourself, as it would be if I sold myself. And that cost must be taken into account if one is to seek a truly complete efficiency system.

The reason why we will not let certain things be sold in the market is because others are offended by such sales. Now one can call it "God's will," which is one very powerful way of speaking (and to the extent one is religious one may well talk that way) or one can use economic language—that something that is happening creates a cost that must be taken into account (which is a very secular and utilitarian way of speaking). In fact, we can almost always speak either way to describe what is going on. And the choice of language depends on what describes it best for us, what resonates most to the audience to whom we are speaking.

I tend to write, because I am in an American context, in the more economic way, and yet the result, the analysis, is not that different from Maimonides. This is because Maimonides, when he does that, always seems to ask: "But does it cost too much? Does it cost too much?" Is taking my offense into account too harmful in terms of the

16. MAIMONIDES, *THE GUIDE FOR THE PERPLEXED* 3:48.

result or is it not? And when he does that, we see that the analysis is very much the same as mine.

In fact, Maimonides himself wrote that “whether the punishment is great or small, the pain inflicted intense or less intense, depends on the following four conditions.”¹⁷ The first condition is “[t]he greatness of the sin. Actions that cause great harm are punished severely, whilst actions that cause little harm are punished less severely.”¹⁸ It seems that this statement (taking into account the cost and the harm caused by the offense) reflects an analysis quite similar to my analysis.

To put it another way, the object of law, as Maimonides said very clearly, is justice. But justice, as Maimonides clearly saw, also includes these economic factors. Justice is not only what in my book I call “other Justice.”¹⁹ I never meant “other Justice” to be justice as a whole. What I meant by “other Justice” was that we may not be able to explain everything—that there are still issues that go beyond our explanations. But true justice is the whole thing. Justice includes straight traditional economic efficiency, as Maimonides said. It also includes that which one can say is “God’s will,” or as I might say it, that which results from taking into account what “other people are offended by,” and it includes distributional considerations as well.²⁰

But, the object of the whole thing, as Maimonides clearly understood, was and remains to make this system of law, like every other, approach justice as much as humans can.

CONCLUSION

Reading the ancient sages, like reading the canonic works of literature—be they *The Divine Comedy* or *King Lear*—is essential to understanding modern law. Such writings give powerful insights into how analogous problems were viewed in different times. Sometimes, after allowing for empirical differences, the approach of the sages seems strikingly similar to modern approaches. And, at first, one must wonder whether one is reading the modern into the past, or whether it truly is there. But when one nevertheless concludes that the similarities are indeed present, one is doubly rewarded. For then one is led to a fuller and deeper understanding of both the past and the

17. MAIMONIDES, THE GUIDE FOR THE PERPLEXED 3:41.

18. *Id.*

19. GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 78, 81 (1970).

20. For distributional considerations see, e.g., Guido Calabresi, *The Complexity of Tort—The Case of Punitive Damages*, in EXPLORING TORT LAW 333, 334 (M. Stuart Madden ed., 2005); Guido Calabresi & Jon T. Hirschoff, *Toward a Test of Strict Liability in Torts*, 81 YALE L.J. 1055, 1077-85 (1972); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1114-15 (1972); Guido Calabresi, *The Pointlessness of Pareto: Carrying Coase Further*, 100 YALE L.J. 1211, 1223-29 (1991).

present.

It was with skepticism that I initially came to Benny and Yuval's work. After further reading and much thought, I became convinced that they are right and that there is a great deal in Maimonides that presages both my work and sophisticated modern Law and Economics generally. This is a reason to rejoice. Not only can we now understand that great man and the breadth of his thinking better, but we also have a clearer picture of the strengths and weaknesses of modern scholarship. This is precisely what Law and Humanities—Law and History, Law and Literature—can lead to. I am grateful to Benny and Yuval for making me, as well as my writings, part of their project.