

REGULATING THEFT - LESSONS FROM BIBLICAL LAW

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Abstract:

Theft is widespread and new forms of theft are threatening our society. Unfortunately, current anti-theft laws are ineffective, rendering thievery the most common crime reported in the USA. Deterrence of theft is primarily based upon criminal sanctions, making public enforcement the major regulatory mechanism. Practically, most property owners give up upon the enforcement of their property rights in relation to thieves. Instead, they resort to costly protection methods and insurance. In essence, property owners are bearing a sort of tax, paid to insurance companies, which substitutes the legal system and enforcement of anti-thievery regulation.

Unlike modern law, the Bible regulated thievery under tort law, by encouraging private enforcement by the owners. Biblical theft law created an exceptional structure of up-scaling punitive damage levels that is unique, even in comparison to other forms of illegal misappropriations or illegal taking of property, such as robbery. The biblical up-scaled multiple damages regulation is unique legal regulation in comparison to the structure of punitive damage remedies, in ancient as well as in modern laws.

The paper analyzes the biblical theft law and explores its economic and social rationale. The analysis of the different levels of compensation leads to a new understanding of the distinctiveness of biblical theft law. The paper shows that the Bible designed a rational system that may be more effective in deterring thievery while at the same time incentivizing property owners to be private enforcers of the law. Deterrence and payoffs to owners against the thieves reflect both: protecting private interests and social welfare interests. While private interests are served standard compensation, the public interest is a function of the kind of stolen property, and in particular post theft actions by the thief. The paper suggests that the Bible internalized into the compensation structure the social welfare losses resulting from the destruction of value by the thief. The analysis also reveals the Bible construes a two-

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step deterrence structure that increases the effectiveness of deterrence.

The wisdom of biblical theft law may have important implications for improving the current regulation of thievery. The deterrence effects of the biblical law are more effective, and the implementation of these principles will lead to a better deterrence of thievery, at no additional social costs.

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I. INTRODUCTION

Protection of private property rights is a cornerstone of biblical law. The earliest biblical code - the "Book of Covenant"¹ - sets a comprehensive set of rules to safeguard private property from tortious interference. The basic biblical rule forbids stealing and requires the wrongdoer to make the damaged whole.² The tortfeasor has to compensate the victim in order to cover the value of the loss inflicted by the tortious action, hence for example, "he that killeth a beast shall make it good; beast for beast."³ Like modern tort law, the Bible usually deters tortious activity by imposing upon the wrongdoer a cost that is at least equal to the inflicted harm.

Modern laws apply the similar compensation structures to thievery as to any other property misappropriation. Biblical tort law, however, creates exceptional standards of punitive damage levels to stealing. The treatment of thievery is unique even in comparison to other forms of illegal taking of property, such as robbery. Even though the loss to the owner is the same in the different forms of illegal taking of property, the Bible treats thievery in a different method.

Even though biblical theft law is an ancient law, understanding its structure and underlying concepts may provide useful guidelines for potential reforms of the current theft law. Present theft laws are quite ineffective, as is evident from the recent statistics, which show that theft is the most common crime reported in the USA; sixty-eight percent of all property crimes are thefts.⁴ Nowadays, thievery is not only

¹ *Exodus* 21:23 (World English Bible: Messianic Edition); see also SHALOM M. PAUL, *STUDIES IN THE BOOK OF COVENANT IN THE LIGHT OF CUNEIFORM AND BIBLICAL LAW* 1 (1970) (asserting that being the earliest biblical code is also proved by the reflection of the heritage of the more ancient Mesopotamian laws in the book of covenant). Author's note: All further Biblical citations are to the World English Bible: Messianic Edition unless otherwise indicated.

² For the basic prohibition on theft, see *Exodus* 20:15; *Leviticus* 19:11; *Deuteronomy* 5:19. As per the obligation to compensate, see *Exodus* 22: 6 ("If fire breaks out, and catches in thorns so that the shocks of grain, or the standing grain, or the field are consumed; he who kindled the fire shall surely make restitution."). See also *Exodus* 21:33-34 ("and if a man shall open a pit, or if a man shall dig a pit, and not cover it, and an ox or an ass fall therein; the owner of the pit shall make it good"). See also *Exodus* 21:36.

³ *Leviticus* 24:17.

⁴ *FBI Releases Inaugural Compilation of Annual Crime Statistics from the National Incident-Based Reporting System*, FED. BUREAU OF INVESTIGATION (Aug. 19, 2013), <http://www.fbi.gov/news/pressrel/press-releases/fbi-releases-inaugural-Compilation-of-annual-crime-statistics-from-the-national-incident-based-reporting-system> (stating theft/larceny accounts for 68.5% of all reported property crimes in the United States).

widespread, but also expanded into new areas of activity. New technologies and new forms of intellectual properties allow for new forms of theft, and the overall cost of thievery is expanding. In light of the expansion of thievery, one may wonder why theft law is not reformed in order to cope with the problem.

As suggested in this paper we can learn important lessons from the biblical theft laws. Some early Colonial American laws⁵ applied the biblical theft laws; however, current state laws have no similarity to the biblical structure. Perhaps it is time to re-implement some of the biblical concepts of theft law into the current laws.

This paper provides a traditional, as well as an economic analysis of theft law. It suggests that following principles of biblical theft law may be useful for reforming the current ineffectual thievery tort law. The deterrence effects of the biblical law are more effective, and the implementation of these principles will lead to a better deterrence of thievery, at no additional social costs. It is further argued that such implementation may be consistent with the underlying principles and basic concepts of the American legal system.⁶

The Bible deters thievery through a structure of a rising scale of punitive damages. The standard compensation in respect to theft is double compensation; however, the multiple-damages may increase to quadruple or even quintuple compensation. Punitive damages were quite common in ancient near-eastern legal systems but were very exceptional in the biblical law. Punitive damages are also employed, although quite scarcely,⁷ in modern private laws.⁸

⁵ John W. Welch, *Biblical Law in America: Historical Perspectives and Potentials for Reform*, 2002 BYU L. REV. 611, 626, 629 (2002) (referring to the laws of the Province of Pennsylvania and of the New Haven Colony).

⁶ *Id.* at 636, 641-42. (summarizing that insights from biblical law may “open to modern legal thinkers insights and potentials for reform that will not only make sense but will have a high likelihood of success because they are consistent with the underlying character of the American legal system.”).

⁷ Benjamin Shmueli & Yuval Sinai, *Liability Under Uncertain Causation-Four Talmudic Answers to a Contemporary Tort Dilemma*, 30 B.U. INT'L L.J. 449 (2012).

⁸ See John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 COLUM. J. TRANSNAT'L L. 391 (2003-2004) (providing a thorough summary of the application of punitive damages in the US, Canada, Australia, New Zealand and England). As per the punitive damages approach in biblical law and modern law, see Elliot Klayman & Seth Klayman, *Punitive Damages: Toward Torah-Based Tort Reform*, 23 CARDOZO L. REV. 221 (2001). For an historical description of fines and punitive damages, see Calvin R. Massey, *Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 VAND. L. REV. 1233 (1987). See also Michael Rustad, & Thomas Koenig,

The multiple-compensation structure of biblical theft regulation is distinct and differs from the regular pattern of punitive damages remedies in ancient as well as in modern laws. The distinctiveness of biblical theft law has not been fully explored in the context of modern approaches to law. The wisdom of biblical theft law may have important implications for improving the current regulation of thievery.

Scholars have addressed the rationale and application of the framework of biblical theft law primarily from traditional, religious, and comparative perspectives; these explanations are often confusing and incomplete. To date, scholarly attention has been lacking with regard to the analysis of efficiency and the economic ramifications of biblical theft laws. This article shows that an economic analysis of the biblical theft law results in a better understanding of its rationale. It further suggests that the biblical structure is in line with notions of economic efficiency. As such, the principles and logic underlying biblical thievery laws may be useful in reforming current theft laws.

Economic analysis of law may improve our understanding of legal history of theft laws.⁹ The law is a reflection of society and, as such, economic analysis may shed light on the nature of law in the context of the ancient Hebrews in biblical times.

The present Western legal systems, common-law and civil-law, classify theft both as a criminal offense and a tortious act. In accordance with the general principles of tort law, the thief must compensate the victim for losses resulting from the theft. Current penal codes, define theft as a crime, subjecting thieves to criminal prosecution, penalties, and, in particular, imprisonment. If current criminal and tort laws were efficient and enforced, they would effectively deter thieves. However, the present tort law is actually almost irrelevant in the actual regulation of theft.

Unlike the modern laws' approach, the Bible focuses on private enforcement to deter theft of personal property. The biblical approach is in line with the rationale of economic analysis of law that questions the need for criminal intervention where the private law is effective. In order to deter theft, the law has to establish a mechanism that will

Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers, 42 AM. U. L. REV. 1269 (1992).

⁹ See, e.g., Nuno Garoupa & Fernando Gomez Pomar, *Paying the Price for Being Caught: The Economics of Manifest and Non-Manifest Theft in Roman Criminal Law*, (Feb. 2005), available at http://www.indret.com/pdf/276_en.pdf.

make thievery costly to the potential thief. For that purpose, biblical theft law establishes a structure that decreases the expected profit of thievery, and, at the same time, increases the probability of detection. This leads to a better level of deterrence and reduces the need to apply criminal law to the tortious activity of thievery.¹⁰

Nowadays, high costs of detecting thieves, litigation costs, and the very low compensation caps drastically reduce incentives to resort to private enforcement. Victims of theft usually do not trace or identify the thief nor do they sue; they practically give up their rights against the wrongdoers/thieves. Potential targets of thievery practically "opt out" of the legal system, and in order to protect themselves from theft, incur additional transaction costs to protect their property. *Ex-post facto*, private enforcement of thievery laws is almost non-existent and extra-legal, costly mechanisms replace it. Owners rely upon insurance to protect them from the economic distress resulting from theft. In essence, property owners are bearing a sort of tax, paid to insurance companies, which replaces the legal system and enforcement of anti-thievery regulation. Consequently, public enforcement through criminal laws and police deterrence activity remains the core regulatory mechanism of thievery.

Under biblical law, regular property theft is a private wrong, resulting in a right to pecuniary relief.¹¹ The biblical law of torts requires the thief to compensate the victim under a multiple-damages structure. Unlike modern legal systems, reparation to the victim of theft under biblical law is based on two elements:

- a) the kind of stolen property, and
- b) the nature of subsequent actions taken by the thief in relation to the stolen property.

The biblical system effectively combines the common standard of tort compensation and an additional "punishment" through increased compensation paid by the thief to the victim. Hence, biblical theft law differs not only from modern torts

¹⁰ Richard A. Posner, *An Economic Theory of Criminal Law*, 85 COLUM. L. REV. 1193, 1204 (1985) ("In cases where tort remedies, including punitive damages, are an adequate deterrent because they do not strain the potential defendant's ability to, there is no need to invoke criminal penalties.").

¹¹ Property theft is primarily viewed as a tort in contrast with human theft that is criminal in essence. See ANTHONY PHILIPS, *ESSAYS ON BIBLICAL LAW* 19 (2004).

theft law but is also exceptional in comparison with the structure of general biblical tort law.

The basic pattern of biblical tort law imposes upon the wrongdoer an obligation to compensate the injured party to the extent of the damage caused by the tortious act.¹² Under biblical theft law, on the other hand, the scope of compensation is substantially higher. In the common case of theft, the compensation is doubled (restitution of the stolen property or its value, plus one hundred percent additional compensation).¹³ In the case of theft of livestock, the scope of compensation increases if the thief sells or slaughters the animal. Hence, biblical theft law is quite complicated and unique in structure, even in comparison to other rules of misappropriation of property or general tortious behavior in the Bible, or under current theft laws.

The extraordinary structure of biblical theft law raises a series of analytical questions such as: Why are the levels of compensation on thievery more severe than those imposed in relation to other misappropriations of property or other civil wrongs? Why is the sanction on robbery (practically a violent form of theft) more lenient than that on theft? Why are specific types of property protected against theft by different levels of compensation? Was the structure of the biblical theft law effective and efficient? What are the practical lessons we can learn from biblical law that may apply to current regulations of theft? These issues and others will be analyzed in this paper.

This article proceeds as follows; part two of this article explores the didactic significance and the practical implementation of theft law in ancient Hebrew society. It focuses on the unique structure of compensation for the theft of livestock as it appears in the Book of Exodus and examines its application in later biblical narratives. Part three discusses the definitions and classifications of theft in the Bible as distinct from other forms of illegal taking. Additionally, part three of the paper relates to the difficulties resulting from the different levels of compensation imposed by the Bible in cases of theft, robbery, and indirect forms of wrongful deprivation of property. Part four, sets forth the implications of a system of private enforcement to regulate and deter thievery and discusses in greater detail the unique biblical structure of sanctions imposed on thieves. Part four also compares biblical theft law

¹² In special cases resulting in damage to a person, such as a false oath, the wrongdoer is required to cover the damage plus one quarter (*chomesh*). *Leviticus* 5:20-26.

¹³ See *Deuteronomy* 22:1, 4, 6, 8.

with multiple damage laws in present Western laws as well as in ancient Middle Eastern legal codes. Part five of the article addresses the justifications for the increasing-scale sanctions in relation to various theft activities as a function of the type of stolen property and the actions of the thief in relation to the stolen properties. Part six analyzes biblical theft law employing modern concepts of law and economic analysis to show that biblical theft laws promote efficiency. The last part of the article suggests that applying the principles of biblical theft law to the present regulation of thievery, and in particular in the context of private enforcement, may be effective and deter thieves.

II. WAS BIBLICAL THEFT LAW ACTUALLY IMPLEMENTED?

Biblical law is a legal system believed to originate in ancient Israel as a set of rules given to the Hebrews by God. As such, the Covenant is also a moral, social, and religious code of behavior pertaining to the relationship among people and between human beings and divinity. Therefore, adherence to the godly command may be much more powerful than adherence achieved by just the deterrent effect of legal sanctions. This forceful power of the biblical law may explain some leniency in the private remedies in biblical tort law in comparison to present and ancient legal systems.¹⁴

Some scholars have long argued that the Bible is not a divine granted covenant but rather a compilation of social and legal norms developed and recorded over numerous generations. There is no direct extra-biblical evidence that proves that the Bible, as we know it today, was the law actually practiced during early biblical times. Some scholarly writings claim that, in fact, the original law was very different,¹⁵ and that biblical law is for didactic purposes.¹⁶ Even

¹⁴ Such as the lack of a remedy of compensation for indirect damages resulting from a tortious action.

¹⁵ David Daube, *STUDIES IN BIBLICAL LAW* (1947). *See also* Reuven Yaron, *The Evolution of Biblical Law*, in *LA FORMAZIONE DEL DIRITTO NEL VICINO ORIENTE ANTICO* 77-108 (A. Theodorides et al eds., 1988); Ziony Zevit, *From Judaism to Biblical Religion and Back Again*, in *THE HEBREW BIBLE: NEW INSIGHTS AND SCHOLARSHIP* 164-190 (Frederick E. Greenspahn ed., 2008).

¹⁶ Bernard S. Jackson, *Ideas of Law and Legal Administration: A Semiotic Approach*, in *THE WORLD OF ANCIENT ISRAEL: SOCIOLOGICAL, ANTHROPOLOGICAL AND POLITICAL PERSPECTIVES*, 185-202 (R.E. Clements ed., 1989). Payment of an amount many times the value of the stolen property was imposed upon thieves also under the ancient Hittite law. *See* Raymond Westbrook, *The Laws of Biblical Israel*, in *THE HEBREW BIBLE: NEW INSIGHTS AND SCHOLARSHIP* 101 (Frederick E. Greenspahn ed., 2008).

if in the early stages of the Israelite nation, biblical theft law was not actually practiced, nonetheless, the special structure and potential impacts of the theft law carries important lessons that may be helpful in constructing anti-theft regulation in modern times.

It seems likely that at least parts of biblical law and, in particular, theft laws were actually enforced. The punitive damages remedies were common in ancient Middle-eastern legal systems. For example, the Hammurabi code¹⁷, imposed a tenfold compensation liability for thievery from a regular person, and a thirty-fold for theft from the king or from a temple. Given the similarity to theft law of other societies in the Middle East at the time, it seems plausible that, to a lesser or greater extent, theft laws were actually practiced.¹⁸

Furthermore, the concept of theft (in its various forms) as a fundamental threat to society goes back, according to the Jewish legal tradition, to the pre-biblical period. The Talmud defines seven basic universal legal principles required to maintain an orderly society. These rules, known as the Seven Laws of the Sons of Noah, are viewed as applicable to all societies created after the Great Flood that wiped out all humanity except for Noah and his family. Among these seven basic rules is the command not to steal.¹⁹ Hence, it is quite plausible that actually practiced biblical theft embodied these principles.

Moreover, the inclusion of an anti-theft command in the Decalogue signifies its fundamental importance and has been regarded as a strong indication that theft law was actually part of the core law of the ancient Hebrews.²⁰ Given that anti-theft

¹⁷ Assembled during the reign of the King Hammurabi (1792-1750 BC.). *Code of Hammurabi*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/253710/Code-of-Hammurabi> (last updated June 1, 2014).

¹⁸ BERNARD S. JACKSON, *ESSAYS IN JEWISH COMPARATIVE HISTORY* 53 (1975).

¹⁹ See, e.g., DANIEL ELAZAR, *COVENANT & POLITY IN BIBLICAL ISRAEL: BIBLICAL FOUNDATION & JEWISH EXPRESSIONS* 112 (1998). See also David Wermuth, *Human Rights in Jewish Law: Contemporary Juristic and Rabbinic Conceptions*, 32 U. PA. J. INT'L L. 1101 (2011).

²⁰ Rashi (Rabbi Shlomo Itzhaki), the great biblical commentator, interprets the commandment as applying to stealing of a person (kidnapping), which is a criminal offense imposing a death penalty. However, Rashi's interpretation is just one of the possible meanings which may be applicable to the commandment. The structure of the ten commandments seems to support the understanding that the prohibition of theft is the basic rule of protection of property. The commandments are structured from the most essential and severe to less severe. The commandment "thou shall not murder," sets the basic and most important rule protecting human life. It is followed by the

laws were a common prohibition in neighboring societies, it seems probable that biblical theft law was, as it appears in the Bible, the law of the Hebrews.

Furthermore, in various contexts (which are not part of the biblical codes), the Bible provides evidence that supports the conclusion that biblical theft law was actually an implemented set of legal norms. There are many examples of biblical theftlaw illustrated in the Bible.. A good example is the parable of the poor farmer's lamb. The prophet Nathan wants to induce King David to state that his behavior in relation to the Bat-Sheba affair was immoral and actually even illegal. Nathan, therefore, presents to David a situation of a rich man taking the property of a poor farmer, his only sheep. The king (who is also *ex-officio* a judge) condemns the rich man who took and slaughtered the poor man's lamb, and states²¹: "He must restore the lamb fourfold, because he did this thing, and because he had no pity!"²²

The parable is telling a story that has legal implications. For a parable to effectively convey its message, it has to reflect a real world situation that is familiar or known to the people. If the audience is familiar with the system upon which the fictitious story is developed, they would easily understand it and infer the lesson of the parable. Otherwise, contemporary people may not understand the parable and it is ineffective in achieving its moral and educational purpose. A purely imaginary parable, or a parable based on facts that are not comprehended by the audience, would be meaningless to the contemporary people and readers of the Bible.

The parable presents to David a description of another person's behavior. The prophet, Nathan, anticipates that the king will relate to the case as a breach of moral and legal rule; however, the king reacts as if the parable is real, and therefore, declares his legal decision as if he is acting in a judicial capacity. The reader, to whom the text is directed, accepts the

prohibition of adultery, protecting the basic social institution. Then, in line of diminishing importance, follow the commandments forbidding theft, false witness, and the prohibition of coveting another's property or wife.

²¹ Actually, David imposes upon the rich man two sanctions: a death penalty and four-fold compensation. The death penalty has no basis in biblical law, unless the theft is of a person. Maybe the Bible refers to a reflection of David's sin that "stole" Uriah from Bat-Sheba and sent him to the front line to be killed. The death penalty may also indicate that David actually deserved a death penalty for causing the death of Uriah. The prophet declares that despite the fact that David did not directly kill Uriah, he is considered as the person killing him: "You killed him with the sword of the Ammonites." 2 *Samuel* 12:9.

²² 2 *Samuel* 12:6.

judgment – “he shall pay four-fold” – as it is the customary rule that applies to theft and the slaughter of a sheep. The prophet composes the parable in a way that will induce David to pronounce the well-known rule of law: four-fold compensation for theft as mandated in *Exodus* 22:1. Being rich and poor might weaken the assumption that four-fold compensation is the general rule in a theft of a sheep.²³ Thus, it seems that the identities of the thief and the owner of the stolen "object" play a major role here.

The story described in the parable is not a legal text aimed at declaring a judicial verdict since there is no legal process or trial. It is rather a moral-ethical text presented in a form of a parable. The king's reaction implementing the biblical theft law serves as the basis for the moral accusation about his behavior. The prophet Nathan employs the parable to induce repentance by the king and to justify a punishment by God. It persuades the biblical reader that David deserved punishment. In other words, the king's knowledge and command of the sanctions under theft law reasonably yields the conclusion that this rule was in fact enforced, or at least that biblical theft rules were known. Otherwise, the parable would remain meaningless to the public at the time. The content of the parable was chosen to demonstrate a point people would relate to as opposed to an obscure norm that was never enforced.

Additional evidence of the actual implementation of biblical theft law may be found in the writings of the historian Josephus Flavius who lived in the period at the the end of the Second Temple period.²⁴ Josephus expressly states that: "the thief shall restore four-fold; and that if he has not so much, he shall be sold indeed."²⁵ It is clear from the description that

²³ It may be argued that the statuses of the persons described in the parable: (the rich man taking the property of the poor) play a significant role in the king's decision. However, in this case it is more likely that the use of the rich and poor figures is designed to construct the parallelism between David and Uriah, Bat-Sheba's husband. The king brought doom to Uriah by positioning him in the front line of the battlefield where he would most probably be killed. Uriah was then killed in the battle; consequently, the king took Uriah's widow, Bat-Sheba, to be his wife.

²⁴ The Second Temple period commenced in 515 B.C when the Jews who returned from exile in Babylon rebuilt the Temple, and ended with the destruction of the Temple by the Romans in 70 AD. *Oral Law*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/EBchecked/topic/430763/Oral-law> (last visited Feb. 3, 2015).

²⁵ *Josephus Flavius, Antiquities of the Jews - Book XVI*, SACRED-TEXTS.COM, <http://www.sacred-texts.com/jud/josephus/ant-16.htm> (last visited Jan. 22, 2015). The rabbinical courts ceased to impose multiple damages

biblical theft law was known and applied, at least at the last period of the Second Temple period.

Further evidence of the application of theft law can be found in the New Testament. In *Luke* 19:8, Zacchaeus wishes to prove his righteousness, and he declares to God: "Behold, Lord, half of my goods I give to the poor. If I have wrongfully exacted anything of anyone, I restore four times as much."²⁶ Here again, the four-fold rule describes a generally known legal rule: multiple-compensation is the sanction for wrongful taking of property. Some New Testament commentators see in this passage a direct reference to the biblical four-fold sanction.²⁷ These examples substantiate the conclusion that biblical theft law was actually practiced, at least during later periods of biblical times. Nevertheless, it is inconsequential whether biblical law was didactic or actually enforced since the main issue discussed in this paper is whether the structure of biblical theft law is economically sound and has implications to improve current theft laws.

III. WRONGFUL TAKING OF GOODS

Biblical law classifies unauthorized takings of property into several legal categories. The first distinction is the focus upon the nature of the victim, namely, whether the theft was of private property (theft from an individual) or of sacred property (theft from the Temple). Unlike other known ancient legal systems, such as the Code of Hammurabi, the compensation for private property theft is substantially higher under biblical law. The second distinction revolves around the method of the property taking. The standard of compensation

around the 4th Century. *See also* ASHER GULAK, FOUNDATION OF JEWISHLAW 221 (1928).

²⁶ *Luke* 19:8.

²⁷ *See* Nazarene Commentary to *Luke* 19:8: "Four times: Suggested by the Law of Moses. [*Exodus* 22:1; *Leviticus* 6:3]". Similarly, John Gill's Exposition of the Bible explains: "restore him fourfold" the same that was done in case of sheep stealing. *Exodus* 22:1, BIBLESTUDYTOOLS.COM, <http://www.biblestudytools.com/commentaries/gills-exposition-of-the-bible/exodus-22-1.html> (last visited Jan. 22, 2015). But in such a case as this, the law only required the principal, with the fifth part added to it. *See Leviticus* 6:5. Another interpretation is that the four-fold payment here is not the reflection of biblical law but rather of Roman law that mandated four-fold compensation in cases of theft. Since the description in *Luke* relates to the time when the Romans ruled the land of Israel, such an interpretation cannot be ignored. It should also be noted that the passage might be understood not as a case of stealing but as perpetrating a false accusation. In this case the biblical rule would only require restitution plus a *chomesh*. *See* ALAN WATSON, ROMAN LAW & COMPARATIVE LAW 69 (1991).

for “regular” theft is higher than imposed upon robbery (violent theft). The same applies to fraudulent denial of property (e.g. failure to return a deposit).

A. Defining Property Theft

Theft is defined as the illegal taking and removing of another's personal property with the intent of depriving the true owner of it.²⁸ Theft law protects rightful owners or holders²⁹ and combines descriptive as well as consequential elements with an emphasis on the method of the illegal taking. Since there are other forms of property misappropriation, they may fall under a different legal categorization. Consequently, various methods of property deprivation are defined differently and are subject to materially different sanctions.

B. Theft and Other Forms of Tortious Misappropriation of Property

Biblical law distinguishes between direct and indirect taking of property. Indirect deprivation is regulated under the law stated in *Leviticus* 5:20-26. This rule provides a list of wrongful "misappropriations" of property resulting in indirect taking or very similar economic consequences to that of direct taking.³⁰ The Bible states indirect taking is “If someone commits a sin of dishonesty against the Lord by denying his neighbor a deposit or a pledge for a stolen article, or by otherwise retaining his neighbor's goods unjustly”³¹ The basic characteristic of all of such wrongdoings is the deprivation of property or money from the rightful owner, similar to theft. In spite of the similar outcomes, the Bible imposes different sanctions with respect to direct and indirect deprivations.

The indirect deprivation cases, as discussed in *Leviticus* 5:20-26, are both direct religious sins, as well as civil wrongs.

²⁸ BLACK'S LAW DICTIONARY (9th ed. 2009). It should be noted that modern law defines theft as a felonious act.

²⁹ Therefore, if a subsequent thief steals a stolen property from the initial thief, the rules of theft do not apply and no punitive damages will be imposed. See MISHNE TORA (Eliyahu Touger trans.), available at http://www.chabad.org/library/article_cdo/aid/1088854/jewish/Genevah.htm (last visited Jan. 22, 2015).

³⁰ The law of embezzlement here deals with perjurious denial of liability. The sanction imposed is an additional payment of one-quarter the value of the embezzled item. The primary sanction is, however, the return of the stolen item or its worth.

³¹ *Leviticus* 5:15.

Surprisingly, the monetary sanction in relation to such cases is significantly lower than in relation to theft. Should the disparity be explained as a function of the differences associated with the manner in which the deprivation of property occurs, either directly or indirectly? The wrongdoer, in the case of indirect deprivation, does not expropriate the property by unlawful taking or a contested overt taking, but rather by a breach of an oath or by a false oath by the wrongdoer denying the owner's rights.³² The offense, therefore, is also an act against God – a serious religious offense, like a false oath.³³ Consequently,³⁴ the sinner may expect to bear an undefined heavenly retribution and is required to perform the religious act of repentance by sacrificing a ram. Notwithstanding the cost of the ram, the wrongdoer must make restoration to the victim plus a quarter of the value of the property.

The Bible distinguishes between two forms of unlawful direct taking of goods: robbery and theft. Robbery, *gezel*, is an act of illegal forceful taking, non-furtive theft.³⁵ Robbery is performed in the open while the taker uses threats or even force in order to accomplish the taking of the goods.³⁶ In the case of theft, *gneva*, the taking is carried out secretly to avoid the identification of the thief at the time of theft. The main differences between theft and robbery are:

- a) The open and public nature of robbery as opposed to the concealed nature of theft; and

³² See *id.*

³³ See *Exodus* 20:6.

³⁴ If the holder of the goods is found to be holding them improperly based upon evidence by acceptable witnesses, he is considered as if he were a thief and the multiple damages rules will apply.

³⁵ See the BIBLICAL ENCYCLOPEDIA (Hebrew) under 'גזל'. The term "*gezel*" illustrates violent taking of property.

At a later stage of the development of the Hebrew law the scope of *gezel* had been widened to include various forms of appropriation of property such as by defrauding or charging interest. See GULAK, *supra* note 25, at 223. Bernard Jackson suggests that the distinction between *gezel* and theft is irrelevant to the law of theft. See BERNARD S. JACKSON, *THEFT IN EARLY JEWISH LAW* (1972). However, Jackson later admitted that his suggestion requires qualification. See BERNARD S. JACKSON, *WISDOM LAWS: A STUDY OF THE MISHPATIM OF EXODUS 21:1-22:16* 304 (2006).

³⁶ See BABYLONIAN TALMUD, TRACTATE BABA KAMA 57 (detailing a dispute between Talmudic sages (*Amoras*) Abaye and Rabbi Yossi, as per the categorization of an armed robber as a robber or as a thief. The source of the dispute is whether the custom of hiding by robbers turns their behavior into furtive theft.).

- b) Violence, actual or potential, associated with robbery, while theft is a concealed and a non-threatening act.

From the perspective of the social-order, the potentially violent aspect of robbery encompasses additional severity. Hence, one may expect that in order to deter such a negative social impact, the sanctions on robbery would be harsher than the sanctions on theft. Conversely, biblical law dictates the opposite. The sanctions to the wrongdoer associated with robbery are significantly lower than the sanctions on thievery. A robber is just required to make restitution, while a thief is required to pay at least twice the value of the stolen article.

Why does biblical law impose different sanctions for such similar misappropriations of property? From the point of view of the rightful owner, the loss of value is the same notwithstanding the method of illegal taking (theft, robbery, or any of the cases of embezzlement as defined in *Leviticus* 5:20-25). Tort law aspires to achieve just compensation;³⁷ so why do we observe different sanctions? Furthermore, from a social perspective, if one should differentiate any subgroup of illegal taking from other torts, a stricter sanction should be the rule in cases of robbery, as it is associated with actual or threatened violence. From the perspective of the victim of thievery, *prima facie*, there seems to be no compelling reason to differentiate the levels of compensation as a function of the type of the stolen property.

IV. THE STRUCTURE OF THE COMPENSATION

As indicated, under biblical law, theft is a wrong imposing direct criminal sanctions.³⁸ Private enforcers are the primary deterrent to theft. While they exercise their private rights against a wrongdoer, they also create a public good - deterrence. Private enforcement is particularly important if a

³⁷ The basic attempt for just compensation can be found for example in *Exodus* 22:5: "If a man causes a field or vineyard to be eaten, and lets his animal loose, and it grazes in another man's field, he shall make restitution from the best of his own field, and from the best of his own vineyard." *Exodus* 22:5. Likewise: "If a man opens a pit, or if a man digs a pit and doesn't cover it, and a bull or a donkey falls into it, the owner of the pit shall make it good. He shall give money to its owner, and the dead animal shall be his." *Exodus* 21:33-34.

³⁸ Biblical law, as a religious law, creates two levels of deterrence. One is the deterrence resulting from the sanction (cost) associated with thievery. The other is the religious sin committed by a thief defying the godly order not to steal.

regulatory system lacks meaningful effective governmental enforcement. In order to encourage victims of theft to enforce anti-theft laws, a legal system must provide a proper set of incentives to private enforcers. This raises the overall level of deterrence by increasing both the expected cost, payment of compensation, and probability of detection. Consequently, under the multiple damage regime, the amount of thefts should decrease and social welfare should increase.

Currently, modern societies rely very little, if at all, on private enforcement to deter theft. Private enforcement, although available to the victims of theft, is practically irrelevant as a factor in maintaining deterrence. It has been replaced by governmental enforcement through criminal law. Interestingly, a double layer structure of regulation of theft, both private and public, was also adopted in some ancient legal systems. For instance, under the Roman regime in Israel, during the final period of the Second Temple, theft was a crime that resulted in the death penalty.³⁹ In order to maintain a reasonable level of property protection, Mosaic Law had to compensate for the lack of governmental enforcement by setting a rising scale of restitution and compensation⁴⁰ as follows:

- a) The general rule: the thief must pay double the value of the stolen property.
- b) If the stolen property is a sheep or an ox, and the thief sells or slaughters the animal, the compensation is set to four-fold for the sheep and five-fold for the ox.
- c) If the thief admits his wrongdoing, then he is only subject to return the stolen property.⁴¹

A victim of theft is always entitled to restitution. Restitution, in its narrow meaning, is just returning the stolen

³⁹ Jesus is described as crucified between two thieves, "Then were there two thieves crucified with him, one on the right hand, and another on the left." See *Matthew* 27:38.

⁴⁰ It should be noted that in regard to multiple damages, Biblical law does not exactly require that the basis for the multipliers will be the actual damage caused to the owner but rather the basis is set as the value of the stolen property. Hence, there is a mixture of restitution principles with punitive damages concepts.

⁴¹ The Jewish Law incentivizes the thief to confess and return the stolen property. This is also reflecting a rational economic approach that aims to reduce social costs of thievery. For a deliberation of this aspect see Eliakim Katz & Jacob Rosenberg, *Property Rights, Theft, Amnesty and Efficiency*, 15 *EUR. J.L. & ECON.* 219-32 (2003).

property or its value. If the thief is identified, he or she must either return or repay the value of the stolen property. Additionally, the thief has a duty to compensate the victim one hundred percent as a means of punitive damages. If the thief commits an action that diminishes or destroys the social value of the stolen animal, as in case (b), compensation is set to three or four hundred percent, on top of the restitution. In the last case (c), no compensation is imposed, and the thief only has a duty to return the stolen property or its value.

Mere restitution of the stolen property or its value may, in many cases, lead to under-compensation. Theft may create actual economic losses to the owner and actual economic gains to the thief, even though at a future time the thief will make full restitution. Such is the case when the thief uses the stolen goods while the rightful owner is deprived of the ability to use them.⁴² Thus, if restitution is the sole remedy, then a thief may see a positive enrichment from their thievery and the legal system is actually encouraging theft.

A. Multiple Damages

Punitive damages, in the context of tort law, are an exception in modern Western legal systems. The regular rule of tort law compensates the victim only to the extent of damage inflicted upon him by the wrongdoer.⁴³ Courts award punitive damages under exceptional circumstances or under the very few statutes specifically conferring such a right upon the victim.⁴⁴ A primary example of this is the American legal system, where treble damages in private *qui tam* actions were enacted to deter violations of special “public interest” statutes (e.g. antitrust laws).⁴⁵ Thus, punitive damages in the U.S. vary greatly from case to case.⁴⁶ Other countries do not implement

⁴² According to the Talmud, indirect damages are not compensated by Biblical law. However, some rabbinical authorities provide compensation for indirect definite losses, see *Aruch Hashulchan* 61:11 (in Hebrew).

⁴³ The meaning of damages here refers only to the losses defined and recognized by the legal system and not to the actual losses that may exceed the recognized damages. Hence, it is inaccurate to state that tort law reinstates the victim to the same state as if the wrong were not committed.

⁴⁴ Mark A. Geistfeld, *Fault Lines in the Positive Economic Analysis of Tort Law*, in N.Y.U. L. & ECON. RESEARCH PAPER SERIES 13-31 (2013); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 7-9 (1982).

⁴⁵ Another example is the treble damages remedy under Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §§ 1961-1968 (2012). It should be noted that other jurisdictions are quite averse to multiple damages.

⁴⁶ Klayman & Klayman, *supra* note 8.

and sometimes even specifically refuse to recognize the possibility of enforcing multiple compensatory statutes.⁴⁷ In modern American tort law, multiple statutory damages are an extreme measure, even in jurisdictions that acknowledge the possibility.⁴⁸ They are applied when fundamental social interests justify a higher level of deterrence, as in the case of combating organized crime.

Ancient Middle Eastern legal systems, in contrast, adopted multiple damages as a common remedy for wrongdoing, implementing extremely severe "private fines," considerably higher than the severest level found in the Bible. For example, Article 57 of the Hittite Code⁴⁹ stated that "he who steals an ox shall pay fifteen oxen in return"⁵⁰ The Code of Hammurabi also imposes severe punitive damages on thieves,⁵¹ ranging from a minimum of tenfold-compensation to a multiplier of thirty.⁵² In the context of Ancient Middle Eastern Law, the Bible is an exception, both in the scope of use and severity of compensation for punitive damages.

⁴⁷ In England, for instance, the courts do not enforce treble damages ordered by American courts. Furthermore, special legislation has been enacted which states that local courts lack jurisdiction to enforce treble damages awards. See Protection of Trading Interests Act, 1980 c. 11, s. 5. (Eng.); see also Michael L. Morkin, Ethan A. Berghoff, & Richard S. Pike, *Doing Business with Foreign Sovereign Entities*, 17 BUS. L. TODAY 43 (2007).

⁴⁸ Robert A. Klick, *The Punitive Damages Debate*, 38 HARV. J. ON LEGIS. 469 (2001) ("[in the U.S.] punitive damages are awarded in two to four percent of civil cases in which the plaintiffs prevail.").

⁴⁹ The text explicitly mentions that the previous damages imposed were thirty oxen but upon delivering the new code the compensation will only be half that. This is an unusual style of legislation were the development of the law may be deduced. *Hittite Code*, USC.EDU, available at http://www.usc.edu/dept/LAS/wsrp/information/REL499_2011/Hittite%20Laws.pdf (last visited Jan. 28, 2015); see *id.* at 226-27 (Hittite Code, arts. 59, 63, 67, and 69 also dealing with thievery).

⁵⁰ *Id.* at 226.

⁵¹ *Hammurabi's Code of Laws*, EAC.EDU, available at <http://eawc.evansville.edu/anthology/hammurabi.htm> (last visited Jan. 28, 2015); see *id.* (Article 8 describing sheep and cattle theft punishment).

⁵² According to The New John Gill Exposition of the Entire Bible commentary to *Exodus* 22:1, the rate of four-fold was the standard multiplier in Persian Law: "Whoever took any substance of another, in retaliation they took fourfold from him, and if he restored it, he gave fourfold of the same". JOHN GILL, EXPOSITION OF THE ENTIRE BIBLE (2012). Even if this represents a more lenient approach, the standard of multiple damage is still double than the regular double compensation according to the Bible.

B. Traditional Explanations for Multiple Damages Regarding Various Forms of Theft

Talmudic sages and biblical scholars have attempted to explain the exception to the regular structure of biblical tort law. The double compensation rule did not pose a serious challenge and biblical commentators seldom questioned its rationale. However, the biblical four- and five-fold compensation for the theft of a sheep or an ox⁵³ raised many questions⁵⁴ such as: Why does the law increase the compensation in the case of slaughter or sale in comparison to simple theft without transformation? Why does the biblical law establish these particular categories only in regard to livestock, but does not apply it to other categories of destruction or sale of stolen properties? Another difficulty arises from the distinction in the severity of the compensation for sheep (four-fold) and for cattle (five-fold).

1. Traditional Commentators' Explanations to Four-Fold and Five-Fold Compensation⁵⁵

Commentators and scholars grappled with the difficulties of explaining the increased compensation in cases of slaughter and sale.⁵⁶ Various explanations, most of them unsatisfactory, were offered in order to explain the four-fold and five-fold rule. One explanation was that by selling or slaughtering, the thief negates, or at least substantially decreases, the possibility of

⁵³ *Exodus* 21:37.

⁵⁴ In this context commentators raised many other questions. For example, does the meaning of ox also include a cow or even have a broader significance encompassing cattle of different kinds? Similarly, does the word sheep also include a flock? Or maybe these constitute a general example, the contents of which are wide enough to include all stolen animals? This question has been examined by traditional sources of Jewish laws and by recent day scholars. The accepted viewpoint is that the sheep and ox appear as a symbol of the category of animals to which they belong. See JACKSON, *supra* note 35, at 100-01. The conclusion is that the words sheep and ox should be interpreted broadly to include flock and cattle. Indeed, what is written in the same relevant context strengthens this conclusion by relating the compensation for an ox or a sheep to four of a flock or five cattle.

⁵⁵ See NEHAMA LIEBOWITZ, *NEW STUDIES IN EXODUS* 263 (1970) (in Hebrew).

⁵⁶ Since it is not the purpose of this article to present an exhaustive survey of all these traditional interpreters, only a brief summary of some leading commentators is presented.

the owner to regain possession of the stolen livestock.⁵⁷ This explanation stems from the concept of restitution resulting in actually returning the stolen animal, or a similar substitute animal. Thus, in order to maintain the possibility of actual restitution, further deterrence is required.

Another explanation suggested that multiple-compensation is appropriate in such cases because the thief who slaughters or sells the livestock breaches several legal prohibitions (e.g. theft and sale of stolen property). Accordingly, the "penalty" for such a violent thief must be more severe than the "penalty" for a thief who transgressed only one prohibition.⁵⁸ The great 15th century Bible commentator, Isaac Abarbanel, maintains that the concealment of the stolen animal makes the evaluation of the compensation uncertain and costly in terms of evidential transaction costs. The increased compensation, therefore, may be considered as covering the expected transaction costs associated with estimating and proving the damage. As an example, differences of opinion are likely to arise as to the value of the stolen animal. The thief will contend that the ox or sheep was of little value to diminish compensation to the owner. Multiple damages may avoid the unnecessary dispute about the actual value of the stolen property by providing a margin ensuring that the victim's compensation will exceed the actual damage.⁵⁹ However, it appears that the approach of most traditional commentators is that the severity is higher due to the nature of the slaughterer and seller's wrongdoing.⁶⁰ The Mishnah limits the multiple damages rule to thefts from the rightful owner.

⁵⁷ UMBERTO CASSUTO, INTERPRETATION OF THE BOOK OF EXODUS 196 (1949) (in Hebrew). See also Thomas J. Miceli & Michael P. Stone, *The Determinants of State-Level Caps on Punitive Damages: Theory and Evidence*, 31 CONTEMP. ECON. POL'Y 110-25 (2013) (suggesting that punitive damages serve to compensate for imperfect detection).

⁵⁸ YITZHAK ARAMA, AQEDAT YITZHAQ, § 64. However, this does not explain why a similar rule is not applicable to thievery of other properties that are sold by the thief or otherwise destroyed by the thief.

⁵⁹ From an economic viewpoint this explanation is not convincing. If the thief is expected to claim that the value of the stolen animal was low, there is no reason to assume that the owner will not exaggerate its value. In any case, quadruple compensation is probably much more than the value of the animal even if the thief's position is accepted.

⁶⁰ The Mishnah limits the multiple damages rule only to the theft from the rightful owner. Hence, if one steals from a thief he is not under any obligation to pay punitive damages. MISHNAH, BAVBA KAMAH, Ch. 7.1, *available at* <http://www.jewishvirtuallibrary.org/jsource/Talmud/bavakama7.html> (last visited Jan 28, 2015).

Other traditional commentators have suggested various explanations for the different sanctions associated with the killing or slaughtering of an ox or sheep. Today, some of these explanations may be considered rational economic considerations. Thus, Philo the Alexandrian points to the greater economic benefits that accrue from sheep (*tzon*) and from cattle (*bakar*): “Because the sheep gives four things - milk, cheese, wool and offspring - while the ox gives five - milk, cheese, offspring, and in addition to this, harvesting and threshing.”⁶¹ This interpretation does not provide a convincing explanation for the varying scope of multiple damages.⁶² This probably is why Philo also points to the importance of the sheep and cattle as the source of wealth in the biblical period. Sheep and cattle were main suppliers of basic products and services, including clothing, food, and labor. Cattle’s potential as a source of work-power gave it the greatest importance. Hence why the damage to owners for the theft of cattle is considered higher and the law responded by increasing the “penalty” aimed to prevent such theft.⁶³

The significance of supplying work-power is also found in ancient Halachic sources, which suggest that the compensation for an ox was larger simply because an ox provides work-power.⁶⁴ Thus, it appears that the differential compensation in relation to the ox and sheep reflects the difference in their economic contributions. Hence, it may be argued that biblical law desires to achieve higher deterrence as a function of the extent of the stolen property’s contribution to economic wealth. In this context, it is possible to see biblical law conforming to

⁶¹ See LIEBOWITZ, *supra* note 55, at 366-77.

⁶² This is not a convincing explanation, especially due to the artificial internal elaboration. See Liebowitz, *supra* note 55, for critical reference.

⁶³ It should be noted, that this explanation is not convincing. The price of the sheep reflects the value that it may produce and similarly the value of the ox. Hence, if the ox is expected to create higher returns than the sheep, this will be reflected in the market price. From the point of view of the damage to the victim of theft, it does not justify different levels of compensation. Even if we follow Philo's approach, the multiple may be the same especially if the owner suffered more.

⁶⁴ Already in the exegesis on the book of Exodus known as the Mechilta, we find: “Rabbi Amir said, go and see how pleasant work is in the eyes of the Creator. [For] an ox which can work [he] pays five, [for] a sheep which does not work (he) pays four.” MECHILTA 106. More direct words in the matter are attributed to the 10th century exegete Rabbi Saadia Gaon who maintained that the increase in compensation in regard to the ox “is because the damage which this will cause the owner of the ox is more than for the sheep because he will plough with it.” See LIEBOWITZ, *supra* note 55 (distinguishing between the opinions of Rabbi Meir in the Mechilta and Rabbi Saadia Gaon).

the assumptions of the modern economy, when a forbidden action causes higher socio-economic damage, it has to be dealt with in an appropriate format of compensation and with more effective deterrence. Hence, deterring the theft of sheep and cattle is critical because they are basic wealth-creating assets in a nomadic or under-developed agricultural society. The greater differential results from assets that produce work power, in addition to food and clothing, which was very scarce then.

V. EXPLAINING HIGHER LEVELS OF COMPENSATION: THE CASE OF SLAUGHTER OR SALE

Biblical theft law, like any other theft law, should be analyzed from the perspective of public interest, as well as interests of persons that are, or may be, affected by thievery. The multiple damages structure may suggest that biblical theft law is primarily concerned with promoting theft victims public and private interests on account of fairness to thieves. Public interest considerations play a major role in biblical theft law. By implementing the multiple compensation structure, the Bible does not aim to enrich the victim of theft.⁶⁵ Nor is the sin of thievery considered a more severe sin than other tortious acts, as exemplified by the more lenient approach towards compensation for violent illegal taking of property or robbery.

Theologically, theft is not more offensive to the faith than other illegal takings or deliberate actions causing damage or inconvenience. Sometimes the Bible even shows some understanding for thievery committed out of necessity by poor thieves.⁶⁶ Although theft is forbidden, a thief who steals in order to survive is not strongly condemned by the Bible.⁶⁷ If the circumstances are of poverty and need, then the stigma associated with thievery is decreased.

⁶⁵ In the Bible, the damages for theft are not defined as penalties. Rather, they are seen as appropriate compensation for the theft.

⁶⁶ *Proverbs* 6:30. This phrase is interpreted in a narrow context of moral attitude and stigma. *Proverbs* does not suggest to derogate from the application of the full severity of legal sanctions, "Yet if he is caught, he must pay sevenfold, though it costs him all the wealth of his house." See *Proverbs* 6:31. Obviously there is no seven-fold sanction in the bible, nor is there a rule confiscating all the valuables of the thief. The phrase emphasizes the sheer objection to thievery.

⁶⁷ From an economic analysis of law, one may argue that when the social value of the theft, survival of the thief, is larger than the economic loss of the value of the stolen property, the Biblical stigma attached to the theft which includes the costs to the thief, is reduced.

Public interest considerations may affect the balance of interests between the victim of the theft and the wrongdoer. If the tortious activity is threatening basic values or causes severe damage to social welfare, the law may regulate such behavior by imposing higher compensation costs and vice versa.⁶⁸ Such an approach can also be traced to private enforcement structures in modern legal systems. This is the case of treble damages under the law of the United States (i.e. antitrust laws, RICO legislation).

The rationale behind imposing a multiple-compensation scheme as a private incentive to enforce the law is obvious. Higher compensation increases the expected value of detection of the thief. It is not the personal interests of the victims that are served by increased compensation but a broader interest, the public good. This incentive is effective under ancient law as well as under modern legislation. However, it does not provide a good explanation for the differentiation in the scope of compensation as a function type of stolen property (sheep or cattle). Nor does it explain the different scope of compensation as a function of actions by the thief performed after stealing (selling or slaughtering).

From the perspective of the victim of theft, there is no economic justification for the distinction between stolen and slaughtered cattle or sheep.⁶⁹ Hence, the rationale for the differentiation has to be explained in terms of public interest. By creating higher deterrence to theft of cattle, the law gives greater protection for the crucially important economic resource related to the fundamental economic production of cattle and sheep.

This approach resembles the modern justification for multiple punitive damages, legislative protection over high-priority public interest. The triple antitrust damages overcompensate the victim in order to deter antitrust violations. An anticompetitive action decreases the victim's welfare and, at the same time, decreases social-welfare at a rate that exceeds the loss caused to the direct victim. Antitrust violations result in a misallocation of economic resources, and

⁶⁸ *De minimis* is an example of negating a person's right to sue if the actual damage does not socially justify society's costs to address the dispute. See *De Minimis*, LEGAL-DICTIONARY.COM, <http://legal-dictionary.thefreedictionary.com/De+Minimis> (last visited Jan. 28, 2015).

⁶⁹ In both cases the owner loses some value that is restituted if the thief is detected. Since it is property in most cases, the injured person is indifferent between actual restitution or payment of the value of the stolen property. It should be noted that some traditional commentators argue that selling or slaughtering negates the possibility of actual restoration of the animal and therefore should be sanctioned severely.

consequently, a social loss exceeding the private loss to the direct victim. In this light, some traditional interpretations link the punitive biblical damages to the magnitude of economic loss resulting from the theft.

*A. Justifying the Higher Level of Compensation*⁷⁰

In this chapter, we try to analyze the basic concepts of compensation in biblical theft law in relation to both traditional justifications and economic analyses of the law to show that it may also deter actions that create net social losses that exceed the private loss of the person whose property was stolen.

Why is the action of a thief who sells or slaughters more severe than the mere taking by a thief, so as to justify the imposition of higher sanctions? The Talmud explains that the harsher sanction is imposed on a thief who also sells or slaughters because the thief “is rooted in sin” and can be regarded as a “professional thief.”⁷¹ Ordinarily, reselling stolen goods requires familiarity with professional buyers of “tainted” goods. The practice of selling stolen property denotes routine involvement of the thief-seller in thievery. Thus, a higher sanction is required to deter a professional-recidivist thief. This denotes a similarity to modern policy and the rational behavior of offenders of economic offenses, who assert that thieves are rational profit-maximizing decision-makers. In this context, the regular sanction of restitution does not deter a professional thief. Hence, higher sanctions are required as an effective measure for deterrence. It is desirable to increase the compensation multiplier and the severity of the monetary sanction in order to achieve a reasonable level of deterrence.

A professional thief is likely able to resell the stolen property more easily and, consequently, receive a higher net income from the theft. The inexperienced thief, or perhaps even the occasional thief, may lack easy access to the stolen goods market and, therefore, will resell the property for less. Hence, the expected profits of an occasional thief are lower than that of a professional thief, and the level of sanction towards such thief can be lower.

Different attitudes toward risk may also explain the need for higher sanctions. Risk-preferences are classified into

⁷⁰ “If a man steals an ox or a sheep, and kills it, or sells it; he shall pay five oxen for an ox, and four sheep for a sheep.” *Exodus* 21:37.

⁷¹ MISHNAH, BAVBA KAMAH, 67b-86A, available at <http://www.jewishvirtuallibrary.org/jsource/Talmud/bavakama7.html> (last visited Jan 28, 2015).

three categories: those who have a preference for higher risks - risk-lovers; those who are indifferent towards risks - the risk-neutral; and those who dislike increased risks - the risk-averse. A person's utility function is affected by his risk preference. It can be assumed that most professional thieves, similar to many criminals, are mostly risk-lovers.⁷² Any person who decides to engage in an activity of uncertain consequences, such as thievery, is actually involved in a sort of gambling. When a rational thief decides to commit theft, he faces an expected profit-loss function that includes the expected revenue derived from the theft (probability of success multiplied by the expected revenues in case of success), minus the costs associated with the theft, minus the probability of being caught, multiplied by the amount of compensation.⁷³ A risk-lover thief is prepared to "take a risk" and steal even under circumstances where an expected cost would prevent a risk-neutral thief from stealing. Risk-lovers are involved in thievery more frequently than a risk-neutral or, obviously, a risk-adverse person. In order to deter a risk-loving thief (particularly a professional thief), it is necessary to raise the "price" of the "lottery ticket" to raise the expected compensation.

An efficient regulator should aim to impose different levels of expected costs, in this case, compensation, upon wrongdoers as a function of their characteristics and, in particular, their risk preferences. Unfortunately, the construction and implementation of such policy is problematic since, in most cases, courts are unable to effectively identify the particular risk pattern of each defendant thief. The Mishnah actually tries simplifying this process by a presumption of recidivism, which implies also a higher probability of risk-loving preference. The Bible recognizes recurrent activity as an element in the definition of a civil

⁷² Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968) ("Offenders are risk preferrers, at least in the relevant region of punishment."); See also, Michael K. Block & Vernon E. Gerety, *Some Experimental Evidence on Differences Between Student and Prisoner Reactions to Monetary Penalties and Risk*, 24 J. LEGAL STUD. 123-38 (1995); William S. Neilson & Harold Winter, *On Criminals' Risk Attitudes*, 55 ECON. LETTERS 97-102 (1997); Eric Langlais, *Criminals and Risk Attitude*, SOC. SCI. RESEARCH NETWORK (November 24, 2006), <http://ssrn.com/abstract=900524>.

⁷³ Transaction costs and the impact of legal uncertainty associated with the legal proceedings, which should be added to the expected costs are excluded here. See Moshe Bar Niv, *Economic Aspects of the Law of Double, Fourfold and Fivefold Law*, 17 DINIE ISRAEL 223 (1993) (in Hebrew).

wrong, as in the case of the tort goring bull.⁷⁴ In this case, the Book of Covenant sets a presumption that an ox that gorged and killed several times is defined as a “gorging ox” and should therefore be eliminated. The scope of damages imposed on its owner is then increased. Hence, a repeat thief should face higher expected costs, while a lower level of compensation is sufficient to deter a “non-professional” thief.

A legal system that imposes the same level of compensation for professional and occasional thieves will have distorted outcomes. It may lead to over-deterrence for occasional thieves and under-deterrence for professional thieves. A regulatory regime that is capable of distinguishing the different types of thieves and adapt the cost of wrongdoing to the relevant type of thief will be more efficient and just. Such a policy will lead to an optimal, or at least better, level of deterrence against theft.

One may criticize this understanding by questioning its underlying presumption: that anyone who engages in the sale or slaughter of the cattle is rooted in crime, which is not applicable to all cases.⁷⁵ However, this is the nature of factual presumptions; they create a legal reality even though it is not necessarily correct in all cases. Here it would be to say that the law always regards one who steals and sells or slaughters as a recidivist. Like many other generally applicable rules, implementing this rule may be inappropriate for certain individual cases, but its purpose is found in the level of general deterrence it creates.

Modern legal systems try to attain the desired differentiation among offenders as a function of their characteristics, mostly under criminal law. The judicial screening of recidivist criminals usually implies harsher penalties. For this purpose, highly skilled judges are employed and act under a strict formal procedure to ensure a reasonably accurate process. This is a costly and lengthy judicial process. However, in private law, such systematic differentiation of defendants is rarely recognized. Courts may apply other

⁷⁴ “Or if it is known that the bull was in the habit of goring in the past, and its owner has not kept it in, he shall surely pay bull for bull, and the dead animal shall be his own.” See *Exodus* 21:36.

⁷⁵ The biblical rule presumes that the thief’s actions (*e.g.* sale and slaughter of the stolen property) indicate that they are repeat offenders. Invariably there were cases where first time offenders were subject to the harsh penalties meant for recidivist criminals. However, the substantial social benefit of decreased litigation costs justified this imperfection in justice. Additionally, novice thieves could mitigate their potential cost (the compensation they would have to pay) by abstaining from slaughtering or selling the stolen property.

private law doctrines to repetitive wrongdoers, such as punitive damages, but such doctrines apply mainly to exceptional circumstances.

During the formation of the Hebrew nation, there was neither any professional courts nor was there a reliable registry of previous offences or wrongdoings. Hence, theft law, as described in the Book of Covenant, reflects a substantially different adjudication structure. In the patriarchal period, judges were probably the chiefs of the tribes or the heads of large families or elders.⁷⁶ ⁷⁷ In the pre-monarchial period, the judges were priests or dignitaries. Only in the monarchic stage do we observe the formation of state courts, and even then, not all judges were trained professional judges.⁷⁸ The judicial system in ancient Israel was less developed and less professional and therefore less qualified to make the proper differentiation among thieves. Furthermore, absent a strong central government and given a primitive data collection system, it was impractical to obtain the information necessary for such differentiation. In order to overcome the judicial system's shortcomings and still maintain a reasonable level of segmentation of offenders, the biblical law created a reasonable *ex ante* general differentiation.

A proxy, the pattern of behavior, replaces a more accurate case by case differentiation. The outcome is a higher level of deterrence for professional thieves, at the cost of over-deterrence of some occasional thieves. This high level of deterrence probably exceeds the very costly modern enforcement methods and judicial systems, which, in particular to private theft law, are almost nonexistent.

The interpretation, which links the higher level damages to repetitive thieves, raises difficult questions such as, Why should this sanction-structure apply only to theft? Why should biblical law impose increased compensation in cases where it is proven that the thief is not a recidivist? What is so special about the theft of oxen and sheep and slaughtering or selling them, in comparison to other offences against property rights? If the logic is that repetitive wrongdoers

⁷⁶ See *Exodus* 18:17-26 (describing the judicial system during the nomadic stage).

⁷⁷ On the special role of the elders in relation to the Biblical law see for example, "So Moses went back and summoned the elders of the people and set before them all the words the LORD had commanded him to speak." *Exodus* 18:7. On the special role of the elders in the early judicial system. See also *Deuteronomy* 19:12, 21:19.

⁷⁸ ZEEV FALK, *HEBREW LAW IN BIBLICAL TIMES: AN INTRODUCTION*, 47-49 (Neal A. Maxwell Institute for Religious Scholarship, 2d. ed. 2001).

should be deterred by paying higher compensation, then paying increased compensation should apply to all sorts of recidivist thieves, notwithstanding the nature of the stolen property. Hence, it is difficult to accept the previous interpretation as a conclusive explanation for the four- and five-fold compensation.

B. Scope of Thievery and Size of Compensation

Higher compensation levels may be seen as a legal reaction to personal recidivism or higher frequency of thefts. If the theft of flock animals was commonplace in biblical time, then deterring such activities is strengthened by imposing higher sanctions. In relation to biblical theft law, Maimonides, the great 12th-century scholar, asserted that the more widespread an offense the more it is “desirable that the punishment, therefore, should be stricter in order to prevent it.”⁷⁹ Maimonides contended that more severe sanctions are necessary, not because of the thieves’ moral imperfection, but due to the prevalence of thievery. Maimonides’ approach explains only the theft sanctions but fails to explain why increased sanctions are limited only to this situation. If Maimonides is right, why limit this approach only to the theft of livestock? Why not apply it to any frequent wrong or at least to any frequently stolen articles.

It seems that the previous explanations do not serve as conclusive explanations. The explanation should probably be linked to the greater harm to social welfare that results from theft of sheep or cattle in comparison to harm imposed by the theft of other properties. Maimonides explains that the theft of cattle and sheep was common since they were spread out in pasture fields, making it difficult and costly to guard against thievery, and making thievery easier and more frequent. In order to deter thieves, higher sanctions are required. Therefore, one who steals a sheep should pay more to the victim in comparison to one who steals property kept in a safeguarded area.⁸⁰

Maimonides’ reasoning is consistent with modern perceptions of the classical economic analysis of rational-decision makers. The decision to steal, as a rational economic decision process, is based upon expected net profit from the theft. Increasing the expected costs associated with theft, by setting higher compensation rates, reduces the expected profit

⁷⁹ MAIMONIDES, GUIDE TO THE PERPLEXED, art. 3 ch. 41. (M. Holander trans. 2d ed., 1904).

⁸⁰ *Id.* at 494.

of theft. Alternatively, property owners may reduce theft by investing more in theft prevention methods. However, such reduction of thefts has several negative social impacts. First, a rise in production costs, followed consequently, by an increase in the price of products and services. The increase production costs will lead to misallocation of otherwise productive resources, to property protection. Guarding sheep and cattle against theft necessitates fences, guards, etc., which are costly methods that increase expenditures of ownership. Invariably, most increased costs will be transferred to consumers who will have to pay more and probably will consume less of these better-protected products. Hence, according to Maimonides' approach, the biblical law minimizes breeding costs and consequently the costs of animal products and services by raising the costs for thieves and reducing theft. The biblical approach offsets the higher costs of raising cattle, or the higher probability of theft, by imposing a higher price tag, compensation, on the wrongdoer. The potential thief's costs and probability of detection are increased, while the value of the stolen livestock is unchanged.

Maimonides provides an explanation for a stricter regulation of the theft of cattle and sheep as distinct from other properties. However, despite the forceful logic of Maimonides' approach, it fails to provide a comprehensive explanation. Biblical law sanctions theft of livestock under the same regime of any other property theft. Increased compensation applies *not* to the theft of livestock, but rather to their sale and slaughter. Hence, even Maimonides' justification fails to explain the different rules governing the sale and slaughter of cattle and sheep.

In sum, no traditional Hallachic source provides an explanation for the four- and five-fold compensation rule. Requiring a thief to pay double compensation was sufficient to deter non-professional thieves the same way it was sufficient to deter other types of theft.⁸¹ It is also reasonable that the nature of breeding and raising sheep and cattle exposed them to a greater threat of being stolen. However, the question of why there were increased sanctions in the case of sale and slaughter remains unanswered by traditional interpretations.

⁸¹ See Aaron Kirschenbaum, *The Rabbinic Law of Agency for Illegal Acts*, 4 DINE ISRAEL 55-91 (1973) (in Hebrew).

VI. ECONOMIC EFFICIENCY AND SOCIAL WEALTH

Theft is an illegal and economically inefficient allocation of property, distorting economic efficiency and decreasing social welfare. Thievery transfers property from the possession of the best economic user, a person who ascribes a high value to it (the owner), to another (the thief), who generally attributes a lower value to it.⁸² Market mechanisms allocate resources through a price mechanism to the best user. In a free market exchange, the person that pays the highest price is also the one who generates the highest economic value from the property. A less efficient user derives less wealth from the property, and therefore, is willing to pay less for the property. The diversion of a property to a less efficient user by thievery will result in lower production, which, in aggregate, reduces the overall level of social wealth.

Theft more negatively impacts social welfare, such as economic wastes associated with the transaction costs of such conduct. For instance, potential victims of theft incur the costs of anti-theft precautions which are pure social waste because they do not produce any wealth. Thieves incur the costs of theft and avoid involvement in wealth creating activity. The government incurs policing costs as well as judicial and jail costs aimed at reducing theft and punishing thieves. Thus, theft in general, is a disturbance to social welfare maximization. Another downside of theft is the adverse effect on wealth distribution. Society may intervene in market wealth allocation and change it through various mechanisms, such as taxes and transfer payments. Intervention in wealth distribution by the illegal taking of property is a distortion of social preferences.

The negative social impact of theft on social welfare is not exhausted just by the damage resulting from the diversion of the property from the possession of the efficient user to that of the thief. In order to explore the additional effect, one has to distinguish between the following three situations: (1) the thief maintains possession of the property and uses it; (2) the thief sells the property; and (3) the thief transforms or destroys the property (such as the case with the slaughter and sale or consumption of its meat).

The Bible seems to be the only general theft law that regulates these three situations differently. In the first case, when the thief holds the property and uses it he produces

⁸² Theft can of course also be considered detrimental to society for sound moral and social reasons, but those are not our subject here.

wealth for himself, and derivatively, for society. For example, a stolen ox can be used as work-power to produce agriculture products. The thief holding the property signifies that the production of the stolen property is more valuable than the consideration in sale. Since the price for stolen goods is lower than the regular market price, in this situation, economic welfare is reduced by the theft, but not to the degree of its sale.

A. The Decision to Sell

As per situation 2, generally, a recidivist (professional) thief specializes in stealing and reselling the property. He will not hold the property and use it; accumulating or holding stolen property increases the probability of detection. Therefore, the thief will usually dispose of the stolen property. Because of the legally tainted nature of the sale of stolen property, the thief is expected to sell the stolen property for less than market price. For instance, the thief will be afraid to display the property on the open market where he might be able to obtain a higher price, and will prefer to secretly dispose of the property at a lower price on the “black” market. The thief may also be under a time pressure and thus aspire to get rid of the incriminating evidence (the stolen property) as soon as possible. However, selling under time pressure may hinder the possibility to locate the most efficient user (and thus the highest price) of the property.

The “market” for stolen goods sets very low prices, sometimes even lower than the wealth that the thief could produce using stolen goods. This requires additional transaction costs and transfer of goods to inefficient users. Hence, the act of selling or slaughtering is generally economically inferior from a social welfare perspective. Therefore, the law should deter professional thieves more than it deters a thief who uses the property.⁸³ It follows that the property will be transferred from the possession of the thief to a user who is almost always inferior to the best user, and is unable to maximize the economic value of the property. Sub-optimal transfers of possession can reduce overall social wealth. Thus, society has a clear interest in reducing the frequency and volume of such sub-optimal transfers.

⁸³ The assumption is that the market for stolen goods set significantly lower prices than that of the free market. This assumption is correct in most cases of markets for stolen goods. The buyer of stolen goods is not obtaining legal title to the goods (except for market overt transactions). Evidently, he will not be willing to pay the price on the free market. *See also* Bar Niv, *supra* n.73, at 232.

B. The Decision to Slaughter

Whoever slaughters stolen livestock destroys productive economically scarce resources, or at least transforms it into a significantly less valuable asset. Because cattle supply work-power, food products, and the ability to reproduce, they are generally more valuable than their meat.⁸⁴ Accordingly, the social loss resulting from the slaughter is usually substantially higher than if the property is stolen by the thief, or even sold to a less efficient user who uses it in production of new wealth. A current example is if we compare slaughter with the common case of thieves who steal cars, stripe their parts, and sell their components as used spare parts. Such actions create considerable net social losses and are evidently socially undesirable.

C. Regulating Post-Theft Socially-Negative Actions

Biblical laws deem two-fold compensation sufficient for an optimal level of deterrence of theft in general. Unlike regular ex-ante deterrence, which becomes ineffective once the wrongdoing is committed, four-fold and five-fold compensation has served two purposes, it acts as a continuous deterrence regulating the thief's behavior at two stages. In the first stage, the thief must take into account the accumulated cost in "fines" that he may have to pay. Thus, when a thief decides to steal, he must weigh the possibility of paying twice the value if he is caught against the expected increase in compensation in the event of sale or slaughter. The second stage, compensation, is aimed to protect the public interest. From the social welfare perspective, compensation should deter the destruction or loss in value of viable social resources that could otherwise generate private and social wealth, which are higher than the benefit to the thief.

Once the thief steals the livestock, he faces an additional continuous deterrence. If he further decides to sell or slaughter the livestock, the compensation is dramatically increased. The regulator presents to the decision-maker an additional decision with higher negative payoffs in order to deter further destruction of value. Furthermore, by selling or slaughtering stolen sheep or cattle, the thief is not signaling only professional thievery, but also showing a lack of regret,

⁸⁴ Otherwise, the owner would have sold it for slaughter prior to the theft.

and a final determination to not return the stolen property to the owner. From a moral and religious perspective, in such a case, the punishment to be imposed upon the thief should be greater. The choice of sale or slaughter not only negates the possibility of regret or return, but, as indicated, also decreases the probability of detection while it increases the cost of detection. This further reduces the probability of compensation to the victim. In parallel, it encourages the thief to slaughter the stolen animal or sell it. The law should provide a negative incentive to such actions. Biblical law does exactly that.

The deterrence purpose of the law is also evident from the different legal consequences of a natural or accidental death of an animal while in the possession of the thief. In both situations, the result is the same, the animal dies. Nevertheless, in the case of natural death, the thief is subject to the regular double compensation.⁸⁵ The fact that the animal perished does not affect the scope of compensation, since the thief did not act in a manner that would deliberately decrease the value of the stolen animal. This supports the view that the primary purpose of the four and five-fold damages law is not to deter the mere act of theft. Rather, it is a law aimed at regulating the behavior of thieves after they have stolen livestock. Though, practically, the theft of a sheep or an ox is the same as any theft of other property, the thief is obliged to repay double. If the thief later slaughters or sells that livestock, he has an additional “fine” of double or triple the value of the stolen property.

As noted, the common structure of current theft laws usually regulates a one-step decision of a thief, whether to steal the livestock. Biblical law confronts the thief with a “two stages of decision” process: (1) to steal or not to steal; if he chooses to steal, then (2) to trade or slaughter, or, alternatively, keep the livestock for personal use. At each stage of the decision-making process, the thief confronts an uncertainty and a cost/benefit decision or problem. He is required to act at each stage as a rational decision making agent faced with a variable cost decision (unlike a sunk cost situation). Biblical law regulates both decision stages of these thievery activities. Consequently, the thief’s incentive, at any of these stages, is negatively affected.

Modern tort structure concentrates on the expected cost considerations of the thief, primarily at the pre-theft stage. Once the thief commits the theft, there is no further sanction or cost facing the thief at the post-theft stage. Hence, the

⁸⁵ MAIMONIDES, *supra* note 79, at ch. A.

decision to destroy the value of the stolen property is costless. Professional thieves will then maximize their profits by decreasing the value of the stolen property through sale or slaughter. Therefore, most thefts may result in additional social loss and waste of important social wealth. Given the importance of livestock to the economy of the Hebrews of the era, the Bible developed a more sophisticated model of legislation that reduced the probability of sale or slaughter.

The Bible applies the two-stage decision model only to the most important types of moveable properties of the ancient Hebrews. Cattle and sheep were a primary source of livelihood.⁸⁶ Even in the beginning of period, much of the economy was dependent upon herds.⁸⁷ The importance and value of the livestock is repeatedly described in the Bible, where many chapters and teachings are centered on examples and images of livestock, including cattle and sheep in particular.⁸⁸ During these times, livestock was a fundamental foundation of the Israelites' agriculture-based economy.

The supply of the essential needs of the society depended heavily upon sheep and cattle to supply food, energy, clothing, raw materials, and more. In order to protect these basic resources, stricter rules were required. The Bible addressed the threat of theft by introducing the unique "two-stage deterrence" structure and increasing the expected sanctions. Biblical law could be more tolerant of the theft and destruction of other properties, but not to primary resources.

While two-fold compensation is concerned with theft deterrence and adequate compensation to the victim, the four- and five-fold compensation is aimed at protecting the general public interest. In the case of slaughter or sale of the property, the theft victim is not in better or worse condition than if the item is just stolen and not destroyed. From the point of view of the victim's interests, there is no coherent explanation for a

⁸⁶ YOHANAN AHARONI, *THE LAND OF THE BIBLE: A HISTORICAL GEOGRAPHY* 193 (1971).

⁸⁷ See the descriptions in the book of *Samuel*, such as David who is a shepherd, the Nathan Parable, the story about Naah and his herds. *Samuel* 1:1-31:13.

⁸⁸ See, e.g., *Isaiah* 1:3 ("The ox knoweth his owner and the ass his master's crib: but Israel doth not know, my people doth not consider . . ."). See also, e.g., *supra* Section 2 (discussing the parable of the poor man's sheep); *Jeremiah* 23:1-4 ("Woe to the shepherds who destroy and scatter the sheep of my pasture! says the LORD."); *Ezekiel* 34:2 (comprehensive description of the role of shepherds as guardians of the sons of Israel); *Isaiah* 22:13 ("But instead, joy and gladness, Slaying oxen and killing sheep, Eating meat and drinking wine: 'Let us eat and drink, for tomorrow we die!'); *Joel* 1:18-19; *Job* 1:3-4; and *Job* 42:12.

windfall of quadruple and higher compensation levels. The loss to the owner resulting from theft remains the same, notwithstanding post-theft value destruction by the thief. Hence, protection of the public interest in order to secure resources essential for the ancient Hebrews' livelihood was the reason for the increased compensation.

This paper's main argument is that biblical theft law maximizes social welfare by creating segmented efficient deterrence. Segmentation of rules is a function of the necessity of economics, as well as the economic distortions resulting from the post-thievery actions.

Biblical law responds to the threat of thievery by creating rules that consider the fair balance between the interests of the potential victims and the general public. As for the victim, the biblical law is primarily interested in fair compensation, even though sometimes the scope of compensation may actually be a windfall for the victim. Unlike other laws that use criminal law as a means to punish thieves (sometimes harshly),⁸⁹ biblical law is aimed at deterrence by creating economic incentives.

The social welfare approach of biblical law is also exemplified by the repenting-thief rule. The law⁹⁰ exempts a thief from any compensation in excess of restitution, once he freely confesses and returns the stolen property.⁹¹ The law does not seek to punish the thief, but rather, to save detection and enforcement costs and return the stolen property to the initial owner (or best economic user). Such amnesty is socially

⁸⁹ HANS GORAN FRANCK, ET. AL, *THE BARBARIC PUNISHMENT: ABOLISHING THE DEATH PENALTY* 137 (1st ed. 2003) (describing that Swedish law in the seventeenth century imposed the death penalty for theft of property exceeding a certain value). Currently, there are still several countries that impose death penalties on particular forms of theft; *see, e.g.*, ROGER G. HOOD & CAROLYN HOYLE, *THE DEATH PENALTY: A WORLDWIDE PERSPECTIVE* 139 (4th ed. 2008). *See also* STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 94 (2009) (discussing the application of the death penalty to theft of property exceeding a certain significant value in seventeenth- and eighteenth-century Britain and colonial America).

⁹⁰ *See* MISHNAH, BAVBA KAMAH, 64b, *available at* <http://www.jewishvirtuallibrary.org/jsource/Talmud/bavakama7.html> (last visited Jan 28, 2015). TRACTATE, BAVA METZIA, ch. 1, *available at* <http://www.jewishvirtuallibrary.org/jsource/Talmud/bm-1.html> (last visited Jan. 28, 2015).

⁹¹ This is aimed to motivate the restitution, but also to reduce legal transaction costs. Even if the thief is detected and sued, if he confesses prior to the testimonies, no punitive damages will be imposed. *See* JACOB NEUSNER, *THE HLAKHA: WITHIN ISRAEL'S SOCIAL ORDER* 23 (2000); *see also* Bar Niv, *supra* note 73 at 236.

efficient,⁹² although not under all circumstances.⁹³ Theft law does not pertain to punish the thief, but rather, to maintain and maximize economic wealth. Actually, this rule is a further example of a two-stage model to regulate thievery. Subsequent to the theft, the law posits a dilemma for the thief, by providing a positive incentive and encouraging the thief to make a decision whether to return the property. In parallel, a negative incentive is threatening the thief from further diminishing the value of the stolen property. In this respect, the law confronts the thief with a positive incentive to repent, or alternatively, with a negative incentive to hold or sell the stolen property. The thief's decision to return relieves the thief from expected costs of multiple-compensation and thus, increases social welfare by preserving the value of the stolen property and reducing detection costs.

D. Probability of Detection

Sale of the stolen goods may reduce the likelihood of detection or successful legal actions against the thief.⁹⁴ If the thief slaughters the animal, then the probability of detection and proof is further decreased. The probability of detection is an important factor among the thief's considerations in reaching the decision of whether or not to carry out the theft. Reducing the probability of detection may be counterbalanced either by more resources invested in detection, or by increasing the magnitude of the sanction. Since the central government and police were, at the relevant times, weak and partially non-existent, these measures could not effectively deter thievery and investment. Policing was not a viable option. The higher sanctions come to balance the poor power of detection. The weakness of this explanation is that if it was really the reason for the increased compensation, it should apply any theft of property that is sold or has its value reduced. This turns the explanation back to the special importance of the livestock to the Hebrews.

In sum, the two-stage regulation results in three key positive effects:

⁹² See Eliakim Katz & Jacob Rosenberg, *Property Rights, Theft Amnesty, and Efficiency*, 15 EURO. J. OF LAW & ECON. 219-32 (2003).

⁹³ See *Id.* at n.36, criticizing Kaplow Louis & Steven Shavell, *Optimal Law Enforcement with Self Reporting of Behavior* 102 J. OF POL. ECON., 583-06 (1994) (suggesting that general admission of crime is socially superior).

⁹⁴ LIEBOWITZ, *supra* note 55 at 264.

1. It diminishes the expected value of the stolen property, since the thief will have to consider the higher cost in case of sale or slaughter;
2. It increases the probability of detection by deterring sale or slaughter; and
3. It replaces or saves detection costs through higher deterrence. This all is designed to promote general social welfare.

E. Reduction of Transaction Costs

Another economically based rationale that explains the special structure of the remedies of biblical theft-law is associated with the production cost of the two types of livestock. According to Maimonides, the higher sanctions imposed upon the theft of cattle can be explained as a function of the safeguarding costs. Maimonides explains that since sheep graze in close herds, it is easier and less costly to guard them.⁹⁵ In contrast, cattle are spread out as they graze, which makes guarding them very costly. Maimonides concludes, therefore their theft increases. Thus, the relative ease of stealing cattle (which may result from the difficulty in guarding them) requires the regulator to impose higher costs upon the cattle thief in order to maintain a proper level of deterrence. If deterrence fails, then owners must increase the costs of guarding the herds, resulting in an increase in the price of products and services.

If protective measures had no cost, then it could be considered a reasonable policy to rely on them as an effective and efficient deterrent to thefts. However, protective measures are costly and require the allocation of economic resources. Such protective resources are actually wasted, and if not for the threat of thievery, could be allocated to the production of valuable products and services. Biblical law increases deterrence by imposing higher penalties on certain thefts⁹⁶

⁹⁵ MAIMONIDES, *supra* note 79, at ch. A.

⁹⁶ Maimonides' explanation is incomplete since it only explains the higher costs to the thief in the case of slaughter of the stolen animal. It does not provide an explanation for the cases of mere stealing, which is not followed by sale or slaughter. In these cases, there is no special deterrence concerning sheep or cattle. Maybe the understanding of Maimonides' approach is rooted in the public interest not to diminish the value of the properties by sale or slaughter. Hence, as long as the animals are kept in the possession of the thief, due to the higher sanctions, the thief may use the animals to produce socially valuable products. The high costs associated with the actions that diminish the value of the animals will then attract thieves

and, as a result, reduces otherwise wasteful precautionary expenditures (i.e., in economic terms, it reduces transaction costs).

There is a negative relationship between the variables: the scope of compensation and the investment in protection against thievery. Precautionary measures are costly to the potential victim and society because they raise the value of owning property, thereby reducing the overall wealth of society. The value of potentially stolen properties is reduced and the production of such valuable properties will decrease. Current private law does not internalize such safeguarding costs into thieves' consideration. Tort law compensates a victim of theft only for the value of the stolen property. It does not retribute the costs of protective measures spent by the potential and actual victims. In practice, many potential victims spent significant resources in order to protect themselves from future theft. An efficient legal system should minimize such social waste.

In contrast to modern tort law, biblical law, through its differentiation between the animals that are more or less likely to be stolen, provides a partial answer to the problem. Raising the compensation for scattered grazing animals (cattle) in comparison to those grazing in concentrated herds (sheep), at least partially internalizes safeguarding costs. Instead of investing more in guarding scattered cattle, higher compensation creates more deterrence. Consequently, the profitability of cattle theft will decrease, and owners will have to spend less on guarding. A potential thief is aware, *ex-ante*, that if he steals an ox and destroys part of its value, he may end up paying higher compensation. This simulates a tradeoff between higher transaction costs associated with raising cattle and the thief's considerations. The owner may rely on a higher deterrence level to reduce guarding costs, and such costs that may be lower under biblical law than under current legal regimes. The biblical approach achieves a reduction in the level of theft without the need to allocate additional costly resources for theft prevention, thus, actually reducing otherwise unnecessary transaction costs. From a social-welfare perspective, the biblical approach seems to be more efficient and effective than the approach of modern legal systems.

Biblical law's substitution of prevention-costs with higher levels of compensation achieves another important social welfare advantage. Thieves faced with protected

who assign to the animals a value that is higher than under another set of sanctions.

property will divert their activity to property that is less protected. This means that investment in protection does protect from theft, but may divert the thieves to other less protected properties. Thus, owners who protect the property enjoy fewer thefts, but at the same time, owners who do not protect the property are exposed to a higher level of theft. Consequently, investment in anti-theft measures is only partially beneficial to society and may not necessarily produce a significant reduction of the scope of thefts. The decrease in the overall level of thievery is not fully materialized by society.

The investment in protection of property only partially deters thieves, and partially directs them to commit the illegal action to less protected properties of owners. Underinvestment in precaution may be a function of the subjective probability of potential theft, but is also a function of the nature of property. The biblical example of the sheep and ox signifies that under the same compensation rule, raising cattle will be less profitable because it is costly in nature. Since stealing cattle is easier (they wander around vast areas and are therefore very costly to guard), thieves will concentrate in cattle theft. Owners will then move from raising cattle to raising sheep or other livestock. As a result, maximization of welfare will not be achieved. Too little cattle will be produced at a higher cost (which internalizes a higher probability of theft or higher safeguarding costs).

In conclusion, building on Maimonides' analysis, we can see a coherent economic explanation to the four- and five-fold compensation rule. However, this logic explains only situations of sale and slaughter. In other situations of theft, even if they are accompanied by the loss of value of stolen animals or goods, biblical law only partially solves the problems of preventing further destruction of value subsequent to the theft action.

VII. CONCLUSION

Biblical laws mandating increased compensation in certain cases of an illegal taking of property have been, and will likely continue to be, interpreted from different points of view. This article provides a point of view of these rules, based primarily on an economic analysis of biblical law. As set forth above, biblical law in this context is efficient. Biblical theft law creates more rational, improved, and segmented deterrence. This analysis highlights the value of economic analysis in explaining complex or an otherwise complex legal rule.

The Bible takes a notably strict approach to theft. In most cases of stolen property, the thief is required to return the stolen item to its owner, and, in addition to the restitution,

compensate the owner to the full value of the stolen property. Hence, the thief ultimately pays double the amount of damages. However, in the case of stolen cattle and sheep that were sold or slaughtered, increased compensation (in addition to restitution) of three or four times the value of the stolen item is imposed on the thief. Traditional explanations for this unique structure of high compensatory sanctions (at least in the biblical context) are incomplete. However, economic explanations seem to provide a more robust and meaningful explanation of this penalty scheme.

Cattle and sheep were the most essential for the well-being of the Israelites in the biblical-era, and in particular, during the formation stages of the ancient Hebrew civilization, in which, livestock constituted an important element of the economic foundation of society. Given ineffective policing authorities, once property of this sort was stolen, the probability of actual detection was quite low. The prospects of detection are further reduced if subsequent to the theft, the property was sold or slaughtered. The Becker formula⁹⁷ of efficient regulation of criminal activity requires an increase in the sanction in cases of low probabilities of detection. Given the weakness of central governmental structure in biblical times, deterrence of thievery was, most efficiently, maintained by increasing the costs of theft.

The biblical laws create both negative and positive incentives that are aimed at reducing thievery. Firstly, they deter the thief from stealing, selling, or slaughtering this socially important property. Secondly, they increase the incentive for private enforcement of theft laws. It is notable that the Bible does not sanction property theft as a criminal act (unlike a crime against God), but rather, establishes an exclusively civil remedy, that is, multiple damages. Entrusting enforcement to private persons increased the probability of detecting the thief.

Furthermore, living in a familial community would probably affect the magnitude of the stigma associated with the theft. If caught, the thief would be considered a culprit and thus be disgraced by the community. This would be costly to the thief in several ways. First, the shame that the thief would experience would be greater than if he lived in a community that was not close and familial. In addition, the stigma may have also affected the standing of the thief's family, which would then try to disconnect itself from the source of

⁹⁷ Gary S. Becker, *Crime and Punishment: An Economic Approach*. 76 J. POL. ECON. 169-17, (1968).

embarrassment. The Bible itself testifies, that even in later biblical times, the stigma of being caught as a thief was significant, reflecting the former tribal morals toward theft.⁹⁸

As we have seen, the biblical theft laws create a system of *ex-ante* deterrence and *ex-post* enforcement aimed at achieving justice for the individual victim of theft and increasing the economic efficiency of society as a whole. To be sure, justice for the victim requires that compensation reflect no more than the actual damages, although the Biblical law grants the victim a windfall of higher compensation in order to attain a sufficient measure of deterrence. The multiple damages awarded for stolen sheep and oxen, specifically protect property that forms the economic foundations of biblical society. Furthermore, in the case of slaughter or sale of that property, higher fines additionally deter the thief from engaging in activities that result in economic inefficiency. In addition, the prospect of “windfall” compensation also boosts the victim’s incentive to locate the thief and recover the damages. In turn, increased incentive on the victim’s part means increased deterrence on that of the potential perpetrator.

In practice, modern legal regulation of thievery does not rely on private enforcement of theft laws. Criminal anti-thievery enforcement is hardly significant. Implementing the principles of the biblical theft law would lead to a reintroduction of private civil enforcement. Currently, the expected value of detection and claims brought against thieves is negative. The biblical structure may remedy, at least partially, the undesirable situation, which discourages law-abiding citizens while it encourages criminals to steal.

Biblical law creates an incentive for private enforcement. Enactment of a similar incentive is expected to increase the volume claims that will be filed against detected thieves. Such a change in the law will induce owners of stolen property to sue. More importantly, insurance companies, to whom theft victims’ rights are assigned under the insurance policies, will actively pursue thieves. Insurance companies have a strong incentive to recover some of the insurance payments. Their main interest is to deter thievery, which is aggregately very costly to them. Currently, when a caught thief retains the wealth of the stolen property, the insurance companies’ interest is to make the thieves pay, even after they

⁹⁸ See *Proverbs* 6:30 (“People do not despise a thief if he steals to satisfy his hunger when he is starving.”).

serve the sentence, and therefore, create a material deterrence against thievery.

Under the proposed structure, one can expect that a certain level of pure private enforcement will be exercised. Predetermined high compensation for victims of theft will provide higher incentives to detect thieves. In many cases, it may be advantageous to hire private investigators to locate stolen property and identify those responsible for the theft. It may even be a source for a new specialization of private investigators to search for the stolen goods and split the compensation with the owners. This is precisely one of the rationales for triple damages under the American system concerning RICO or antitrust legislation. Invariably, adopting the biblical approach to thievery will reduce the public costs allocated to using law enforcement officers and having jails for thieves.⁹⁹

Current statistics suggest that there is a lack of deterrence as rates of property crime are jarringly high, in addition to incentives used to recover the damages caused by such acts. Our analysis suggests that what may be lacking in our current system is a broader view of the economic ramifications of thievery. Biblical theft laws seek to create economic incentives, both negative and positive, and entrusts these into private hands, where they can be executed most efficiently. Biblical theft law cleverly developed this unique legal pattern due to the lack of an effective central government. Modern Western societies do have a central government empowered to prosecute thievery. But in general, the governmental enforcement is ineffectual. Hence, our society, with respect to effective and efficient regulation of thievery, resembles the situation of biblical times when the central government was ineffective. This may call upon modern legislators to consider the implementation of an approach that uses elements from the Bible. This new approach may discourage tortious and criminal theft, and at the same time, reduce the cost of state enforcement, thus, freeing up public resources and further increasing societal prosperity.

⁹⁹ However, part of these costs will be shifted to the property owners or the professional detectives. But if the private enforcement is successful, the thief will bear the burden of actual costs through high compensation.