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## Economic Analysis of Jewish Law

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## ECONOMIC ANALYSIS OF JEWISH LAW

*Keith Sharfman*\*

### I. INTRODUCTION

Like any legal system, Jewish law is amenable to economic analysis, both positive and normative.<sup>1</sup> Economic analysis can help to explain how and why the various rules comprising Jewish law arose and persisted over time. It also can facilitate a direct assessment of Jewish law on the merits. In practice, however, it is a mainly positive economic analysis of Jewish law that scholars have emphasized, while normative analysis has, for the most part, been underemphasized.

Take, for example, the application of law and economics to biblical exegesis. The legal-economic work in this field has been largely descriptive rather than prescriptive.<sup>2</sup> Scholars such as Saul

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<sup>1</sup> On the distinction between positive and normative economic analysis of law, see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* §2.2, pp. 31-33 (9th ed. 2014) (defining positive economic analysis of law as "the attempt to explain legal rules and outcomes as they are" as distinct from the normative effort "to change [legal rules] to make them better.").

<sup>2</sup> See Geoffrey P. Miller, *Ritual and Regulation: A Legal-Economic Interpretation of Selected Biblical Texts*, 22 J. LEG. STUD. 477 (1993); Geoffrey P. Miller, *Contracts of Genesis*, 22 J. LEG. STUD. 15 (1993); Geoffrey P. Miller, *J as Constitutionalist: A Political Interpretation of Exodus 17:8-16 and Related Texts*, 70 CHI. KENT L. REV. 1829 (1995); Geoffrey P. Miller, *Verbal Feud in the Hebrew Bible: Judges 3:12-30 and 19-21*, J. Near Eastern Studies (1996); Geoffrey P. Miller, *The Song Of Deborah: A Legal-Economic Analysis*, 144 U. PA. L. REV. 2293 (1996); Saul Levmore, *Rethinking Comparative Law: Variety and Uniformity in Ancient and Modern Tort Law*, 61 TUL. L. REV. 235 (1986); Saul Levmore, *Ancient Rights and Wrongs: Rethinking Group Responsibility and Strategic Threats in Biblical Texts and Modern Law*, 71 CHI. KENT. L. REV. 85 (1995); see also Robert C. Ellickson & Charles Dia Thorland, *Ancient Land Law: Mesopotamia, Egypt, Israel*, 71 CHI.

Levmore and Geoffrey Miller have argued persuasively that positive legal-economic analysis can help to explain the existence, preservation, and structure of various biblical regulations. They argue that the Hebrew Bible's regulations are economically *predictable*. But they do not try to defend them on normative grounds.<sup>3</sup> As Miller has explained in a paper narrowly applying positive economic analysis to the Talmud, "economic analysis of law is the use of economic principles and reasoning to understand legal materials."<sup>4</sup> The narrow goal of positive economic analysis of law, applied to Jewish law as to other contexts, is thus to understand and explain rather than to justify the rules and laws under study.

This paper builds on prior work applying economics to Jewish law. It argues that Jewish law lends itself not only to positive but also to normative legal-economic analysis. In contrast to prior work applying economics to biblical interpretation, this paper employs both positive and normative legal-economic analysis. Three sets of biblical regulations—those pertaining to lepers, loan agreements, and land ownership—are studied from both positive and normative perspectives. And the conclusion reached in each case is that the regulations at issue are not only predictable as a descriptive matter but also normatively defensible.

Section II briefly elaborates on the distinction between positive and normative legal-economic analysis. Section III summarizes some of the previous uses of positive legal-economic analysis as a tool of biblical exegesis and notes the prior literature's underuse of normative legal-economic analysis as an exegetical device. Section IV introduces and summarizes certain biblical regulations concerning leprosy, debt contracts, and land ownership. Section V applies both positive and

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KENT L. REV. 321 (1995); GEOFFREY P. MILLER *THE ECONOMICS OF ANCIENT LAW* (Edward Elgar Publishing, 2010).

<sup>3</sup> An important exception from outside the law and economics field concerning not only biblical but also rabbinic law is the scholarship of economist Aaron Levine, whose work does indeed have a normative dimension. See AARON LEVINE, *ECONOMIC PUBLIC POLICY AND JEWISH LAW* (1993); AARON LEVINE, *ECONOMICS AND JEWISH LAW: HALAKHIC PERSPECTIVES* (1987); AARON LEVINE, *THE OXFORD HANDBOOK OF JUDAISM & ECONOMICS* (2010) (a collection that includes some essays applying economics to Jewish law from a normative perspective). See also Samuel Levine, *Richard Posner Meets Reb Chaim of Brisk: A Comparative Study in the Founding of Intellectual Legal Movements*, 8 SAN DIEGO INT'L L. J. 95 (2006) (considering economics in relation to Jewish law using a comparativist rather than a positivist approach); Keith Sharfman, *The Law and Economics of Hoarding*, 19 LOYOLA CONSUMER L. REV. 179 (2016) (normatively assessing the Talmudic ban on hoarding).

<sup>4</sup> See Geoffrey P. Miller, *Law & Economics Versus Economic Analysis of Law*, 19 AM. BANKR. INST. L. REV. 459, 459 (2011).

normative legal-economic analysis to these regulations. Section VI concludes.

## II. POSITIVE VERSUS NORMATIVE ANALYSIS

Positive legal-economic analysis is concerned with what “is” while normative legal-economic analysis is concerned with what “ought” to be.<sup>5</sup> Elaborating on this distinction will likely be helpful to those who are unfamiliar with it.

Positive legal-economic analysis seeks to *explain* why particular legal rules arise and persist and, somewhat more ambitiously, seeks to *predict* the future form that they might take and the behavioral responses that regulatory changes are likely to produce. Because positive legal-economic analysis is agnostic as to particular social goals, it is sometimes claimed to be the more “scientific” and “objective” of the two modes of analysis.<sup>6</sup> Conclusions reached via positive legal-economic analysis do not, it is said, depend on value-laden judgments and are therefore less vulnerable to, though certainly are not immune from, criticism.<sup>7</sup> Positive legal-economic analysis does depend critically on one key assumption, namely that people are in the main rational maximizers of their satisfactions.<sup>8</sup> And so to the extent that this assumption is incorrect, the explanations and predictions of positive legal-economic analysis are commensurately less reliable.

Normative legal-economic analysis is more ambitious. It is not concerned with merely explaining why legal rules arise and persist, predicting the future course that they likely will take, and predicting the behavioral responses that changes in them will likely produce. It is concerned, rather, with assessing whether particular legal rules enhance or detract from social welfare, that is, with assessing whether particular legal rules are, at bottom, desirable or not.<sup>9</sup>

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<sup>5</sup> POSNER, *supra* note 1, at 31-33. On the distinction between “is” and “ought” more generally, see Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931).

<sup>6</sup> MILTON FRIEDMAN, *The Methodology of Positive Economics*, in *ESSAYS IN POSITIVE ECONOMICS*, 3-43 (1966), at pp. 3-4.

<sup>7</sup> *Id.* at 4.

<sup>8</sup> POSNER, *supra* note 1, at 4.

<sup>9</sup> David Colander & Huei-Chun Su, *Making Sense of Economists’ Positive-Normative Distinction*, 2 J. ECON. METHODOLOGY 157 (2015).

“Social welfare” is a slippery concept that is susceptible to many definitions. “*Whose* welfare?” one might well ask. That of a particular individual (e.g., a buyer, seller, regulator, judge, criminal, victim, landowner, etc.), and if so, which? That of a particular group (e.g., buyers or sellers as a group, a family or a tribe, the citizens of a particular state or country, etc.), and if so, which? And anyway, how does one measure welfare? One cannot answer any of these without applying values from outside the field of economics.<sup>10</sup>

A familiar example of divergence between normative and positive economic analysis is the insoluble debate over whether to use “Pareto efficiency” or “Kaldor-Hicks efficiency” as the criterion of social choice.<sup>11</sup> Consider a proposed regulatory change that would harm A by \$5, help B by \$10, and leave all others unaffected. Would the adoption of the proposed change improve economic efficiency? The Pareto approach answers “no,” because the change leaves A worse off, and thus we cannot say that adoption of the change would produce a Pareto improvement. The Kaldor-Hicks approach, by contrast, says “yes” unambiguously—even if it is known that B is very rich and A is very poor—because the regulatory change would lead to a net gain in aggregate social wealth. That is, the wealth gain to B of \$10 would more than offset the \$5 loss of wealth to A. Since *in principle* B could compensate A for its loss and still be better off (by transferring \$5 to A), the change is better for society (if one’s goal is to maximize social wealth) even if in practice A’s loss is not compensated.<sup>12</sup>

As this example shows, normative analyses (like the choice between the Pareto and Kaldor-Hicks criteria) ultimately depend on the subjective values of the decisionmaker, which makes normative analysis inherently less scientific and objective than its positive analog. This inherent indeterminacy of normative analysis should not, however, be a reason to avoid it. In fact, law and economics scholars

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<sup>10</sup> On the indispensability of values to normative economic analysis, *see generally* A.C. PIGOU, *THE ECONOMICS OF WELFARE* (1920).

<sup>11</sup> On this debate, *see* POSNER, *ECONOMIC ANALYSIS OF LAW*, *supra*, note 1, §1.2, pp. 13-17 (introducing and summarizing the debate, and defending the Kaldor-Hicks, “wealth maximization” criterion). On the insolubility of this debate, *see* Louis Kaplow & Steven Shavell, *Any Non-Individualistic Social Welfare Function Violates the Pareto Principle*, NBER Working Paper No. W7051 (Mar. 1999); Amartya Sen, *The Impossibility of a Paretian Liberal*, 78 J. POL. ECON. 152 (1970).

<sup>12</sup> POSNER, *supra* note 1, at 14 (“The Kaldor-Hicks concept is ... suggestively called *potential* Pareto superiority: The winners *could* compensate the losers, whether or not they actually do.”).

regularly engage in normative analysis in a host of areas,<sup>13</sup> and there is not any reason to suppose that Jewish law is less amenable to normativity than other fields.

In the area of biblical exegesis, normative economic analysis is arguably of special importance, because *theological interpretation of biblical passages involving social regulation becomes difficult if the regulations are not at least normatively defensible*. Normative defensibility is necessary (though obviously not sufficient) to justify laws and rules. It is difficult to expect compliance with laws that are normatively indefensible. If a religious law cannot be defended on normative grounds, the faithful may come to question the law's authority or even its divine origin. So there is much at stake in the normative evaluation of biblical regulations and Jewish law more generally, an exercise to which economic theory can contribute significantly.

### III. PRIOR APPLICATIONS OF ECONOMICS TO JEWISH LAW

Saul Levmore is likely the first law and economics scholar to offer a positive legal-economic interpretation of a biblical regulation.<sup>14</sup> In a 1986 article, Levmore suggests a novel thesis: that economics can explain the independent development of uniform legal rules across time and place. As evidence supporting this independent uniformity hypothesis, Levmore cites the similarity between much of modern tort law and the tort laws found in the book of *Exodus*. Significantly, the focus of Levmore's article is on whether under economic theory, biblical tort law is *predictable*, not on whether it is normatively desirable. And in the decade following the publication of Levmore's article, several other articles appeared similarly applying a legal-economic approach to biblical law, including four articles by Geoffrey Miller and another by Levmore.<sup>15</sup>

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<sup>13</sup> E.g., WILLIAM F. BAXTER, PEOPLE OR PENGUINS: THE CASE FOR OPTIMAL POLLUTION (1974) (applying normative economic analysis to environmental policy); Edward J. McCaffery, *The Uneasy Case for Wealth Transfer Taxation*, 104 YALE L. J. 283 (1994) (applying normative economic analysis to tax policy). See also, Jules Coleman, *The Normative Basis of Economic Analysis: A Critical Review of Richard Posner's The Economics of Justice*, 34 STAN. L. REV. 1105 (1982) (suggesting that Posner himself engages in normative analysis through use of the Kaldor-Hicks criterion, which Coleman contends itself embodies normative judgments that are not value neutral).

<sup>14</sup> See Levmore, *Rethinking Comparative Law*, *supra*, note 2.

<sup>15</sup> See citations to Miller and Levmore, *supra*, note 2.

Miller's approach is similar to Levmore's. Each of Miller's articles offers a positive legal-economic interpretation of biblical texts and largely eschews normative assessment. For example, Miller views the stories of Adam and Eve in Eden, the fratricide of Cain against Abel, and the binding of Isaac on Mount Moriah as texts that bolster the institution of and provide a legitimating ideology for the animal sacrifice ritual practiced by the priests of ancient Israel.<sup>16</sup> Similarly, Miller interprets the many and varied contract-like arrangements reported in the book of *Genesis*—e.g., Abraham's purchase from Ephron of the Cave of Machpelah, Esau's sale of his birthright to Jacob, Jacob's employment agreement with Laban—as a compilation of contract doctrines that endured because the tale-like form in which they were recorded made them easy to remember, transmit, and apply.<sup>17</sup> Finally, Miller suggests that the Song of Deborah in the book of *Judges* served “norm-creating” and “norm-enforcing” functions by clearly and memorably documenting the rights and obligations of a mutual defense pact among the tribes of ancient Israel.<sup>18</sup> For each of these biblical texts, the issue for Miller is not whether the rule or arrangement in the text is normatively desirable but rather simply whether the text can be *explained* by the economic incentives of its protagonists, drafters, transcribers, promoters, and readers.

Inattention to normative defensibility can lead to analysis that is substantively incomplete. For example, in his earlier work on legal-economic, biblical interpretation, Miller is particularly careful to offer his own textual interpretations “without derogation of other interpretations”<sup>19</sup> and without seeking to undermine “the many-textured meanings already recognized.”<sup>20</sup> However, in his later article on the account in *Exodus* of Amalek's attack on the Israelites soon after they had left Egypt, Miller is less cautious. Abandoning his nonjudgmental attitude to alternative textual interpretations, Miller suggests that a theological interpretation of the Amalek story is “unconvincing” because “an attack by a threatened group [i.e., Amalek] on a large party of hostile trespassers [i.e., the Israelites]

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<sup>16</sup> Miller, *Ritual and Regulation*, *supra*, note 2.

<sup>17</sup> Miller, *Contracts of Genesis*, *supra*, note 2.

<sup>18</sup> Miller, *The Song of Deborah*, *supra*, note 2.

<sup>19</sup> Miller, *Ritual and Regulation*, *supra*, note 2 at 479.

<sup>20</sup> Miller, *Contracts of Genesis*, *supra*, note 2 at 19.

hardly seems like the kind of degraded moral evil that would justify placing the attacker under a ban of eternal enmity.”<sup>21</sup>

Miller might also have considered a normative defense of the anti-Amalek regulations<sup>22</sup> arising out of the Amalek story. He might have suggested that the command to “blot out the remembrance of Amalek” is justified on the ground that Amalek inflicted unnecessary “civilian” casualties by attacking the weak and feeble Israelites at the “rear” (who possibly included women, children, and the elderly). Moreover, he might have pointed out how the Amalek regulation creates incentives for a king of Israel to shift resources away from discretionary, offensive wars against non-antagonist nations in favor of (arguably more just) obligatory wars against truly hostile nations. Wars against Amalek and certain other antagonists of Israel (as well as all defensive wars) are “obligatory” in the sense that the king need not obtain permission from the Sanhedrin, the rabbinic high court, to initiate them. Offensive wars against other nations, by contrast, are “discretionary” in the sense that the king may not wage them without the Sanhedrin’s authorization.<sup>23</sup>

Given the relative institutional ease with which a king can launch an offensive war against Amalek as compared to launching one against a neutral nation, one would expect a king who is otherwise indifferent between the two options to choose to fight Amalek rather than a neutral nation so as to avoid having to seek the approval of the Sanhedrin. A normative assessment using plausible value assumptions would likely view an attack upon Amalek as morally superior to and more consistent with Israel’s national interest than an attack on a heretofore neutral, nonbelligerent nation. So the Amalek regulations

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<sup>21</sup> Miller, *J as Constitutionalist*, *supra*, note 2 at 1831.

<sup>22</sup> *Deuteronomy* 25:17-19:

Remember what Amalek did unto thee by the way as ye came forth out of Egypt; how it met thee by the way, and smote the hindmost of thee, all that were enfeebled in thy rear, when thou wast faint and weary; and he feared not God. Therefore it shall be ... that though shalt blot out the remembrance of Amalek from under heaven; thou shalt not forget.

*Id.* This obligation to blot out Amalek is limited, however, to the circumstance of a refusal to surrender. See Maimonides, *Mishne Torah*, *hilchoth melachim* 6:1 (the command to blot out Amalek was not genocidal because Amalek, like the seven nations of ancient Canaan, had the option under Jewish law to surrender without loss of life, as per *Deuteronomy* 20:10, which requires Israel first to offer the enemy a chance to surrender before waging war).

<sup>23</sup> On the distinction between discretionary and obligatory wars and the King’s powers with respect to each, see Maimonides, *Mishne Torah*, *hilchoth melachim* 5:1-2. See also, David Flatto, *The King and I: The Separation of Powers in Early Hebraic Political Theory*, 20 *YALE J. L. & HUMANITIES* 61 (2008).



have the effect of channeling resources away from wars that are less likely to be in the national interest to wars that are more likely to be. Therefore, properly understood, the Amalek texts are normatively defensible when their effect is assessed in light of how things would be in their absence.

Miller's decision not to consider a normative defense of the Amalek story and its accompanying regulations is a prime example of the prior literature's underemphasis of normative analysis. Normative assessment of the Amalek regulations significantly enhances our understanding of the Amalek story, and normative analysis of other biblical regulations can be similarly useful. The remaining sections of this paper approach three sets of biblical regulations in precisely this fashion by engaging in both positive and normative analysis.

#### IV. BIBLICAL REGULATION OF LEPROSY, LOANS, AND LAND

*Leprosy.*<sup>24</sup> Biblical law requires that anyone with the symptoms of "leprosy"<sup>25</sup> be examined and diagnosed by a priest.<sup>26</sup> If the diagnosis is positive, the priest must pronounce the individual ritually impure and impose a quarantine until such time as the leprosy subsides.<sup>27</sup> During the quarantine period, hair covering the leper's afflicted areas may not be shaved,<sup>28</sup> his clothing must be torn, the hair

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<sup>24</sup> The regulations described below appear in the book of *Leviticus*, chs. 13 and 14.

<sup>25</sup> *Leviticus* refers to a skin ailment called "*tzara'ath*," which usually is translated as "leprosy" though may in fact mean another disease (e.g., psoriasis or favus). For convenience, I shall refer to the *tzara'ath* disease as leprosy, as it is conventionally translated. I also shall assume that *tzara'ath* (however translated) is communicable, which is implicit in the bible's use in relation to *tzara'ath* of the descriptive term "*nega*," i.e., "plague" (see, e.g., *Leviticus* 13:2), which connotes communicability.

<sup>26</sup> *Leviticus* 13:2-3:

When a man shall have in the skin of his flesh [symptoms suggesting] the plague of leprosy, then he shall be brought unto ... the priests. And the priest shall look on the plague in the skin of the flesh; and if [certain criteria are met] it is the plague of leprosy; and the priest shall look on him, and pronounce him unclean.

*Id.* See also *Leviticus* 13:9-15 ("When the plague of leprosy is in a man, then he shall be brought unto the priest. And the priest shall look, and, behold, if [certain criteria are met] the priest shall look on the raw flesh and pronounce him unclean.").

<sup>27</sup> *Leviticus* 13:46 ("All the days wherein the plague is in him he shall be unclean; ... he shall dwell alone; without the camp shall his dwelling be.").

<sup>28</sup> *Leviticus* 13:33 ("the scall shall he not shave"). Relatedly, *Deuteronomy* 24:8 ("Take heed of the plague of leprosy, that thou observe diligently, and do according to all the priests the Levites shall teach you, as I commanded them, so shall you do.") has been interpreted as forbidding the leper (or anyone else) to cauterize or pluck out from the leper's skin identifying

on his head may not be cut, and, mantra-like, he must continually intone the word “unclean.”<sup>29</sup> To end the quarantine, the leper must obtain a pronouncement from the priest that the leprosy has healed.<sup>30</sup> Then he must (among other ritual obligations) wash his clothes, shave all his hair, bathe in water, and dwell outside of his tent during his first seven days upon returning to the camp.<sup>31</sup>

The Pentateuch reports only one actual instance of a leprosy outbreak during the Israelites’ forty years of wandering in the desert. The case reported is that of Miriam, the sister of Moses and Aaron.<sup>32</sup> Miriam gossips about Moses to Aaron, and as punishment, she contracts leprosy. Aaron, the High Priest, examines her, diagnoses the ailment, and then forces her to remain outside the camp for seven days until the plague subsides. In contrast to the technical and clinical set of leprosy regulations found in *Leviticus*, the Miriam story recorded in *Numbers* contains an added moral dimension in its suggestion that leprosy is a consequence of sin and that the leper’s quarantine is therefore morally just and thus is normatively desirable.<sup>33</sup>

*Loans.* The most significant biblical regulation of loan contracts is the prohibition against lending (to an Israelite co-religionist) at interest<sup>34</sup> or helping others to engage in such a lending transaction (e.g., by witnessing, drafting, or guaranteeing a loan document requiring the payment of interest).<sup>35</sup> Other biblical

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signs of the leprosy affliction. See Babylonian Talmud, *Shabbath* 94b; Maimonides, *Mishne Torah*, *hilchoth tum’ath tzara’ath*, ch. 10, *halacha* 1.

<sup>29</sup> *Leviticus* 13:45 (“And the leper in whom the plague is, his clothes shall be rent, and the hair of his head shall go loose, and he shall cover his upper lip, and shall cry: ‘Unclean, unclean.’”). The Hebrew term טָמֵא (pronounced “Tah-May”), though rendered by most translations to mean “unclean,” in fact is best understood to mean “ritually impure,” a kind of spiritual rather than physical uncleanness.

<sup>30</sup> *Leviticus* 14:2-3 (“This shall be the law of the leper in the day of his cleansing: he shall be brought unto the priest. And the priest shall go forth out of the camp; and the priest shall look, and, behold, if the plague of leprosy be healed in the leper.”).

<sup>31</sup> *Leviticus* 14:8 (“And he that is to be cleansed shall wash his clothes, and shave off all his hair, and bathe himself in water, and he shall be clean; and after that he may come into the camp, but shall dwell outside his tent seven days.”)

<sup>32</sup> *Numbers* 12:1-16.

<sup>33</sup> See *Numbers* 12:14 (“And the Lord said unto Moses: ‘If her [Miriam’s] father had but spit in her face, should she not hide in shame seven days? Let her be shut up without the camp seven days’”).

<sup>34</sup> *Leviticus* 25:36-37; *Deuteronomy* 23:20.

<sup>35</sup> *Exodus* 22:24 (“If thou lend money to any of my people, even to the poor with thee, thou shalt not be to him as a creditor; neither shall ye lay upon him interest”), which is broadly interpreted by the Babylonian Talmud, *Bava Mezia* 75b, as prohibiting even the facilitation of

regulations concerning debt transactions include the debtor's right to cancel certain types of debts in each sabbatical year of the 50-year jubilee cycle (i.e., every seventh year of the first forty-nine),<sup>36</sup> the prohibition against secured lending to orphans and widows,<sup>37</sup> the prohibition against dunning or otherwise demanding repayment from a poor or insolvent debtor,<sup>38</sup> the prohibition against entering the debtor's home to repossess collateral,<sup>39</sup> the prohibition against taking in pledge tools of the trade that are needed by the debtor for his physical sustenance,<sup>40</sup> the obligation not to refrain from lending to the poor on account of the imminence of the sabbatical year,<sup>41</sup> and the obligation to pay workers—whether employees or independent contractors—on the same day as their work is performed.<sup>42</sup>

It is important to note that the prohibition against lending at interest can be circumvented through a device known as a *heter iska* agreement, which in essence partially converts the debt into an equity instrument and thereby allows the parties to recharacterize the debtor's

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an interest-bearing loan transaction by participating in the transaction as a guarantor, witness, or scribe.

<sup>36</sup> *Deuteronomy* 15:1-3:

At the end of every seven years thou shalt make a release. And this is the manner of the release: every creditor shall release that which he hath lent unto his neighbour; he shall not exact it of his neighbour and his brother; because the Lord's release hath been proclaimed. Of a foreigner thou mayest exact it; but whatsoever of thine is with thy brother thy hand shall release it.

*Id.*

<sup>37</sup> *Deuteronomy* 24:17. See also, relatedly, *Exodus* 22:21 (“Ye shall not afflict any widow or fatherless child”), which has been interpreted by the Babylonian Talmud, *Shavuoth* 45a, as requiring a creditor seeking to collect a debt from a widow or orphan to swear an oath (i.e., to meet a higher than normal standard of proof).

<sup>38</sup> *Exodus* 22:24.

<sup>39</sup> *Deuteronomy* 24:10.

<sup>40</sup> *Deuteronomy* 24:6 (prohibiting the pledge of millstones—and by implication other objects essential to the debtor's trade—to secure a debt); *Deuteronomy* 24:12-13 (prohibiting a creditor from keeping a debtor's clothing in pledge for more than a day); *Exodus* 22:25 (same; “If thy at all take thy neighbour's garment to pledge, thou shalt restore it unto him by that the sun goeth down”). The U.S. Bankruptcy Code has some similar limitations. 11 U.S.C. §522(d)(3) (exempting some of a bankruptcy debtor's household goods from collection by creditors); 11 U.S.C. §522(d)(6) (exempting certain tools of trade).

<sup>41</sup> *Deuteronomy* 15:9 (“Beware that there not be a base thought in thy heart, saying: ‘The seventh year, the year of release, is at hand’; thine eye be evil against thy needy brother and thou give him nought; ... it be a sin in thee”). In this connection, note also the general biblical obligation to be charitable—and to lend—to the poor. *Deuteronomy* 15:8; *Exodus* 22:24.

<sup>42</sup> *Leviticus* 19:13; *Deuteronomy* 24:15.

interest payments as a return on the creditor's equity.<sup>43</sup> A modern alternative to the *heter iska* that can accomplish the same thing is a sale-leaseback arrangement, whereby an asset (e.g., a piece of land) is sold by the would-be debtor to the would-be creditor and then is leased back from the creditor. The lease payments can be structured in such a way so as to make them economically indistinguishable from loan payments with interest. Yet the lease payments would not as a legal matter be characterized as interest for purposes of Jewish law.<sup>44</sup>

The debtor's right to a debt discharge in the sabbatical year can similarly be contracted around. One way of doing so is for the parties to contract for a term structure explicitly contemplating repayment beyond the sabbatical year.<sup>45</sup> For example, if a loan is made in the fourth year of the sabbatical cycle and the lending agreement contemplates from the outset that the loan will not come due for ten years, then the sabbatical year reached three years after the loan is made will not discharge the debt. Debt is discharged in the sabbatical year only once it becomes due, but not if it does not become due until after the sabbatical year. Alternatively, the parties can anticipate that if the debt becomes due and remains unpaid in the seventh year, its cancellation can be avoided through the device of *pruzbul*, a legal mechanism that permits the creditor to transfer the debt to the rabbinical court during the sabbatical year and thereby avoid discharge, on the theory that only those debts that are "with your brother [i.e., the creditor]" (*Deuteronomy* 15:3) are canceled, but not those that are with the court.<sup>46</sup>

*Land.* Two of the Hebrew Bible's most significant regulations affecting the ownership of land are (1) that ancestral lands revert back to their original owners at the jubilee year (i.e., every fiftieth year)<sup>47</sup>

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<sup>43</sup> On *heter iska*, see J. David Bleich, *Heter Iska, the Permissible Venture: A Device to Avoid the Prohibition Against Interest Bearing Loans*, in AARON LEVINE, THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS, *supra* note 3, pp. 197-22.

<sup>44</sup> *Id.*; see also Daniel Z. Feldman, *The Jewish Prohibition of Interest: Themes, Scopes, and Contemporary Applications*, in LEVINE, THE OXFORD HANDBOOK OF JUDAISM AND ECONOMICS, *supra* note 3, pp. 239-254.

<sup>45</sup> Babylonian Talmud, *Makkoth* 3b.

<sup>46</sup> On avoiding debt discharge in the sabbatical year and the institution of *pruzbul*, see *id.* at *tosafoth*, s.v. *ha-moser*; see also Mishna, *Sh'vi'ith* 10:3-4).

<sup>47</sup> *Leviticus* 25:10, 13:

And ye shall hallow the fiftieth year, and proclaim liberty throughout the land unto all the inhabitants thereof; it shall be a jubilee unto you; and ye shall return every man unto his possession, and ye shall return every man

and thus cannot be sold in perpetuity but rather must in effect be leased for a fixed term;<sup>48</sup> and (2) landowners are prohibited from cultivating their land during sabbatical years (i.e., every seventh year) but must rather allow the land to lie fallow.<sup>49</sup> Other relevant regulations include the right of sellers of ancestral land and their kin to “redeem” the land (i.e., exercise an option to buy back the land prior to its automatic reversion in the jubilee year)<sup>50</sup> and the right of the initial seller of a dwelling in a walled city to sell the dwelling in perpetuity, with the option to “redeem” the dwelling (i.e., to buy it back), exercisable within one year of the initial sale date.<sup>51</sup>

As with the prohibition against interest and the discharge of debts in the seventh year, the prohibition against selling ancestral land in perpetuity can largely be contracted around. While an explicitly perpetual sale is not legally feasible, land can be sold for *any* finite term, including for a term that will conclude beyond the next jubilee year (or even beyond multiple jubilee years). So the parties could stipulate to a sale for a term of, say, 60 years—or for that matter 600 years. So long as the sale is for a fixed, non-perpetual term that explicitly extends beyond the jubilee year, there is no reversion in the jubilee year.<sup>52</sup>

## V. APPLICATION OF POSITIVE AND NORMATIVE LEGAL-ECONOMIC ANALYSIS TO BIBLICAL REGULATIONS RELATING TO LEPROSY, LOANS, AND LAND

What accounts for these regulations with respect to leprosy, loans, and land, and are these regulations normatively defensible? Economic analysis can help to answer these questions.

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unto his family. . . . In this year of jubilee ye shall return every man unto his possession.

*Id.*

<sup>48</sup> *Leviticus* 25:23 (“And the land shall not be sold in perpetuity, for the land is Mine; for ye are strangers and settlers with me”).

<sup>49</sup> *Leviticus* 25:3-4 (“Six years thou shalt sow thy field . . . . But in the seventh year shall be a sabbath of solemn rest to the land, a sabbath unto the Lord; though shalt neither sow thy field nor prune thy vineyard”); *Exodus* 23:10-11 (“And six years thou shalt sow thy land . . . . But the seventh year thou shalt let it rest and lie fallow, that the poor of thy people may eat; and what they leave the beast of the field shall eat”).

<sup>50</sup> *Leviticus* 25:25-28.

<sup>51</sup> *Leviticus* 25:29-30.

<sup>52</sup> Babylonian Talmud, *Bava Mezia* 79a (interpreting *Leviticus* 25:23 (“And the land shall not be sold in perpetuity”).)

*Leprosy.* An economic interpretation of the leprosy regulations codified in *Leviticus* and implemented in the case of Miriam's affliction as recounted in the book of *Numbers* might run as follows. Positive economic theory suggests that a society the majority of whose members are not as yet infected but fear becoming infected by a communicable disease is likely to evolve a regulatory regime that would result in the early detection and containment of that disease. That the society's norms will likely reflect the preferences of the unafflicted majority is implied by the theory of "public choice" and by economic models of the private demand for public regulation.<sup>53</sup> And past experience with the social stigmatization of those diagnosed with the AIDS virus (and more recently with those who early on tested positive for Covid-19) offers empirical support for the theory.<sup>54</sup>

Positive economic theory thus expects and predicts that non-leprous Israelites—and perhaps *all* Israelites from an *ex ante* perspective—would generally favor a public health regime whose goal is detection and containment, in which those afflicted with leprosy would be separated from society until such time as the affliction subsides. And that is indeed the regulatory regime that the Hebrew Bible institutes. A reliable and (one hopes) incorruptible specialist—the priest—is charged with diagnosing the disease and thereafter, imposing and administering a quarantine. The further requirements that the leper's appearance (torn clothing, uncut hair) and speech ("unclean, unclean") be regulated in such a way as to make his affliction easily apparent to passersby similarly promotes the goal of containment. From the outward manifestations of the leper's disease, passersby will know to steer clear. And lepers seeking to evade the quarantine will have a difficult time, given their appearance, concealing their leper status.

As a textual matter, note that the rules concerning the leper are written in the passive voice (e.g., "he shall *be brought* unto the priest"), suggesting that third parties with an interest in containing the disease

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<sup>53</sup> On the economic theory of public choice, see DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* (1991). For an economic model on the demand for regulation, see George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971). For extensions to the Stigler model, see Sam Peltzman, *Toward a More General Theory of Regulation*, 19 *J. LAW & ECON.* 211 (1976); Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 *Q.J. ECON.* 371 (1983).

<sup>54</sup> See TOMAS J. PHILIPSON AND RICHARD A. POSNER, *PRIVATE CHOICES AND PUBLIC HEALTH: THE AIDS EPIDEMIC IN AN ECONOMIC PERSPECTIVE* (1993).

will see to it that the leper is diagnosed and quarantined. This is predictable, given that lepers have little incentive to quarantine themselves. Also, note the further precautions before the leper can reenter society: hair must be shaved, clothing washed, flesh bathed, and upon readmission, there must be an additional seven days spent outside the tent. These regulations, too, seem calculated to contain the disease.

While the regulations in *Leviticus* seems relatively straightforward and can be explained descriptively as a public health initiative, the passage in *Numbers* recounting Miriam's contraction of the disease is not so easily explained. What purpose is served by the exclusive recordation of the Miriam story? Surely there must have been others besides Miriam who became afflicted with leprosy during the Israelites' forty years in the desert. For if Miriam's situation was unique, why create such an elaborate set of rules just for her? On this question, Miller's positive analysis of Esau's sale of his birthright for a mess of porridge is instructive.<sup>55</sup> Miller observes that in a world where recording, learning, and obtaining compliance with legal rules is costly, one would expect to observe the recordation of only the most difficult and memorable cases from which easier cases may be inferred *a fortiori*. If the leprosy regulations (harsh as they are) are enforceable against a person of Miriam's prominence, then surely they must be stringently enforced against everyone. Surely no exceptions of any kind can be made, no matter how privileged or highly-placed the leper might be. The advantage, then, of recording Miriam's case exclusively is that knowledge of the "holding" there makes the rule in other leprosy cases easy to infer.<sup>56</sup>

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<sup>55</sup> Miller, *Contracts of Genesis*, *supra*, note 2 at 26:

Why would the hard case be transmitted in oral tradition and the easy cases not? Because the hard case conveys information in the most economical fashion. Given the Jacob-Esau story, other fact patterns that might arise seem a fortiori. In an oral tradition where economy of meaning is at a premium because of the costs of memorization, it is exactly the hard case that we would expect to see passed through the culture. The easy cases will be forgotten for the same reason that we forget the easy cases today: they simply do not convey as much information.

*Id.*

<sup>56</sup> Another instance of the phenomenon that Miller identifies is the story of the daughters of Zelophehad as recounted in *Numbers* 27:1-11. They successfully litigated against their tribe before Moses the question whether title to ancestral land in Israel could pass to a man's daughters in the absence of any male heirs, or whether instead the land would revert back to the tribe. *Id.* at 27:8 ("If a man die, and have no son, then ye shall cause the inheritance to pass unto his daughter."). Surely there must have been other property (as well as other types

As a normative matter, it is worth noting that the biblical regime, while certainly a plausible approach to the problem of leprosy, is hardly inevitable. There are other ways to curb the spread of disease, such as through tort or criminal liability. But both of these alternative solutions would produce suboptimal levels of deterrence. Tort liability would not deter lepers with low levels of wealth, and criminal liability could not be imposed in cases where harm is inflicted only negligently but not intentionally. So a regulatory solution like quarantine is thus quite plausibly the very best way to deal with epidemiological problems like leprosy, and therefore the biblical regulation appears to satisfy a standard of normative defensibility.

*Loans.* There is already an economic literature that offers both a positive explanation for the ubiquity of “usury laws” and a normative assessment of them.<sup>57</sup> Glaeser and Scheinkman suggest that restrictions on charging interest might be explained, as a positive matter, by borrowers having disproportionate political clout as compared to that of lenders (e.g., situations where there is a large institutional borrower that might benefit from, and hence lobby for, regulations leading to lower interest charges on loans). They also suggest that usury laws can be justified on normative grounds as a form of “social insurance” that smooths consumption over time by facilitating an arrangement whereby behavioral agents lend in relatively high wealth, low marginal utility of income periods and borrow in relatively low wealth, high marginal utility periods of income.

But Glaeser and Scheinkman do not seek to explain (indeed, it seems they are unaware of) the fact that, under Jewish law, the usury laws on the books can be contracted around (and often are), as explained above.<sup>58</sup> Recognizing that the Bible’s restrictive laws with respect to debt transactions can be contracted around leads inevitably

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of) litigation before Moses. Indeed, we know that there must have been from the story of Jethro, who upon observing that his son-in-law Moses “sat to judge the people ... from the morning unto the evening” (*Exodus* 18:13), devised a justice system whereby lower judges would judge the people in garden variety cases, with Moses judging them only in the “hard cases” (*Exodus* 18:26). So even though there were other cases, the case of *Daughters of Zelophehad v. Tribe* (like the cases of *Esau v. Jacob* and *In re Miriam*) is exclusively reported because it is an economizing “hard” case from which easier rules can be inferred.

<sup>57</sup> See Edward L. Glaeser & Jose Scheinkman, *Neither A Borrower Nor A Lender Be: An Economic Analysis of Interest Restrictions and Usury Laws*, 41 J. L. & ECON. 1 (1998); GIUSEPPE COCO, CREDIT RATIONING AND THE WELFARE GAIN FROM USURY LAWS, UNIVERSITY OF EXETER DEPARTMENT OF ECONOMICS DISCUSSION PAPER (October 1997).

<sup>58</sup> See *supra* notes 45 & 46 along with their accompanying text.



to the conclusion that the institutional lobbying and consumption smoothing stories offered by Glaeser and Scheinkman are inapposite in the Jewish law context, where the regulations cover small consumer loans in an economically stable, agrarian society. So our task is to replace their model with contextually more relevant explanations.

The logical place to begin is to ask whether there is any practical consequence to these lending regulations if they can be circumvented by contract. Economic analysis suggests that there is indeed a consequence. The Bible's regulations forbidding interest and requiring release in the sabbatical year will, even with the possibility of contracting around them, continue to have some bite with respect to "small loan"/ "low stakes" debt transactions. This is because there are "transaction costs" associated with contracting around the regulations, and this cost will not be worth incurring in low stakes transactions.<sup>59</sup>

One, therefore, should expect the biblical regulations concerning debt contracts to have two effects on low-principal borrowers: (1) to reduce the borrowing costs faced by small loan borrowers who are fortunate enough to obtain financing; and (2) to reduce the supply of loan funds available for such low stakes borrowers. Because these effects are offsetting from the perspective of borrowers, it is difficult to say whether, overall, low stakes borrowers are helped or harmed by the Bible's lending restrictions. But one can say unambiguously that low-principal lenders are harmed overall. Still, perhaps the harm to them is more than offset by possible gains to low-principal borrowers. So long as this redistribution effect is a real possibility, the identified effects of the regulations are normatively defensible. Moreover, to the extent that transaction costs are high enough to make "contracting around" unrealistic in most cases, the Glaeser & Scheinkman analysis applies—and then looking at low stakes debt contracts in isolation, the regulations might well be normatively justified

But these lending regulations have an additional consequence in the larger loan context. Aside from the transaction costs that must be incurred to contract around the background rules, there also would likely be *information* effects as a consequence of the parties' efforts to contract around the background rules that would otherwise apply. Prospective borrowers who show reluctance to facilitate the waiver of

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<sup>59</sup> On the economic analysis and significance of transaction costs, see POSNER, *supra* note 1, at 50-55; see generally Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

their sabbatical year, debt discharge rights signal to their prospective lenders that they believe there is a significant risk of loan default. Similarly, a prospective borrower who is uninformed of the background default rules governing debt transactions (specifically, the default rule requiring the release of the debt in the sabbatical year) would of necessity become informed about the rule upon efforts by the prospective lender to contract around it.

The first of these information effects—i.e., signaling<sup>60</sup> by borrowers about the likelihood of default—unambiguously helps lenders who learn valuable information from the contracting around process that they could not learn without the presence of the sabbatical release rule at the outset as the default regulatory mechanism. Perhaps the value of this information effect more than offsets the lenders' increased transaction costs. On the other hand, this information effect helps only some borrowers (i.e., those with low default risk) while hurting others (i.e., those with high default risk). On balance, then, because it enables lenders to tailor their loans more efficiently for each borrower, the first information effect is likely welfare-enhancing (from a Kaldor-Hicks perspective), assuming that transaction costs are sufficiently low.

The net consequences of the second information effect—i.e., the education of otherwise unsophisticated borrowers about the background legal regime that governs lending contracts—are unclear, but plausibly are also welfare enhancing. The effect unambiguously hurts lenders by (a) raising transaction costs; (b) improving the bargaining position of borrowers who would otherwise not think to negotiate for such terms; and (c) not in any way helping the lenders with respect to sophisticated borrowers. Sophisticated borrowers are unaffected by disclosure of information that they already know, though presumably, they would have higher transaction costs due to lenders' efforts to contract around the background rule. However, unsophisticated borrowers benefit from the educative function of the default rule, perhaps by an amount sufficient to offset their own increased transaction costs as well as the increased costs imposed on the lenders and on other borrowers.

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<sup>60</sup> On the economics of signalling in markets with incomplete or imperfect information, see ERIC A. POSNER, *LAW AND SOCIAL NORMS* 18-21 (2000); Dan M. Kahan, *Signalling or Reciprocity? A Response to Eric Posner's LAW AND SOCIAL NORMS*, 36 U. RICH. L. REV. 367 (2002).

Overall, the welfare effects of imposing a contractually waivable restriction on interest and a contractually waivable right to cancel debts in the sabbatical year are difficult to assess. But under at least one plausible set of assumptions, the net welfare effects are positive.

*Land.* What we have asked about the land regulations we can also ask about the loan regulations. If the restriction on perpetual sales is effectively waivable by contract, then what effect if any does the jubilee regulation really have? Again, the answer is somewhat ambiguous as an empirical matter. On the one hand, the regulations undoubtedly increases transaction costs, in the sense that parties to land sales have to specify a term of years short of a fee simple sale in perpetuity, whereas without the regulation they would not. This limitation in itself should reduce the volume of land sales. Moreover, the the land sale regulation text in the book of *Leviticus* may well have “preference shaping” effects on tribe members (similar to those that Miller suggests are caused by the Song of Deborah<sup>61</sup>) which would also tend to depress land sales by raising the price that a tribesman would charge a non-tribesman and reducing the price that a non-tribesman would offer to pay. Since there may actually be positive externalities<sup>62</sup> associated with living in close proximity to other members of one’s tribe—and because such externalities would be magnified to the extent that inter-tribal land sales are reduced—a reduction in land sales could in theory increase welfare. While this is plausible under only a restrictive set of assumptions, it nevertheless satisfies a normative defensibility standard.

## VI. CONCLUSION

This paper continues the work of law and economics scholars to employ legal-economic analysis as a tool of biblical interpretation and explication. The principal argument suggested in the paper is that previous economic interpretations of biblical texts might well have been improved if normative as well as positive analyses had been undertaken. An effort to demonstrate the benefits of such a normative

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<sup>61</sup> Geoffrey P. Miller, *The Song Of Deborah: A Legal-Economic Analysis*, 144 U. PA. L. REV. 2293 (1996), *supra* note 2.

<sup>62</sup> On economic externalities associated with population characteristics, see Posner, *supra* note 1, at 179-181; Shai Bernstein & Eyal Winter, *Contracting with Heterogeneous Externalities*, 4 AM. ECON. J. 50 (2012).

enterprise was attempted here. Three sets of biblical regulations—those pertaining to leprosy, loans, and land ownership—were normatively assessed, and all were found, under certain assumptions, to be normatively defensible.