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Legal Theology: The Turn to Conceptualism in Nineteenth-Century Jewish Law

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Chaim Saiman

Abstract

This Article is a first-ever attempt to introduce the Briskers—an influential school of late nineteenth century Talmudic interpreters—to the legal academy. The paper describes how at the very moment that secularization and assimilation undermined the traditional legitimizing narratives of Jewish law, the Briskers fused law, theology and science to offer an alternate "scientific" vision of halakha (Jewish law). By recasting the multitude of detailed rules comprising halakha into a system of autonomous legal constructs, the Briskers revolutionized Jewish self-understanding of the halakhic system, and developed a jurisprudence that was able to counteract the social, institutional and intellectual upheavals represented by the haskala and Jewish emancipation. The article first describes the Brisker project on its own terms and then contrasts several prominent features of the Brisker school with analogous trends in nineteenth century German and American legal thought.

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The nineteenth century was the age of legal science. Across the globe, numerous cultures began to think of their law in terms of an interlocking system of internally coherent rules. While the details differ, these movements shared the belief that numerous legal propositions were held together by a small number of core legal concepts, and that correct decisions could be determined via formal methods of legal deduction and analysis. This mode of legal thought gave increased importance to legal concepts and analytic categories. Duncan Kennedy has termed this mode of legal analysis Classical Legal Thought.

This restructuring of legal analysis brought about changes in the understanding of what the law is and how it should be studied. In its American variant, the ascendance of Classical Legal Thought is usually associated with Christopher C. Langdell's tenure as dean of Harvard's law school. Langdell created the modern law school by shifting legal training away from apprenticeship and moving it to a university setting where students were trained as legal scholars. Underlying the Langdellian moment is the assumption that law is comprised of analytic concepts which can be apolitically applied through a series of deductions made from the core legal principles.

Several decades before Langdell, Fredrich Carl von Savigny founded the Romanist historical school in Germany. Savigny also trumpeted the idea of law as a science and advocated that university-based law professors should be the high priests of the legal order.⁵

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^{1.} See Duncan Kennedy, Two Globalizations of Law & Legal Thought: 1850-1968, 36 Suffolk U. L. Rev. 631, 637-651 (2003).

^{2.} *Id*.

^{3.} Id.

^{4.} In

^{5.} See James Q. Whitman, The Legacy of Roman Law in the German Romantic Era 104-112

Savigny's successor, Puchta, postulated that the law was a set of interrelated concepts that took the form of a hierarchical pyramid.⁶ In Puchta's schema, one moved up the pyramid by inducing more general principles from specific cases, and moved back down by deducing specific applications from the general rules.⁷ Following Puchta's lead, Rudolph von Jhering argued that the proper mode of legal analysis was to break down each legal rule into more elemental "fundamental concepts," and then reconstruct the system by aggregating these base concepts according to their proper internal relationship.⁸

Little known to Langdell, Savigny, or their counterparts, far off in the small Lithuanian town of Volozhin, a group of rabbinic legal scholars were creating their own fusion of law, theology and science. This method, known as the *Brisker derekh* or simply *Brisk*, emerged during the closing decades of the nineteenth century and offered a conceptual and "scientific" vision of *halakha* (Jewish law). Brisk revolutionized the study of Jewish law by recasting the multitude of detailed rules comprising *halakha* into a system of legal constructs.

This Article aims to introduce the *Brisker* school to the legal academy. Analyzing *Brisk*, however, offers more than just another (if more exotic) form of nineteenth-century legal scientism. This results from two unique features of the *Brisker* school. First, the *Briskers*, like all nineteenth-century Jews, were stateless. *Brisk* did not interact with a system of courts, a practicing bar, a political order or a commercial establishment. It is difficult to fit the *Briskers* into the traditional Classical Legal Thought narrative that explains the classical movement in terms of economic individualism, limited government and self-

⁽Princeton U. Press 1990).

^{6.} See Mathias Reimann, Nineteenth Century German Legal Science, 31 B.C. L. Rev. 837, 860-862 (1990).

^{7.} *Ìd*.

^{8.} Id. at 863.

^{9.} Terminology in this area is a bit tricky. "Analyst" and the "analytical school" are the terms used by Norman Solomon, in *The Analytic Movement: Hayyim Soloveitchik and his Circle* (Scholars Press 1993). These terms focus on the centrality of analysis to the school, and inasmuch as there is scholarly convention, it derives from Solomon. The problem with this terminology, is that it is exclusively an outsider's term. No analyst, past or present, refers to himself or his method as such. Rabbi Aharon Lichtenstein, a leading contemporary analyst, favors "the conceptual approach." Aharon Lichtenstein, *The Conceptual Approach to Torah Learning: The Method and Its Prospects*, in *Leaves of Faith: The World of Jewish Learning* 19 (Ktav Publg. H. 2003). In Yeshiva nomenclature, the school is usually referred to as the *Brisker derekh* (literally the method of *Brisk*) or simply *Brisk*. Others may use the term *lomdus*—a Yiddishim of the Hebrew word to study, *Imd*. The school is sometimes referred to as the Lithuanian style or approach. Others still, in recognition of the school's widespread adoption throughout yeshiva circles, would term the movement the "Yeshivish approach." I balance the clinical "analytical" and "analyst" with the more native *Brisker* and *Brisk* respectively.

realization.¹⁰ In short, the environmental stimuli that produced the *Brisker* revolution are substantially different from the conditions traditionally associated with the rise of legal classicism.

The second feature distinguishing its legal system is *Brisk's* insularity. During the close of the nineteenth century, intellectual isolationism became a form of religious dogma within the traditional Jewish milieu. Members of the *Brisker* school had limited (if any) interactions or familiarity with commercial, political, philosophical or legal activity taking place beyond their pale. And while no culture can be hermetically sealed from its surroundings, the school seems to have developed essentially independently from the other modes of nineteenth-century legal thought.

Brisk's central features are at once deeply familiar, yet radically foreign. While I return to the comparative element at the conclusion of this Article, I want to call attention here to three central themes shared by the Briskers and their classicist brethren. First, both Brisk and classicism followed (or perhaps caused) structural changes within lawteaching institutions. Each legal culture underwent a professionalization of legal scholarship and an increase in the social prestige of its central scholarly institution. Second, in their methods of instruction, classicism and Brisk stressed a return to the original sources at the expense of intermediate works that codified or summarized legal doctrine. Learning the law now involved thinking through its principles rather than memorizing its particulars. Legal rules could not be posited or simply lectured about, had to be teased out of the sources through dialectical analysis. Finally, each school produced analogous views about the nature of law-most importantly, that numerous and minute technicalities reflect an underlying coherent system of conceptual legal principles. The goal of classical legal analysis thus revolved around exploration and definition of these basic legal categories.

Despite these similarities, the movements are vastly different. Classical Legal Thought was derided as "theology," yet the *Briskers* would have probably taken it as a compliment. The Yeshiva was populated by cloistered *shtettel*-dwellers who gathered at the yeshiva to escape the tidal wave of modernity, secularization and assimilation overwhelming traditional Judaism. The *Briskers* were deeply religious and conservative men whose identity was marked by extreme insularity and traditionalism coupled with fear and hostility toward the broader social and intellectual culture. The yeshiva student's persona contrasts

^{10.} See e.g. Kennedy, supra n. 1, at 637-648.

sharply with the cosmopolitan gentleman-scholars who came to Harvard to train for a career in private enterprise and public life or with the intellectualism associated with the German law faculty.

This Article focuses on several related questions. Who were the *Briskers* and what was their social and intellectual world? What typifies their legal method? What made this method compelling to the *Briskers* and their broader audience? What solutions did the method provide, and what problems did it subsequently create? Finally, by locating the *Brisker* school within the larger family of nineteenth-century legal thought, the Article aims to shed light on the *Briskers* as well as their common law and Romanist counterparts. The article closes by pulling together several prominent *Brisker* features and contrasting them to analogous trends in German and American classicism.

I. THE YESHIVA AND ITS ENVIRONS

The program of legal conceptualism initiated by the Briskers arose when Eastern European Jewry was undergoing radical transformation. In a few short decades, a movement of secularization and emancipation known as the haskala11 altered the face of European Jewry. Communities that for centuries had adhered to halakhic lifestyles quickly assimilated and abandoned the traditions of their fathers. The Briskers' less than fully conscious response to these radical structural changes emerged from deep within traditional culture. They went back to the halakha-the very basis of traditional life-and retooled it to confront modernity. In the Briskers' hands, halakha was transformed from a seemingly endless collection of technical details concerning religious-legal practice into an elegant system of interrelated legal concepts. This move increased the analytical depth of the legal system and gave it the wherewithal to stand up to the social and intellectual critiques advanced by the haskala. The program succeeded because it was able to at once reaffirm traditional theological commitments—the divine origin and immutability of the halakhic legal system-while offering a response to the most trenchant critiques of traditional Jewish study and observance.

The discussion of analytic Talmudism begins with the yeshiva as it existed in the late nineteenth century. Yeshiva *Etz Chaim* ("Yeshiva of Volozhin" or simply "Yeshiva" or "Volozhin")¹² opened its doors in

^{11.} Haskala (literally enlightenment) was the 18th and 19th-century movement seeking to modernize and assimilate European Jews into broader society.

^{12.} Volozhin, or Wolozyn in Polish, is a town in southern Molodechno Oblast, Belorussia.

1802-03 under the leadership of Rabbi Hayyim of Volozhin. Over the years, the Yeshiva thrived, becoming the preeminent academy for advanced Talmudic studies in all of Europe. Volozhin reached its golden age in the latter decades of the nineteenth century, and became the model for all other Yeshivas in Eastern Europe. In 1892, the Yeshiva decided to close its doors rather than succumb to pressure from the Russian government (egged on by haskala-minded Jewish reformers) to include non-Talmudic subjects into its curriculum. In a move that looms large in the minds of many contemporary yeshiva deans, Volozhin chose to close rather than make even minimal accommodations toward the twin aims of secularization and assimilation.

A. Torah Lishma

Torah lishma—Torah for Torah's sake—was a central tenet in the ideology of Reb Hayyim Volozhin and his Yeshiva. Torah lishma meant studying Torah, but Talmud in particular, to fulfill the religious mandate of immersing oneself in the Talmudic canon. This obligation was paramount to all others, so that even mandated prayer times took second-class status to careful and diligent study. Moreover, the focus on Talmud was exclusive. Related areas, such as Hebrew grammar, liturgy, Jewish history, philosophy, and even the Bible, were understood to be less appropriate subjects for study (lishma) "for the sake of knowing the Torah." This theology posited that to know God was to be intimately familiar with the details and substance of His law. One did not study to be inspired by the Biblical narrative or to be immersed in its

^{13.} Jacob J. Shacter, Haskalah, Secular Studies and the Close of the Yeshiva in Volozhin in 1892, 2 The Torah U Madda J. 76, 81 (1990).

^{14.} Id. See also Norman Lamm, Torah Lishmah: Torah for Torah's Sake 26 (Ktav Publg. H. 1989); Abraham Menes, Patterns of Jewish Scholarship in Eastern Europe, in The Jews: Their History, Culture and Religion vol. 1, 403 (Louis Finkelstein ed., 3d ed., Harper 1960); Jacob Katz, Jewish Civilization as Reflected In the Yeshivot—Jewish Centers of Higher Learning, 10 J. World History 674, 701 (1966).

^{15.} Lamm, supra n. 14, at 103, 230-244.

^{16.} Like nearly all traditional scholars, the analysts did not see much difference between the Talmud and its canonical medieval commentators and interpreters. They were all part of the same seamless web of the Oral Law. Unless otherwise specified, the term Talmud is used broadly to include the body of mediaeval literature which the analysts considered part of the Talmudic canon.

^{17.} Menes, supra n. 14, at 402.

^{18.} Lamm, supra n. 14, at 158 (discussing the tension between study and prayer). Whereas hassidic sects were likely to view prayer as the fundamental religious act, Torah Lishma understood that study was the highest form of worship. In fact, Yeshiva students who spent too much time engaged in prayer were derided. See Shaul Stampfer, Hayeshiva Halitait Behithavuta 98-99 (Zalman Shazar Inst. 1995) [hereinafter The Lithuanian Yeshiva].

ethical tradition. Rather, students diligently poured over the Talmudic texts in order to comprehend the intricacies of its substantive laws. In the Yeshiva landscape, the Talmudic scholar (someone we might compare to a law professor) was the high priest of the legal, religious and social order.

The ideals of *Torah lishma* mandated that Volozhin's curricular structure depart from that of its predecessor institutions. Historically, *Sephardic* (North African and Middle Eastern) *yeshivot* were more oriented toward *halakha le'maaseh*, (loosely translated as "arriving at a black-letter law conclusion"), while their Central European (*Ashkenazik*) counterparts placed greater emphasis on dialectical give-and take. Nevertheless, some form of apply-to-practice study was present in nearly every Talmud study setting. The pre-*Brisk* yeshiva understood that at least part of its mission was to teach its students how to practice the religion and arrive at *halakhic* decisions.

In Volozhin, by contrast, the curriculum was weighted against decision-rendering. First, the entire Talmud was studied. No differentiation was made between Talmudic passages bearing directly on daily practice and those dealing with sacrificial rites that had not been observed since antiquity. Second, the Yeshiva's discourse stressed dialectic and argumentation over summary and conclusion. Thus, mediaeval texts that elaborated the Talmudic debate were celebrated while those that reformulated Talmudic passages into concise legal rules were largely abandoned. Little, if any, thought was given to how the Talmud's legal abstractions would be translated into real-world applications. Finally, students had only limited exposure to the responsa literature that functioned as rabbinic case law and reported particular instances of halakhic decisions rendered by rabbinic judges.

B. The Yeshiva Experience

Torah lishma ideology urged that every moment of life be used to increase the knowledge of Torah.²² The study of the Talmud became a "continuous fire," a figurative and theological replacement for the daily sacrifice of the Temple period.²³ Students were discouraged from

^{19.} See Mordechai Breuer, Ohalei Torah 137-143 (Zalman Shazar Inst. 2004).

^{20.} Id. at 142-143.

^{21.} See Joseph B. Soloveitchik, Halakhic Man 24 (Lawrence Kaplan trans., Jewish Publication Socy. 1983). This work is discussed in greater depth in Part IV.

^{22.} Lamm, supra n. 14, at 117.

^{23.} Menes, supra n. 14, at 402. One important account details how the students studied in shifts as to insure that the Torah was being studied on a twenty-four hour basis. The Lithuanian Yeshiva, supra n. 18, at 92

engaging in any extra-curricular activities and spent the significant majority of their waking hours in the *beit midrash* (study hall). The spiritual outlook of the Yeshiva students embodied the ideals of *Torah lishma*. Mastery of the Talmud was the culmination of the student's personal, spiritual and religious motivations.²⁴ This attitude was best captured by one of the Yeshiva's most famous non-Rabbinic alumnus, Hayyim Nachman Bialik.

I was completely absorbed in the Talmud.... I would suddenly be seized by a spasm of diligence and piety, and would dive in completely with all my 248 limbs and five senses into the sea of the Talmud, and immersed in it up to my neck, I would descend down into its depths, and my soul would be filled with nameless delights unlike anything else. These were wondrous hours of an uplifted soul, of ecstasy, of barriers and curtains transcended. Study turned to prayer. Its rules became a song to me. 25

C. The Yeshiva's Composition

The innovations at Volozhin extended to the Yeshiva's institutional structure. Previous *yeshivot* were essentially local institutions. Instructors served both as communal leaders and as teachers in the local yeshiva-study house.²⁶ The Rabbi was expected to cater to the educational and spiritual needs of both yeshiva students and laymen in their communities, and these experiences placed the Rabbi in the world of his laymen congregants. Similarly, pre-Volozhin, students were supported by members of the local community, an arrangement that created a financial and spiritual bond between the yeshiva and the local community.²⁷ Volozhin, by contrast, stood apart from the world around it. Students received a stipend directly from the dean of the Yeshiva, and the Yeshiva in turn was funded by donors from all over Eastern Europe.²⁸ Further, Yeshiva faculty did not serve as leaders of the local community, rather, their full attention was devoted to scholarship and

^{24.} The world of the Yeshiva student is also brilliantly captured in Chaim Grade's novel, Chaim Grade, *The Yeshiva* (C. Leviant trans., Bobbs-Merril 1976).

^{25.} Bialik's statements are cited in F. Lachover, *Toldot HaSifruit Halvrit HaChadasha*, vol. IV, 47. This translation is found in Menes, *supra* n. 14, at 385-386. On Bialik's experiences in the Yeshiva, *see* A. Balosher, *Bialik beValozhin* (4 Maoznayim 1934) (repr. in *Yeshivot Lita: Pirkei Zohronot* 164-182 (Etkes & Tikochinski eds., Zalman Shazar Inst. 2004)) [hereinafter *Memoirs of the Lithuanian Yeshiva*].

^{26.} The Lithuanian Yeshiva, supra n. 18, at 14; Katz, supra n. 14, at, 699.

^{27.} The Lithuanian Yeshiva, supra n. 18, at 14.

^{28.} The Lithuanian Yeshiva, id. at 114-121. See also Moshe Avital, Ha'Yeshivah ve'ha'hinukh ha'mesorati ba'sifrut ha'Haskalah ha'Ivrit 91 (Reshafim 1996) [hereinafter The Yeshiva and Traditional Education in the Literature of the Hebrew Enlightenment Period].

preparing lectures to be delivered at the Yeshiva.²⁹

It is important to stress that Volozhin was not a vocational school.³⁰ Students aspired to become sophisticated Talmud scholars rather than practicing rabbis.³¹ Preparing for rabbinic ordination was viewed as a less pristine form of Torah study, one that ignored the most substantive, i.e., analytically rigorous, areas of the law. The relationship between Talmud study and pre-ordination study in the Yeshiva is analogous to the relationship between a constitutional law course and preparation for the bar exam in the modern elite law school. While it is (presumably) necessary to attend law school to sit for the bar exam, members of the elite law school community view such bar preparation as a banal byproduct of an otherwise rigorous and intellectually challenging education. While ordination required a felicity with Talmudic texts acquired through the general curriculum, at Volozhin, studying for ordination was not perceived to be intellectually or spiritually enriching.³²

The result of these curricular and institutional changes produced an elite cadre of Talmudic intellectuals that made up the Yeshiva community. As a result, the social status of the yeshiva student significantly improved. No longer was he a wandering "mendicant pleading for alms." He was now viewed as a member of the intellectual and religious elite. Similarly, Yeshiva Rabbis were no longer responsible to local lay communities, and devoted their full energies to scholarship and teaching. Students followed suit, spending their days engrossed in the give-and-take of the Talmudic dialogue.

Before moving on to discuss the *Briskers*' particular methodological innovations, we must examine the Yeshiva's role in both defining and mediating the conflict between traditionalist Jewish society and the broader world outside.

D. The Yeshiva and the Haskala

The enlightenment of European Jewry, or haskala, was an encompassing social, intellectual and political movement that irreversibly altered the course of Judaism during the eighteenth and

^{29.} The Lithuanian Yeshiva, id. at 94. See also Mordechai Breuer, On the Hungarian Yeshiva Movement, 11 Jewish Hist. 113, 116 (1997) (contrasting the institutional independence of Volozhin with the situation in contemporaneous Hungarian Yeshivot).

^{30.} The Lithuanian Yeshiva, supra n. 18, at 99.

^{31.} Menes, supra n. 14, at 402.

^{32.} The Lithuanian Yeshiva, supra n. 18, at 100.

^{33.} Lamm, supra n. 14, at 118.

nineteenth centuries. The *haskala* began in Germany at the close of the 1700s and gradually moved eastward over the next century. The *maskilim* (adherents of the *haskala*) believed that only assimilation in language, dress, manners, and especially education would lead to the emancipation of European Jewry.

The full force of the *haskala* reached Eastern Europe in the second half of the nineteenth century.³⁴ Traditionalists saw the *haskala*, in its social, intellectual and popular manifestations, as a precursor to widespread assimilation and threatening loss of the Jewish spiritual identity.³⁵ The ultra-traditionalist position allowed for no compromises with *maskilim* or modernity. A counter-*haskala* movement emerged which adopted positions of extreme isolationism in the face of this modernization—making it a violation of religious law to read or even possess *haskala*-inspired literature.

Yeshivot in general, and Volozhin specifically, became a flashpoint in the raging battles of the haskala.³⁶ Both sides understood that the Yeshiva represented the intellectual and religious stronghold of traditional Jewish culture and stood as a formidable force in warding off the haskala.³⁷ Maskilim assumed that once the barrier presented by the Yeshiva was removed, traditionalist elites would become enlightened and eventually emancipated.³⁸ Throughout the 1870s and 1880s, scores of articles appearing in the haskala's newly-formed journals criticized the Yeshiva.³⁹ These publications pointed out the perceived lack of pedagogical sophistication and methodological rigor of the Yeshiva, and lamented the exclusive focus on Talmud study. Maskilim repeatedly called for an expansion of the curriculum to include secular subjects to assist in the integration of Jews into the broader society.⁴⁰ Though the Yeshiva formally ignored these cries, subtle changes were unfolding

^{34.} Schacter, supra n. 13, at 82.

^{35.} Solomon, supra n. 9, at 7.

^{36.} Schacter, supra n. 13, at 84-90. A more general survey of the attitude of the maskilim to the traditionalist education generally and the yeshivot in particular can be found in *The Yeshiva* and *Traditional Education in the Literature of the Hebrew Enlightenment Period*, supra n. 28. More recently, Immanuel Etkes has provided an excellent overview of the place of the haskala in the yeshiva movement. See Memoirs of the Lithuanian Yeshiva, supra n. 25, at 31-44.

^{37.} See The Yeshiva and Traditional Education in the Literature of the Hebrew Enlightenment Period, supra n. 28, at 159.

^{38.} Schacter, supra n. 13, at 84-90.

^{39.} These articles are collected and discussed in id. at 84-90.

^{40.} See e.g. A. Zuckerman, Androlomusya, 7 ha-Shachar 289 (1876); A Zederbaum, Yeshivah shel Ma'alah, 16 HaMeliz 743 (1880). Much to the dismay of the faculty, the journals in which these articles were published were read by Yeshiva students. See Schacter, supra n. 13, at 82; Nathan Kamenetsky, The Making of a Godol, 885-895 (P.P. Publishers 2002).

within its walls.41

The Yeshiva's contention with secular society pervaded the walls of the study hall.⁴² Despite official efforts to limit the incursion of secular subjects, at least some of Volozhin's students were actively reading a wide range of haskala-oriented literature. Several future leading maskilim gained their initial introduction to the haskala while at the Yeshiva.⁴³ Students clandestinely founded societies for Jewish and secular literature and history.⁴⁴ In some circles, Volozhin became known as a place where a young Jewish man could gain access to high levels of both the traditional Talmudic corpus and the burgeoning haskala literature.⁴⁵

The status of the *haskala* in Volozhin is oft-debated.⁴⁶ Perhaps the most balanced approach, recently sanctioned by scholarly opinion, was offered by Abba Balosher.⁴⁷

Regarding the Yeshiva of Volozhin: Although the haskala itself was not to be found, the smell and spirit of the haskala was present in small doses.

. . .

Students engaged in the works of our historians and our philosophers. Possession of these works, that would have expulsion in other battei midrash (yeshivot), was not completely forbidden in Volozhin. Rather it was the type of thing that one did

^{41.} Although the deans of the Yeshiva vehemently opposed any changes to the Yeshiva's curriculum, their personal attitude towards extra-Talmudic scholarship was far less rigid. See Schacter, supra n. 13, at 97-105; Kamenetsky, supra n. 40, at 263-267.

^{42.} Schacter, id. at 13, at 91; Kamenetsky, supra n. 40, at 885-895 (cataloguing reports of haskala activity in the Yeshiva); Memoirs of the Lithuanian Yeshiva, supra n. 25, at 31-44.

^{43.} Schacter, id. at 13, at 91-92.

^{44.} Id. at 94-96.

^{45.} Id. at 92. In fact, the great Hebrew poet Hayyim Nachman Bialik was lured to Volozhin because he thought that he would be able to study both Talmudic and haskalic literature there. Bialik was ultimately disillusioned, finding nothing other than "Talmud, Talmud, and Talmud," and he accused others of greatly overstating the presence of the haskala. See Hayyim Bialik, Iggrot Rishonot mi-Volozhin, 2 Knesset (1937); see also Abba Balosher, Bialik be-Volozhin, in Memoirs of the Lithuanian Yeshiva, supra n. 25, at 164.

^{46.} See Schacter, supra n. 13, at 91-96; Memoirs of the Lithuanian Yeshiva, id. at 31-44. M.Y. Berdyczewski, Olam ha'Azilut (1888), in Memoirs of the Lithuanian Yeshiva at 132. Further sources dealing with the prevalence of the haskala among Volozhin's students are cited in Schacter, supra n. 13, at n. 57, and Memoirs of the Lithuanian Yeshiva at 31-44. The Yeshiva and Traditional Education in the Literature of the Hebrew Enlightenment Period, supra n. 28, at 159-176 describes the existential and spiritual conflicts facing the Yeshiva student who delved into the haskala.

^{47.} Abba Balosher, Bialik be-Volozhin, in Memoirs of the Lithuanian Yeshiva, id. at 172. Of all the divergent accounts presented regarding the state of the haskala in Volozhin, Etkes finds Balosher's narration the most balanced and accurate. See Memoirs of the Lithuanian Yeshiva at 39-40.

not read in public, but was tolerated in private. During every semester there were some students who engaged in these works during the hours of the day where presence in the study hall was not mandated.

The works of Rabbi Sa'adya Gaon,⁴⁸ Rabbi Azaria de Rossi,⁴⁹ Krochman,⁵⁰ Wiess,⁵¹ Rubin,⁵² Rival,⁵³ Shir,⁵⁴ Shadal,⁵⁵ YaShaR,⁵⁶ Zwiefel⁵⁷ Schulman⁵⁸ and others. While these works were not listed on the Yeshiva's official listing of books [they were not in the Yeshiva's library], they were nevertheless found amongst the students, and would be passed on from hand-to hand. Regarding external knowledge "the seven wisdoms and seventy tongues" [secular knowledge more generally]: while there was no time designated to study publicly and with official permission, this knowledge was nevertheless acquired by those who sought it in private.

48. Saadya b. Joseph Gaon (882-942). One of the greatest scholars and philosophers of post-Talmudic Babylonia. His writings straddled classic rabbinic Talmudism, which was studied in the yeshiva, with philosophy and grammar, which was not studied in the yeshiva.

49. Azaria b. Moses de Rossi, Italy (1511-78) was a somewhat controversial rabbinic maverick who authored the *Meor Eynayim*, a revolutionary rabbinic work that uses critical methods to chart the development of the Bible, of Jewish history, and culture. The work cites classical and medieval philosophers, historians, Church Fathers and medieval Christian writers—sources inconceivable to the classic rabbinic mind. *Meor Eynayim* shares more in common with *haskala* thinking than traditional rabbinic scholarship.

50. Nachman Krochmal (1785-1840) was one of the founders of the Wissenschaft des Judentems school, and one of the first to propose investigating Judaism through historical-critical methods. His most famous work is Moreh Nevukhei Ha'Zman (Guide to the Perplexed of our Time).

51. Isaac Hirsch Weiss (1815-1905) was a haskala scholar of the Talmud and oral law. He wrote Dor Dor Ve'Dorshav, one of the first critical histories of the development of halakha. In traditional circles, both his methods and conclusions were typically regarded as heresy.

52. Solomon Rubin (1823-1910) was a Galician haskalist, historian and philosopher who wrote on Spinoza, Maimonides, Jewish folklore, customs and superstitions.

53. Issac Baer Levinsohn (1778-1860) was a leader of the Russian haskala. His most influential work *Teudah Be'Yisrael* is a criticism of traditional Jewish culture, which includes critiques of the traditional mode of Talmud study and education.

54. Solomon Judah Leib Rapoport (1790-1867). A moderate maskil whose works were nonetheless opposed by the traditional establishment. Rapoport wrote some of the pioneering works in the history and historiography of rabbinic Judaism and halakhic development.

55. Samuel David Luzzatto (1800-65). A leading Biblical scholar in the haskala mode.

56. Joseph Solomon Delmedigo (1591-1655). A real Italian renaissance man who was learned in the rabbinic canon as well as in medicine, physics, astronomy and mathematics. He also had close ties with the Ka'arite community. Delmedigo was celebrated by Geiger as a proto-haskallic Jew.

57. Eliezer Zwiefel (1815-88) was a Maskilic rabbinic scholar and historian who took a more sympathetic view to tradition and especially hassidim than most maskilim. His most famous work is Shalom al Yisrael.

58. Kalman Schulman (1819-99), studied in Lithuanian yeshivot in his youth, but was attracted to the *haskala*. Schulman wrote history and literature and adapted several 19th-century works of world history into Hebrew.

While the Yeshiva officially condoned any extra-Talmudic activities, the raging debates both for and against the *haskala* reverberated throughout the *beit midrash*. From within and without, Volozhin was being challenged to conform to the new paradigm of Jewish life and scholarship.

II. THE ANALYTICAL METHOD

The founder of the analytic school was Rabbi Hayyim Soloveitchik (1853-1918) ("Reb Hayyim"). Reb Hayyim was appointed a lecturer in the Yeshiva of Volozhin in 1880 where he quickly became the most popular lecturer. After the Yeshiva closed in 1892, Reb Hayyim moved to Brisk (Brest-Litovsk) to assume the rabbinic post left open by his father. In Brisk he continued teaching students who came to town to hear his lectures, and the movement, called the *Brisker derekh* (literally the approach or method of Brisk), or just *Brisk*, takes its name from this town. Reb Hayyim was an anti-haskalist whose personal character and political ideologies were characterized by a singular devotion to Torah, traditional scholarship and the halakhic way of life.

Reb Hayyim's chief work, Chiddushei Rabbeinu Hayyim Ha'Levi al Ha'Rambam is considered the first work of the analytical school. Let book is structured as a commentary on the Mishne Torah, Maimonides' magnum opus, which is a restatement/codification of the entire Talmud. Reb Hayyim's Insights contains roughly two hundred short discussions. Each section generally opens with the presentation of Maimonides' approach and a critique of that approach by Ra'avad (Abraham Ben David of Posquieres 1125-98), Maimonides' chief glossator and critic. Reb Hayyim sets out to "defend" the Maimonidean approach by introducing a distinction—often structured as a two-sided

^{59.} A short biographical and intellectual portrait of Reb Hayyim can be found in S.Y. Zevin, *Ishim Ve'Shitot* 39-87 (Tzioni 1966) [hereinafter *Men and Methods*].

^{60.} Solomon, supra n. 9, at 47-48.

^{61.} Id. at 48. Solomon reports that one of Reb Hayyim's leading students, RBB, bragged that he had never read a newspaper. Id. at 67. Other descriptions of Reb Hayyim's life and personality can be found in Kamenetsky, supra n. 40, at 880-920, 1198-1293, and are interspersed throughout Shimon Yosef Meler, U'vdot ve'Hanhagot le'Veit Brisk (S. Meler 2000). See e.g vol. 2, p. 201 (recording a letter drafted by Reb Hayyim lashing out against Zionism); Men and Methods, supra n. 59, at 67.

^{62.} Translated as "Insights of Rabbi Hayyim the Levite on Maimonides" (Brisk 1936) [hereinafter "Reb Hayyim's Insights"]. While this book is the classic work of the Brisker school, it was not the first published work. Reb Hayyim's Insights was published in 1936, 18 years after Reb Hayyim's death. Solomon, supra n. 9, at 49. The publishers (Reb Hayyim's sons) attest to the painstaking efforts undertaken by their father to prepare the manuscript. See the introduction to Reb Hayyim's Insights.

query—that refines the traditional understanding of the legal rule under review. The query often demonstrates that the rule is in fact comprised of two more elemental components, or that there are two ways to understand the mechanism through which the legal rule is said to "work." Reb Hayyim then shows how Maimonides and his critics disagree over the precise construction of the legal mechanism, often through a discussion of how the various sub-rules interact in a given case. The goal of the analysis is to provide Maimonides, as well as his critic Ra'avad, with ample justification in terms of both logic and tradition.

The name given to this two-sided query is hakira (root hkr), best translated as an "inquiry" or "investigation," and many Brisker discussions are introduced with the phrase yesh lahkor ("there is room to inquire/investigate"). While the Briskers were not the first Rabbinic writers to use this term, they popularized it and made it a central feature of their analysis. In fact, one of the telltale markers of the

^{63.} See also Elyakim Krumbein, Mi'Reb Hayyim MiBrisk VeHaGrid Soloveitchik Vead Shiurey HaRav Aharon Lichtensten; Al Gilgula Shel Masoret Limud, (From Reb Hayyim Brisk and Rabbi Joseph B. Soloveitchik to "The Discourses of Rabbi Aharon Lichtenstein": The Evolution of a Learning Methodology), 9 Netuim 51, 64 (2002) (typifying Reb Hayyim's approach) [hereinafter The Evolution of a Learning Methodology]. As this article was going to press, the Orthodox Forum published the proceedings from its 1999 conference on the Brisker method. See The Conceptual Approach to Jewish Learning (Yosef Blau ed., Ktav Publg. House 2006). The book contains an abridged translation of Krumbein's article as well as a response by Avraham Walfish.

^{64.} Solomon, supra n. 9, at 200.

^{65.} Solomon argues that both "etymologically and historically" the more appropriate word would have been hilluk (root hlk), which means to divide or distinguish. Solomon speculates that the transition from hilluk to hakira is related to the tension between Brisk and the haskala, noting that the root hkr was the word that the maskilim used to describe their academic research. (Research is called mehkar and a researcher is called a hoker). Solomon adds:

The terms thus began to acquire an air of intellectualism and the Analysts, wishing to appear intellectual, adopted them, or at least words from the same root. It would be naïve to suppose that this would imply the intentional borrowing of a term from the hated maskilim. It is merely that they [the *Briskers*] used, to describe their basic method, what was to them the most impressive sounding term without, perhaps, realizing just why it impressed them.

Id. at 119-120.

^{66.} See e.g. the title page to R. Shimon Shkop's Sha'arei Yosher (New York 1959) which states that the book contains "hakire halakhot" (literally investigations or inquiries into the halakha). The word also appears frequently in that work. See further the opening discourse in Sheurie Reb Hayyim MiTelz (yesh lahkor), and Sheurie HaRav Barukh Ber Liebovitz al Bava Kamma, Bava Metzia, Hulin at 113, 115, 116 (Y.B.Y.R. 1990) (using the yesh lahkor formulation in the name of Reb Hayyim); see also Baruch B. Leibowitz, Birkhat Shmuel, to Yevamot § 21 (A.Y. Freidman 1972).

^{67.} Marc B. Shapiro, Review Essay, *The Brisker Method Revisited*, 31 Tradition 78, 84 (1997) citing R. Eleazar Kalir, *Heker Ha'Halakha* (3^d ed., Makhon Hatam Sofer 1970) (originally published in Vienna 1838) as a pre-*Brisker* usage of this term.

Brisker approach is the presentation of a hakira (either at the outset or in the course of the discussion) and the use of this bivalent inquiry as the pivotal point of the legal analysis. Over time, hakira has come to mean more than a two-sided query and has come to be used as shorthand for the Brisker mode more generally.⁶⁸

The work of *Brisker* scholars is best illustrated by some examples of the analysts' work product. I have attempted to balance making this material accessible to the uninitiated while retaining the style and substance of *Brisker* thought, though the presentation is bound to be wanting on at least one, if not both counts.⁶⁹ The first few examples

The hakira however, takes on a far more prominent role in the firsthand memoir written by Yehuda Lieb don-Yihya, in Memoirs of the Lithuanian Yeshiva, supra n. 25, at 152-163. Yihya's memoir records his attendance in Reb Hayyim's lectures in Volozhin, and states:

[Reb Hayyim] would approach every Talmudic theme as a surgeon. He would investigate the logical elements of every sugya [Talmudic topic], showing the strength of each side of the debate. Once the logical basis was clear to all listeners, he would then focus on a dispute in the Talmud or one between Maimonides and Raavad, and explain it in accordance with two [divergent] logical approaches.

Memoirs of the Lithuanian Yeshiva at 153.

Yihya further attests:

It is interesting to note the way he would test the students. He would propose a hakira or discussion and ask the students to support it with a Talmudic passage. When one of the students would show the strength of the approach from a logical perspective (kokho be 'svara), Reb Hayyim would reply, "Know my friend, that I am pretty good at logic myself. Please bring me a proof from an explicit Talmudic passage."

Id. at 155.

These passages highlight two important points. First the term hakira is directly attributed to Reb Hayyim. Second, at least in the oral presentation, the hakira was not buried within the analysis but was given major prominence in the lecture. In contrast to his written work, it appears that in the classroom Reb Hayyim would begin with the hakira and reach the various Talmudic sources via reference to the hakira.

Further, in their published writings, Reb Hayyim's students frequently attribute the term hkr to their master. For example, the Hiddushei haGrach ve 'haGriz al haShas (Jerusalem 1965) at 8 uses the "yesh lahkor" locution as attributed to Reb Hayyim. Similarly, published notes from RBB's lectures record RBB as saying that Reb Hayyim declared "yesh lahkor." Solomon notes that while the use of the term hkr is more frequent in the later writers (Reb Hayyim's students), "it is by no means infrequent in the earliest." Solomon, supra n. 9, at 120; see also Yitzchak Adler, Iyun Be'lomdut xviii-xix (Sha'ar Press 1989); Moshe Wachtfogel, The Brisker Derech: A Practical Guide (Feldheim 1993).

69. Several distortions/simplifications require special note. First, the issue raised in the previous footnote. Second, I have not tied the analysis back to the original problem found in Maimonides, and in other ways I have abstracted the *hakira* out of its native context. Not every case of *Brisker* analysis contains an explicit articulation of a *hakira*; in many cases a *hakira*-styled distinction is only implied within the analysis. See generally The Evolution of a Learning

^{68.} While this style of analysis pervades *Reb Hayyim's Insights, supra* n. 62, the term *hakira* is apparently absent from Reb Hayyim's published works, where the *hakira* is more muted than in the works of Reb Hayyim's students or in first-hand accounts of his teaching style. I have combed through the first 20 sections of Reb Hayyim's work (reflecting 45 out of 313 pages) and have not found a single occasion where Reb Hayyim presents his basic distinction using any variation of the root *hkr*. Moreover, the *hakira* is rarely presented in its own paragraph, and is sometimes buried within the analysis.

display the type of legal distinctions forwarded by the *Briskers* and show how difficult Talmudic passages or legal disputes are explained through the *hakira*. Later examples cast a wider net and focus on how *Briskers* organized a number of legal questions around the underlying concepts reflected in a *hakira*.

A. Person or Object?

1. Background

The Talmud rules that in preparation for the Passover holiday, one is obligated to destroy all *hametz* (leavened bread) in his possession.⁷⁰

2. Brisker Analysis

A classic Brisker hakira distinguishes between obligations or acts that attach to the heftza (to the thing) and those that attach to the gavra (to the person).⁷¹ With respect to the *hametz* prohibition, Reb Hayyim inquired whether the commandment lies be 'heftza or be 'gavra-whether the law mandates a person to rid himself of hametz (heftza) or whether the law commands the hametz to be eliminated by the person (gavra).⁷² The difference between the two views is brought to light by an argument recorded in the Talmud between Rabbi Yehuda and the Sages regarding the correct method of hametz disposal. While Rabbi Yehuda maintains that hametz must be burned, the Rabbis find that no specific method is mandated. According to Reb Hayyim, Rabbi Yehuda understands that the underlying hametz prohibition to be b'heftza (in rem) that is, relating to the hametz itself; therefore the Torah sets a specific method of The Sages, on the other hand, maintain that the destruction. commandment is b'gavra (in personam), so as long as no hametz remains, the specific method of disposal is not regulated.

Methodology, supra n. 63 regarding the significance of these observations.

Finally, this article is an initial presentation of the *Brisker* school intended for an audience unfamiliar with rabbinic jurisprudence; tensions or competing ideas within the *Brisker* school are somewhat papered over. The presentation reflects something of an amalgamation of various forms of *Briskerism*. I try to note this with relevant footnotes, and hope that future work (mine and others) will bring these tensions to light.

^{70.} See Exod 12:15.

^{71.} This distinction bears some resemblance to Roman law's in rem/in personam distinction. Elementary forms of this distinction appear in the Talmud. However, the usage and ubiquity that one finds in *Brisker* writing is largely unprecedented. See Solomon, supra n. 9, at 123-124 for a more complete discussion of the evolution and usage of these terms.

^{72.} Reb Hayyim's Insights, supra, n. 62 to Hametz u'Matza 1:13.

3. Comments

While it is tempting to translate *heftza* and *gavra* as equivalent to the Roman *in rem/in personam* distinction, the *Briskers*' use of the *heftza/gavra* distinction is far more expansive than such a translation would suggest. The analysts make frequent use of these terms, often in radically different contexts than suggested in the then-existing literature. While the pairing obviously expresses some version of the *rem/personam*, internal/external or essential/peripheral distinction, it is important to note how the use of the term *heftza* (*res*, thing, object) is used to "thingify" a broad range of legal concepts. This theme is drawn out in the next example.

4. Background

Rabbi Baruch Ber Liebovitz (1862-1939) ("RBB"), one of Reb Hayyim's principal disciples and a first-rate analyst in his own right, ⁷³ inquired into the difference between causation in tort and causation for purposes of violating Shabbat. In the tort context, the Talmud raises the possibility that a tortfeasor's liability for damage caused by a fire is *me'shum hetzio* (literally on account of his arrow). This means that the ensuing damage is considered to be the direct action of the ignitor. ⁷⁴ Based on the *me'shum hetzio* principle, RBB wonders how one is permitted to light a candle prior to the onset of Shabbat. ⁷⁵ (One is not permitted to light a fire on Shabbat.) Isn't the candle's burning over Shabbat considered the "action" of the kindler, as is the case in tort? ⁷⁶

5. Brisker Analysis

RBB answered this question through the heftza/gavra distinction. Tort liability is premised on actions in the gavra—that is, we examine the action from the perspective of the person who caused it. (This is proven from other Talmudic sources.) Under this framework, me'shum hetzio teaches that the damage is traced back to the action of the ignitor,

^{73.} Kamenetsky, supra n. 40, at 517-520. Solomon, supra n. 9, at 66-69. A short biographical and intellectual portrait of RBB, can be found in *Men and Methods*, supra n. 59, at 292-307

^{74.} The Talmud contrasts this view with *aysho me'shum memono*—that the fire is considered property and liability stems from the general duty to ensure that one's property (prototypically an ox) does not cause damage. *See B.Talmud, Bava Kamma*, 22.

^{75.} Birkhat Shemuel, Bava Kamma § 17, supra n. 66.

^{76.} The question is not original to RBB. It is cited from the *Nemukei Yosef*, a medieval authority commenting to Shabbat 17b. RBB's use of the *heftza/gavra* terminology however is original.

who is therefore liable in tort. But for purposes of Shabbat violation, the law adopts the *heftza* perspective. That is we look to the "res," or "essence," or "thing" of the action itself (kokho be'gavra; ma'aseh be'yadayim be'gavra). Here we note that the candle lighter did not perform an action in the heftza—since he did not actually burn the candle on Shabbat. Therefore, he is not liable for Shabbat violation.

6. Comments

RBB's distinction is not revolutionary; the entire discussion could be recast as simply suggesting that there are different standards for causation in tort and Shabbat. More significant is his formulation. In his mind, it seems that the act-in-the-gavra/act-in-the-heftza distinction is the reason for (rather than the effect of) different substantive standards.

B. Physical and Legal Status

1. Background

Jewish law requires that certain objects and persons be immersed in a body of water for purposes of ritual purification. The Talmud discusses several different bodies of water and their relative strength in affecting purification.⁷⁷

Specifically, the Talmud contrasts a *mikva*—a pool, and a *ma'ayan*, a natural spring. A *mikva* has three basic requirements. First, the water must be collected into the pool naturally; it cannot be drawn or collected by human efforts (this is known as the "drawn water" problem). Second, the *mikva* must contain, at minimum, forty liquid units. Finally the forty units must be in one "place" or pool. Thus a stream trickling out of the *mikva* cannot affect purification since the water is not all in one place.⁷⁸

A natural spring on the other hand, has fewer technical requirements and does not require forty units. Immersion will be valid so long as the object can be fully dipped underwater. We will call this the "just enough water" rule. Second, the water does not need to be all in one place: a stream trickling (literally crawling) out of the spring will suffice (the "trickle" rule).

^{77.} See generally Mishna, Mikva'ot, ch. 1.

^{78.} Id.

The Talmud discusses an intermediate case where a large quantity of "drawn water" was poured into a natural spring that had only a little of its own water. Does this situation require the stringencies of a *mikva* or can one rely on the more the relaxed standards of a spring? The answer is a little of both. It is like a *mikva* in that the water needs to be collected into one place (the trickle rule does not apply), but it is like a spring in that the "just enough water" rule does apply. The commentators, however, have had great difficulty explaining this ruling. Why should this case have properties of both a *mikva* and a spring?

2. Brisker Analysis

Reb Hayyim explains this ruling by offering a distinction between the "essence of a spring" (etzem ha'maayan) and the "status of spring water" (din mei maayan). In less Brisker terms, the distinction is between water of the spring and water in the spring.

Reb Hayyim goes to work on the two rules. He argues that the trickle rule attaches specifically to the spring water, not to the spring itself. This must be the case since when the water is trickling out of the spring it can no longer be considered part of the "essence of the spring"; yet the trickle rule nevertheless applies. But when the spring water is diluted by non-spring water, the water, qua water, loses its status as "spring water," and the trickle rule does not apply.

By contrast, the just-enough-water rule relates to the "essence of a spring itself." Therefore, even when the spring is "diluted" by having drawn water poured into it, the spring does not lose its "inherent status" as a spring (despite the water losing its "spring water" status). So long as the water is deemed to be "in the spring," the just-enough rule applies.

3. Comments

This example demonstrates the novelty of Reb Hayyim's approach. The more conventional approach resolves the competing ideas by distinguishing on the basis of fact; finding that principle A relates to fact-group A while principle B relates to fact-group B. Reb Hayyim, by contrast, probes the nature of the legal rule itself. Reflecting on the law of the spring, Reb Hayyim noticed that it was comprised of two independent or differentiated legal rules. Teasing out these two

^{79.} Reb Hayyim's Insights, supra n. 62, to Mikvaot 9:6.

^{80.} In fact, Ran (14th C. Spain) takes this approach. See Ran to Nedarim 40.

components, Reb Hayyim is able to resolve difficulties that eluded previous commentators. Moreover, the analysis remains solely within the domain of "law" and does not require a distinction on the basis the particular facts of the case.

Finally, the analysis itself is also quite novel. Previous writers would not have formulated a distinction between the status of the spring and spring-water. Much like the present example, a large number of Reb Hayyim's *hakirot* turn on a distinction between two elemental components of a legal concept, one that was previously thought to be a unitary whole.

C. Are There Merely Technical Laws?

1. Background

A common feature of *Brisker* analysis involved organizing a number of specific and technical *halakhic* rules around one central *hakira*. In this way, the analysts demonstrated that several *halakhic* technicalities are simply manifestations of the core concepts unearthed by the *hakira*.⁸¹

A straightforward example is found in a discourse pertaining to halakha's laws of mortgages. If a debtor defaults on a loan secured by real assets, the court will issue a deed transferring the debtor's property to the creditor.⁸² There is a principle, however, (analogous to the common law's rule of equitable redemption) that allows the defaulting debtor to buy back (redeem) the property from the creditor even after default and transfer.⁸³

2. Brisker Analysis

The *Brisker* ponders the mechanics of the redemption option. Does it work because the court's original transfer to the mortgagee was inherently incomplete—that the possibility of redemption prevents a full and unreserved transfer? Or was the transfer fully effective, but there is

^{81.} It is possible that the feature tying of several disputes to one hakira is more prominent in works of the later Briskers. In Reb Hayyim's Insights, supra, n. 62, Reb Hayyim rarely strays far from the topic at hand. Nevertheless, he often adduces proof for his approach by surveying several related disputes or interpretive problems. This issue requires further investigation. Overall, however, the Briskers' recourse to distant Talmudic passages is never quite as fanciful as the "leshitato" exercises favored by the earlier pilpulists.

^{82.} See B. Talmud, Bava Metzia 16ba.

^{83.} Id. at 35a.

an "external" rule, stemming from principles of *halakhic* equity, that affords the defaulting debtor a redemption option? 84

Having set up this *hakira*, the analyst proceeds to examine a variety of specific rules that arise in the mortgage context. Two medieval authorities disagree about the technicalities of the transaction facilitating the redemption. Nahmanides ("Ramban"; 1194-1270) maintains that the debtor (now the purchaser) must draw up a new sale document to facilitate the redemption. Alternatively, Rabbi Nissim b. Reuben Gerondi ("Ran"; 14th Cent.) maintains that the transaction is facilitated by returning the original document (through which the court granted title to the creditor) to the debtor.⁸⁵

What lies behind this "technical dispute"? In the *Briskers*' mind, the medieval jurists are sparring over two competing legal images. Ramban holds that the court's transfer to the creditor was complete, and that the redemption option comes from an external and independent source of law. Therefore, a new document is needed to effect what is in essence a new transaction. Ran, on the other hand, maintains that since the sale was always subject to rescission on account of the debtor's option, the original transfer was never fully completed. This understanding is reflected in the rule that allows the parties to rely on the original document and does not require them to draft a new contract for the redemption purchase.

The same model was used to explain several other technicalities of mortgage law. For example, if the debtor has no property in his possession, the debt can be satisfied from real assets that the debtor sold to third parties in the intervening period, as these assets were sold subject to the mortgage lien. But do these third parties have the redemption option? The medieval jurists disagreed on this point. Maimonides⁸⁶ extends the redemption option even to third-party purchasers while Asher b. Yehiel ("Rosh" 1250-1328)⁸⁷ argues that the option is limited to the debtor exclusively. In the *Brisker* reading, the source of this dispute again lies with the *hakira*. If there is an inherent limitation in the creditor's title, then the weakness of the title will allow third-party purchasers to avail themselves of the redemption option. But if redemption stems from an external source, then the initial transfer to the creditor was fully effective, and the equitable right only applies to

^{84.} This discussion is based on a lecture delivered by Rabbi Moshe Taragin, *Talmudic Methodology* (1995) (available at www.vbm-torah.org/archive/ml-shuma.htm).

^{85.} See comments of Ran to Bava Metzia 16b.

^{86.} Mishenh Torah, Malveh ve' Loveh 22:16.

^{87.} Rosh to Ketubot 10:3.

the debtor, who lies in privity with the creditor. Under the two-rule model, the option does not run with the land to third-party purchasers.

A further demonstration of how several *halakhot* revolve around fundamental concepts comes from the Talmud's discussion of a trustee charged with dividing an estate.⁸⁸

The Talmud states that when a father dies, leaving both adult and minor children, the court is required to appoint a trustee to represent the interests of the minor heirs. The Rabbis debate whether the agent's division is permanently binding, or whether it can be revisited when the minors attain majority.

The analyst inquires as to the source of the trustee's powers: Is he fundamentally an agent of the court or a representative of the heirs? This *hakira* is used to explain the debate in the Talmud. If the trustee is an agent of the court, then the court's division is binding and there is no basis to repudiate the initial division. If, however, the agent is conceived to be the representative of the heirs, then the heirs can claim that the trustee exceeded the scope of his authority in acting against their beneficial interests. The second side of the *hakira* (but only the second side) provides the conceptual imagery that allows the heirs to repudiate the division.

The medieval commentators also disagree as to whether each heir requires his own trustee, or whether a single trustee can serve as the representative of all the minor-heirs. Again, the *Brisker* sees this as dependent on whether the agent serves the interests of the heir (in which case each child requires his own agent) or whether his power stems from the court so that a single agent suffices for all the heirs.

D. Agency and Conditional Transfers

Our final example is a bit more complex and demonstrates how hakira models were used to solve a number of conceptual and interpretive difficulties. The following is taken from the works of Rabbi Shimon Shkop (1860-1939) ("Reb Shimon"), a student of Reb Hayyim and leading analyst of the Telzer Yeshiva in Lithuania. 89

1. Background

Reb Shimon sets out to understand how a conditional transfer

^{88.} See B. Talmud, Kiddushin 42a. This discussion is also based on a lecture of Rabbi Moshe Taragin.

^{89. 2} Sha'arei Yosher, supra n. 66, ch. 7, § 7.

operates. To simplify, assume that A transfers Blackacre to B at Time₁, on the condition that B marries A's daughter, D, at Time₂. Reb Shimon's starting premise is that a legal transaction (a way of changing the legal status) creates a state of being—a concrete event that is understood to take place at a specific moment in time and space. Proceeding from this assumption, Reb Shimon wonders how conditional transactions are at all possible. In his words, just as the performer of a physical action cannot negate his action on the basis of a condition, similarly, the effects of a legal action cannot be undone via a condition. Reb Shimon compares entering a legal transaction to digging a ditch. Once the act of digging is performed, the ditch cannot be wished away by claiming it was dug on condition. In the same vein, once A deeds the property to B, a legal act was consummated. How can a condition undo the transaction?

This question leads Reb Shimon to investigate how a conditional transfer works. When A deeds Blackacre to B: (i) does the condition present a defect in the transactional act, or (ii) was the act at Time₁ complete, but the condition creates a "hold" on the transaction so that title does not vest until the condition is fulfilled at Time₂? (Note the similarity to the *hakira* regarding the redemption option).

Reb Shimon sides with the second visualization. As proof, he cites the Talmudic rule that if A were to release B from the condition of marrying D, B would nevertheless retain ownership of Blackacre. This proves that the transaction was fully consummated at Time₁, for otherwise the initial transfer to B would have remained deficient (since the original act was only partial and the condition was never filled), and B would be unable to retain Blackacre without a second (complete) transactional act. After reaching this conclusion, Reb Shimon moves to explain exactly how the condition operates to defer the vesting of title. After all, if the initial transaction is fully consummated, why would a condition ever be effective?

Here, Reb Shimon raises a hakira regarding the act or formality that effectuates a transaction, (i) does the act itself create the change in legal status or (ii) is it the will manifested through the act which effectuates a change in legal status?

Reb Shimon proposes that not every change in legal status operates through the same mechanism. In some cases, it is the act itself, while in others it is the will manifested through the act. He substantiates this distinction by pointing to an opaque Talmudic statement that connects the rules governing conditional transfers to those applying to the *halitza*

ceremony. While commercial transactions may be performed conditionally (e.g. A deeds Blackacre to B on condition that B marry D), the *halitza* ceremony may not be performed on condition (e.g. A releases B from the presumptive bond on condition that B travels to New York on Monday). A parallel distinction is found regarding the laws of agency. Commercial transactions may be performed via an agent (A delegates B to purchase Blackacre from C), but the *halitza* ceremony must be performed by the principal actor and cannot be delegated. Curiously, the Talmud specifically links these two rules, holding that *halitza* cannot be performed via an agent *because* it cannot be performed on condition. The obvious question (unanswered by the Talmud or classical commentators) is what does agency have to do with the law of conditions.

Reb Shimon explains that the basis of a commercial transaction is the parties' will. Therefore, the transaction is effectuated by the will as manifested through the formal act of acquisition. While it remains true that the condition cannot undo the act itself, the condition acts as a limitation on the will manifested through the act. Because the donor's act is meaningless without the requisite will, title does not vest in the donee until Time₂ when the condition is fulfilled and the donor's will is satisfied. The same model explains the agency rules. Because the transacting party's will effectuates the transaction, so long as the principal wills the transfer, the act itself (merely manifesting will) can be performed via an agent. As proof for this view, Reb Shimon notes that both agency and conditions are effective in commercial transactions.

Halitza, by contrast, is accomplished through the act itself; will is not a required element. Since the emphasis is on the physical performance of the act itself, it cannot be delegated, and must be performed by the principal party. Similarly, a condition will not work, because once the legal/physical action is performed it cannot be undone via a condition (as in the ditch-digging example), and here there is no element of will for the condition to attach itself to. Again, as proof, Reb Shimon points out that neither agency nor condition are effective in the halitza context. It is important to note that Reb Shimon does not make a distinction between ritual and commercial/civil acts. This possibility is not raised by Reb Shimon and he finds that there are several "civil law"

^{90.} Halitza is a ceremony described in Deuteronomy 25: 5-10. The Biblical text provides that when a married but childless man dies, the deceased's brother is encouraged to marry the widow and rebuild a family on behalf of his dead brother. However, if the surviving brother does not wish to marry his sister-in-law, he must go with her before the elders and perform the halitza ceremony which frees the parties of the presumptive bond existing between them.

acts that fit into the *halitza* model, and conversely, a number of cultic/religious acts that require both action and will.

2. Comments

This analysis is fairly typical of Reb Shimon and *Brisker* thought more generally. A transaction creates a legal fact that is every bit as real as a physical fact; hence the digging analogy. A related feature is the mechanistic view of the transactional process. Transferring property, *halitza*, and every other legal act is seen as a sort of Rube Goldberg contraption. Once all the predicates are in place, the transaction automatically goes forward. Therefore, Reb Shimon must investigate the nature of the braking lever represented by the condition: Is it a defect in the machine itself, or does the machine remain in working order but the condition places a hold on the vesting of title?

Like Reb Hayyim, Reb Shimon uses positive Talmudic rules to substantiate his premises and prove his conclusions. Reb Shimon argued that since B retains the property, it must be true that the transaction was valid at Time₁. The observed fact of B's possession means that the transactional mechanism completed its cycle. This in turn can be used to substantiate the claim made as to the nature of the For if the transactional act had not been conditional transaction. completed at Time₁, there would be no basis for B's continued retention Similarly, Reb Shimon substantiated his distinction between action qua action and action qua intent from the "observed fact" that the Talmud links agency and condition in the halitza context. The linkage between these two bodies of law proves that they relate to the will manifested through the action rather than the action itself. Throughout the Brisker discourse, observed legal facts (rulings in specific cases) are used to reverse engineer the legal mechanisms that weave the halakha's seamless web together.

III. THE BRISKERS' LEGAL DISCOURSE

A. Style and Substance of Brisker Reasoning

The *Briskers* understood *halakha*'s numerous legal categories as ontological realities. This approach required the development of a substantially new terminology and created a genre of synthetic legal language that has little precedent in rabbinic literature. The *Briskers*' "essential," "inherent," and "fundamental" constructs are typically contrasted with "external," "independent," "separate," and

"unconnected" states of legal being. Similarly, an analyst might speak of the "essential status of the spring" (din et'zem ha'maayan) the "onset of the status of prohibition," (halot shem ha'issur), "causation in the essence" (kokho b'heftza), and argue that "the central source of the vesting of legal status is caused by the action in its essence" (ikar sibat ha'halot be'etzem ha'maaseh). These formulations appear as strange in their original Hebrew as when translated into English. To the modern jurist, the locutions sound artificial and contrived, precisely because they are designed to convey the metaphysical status of each legal rule.

Even to the rabbinic ear, however, *Brisker* distinctions can sound somewhat semantic. Is there really a coherent distinction between the act qua act and act qua manifested intent, between spring water and the spring itself? *Brisk* has had its share of critics, even from deep within the traditionalist camp—a group that does not usually criticize its own on methodological grounds. But while *hakira* hair-splitting generated its share of skeptics, the movement's success lay in its explanatory prowess. Reb Hayyim was known to tackle interpretive conundrums that had long confounded rabbinic scholars, so that once Reb Hayyim articulated his *hakira*, the solution seemed obvious from the outset. Several observers noted that Reb Hayyim did not so much reconcile the texts—the traditional tool of rabbinic analysis—as undermine the very basis on which the alleged contradiction was premised. In short, the *Briskers*' success in rationalizing the sprawling and unwieldy Talmudic terrain mitigated skepticism regarding their methods.

^{91.} Analytic terminology is made even more obtuse because many analysts found it theologically objectionable to use terms generated outside the traditional rabbinic canon, since the *Briskers* saw themselves as continuing rather than innovating Talmudic interpretation, and anything sounding too "external" would have been suspect. Many analysts redefined and reconjugated existing terms to convey a new set of ideas.

Solomon devotes a chapter to analytic terminology, noting that the *Briskers* were not of one view regarding foreign terminology. He further demonstrates how some analysts struck a middle ground by using philosophical terms that entered the canon via the mediaeval Jewish philosophers. *See* Solomon, *supra* n. 9, at 181-182. (Of course this compromise is ironic since the mediaeval philosophers clearly borrowed these terms from non-Jewish mediaeval philosophers, but it is very possible that the *Briskers* were unaware of this fact.). *See also* Shapiro, *supra* n. 67, at 81 (noting that Reb Hayyim's sons viewed their father as "merely continuing the path of the *rishonim* [classical medieval commentators].").

^{92.} See criticisms cited infra, at n. 187.

^{93.} See Yihya's Memoirs, supra n. 68.

^{94.} Men and Methods, supra n. 59, at 47.

^{95.} Kamenetsky, supra n. 40, at 910.

^{96.} Id. at 906-920, recounting how Reb Hayyim's lectures became the most popular in the Yeshiva.

B. Law as Fact—Halakhic and Physical Reality

Not only do *halakhic* concepts exist in a heaven of legal stasis, they succeeded in defining the *Briskers*' earthly experience as well. Reb Shimon could thus equate a legal transaction with the physical act of digging. In fact, one of the most striking features of the *Brisker* discourse is how physical reality is made subservient to the *halakhic*-legal reality. The *Briskers* did not have any pre-legal categories. Because *halakhic* principles were thought to be "hard-wired" into the physical world, the *Briskers* approached the physical world through the *halakhic* prism. 97

A striking example is taken from the laws of *mikva*. One of the *mikva*'s basic requirements is that its waters must be collected naturally. Water drawn to its source via human efforts (known as "drawn water") is therefore not suitable for a *mikva*. Examining this rule, RBB wondered whether drawn water exists as water but is disqualified for use in a *mikva*, or whether it loses its "status" as water. The literal translation is far more graphic:

To explain the matter we shall investigate the disqualification of drawn water. Is it disqualified to the extent that the status of water does not vest [to the drawn water] (d'lo hal shem ma'yim) and it is as if there were no water at all.... Or is it not like there is no water at all, and that the status of water attaches to it [the drawn water] but rather, that there is a rule of disqualification that attaches to the drawn water, (din p'sul d'hal a'laihu), a rule of disqualification with respect to the mikva. 100

There is little doubt that RBB only considered that the water might lose its "status as water" as applied to the rules of *mikva*. Undoubtedly, he would have treated drawn water as water for other *halakhic* purposes (where the injunction against drawn water is inapplicable), and most certainly would have used it to put out a fire. But the fact that he expresses himself in this fashion—that he is willing to conceive that water unacceptable for a *halakhic* purposes loses its status *as water*—suggests the degree to which the *Briskers*' view of physical reality was dominated by *halakhic*-legal reality.¹⁰¹

^{97.} See infra nn.158, 162-163 and accompanying text.

^{98.} See Mishna Mikvaot 1:7.

^{99.} Id

^{100.} Birkhat Shmuel, supra, n. 66, to Yevamot § 21(emphasis added).

^{101.} Admittedly, this feature seems to be more acute in RBB's works than in Reb Hayyim or the other analysts. In varying degrees, however, examples of this mode of thought can be found throughout the *Brisker* corpus. Further work in this area will bring these distinctions to light.

This tendency was celebrated. The introduction to RBB's main work, *Brikhat Shmuel*, written by his disciple and son-in-law, recounts as follows:

Spirituality [probably halakhic concepts] and anything understood through the logic of the Torah took on a physical existence. This was emphasized in all his mannerisms and especially in his explanations of halakhic concepts. He would thus explain that an ox that is ownerless and is not included within the legal category of an "ox that damages" [since there is no one to pay for the damage] is therefore not an ox! . . . Similarly with regard to the heftza, which according to his understanding and expression every spiritual [halakhic] matter was considered a heftza [object; reality]. For example, regarding the concept of intent in a transaction, he would explain that intent creates an onset of the object [reality?] of the transaction, (she'haddat hu ha'ose halot heftza shel kinyan) and many similar examples. (emphasis added)

This view inspired a joke that travels in yeshiva circles (first, some background). One of the basic prohibitions of the Sabbath is cooking. One is permitted to cook however, using a "secondary vessel" (keli sheini) i.e., a vessel twice removed from the heat source. While ordinarily, one may not make tea on Shabbat (since placing the teabag in a cup of boiling water is construed as cooking the tea leaves), based on the Talmudic dictum, "a secondary vessel does not cook," many authorities permit teamaking if the water is first transferred from the kettle (the "first" vessel) into another cup or pot, the "secondary vessel."

A story is told about a *Brisker* enjoying a cup of tea (prepared via the second vessel) with his son on Shabbat. The child spills the tea on his lap and begins to cry, "it burns, it burns." The father stares indignantly at the boy and slaps him on the face, saying, "silly lad, a 'secondary vessel does not cook." A joke to be sure, but the story emphasizes the extent to which *halakhic* constructs were part of the physical world.

Rabbi Joseph B. Soloveitchik presented this view in more philosophical terms. 102

When halakhic man [a *Brisker*] comes across a spring bubbling quietly, he already possesses a fixed a priori relationship with this real phenomenon: the complex laws regarding the halakhic construct of a spring.... When halakhic man approaches a real spring, he gazes at it and carefully examines its nature. He

^{102.} Soloveitchik, *supra* n. 21, at 20. This work, along with and the personality and thought of Rabbi Joseph B. Soloveitchik are explored *infra* Part IV.

possesses, a priori, ideal principles and precepts which establish the character of the spring as a halakhic construct, and he uses the statutes for the purpose of determining normative law: does the real spring correspond to the requirements of the ideal Halakhah or not?

Halakhic man is not overly curious, and he is not particularly concerned with cognizing the spring as it is in itself. Rather he seeks to coordinate the a priori concept with the a posteriori phenomenon.

C. Explanatory Powers of the Hakira-Model

The analysts' work product emphasizes how every legal position is derivative of an ideational concept. The set of *Brisker* explanations, however, is limited. *Briskers* rely exclusively on *legal* terminology and concepts, and many *hakirot* play on a nearly metaphysical interaction between stages of legal process. *Brisker* discourse lacks any indication that legal doctrine is a product of a particular history or competing social, political and economic interests.

For example, Rabbi Judah and the Sages argued about the destruction of hametz. Reb Hayyim understood this dispute to be about whether the command to destroy hametz is grounded in a b'gavra or b'heftza obligation. In other words, these Rabbis are "really" arguing about the "core" dichotomy expressed within the hakira. Because Rabbi Judah understands that the "essential" nature of the law was b'heftza, therefore, he maintains that the hametz must be burned. It is important to appreciate which way the argument runs. The conceptual commitment (the hametz prohibition is b'heftza) is not a by-product of Rabbi Judah's legal position; it is the very reason for the position. This hakira-centered interpretation reflects the sum total of the analysts' legal "External" contextual, historical, textual or factual interpretations are unacceptable as they suggest that the law is influenced by factors outside the rarefied terms defined within the hakira. The following example drives this point home.

The medieval commentators argue whether, to acquire a chattel, the buyer must lift the object one *tefah* (approximately three inches) or three *tefahim* (pl. tefah). The proposed hakira explores the nature of this transactional formality: does formal act of acquisition effectuate the legal transfer, or does it merely supply evidence of the transaction? The

^{103.} See Yitzchak Adler, Iyyun Belomdus: Lomdus a Substructural Analysis, supra n. 68, at 113-120. See also Lichtenstein, supra n. 9, at 30.

analyst understands that if the formal act demonstrates the transfer of ownership, then a pronounced act involving three *tefahim* is required. But if the act simply effectuates the transfer, even a minimal gesture of ownership can consummate the transaction.

The datum, of course, does not have to be explained according to the *Brisker* method. Several other readings are equally plausible. For example, one might argue that each opinion reflects the prevailing commercial norm of the author's locale. This explanation is especially compelling since the *rishonim* (literally early ones; classical medieval commentators) often spanned cultures and centuries. Another account stresses the political and economic interests served by each rule. A third approach, the one most likely to be taken by non-*Brisker* rabbinic scholars, focuses on which position has more compelling support from text and/or precedent. Finally, one might suggest that the dispute has no underlying theory, but that each jurist has a different intuitional sense regarding commercial propriety. The *Brisker* eschews these theories because, in different ways, each assumes that the law is influenced by factors other than those reflected in the concept-centric account.¹⁰⁴

D. Law and Policy

To the *Brisker*, *halakhic* constructs form reality. Water that is not *halakhic* water is not water, an ownerless ox (which does not generate tort liability) is not an ox, hot tea does not burn since secondary-vessel water does not burn, and entering a legal transaction is just like digging a ditch. Legal rules "exist" every bit as much as do trees, and just like it is irrelevant to argue that the world would be better if trees were blue rather than green, it makes no sense to argue that the system would be more efficient if a creditor did not have the option to reclaim his assets. Policy arguments are irrelevant to the *Briskers*' legal universe.

This tendency comes to the fore in both the discussion of the debtor's redemption option and the agent's authority to divide an estate. In the trustee case, the *Brisker* conceptualizes the central question as whether the trustee acts on behalf of the court or the heirs. The debate over the scope of the redemption option similarly depends on whether the option represents an inherent defect in the creditor's title, or whether it is premised on an external rule of equity. From the instrumentalist perspective, these questions are remote and merely distract from the real issues. Contemporary analysis understands these questions to present a recurring private law dilemma: when are private transactions treated as

^{104.} See infra Part IV.

final and unreviewable. Each side will present its predictable arguments. The pro-finality side emphasizes the need for predictability and stability, while the pro-regulation side looks at the need to monitor the substantive fairness of the transaction.¹⁰⁵

These arguments, tangled as they are in the "skein of human affairs," have no place in the *Briskers*' legal world. It is inconceivable that the Talmudic scholars would argue about the practical effect of the *halakhic* rules, and it would be highly unusual for an analyst to even take note of economic or social implications of a legal rule (unless this dimension is specifically discussed in the Talmud or *rishonim*). The *Brisker* presents an internal account where the entire legal order is expressed by the ideational constructs reflected in the *hakira*. For this reason, *Briskers* were able to use the same set of analytical methods when engaged in a discussion of sacrificial law not practiced since the first century, as when exploring the details of commercial transactions.

The reading of *Rosh*'s position regarding the debtor's redemption option provides an illustration. *Rosh* wanted to limit the redemption option to the debtor since extending it to third-party purchasers leaves ownership of a large number of land holdings in a continual state of doubt. At face value, *Rosh*'s comments are driven by real-world concerns regarding transactional security. But the analyst cannot accept this reading because the metaphysical construction of the redemption rule cannot turn on practical policy concerns. Policy analysis is therefore transformed into a *hakira*-based analysis. What *Rosh* is *really* saying is that the redemption rule is an external rule of equity—one that does not impinge on the essential nature of the creditor's title.

The modern lawyer is unlikely to ponder whether equitable redemption is constructed of a unitary whole or of disparate bits of legal doctrine, or the mechanics of a conditional transfer. Focusing on these minutiae of "transcendental nonsense" simply obscures the real question: whether the redemption rule should be extended, or whether the court must appoint agents for each heir individually. However, because the legal concepts form the *halakhic*-legal reality, the *Brisker* finds these questions of central significance.

E. Concepts and Facts

The exclusive focus on concepts led Briskers to convert factual

^{105.} See e.g. Duncan Kennedy, The Rise and Fall of Classical Legal Thought unpublished ms. at 102-103 (1998) (available at www.duncankennedy.net).

^{106.} Rosh to Ketubot 10:3.

arguments into legal ones. 107 For example, the Talmud records a dispute regarding whether a debtor should be believed if he claims to have repaid a loan prior to the due date. 108 One scholar, Reish Lakish, rejects this claim as he holds that the law presumes that debts are not prepaid. Others accept this claim, arguing that debts are occasionally prepaid. Despite the empirical tone of this Talmudic text, the Brisker refuses to analyze this as a debate about the percentage of loans likely to be prepaid. Rather, the analyst assumes that both sides agree as to the relevant facts, (e.g. that in fact, twenty-five percent of the debtors prepay) but that they argue over a question of law: whether a twenty or fifty percent prepayment rate is required to rebut the non-prepayment This dispute in turn, depends on more general presumption. considerations regarding the level of certitude required to extract assets. No matter how factual or contextual the relevant Talmudic passage appears to be, the analyst reworks the material until it can be framed as a debate over "core" halakhic concepts.

This sentiment is best expressed by Rabbi Joseph B. Soloveitchik (RJBS):

Torah scholars used to denigrate those who studied the laws of kashrut [kosher laws]: only those who were about to enter the rabbinate would study this area of the law. Who could guess the day would come [with the development of the Brisker approach] and these laws would be freed from the bonds of facticity, external and common sense explanations, and become transformed into abstract concepts, logically connected ideas that would link together to form a unified system Suddenly, the pots and pans, the eggs and onions disappeared from the laws of meat and milk; the salt, blood and the spit disappeared from the laws of salting. The laws of kashrut were taken out of the kitchen and removed to an ideal halakhic world . . . constructed out of complexes of abstract concepts.

RJBS repeats this theme on several occasions. In assessing Reb Hayyim's reorientation of the Talmudic tractate of *Kaylim*—a highly technical tractate discussing the ritual status of a wide array of household items—RJBS writes:

^{107.} Lichtenstein, supra n. 9, at 29.

^{108.} See B. Talmud, Bava Batra 5a-b. This example is presented and discussed in Lichtenstein, supra, n. 9, at 29.

^{109.} Joseph B. Soloveitchik, Ma Dodekh MiDod, 28 (Ha'Doar 1963) [hereinafter MDD]. This translation is taken from Lawrence Kaplan, Rabbi Joseph B. Soloveitchik's Philosophy of Halakha, 7 Jewish L. Annual 150 (1988).

Take for example what was done with the tractate of Kaylim (lit. vessels). At first reading this appears to be little more than a catalogue of household items... as if the entire purpose of the tractate is to describe the domestic objects of a second-century household. But this is impossible. Reb Hayyim unveiled the tractate's true meaning. He abstracted the ideas from their physical form, placed the concept in place of the fact, the logical connections over material form, and ideal principles over concrete objects. 110

F. Concept and Texts

Before the *Brisker* movement overtook the yeshiva world, Torah study focused primarily on reading and interpreting *halakhic* texts. The study of Talmud primarily involved reading the text and working through the kinks arising out of the dialogue. Advanced study centered on reconciling contradictory Talmudic texts. The most common form of reconciliation involved reading at least one source against its literal grain or showing how each relates to a different factual scenario. In the pre-*Brisker* method, legal analysis rarely stood on its own merit; it was a tool used to solve the interpretive problems arising from discordant Talmudic passages. In the words of a leading *Brisker*, analysis was "accidental" rather than "fundamental." It was not until the *Briskers* came along that *halakha* was understood as a system meriting conceptual definition and classification in its own right.

Rather than "clearing the minefields" of textual contradictions, the analysts erected self-sufficient conceptual and definitional structures. 114

^{110.} Id. at 24.

^{111.} Lichtenstein, supra n. 9, at 32-33.

^{112.} Id. at 25-26. See also Mosheh Lichtenstein, "What" Hath Brisk Wrought: The Brisker Derekh Revisited, 9 The Torah u-Madda J. 1, 2 (2000) (discussing transition from give-and-take analysis to sugya based interpretations).

^{113.} See generally Lichtenstein, supra n. 9, at 28; but see The Evolution of a Learning Methodology, supra n. 63, at 55-60 (noting that this view is not shared by all Briskers, and that many well-known Briskers will only propose new conceptual understandings if it resolves an existing textual difficulty).

^{114.} Lichtenstein, supra n. 9, at 34-38. A compelling example of the difference between Brisk and other Talmudic schools is presented in The Evolution of a Learning Methodology, id. at 82 n. 64, where Krumbein compares the Brisker school to the work of another highly regarded 20th-century Talmudist, Rabbi Aharon Kotler. R. Kotler's work deals extensively with the various texts and documentary sources, and his intellectual energies are devoted to fashioning a coherent whole from the disparate parts. In R. Kotler's analysis, the legal concept takes a secondary role to the interpretation of the relevant passages; the concept is used to "answer" the problems created by the divergent texts. He does not deal with the concepts as much as with arranging the various literary sources to fit into a single manageable conception. When abstracted from the texts, R. Kotler's work provides few conceptual insights. The Brisker approach by contrast is far less

Talmud study moved away from the text itself and towards the *sugya*, (plural *sugyot*; roughly translated as Talmudic topic or subject matter) e.g. liability for torts caused by fire. The focus on concepts similarly changed the structure of Talmudic commentary. Traditionally, the commentary/gloss formed a "play-by-play" to the Talmud's give-and-take and was oriented primarily to the details of the text and only secondarily to the broader subject matter expressed therein. The analysts moved away from the Talmud's meandering narration, focusing instead on the concepts embedded within each passage. 115

The transition from text to concept further influenced the relationship between concepts and canonical texts. As an example, a modern-day analyst cites a dispute between Maimonides and Gra^{116} regarding the proper formulation of the blessing recited before lighting Shabbath candles on Friday eve. Maimonides rules that the blessing's text reads "Blessed are you God... who has commanded us to light the Shabbath candles." Gra, based on a text found in the Jerusalem Talmud holds that that the correct liturgy reads "Blessed are you God... who has commanded us on the lighting of the Shabbat candles."

The analyst employs the *heftza/gavra* distinction to assess the nature of the candle-lighting commandment. Must an individual light candles in honor of Shabbat (*gavra*); or is the obligation for candles to be lit in honor of Shabbat (*heftza*)? Maimonides sides with the *gavra* understanding; therefore the blessing focuses on the obligation to light the candles. *Gra*, on the other hand, looks at the obligation *b'heftza*—for the candles to be lit. *Gra's* favored locution thus emphasizes the candles' lighting rather than the person doing the lighting.

Framing these texts through the heftza/gavra distinction subtly inverts the traditional relationship between text and concept. Traditionally, the Talmudic text stood as the ultimate reason for a given

dependent on the ins and outs of the Rabbinic texts so that the analysis of concepts stands on its own merit. While R. Kotler sustains his textual readings via reference to legal concepts, *Brisk*'s conceptual structures are *supported* by canonical texts.

^{115.} See Evolution of a Learning Methodology, id. at 63-84 for an extended discussion of the role of incidental questions in the Brisker enterprise.

^{116.} The "Genius of Vilna;" Rabbi Elijah b. Solomon of Vilna (1720-97).

^{117.} See Yitzchak Adler, Iyun Belomdus, supra n. 68, at 126-127.

^{118.} Mishna Torah, Shabbat 5:1.

^{119.} I have not been able to locate this passage from Gra based on Rabbi Adler's citation. Hagahot Maimoniyot does record an alternate tradition from the Jerusalem Talmud that reads le'hadlik ner li'khvod Shabbat, ("to alight a candle in honor of Shabbat,") but this is different from the position attributed to Gra. Further see Arukh HaShulhan to Orakh Hayyim 363: 2 who states that he was unable to locate the passage in the Jerusalem Talmud cited by the Hagahot Maimoniyot. In any event, I follow Rabbi Adler's analysis not so much for the accuracy of Gra's position as to demonstrate how an analyst views a dispute between two textual traditions.

position—legal opinions were explained and rationalized in terms of adherence to the core rabbinic text. The *Briskers*, by contrast, understood the texts to embody a "fundamental legal concept" which underlies and motivates the position formulated in the Talmud. The texts' authority stems not so much from the words themselves as from the analytic construct reflected within the canonic language. ¹²¹

G. Technical Rules

The conceptual orientation also assisted the Briskers in mediating the tension between precedent and development in halakhic-legal The Briskers were arch-traditionalists who had great discourse. difficulty confronting their own inventiveness, hence, the problem of legal development was especially acute for these scholars. [122] Several oral histories attest that the Briskers denied the novelty of their approach, arguing that their job was simply to bring the insights of the rishonim into clearer focus. 123 The analysts were far from naïve, however, and understood that in tone and style, they were newcomers to the rabbinic scene. 124 Their solution was to interpret the classical literature through a distinctly Brisker lens. While Maimonides may never have explicitly distinguished between the status of a spring and the status of spring water, he must have intended it; how else can his rulings be reconciled? Similarly, why would Ran and Ramban disagree about a fine point of commercial law unless they were arguing about the underlying nature of the creditor's legal title? What else could the Talmud mean by linking agency to conditional transfers? The analysts overcame the paradox of halakhic development by framing every Talmudic statement in terms of a pre-existing analytic concept. 125

Moreover, explaining several disputes in terms of a central hakira reveals the relationship between the halakha's technical details and the law's broader, overarching themes. Halakha is notorious for its myriads of picayune details: whether the proper blessing is "on the lighting of the

^{120.} This is similar to the common law understanding that cases are evidence of the law rather than the law itself. See Eugene Wambaugh, The Study of Cases 18-24 (2d ed., Little, Brown & Co. 1894).

^{121.} See our discussion of Brisker empiricism infra Part IV.

^{122.} Solomon, supra n. 9, at 91-92.

^{123.} Reb Hayyim reportedly commented "[I]t is not for us to make *hiddushim* (innovations; novel interpretations); only the *Rishonim* were able to do this. All we have to do is understand what is written." Quoted & translated in *id.* at 91.

^{124.} This sentiment probably lies behind all the disclaimers of originality. See e.g. the introductions to Reb Hayyim's Insights, supra n. 62, and RBB's Birkhat Shmuel supra n. 66.

^{125.} See infra nn. 170-172 & accompanying text.

Shabbat candles" or "to light the Shabbat candles," whether a new document must be drafted in a debtor-redemption scenario, whether title transfers by lifting the object one or three *tefahim*. The list goes on and on.

In the hands of the *Brisker*, legal technicalities are transformed from lawyers' points into lofty ideals and ideas. The technicalities are used to reverse engineer the law's overall structure. While it may look like the rabbis are arguing over six inches of space, in reality, they are probing the deeper question regarding the general purpose of transactional formalities. What looks like a trivial quibble over the grammatical structure of a sentence explores the very nature of man's relationship to the Sabbath. A technical dispute over contract law becomes a central question in the law of mortgages and, perhaps, opens a window into the tension between law and equity more generally. The analysts understood that the law's broad themes were found deep within the recesses of its technical details, and they investigated every bit of legal minutiae to bring *halakha*'s core concepts to light.

H. The Goals of Legal Discourse

The *Briskers* were not legal decision-makers.¹²⁶ They were doctors of the law rather than judges, academics rather than practitioners.¹²⁷ They did not produce written *responsa*, compose treatises, or codify existing decisions, and day-to-day, their interactions were with students, not clients or litigants. More fundamentally, the anti-decisional bias ran deep within *hakira*-styled analysis. *Briskers* investigated opinions long rejected by the *halahkic* authorities with the same degree of intensity as laws relevant to daily practice. And by matching up each position with one of the sides developed in the *hakira*, the analyst showed how each position was acceptable, perhaps equal, from the perspective of both reason and tradition.¹²⁸

^{126.} See Men and Methods, supra n. 59, at 62-63.

^{127.} As noted above, Reb Hayyim's principal work is styled as a commentary to Maimonides' Mishne Torah, which is a summary and restatement of the Talmud's halakhic corpus. Thus Marc Shapiro writes: "[Reb Hayyim] transformed the practical halakhic work par excellence—Maimonides' Mishne Torah—into both the central feature of his theoretical analysis as well as the most profound commentary on the Talmud." Shapiro, supra n. 67, at 78. See also Lichtenstein, supra n. 112, at 2-3 for an interesting speculation as to why (somewhat counter-intuitively) the Briskers looked to the Mishne Torah as the fountainhead of their conceptual/theoretical analysis.

^{128.} Solomon, supra n. 9, at 200.

Not surprisingly, the analysts rarely issued legal opinions. A story is related about a certain family law dispute that was referred to Reb Hayyim by the local tribunal. Reb Hayyim requested that each side commit its arguments to writing, and sent the case off to Rabbi Y.E. Spektor. Reb Hayyim asked that Rabbi Spektor only inform him of his bottom-line holding and that he not reply with a reasoned analysis of the legal issues. As the story is related, Reb Hayyim feared that he might disagree with Rabbi Spektor's analysis and have a hard time instituting the decision in light of (what he perceived to be) faulty reasoning. Reb Hayyim had no problem, however, submitting to Rabbi Spektor's authority to render judgment in the case. 130

It is tempting to see the *Brisker* aversion to *halakha*'s practical side as analogous to the tension between academics and practitioners in American law. But while certain common forces are at work, the *Briskers*' anti-practice bias runs deeper. The *Briskers* maintained a very different understanding about the goals of legal discourse and of law more generally.

The contrast is best captured by comparing the way law professors and *Briskers* use legal abstractions. American legal academics focus on how abstract doctrines are applied to a live set of facts. This reflects the common lawyer's nearly inborn belief that doctrine is defined only by application to real cases. Negligence, probable cause, or cruel and unusual punishment, do not mean anything until they are applied to a specific tort, search or sentence. The *Briskers*' view by contrast, is nearly the opposite. He assumes that legal rules can only "really" be understood by *stepping away* from the realm of practice and considering the rule's analytic anatomy in a vacuum. The contingencies, exigencies and equities that inevitably attend an actual case serve only to distort one's view of the law's conceptual essence. While the common-law professor gives meaning to abstract concepts by testing them via fact-patterns, the *Brisker* gives meaning to concrete facts and objects by converting them into abstract legal concepts. 132

^{129.} Id. at 47-82 (surveying the work product of the various analysts). None of the major analytical works record answers to actual questions posed to the rabbi-judges.

^{130.} Men and Methods, supra n. 59, at 63-64.

^{131.} The comparison here is directed to the legal professoriate as it existed during the late 19th and early 20th centuries. For a discussion on the characteristics of the 19th-century German and American legal professoriate, see Mathias Reimann, A Career in Itself: The German Professoriate as a Model for American Legal Academia, in The Reception of Continental Ideas in the Common Law World 1820-1920 (Reimann ed., Duncker & Humblot 1993).

^{132.} Thus the spring becomes a "law of the spring" (din ma'ayan) the ox, a halakhic ox (din shor), and water, becomes "the status of water."

One searches in vain for analytic writings that perform the "core" functions of the legal professoriate. *Briskers* did not codify legal decisions, write treatises, or predict (or proscribe) how the law ought to be applied to a given set of facts, and they most certainly did not contemplate legal reform. At every stage, the analysts seem to have purposely neglected scrutinizing the process through which abstract legal rules are applied to actual decisions. This anti-decisional bias is hardly accidental. It stems from the analyst's belief that the law—meaning the analytical composition of *halakhic* rules—can only be understood if divorced from its earthly and mundane considerations.

IV. LEGAL THEOLOGY

The *Brisker* narrative is astonishingly lacking in characters. Human desires, facts about the nature of the physical and social world, policy goals, and even basic notions of fairness and justice are either ignored or translated into the *hakira*'s language of metaphysical legal anatomy. *Brisk* similarly shied away from legal decision-making—the very space where abstract principles meet their human subjects. This section explores the theological basis of these commitments.

The *Briskers* were doctrinal writers. Their interests were *halakha* and its foundational principles, not jurisprudence, philosophy or theology. The analysts expressed, in the extreme, the Talmud's preference for legal rather than philosophical discourse. But whereas the Talmud's legalism is balanced by the homiletic/theological tone of the *aggada* (non-legal sections of the Talmud) the *Briskers* continued the longstanding tradition of relegating *aggada* to the margins of rabbinic activity. The *Brisker* canon contains scarcely a trace of self-reflection.¹³³ The existing writings and oral histories do little more than to suggest that *Briskers* were fierce opponents of secularization, and resisted any movement that sought to recast Jewish identity in terms other than strict fidelity to *halakha* (i.e., Zionism, secularism and socialism).

^{133.} Solomon collects several of the *Briskers*' attempts to describe their methods but concludes that they are by and large disappointing. Solomon, *supra* n. 9, at 91. The most accurate account of the relationship between the *Brisker* method and earlier rabbinic writers is found in Lichtenstein, *supra* n. 112, at 16, n. 9. An interesting first-hand description of Reb Hayyim's lectures is provided by Yihya, who writes: "The importance of his words was in his unique approach to the matter, in the astounding level of logical analysis, in the internal architecture of his words, and in his investigation of all the internal logical elements that comprise each and every *sugya*." *Memoirs of the Lithuanian Yeshiva*, *supra* n. 25, at 155.

A. Halakhic Man

The task of articulating the analysts' worldview was undertaken by the scion of the Soloveitchik dynasty, Rabbi Joseph B. Soloveitchik ("RJBS" 1903-93). RJBS's analysis and interpretation of *Brisk* is laid out in two principal works. *Halakhic Man*, published in 1944, discusses the life, worldview and creative capacity of the *Brisker*, typologically termed *halakhic* man. Another work, titled *Ma Dodekh MiDod* ("MDD"), technically a eulogy for RJBS's uncle and Reb Hayyim's son Issac Zev Soloveitchik (1887-1959), contains a celebratory discussion of Reb Hayyim's innovative ideas in the field of Talmud study. 134

These works offer unparalleled moments of rabbinic self-reflection and a behind-the-scenes tour of the House of *Brisk*; or as one observer put it, an all-too-rare "attempt to express Judaism's self image by someone regarded as one of the very molders of this image." RJBS was a first-rate analyst, and a central link in the chain of the *Brisker* tradition; but he broke paths with his forbearers on the issues of secular education and modernity. While reared in the classical rabbinic mold, RJBS later attended the University in Berlin, writing a doctoral dissertation on the philosophy of Hermann Cohen. Later he came to the United States and served as the spiritual and intellectual leader of Yeshiva University. He is widely considered to be the most influential twentieth-century American Orthodox thinker, and in particular, is recognized as pioneering the dialogue between traditional *halakhic* Judaism and modern (or mid-twentieth century) philosophy.

RJBS's education and philosophic disposition present a problem in reading his account of the analytic mindset as a historically accurate representation of the "classical *Briskers*"—Reb Hayyim and his

^{134.} In addition to these two works, RJBS (Soloveitchik) authored *The Halakhic Mind*, which, though written in 1944, was not published until 1986 (Seth Press 1986). See William Kolbrener, Towards a Genuine Jewish Philosophy: Halakhic Mind's New Philosophy of Religion, in Exploring the Thought of Rabbi Joseph B. Soloveitchik 179 (Marc D. Angel ed., Ktav Publg. H. 1997). Halakhic Mind is a complex work. Even experts have termed it "difficult and arcane" (id.) and described it as a "highly technical and abstract philosophic monograph." Kaplan, supra n. 109, at 143-144. Halakhic Mind argues that modern quantum physics, as opposed to Aristotelian and Newtonian physics, supplies the only legitimate analytic model for the study of religious philosophy. Philosophers should cease asking the sociological and anthropological "why question" ("why did God command to do X"), and focus, like the mid-century quantum physicist, on the "what" question ("what are the nature and properties of the divine command").

My comments are taken primarily from Halakhic Man, supra n. 21, rather than Halakhic Mind, id. First, even specialists have encountered great difficulty digesting it, and I am in no position to do so. Second, while Halakhic Mind speaks of the philosophy of religion in general, it contains relatively little discussion specific to halakha, and makes no attempt to connect the general argument to the Brisker project.

^{135.} Rachel Shihor, On the Problem of Halakha's Status in Judaism, 31 Forum 146 (1978).

students. 136 While RJBS claims to have written *Halakhic Man* with the portrait of his grandfather before him, 137 he undoubtedly used a style and tone foreign to classic *Brisk*. His descriptions of the *halakhic* order as "ideal," and "a priori," creating a "noetic" system filled with "ontological principles" would have been incomprehensible to the classical *Briskers*; and the gap is more than terminological. The *Briskers* were arch-traditionalists who worked tirelessly to shield themselves from the culture and education that produced the expressions used by RJBS to describe their project. Further, RJBS's account is not designed to convey historical fact. It was part of his own life-long quest to confront the philosophical tensions between modern thought and classical *halakhic* Judaism. The interpretation is more theological than historical. 138

Though the philosophical tone of argument is somewhat removed from Reb Hayyim, RJBS's observations are consistent with the *Brisker* approach. To put this in clearer focus, it is nearly impossible to imagine how RJBS could have related the philosophy laid out in *Halakhic Man* had his rabbinic role model been anyone other than Reb Hayyim. ¹³⁹ Growing up, as he did, in Reb Hayyim's orbit, RJBS had unparalleled access to the *halakhic* mind. Despite their limitations as history, *MDD* and *Halakhic Man* remain the most compelling account of the *Briskers*' inner world.

The essence of RJBS's interpretation can be captured in these two paragraphs:

Reb Hayyim... invented the conceptual approach to Talmud study. He fashioned an ideal world, and discovered independent *halakhic* constructs. If we understand a bit about conceptualization and quantification of the natural sciences developed by the fathers of classical and modern physics—from Galileo to Newton, and down to our times—we will understand Reb Hayyim' approach to *halakha* which is surprisingly similar to

137. Kaplan, supra n. 109, at 192.

^{136.} As used here, "classic *Brisk*" refers to Solomon's grouping of the *Brisker* school. Solomon, *supra* n. 9, at ix. However, I would exclude M.M. Amiel from this grouping on account of his interest in and knowledge of secular disciplines.

^{138.} Krumbein argues that RJBS's claim that Reb Hayyim transformed the technical details of the daily prayer service into ideal *halakhic* principles is more descriptive of RJBS's writing than of Reb Hayyim's. See Evolution of a Learning Methodology, supra n. 63, at 87.

^{139.} Counter-factual histories are always difficult to write, but one cannot imagine RJBS making the same claims if his *halakhic* hero was one of the prominent 16th-century Talmudists e.g. *Maharshal*, (Rabbi Shlomo Luria, Lithuania 1510-73), *Maharam*, (Rabbi Meir Gedalia of Lublin, d. 1616), or *Maharsha* (Rabbi Shmuel Edles, Poland 1555-1631), whose dialectical style bears superficial resemblance to the *Brisker* school).

the mathematical scientists' approach to the physical world. 140

The "payoff" of the science analogy, and the *Brisker* approach more generally is that:

[Reb Hayyim] purified halakha from all exogenous influences. Based on his approach, one rejects the psychologization or historicization of halakha.... Halakhic thinking follows a path of its own. Its rules and principles are not psychological-factual but ideal-normative, as is logical-mathematical thinking. The historical and factual context does not impinge on truth or correctness of halakhic judgments.... Just as the validity of mathematical thought is not assessed through psychological analysis. 141

The halakha-science analogy is more fully worked out in the pages of Halakhic Man, which contrasts halakhic man (the Brisker), with the modernist-scientific "cognitive man" on the one hand and "homo religiosus," the universal transcendent religious aspirant, on the other. AJBS's thesis is that halakhic man shares much (more than expected) in common with the rationalist cognitive man, and somewhat less than expected with the romantic homo religiosus. Halakhic man's comprehension of his halakhic reality is compared to cognitive man's desire to understand the natural world through application of the scientific method. 143

^{140.} Soloveitchik, supra n. 109, at 19.

^{141.} Id. at 20.

^{142.} See Soloveitchik, supra n. 21, at 1-16. Perhaps the most succinct contrast between these two figures is captured in the following paragraph:

The duality in the attitudes of cognitive man and homo religiosus is rooted in existence itself. Cognitive Man concerns himself with simple and "candid" reality. He does not seek to closet himself with the hidden in existence but rather focuses his attention on its revealed aspect. This is not the case with homo religiosus. He clings to a reality which, as it were, has removed itself from the cognizing subject and has barred the intellect from all access to it. He is totally devoted and given over to a cosmos that is filled with divine secrets and eternal mysteries. The very nature of the law itself, the very phenomenon of cognition is an open book for cognitive man and a closed one for homo religiosus.

Id. at 9.

A more complete discussion of the theological (but not legal) implications of RJBS's halakhic philosophy is found in Kaplan, supra n. 109 and my analysis is based in part on Kaplan's reading. See also Gerald Blidstein, On the Halakhic Thought of Rabbi Joseph B. Soloveitchik in Rabbi Joseph B. Soloveitchik, Man of Halakha Man of Faith (Menachem Genack, ed., Ktav Publg. H. 1998); Kolbrener, supra n. 134; see also Jonathan Sacks, Rabbi Joseph B. Soloveitchik's Early Epistemology, in Exploring the Thought of Rabbi Joseph B. Soloveitchik 209 (Marc D. Angel ed., Ktav Publg. H. 1997); Evolution of a Learning Methodology, supra n. 63.

^{143.} RJBS was not the only rabbinic scholar to note the connection between the *Brisker* enterprise and scientific methods. Rabbi Y.Y. Weinberg, himself a rabbinic maverick familiar with both rabbinic and 19th-century non-rabbinic thought, wrote the following as a eulogy for his teacher, Rabbi M.M. Esptein, a more traditional *Brisker*:

Like the pure sciences, *Halakha* is a conceptual, ideal and *a priori* system through which reality is both interpreted and given meaning. 144 *Halakha* is a "theoretical-normative system" and "there is no phenomenon, entity or object in this concrete world which the *a priori* halakha does not approach with its ideal standard. The Halakhah is not a random collection of laws, but a method, an approach which creates a noetic unity. This peculiarity of this worldview is that it is constructed of exclusively *legal*, rather than theological or philosophical, data. According to RJBS, the *Briskers*' cognition of this system of ontology-masked-as-law is the epitome of divine service and religious observance. More traditional modes of religious service favored by homo religiosus (prayer, fasting and asceticism on the one hand, rapture and ecstasy on the other) are found to be "subjective" and decidedly inferior to halakhic man's "objective" analytical legalism. 148

When we shall be worthy of having a true Hebrew science, they (the Hebrew scientists) will recognize and understand the value of the great ideas spread throughout his books. The new Hebrew science, and in particular the field of *Mishpat Ivri* (Jewish or Hebrew law), can learn much Torah and wisdom from his magnificent works, if it knows how to retrieve the original ideas from the give and take of the Talmudic discussion which [R. Epstein] made the external/superficial framework for his *hiddushim* (insights). Here and there, brilliant ideas and new definitions of legal terms and concepts shine. Their scientific value is immeasurable.

See Y.Y. Weinberg, LeFrakim 269-270 (Kiryah Ne'emanah 1967) (this translation is based on Shapiro, supra n. 67, at 83).

This passage presents an interesting contrast to RJBS's reconstruction. Like RJBS, R. Weinberg understands that the *Brisker* program has implications for seeing *halakha* as a science. But while RJBS thought Reb Hayyim had *already* transformed *halakha* into a legal science, Weinberg finds that Epstein's work will be of great value to future halakhic scientists. His comments are directed to the community of self-conscious halakhic scientists (the *Mishpat Ivrei* community) who might otherwise disregard Epstein's work as being the product of tradition rather than science. Weinberg implores these scholars not to be deterred by the traditional garb of Epstein's works and to recognize his contributions to the emerging *halakhic* science.

144. Halakhic Man, supra n. 21 was first published in 1944 and undeniably reflects the dominant conception of science at the time. Commenting on Halakhic Mind, supra n. 134 (but the comments are equally applicable to Halakhic Man), one scholar noted that the work has a "dated feel about it" and wondered how RJBS would have expressed himself if he were aware of Kuhn's The Structure of Scientific Revolutions or Gadamer's Truth and Method. See Sacks, supra n. 142, at 218. My own presentation makes no attempt to square RJBS's views with more updated approaches towards the objectivity of the scientific method. In a similar fashion, Thomas Grey explains that Langdell's views regarding law and a science were premised on a late 19th-century lawyer's view of the philosophy of science. See Thomas C. Grey, Langdell's Orthodoxy, 45 U. Pitt. L. Rev. 1, 16-20 (1983).

145. Soloveitchik, supra n. 21, at 86.

146. Id. at 20.

147. Soloveitchik, supra n. 109 (translated by Shubert Spero, Rabbi Joseph B. Soloveitchik and the Philosophy of Halakhah, in Exploring the Thought of Rabbi Joseph B. Soloveitchik 166 (Marc D. Angel ed., Ktav Publg. H. 1997).

148. Kaplan makes a valid point in noting that from halakhic man's perspective, studying Halakhic Man is a less worthy pursuit than studying a Talmudic passage. Kaplan, supra n. 109, at

B. The Ideal System

RJBS's philosophic reconstruction of halakha is a far cry from Reb Hayyim's hakirot. However, thinking about halakha as an ideal and a priori legal system helps explain the theology behind the Brisker method.¹⁴⁹

RJBS considers *halakha* ideal in several senses of the term. First, the system's determinants—its facts, acts and rules—reflect ideal legal constructs rather than physical, commercial or social realities. One *tefach* of lifting is not a physical act, but a statement about the essence of a transactional formality. A spring is not a collection of water, but a reflection of an ideal vision of a "*halakhic* spring." The redemption option is a function of an "essential" defect in legal title. Even the trustee is transformed from a middling bureaucrat into an expression of the court's power. Each and every bit of law has a specific and preordained mechanism that defines its properties and makes the law "work."

Halakhic concepts, like their mathematical counterparts, reflect an ideal order. They are like an ideal triangle in the sense that a geometrist can posit the ideal triangle independent of (and in RJBS's terms, a prior to) the presence of the correlating real triangle. And just like the ideal triangle will have only a rough approximation in physical reality, ideal halakhic constructs often find only partial expression in Talmudic laws or legal decisions.

RJBS was fully cognizant of the gap between his ideal *halakhic* rules and their application in practice. But rather than apologize, he celebrated it, comparing *halakhic* man to:

[T]he physicist who concerns himself with mathematical formulae.... He engages in complex and difficult calculations, involving the manipulating of ideal mathematical quantities that, at first glance, are wholly lacking in the music of the living world and the beauty of the resplendent cosmos. It would seem as if there exists no relationship between these quantities and reality. Yet these ideal numbers that cannot be grasped by one's senses, these numbers that are only meaningful from within the system itself, only meaningful as part of abstract mathematical functions,

^{187.} Anyone who has spent time in a traditional Yeshiva can certainly confirm this impression.

149. While RJBS is unique amongst the *Briskers* in using philosophic and scientific terminology to discuss Reb Hayyim's method, even more traditional *Briskers* appreciated the conceptual ordering reflected in Reb Hayyim's method. RBB for example, stated that Reb Hayyim "arranged the Talmud for us," which points to Reb Hayyim's ability to conceptually order the sprawling Talmudic material. *See* S.Y. Meler *supra*, n. 61, at vol. 2, 190.

symbolize the image of existence. 150

The ideal status of *halakhic* concepts clarifies several *Brisker* predilections. The specialized *Brisker* terminology is a function of the hypostasized vision of *halakhic* principles: hence the "ideal," "fundamental," "inherent," "intrinsic," and "essential" components of each law. Similarly, the *hakira* occupies the top spot in the analytic hierarchy, so that every legal position is understood to flow from the core and ideal concept. A dispute about the best legal rule is therefore translated into a discussion about the law's metaphysical imagery. Texts cease to be the central source of legal authority but become manifestations—or adopting the scientific model—data points, from which the legal mechanism can be reverse-engineered.

RJBS likewise marveled at how his grandfather was able to remove the laws of *kashrut* (kosher) from the kitchen. The grit and grime of the pots and pans, the sharpness of the knife and the onion, were transformed into "pure" concepts and analyzed on the ideational plane. But if facts merely serve as placeholders for the underlying analytical rules, they could be dispensed with altogether. As the story goes, a rabbi was able to deliver an intricate series of complex discourses on *riddiyat ha'pat* (a stage in the bread-baking process relevant to understanding the nature of the Shabbat-work prohibitions) without understanding what, as a factual matter, was involved in *riddiyat ha'pat*. (And in true *Brisker* fashion, I can relate this story without explaining what *riddiyat ha'pat* is either.) Viewing facts through an exclusively legal lens promotes the view that the *halakha* is not of the here and now, but constitutes eternal wisdom imparted at Sinai. This sentiment is expressed most directly by RJBS:

Halakhic man is not at all grieved by the fact that many ideal constructions have never been and will never be actualized.... The foundation of foundations and the pillar of halakhic thought is not the practical ruling but the determination of the theoretical Halakha. Therefore, many of the greatest halakhic men avoided and still avoid serving in rabbinical posts. They rather join themselves to the group of those who are reluctant to render practical decisions.... The theoretical Halakha, not the practical decision, the ideal creation, not the empirical one, represent the longing of halakhic man. Halakhic man engages in theoretical discussion and debate concerning the subjects of sacrifices and

^{150.} Soloveitchik, supra n. 21, at 83.

^{151.} See supra Parts III, B & C.

^{152.} See Lichtenstein, supra n. 9, at 48.

purity [not practiced since antiquity] and plumbs the depths of those concepts, laws, and distinctions with the same seriousness that he investigates and searches out the laws of . . . plaintiff and defendant, and forbidden foods. 153

C. The A Priori System

The second refrain running through RJBS's account is that *halakha* is *a priori*. As used by RJBS, this phrase suggests that *halakhic* reasoning and its principles are unaffected by "external" factors, in particular, history, culture, anthropology and economics. Rather, *halakhic* rules are understood only though the internal perspective—via examination of the logical relationship between idealized principles. The emphasis on the internal approach is connected to the law's origin. Because *halakhic* norms were given at Sinai, they represent a divine understanding that predates other forms of existence. Thus:

when Halakhic man approaches reality, he comes with his Torah, given to him at Sinai, in hand. He orients himself to the world by means of fixed statutes and firm principles.... Halakhic man, well furnished with rules, judgments, and fundamental principles, draws near the world with an *a priori* relation....

His deepest desire is not the realization of Halakha but rather the ideal construction which was given to him from Sinai, and this ideal construction lasts forever. ¹⁵⁶

A more extreme form of this sentiment was attributed to Reb Hayyim himself:

There are commandments, such as assisting one's fellow to load and unload his donkey, which are the foundation of civilized society. Similarly, commandments from which we are forbidden such as murder and theft prevent the destruction of society. One may think that the reason the Torah instituted these commands is in order for society to function. But in truth, the fact is the opposite. Because there is a commandment not to murder, therefore murder leads to destruction. Similarly, regarding

^{153.} Soloveitchik, supra n. 21, at 23-24.

^{154.} Observers have noted RJBS's problematic use of the concept of a priori. See Rachel Shihor, supra n. 135, at 148-150; Kaplan, supra n. 109, at 154-157.

^{155.} The depth of RJBS's commitment to the a priori conception of halakha was expressed in his view regarding the halakhic presumption that a woman would rather be married than single. RJBS's approach is cited and critiqued in Ruth Halperin-Kaddari, Tan Lemeitav Tan Du Mi-Lemeitav Armalu: An Analysis of the Presumption, 4 Edah J. 1, n. 28 (2004).

^{156.} Soloveitchik, supra n. 21, at 19 & 23.

charity, because the Torah commanded to give charity, such an act sustains the world.... Thus the universe is created is in accordance with the Torah, and the Torah is the blueprint of the creation. For in truth, a universe could be created in which murder would sustain society and charitable deeds would destroy it—is the hand of God limited? Rather, because the Torah commanded us to perform charitable deeds and refrain from murder the universe was created in a fashion in which charity sustains the world while murder destroys it. Everything is in accord with what is written in the Torah; and not that the Torah was given on the basis of the world. The Torah predated the creation, as it is stated "God looked into the Torah and created the universe." ¹⁵⁷ (emphasis added)

That the entire legal system, from the finer points of criminal law to the debtor's psychology, exists prior to physical and human reality is a bold notion of religio-legal theology. It is based on the *aggadic* idea that the Torah (which for Reb Hayyim included the detailed mass of Talmudic laws and medieval commentary) is both temporally and conceptually precedent to the existence of the universe. Because the law was formed prior to creation of man, it is not (and cannot be) affected by temporal or contextual factors which axiomatically transpire after God has willed the law into being. Human thought, motivation, and experience have no part in shaping the rules, decisions and contours of the law. This theory attains its starkest formulation in Reb Hayyim's assessment that, at some level, murder and charity are interchangeable.

The Brisker constructs his legal world to emphasize that halakha stands outside of time and space. Using the hakira, the analyst transformed halakha from hundreds of technical details into abstract legal principles. Halakhic reasoning comes to emphasize the law's

^{157.} This passage is cited in the name of Reb Hayyim in the writings of his students, in *Hagadah shel Pesah Mmi-beit Levi*. 182-183 s.v. *Shanu ochlim al shum mah* (M.M. Gerlitz ed., Oraysoh 1983).

^{158.} This idea was part of their inheritance of the *Torah lishma* theology. Lamm reports that for *Torah lishma* adherents, "[t]he Torah's preexistence is primarily an axiological-teleological concept." Lamm, *supra* n. 14, at 105; 121, n. 14. The idea itself appears in several formulations. *Bereishit Rabbah* 1:1 draws an analogy between a builder who builds on the basis of the architect's plans and God who "looked into the Torah and created the universe." Similarly, *Bereishit Rabbah* 1:4, B. Talmud *Nedarim* 39b and *Pesahim* 54a, speak of Torah as one of the things that was created before the world. In slight contrast, *Shabbat* 88b, *Haggigah* 13b-14a and *Zevahim* 116a, speak of the Torah as being created 974 generations before the creation, or 1000 generations before the revelation at Sinai. While previous thinkers probably interpreted the term Torah as a stand-in for the divine will generally, or perhaps even the divine will as expressed in the Bible, Reb Hayyim took this statement to mean that the specific and individual technicalities of Talmudic law predate creation. On the evolution of this concept in Jewish thought in general, *see* Lamm, *supra* n. 14, at 102-120.

timelessness, coherence and consistency. Each *Brisker* move is designed to reinforce the image of an ideal and divinely given law, which, like the divine itself, remains pure, abstract and meta-historical.

This idea receives its most eloquent expression in RJBS's description of his grandfather's method.

Reb Hayyim fought a war of independence on behalf of halakhic reasoning and granted it full autonomy. Any psycholization or sociologization of halakha strangles its soul, as such an attempt destroys mathematical thinking. If halakhic thinking depends on personal variables, it loses its objectivity and devolves into a subjectivity lacking all substance... Rather, Reb Hayyim provided for halakha specific methodological tools, created a complex set of halakhic categories and an order of a priori premises through a process of pure postulization... Halakha is not conceived of in historical-political or sociological terms.... Reb Hayyim re-coronated halakha with the crown of complete independence. 159

D. Law as Theology

Like cognitive man, the Brisker "is uninterested in a world that is above the rule of empirical reality."160 But RJBS's use of empirical needs clarification. He certainly did not use this term to refer to the status of the physical or social world; the Briskers were decidedly uninterested in such questions. Rather, the Brisker interprets empirical as testable or falsifiable within the corpus of Talmudic legal rules, which to the Brisker was reality. Using halakhic rulings as data points, Reb Hayyim's two-rule thesis regarding the law of the spring is testable. If the law's conceptual image was an undifferentiated whole, then the "just enough" rule would go hand-in-hand with the "trickle rule": there would be no basis to distinguish between them. That each of these laws is triggered by a different set of circumstances proves the validity of the two-rule imagery. The same is true regarding Reb Shimon's hakira regarding whether a change in legal status is effectuated by an action itself or by the intent manifested through the action. The proof that this distinction is real and not mere sophistry is found in how the positive rules governing agency and conditions apply to commercial transactions and the halitza ceremony. Brisker reasoning is empirical in the sense that the correct legal construct represents the value that balances the

^{159.} Soloveitchik, supra n. 109, at 22.

^{160.} Soloveitchik, supra n. 21, at 13.

complex equation generated by the Talmud's positive legal rulings.

This type of halakhic empiricism is demonstrated through the following story.¹⁶¹ A guest scholar once delivered a Talmudic lecture when Reb Hayyim was in attendance. The visitor cited a certain proposition in the name of the Tosafot, the classic medieval gloss on the Talmud. Reb Hayyim remarked that the Tosafot do not maintain the opinion as cited. After consulting the sources, it turned out that Reb Hayyim was correct and the visiting scholar misquoted the medieval The assembled students were amazed at their master's source. erudition—he not only knew what the Tosafot commented to every Talmudic passage, he even knew what Tosafot did not say! Hayyim explained that his students overestimated him. He had not committed every comment of Tosafot to memory. Rather, Reb Hayyim explained that he knew that the Tosafot could not have maintained such a position since it was inconsistent with their views in other areas with which Reb Hayyim was more familiar. In this way, the Brisker project can be understood as having an empirical dimension. When performed correctly, Brisker analysis establishes a conceptual map of the entire rabbinic corpus. To the extent that this map accurately predicted observable data points, (positions maintained by halakhic authorities) the validity of the Brisker approach was empirically confirmed.

Halakhic man's legal empiricism is contrasted with homo religiosus's spiritual/legal outlook. The Brisker rejects legal understandings premised on inquiries into the nature of the divine, moral theology, Biblical exegesis or natural law-styled searches for abstract conceptions of justice or morals. These inquiries are dismissed as "subjective" speculations that have no place in halakha's "objective" sphere. The Briskers' complaint is that this form of reasoning is not falsifiable (within the rabbinic canon). For example, homo religiosus might confront the issue of the spring's halakhic status by commenting on the metaphor that equates spiritual cleansing with a complete immersion in an unspoiled natural spring. Alternatively, he may seek a legal conclusion by meditating on why God mandated purification via immersion in natural water, or other ways of getting at the divine policy rationale for immersion.

The Brisker rejects this approach on both methodological and theological grounds. As to method, this approach is not falsifiable

^{161.} Men and Methods, supra n. 59, at 47-48.

^{162.}

The categorization [of the Analytic school are] taken as self-explanatory, and the question of why there should be such a category is dismissed without further ado. The

because it can neither be confirmed nor denied by a point of Talmudic law. This inquiry typifies homo religiosus's subjective search for the divine rather than halakhic man's objective analysis of legal rules. By contrast, the Briskers' analysis is far more technical. Leaving aside speculation about the theological basis for immersion, the Brisker looks only to the rules laid out in the Talmud, and attempts to reverse engineer the legal mechanisms that explain the observed Talmudic datum. Briskers were suspicious of any philosophy, theology or natural law that purported to embody or discover the divine will. They similarly rejected free-formed interpretation of Biblical text which claimed to discern the intention of the divine author. In Brisk, legal theory comes from the law itself. It must be based on a detailed and sensitive investigation of the law's numerous legal technicalities. 163

This *halakhic*-empiricism led the analysts to be indifferent, even hostile, to investigating the ethical or moral dimensions that underlie *halakhic* norms. While they might expend untold effort to understand the various legal classifications of a Canaanite slave, a female maidservant, a Hebrew slave, and a half-slave, the analyst does not give a moment's pause to come to terms with the morality of slavery in an ostensibly perfect system of divine law.¹⁶⁴ The very question borders on the heretical. Who is man to question God's ethics?

Methodology was intimately connected to theology. The *Briskers* presented an extreme form of the theological idea, expressed in the Talmud that "one does not search for the reasons of the Torah's

learning act [Talmud study] is thus limited to the act of classification and definition, consciously ruling out any attempt to fathom why the halakhah should be as it is. Lichtenstein, *supra* n. 112, at 4-5.

^{163.} RJBS is recorded as having thought that "[t]he Halakhah is the objectification and crystallization of all true Jewish doctrine." Marvin Fox, The Unity and Structure of Rabbi Joseph B. Soloveitchik's Thought, in Exploring the Thought of Rabbi Joseph B. Soloveitchik 31 (Marc D. Angel ed., Ktav Publg. H. 1997). Similarly,

[[]r]eligious and philosophical accounts of Jewish spirituality are sound and meaningful in his view only to the extent that they derive from the Halakhah. The deepest religious emotion, the subtlest theological understanding, can only be Jewishly authentic to the extent that they arise from reflection on matters of Halakhah[.]

Or "[p]hilosophy is always to be derived from the [realm of the] Halakhah and not visa versa." Aviezer Ravitsky, Rabbi J.B. Soloveitchik on Human Knowledge, 6 Modern Judaism 157, 181 n. 12 (1986). Finally, "Halakhah was the visible surface of a philosophy: the only philosophy that could legitimately claim to being Jewish." Oral statement attributed to RJBS by Jonathan Sacks, Halakhah as the Starting Point of Jewish Philosophy, 53 Jewish Action 30 (1993). These sources are collected and critiqued in Spero, supra n. 147, at 149.

^{164.} A more complete discussion regarding the theological limits of *Brisker* inquiry is found in Lichtenstein, *supra* n. 112.

commandments."¹⁶⁵ Behind this statement lies the idea that finite man is incapable of understanding the infinite wisdom of the divine, and has no business trying. To the extent that man insists on fathoming the purpose of God's commands, he will pervert the law by imposing his own categories and notions of justice to the divine. ¹⁶⁶ Based on this theology (typical, though not universal, in the rabbinic tradition), *Briskers* limited themselves to understanding the law (and God) on the basis of the Talmud's normative statements. ¹⁶⁷

One contemporary analyst extends the science analogy one step further, arguing that successful conceptual interpretation depends on a certain moral agnosticism. Mosheh Lichtenstein (RJBS's grandson and Reb Hayyim's great-great grandson) writes:

An interesting analogy to [the development of the *Brisker* method] is the scientific revolution of the early seventeenth century. Here, as there, 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 of the learner to ascertain why halakhah 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. ¹⁶⁸

The *Briskers*' desire to maintain a purely internal account of the law left no room for moral, ethical or theological considerations, even in a system premised on divine justice.¹⁶⁹ This position mirrors the view

^{165.} See BT Sanhedrin 21a. See also Soloveitchik, supra n. 134, at 92-96.

^{166.} The Talmud expresses this by using King Solomon as an example. Although Solomon was reputed to be the wisest of all men, the Talmud records that he sinned because he attempted to rationalize the reasons for the Torah's commandments. See Sanhedrin 21a.

^{167.} While there is some dispute as to whether this statement applies to more contemporary *Briskers*, see The Evolution of a Learning Methodology, supra n. 63. All seem to agree that it is accurate with respect to the classical writers.

For example the introduction to Birkhat Shmuel, supra n. 66, states:

[[]RBB] would frequently say that Torah is not understood through human "logic" ["logic" transliterated in original], but based on the Torah's own rules and principles. Therefore one must conform his mind to the Torah's wisdom, and not conform the Torah to human understanding.

^{168.} Lichtenstein, supra n. 112, at 3. The distinction between "what questions" and "why questions" is based on RJBS's discussion in Halakhic Mind, supra n. 34. But see Evolution of a Learning Methodology, supra n. 63, at nn. 11, 13, 26-27 where Krumbein disagrees, in part claiming that the "what/why" distinction breaks down in the writings of more contemporary Briskers.

^{169.} Reiigious law is generally associated with natural law, and in general, natural lawyers are inclined to interpret law via recourse to ethical, moral and religious considerations. The *Briskers* were religious legal positivists and thus provide an interesting counter-model to the religion-natural law equation. In *Brisk*, law was limited to the revealed law of the Talmudic corpus, and legal/analytic arguments based on those sources. *Briskers*' commitment to the

that arguments premised on text, history, fact and policy are analytically subordinate to queries over the *halakha*'s metaphysical anatomy. "Empirical" or positive legal concepts are the sum total of the legal order.

E. Legal Development

One of the most significant challenges to the *Brisker* view of *halakha*, and one that clearly occupied RJBS, is how to account for legal development. Legal evolution hardly fits with understanding law as an ideal conceptual system dominated by timeless and immutable legal principles. RJBS confronted this tension by expanding on the science/*halakha* analogy. He suggested:

Historical events do not influence the structure of halakhic reasoning, just as they do not impinge the consistency of mathematical thought. While certainly, a specific event may leave an imprint on halakhic man, awakening his intellectual energies, directing his focus, and inciting his curiosity... to address the needs of a particular time. Nevertheless, the relationship between the halakha and the historical event does not take place in the realm of the pure halakhic reasoning, but rather in the depths of halakhic man's heart. The historical event provides the psychological impetus; it pushes the pure objective halakhic thinking onto a certain path. However, once the halakhic process sets down a given path, its direction is not resultant or dependent on the historical event, but is determined by fidelity to its own normative-ideal trajectory. 170

While RJBS does not ignore the existence of historical-contextual factors, he is unwilling to sacrifice the independence or a priori nature of halakha. To solve this problem, he reaches for a distinction between halakhic man and halakha itself (note the tones of the heftza/gavra distinction). Contextual factors can impact halakhic man, but the halakha itself remains outside of time, place and history. History can explain why the analyst directs his energies toward a particular set of legal problems, but after that, objective halakhic thinking takes over and

revealed law of the Talmud (more accurately, to the legal ideas embodied in that revealed law) made them hostile to arguments premised on Biblical interpretation or moral theology. The analysts understood that halakha was contained exclusively in the Torah and decidedly not in the hearts and minds of men. But see RJBS's understanding of halakhic creativity, spelled out in Soloveitchik, supra n. 21, at 99-137; see also Walter Wurzberger, The Centrality of Creativity in the Thought of Rabbi Joseph B. Soloveitchik, in Exploring the Thought of Rabbi Joseph B. Soloveitchik 277 (Marc D. Angel ed., Ktav Publg. H. 1997).

^{170.} Soloveitchik, supra n. 109, at 21.

halakha is once again detethered from context.

This distinction is brought into sharper focus through a story related by one of RJBS's principal disciples, Rabbi H. Schachter, who describes how RJBS responded to a claim that some of the leniencies regarding the minimum requirements for the walls of a sukka (a temporary hut used for ritual service during the Tabernacle festival) came about due to the paucity of building materials in the Talmudic era.¹⁷¹ RJBS responded that while the historian may be correct as a factual mater, this detail does not further the understanding of the analytic foundations of the laws of sukka. Returning to the physics analogy, RJBS argued that while the knowledge of nuclear physics was advanced during the race to develop the atomic bomb during the Second World War, the historical setting does little to explain the key insights of nuclear physics, and no equation is resolved via reference to this fact. History, at best, explains why the atom's structure became a hot topic in the mid-twentieth century, but it does not explain the underlying structure of the physical universe. Similarly, a second-century wood shortage might explain why the Talmudic sages focused on the minimal requirements for the walls of a sukka, but ultimately, the law's content is not a product of accommodation to the human condition.

V. Brisk's Success

RJBS claimed that the *Brisker* revolution was comparable to the paradigm shift heralded by Newton and Galileo in the natural sciences. A more detached view points to a change in the way *halakha* was studied and conceived. More than one hundred and twenty years after Reb Hayyim began teaching in Volozhin, the *Brisker* method remains a going concern, and in its various iterations, remains the dominant method in the contemporary Yeshiva community.¹⁷³ Yet the approach is highly idiosyncratic. It envisions a legal system dominated by metaphysical legal imagery and leaves surprisingly little room for

^{171.} See Hershel Schachter, Nefesh Ha'Rav 12 (Reishit Yerushalayim 1994).

^{172.} In the common law tradition, the figure most associated with the timelessness of the law is undoubtedly Sir Edward Coke. Indeed Pocock's description of Coke's methodological assumptions rings familiar to every student of *halakha*.

Innumerable decisions were ... on record as declaring that everything which they contained, down to the most minute and complex technicality, had formed part of the custom of England from time out of mind; They took everything in the records of the common law to be immemorial[.]

J.G.A. Pocock, The Ancient Constitution and the Feudal Law 37 (W.W. Norton & Co. 1967).

^{173.} See Lichtenstein, supra n. 112, at 1; Shapiro, supra n. 67, at 78; Lichtenstein, supra n. 9, at 53-54.

understanding how environmental forces impact the form or substance of legal doctrine. What accounts for its success?

Inside the Yeshiva

From a theological perspective, *Brisker* conceptualism was a comfortable fit for the Yeshiva. *Torah lishma* ideology posited that Talmud study was comprehensive, in nearly every sense of the term. Foremost, as described best by Bialik, Torah study was comprehensive of the Yeshiva experience. Second, Torah was understood to be comprehensive of the divine revelation. Everything that could be known about God was found in the *halakha*'s technical details. Third, it was comprehensive in terms of man's religious duties—Torah study being the ultimate form of religious expression. Fourth, the Talmud was to be studied comprehensively, in its entirety and without regard to whether a given set of laws was applicable. Finally, Torah was to be comprehended. The students' goal was to master the notoriously intricate and technical discussions of Talmudic law.

Structurally, the Yeshiva developed into a tighter and more insular institution. The school grew independent from the community where it resided, and transformed itself into a self-standing "academic" institution in which Rabbis were full-time faculty and were released from the burdens of communal leadership and the "ever tangled skein of human affairs," and students were similarly recast as members of the religious and intellectual elite. Finally, the Yeshiva's isolation was enabled by its anti-decisional bias. Deciding live cases requires judges to translate legal constructs into actual events—and necessarily engage the world beyond the rarified law treatises. However, by avoiding issuing decisions, the Yeshiva's curriculum was able to avoid reducing the legal abstractions to practice and systematically overstated the importance of academic legal analysis to legal decisionmaking.

The combined effect of these environmental and institutional factors placed the Yeshiva in an all-encompassing and all-consuming legal world. Law, or at least, the idea of law, became the center of the religion, and of the Yeshiva's universe. *Brisk* succeeded because, like

^{174.} See supra n. 25.

^{175.} See e.g. Lamm, supra n. 14, at 230 (favoring the study of technically abstruse areas of halakhic doctrine over the admittedly more sublime poetry of the Psalms).

^{176.} Id. at 138-141, 230-232.

^{177.} Soloveitchik, supra n. 21, at 23-24; see also M. Breuer, supra n. 19, at 148-149.

^{178.} Lamm, supra n. 14, at 192.

^{179.} C.C. Langdell, Selection of Cases on the Law of Contracts viii (2d ed., Little. Brown & Co. 1879).

the experience the Yeshiva itself, it reaffirmed the centrality of legal study to Jewish identity. *Brisk* was the methodological counterpart to a theology predicated on the comprehensive nature of legal study.

Methodological and sociocultural isolation went hand in hand. Brisk made the entire system of Talmudic law become completely selfreferential. Law was removed from the realm of life and moved to an idealized "heaven of legal concepts." The laws of creditor and debtor was about the metaphysical nature of the creditors' rights in collateral rather than about the about the distribution of resources in an economy. In short, Halakhic thought was thus not subject to any non-legal variables. Facts, policy, text and human experience became stand-ins for the rarified *hakirot*/concepts. 180 No pre-legal categories existed, as anything and everything that one needed to know about the halakha could be found in the Talmud or be postulated from its discussions. Unlike legal historians, Briskers had no interest in the world that produced the Talmud or its legal culture. And unlike judges, they were neither interested nor involved in how halakha affected the world around them. The Briskers engaged halakha as a system of theoretical constructs, where only Talmudic proficiency and a "clear and logical mind" were required to plumb the depths of the legal corpus. 181

B. Outside the Yeshiva

Brisk's significance goes beyond its attraction to Yeshiva scholars. At least on RJBS's account, Reb Hayyim's *hakirot* were part of a deeper program transforming the law's conception of itself.¹⁸²

^{180.} In this way, *Brisk* stands in direct contrast with Savigny's school of historical jurisprudence. The German school took specific interest in the historical evolution of legal principles, as well as source and text criticism of the Roman materials. These differences take on an added dimension in light of (a) the similarity between *Brisk* and the German conceptual jurisprudence generally, and (b) the fact that both the text/source criticism and historical jurisprudence feature prominently in the works of the 19th-century German *maskilim*.

While it is unclear whether Reb Hayyim was aware of the haskalic German-Jewish scholarship, these works were undoubtedly read in the Yeshiva. The author of one of the leading traditionalist histories, Isaac Halevy-Rabinowitz, was active in the Yeshiva during Reb Hayyim's tenure. Rabinowitz's Dorot Ha-Rishonim was the leading traditionalist response to the writings of the historicists German-Jewish Wissenschaft des Judentems school, particularly Heinrich Graetz, Abraham Geiger and Isaac Hirsch Weiss. See Memoirs of the Lithuanian Yeshiva, supra n. 25, at 172

^{181.} This statement is attributed to RJBS, who said it in response to a student's inquiry regarding the source for a certain point developed during a Talmudic lecture. See Lichtenstein, supra n. 9, at 39.

^{182.} Solomon finds that emancipation and secularization reduced the demand for rabbinic communal leadership and practical decisions and focused rabbinic attention towards academic consideration. Solomon, *supra* n. 9, at 115, 234. But this analysis does not cut to the heart of the matter, as there were many communities seeking rabbinic rulings and leadership during this time

It is difficult to grasp the magnitude of the transformation of Eastern European Jewry that occurred during Reb Hayyim's lifetime. Within a short period, an overwhelming percentage of Jews left the traditional communities and moved towards assimilation and secularization. To traditionalists, the Yeshiva represented a final stand against the rising tide of modernity, a "Noah's Ark," designed to save the Tradition from the deluge of modernity. Reformists, on the other hand saw the Yeshiva as an outmoded, narrow-minded holdover from a bygone era. They wanted to recast the Yeshiva as a more enlightened institution, one that would produce Rabbinic leaders who would transform the community from tradition to modernity. 184

At one level, the conceptual approach equipped halakha with a deeper intellectual apparatus, a type of response to the maskilim's attack on the Yeshiva's lack of analytical and methodological sophistication. In stressing the law's fundamental and definitional elements, Brisk presented halakha as an organized and rational system. The method is also more intellectually satisfying than the traditional variety of Talmudic dialectics, and the analytic interpretations showed how numerous details could be explained through central principles. Brisk presented a unified field theory of Talmudic law in which every detail was formalized, rationalized and consistent with the whole. Halakha

of crisis. For example, Hattam Sofer, whose style can be usefully contrasted with the *Briskers*, played an important role as an anti-haskalist rabbinic judge and decisor.

^{183.} See Breuer, supra n. 29, at 113.

^{184.} See Schacter, supra n. 13, at 84-85.

^{185.} See Solomon, supra n. 9, at 6-8, 33-34. See also Shapiro, supra n. 67, at 84, noting that Brisk was "engaged in a struggle with non-traditional forces for the soul of Jewish youth." Shapiro adds that RJBS himself argued that Reb Hayyim's approach "showed talented youth that Torah study was not any less intellectual or modern than the secular studies of his day." Id. See also statements attributed to RJBS in Lawrence Kaplan, The Hazon Ish: Haredi Critic of Traditional Orthodoxy, in The Uses of Tradition: Jewish Continuity in the Modern Era 152-153 (Jack Wertheimer ed., Jewish Theological Seminary Am. Press 1992). Shapiro also cites one of RJBS's students who, assessing RJBS's lectures, claimed that "[i]t would be most difficult to study Talmud with students who are trained in the sciences and mathematics, were it not for his [Reb Hayyim's] method, which is very modern and equals, if not surpasses, most contemporary forms of logic, metaphysics or philosophy." Abraham R. Besdin, Man of Faith in the Modern World: Reflections of the Rav vol. 2, 22 (Ktav Publg. H. 1989).

^{186.} Rabbi A. Lichtenstein expressed this sentiment as follows:

Torah 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. As Einstein rejected Heisenberg's indeterminacy because he could not imagine God playing dice with the universe, so, I believe, Reb Hayyim espoused conceptualism because he could not imagine [the words of God] as a pedestrian amalgam of incommensurate detail. There is a power, majesty, and grandeur in Torah, conceptually formulated, that a patchwork of minutiae, largely molded by ad hoc pragmatic considerations, simply cannot match Lichtenstein, supra n. 9, at 52.

was not a matter of intuition, conjecture or custom, but an exploration into the most basic and fundamental ideas of the concepts of law. And like the emerging hard sciences, it was falsifiable.

On a deeper level, *Brisk* presented the rudiments of a theory of *halakhic* independence. *Halakha* is not a method of social control but a system of concepts revealed to Moses at Sinai. These concepts form the substantive content of the covenant between God and Israel. The *hakira* studiously avoids historical-contextual, social or economic perspectives on legal thinking or development. *Halakha* consisted only of conceptual structures residing outside of historical time and physical space, an attractive perspective in light of the en-masse abandonment of *halakha* taking place beyond the Yeshiva's walls. *Brisk* looked to extirpate *halakha* from the realm of human experience at the very moment that humans were extirpating *halakha* from their own experience.

Brisk's success is owed to the school's ability to adopt elements of the very method it was rejecting. While the analysts were undisputed standard-bearers of tradition, they quietly revolutionized the conception of halakha.¹⁸⁷ They refocused Talmud study towards classification,

^{187.} Because the analysts were firmly in the traditionalist camp, the revolutionary aspects of their work are often overlooked. The novelty "modernity" was noticed by traditionalists who repudiated the *Brisker* method. One of Reb Hayyim's contemporaries, R. Jacob D. Wilovsky (1845-1913) wrote in the introduction to his *responsa*, *Bet Ridbaz*:

A certain Rabbi invented the "chemical" method of study. Those in the know now refer to it as "chemistry," but may speak of it as "logic." This proved to be of great harm to us, for it is a foreign spirit from without that they have brought into the Oral Torah. This is not the Torah delivered to us by Moses from the mouth of the Omnipresent.

Cited & translated in Shapiro, supra n. 67, at 79.

Yet another detractor claimed:

New times have come, numerous "methods" proliferate in the world of Torah students. The halakha does not, however, follow a "method." They lay claim to being pioneers and revolutionaries, the creators of the world of logical method in the study of the Torah. One must strongly protest against this. These methods have altered the whole face of halakhic studies.

R. Aryeh Karlin (1874-1957) in the introduction to his Lev Arye (cited & translated in Shapiro, supra n. 67, at 80, 94 & nn. 2, 4) (Shaprio in turn bases his translation on L. Jacobs, A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law 59-60 (Oxford U. Press 1984)). See there for a discussion as to whether this statement was made in reference to the Brisker method.

R. Henoch Agus (b. 1863) takes a more moderated approach in the preface to his *Marheshet*, yet his skepticism of the new "method" is clearly discernable:

I have written this introduction in light of the well-known [development] that in our time the ways of study in the learning of our sacred Torah have changed considerably, and the style of their [the innovators'] thought and manner of their understanding have made a place [lit., "way"] for themselves in the batei midrash [study houses] of Torah and Talmud, and in particular, in the yeshivot of our generation. . . I am naked of the robes of light and logic in the Talmud like these which are newly come from near, bringing with them the style of their learning. . . . [Rather I have written my commentary in] the well-maintained, well-trodden paths of our teachers, early and later, may their memory be blessed.

definition and objectivity, mantras more closely associated with (19th Cent.) modernity than traditional Talmudism. And while it is highly doubtful that the analysts appreciated the revolutionary forces that they brought upon the world of *halakha*, they succeeded (unconsciously) to raise it to the level of a legal science. The *Briskers* held the cord at both ends, conducting at once a polemical reaction and a progressive revolution. While the tradition was reaffirmed, this very affirmation subtly modernized *halakha* and brought it more in line with contemporaneous methods of critical analysis. *Brisk* succeeded in transforming *halakha* from a collection of rules to an expression of a larger and broader set of ideas; into a theology of its own.

VI. BRISK AND NINETEENTH-CENTURY LEGAL SCIENCE

Brisker thought bears some resemblance to certain forms of German pandectism and to Classical Legal Thought in the United States, and to a lesser extent in England, and in yet different ways to the école de l'exégèse in France. At a rather broad level, Brisk demonstrates some remarkable parallels to late nineteenth-century western legal thought. There are, of course, differences, not the least of which is that the Briskers were emphatically working with a religious legal system and the other schools were decidedly not. But this just highlights the question of whether classical thought functioned as a replacement for more traditional forms of theology in the increasingly secular west.

This article presents the legal academy an initial portrait of the *Brisker* school that lays the groundwork for using the *Brisker* mind as a bridge into exploring nineteenth-century legal consciousness more generally. Each school (and its corresponding culture) has within it numerous streams and counter-streams. Analyzing these elements will expose how each system's constituent elements are bonded together and expose the fault lines underlying each mode of consciousness. Comparing the trends and tensions both within and between the schools

Cited & translated in Lichtenstein, supra n. 9, at 41-42.

Lawrence Kaplan has written a fascinating article in which he paints the Hazon Ish (R. Yeshia Karelitz, 1878-1953), as a tacit but powerful critic of Reb Hayyim and his method. Hazon Ish authored a critique of Reb Hayyim's Insights. In classic rabbinic style, the critiques are substantive and localized rather than methodological or programmatic, but Kaplan argues that between the lines lies an oblique criticism of Reb Hayyim's underlying assumptions regarding the nature of halakhic reasoning. See Kaplan, supra n. 185, at 145-174. In Kaplan's view, Hazon Ish felt that the Brisker approach "concedes too much to the modern temper, to the modern emphasis on self and its intellectual autonomy." While Reb Hayyim might have caught the interests of his students, he worked against the interests of tradition. The analytic approach "allows too much room for self-expression, for the play of the individual's own intellectual powers unconstrained by the discipline of the text." Id.

promises a more robust understanding of legal classicism and legal classicisms. Below, I sketch potential directions for a three-way comparison between the nineteenth-century heirs to the Roman law, common law and Jewish law traditions. I hope future research builds on and challenges the ideas outlined below.

A. Influence: Brisk and Nineteenth-Century Legal Thought

The apparent similarities between the schools demands more precise investigation into the nature and depth of the similarities. Assuming they are found to exist, one must consider the question of mutual influence.

Brisk's relationship to the outside world of ideas is complex. The school was deeply conservative and reactionary. It rejected (at least rhetorically) any ideas emanating outside the traditional realm. It is almost certain that the Briskers were unacquainted with non-rabbinic jurisprudence, and it is highly doubtful that they were familiar with the philosophical bases of classical legalism. Notwithstanding the Yeshiva's attempt to create a hermetic bubble however, extra-rabbinic literature undoubtedly circulated amongst the students. While it is known that socialist and Zionist ideology, the output of the German-Jewish Wissenschaft des Judentems school, Russian literature, and even general philosophy made the rounds through the students' dormitories, the effect, if any, of this literature on the development of the Brisker movement has yet to be studied.

Contrasting Brisk to its nineteenth-century counterparts presents an interesting case study in how legal ideas transfer between cultures. While these movements may share common intellectual roots, each culture nativized legal science into its own discourse. The pandectists tailored their theories to the Roman law tradition, American classicists had to square the law as science idea with the notoriously theory-resistant common law, and the Briskers clothed their method in traditional rabbinic garb. Exploring how classical thought was absorbed into each legal system will both enrich our understanding of the different strains of classicism and offer a window into the structural configuration of each host culture.

B. Historical & Conceptual Scholarship

In both Germany and America, the emergence of legal classicism resulted in a renewed interest in historical scholarship. Despite the tensions between the German historians and conceptualists, each group located itself within Savigny's school. In America, one finds even less tension between these two modes of analysis. James Barr Ames and Joseph H. Beale, the names most likely to be associated with classical conceptualism, were legal historians who wrote extensively about the development and history of legal doctrine. Historical research (of a certain type, no doubt) complemented conceptual categorization. These scholars understood that the law's fundamental categories were revealed via historical research.

By contrast, the *Briskers* were remarkably ahistorical. Nowhere is there even the slightest indication that law develops over time. The very idea was considered heretical, because it suggested that the Torah's divinely given laws are in some way dependent on human factors. Moreover, at least one reading of the *Brisker* project sees its conceptualism as a direct reaction and response to the historicism of *Wissenschaft des Judentems*, a school with deep affinity to the historical and philological methods used by Savigny and his followers.

Each school forged a different relationship between concept and context. Ideas that represented two poles of the same school in Germany were irreconcilably opposed in the Jewish context. Meanwhile in America, they existed side-by-side in relative harmony. A study of this tension, both within and among the schools promises to reveal a more complete account of the relationship between thinking historically and thinking conceptually.

C. The Hierarchy of Legal Concepts and the Goals of Legal Scholarship

The pandectists' goal was to organize and rationalize legal doctrine. They envisioned a pyramid of legal concepts where on-the-ground legal questions were resolved via reference to more generalized upper-level principles. In America, the common law classicists grabbed the opportunity to move the law away from the tortured history of the writ system and reframe the law in terms of general and consistent principles.

The end (and ends) of at least part of the German school was the civil code. And while codification was more controversial in the common law setting, the treatise tradition is largely a product of the classical period. Like the code, the treatise aspires to a gapless legal system where all relevant principles are neatly summarized and straightforwardly applied. Both works seek to guide the judge up the pyramid to locate the general rule, and accompany him back down to the resolution of specific cases.

Like their western counterparts, the Briskers understood halakha's technical rules and lower-level doctrines as reflections of higher-level conceptual commitments. But the Briskers did not think or speak in terms of a hierarchical pyramid. They did not produce anything like a code or a summarizing treatise that was useful in resolving future cases. Ouite to the contrary, in the Briskers' world, legal rules metastasize. Reb Hayyim's "tzvei dinim," or twin aspects method, demonstrates how legal rules, previously understood as a composite whole, are in fact divisible into more basic components. Rather than end with a code, the Briskers started with a code as they converted Maimonides' Mishne Torah (the classical restatement of Talmudic law) into a sprawling work of Talmudic commentary. Finally, the halakhic treatises of the late nineteenth and early twentieth centuries are generally seen as an opposition to Brisk, rather than the natural consequence of this Brisk is associated with splitting, dividing and movement. distinguishing; while codes and treatises set out to amalgamate, combine and conclude.

A related point touches on the ends of legal scholarship. The Germans were clearest on this point. Scholarship was a method of legal reform, aimed at influencing legal and political actors. The American experience is fairly similar. Both the pandectists and classical thinkers are associated with substantive positions on a host of legal issues. Each school registered its impact on legal doctrine and legal consciousness.

Here too, the *Brisker* position is more ambivalent. *Brisker* scholars specifically shied away from issuing legal decisions. Reb Hayyim declared that his task was "to understand rather than to innovate." The *Briskers* are not associated with specific doctrinal positions, and they worked extensively on both relevant and wholly theoretical sections of the Talmudic corpus. Moreover, at least in RJBS's view, the entire goal of the *Brisker* program was the conception of the ideal *halakha*, a commitment that came directly at the expense of its realization in practice.

Ironically, the *Briskers* turn out to be more "academic" (or scholastic) than both their American and German counterparts. The pandectists appear to be both the most interested in substantive reform and are most committed to the pyramid conception. The classical common law theorist takes a middle stance on both issues, while the *Briskers* eschewed law reform while exhibiting only weak support for the pyramid thesis.

This alignment raises several questions. What is the connection between the hierarchical pyramid thesis and a commitment to

substantive law reform? Do conceptual schemas invariably lead to codification (and are we catching *Brisk* at an earlier stage of development)? Or, is there a natural break between these ideas? Finally how much of the *Brisker* position can be attributed to their statelessness and general detachment from public and political discourse?

D. Institutionalization and Legal Scholarship

In each system, the rise of classical thought emerged as the institution of learning took on increasing prominence. The historical school's rise coincided with the increase in power and influence of the German law faculty. Langdell presided over the emergence of Harvard's law school and the growth of its professoriate; a transition owed in part to the shift from practitioner-teachers to full-time faculty. Likewise, the Yeshiva, which also introduced the idea of full-time teaching faculty, became a dominant institution during the latter half of the nineteenth century. During this period, the *Rosh Yeshiva* (dean of the Yeshiva) became an influential public figure, rivaling and eclipsing the power and authority of the town rabbi and rabbinic judge.

Each school is associated with an influential founding father (Savigny, Langdell and Reb Hayyim), who took analogous positions on similar issues. Langdell argued that the law must be studied in the library rather than a law office. The *Briskers* celebrated their approach for taking *kashrut* (kosher laws) out of the kitchen and setting it in the confines of the study hall. The pandectists claimed that the true law is discovered by careful philological and conceptual analysis of ancient texts, a pursuit suited for scholars, not lawyers, judges or politicians. In each case, the celebration of academic analysis resulted in simultaneous denigration of legal practice.

These developments point to a deep relationship between the educational institution, the social status and professional experience of the legal scientist, and the style and substance of legal scholarship. Because conceptualist legal theory works better in the library than in the courtroom, it requires distance from, and a certain dismissal of, the front-lines of legal administration. Legal classicism is thus particularly suited to an institution with enough prestige to be insular and allow its legal scientists to concentrate exclusively on the internal analysis of legal doctrine.

E. Methods of Legal Education

Classicism, particularly in its American and Jewish variants,

initiated a shift in the method of legal instruction. The case method changed the educational focus from memorizing legal rules towards a dialectical analysis of legal principles. Behind this approach lay the assumption that "the law" was not the sum total of its technical rules but a system of interrelated concepts. As a result, the method of instruction was redirected towards teaching students how to tease out conceptual principles from relevant legal texts.

Like Langdell's method of contrasting cases, the *Briskers*' two-sided *hakira* presents two competing models to view a legal rule. Departing from previous traditions, Reb Hayyim's lectures revolved around the development, critique and analysis of his *hakira*. Both Langdell and Reb Hayyim assumed that the law could not be lectured or posited, but had to be extracted from canonical texts. The "extraction" method of teaching influenced the set of legal texts selected for serious study. Thus somewhat counter-intuitively, Savigny championed the ancient Roman law, Reb Hayyim looked to Maimonides and his contemporaries, while Langdell advocated outdated English appellate cases.

The emerging legal consciousness produced educational reforms that stressed abstraction and analysis over narration and memorization. Both Reb Hayyim and Langdell's lectures were initially greeted with skepticism and hostility. First hand accounts and class notes reveal remarkably similar critiques emerging from students at both Harvard and the Volozhin Yeshiva in the latter decades of the nineteenth century. Probing these issues further promises to reveal additional insights into the relationship between the prevailing legal consciousness and the paradigm of legal education.

Over its long history, legal thought has vacillated between two poles. One view is characterized by an extreme skepticism to the idea that law is an autonomous system. Here, law is little more than the assertion of power by those with enough clout and resources to manipulate the system accordingly. Doctrine is the tool used by the powerful to rule over the masses, and the law's complexity merely serves to mask the odium of raw politics by infusing it with the musky legitimacy of the law's alleged majesty. On the other end is the view of law as a timeless and elegant system of just principles. The law's mysterious austerity, ceremonial officiousness and detailed rituals underscore that the system has its roots in the wisdom of the ages and in the eons of a distant past. The operative metaphors are reverence, stability and tradition. Legal doctrine reflects the finest output of a

particular history and tradition, designed to insure political and social harmony.

Classical Legal Thought, in all its forms, was an attempt to capture and rearticulate this second vision of the legal enterprise. Classical Legal Thought looked to produce a unified field theory of legal doctrine, where the law's authority was demonstrated via the logical coherence and consistency permeating the entire system. Faith and tradition were thus buttressed by rational deduction and argument, and thus usher the ancient conceptions of the law in to the modern era.

The *Briskers* undoubtedly reflect one of the most extreme versions of legal classicism. But by understanding how and why they constructed their peculiar legal universe we can hope to reach a better understanding of the attraction of the classical project more generally. *Brisker* Talmudism thus presents an important data point in explaining the law's recurring attraction to Classical Legal Thought.