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Richard Posner Meets Reb Chaim of Brisk: A Comparative Study in the Founding of Intellectual Legal Movements

SAMUEL J. LEVINE*

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I. INTRODUCTION

Of the various movements that have surfaced in American legal theory in recent decades, law and economics has emerged as perhaps the most influential, leading some to characterize it as the dominant contemporary mode of analysis among American legal scholars.¹ This Essay considers law and economics in the context of a comparative discussion of another prominent intellectual legal movement, the Brisker method of Talmudic analysis, which originated in Eastern Europe in the late nineteenth century and quickly developed into a leading method of theoretical study of Jewish law.

The Brisker method² takes its name from the Eastern European city of Brisk,³ home to the movement's founder in the late nineteenth century, Rabbi Chaim Soloveitchik. In his innovative lectures and posthumously published writings,⁴ "Reb Chaim" developed a highly original model that quickly emerged as the predominant form of theoretical study of Jewish law.⁵ The method's primary features include an emphasis on precise definition and categorization of legal concepts, often through the framework

1. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* xix (2003) (declaring that law and economics is the "foremost interdisciplinary field of legal studies"). See also Anthony T. Kronman, *The Second Driker Forum for Excellence in the Law*, 42 WAYNE L. REV. 115, 160 (1995) (referring to law and economics as "an enormous enlivening force in American legal thought" that "continues and remains the single most influential jurisprudential school in the country"). The degree and nature of success achieved by law and economics compare favorably with those achieved by other intellectual movements, such as critical legal studies, see *infra* notes 93-99 and accompanying text, law and literature. See Kenji Yoshino, *The City and the Poet*, 114 YALE L.J. 1835, 1836 & n.6 (2005) (observing that "[a]lthough law and literature is a contemporary of law and economics, and arguably a response to it, scholarship in law and literature lags far behind that in law and economics" and that "'law and economics' has been cited six to eight times as often as 'law and literature' in recent law review articles").

2. The term "Brisker method" is a translation of "*der Brisker derech*." An alternate phrase, "*der Litvishe derech*," references more broadly the Lithuanian origins of the method. See Chaim Leib Balgley, *Remembering Reb Chaim Brisker*, in *THE TORAH PERSONALITY* 31 (Nisson Wolpin ed., 1980).

3. "Brisk" is an English version of "Bresc," the name commonly used by the Jewish community to refer to the city of Brest-Litovsk. See 4 *ENCYCLOPEDIA JUDAICA* 1359-63 (1971).

4. Reb Chaim lived from 1853 to 1918. Many of his novellae on Talmudic tractates have been published, like his novellae on Maimonides *Mishneh Torah* in 1936. See 15 *ENCYCLOPEDIA JUDAICA* 130 (1971).

5. It should be noted that although Reb Chaim's method may accurately be deemed the dominant contemporary mode of Talmudic analysis, its primacy has largely been limited to Talmudic academies tracing their origins to Lithuanian Jewish communities. In other academies, including those associated with Sephardic and Chassidic communities, alternative methods of analysis continue to prevail. See 1 RABBI AHARON LICHTENSTEIN, *LEAVES OF FAITH: THE WORLD OF JEWISH LEARNING* 40-41 (2003). Moreover, while clearly influenced by Reb Chaim's method, other scholars have taken the conceptual approach in different directions. See *id.* at 41, 55. Cf. NORMAN SOLOMON, *THE ANALYTIC MOVEMENT: HAYYIM SOLOVEITCHIK AND HIS CIRCLE* 47-82 (1993).

of underlying dichotomies. As a result, some contemporary scholars have characterized the method as “scientific,”⁶ “conceptual,”⁷ and “analytic.”⁸

Although the field of law and economics does not lend itself to such neat demarcations of a time and place of origin, or to the identification of a single founder, for the purposes of this Essay it may be helpful and appropriate to associate the movement with the theories of the “Chicago school” and to focus on the approach and contributions of its leading academic proponent, Richard Posner.⁹ Economics is, as defined by Posner, “the science of rational choice in the world—our world—in which resources are limited in relation to human wants.”¹⁰ Thus, he explains, “[t]he task of economics . . . is to explore the implications of assuming that [a person] is a rational maximizer of [one’s] ends in life, [one’s] satisfactions . . . [one’s] ‘self-interest.’”¹¹ Accordingly, economic analysis of law provides a conceptual framework for the application of the principles of economics in the context of legal issues.

This Essay aims to examine some of the common elements of law and economics and the Brisker method that have contributed to their success as intellectual movements.¹² Toward that end, the Essay compares the

6. See, e.g., Moshe Lichtenstein, “What” Hath Brisk Wrought: *The Brisker Derekh Revisited*, 9 THE TORAH U-MADDA J. 1, 3-4 (2000); RABBI JOSEPH B. SOLOVEITCHIK, HALAKHIC MAN (Lawrence Kaplan trans., 1983) (originally published in Hebrew as *Ish ha-Halakhah*, in 1 TALPIOT 3-4 (1944)).

7. See, e.g., YITZHAK ADLER, LOMDUS: A SUBSTRUCTURAL ANALYSIS vi-ix (1989); LICHTENSTEIN, *supra* note 5, at 34-35; Chaim Saiman, *Legal Theology: The Turn to Conceptualism in Nineteenth Century Jewish Law*, 21 J. L. & RELIGION 39, 70-72 (2005-2006).

8. See, e.g., SOLOMON, *supra* note 5, at 49.

9. Posner was recognized at the 1991 inaugural meeting of the American Law and Economics Association as one of the four founders of the law and economics movement. See NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM 193 n.1 (1997); Francesco Parisi, *Palgrave on Law and Economics: A Review Essay*, 20 INT’L REV. L. & ECON. 395, 397-98 (2000). For an overview of the Chicago school and its place in the intellectual history of law and economics, see MERCURO & MEDEMA, *supra*, at 51-83.

10. POSNER, *supra* note 1, at 3.

11. *Id.*

12. Although numerous factors contribute to the success of a movement, this study is limited to a consideration of some of the central intellectual elements, and the corresponding appeal, of law and economics and the Brisker method. In addition, somewhat similar to the goals of a recent book on the intellectual history of law and economics, this study aims primarily to “describe the central ideas that each school of thought is attempting to convey” rather than “to critique the schools of thought or the ideas contained therein.” See MERCURO & MEDEMA, *supra* note 9, at 3-4. Moreover, like the authors of the book, I am “well aware of the pitfalls that are to be encountered in trying to describe the essential elements of a particular school of thought when there are

founding principles of these movements, exploring similarities in their essential characteristics.¹³ Part I presents and analyzes representative examples of the conceptual approach underlying each of these methods. Drawing on these and other examples of each method, Part II observes that the success of the methods stems in part from their common reliance on historical antecedents as well as their emphasis on conceptual frameworks broadly applicable within the legal systems they analyze. Building on these observations, Part III suggests that as a result of these characteristics, the two methods have gained a somewhat similar place of prominence in their respective legal systems, while at the same time facing similar criticisms. Finally, the Essay concludes with a cautious evaluation of similarities that exist in the present and future state of law and economics and the Brisker method.

II. REPRESENTATIVE EXAMPLES OF THE METHODS

A. *The Brisker Method*

To facilitate an examination of the nature of the Brisker method, it may be helpful to consider an application of the method to a particular issue in Jewish law. Among the obligations connected with the holiday of Passover, the Torah commands each individual to offer a Passover sacrifice during the afternoon of the fourteenth day of the first month of

continuing . . . disputes within [the] schools.” See MERCURO & MEDEMA, *supra* note 9, at 4. Nevertheless, again like the authors, I suggest that “the benefits of analyzing the schools of thought as presented here exceed the costs” of these limitations. See MERCURO & MEDEMA, *supra* note 9, at 4. Notably, a number of scholars have recently considered the contention that aspects of economic analysis resemble religious concepts. See, e.g., ROBERT H. NELSON, *ECONOMICS AS RELIGION: FROM SAMUELSON TO CHICAGO AND BEYOND* (2001); Symposium, *Understanding Economics Through Theology: Reflections on Robert Nelson’s Economics as Religion*, 56 CASE W. RES. L. REV. 547 (2006); Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303 (2005).

13. The aims of this Essay, focusing on conceptual comparisons between law and economics and the Brisker method of analysis in Jewish law, differ from an emerging area of scholarship that considers and critiques the substantive claims of law and economics through a perspective of religious traditions. A recent example of the latter form of scholarship, the program of the Section on Jewish Law at the 2005 Annual Meeting of the Association of American Law Schools in San Francisco, was entitled “Economic Analysis of Jewish Law” and consisted of presentations by leading and emerging scholars of law and economics, including Dean Saul Levmore of the University of Chicago Law School and Professors Daniel Klorman, Keith Sharfman, and Shayna Sigman. See also AARON LEVINE, *ECONOMIC PUBLIC POLICY AND JEWISH LAW* (1993). For considerations of law and economics in Catholic perspectives, compare, e.g., Stephen M. Bainbridge, *Law and Economics: An Apologia*, in CHRISTIAN PERSPECTIVES ON LEGAL THOUGHT 208 (Michael W. McConnell et al. eds., 2001), with Mark A. Sargent, *Utility, the Good and Civic Happiness: A Catholic Critique of Law and Economics*, 44 J. CATH. LEGAL STUD. 35 (2005).

the year, the eve of the first night of Passover,¹⁴ and to eat matzo that night, the fifteenth of the month.¹⁵ By definition, these obligations are incumbent only upon those who are legally adults, having reached the age of obligation. In practice, each individual who brought a Passover sacrifice generally represented others as well, at times including not only adults, who thereby fulfilled their obligation to bring the sacrifice, but also minors, who were not obligated. All those who were represented would partake in the eating of the sacrifice later that night.¹⁶

When an individual is obligated to offer the Passover sacrifice but is precluded from doing so as a result of any of a variety of circumstances, the Torah requires that the individual bring the sacrifice on the fourteenth day of the next month, a date thus termed "*Pesach sheni*," the "second Passover."¹⁷ The Talmud inquires whether a minor who reaches the age of obligation during the month between Passover and *Pesach sheni* should likewise be required to offer the Passover sacrifice on *Pesach sheni* of that year.¹⁸ In his landmark codification of Jewish law, the medieval legal authority Rambam (Maimonides)¹⁹ adopts the position, among competing views in the Talmud, that in such a case the individual is obligated to offer the Passover sacrifice on *Pesach sheni*.²⁰ Nevertheless, Rambam concludes that if, when still a minor on Passover, the individual was counted among those represented in the Passover sacrifice brought by another, the individual is not required, upon reaching adulthood, to bring a Passover sacrifice on *Pesach sheni*.²¹ At first glance, Rambam's rulings appear problematic; after all, if a minor is not obligated—and therefore, by definition, unable to fulfill any obligation—to offer the Passover sacrifice, it would seem to follow that being represented in a sacrifice should not relieve the minor of an obligation that later arises.²²

Moreover, as Reb Chaim notes, Rambam's ruling seems to contradict the Talmud's discussion regarding an individual who lacks the requisite

14. See, e.g., *Exodus* 12:6.

15. See, e.g., *Exodus* 12:18. In Jewish law, the calendar date begins at night.

16. See RAMBAM [MAIMONIDES], MISHNE TORAH [CODE OF LAW], *Laws of the Passover Sacrifice* 2:1-3.

17. See *Numbers* 9:9-14.

18. See BABYLONIAN TALMUD 193.

19. "Rambam" is the acronym for Rabbi Moses ben Maimon (Maimonides).

20. See RAMBAM, *supra* note 16, at 5:7.

21. See *id.*

22. See RABBI JOSEPH KARO, KESEF MISHNA (commenting on RAMBAM, *supra* note 19).

mental capacity and therefore is exempt from positive commandments.²³ According to the Talmud, such an individual who performs the physical actions required of a commandment does not fulfill the commandment. For example, if the individual eats matzo on the first night of Passover, this action does not qualify to fulfill the commandment to eat matzo. Therefore, according to the Talmud, if the individual then gains the requisite mental capacity in the course of the night, thereby becoming obligated to perform commandments, the obligation to eat matzo will remain unfulfilled until the individual eats the matzo while possessing the requisite mental capacity.²⁴ The Talmud's conclusion seems to imply that if a minor is counted among those represented in the Passover sacrifice brought by another, even though adults who are similarly included in the same sacrifice thereby fulfill their obligation, the minor, who is not yet obligated, should not qualify as having fulfilled any obligation. Accordingly, if such an individual reaches the age of obligation prior to *Pesach sheni*, the individual should be obligated to bring a Passover sacrifice on *Pesach sheni*.

A number of scholars have attempted to resolve the apparent problems posed by Rambam's rulings. For example, Rabbi Joseph Karo, a leading sixteenth century legal authority, cites the suggestion that the inclusion of a minor in the Passover sacrifice stands as an exception to the general rule regarding the actions of a minor in relation to commandments. Specifically, because a minor is authorized to be counted among those represented in a Passover sacrifice for the purpose of being permitted to eat of the sacrifice, the minor is likewise relieved of any further obligation with respect to bringing the Passover sacrifice.²⁵

Reb Chaim offers an alternative resolution to the problems presented by Rambam's conclusions.²⁶ Unlike Rabbi Karo's approach, which is premised upon a technical legal rule unique to the Passover sacrifice, Reb Chaim's resolution operates within a broader analytical framework, applicable to a wide range of issues in Jewish law. Reb Chaim distinguishes between the essential nature of the commandment to offer the Passover sacrifice and that of the commandment to eat matzo. He explains that the essence of the commandment to eat matzo operates in relation to the *gavra*, the person, who is obligated to perform the act of eating the

23. See SOLOVEITCHIK, *supra* note 6, at 67 (quoting TALMUD BAVLI, *Rosh ha-Shana* 28a).

24. See *id.* See also RAMBAM, *supra* note 16, *Laws of Chametz and Matzo* 6:3.

25. See KARO, *supra* note 22.

26. See SOLOVEITCHIK, *supra* note 6, at 67-68.

matzo.²⁷ Therefore, an individual who is not obligated, but performs, the physical act of eating matzo on the first night of Passover has not fulfilled the commandment; thus, if in the course of the night, the individual then becomes obligated to eat matzo, the act of eating the matzo must be repeated to fulfill the commandment.²⁸

In contrast, Reb Chaim posits that the essence of the commandment to offer the Passover sacrifice operates in relation to the *cheftza*, the “object” through which the commandment is performed—specifically, the animal that is brought as a sacrifice.²⁹ Although the obligation is, of course, directed at the person commanded to offer the sacrifice, conceptually, the mechanics of the commandment operate primarily through the requirement that the sacrifice be brought. Consequently, once the sacrifice is properly offered, the individual who has brought the sacrifice and those on whose behalf it has been brought have all satisfied the commandment.³⁰ Moreover, Reb Chaim notes that although a minor is not obligated to offer sacrifices, a minor is nevertheless not excluded generally from the laws that apply to sacrifices.³¹ Likewise, he suggests, the rule that a properly offered Passover sacrifice serves to satisfy the obligations of all those on whose behalf it is brought applies to the minor as well. Thus, as a result of being included in a properly offered Passover sacrifice while still a minor, an individual is relieved of any applicable obligation in connection with the commandment. Therefore, as Rambam concludes, if the individual then reaches the age of obligation prior to *Pesach sheni*, there is no requirement to repeat the act of bringing the Passover sacrifice.³²

The application of the *cheftza/gavra* dichotomy to explain and distinguish between the essential qualities of the commandments of the Passover

27. Although Reb Chaim does not expressly use the term “*gavra*” in this discussion, in the context of his methodology, it is universally the conceptual counterpart to the term “*cheftza*”.

28. See SOLOVEITCHIK, *supra* note 6, at 67-68.

29. See *id.*

30. The distinction in characterization between commandments operating in relation to the *gavra* and those operating in relation to the *cheftza* may bear more than a passing conceptual resemblance to the distinction between *in personam* jurisdiction and *in rem* jurisdiction. In either case, the individual is subject to the jurisdiction of the court; however, the mechanics yielding the court’s exercise of jurisdiction may operate directly in relation to the individual or, alternatively, primarily in relation to the individual’s property and, as a consequence, in relation to the individual. See SOLOMON, *supra* note 5, at 123.

31. See SOLOVEITCHIK, *supra* note 6, at 67-68.

32. See *id.*

sacrifice and eating matzo, respectively, illustrates some of the elements of the Brisker method that have led to its characterization as “conceptual” or “analytic.”³³ Rather than focusing upon the technical aspects of each particular legal rule and restricting the examination to only the most directly relevant Talmudic passages, the Brisker method constructs conceptual frameworks through which a broad range of legal principles can be analyzed and understood, in a generally applicable and systematic manner.³⁴ Thus, Reb Chaim’s resolution of the specific issue of Rambam’s treatment of the commandments of the Passover sacrifice and eating matzo is not limited to an explanation of unusual or unique aspects of one or both of these areas of law. Instead, Reb Chaim’s approach is premised upon a conceptual dichotomy that similarly serves as a means of explaining the nature of a number of other commandments through their categorization as essentially based in the *cheftza* or the *gavra* aspect of the commandment.³⁵

B. Law and Economics

The methodology employed in law and economics has been described and applied in painstaking detail, producing a vast and growing body of legal scholarship widely accessible to American legal scholars.³⁶ Thus, a brief example may suffice for the purposes of illustrating the application of the method to conceptualize an issue in the American legal system.

In his groundbreaking text on the economic analysis of law, Posner engages in an extensive discussion of one of the basic components of the common law, the area of tort law. Posner first addresses the topic of accidents, or unintentional torts, citing Judge Learned Hand’s formula for the determination of negligence. Under the Hand Formula, a defendant is negligent if and only if $B < PL$, where B represents the “cost of precaution” to prevent the accident, P represents the probability of the accident’s occurrence, and L represents the magnitude of the potential loss.³⁷ Through this formula, Posner notes, the potential injurer will be required to act to prevent the accident only to the extent that such

33. See *supra* notes 6-7 and accompanying text.

34. See discussion *infra* notes 59-62 and accompanying text.

35. See SOLOMON, *supra* note 5, at 123-26; SHLOMO YOSEF ZEVIN, ISHIM V’SHTOT 49-57 (3d ed. 1966). For additional discussions of the Brisker approach to the *cheftza/gavra* dichotomy in the context of the Passover sacrifice, see HERSHEL SCHACHTER, MIPNINEI HARAV 96 (2001); SHLOMO YOSEF ZEVIN, HAMOADIM B’HALACHA 225-26 (1955).

36. See POSNER, *supra* note 1, at xx and n.3 (citing Bryant G. Garth, *Strategic Research in Law and Society*, 18 FLA. ST. U. L. REV. 57, 59 (1990); William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J.L. & ECON. 385 (1993)).

37. See *id.* at 168 (citing *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947)).

prevention will result in a net social gain.³⁸ Thus, according to Posner, the Hand Formula reflects the incorporation of the economic principle of efficiency to define the contours of the law of negligence. Through further and more complex application of the Hand Formula, Posner offers an economic analysis of a wide range of issues related to negligence.³⁹

Turning to the topic of intentional torts, Posner suggests that, analytically, the distinction between intentional and unintentional torts may prove both vague and, at times, inaccurate.⁴⁰ Posner recounts an early nineteenth century English case⁴¹ in which a defendant kept a valuable tulip garden about a mile from his house. After finding that a wall around the garden had failed to prevent tulips from being stolen, the defendant set up a spring gun to protect the garden. One day, a neighbor's peahen escaped and entered the garden, followed by the pursuing plaintiff, who tripped the spring gun and was injured. The courts held that because the defendant failed to post warnings of the spring gun, and because the injury occurred in the daytime, the defendant was liable for the injury.⁴²

Posner considers the case through the lens of economic analysis, framing the issue as "the proper accommodation of two legitimate activities," the defendant's growing tulips and the plaintiff's keeping animals.⁴³ Under the circumstances, Posner notes, the spring gun may have served as the most cost-effective means for the defendant to protect the tulips.⁴⁴ At the same time, however, because spring guns deter not only thieves but innocent trespassers as well, such as owners who are attempting to recover straying animals, they will cause an increase in the cost involved in keeping animals; as a result of the presence of the spring gun, animal owners will either face greater expenses, necessary to prevent animals from straying, or incur greater losses, through the decreased ability to follow and recover animals straying onto the defendant's property.⁴⁵

In Posner's analysis, the court's decision "implied an ingenious accommodation."⁴⁶ Specifically, if owners who set up spring guns are

38. *See id.*

39. *See id.* at 167-204.

40. *See id.* at 204.

41. *Bird v. Holbrook*, (1828) 4 Bing 628, 130 Eng. Rep. 911 (C.P.).

42. *See POSNER, supra* note 1, at 204-05.

43. *See id.* at 205.

44. *See id.*

45. *Id.*

46. *See id.*

required to post notices, the absence of such notices signals to animal owners the absence of spring guns; as a result, if there are no signs posted, animal owners will not be deterred from following and recovering their straying animals.⁴⁷ To the extent that such notices will not be effective at night, it is less likely that an animal will be left unsecured at night and, if the animal strays, much less likely that its owner will follow after it.⁴⁸ On the basis of this analysis, Posner concludes that, although the defendant intentionally set up the spring gun, the case is more accurately understood through principles applicable to negligence cases.⁴⁹

Accordingly, Posner presents an alternative analytical framework, distinguishing torts involving “a conflict between legitimate (productive) activities” from those such as fraud, involving “a coerced transfer of wealth to the defendant in a setting of low transaction costs.”⁵⁰ The latter category represents conduct that “is inefficient because it violates the principle that when market transaction costs are low, people should be required to use the market if they can and to desist from the conduct if they can’t.”⁵¹

Posner’s application of an economic framework for the analysis of the court’s decision in an early nineteenth century English case illustrates some of the significant characteristics of law and economics. Although the court’s decision appeared to rest on a notion of fairness, faulting the owner of the tulips for failing to post signs warning of the spring gun, the implications of its ruling seemed limited to the relatively particular and somewhat unusual facts of the case, superficially involving an apparently intentional tort committed against a trespasser. In contrast, Posner seeks to uncover the underlying logic supporting the court’s ruling, placing it within the broader conceptual framework of law and economics. Reconceptualized as posing an economic problem of balancing competing claims to legitimate activities, the case presents the court with the opportunity to resolve the dispute, “ingenious[ly]” according to Posner,⁵² on the basis of a methodology generally applied to negligence cases. Thus, in Posner’s economic framework, the case takes on a wider significance, somewhat removed from its specific facts. Understood in this light, the case serves to demonstrate the broad applicability and consistency of economic analysis, while at the same time the underlying conceptual characteristics of the case are revealed as more similar to negligence than to intentional torts.

47. *See id.*

48. *See id.*

49. *See id.*

50. *Id.*

51. *Id.*

52. POSNER, *supra* note 1, at 205.

III. SIMILAR CHARACTERISTICS OF THE METHODS: BUILDING ON INTELLECTUAL ANTECEDENTS TO DEVELOP A THEORY OF BROAD APPLICABILITY AND APPEAL

A. The Brisker Method

To be sure, notwithstanding the originality of his approach, Reb Chaim was far from the first to utilize conceptual frameworks as a method for understanding the Jewish legal system. For example, the *cheftza/gavra* dichotomy finds an antecedent in the ancient Talmudic discussion of the commandment to place fringes on the corners of a four-cornered garment.⁵³ In Talmudic terminology, certain aspects of the commandment depend upon its characterization as essentially operating either through the obligation incumbent upon the *gavra*, the individual, to perform the commandment, or alternatively, through the *manne*, the object upon which the commandment is performed—here, the garment, which must have fringes placed on it.⁵⁴

Likewise, the Talmud utilizes a similar dichotomy to explain the conceptual distinction between two different types of oaths, a *neder* and a *shevua*. Through a *neder*, the *cheftza*—the object identified in the oath—becomes prohibited to an individual, while through a *shevua*, the individual undertakes an obligation or prohibition vis-à-vis an object.⁵⁵ Indeed, from the text of the Talmud through the works of medieval and modern commentators, conceptualization, dichotomization, and categorization have played an important role in the analysis of Jewish law.⁵⁶

Notwithstanding the historical antecedents to Reb Chaim's approach, however, the Brisker method stands out in the extent to which it offers a systematic and broadly applicable framework for the conceptual analysis of Jewish law.⁵⁷ Indeed, Reb Chaim's work, recorded both in his carefully

53. See *Numbers* 15:38.

54. See TALMUD BAVLI, *Menachoth* 41a, 42b.

55. See TALMUD BAVLI, *Nedarim* 2b. See also JOSEPH B. SOLOVEITCHIK, YEMEI ZICHARON 21-23 (1996).

56. See SOLOMON, *supra* note 5, at 123-26.

57. See LICHTENSTEIN, *supra* note 5, at 40. Explains:

The conceptual approach is no recent innovation. Its primary features are clearly present in [the Talmud], recurrently manifest in [Medieval legal sources], and amply exemplified by many [modern legal commentators] who were precursors to the Brisker tradition, with which the approach is now most familiarly associated. Much of this is only perceived in retrospect, however, and unquestionably Reb [Chaim], for whom this approach was not merely one

written essays, structured according to corresponding sections of Rambam's Code of Law,⁵⁸ and in his lectures, transcribed by his students and organized according to the order of the Talmud,⁵⁹ encompasses topics representative of nearly the entire range of Jewish law, including, among others: martyrdom, prayer, ritual objects, the Sabbath and various holidays, marriage and divorce, dietary laws, agricultural laws, the Temple and sacrifices, ritual purity, contracts, torts, property, criminal law, commercial law, procedure, and estate law, in addition to several subtopics and other related areas.

Moreover, a number of areas of law that proved most prominent in Reb Chaim's methodology had previously seemed least susceptible to conceptual analysis, appearing instead to revolve largely around technical and particularistic details. One of Reb Chaim's most influential intellectual heirs, Rabbi Joseph Dov Soloveitchik—who was also his grandson—wrote eloquently of the striking innovation effected by the application of Reb Chaim's method to the analysis of dietary laws, manifested in “matters of abstract thought and orderly concepts, which combine [to produce] a unified, consistent theory.”⁶⁰ As a result, “[t]he spoons and pots, the onions and radishes, have disappeared from the [laws] of meat and milk; boiling water that has fallen into wine, a mouse that has fallen into oil—all have disappeared from the [laws] of mixtures; blood and fat, salt and spit have disappeared from the laws of salting.”⁶¹ In short, these matters “have been moved from the kitchen and into another sphere . . . which is entirely concerned with conceptual structures.”⁶² The effectiveness of Reb Chaim's method, in providing a

of the many arrows in his quiver, but the central mode of learning, gave conceptualism great impetus toward preeminence. In this respect he certainly effected a major sea change—particularly noteworthy when his achievement is contrasted with the overall direction of most of his immediate forerunners and contemporaries. . . . In this undertaking, he surely had ample precedent and built upon predecessors. Just as surely, he was strikingly original.

See also Lichtenstein, *supra* note 6, at 16 n.9. Discussing

Though [Medieval commentators] . . . occasionally offer conceptual analysis similar to the Brisker method, they do it not systematically but intuitively. The change brought about by [Reb Chaim], which justifies the claim that he created a new method, is precisely the fact that conceptualizations and analysis of the phenomenon were transformed into a system [T]he significance of Brisk is not in the fact that an approach never before attempted was introduced into the world of learning, but that a system has been created.

58. See SOLOVEITCHIK, *supra* note 6, *passim*.

59. RABBI CHAIM SOLOVEITCHIK, CHIDUSHE HA-GRACH AL HA-SHAS. See also RABBI CHAIM SOLOVEITCHIK, SHIUREI RABBENU CHAIM HA-LEVI, published in 1998 from Reb Chaim's notes.

60. LICHENSTEIN, *supra* note 5, at 44 (quoting and translating RABBI JOSEPH B. SOLOVEITCHIK, DIVREI HAGUT VE-HA'ARACHA 80 (1981)).

61. *Id.* at 44-45 (quoting and translating SOLOVEITCHIK, *supra* note 59, at 80).

62. *Id.* at 45 (quoting and translating SOLOVEITCHIK, *supra* note 59, at 80).

conceptual framework for the systematic analysis of such a wide array of legal materials, evokes similarities to “scientific” methods that present organizing principles to explain various empirical and observational data.⁶³

The scientific and conceptual characteristics of the Brisker method may account in part for the rapid and widespread prominence it gained in academies of Jewish law. In the words of a leading current proponent of Reb Chaim’s method, “for sheer beauty and excitement, tedious plodding through . . . laborious, relatively mechanical, and often technical” legal material “cannot hold a candle to Reb [Chaim’s] soaring imagination and piercing insights.”⁶⁴ Others have suggested that, in addition, the scientific approach had particular appeal in the context of the modern intellectual milieu of late nineteenth century Europe.⁶⁵

Moreover, the systematic quality of the Reb Chaim’s approach offered a powerful alternative to one of the methods of Talmudic theory to which it responded, the *pilpul* mode of analysis. Taking its name from the Hebrew word for “pepper,” a paradigm of sharp food, *pilpul* placed an emphasis on applying sharply calculated arguments to investigate the complexity of Talmudic logic. Although on one level, *pilpul* follows—and extends—a traditional method of rigorous reasoning prominent in Jewish

63. See *infra* notes 107-09 and accompanying text.

64. LICHTENSTEIN, *supra* note 5, at 43, 50-52; (describing both: a “subjective element” to the attractive nature of the Brisker method, expressed in “the excitement and the sparkle of conceptual analysis” and “the precision and sweep manifested in the best of Brisk [that] simply does not characterize grappling and groping within the confines of a pragmatic mode”; and an “objective factor” premised on the view that “Torah that is perceived as grounded upon rational principles and marked by consistency and coherence, that is developed and perceived as an organic unity, is nobler than one that is a potpourri of practical directives” and that “[t]here is power, majesty, and grandeur in Torah, conceptually formulated, that a patchwork of minutiae, largely molded by ad hoc pragmatic considerations, simply cannot match”).

65. Lawrence Kaplan, *Rabbi Joseph B. Soloveitchik’s Philosophy of Halakha*, 7 JEWISH LAW ANNUAL 139, 190 (1988) (according to Lawrence Kaplan, although there is a “good deal of truth” to the suggestion that the emphasis on a scientific model of legal analysis may have been in part an apologetic response to modernity,

[t]here is a deeper reason behind the general appeal of the scientific model . . . and . . . this deeper reason is the essential reason. For the system of science provides [Jewish law] with a model of a system that has a strictly objective and autonomous character but at the same time allows for, indeed is the result of, profound and powerful human creativity. And the traditional [theorist of Jewish law] seeks to maintain the strict objectivity and autonomy of [Jewish law] . . . but together with that, sees [Jewish law] as an unfolding conceptual system that allows for, nay demands, ongoing human creativity.).

law at least since the times of the Talmud,⁶⁶ the movement began to encounter critics who characterized it, in the words of one historian, as “the twisting of plain truth resulting out of the hairsplitting efforts of the most sharp-witted.”⁶⁷ In contrast to *pilpul*’s clever—if, at times, somewhat convoluted—deconstruction of Talmudic passages and modes of argumentation, Reb Chaim’s approach provided a methodology for a more structured understanding of Jewish law as a system of orderly logic, comprising clearly articulated, albeit complex and rigorously applied, conceptual frameworks.

B. Law and Economics

Likewise, despite the significance of law and economics as a late twentieth century movement, and of the importance of Posner and the Chicago school as leading proponents, Posner readily acknowledges earlier expressions of the economic analysis of law. Indeed, the Hand Formula, which serves as a basis for the economic analysis of negligence, was articulated in a 1947 case.⁶⁸ Moreover, although Posner characterizes the Hand Formula as “relatively new,” he finds antecedents in earlier cases, suggesting, in fact, that “the method it capsualizes has been used to determine negligence ever since negligence was first adopted as the standard to govern accident cases.”⁶⁹

Thus, Posner characterizes an 1856 English case,⁷⁰ emphasizing that an injury was “of unprecedented severity,” as finding that “the probability of the loss had been low,” thereby leading to the court’s conclusion that, in Posner’s terms, “[t]he damage was not so great as to make the expected cost of the accident greater than the cost of prevention.”⁷¹ Similarly, in Posner’s reading of a 1919 New York Court of Appeals case,⁷² Cardozo’s opinion employs “terms suggestive of economic insight,”⁷³ including the declaration that “[c]hance of harm”—low *P*—“though remote, may

66. See RABBI MOSHE AVIGDOR AMIEL, 1 HA-MIDDOT L’CHEKER HA-HALACHA 1-26 (1939).

67. Mordechai Breuer, *Pilpul*, in 13 ENCYCLOPEDIA JUDAICA 524, 524-27. See also LICHTENSTEIN, *supra* note 5, at 42 (describing “dexterous pyrotechnics” and “ingeniously convoluted” reasoning); *id.* at 50 (describing “far-fetched and fantastic” and “diversionary and trivial” reasoning). See generally Mordechai Breuer, *Aliyat ha-Pilpul V’ha-chilukim B’Yeshivot Ashkenaz*, in SEFER HA-ZICHARON L’MORENU YECHIEL YAAKOV WEINBERG 241-255 (1969) (describing the initial success of and subsequent opposition to the evolving *pilpul* method.).

68. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947).

69. POSNER, *supra* note 1, at 169.

70. *Blyth v. Birmingham Water Works*, (1856) 11 Exch. Div. 781, 156 Eng. Rep. 1047.

71. POSNER, *supra* note 1, at 169.

72. *Adams v. Bullock*, 227 N.Y. 208, 125 N.E. 93 (1919) (Cardozo, J.).

73. POSNER, *supra* note 1, at 170.

betoken negligence, if needless”—very low *B*.⁷⁴ In addition, Posner further acknowledges that even before 1960, which he marks as the start of the “new” law and economics,⁷⁵ there were a number of important “precursors” to contemporary economic analysis of law, applied to fields such as antitrust and “other regulation of explicit economic markets,”⁷⁶ as well as criminal law and tort law, among other areas.⁷⁷

In a manner similar to the Brisker method, relying on previous applications of economic analysis to a variety of legal issues, Posner and other scholars have aimed to produce a systematic framework for the economic analysis of nearly every area of American law.⁷⁸ As Posner describes it, “the hallmark of the ‘new’ law and economics—the law and economics that has emerged since 1960—is the application of economics of the legal system across the board.”⁷⁹ Specifically, Posner enumerates the application of economics:

to common law fields such as torts, contracts, restitution, and property; to the theory and practice of punishment; to civil, criminal, and administrative procedure; to the theory of legislation and regulation; to law enforcement and judicial administration; and even to constitutional law, primitive law, admiralty law, family law, and jurisprudence.⁸⁰

Just as a survey of Reb Chaim’s work illustrates the wide-ranging applicability of the Brisker method throughout the Jewish legal system, the table of contents of Posner’s text bespeaks the ambitious goal of demonstrating the effectiveness of law and economics as a viable theory for understanding almost any issue within the American legal system.⁸¹

74. *Id.* at 170 (quoting *Adams*, 227 N.Y. at 208, and drawing parallels to *P* and *B*).

75. *Id.* at 23 (citing Guido Calabresi, *Some Thoughts on Risk Distributions and the Law of Torts*, 70 YALE L.J. 499 (1961); Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960)).

76. *See id.* at 23 (referencing the work of Henry Simons in tax law, Henry Manne in corporate law, Arnold Plant in patent law, Robert Hale in contract law, and Ronald Coase and others in public utility and common carrier regulation).

77. *See id.* at 23-24 n.2 (referencing the works of Beccaria and Bentham in criminal law, and citing a number of articles identifying precursors to law and economics in other areas).

78. *See POSNER, supra* note 1, at xix (declaring that the breadth of the book’s coverage includes “almost the whole legal system”) (emphasis in original).

79. *Id.* at 23.

80. *Id.*

81. *See id.* at ix-xviii. Indeed, even the more abbreviated “Summary of Contents” delineates applications to: “the common law,” including “property, contract rights and remedies, family law and sex law, tort law, criminal law, the common law, legal history and jurisprudence”; “public regulation of the market,” including “the theory of monopoly, the antitrust laws, the regulation of the employment relation, public utility and common

Moreover, parallel to Rabbi Joseph Soloveitchik's observation regarding the Brisker method,⁸² Posner notes the degree to which economic analysis has been utilized to understand areas of nonmarket behavior that might seem least related to economics. Indeed, the structure and substance of Posner's text aims, in part, to focus on these areas of the law, highlighting the broad range of applicability of law and economics. Thus, according to Posner, one of the significant features of his book is the "emphasis placed upon the legal regulation of nonmarket behavior—not only familiar examples such as crimes and accidents and lawsuits, but also less familiar (to economists) examples such as drug addiction, thefts of art, sexual acts, surrogate motherhood, rescues at sea, flag desecration, public international law, presidential pardons, democratic theory, and religious observances."⁸³ Therefore, as Posner poignantly explains in the preface to his text, "[t]his approach enables the law to be seen, grasped, and studied as a system—a system that economic analysis can illuminate, reveal as coherent and in places improve."⁸⁴

Again echoing the Brisker method,⁸⁵ the scientific and systematic characteristics of law and economics may thus have contributed substantially to its striking and somewhat singular success as an intellectual movement in contemporary American legal theory. Posner cites with approval the observation that "[l]aw and economics represents the one example of a social science that has successfully found a place at the core of the legal arguments made in courts, administrative agencies, and other legal settings."⁸⁶ Moreover, the science of economics may have particular appeal because of what Posner describes as "the unity, simplicity, and power, but also the subtlety, of economic principles."⁸⁷

carrier regulation, the choice between regulation and common law"; "the law of business organizations and financial markets," including "corporations, secured and unsecured financing, bankruptcy, financial markets"; "law and the distribution of income and wealth," including "income inequalities, distributive justice, and poverty, taxation, the transmission of wealth at death"; "the legal process," including "the market, the adversary system, and the legislative process as methods of resource allocation, the process of legal rulemaking, civil and criminal procedure, evidence, law enforcement and the administrative process"; and "the Constitution and the federal system," including "the nature and functions of the Constitution, economic due process, the economics of federalism, racial discrimination, the protection of free markets in ideas and religion, searches, seizures, and interrogations." *Id.* at vii-viii.

82. See *supra* notes 59-60 and accompanying text.

83. *Id.* at xix.

84. *Id.*

85. See *supra* notes 63 and accompanying text.

86. POSNER, *supra* note 1, at xx n.3 (quoting Bryant G. Garth, *Strategic Research in Law and Society*, 18 FLA. ST. U. L. REV. 57, 59 (1990)). Cf. Morton J. Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905, 912 (1980) (arguing that "[t]he economic analysis of law, I believe, could maintain its prestige only so long as it wrapped itself in the cloak of science").

87. POSNER, *supra* note 1, at xix.

Accordingly, in yet another parallel to the emergence of the Brisker method,⁸⁸ the prominence of law and economics may be attributed in part to its ability to provide a systematic alternative to other intellectual movements.⁸⁹ In a stinging 1974 review of the first edition of Posner's book, Arthur Leff noted the appeal of law and economics as a response to the Realists.⁹⁰ According to Leff, one of the central features of legal realism was its view of the law in terms of "existential reality" rather than "systematic consistency," a view that was not only "liberating" but also "ultimately terrifying" in the context of "a universe normatively empty and empirically overflowing."⁹¹ Leff thus posited that "the move to economic analysis in law schools seems an attempt to get over, to at least get by, the complexity thrust upon us by the Realists."⁹² Thirty years later, Leff's begrudging description of law and economics as an effective response to legal realism continues to ring true.⁹³

Indeed, the pattern detected by Leff and others seems to have been repeated more recently with the evolution of legal realism into critical legal studies. Though notoriously difficult to define,⁹⁴ by most accounts

88. See *supra* notes 66-67 and accompanying text.

89. Although of course, the relative success of these and other movements is intertwined with political, philosophical, and other forces, the focus of this study remains the intellectual elements and appeal of the movements. See discussion *supra* note 11.

90. Arthur Allen Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 459 (1974).

91. *Id.* at 454, 455.

92. *Id.* at 459.

93. See also Horwitz, *supra* note 86, at 905 ("Law-and-economics emerges to fill the intellectual vacuum left by Legal Realism"); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 125 (1987) (describing law and economics as "an attempt to respond to an ongoing internal legal academic crisis, the difficulty of justifying the separation of law and politics that has beset post-Realist legal academics who have been taught that legal rules are nothing but policy-oriented decisions"); MERCURO & MEDEMA, *supra* note 9, at 12-13 (stating that "it was the Legal Realists who created an environment that was more receptive to the introduction of economics into the law school curriculum" and referring to law and economics as "an attempt . . . to fill the void left by Legal Realism"). Cf. Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877, 918 (1997) (observing that "[t]he breakdown of Langdell's vision of law as science throughout the twentieth century has occasioned many attempts to find or reconstruct the intelligent knowledge of the law" and characterizing Posner's efforts as an example of "the manifestations of a professional desire to reinstitute the discipline of law as a science").

94. See, e.g., Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516 (1991) (stating that "as I read articles by and about critical legal studies, I not infrequently find myself puzzled" when authors "describe what they believe critical legal studies to be, and yet the descriptions do not resonate strongly with what I think about the law" and that "I find these authors taking as central to their understanding of

critical legal studies is broadly premised, in part, on uncovering the inherent contradictions in liberal legal thought.⁹⁵ The focus in critical legal studies on demonstrating the indeterminacy of the law through the deconstruction of the forms of legal reasoning, reminiscent of the *pilpul* method of Talmudic analysis,⁹⁶ led to the arguably fatal critique of critical legal studies as overly nihilistic in its view of the law.⁹⁷ As one proponent of critical legal studies sarcastically put it, in light of this perceived nihilism, the failure of the movement to answer the subsequent question “[w]hat would you put in its place” effectively “killed” critical legal studies.⁹⁸ Notwithstanding the merits of the argument that this is the “wrong question” and therefore could not have “killed” critical legal studies,⁹⁹ the perception of failure remains, stemming from an inability to offer a systematic account of the law. Accordingly, upon the perceived death of the nihilistic critical legal studies movement, law and economics was able to claim victory through its contrasting reliance on a structured and systematic approach to the legal system.¹⁰⁰

[critical legal studies] propositions that I find extremely problematic, or dismissing as unimportant propositions that I find central.”).

95. See generally KELMAN, *supra* note 93.

96. See *supra* notes 66-67 and accompanying text.

97. See, e.g., Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984). See also Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779, 781-82 (1992) (quoting and citing sources).

98. See Fischl, *supra* note 97, at 780.

99. See *id.* See also Pierre Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 802 (1991) (“What should be done? How should we live? What should the law be? These are the momentous questions. These are the hard questions.”); Pierre Schlag, *Normative and Nowhere to Go*, 43 STAN L. REV. 167, 177 (1990).

100. See Daria Roithmayr, *A Dangerous Supplement*, 55 J. LEGAL EDUC. 80, 84 (2005) (stating that “[t]he ‘science’ of economics promises to make legal reasoning even more objective than it ostensibly was” and that “[u]nder law and economics, the scientific domain of legal reasoning has been recaptured as the domain of objective economic reasoning . . . while the domain of politics has now been separated out as the subjective”).

Notably, however, despite the apparent competition between critical legal studies and law and economics, the two movements share a number of insights and emphases. See, e.g., KELMAN, *supra* note 93, at 114-85; MERCURO & MEDEMA, *supra* note 9, at 157-70. Indeed, despite any claim to victory over critical legal studies on the part of law and economics, and despite the clear substantive differences in the movements, the economic analysis of law has arguably borrowed and benefited from methodologies developed in part by critical legal studies, such as an emphasis on interdisciplinary and empirical research.

Similarly, to some degree, the conceptual frameworks that Reb Chaim introduced resemble the rigorous distinctions that form the basis of the *pilpul* method. Indeed, it need not prove surprising to find similarities among distinct intellectual movements analyzing the same substantive material. Nevertheless, a close look at the apparent similarities among *pilpul* and Reb Chaim’s approach serves to highlight the significant differences between the two methods. See SOLOMON, *supra* note 8, at 117-20.

IV. SIMILARITIES IN CRITICISM OF THE METHODS AND RESPONSES

A. *The Brisker Method*

Not surprisingly, in addition to—and likely, at least in part as a result of—its rapid and considerable success in attracting adherents, Reb Chaim's method attracted criticism as well. An examination of some of the criticisms, together with responses that have been offered, may serve to illuminate further the nature of Reb Chaim's method. Indeed, to some extent, the criticisms themselves prove less a challenge to the method than an occasion for elucidation and articulation of its salient features.

Much of the criticism, some of which surfaced during Reb Chaim's lifetime, was broadly premised on the contention that Reb Chaim's theories seemed inconsistent with the approaches and concerns traditionally applied in the study of Jewish law. On a basic level, there was apparently some resistance to the degree of innovation inherent in Reb Chaim's creative methodology.¹⁰¹ More substantively, critics claimed that Reb Chaim's conceptualizations of the law were at times insufficiently or inconclusively based in the legal sources analyzed and explicated.¹⁰² Relatedly, it has been argued that Reb Chaim's focus on conceptualization relies upon broadly structured theories that entail insufficient attention to concrete analysis of the law and detailed disquisition of the Talmudic text.¹⁰³

101. See LICHTENSTEIN, *supra* note 5, at 41-42 (quoting and translating REB HENOKH AGUS, SEFER MARCHESHET (1931)) (describing "the well-known [development] that, in our time the ways of study in the learning of our sacred Torah have changed considerably" and contrasting "these which are newly come from near, bringing with them the style of their learning" with his own experience, in which "all my life, I grew up among scholars of the old [school]" and "the well-maintained, well-trodden paths of our teachers, early and later"). Others were harsher in their criticisms, referring to the Brisker method as "chemistry" and decrying the notion of new "methods" of study. See Marc B. Shapiro, *The Brisker Method Reconsidered: Review Essay*, 31 TRADITION 78, 79-80 (1997) (reviewing SOLOMON, *supra* note 8).

102. See Lawrence Kaplan, *The Hazon Ish: Haredi Critic of Traditional Orthodoxy*, in THE USES OF TRADITION 145, 154-55 (Jack Wertheimer ed., 1992) (observing that, in the important glosses of the Hazon Ish on Reb Chaim's writings, "[a]bove all, he consistently and firmly opposes what he views as attempts on the part of Reb [Chaim] to read certain concepts and ideas into the Rambam or the [Talmud] which are not stated clearly therein"). See Kaplan at 155 n.32 (citing sources). See also LICHTENSTEIN, *supra* note 5, at 78 (acknowledging that "[i]t may indeed perhaps be doubtful whether in codifying his positions regarding [particular legal issues], [Rambam] personally sought to communicate everything Reb [Chaim] expounded by way of explication").

103. LICHTENSTEIN, *supra* note 5, at 45 (noting Rabbi Joseph B. Soloveitchik's conceptualization of the physical elements of dietary laws, but acknowledging that some

Responses to these arguments vary, but most seem to share the common thesis that the criticisms are based upon a misunderstanding of the underlying goals and claims of the Brisker method. In spite of the innovative nature of the methodology he developed, Reb Chaim insisted that his aim was not to initiate new ideas, but rather to obtain a clearly defined understanding of the Jewish legal tradition that preceded him.¹⁰⁴ Accordingly, although Reb Chaim's methodology often employed conceptual frameworks that had not been expressly articulated in earlier sources, the subject of analysis remained the Talmudic discussions as understood through the works of earlier commentators and legal authorities, most prominently Rambam.¹⁰⁵ Likewise, as one scholar has put it, the notion that the Brisker method requires less attention to detail applies only to "details that are neither here nor there with respect to [conceptual] principles."¹⁰⁶ In contrast, "even technical details receive major attention" in the Brisker method when "related to conceptual issues [] through which . . . the issues can be refracted."¹⁰⁷

"deplore" this approach, because "[t]hey need to hear dishes rattling and utensils clattering in order to feel connected with" the world, or, "impelled by a holistic perception of metaphysical and spiritual reality, [they] view analysis with a jaundiced eye"). Cf. Lichtenstein, *supra* note 6, at 2 ("[T]he Brisker approach shifted the learner's interest from the talmudic discussion itself . . . to the practical implications thereof. . .").

104. Reb Chaim is quoted stating that "our role is not to create [new ideas], for this was the task of the early commentators on the Talmud. Our duty is merely to understand the words of the early commentators." Shapiro, *supra* note 101, at 80. Likewise, Shapiro notes that in their introduction to Reb Chaim's work on Rambam's Code of Law, Reb Chaim's sons emphasize that his method was "in accordance with the approach taught to us by our teachers, the [early commentators], of blessed memory." *Id.* at 81 (quoting and translating *Introduction to SOLOVEITCHIK*, *supra* note 4). See also SOLOMON, *supra* note 8, at 91-92.

105. See LICHTENSTEIN, *supra* note 5, at 34-35 (asserting that "it would, of course, be naive to assume that the whole of [Reb Chaim's work on the Rambam's Code of Law] was composed purely in order to defend [Rambam]. Unquestionably, many of the seminal ideas had been developed independently, as part of the process of understanding the [Talmud], and here found application."). See also LICHTENSTEIN, *supra* note 5, at 78-79 (finding that "[t]he potential for the whole of [Reb Chaim's work on Rambam's Code] is surely latent within the raw material of the [Code]—within its individual components and the sum total of their interrelation—although it may have taken a genius of Reb [Chaim's] stature to extract and elucidate its content."). Cf. Shapiro, *supra* note 101, at 81 (stating that "the Brisker method assumes that if the [earlier commentators] had seen the way their positions were explained and presented, they would agree" with Reb Chaim's derivations and analytical structure).

106. LICHTENSTEIN, *supra* note 5, at 38. See also Lichtenstein, *supra* note 6, at 16 n.9 (observing that the Brisker method restricts the treatment of the [Talmudic section] solely to the conceptual issue, to the exclusion of other queries [such as] [i]ssues relating to the dialogue's . . . cogency, or to textual or practical problems, . . . insofar as they are deemed essentially technical issues that have nothing to contribute to the essence of the [topic].).

RABBI HERSHEL SCHACHTER, NEFESH HA-RAV 12-19 (1994).

107. LICHTENSTEIN, *supra* note 5, at 38.

Indeed, as some have suggested, the goals and approaches of the Brisker method may be best understood through analogy to the scientific method.¹⁰⁸ For both the scientist and those applying the Brisker method

108. The most explicit and most sustained comparisons between the Brisker method and the scientific method were offered by Reb Chaim's grandson, Rabbi Joseph B. Soloveitchik. For example, Rabbi Soloveitchik describes the "approach . . . of mathematics and the mathematical, natural sciences" as "construct[ing] an ideal, ordered and fixed world . . . fashion[ing] an a priori, ideal creation," which is "superimpose[d] . . . upon the realm of concrete empirical reality. . . ." SOLOVEITCHIK *supra* note 6, at 18-19. Similarly, he writes, "[t]he essence of [Jewish law], which was received from God, consists in creating an ideal world and cognizing the relationship between the ideal world and our concrete environment in all its visible manifestations and underlying structures." *Id.* at 19-20. See also Joseph B. Soloveitchik, *Mah Dodech Midod*, in JOSEPH B. SOLOVEITCHIK, BESOD HAYACHID V'HAYACHAD 231 (1970) [hereinafter Soloveitchik, *Mah Dodech Midod*] (referring to Reb Chaim's "mathematical thinking" and stating that Reb Chaim "provided for [Jewish law] specific methodological tools, created a complex of [Jewish legal] categories and an order of a priori premises through a process of pure postulatization" (quoted and translated in Kaplan, *supra* note 102, at 165). For a thoughtful and extensive consideration of Rabbi Joseph Soloveitchik's approach, as it appears in many of his written works, see *id.*, *passim*.

According to Kaplan:

Rabbi [Joseph] Soloveitchik is not concerned with a philosophy of the Talmud but with the philosophy of [Jewish law]. He is not interested so much in the Talmud as a particular ancient text that needs to be interpreted . . . but with the Talmud as a corpus of law, as part of a larger, ongoing [Jewish legal] tradition. And as a jurist, his task, as he sees it, is analogous to that of the scientist: to create an abstract, self-contained, coherent system that will illuminate and order the multifarious and recalcitrant data that demand illumination and ordering. In a word, the task of both [theorist of Jewish law] and scientist is to create an ordered world that will satisfy their intellectual and aesthetic needs for comprehension and coherence.

Id. at 173.

Kaplan concludes that:

Even if the scientific model is not the best model for understanding the nature of [Jewish law], even if the [analogy of] scientist-world [to Jewish legal theorists-Jewish law] is not free of serious problems, even if one argues that the objectivity and autonomy of science are of a different order than the objectivity and autonomy of [Jewish law], nevertheless, Rabbi Soloveitchik, in focusing upon and fusing together these two different sides of [Jewish law], objectivity and autonomy with creativity and freedom, has touched the very heart of the [Jewish legal theorist's] complex, dialectical relationship with [Jewish law]: strict obedience, nay subservience, to the objective inner logic of [Jewish law], combined with a sense of unbound intellectual freedom and profound creative power.

Id. at 192.

A more recent comparison between the Brisker method and the scientific method identifies an analogue to Reb Chaim's innovations in "the scientific revolution of the early seventeenth century." Lichtenstein, *supra* note 6, at 3. In both cases,

a shift was effected from the "why" to the "what," and from the final cause to the efficient cause. No longer is it the task . . . to ascertain why a certain

of Talmudic analysis, although “there are key contraindicating findings that may mandate discarding a much-cherished theory[,]” at the same time, “there are also peripheral minutiae for the sake of which a deeply held conviction will not be abandoned, in the hope that the difficulty will be resolved by someone, somewhere, subsequently.”¹⁰⁹ Ultimately, like the scientific method, the Brisker method is concerned with the “what” rather than the “why,”¹¹⁰ thus focusing on conceptual definition and categorization, aiming to ascertain a systematic understanding of how the law functions.

B. Law and Economics

In perhaps the most striking of the parallels to the Brisker method, law and economics has faced a number of criticisms similar to those leveled against Reb Chaim’s approach, broadly premised on the claim that the economic analysis of law proves inconsistent with the methods and substance of the legal principles it is designed to analyze. Some opposition to the innovative qualities of law and economics seems based in a broader rejection of the possibility of formulating a theory that adequately explains the nature of law.¹¹¹ On a more substantive level,

[principle in Jewish law] is as it is, any more than it is the role of the scientist to determine why nature behaves as it does. Rather, in both cases, the goal of the analysis of the concrete phenomenon at hand is to understand what it is and how it works.

Id. at 3. Moreover,

as in the scientific world, the transition from “why” to “what” achieved breakthrough results for talmudic learning; focusing upon the “what” enabled the establishment of a disciplined method, subject to verification and criticism . . . With the introduction of the Brisker approach, practical implications . . . become the standard by which opinions . . . could be examined, for positions were now held accountable for their [legal] manifestations in actual practice. . . .

Id. at 4.

Cf. LICHTENSTEIN, *supra* note 5, at 34 (stating that “[a]s a scientist may be inspired by conflicting empirical evidence to suggest a novel theory that will take all the disparate phenomena into account, so the [theorist of Jewish law] will expound a distinction that will allow for harmonious coherence”).

109. LICHTENSTEIN, *supra* note 5, at 38-39.

110. *See* Lichtenstein, *supra* note 6, *passim*. *Cf.* LICHTENSTEIN, *supra* note 5, at 56 (writing that the conceptual approach “relates to the content of Torah, its ‘what’ and juridic ‘why,’ but not to a spiritual and philosophic ‘why’”); LICHTENSTEIN, *supra* note 5, at 194 (writing that Rabbi Joseph Soloveitchik “sought, in the spirit of a much-cherished analogy to modern science, to focus upon the ‘what’ rather than the ‘why.’”).

111. *See, e.g.*, GRANT GILMORE, *THE AGES OF AMERICAN LAW* 99-100 (1977):

For two hundred years we have been in thrall to the eighteenth-century hypothesis that there are in social behavior and in societal development, patterns which recur in the same way that they appear to recur in the physical universe.

. . . [T]he hypothesis is itself in error. [Humans’] fate will forever elude the attempts of [their] intellect to understand it. The accidental variables which

others have found economic analysis of law incompatible with the general absence of economic rhetoric and references in the legal materials that law and economics purports to explain.¹¹² Finally, a related criticism faults law and economics for its reliance on a core set of economic principles, resulting in disregard for or insufficient attention to other issues of complexity necessary for effective analysis of the law.¹¹³

In evaluating these arguments, Posner acknowledges, to some degree, the underlying concerns they identify, though he finds the criticisms ultimately based in “prevalent misconceptions” of law and economics.¹¹⁴ Therefore, Posner’s response to the critics focuses on “clarifying the nature and aims of the economic approach.”¹¹⁵ Specifically, Posner depicts law and economics as a vehicle for the scientific analysis of the law; accordingly, its goals, methods, and properties parallel those of other scientific theories.

Indeed, Posner ambitiously, expressly, and extensively described this approach as the primary motivation behind the founding of the *Journal of Legal Studies*:

The aim of the *Journal* is to encourage the application of scientific methods to the study of the legal system. As biology is to living [systems], astronomy to the stars, or economics to the price system so should legal studies be to the legal system: an endeavor to make precise, objective, and systematic observations of

hedge us about effectively screen the future from our view. The quest for the laws which will explain the riddle of human behavior leads us not toward truth but toward the illusion of certainty, which is our curse. So far as we have been able to learn, there are no recurrent patterns in the course of human events; it is not possible to make scientific statements about history, sociology, economics—or law.

Id. at 99-100 (quoted in Arthur Allen Leff, *Law and*, 87 YALE L.J. 989, 1010 (1978)).

112. See Richard A. Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 292 (1979) (acknowledging “the prevalence of noneconomic rhetoric in judicial decisions”).

113. See Edward J. Bloustein, *Privacy Is Dear At Any Price: A Response to Professor Posner’s Economic Theory*, 12 GA. L. REV. 429 (1978):

The persuasiveness of Professor Posner’s article on the economic theory of privacy hinges on his apparent success in transforming, in classical rationalistic fashion, a complex and disorderly jumble of legal rules into a simple and unified scheme of explanation. Unfortunately, in at least one important sense, Posner’s theory is simplistic, not simple, because it accomplishes its objective by avoiding, rather than confronting, complexity. He seduces by reduction, rather than convincing by explanation.

Id. See also Leff, *supra* note 111, *passim* (characterizing law and economics as avoiding complexity).

114. Posner, *supra* note 112, at 306.

115. POSNER, *supra* note 1, at 25.

how the legal system operate[d] in fact and to discover and explain the recurrent patterns in the observations—the “laws” of the system.¹¹⁶

Consistent with this approach, Posner has openly acknowledged that “few judicial opinions contain explicit references to economic concepts.”¹¹⁷ Likewise, he does not dispute the claim that “the assumptions of economic theory are one-dimensional and pallid when viewed as descriptions of human behavior—especially the behavior of such unconventional economic ‘actors’ as the judge, the litigant, the parent, the rapist, and others” in the law.¹¹⁸ In Posner’s view, however, these observations, though descriptively accurate, do not undermine the validity of the scientific nature of the economic analysis of law. Instead, he insists, when presented as criticisms, these claims “bring[] out the fundamental difference between the legal and the economic culture or, more broadly, between the humanistic and the scientific approach.”¹¹⁹ Specifically, he argues, resistance to law and economics reflects either an orientation among legal scholars against “finding a simple, theoretical structure” to uncover “an inner, and simple, economic logic” in the law,¹²⁰ or a general “dismiss[al of] the whole of social science.”¹²¹

In response, Posner explains that “[t]he goal of science, including economic science, is to explain complex and seemingly unrelated phenomena by reference to a theoretical model or construct, and the power of a scientific explanation can be expressed as the ratio of the different phenomena explained to the number of assumptions in the theory.”¹²² Moreover, “[a] simple theory tends to yield more, and more definite, hypotheses than a complex one . . . ; if these hypotheses survive their confrontation with the test data, the power of the theory to organize diverse phenomena is confirmed.”¹²³ Therefore, “[a]bstraction is . . . the essence of scientific theory, and a successful theory is bound to ignore a good deal of the apparent differences between phenomena.”¹²⁴

Drawing a substantive comparison to the natural sciences, Posner notes that “Newton’s law of falling bodies is unrealistic in its basic assumption that bodies fall in a vacuum, but it is still a useful theory because it predicts with reasonable accuracy the behavior of a wide

116. Richard A. Posner, *Volume One of the Journal of Legal Studies—An Afterword*, 1 J. LEGAL STUD. 437, 437 (1972).

117. POSNER, *supra* note 1, at 25.

118. *Id.* at 17.

119. Posner, *supra* note 112, at 301. Cf. James Boyde White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161 (1986).

120. Posner, *supra* note 112, at 302.

121. *Id.* at 288.

122. *Id.* at 301.

123. *Id.*

124. *Id.*

variety of falling bodies in the real world.”¹²⁵ “Similarly,” he suggests, “an economic theory of law will not capture the full complexity, richness, and confusion of the phenomena—criminal or judicial or marital or whatever—it seeks to illuminate.”¹²⁶ In fact, according to Posner, any “lack of realism in the sense of descriptive completeness, far from invalidating the theory, is a precondition of theory. A theory that sought faithfully to reproduce the complexity of the empirical world in its assumptions would not be a theory—an explanation—but a description.”¹²⁷

Finally, Posner likewise argues that the “prevalence of noneconomic rhetoric in judicial decisions”¹²⁸ does not undermine the theoretical validity and value of law and economics. He points out that “the major economizing doctrines of the common law preceded the development of an explicit economic theory of law that might have made the specialized rhetoric of economics available for use in judicial decisions.”¹²⁹ After all, he continues, “[j]ust as people were maximizing utility before the terms were invented by economists, judges may have been maximizing efficiency before the language of economics gained currency in judicial opinions.”¹³⁰ In addition, he argues, “often the true grounds of legal decisions are concealed rather than illuminated by the characteristic rhetoric of opinions,” and he posits that “legal education consists primarily of learning to dig beneath the rhetorical surface to find those grounds, many of which may turn out to have an economic character.”¹³¹

125. POSNER, *supra* note 1, at 17.

126. *Id.*

127. *Id.*

128. Posner, *supra* note 112, at 292.

129. *Id.*

130. *Id.*

131. POSNER, *supra* note 1, at 25.

To some degree, less technical characterizations of law and economics likewise find echoes in descriptions of the Brisker method. For example, Arthur Leff draws an intriguing, albeit unfavorably intended, analogy between the picaresque novel, such as *Tom Jones*, *Huckleberry Finn*, or *Don Quixote*, and Posner’s text on economic analysis of law. In the novel,

the eponymous hero sets out into a world of complexity and brings to bear on successive segments of it the power of his own particular personal vision. The world presents itself as a series of problems; to each problem that vision acts as a form of solution; and the problem having been dispatched, our hero passes on to the next adventure.

Leff, *supra* note 111, at 451. Similarly, Leff asserts, “Posner’s hero is eponymous[]” in the character of “Economic Analysis,” who “ride[s] out into the world of law, encountering one after another almost all of the ambiguous villains of legal thought In each case Economic [Analysis] . . . brings to bear his single-minded self, and the Evil

V. CONCLUSION

As Rabbi Aharon Lichtenstein has noted, together with “the triumphal ascendancy of the conceptual approach,” the Brisker method has, inevitably, undergone changes.¹³² In part as a result of its successful emergence as the dominant and established approach of Talmudic analysis, “[t]he spirit of independence that guided [Reb Chaim’s] bold originality has gradually become more muted.”¹³³ Likewise, the widespread influence of Reb Chaim’s ideas has been coupled with the parallel development of a wider variety of methods that share the conceptual approach.¹³⁴

As for the future, despite expressing a “reluctan[ce] to predict,” Rabbi Lichtenstein offers “some qualified remarks.”¹³⁵ Specifically, he anticipates the continuation of recent trends, such as a modification of the Brisker method into “more blended models,” including “greater awareness of

Ones . . . dissolve, one after another.” *Id.* at 452. As Leff acknowledges, “[t]o hold the mind-set constant while the world is played in manageable chunks before its searching single light is a powerful analytic idea” *Id.*

More positively, Rabbi Joseph Soloveitchik has used somewhat analogous imagery to describe the Brisker method:

[A] person . . . awakes in the middle of the night and cannot figure out just where he is The whole picture of his room and its furniture is distorted and unreal. Suddenly he finds the lamp switch, flicks it on and a clear light shines on his surroundings. Everything is in order and he recovers his sense of place, his orientation. He can’t understand himself, why wasn’t he able to picture his room and its furniture, why did he have such a confused image? Wasn’t everything so simple and clear?

Soloveitchik, *Mah Dodech Midod*, *supra* note 108, at 231 (quoted and translated in Kaplan, *supra* note 102, at 164-65).

In a similar vein, it is said that Reb Chaim’s father, an eminent scholar of Jewish law, contrasted his own, more traditional approach, which resolved legal questions by acknowledging the difficulty posed by the question and providing appropriate answers, with his son’s innovative methodology, which responded to legal questions by demonstrating that the question did not really pose any difficulty because it was premised on a fundamental misunderstanding of the legal system. *See* SCHACHTER, *supra* note 106, at 18-19 n.23.

In yet another description that evokes Leff’s imagery, Rabbi Soloveitchik writes dramatically of his childhood perceptions of the heroic manner in which his father, teaching an advanced class in Jewish law, employed the Brisker method to “defend” Rambam against the “attacks” of intellectual opponents and “enemies.” RABBI JOSEPH B. SOLOVEITCHIK, U’BIKASHEM MI-SHAM, in *ISH HA-HALAKHAH: GALUI V’NISTAR* 230-31 (1979).

132. LICHENSTEIN, *supra* note 5, at 53-54.

133. *Id.* at 54.

134. *See id.* at 54-55.

135. Rabbi Lichtenstein specifies that he offers these thoughts, in response to a request, for the benefit of “educational planning.” LICHENSTEIN, *supra* note 5, at 55. He also emphasizes that he is conscious of the possibility that “the wish, to some extent, may be father to some thoughts,” though he adds that he “trust[s] that [his] own admitted inclinations will not distort [his] perceptions.” *Id.*

factual points[,] recourse to a wider arc of sources[,] . . . and thematic expansion,” perhaps incorporating a consideration of “a spiritual and philosophic ‘why.’”¹³⁶ Moreover, he suggests, as a result of the Brisker method’s becoming “conventional, and in some cases even cliché-ridden, the danger of lapsing into . . . ‘stock responses’ looms large; and these factors may erode the preeminence of the approach.”¹³⁷ Nevertheless, Rabbi Lichtenstein concludes that “[t]here may be complements, but for the time being, no substitute” for the conceptual approach as “the optimal mode of” the study of Jewish law.¹³⁸

Any effort to evaluate the present and future state of law and economics may seem even more perilous than similar attempts directed toward the Brisker method; nevertheless, a brief discussion may prove valuable, if only as an illustration of yet one more apparent parallel that spans the two methods. In the 2003 edition of his text, Posner boldly declares that, defying repeated predictions of its demise or reduced significance,¹³⁹ the economic analysis of law “has now outlasted legal realism, legal process, and every other one of the twentieth century’s new fields of legal scholarship, except those too recent to have yet reached their peak. And it shows no signs of abating.”¹⁴⁰

136. *Id.* at 56.

137. LICHTENSTEIN, *supra* note 5, at 56. Indeed, an additional criticism of the Brisker method finds fault with the seemingly universal application of dichotomous analysis to resolve nearly every legal problem, even when such an approach appears overly formalistic or even, arguably, somewhat illogical. See Lichtenstein, *supra* note 6, at 6-9 & n.17; See Lichtenstein, *supra* note 6, at n.11 (stating that “[t]he more popular and widespread the conceptual approach became, the greater such a danger became”). Similar criticisms have been leveled against law and economics since as early as the appearance of the first edition of Posner’s text. See, e.g., Leff, *supra* note 111, at 452 (writing of Posner’s “tunnel vision” and the “limitations” that “arise from the single-approach strategy itself” as well as “from the particular mode of apprehension chosen [by Posner] to be single-minded with”); see Leff, *supra* note 111, *passim*.

138. LICHTENSTEIN, *supra* note 5, at 57.

139. See, e.g., Gregory Scott Crespi, *The Mid-Life Crisis of the Law and Economics Movement: Confronting the Problems of Nonfalsifiability and Normative Bias*, 67 NOTRE DAME L. REV. 231 (1991); Owen M. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989); Horwitz, *supra* note 86, at 912; Leonard R. Jaffee, *The Troubles with Law and Economics*, 20 HOFSTRA L. REV. 777, 779 (1992).

140. POSNER, *supra* note 1, at 28. See also POSNER, *supra* note 1, at xx n.3 (referring to “the continued growth of economic analysis of law”) (citing William M. Landes & Richard A. Posner, *The Influence of Economics on Law: A Quantitative Study*, 36 J. L. & ECON. 385 (1993)); POSNER, *supra* note 1, at xx n.3 (noting “[t]he number of changes (especially additions) in this sixth edition [that] attest to the growth in the scholarly literature in just the last five years”). See also MERCURO & MEDEMA, *supra*

To be sure, over the years since the appearance of the first edition of Posner's text, in addition to the evolution of Posner's approach, the field of law and economics has undergone changes, modification, and a diversification of goals and methodologies,¹⁴¹ leading some to question its continued vitality as a unified movement.¹⁴² Indeed, looking to the future, Posner entertains the possibility that, "[l]ike some of the other fields, [law and economics] may some day become so woven into the fabric of the law that it ceases to be visible as a distinct field."¹⁴³ Ultimately, however, similar to Rabbi Lichtenstein's assessment of the Brisker method, Posner confidently concludes that "for now, [the economic analysis of law] is well worth studying as a fruitful, interesting, and influential body of insight and analytic techniques."¹⁴⁴

note 9, at 172 (stating that "[t]here are a great many factors which suggest that any predictions of the demise of Law and Economics are extremely premature").

141. See, e.g., *Symposium on Post-Chicago Law and Economics*, 65 CHI.-KENT L. REV. 3 (1989); Robert C. Ellickson, *Bringing Culture and Human Frailty to Rational Actors: A Critique of Classical Law and Economics*, 65 CHI.-KENT L. REV. 23 (1989); Robert C. Ellickson, *Law and Economics Discovers Social Norms*, 27 J. LEGAL STUD. 537 (1998); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998); Owen D. Jones, *Time-Shifted Rationality and the Law of Law's Leverage: Behavioral Economics Meets Behavioral Biology*, 95 NW. U. L. REV. 1141 (2001); Thomas S. Ulen, *A Nobel Prize in Legal Science: Theory, Empirical Work, and the Scientific Method in the Study of Law*, 2002 U. ILL. L. REV. 875. See generally Anita Bernstein, *Whatever Happened to Law and Economics?*, 64 MD. L. REV. 303 (2005); MERCURO & MEDEMA, *supra* note 8, *passim*.

142. See Bernstein, *supra* note 141, at 322.

143. POSNER, *supra* note 1, at 28. Cf. MERCURO & MEDEMA, *supra* note 9, at 172 (arguing that "[i]f Law and Economics seems less threatening now, it may be due to the fact that a number of its basic insights have become more or less a part of orthodox legal thinking" and that Law and Economics "is now an entrenched part of the legal landscape").

144. POSNER, *supra* note 1, at 28.