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# Method in Jewish Bioethics: An Overview

*Dena S. Davis\**

## I. INTRODUCTION: THE RELEVANCE OF JEWISH BIOETHICS

This essay introduces the reader to the processes by which Jewish ethical-legal reasoning<sup>1</sup> brings old insights to bear on new problems generated by advances in science and medicine. There are at least four reasons why Jewish legal thinking in this area is important to the wider community of Western legal scholars. First, because the law often strives to consider different religious beliefs,<sup>2</sup> it is important to understand these beliefs, the history of these beliefs, and how they func-

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<sup>1</sup> In contrast to Anglo-American secular law, Jewish law does not recognize a split between ethical and legal issues. Thus, it is coherent in Anglo-American but not in Jewish law, to say, "One has a legal right to do x, even though x is morally wrong." Further, the purview of Jewish law extends to those areas that are considered private and "off limits" in secular law, for example, how often a man must offer to make love to his wife. See *Law and Morality*, 10 *ENCYCLOPEDIA JUDAICA* 1480, 1484 (1972); Elliot Dorff, *Judaism as a Religious Legal System*, 29 *HASTINGS L.J.* 1331, 1357-59 (1978).

<sup>2</sup> For example, a controversy arose among potential supporters of the Religious Freedom Restoration Act (RFRA), which was drafted in 1991 to reverse the alleged results of *Oregon Dep't of Human Resources v. Smith*, 485 U.S. 660 (1988), which abandoned the requirement that government show a compelling interest before burdening the free exercise of religion. Groups as diverse as the American Civil Liberties Union and the National Association of Evangelicals endorsed the RFRA, which would have restored to Americans "the right to carry out our duties to our Creator in accordance with the dictates of our many religious faiths," unless these duties were overridden by a "compelling government interest." W. Cole Durham et al., *For the Religious Freedom Restoration Act*, 21 *FIRST THINGS* 42, 42 (1992). However, some pro-life supporters withdrew their endorsement when they became concerned that RFRA could be interpreted as creating "a statutory 'religious' right to abortion." James Bopp, Jr. & Richard E. Coleson, *How to Restore Religious Freedom: A Debate*, 22 *FIRST THINGS* 40, 40 (1992). One group that could be expected to raise such a claim are religious Jews; even Agudath Israel, the pro-life Orthodox group, insists that Jewish teaching "mandates" abortion in some (relatively rare) instances. W. Cole Durham et al., *How to Restore Religious Freedom: A Debate*, 22 *FIRST THINGS* 48, 48 (1992).

Another example is the decision by the New Jersey Legislature to include a religious exemption clause in their "brain death" statute, recognizing that to some Orthodox Jews a person is not considered dead until respiration and circulation have ceased, even if the person otherwise meets the criteria of "brain death." Robert S. Olick, *Brain Death, Religious Freedom, and Public Policy: New Jersey's Landmark Legislative Initiative*, 1 *KENNEDY INST. OF ETHICS* 27-28 (1991).

tion within their religious community.

Second, Jewish legal thinking is important because representatives of religious traditions frequently serve on policy and law-making bodies. Clergy are often asked to serve as "outside members" of groups such as the Institutional Review Boards for the Protection of Human Subjects of Medical Research and Experimentation.<sup>3</sup> Rabbi J. David Bleich, one of the best known writers in English on Jewish bioethics, and Rabbi James Rudin serve on the New York Task Force on Life and the Law, which has produced advisory documents on the determination of death, the procurement and distribution of organs for transplant, and surrogate parenting, among other topics. Bleich was also a member of the panel of consultants to the National Institutes of Health on the subject of medical research with human fetal tissue.<sup>4</sup> Immanuel Jakobovits, until recently Chief Rabbi of the British Commonwealth, is a member of the British House of Lords, where he sees his task as bringing a Jewish point of view to debates on issues ranging from the definition of death to artificial insemination.<sup>5</sup>

Third, Jewish legal thinking is important to bioethics because bioethics has always thrived on a discourse in which religious and secular ethics play equally lively roles. An Episcopal theologian, Joseph Fletcher, inaugurated the modern era of bioethics with his book *Morals and Medicine*.<sup>6</sup> Other founding figures include James Gustafson,<sup>7</sup> Richard McCormick,<sup>8</sup> and Paul Ramsey,<sup>9</sup> all Christian ethicists.<sup>10</sup>

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<sup>3</sup> Division of Health and Human Service's Regulations on Institutional Review Board (IRB) memberships include provisos that at least one member not be affiliated with the institution. It further requires that, "[e]ach IRB include at least one member whose primary concerns are in nonscientific areas; for example, lawyers, ethicists, members of the clergy." 45 C.F.R. § 46.107 (a)-(c) (1993).

<sup>4</sup> Consultant to the Advisory Committee to the Director, National Institutes of Health, Report of the Human Fetal Tissue Transplantation Research Panel, December 1988.

<sup>5</sup> Immanuel Jakobovits, *The Role of Jewish Medical Ethics in Shaping Legislation*, in *MEDICINE AND JEWISH LAW* 1, 8-16 (Fred Rosner ed., 1990).

<sup>6</sup> JOSEPH FLETCHER, *MORALS AND MEDICINE* (1954).

<sup>7</sup> James M. Gustafson, *Issues in the Bio-Medical Fields*, 53 *SOUNDINGS* 151 (1970); James M. Gustafson, *Mongolism, Parental Desires, and the Right to Life*, 16 *PERSP. IN BIOLOGY & MED.* 529 (1973).

<sup>8</sup> Richard A. McCormick, *Moral Notes: Abortion Dossier*, 35 *THEOLOGICAL STUDIES* 312 (1974); Richard A. McCormick, *To Save or Let Die: The Dilemma of Modern Medicine*, 229 *JAMA* 172 (1974); Richard A. McCormick, *Transplantation of Organs: A Comment of Paul Ramsey*, 36 *THEOLOGICAL STUDIES* 503 (1975); Richard A. McCormick, *Sterilization and Theological Method*, 37 *THEOLOGICAL STUDIES* 471 (1976); Richard A. McCormick, *The Quality of Life, The Sanctity of Life*, 8 *HASTINGS CENTER REP.* 30 (1978); Richard A. McCormick, *Some Neglected Aspects of Moral Responsibility for Health*, 22 *PERSP. IN BIOLOGY & MED.* 31 (1978); RICHARD A. MCCORMICK, *HOW BRAVE A NEW WORLD* (1981).

Until recently, Jewish religious ethicists were notably absent from this conversation, engaging in discussions primarily within their own communities. Now, however, we are beginning to see a more robust Jewish presence in public, cross-denominational discourse. As David Novak says: "[B]ioethics [has] raised the whole field of normative Jewish ethics to a level of public prestige it has not enjoyed since premodern times."<sup>11</sup>

Finally, legal and ethical systems can always benefit from knowledge about other, parallel, systems of thought. That is why law schools offer courses and produce journals on Islamic, Jewish, and canon (Roman Catholic) law, and on comparative law generally.<sup>12</sup>

Part II of this essay introduces the reader to the different branches of Jewish religious thought, in order to provide some context for the discussion to follow. In Part III, I identify and discuss three principles that "anchor" any Jewish bioethics discussion. In Part IV, the heart of the essay, I show the analogical, case-oriented method of Jewish argument, and use two bioethical issues—abortion, and the surgical separation of Siamese twins—to illustrate the discussion. Finally, in Part V, I introduce some controversial issues: The immutability, interpretation, and relevance of the law, the role of women in shaping the law, and the extent to which the law influences the health care choices and behavior of American Jews.

## II. JEWISH DENOMINATIONALISM

Most religious Jews identify with one of the three main branches

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<sup>9</sup> PAUL RAMSEY, *FABRICATED MAN: THE ETHICS OF GENETIC CONTROL* (1970); PAUL RAMSEY, *THE PATIENT AS PERSON* (1970); Paul Ramsey, *The Ethics of a Cottage Industry in an Age of Community and Research Medicine*, 284 *NEW ENG. J. MED.* 100 (1971); PAUL RAMSEY, *THE ETHICS OF FETAL RESEARCH* (1975); Paul Ramsey, *Euthanasia and Dying Well Enough*, 44 *LINACRE Q.* 37 (1977); PAUL RAMSEY, *ETHICS AT THE EDGES OF LIFE* (1978).

<sup>10</sup> Among Christian ethicists, there has been vigorous debate about the role of religious ethics in public discourse generally and in bioethics specifically. See, e.g., Stanley Hauerwas, *Can Ethics Be Theological?*, 8 *HASTINGS CENTER REP.* 48 (1978); Lisa S. Cahill, *Can Theology Have a Role in "Public" Bioethical Discourse?*, 20 *HASTINGS CENTER REP.* (Special Supplement) 10 (1990). As Jewish ethicists offer their contributions, they must also wrestle with the question of "how one speaks to a general, secular society out of a singular religious tradition." David Novak, *Bioethics and the Contemporary Jewish Community*, 20 *HASTINGS CENTER REP.* (Special Supplement) 14, 16 (1990). See also Louis E. Newman, *Jewish Theology and Bioethics*, 17 *J. MED. & PHIL.* 309, 324–325 (1992).

<sup>11</sup> See Novak, *supra* note 10, at 15.

<sup>12</sup> For a general discussion of the scope and development of Jewish law, see ELLIOT N. DORFF & ARTHUR ROSETT, *A LIVING TREE: THE ROOTS AND GROWTH OF JEWISH LAW* (1988).

of Judaism: Orthodox, Conservative, and Reform.<sup>13</sup> To achieve a properly contextualized understanding of Jewish legal and ethical thought, it is crucial to keep in mind the pluralistic character of modern Judaism. Menachem M. Kellner, a Jewish scholar, comments:

One must not ask today, "What is the Jewish position on such and such?" but rather, "What is the Orthodox, Conservative, or Reform interpretation of the Jewish position on such and such?" Although many writers persist in presenting *the* Jewish position on various subjects, it very often ought more correctly to be characterized as *a* Jewish position.<sup>14</sup>

Although it would be equally false to assume that ethicists are united on methodology even within the different denominations,<sup>15</sup> it is possible to make some characterizations about the approaches of these three branches.

Within Orthodoxy, Jewish law (*halakhah*) is the unchanging will of God. It is a divine, not a human, system, and thus is not subject to historical development.<sup>16</sup> While some Orthodox commentators do make use of scientific resources,<sup>17</sup> the *halakhah* is generally held to be sufficient unto itself and capable of answering all questions when in the hands of a competent decisor.<sup>18</sup>

Conservative Judaism considers *halakhah* to be decisive, but views it as a human institution which "preserves the insights and experiences of the Jewish people as a whole."<sup>19</sup> Conservatives are also more likely than Orthodox Jews to use extrahalakhic sources as additional grounds for decision. Together, these two branches of Judaism can be termed

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<sup>13</sup> When terms such as Orthodox and Conservative are capitalized, they refer to specific denominations. This should not be confused with the adjectival use of these terms. It is quite coherent to speak of a "liberal Orthodox" or "conservative Reform" scholar. To avoid further confusion, I will not use the term "Liberal" as a synonym for "Reform," although many Reform Jews do so.

<sup>14</sup> MENACHEM M. KELLNER, *CONTEMPORARY JEWISH ETHICS* 15 (1978).

<sup>15</sup> See, e.g., David H. Ellenson, *The Pluralistic Nature of Orthodox Judaism*, 36 *JUDAISM* 117 (1987).

<sup>16</sup> "The Torah of God is perfect' (*Psalms* 19:8), and in its teachings the discerning student will find eternally-valid answers to even newly-formulated queries." Fred Rosner, *The Traditionalist Jewish Physician and Modern Biomedical Ethical Problems*, 8 *J. MED. & PHIL.* 225, 225 (1983).

<sup>17</sup> David H. Ellenson, *How to Draw Guidance from a Heritage: Jewish Approaches to Mortal Choices*, in *A TIME TO BE BORN AND A TIME TO DIE* 219 (Barry S. Kogan ed., 1991).

<sup>18</sup> Rosner, *supra* note 16 at 225.

<sup>19</sup> KELLNER, *supra* note 14, at 17.

“traditional,” in that they both accept *halakhah* as decisive, although they understand it somewhat differently.

In contrast, Reform Judaism may use *halakhah* as one resource for understanding its history and tradition, but does not consider it normative. The Reform movement relies instead on Enlightenment notions of personal autonomy, justice, and individual rights, grounded in divine warrant.<sup>20</sup> Reformists identify primarily with the prophetic rather than the legal tradition in Judaism and they emphasize universal ethical principles and a social justice critique of contemporary society. However, some Reform scholars are calling for an increased appreciation of the halakhic tradition, and for a more “covenantal” ethic within which the autonomous person looks also to the authority of the community to help her understand and give life to the ethical demands made on her through her relationship with God.<sup>21</sup>

### III. PRINCIPLES OF JEWISH BIOETHICS

Elliot Dorff, a conservative rabbi and scholar, has identified three principles inherent in Jewish bioethics.<sup>22</sup> With the exception discussed below, these principles are valid for most thinkers in all branches of Judaism.

#### *A. The Body Belongs to God*

Judaism teaches that because our bodies were created by God, they are owned by God and loaned to us; therefore it is our obligation to care for them. This principle accounts for the Jewish prohibition against

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<sup>20</sup> A good example of Reform thinking is Rabbi Balfour Brickner's testimony in the U.S. Senate in favor of liberal abortion laws:

It is precisely this traditional Jewish respect for the sanctity of human life that moves us now to support that legislation which would help all women to be free to choose when and under what circumstances they would elect to bring life into the world. It is that regard for the sanctity of human life which prompts us to support legislation enabling women to be free from the whims of biological roulette and free mostly from the oppressive crushing weight of anachronistic ideologies and theologies.

*Id.* at 283.

<sup>21</sup> Eugene Borowitz, *The Autonomous Self and the Commanding Community*, 45 THEOLOGICAL STUDIES 34-56 (1984).

<sup>22</sup> ELLIOT DORFF, CHOOSE LIFE: A JEWISH PERSPECTIVE ON MEDICAL ETHICS (1985).

suicide.<sup>23</sup> More recently, some Jewish authorities have prohibited smoking on the same grounds.<sup>24</sup> God's ownership of the body is a limit on one's medical choices, which Judaism typically expresses as duties rather than rights. The primary obligation of the doctor and of the patient is to promote the latter's health, not to maximize his autonomy.<sup>25</sup>

Most contemporary Reform Jews find the principal that God owns a person's body unacceptable because their values of autonomy and self-determination justify a person's ultimate control over her own body, subject only to the limit of not causing harm to others.<sup>26</sup> The cluster of issues that surround the terminal patient—treatment refusal, advance directives, and passive euthanasia—highlight this split between Reform and traditional ethicists. For traditional commentators, "all of life, regardless of its quality and regardless of its duration, is of infinite value."<sup>27</sup> The wishes of the patient are not likely to be central to a discussion by traditional commentators. In contrast, Reform writers are more likely to stress respect for the patient's wishes. Because self-determination is not a key concept for traditional ethicists, they often fail to make important ethical distinctions among suicide, withdrawing aggressive treatment at the dying patient's request, and "selective elimination of those whose life is deemed a burden upon society at large."<sup>28</sup> In another example, Reform writers would generally support the patient's right to know her diagnosis, while some leading traditionalists prohibit disclosure, lest it cause the patient increased suffering and perhaps shorten her life.<sup>29</sup>

<sup>23</sup> DAVID NOVAK, LAW AND THEOLOGY IN JUDAISM 80-93 (1974).

<sup>24</sup> ABRAHAM S. ABRAHAM, THE COMPREHENSIVE GUIDE TO MEDICAL HALACHAH 25 (1990).

<sup>25</sup> "In Jewish law a doctor is obligated to come to the rescue of his stricken fellow-man and to perform an operation he considers essential for the life of the patient, even if the patient refuses his consent or prefers to die. . . . [T]he emphasis is on the physician's responsibility to heal, to offer service, more than on the patient's right to be treated." Marc Gellman, *On Immanuel Jakobovits: Bringing the Ancient Word to the Modern World*, 17 SECOND OPINION 97, 106 (1991).

<sup>26</sup> Matthew M. Maibaum, A "Progressive" Jewish Medical Ethics: Notes for an Agenda, 33 J. REFORM JUDAISM 27, 28-33 (1986).

<sup>27</sup> Abraham S. Abraham, *Euthanasia*, in MEDICINE & JEWISH LAW, supra note 5, at 125.

<sup>28</sup> J. David Bleich, *Establishing Criteria of Death*, in JEWISH BIOETHICS 277, 291 (Fred Rosner & J. David Bleich eds., 1979).

<sup>29</sup> J. David Bleich, *A Physician's Obligation with Regard to Disclosure of Information*, in MEDICINE & JEWISH LAW, supra note 5, at 31-63. See also Bradford Wixen, *Therapeutic Deception: A Comparison of Halacha and American Law*, 13 J. LEGAL MED. 77 (1992) (contrasting the primacy of "individualism and the ability to control one's destiny" in American law, with halakhic emphasis on preserving life and health).

God's ownership of one's body explains the obligation of *pikkuah nefesh*, under which preserving life and health takes precedence over all other commandments except the prohibitions against sexual immorality, murder, and idolatry. For example, a person who needs to eat to maintain her health is obligated to eat on Yom Kippur, a holiday on which she would otherwise be obligated to fast.<sup>30</sup> Likewise, one who needs medical care on the Sabbath must do everything possible to obtain it, including riding in a car, paying a taxi, using the telephone, and other activities normally forbidden to rigorous Sabbath observers.<sup>31</sup>

*Pikkuah nefesh* is the rationale for the 1991 decision by the Rabbinical Council of America (Orthodox) to encourage the donation of organs from brain-dead patients, overriding the halakhic condemnation of dismemberment and mutilation of corpses.<sup>32</sup>

The obligation to preserve life also grounds a rigorous ethic of professional responsibility for physicians. A physician who refuses to render care in a life-threatening situation, or one who give less than the best possible care available, is considered a potential murderer, while a physician who heals is considered God's messenger.<sup>33</sup>

So there is a dual responsibility: The physician must provide the best possible care, but each person must avoid unhealthy practices and seek out medical care when necessary. The result is a strong emphasis on education and preventive medicine. Medieval scholars and physicians understood their task as maintaining health when it is present and restoring health when it is absent.<sup>34</sup> As Jewish bioethicist Fred

<sup>30</sup> DAVID M. FELDMAN, *HEALTH AND MEDICINE IN THE JEWISH TRADITION* 25 (1986). See also ABRAHAM, *supra* note 24, at 52-94.

<sup>31</sup> ABRAHAM, *supra* note 24 at 52-94.

<sup>32</sup> The Rabbinical Council of America's decision reads in part:

Since organs that can be life-saving may be donated, the family is urged to do so. When human life can be saved, it must be saved. Cornea transplants that restore sight to the blind are treated in halacha as life-saving surgery. The halacha therefore looks with great favor on those who facilitate the procurement of life-saving organ donations.

N.Y. TIMES, June 15, 1991, § 1, at 10, col. 5. The Rabbinical Council of America accepts the concept of brain death, unlike the more conservative Agudath Israel of America. See, Immanuel Jakobovits, [*Brain Death and*] *Heart Transplants: the [Israeli] Chief Rabbinate's Directives [sic]*, 24 *TRADITION* 1 (1989); David Zweibel, *A Matter of Life and Death: Organ Transplants and the New RCA "Health Care Proxy,"* *THE JEWISH OBSERVER* 11 (Summer 1991).

<sup>33</sup> David Steinberg, *Jewish Medical Ethics*, in *THEOLOGICAL DEVELOPMENTS IN BIOETHICS: 1988-1990*, 181 (B.A. Brody, et al. eds., 1991).

<sup>34</sup> BYRON L. SHERWIN, IN *PARTNERSHIP WITH GOD: CONTEMPORARY JEWISH LAW AND ETHICS*



Rosner wrote: "The need of the physician is twofold, preserving health and curing disease; and the demand for the former is greater than for the latter; for it is better for man that he avoid becoming ill than that he become ill and be cured."<sup>35</sup>

### *B. The Body is Good*

Because the body is God's creation, it is intrinsically good, and the pleasures of the body (*e.g.*, food, sex) are also God's gifts. Judaism is not an ascetic tradition and it rejects the idea that suffering can be good for its own sake. On the contrary, being good to one's body—eating, sleeping, seeking appropriate medical care and rehabilitation—is considered service to God.<sup>36</sup>

### *C. Healing is Permitted and Obligatory*

Judaism's love affair with medicine predates the modern era. The great medieval scholar Maimonides, himself a physician, opined that it is forbidden for a Jew to live in a town without a doctor.<sup>37</sup>

The obligation to heal can be problematic when curing a specific problem may not benefit the patient overall. Elliot Dorff presents the case of a person suffering from multiple, incurable illnesses who then develops pneumonia. In Dorff's opinion, it is acceptable not to treat the pneumonia, so as to spare the patient the suffering caused by the underlying illness. Dorff makes a distinction between curing the pneumonia and curing the person, a distinction that more conservative commentators would not accept.<sup>38</sup> But in a 1993, precedent-setting decision, an Israeli judge ruled that a terminally ill woman could be disconnected from dialysis machines because the woman was in severe

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<sup>35</sup> *Id.* (citations omitted).

<sup>36</sup> David Feldman states:

Renunciation of the pleasures of this world is characteristically regarded as sinful ingratitude to its Creator. No lesser a sage than Rav, founder of leading academies of Talmudic learning, is the authority for the declaration: "Man will have to render an account [to God] for all the good things which his eyes beheld but which he refused to enjoy."

DAVID M. FELDMAN, BIRTH CONTROL IN JEWISH LAW 82 (1968).

<sup>37</sup> Fred Rosner, *The Physician and Patient in Jewish Law*, in JEWISH BIOETHICS 45-58 (F. Rosner & J.D. Bleich eds., 1979).

<sup>38</sup> Elliot N. Dorff, *A Jewish Approach to End-Stage Medical Care*, 43 CONSERVATIVE JUDAISM 3-51 (1991).

pain.<sup>39</sup> The judge cited Jewish law, saying that the ill should suffer no more hardship than necessary.<sup>40</sup>

#### IV. METHODOLOGY

Traditional Judaism reaches ethical conclusions through legal reasoning which uses the resources of *halakhah* (law) and sometimes *aggahah* (extra-halakhic, non-authoritative rabbinic literature, often taking the form of allegory, fairy-tale, poetry, metaphor, etc.). The sources of *halakhah* include the Torah (Pentateuch, the first five books of the Hebrew Scripture) and the "oral tradition," or Talmud, which is made up of the Mishnah (the first written summary of the oral law) and the Gemara (the commentary on the Mishnah).<sup>41</sup> Gemara records 300 years of spirited rabbinical debate on almost every topic imaginable. Along the way, there are stories, jokes, medical lore, advice for the new bridegroom, and wonderful depictions of the actors themselves, the rabbis who created this body of knowledge. Because the debates are as important as the conclusions, which are not necessarily definitive, the Talmud records the arguments of the dissenters as well as those of the sages whose opinions carried the day. As in our American legal system, the lone voice of a prophetic dissenter may prove more influential than that of the majority in the long run.<sup>42</sup>

The final redactions of the Palestinian and Babylonian Talmuds in the fifth and sixth centuries C.E. did not signal the end of *halakhic* discussion, which presently continues to be recorded in various codes, commentaries and *responsa* (replies to legal and religious questions). The development of *halakhah* proceeds by a mix of interpretive methods which include analogy, grammatical analysis, and appeal to earlier decisions. Talmudic scholar Jacob Neusner defines Talmudic thinking as "the persistence of the spirit of criticism in four modes:" (1) abstract, "skeptical" examination of the questions raised and the answers offered; (2) historical criticism of courses and their degree of consistency; (3) philological and literary criticism; and (4) "practical criticism of what

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<sup>39</sup> MONTREAL GAZETTE, April 10, 1993, at D19.

<sup>40</sup> *Id.*

<sup>41</sup> *Halakhah*, 7 ENCYCLOPEDIA JUDAICA 1157 (1972); *Talmud and Midrash*, 17 ENCYCLOPEDIA BRITANNICA 1006 (1974).

<sup>42</sup> ALAN BARTH, PROPHETS WITH HONOR: GREAT DISSENTS AND DISSENTERS IN THE SUPREME COURT (1974).

people actually do in order to carry out their religious obligations."<sup>43</sup>

Jewish legal reasoning is case-oriented and analogical. Much Jewish legal argument would not seem strange to those familiar with the case-precedent approach of modern Anglo-American law. Although the three principles explained above are clearly evident in *halakhic* reasoning on medical issues, the argumentation process appeals less to principle than to cases, proceeding from old case to new case, from paradigm case to marginal case. Jacobovits, perhaps speaking somewhat too simply, asserts that Jewish medical ethics operate "in the reverse" of secular medical ethics. Secular medical ethics seek to turn ethical guidelines into law, while Jewish ethics distill ethical guidelines and principles from legal judgments.<sup>44</sup> In Isaac Franck's more nuanced description:

Knowledge on any legal or ethical problem is evolved, quasi-deductively, pursuant to casuistic methodology, by searching for Biblical doctrines, for precedents, for earlier decisions, for analogous cases and problems within the mainstream of the legal and ethical tradition. Out of the "*shakla v'tarya*" (literally, "weighing and throwing" . . .) of ideas, citations, precedents, clashing views, and, as often as not, after they have been tried in the crucible of critical, contemporary, rational thought, a new application of an applicable principle emerges.<sup>45</sup>

Paradigm cases are not necessarily those that occur often, if at all, in daily life. Rather, they are vivid examples of ethical or legal dilemmas with clear responses to which most experts subscribe. These cases exert a strong "gravitational pull" on new questions and dilemmas, which then orient themselves by analogy to one or more paradigmatic cases. Two examples will demonstrate how *halakhic* reasoning works.

### A. *The Case of the "Siamese" Twins*

In 1977, "Siamese twins" were born to a family of deeply religious Orthodox Jews. The father himself was a rabbinical student at the

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<sup>43</sup> JACOB NEUSNER, INVITATION TO THE TALMUD 267 (1989).

<sup>44</sup> Immanuel Jakobovits, *The Role of Jewish Medical Ethics in Shaping Legislation, in MEDICINE AND JEWISH LAW*, *supra* note 5, at 2-3.

<sup>45</sup> Isaac Franck, *Understanding Jewish Biomedical Ethics: Reflections on the Papers*, 8 J. MED. & PHIL. 207, 212-13.

time. The two girls were joined at the chest. Baby B had an essentially normal, four-chambered heart that was fused with Baby A's stunted, two-chambered heart. The doctors were certain that both babies would die if no action were taken, but hoped that it would be possible to save one of the babies by separating them. Unfortunately, it was not feasible to give each baby a viable heart and circulatory system. Moshe Tendler, a highly respected scientist and Talmudic scholar, was one of the rabbis who wrestled with the ethical problem. Rabbi Tendler and his colleagues were anxious to discover whether the choice of which baby would receive the viable heart would be made by the doctors or predetermined by the medical facts. The doctors assured Tendler that only Baby B had the circulatory capacity to make use of the six-chambered heart. The moral question confronting the family was whether it was permitted to sever one baby's life support system in order to afford a better chance of life for her sister.<sup>46</sup>

A somewhat similar dilemma is presented in the case of a woman who is pregnant with three or more fetuses. A very high fetal and infant mortality rate is associated with multiple gestation. Pregnancy reduction—selective termination of some of the fetuses—is now considered much more likely to result in the live birth of one or two healthy babies.<sup>47</sup> But Orthodox and Conservative ethicists are united in agreeing that abortion is generally impermissible except to preserve the life and health of the pregnant woman.<sup>48</sup>

These cases seem to present parallel moral dilemmas. It is "the ultimate axiom" in Judaism that one cannot sacrifice one life for another, or even for many others.<sup>49</sup> Life comes from God, and no human being can decide that one person's blood is "sweeter" than another's. But in both cases, it appears that without intervention all the babies are doomed, or at least are at great risk. In the first case, one asks, is it permissible to sever one baby from her life support system, so that her sister has a chance to survive? In the second case, one asks if it is permissible to abort one or more fetuses in order that at least one healthy baby is born.<sup>50</sup>

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<sup>46</sup> D.C. Drake, *One Must Die So the Other Might Live*, 16 NURSING FORUM 229 (1977).

<sup>47</sup> Fred Rosner, *Pregnancy Reduction in Jewish Law*, 1 J. CLINICAL ETHICS 181 (1990).

<sup>48</sup> See *infra* pp. 13–17.

<sup>49</sup> Franck, *supra* note 45, at 211.

<sup>50</sup> By highlighting the similarities in these cases, I do not mean to suggest that Judaism equates the moral status of a fetus with that of a born baby. A fetus is not a human being

Despite the apparent similarities in the two cases, *halakhic* reasoning, using paradigm cases, shows deep differences that point to different conclusions. The first paradigm case, or precedent narrative,<sup>51</sup> comes from the Talmud, where the story is told of a bunch of heathens who said to a group of Jewish women, "surrender one of you to us so that we may defile her, or else we will defile you all." The Talmud rules that all the women should suffer rather than give up one of their number.<sup>52</sup> In another case, a caravan is surrounded by bandits. If the bandits threaten to murder everyone in the caravan unless the group chooses one of their number and surrenders him for death, it would be impermissible to surrender the one. But if the bandits call for a specific member of the caravan by name, it would be morally justified to give up this person because he had been designated for death.<sup>53</sup> Rabbi Tendler offers a modern example in the story of two men who jump from a burning airplane. The second man's parachute fails to open. As he falls past the first man, he grabs onto the first man's foot. But now they are both plunging to their deaths, as the parachute cannot support them both. The first man is justified in kicking away the second, because "they would both die if he didn't, and it was the second man who was designated for death since it was his parachute that didn't open."<sup>54</sup>

In light of these cases, it now appears that our two dilemmas differ in one crucial respect: in the case of the twins, Baby A had been "designated for death." Neither the doctors nor the parents needed to choose which baby would get the viable heart. But in the case of multiple pregnancy, aborting any three quintuplets will result in the probable survival of the other two as healthy twins and there is no reason to choose one fetus over another. Thus, the case of the Siamese twins is like the doomed parachutist or the "designated" member of the caravan, while selective reduction of multiple pregnancy is like the women who are threatened by heathens unless they sacrifice any one of their number. We can now understand why Tendler and his colleagues found it permissible to sacrifice Baby A for the sake of Baby B, while Rosner argues that it is not permissible to abort some fetuses

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<sup>51</sup> The term "precedent-narrative" is from DAVID FELDMAN, *MARITAL RELATIONS, ABORTION AND BIRTH CONTROL IN JEWISH LAW* 289 (1974).

<sup>52</sup> Rosner, *supra* note 47, at 184.

<sup>53</sup> Drake, *supra* note 46, at 242.

<sup>54</sup> *Id.* at 241.

in order to save the others.<sup>55</sup>

A second line of reasoning would distinguish these cases by using the idea of *pursuit*. Jewish law requires that one disable or even kill an assailant to protect one's life or that of another, even if the assailant is quite innocent of murderous intent. In the case of the Siamese twins, as in that of the parachutists, one baby was essentially parasitic to the other; Baby A was being kept alive because her blood was circulating through her sister's heart, a burden Baby B could not sustain for long. Baby A was a pursuer. But in a multiple pregnancy, it is a purely arbitrary decision as to which fetuses are endangering the lives of the others.<sup>56</sup>

### B. Abortion

Three paradigm cases exert gravitational pull on the discussion of abortion in traditional Judaism: Exodus 21:22-23; *Mishnan Ohalot* 7:6, and Babylonian Talmud *Arakhin* 7a-b.

#### 1. Exodus 21:22

This passage is the most authoritative because it is biblical rather than rabbinic. It reads: "If men strive, and wound a pregnant woman so that her fruit be expelled, but no harm befall [her], then shalt thou give life for life."<sup>57</sup> In this case, accidentally causing a woman to miscarry is a civil injury, and the perpetrator must pay a fine. But accidentally killing the woman is a criminal case, and the wrongdoer is subject to death. The fetus is not considered a *nefesh adam* (human person) in Jewish law at any stage in pregnancy.<sup>58</sup> Unlike the woman, the fetus has neither the moral nor the jurisdictional status of a person. Consequently, when the woman's life is endangered by pregnancy or childbirth, she has the right to protect herself by destroying the fetus.

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<sup>55</sup> Rosner finds other grounds on which pregnancy reduction could be considered acceptable, principally to safeguard the life and health of the mother, for whom multiple pregnancy presents serious hazards. In Jewish law, the life of the mother always takes precedence over that of the fetus. Because it would be acceptable to abort *all* the fetuses in a multiple pregnancy that presented risks to maternal health, it would be acceptable to abort only *some* of the fetuses for that reason. Rosner, *supra* note 47, at 184.

<sup>56</sup> *Id.*

<sup>57</sup> FELDMAN, *supra* note 51, at 254.

<sup>58</sup> *Id.* at 253-54. See also Ronald M. Green, *Contemporary Jewish Bioethics: A Critical*

In *halakhah* this is not only her right but her obligation, because the duty to protect one's life and health outweighs all others.<sup>59</sup>

The Exodus passage does not imply that fetal life is held as lightly as if it were simply property. David Bleich speaks for the tradition when he says, "Judaism regards all forms of human life as sacred . . . fetal life is regarded as precious and may not be destroyed wantonly."<sup>60</sup> Judaism holds that human life is intrinsically sacred because humans are created in God's image. Byron L. Sherwin identifies three claims of Jewish theology regarding human life: That each person is unique, that each human life is therefore irreplaceable, and that because of that unique and irreplaceable character, each human life "embodies intrinsic sanctity."<sup>61</sup> Furthermore, when a fetus is destroyed, *its* possible offspring are destroyed as well.<sup>62</sup>

Thus, the Exodus passage on the one hand and the intense concern for the preservation of human life on the other, set the ontological boundaries within which *halakhists* can make decisions. Within these boundaries, cases exert their gravitational pull, governing the ebb and flow of argument, as *halakhists* make their points by orienting specific questions to paradigmatic cases.

## 2. *Mishnan Oholot 7:6*

The passage in *Mishnan Oholot* reads as follows:

If a woman is having difficulty giving birth, one cuts up the fetus within her and takes it out limb by limb because her life takes precedence over its life. Once its greater part has emerged, you do not touch it, because you may not set aside one life for another.<sup>63</sup>

This passage presents the paradigm case to which the principles inferred from the Exodus narrative are applied. The mother's life is threatened by the fetus. Because we know from Exodus that the fetus is not a *nefesh* and can never be preferred over the mother, it follows that the fetus must be destroyed to protect her. However, the second

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<sup>59</sup> See Rosner, *supra* note 47.

<sup>60</sup> David Bleich, *Abortion in Halakhic Literature*, in *JEWISH BIOETHICS*, *supra* note 28, at 135.

<sup>61</sup> BYRON L. SHERWIN, IN *PARTNERSHIP WITH GOD: CONTEMPORARY JEWISH LAW AND ETHICS* 175 (1990).

<sup>62</sup> FRIEDMAN, *supra* note 51, at 185.

half of the passage is puzzling, because it is impossible to imagine a situation to which it would apply. If the head has emerged (or its "greater part," in the case of a breech presentation) the mother's life may still be in danger, but not in any way that would be diminished by destroying the fetus. The second half of the passage describes a null set, even in ancient times. The practical result is that an abortion must be performed any time it is necessary, and may not be performed in those instances in which it would be pointless. So the thrust of the passage, as it relates to abortion, is to remind us of the absolute precedence of the woman's life.

This case stands for certain principles. It would be impossible to tug the case in a radically different direction—for example, to argue that fetal life has a claim equal to that of the mother. But within its directional thrust, there are many interpretive moves to be made. What is meant by "difficulty in childbirth?" That is, what kinds of threats are serious enough to come under the rubric of this case? A wide range of interpretation is possible. Even Jakobovits, one of the most conservative commentators, states that the "threat to the mother need not be either immediate or absolutely certain."<sup>64</sup> Further, a grave psychological threat is considered by many decisors to be as weighty as a physical hazard.<sup>65</sup>

### 3. *Arakhin* 7(a)-(b)

A third paradigm case is the strange hypothetical question of the woman who has been condemned to death and is pregnant. This precedent-narrative has been described as "ghastly," "grisly" and "bizarre" by modern commentators, but ironically its thrust is compassionate.<sup>66</sup> In Jewish law, once a prisoner is condemned to death the

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<sup>64</sup> Immanuel Jakobovits, *Jewish Views on Abortion*, in *JEWISH BIOETHICS* 130 (Fred Rosner & W. David Bleich eds., 1979).

<sup>65</sup> See *id.* at 124. See also FELDMAN, *supra* note 51. But see DAVID NOVAK, *LAW AND THEOLOGY IN JUDAISM* 123 (1974) (expressing doubt, on psychiatric grounds, that abortion is ever warranted even for suicidal patients).

In an intriguing twist, some halakhists argue that not only can danger to the mother be grounds for abortion, but also danger to an existing child who is dependent for life on the mother's milk can be grounds for abortion. FELDMAN, *supra* note 51, at 187.

<sup>66</sup> The frequency with which questions relating to execution and the death penalty are discussed in Talmudic sources should not be misinterpreted to mean that capital punishment was common in the rabbinic period. In fact, the opposite was true. Although capital punishment was common in the rabbinic period, it was hedged by procedural barriers that execution



execution may not be delayed, because it is not permissible to extend the anxiety and mental suffering of the one facing death. A question arises if a woman condemned to death is discovered to be pregnant. Should one delay her execution until the birth of the baby? The answer is no, unless labor has already begun. Furthermore, if there is a possibility that the fetus might be born after the death, "where it would cause bleeding and thus expose the executed mother to be disgraced," then "one should strike the woman against the womb so that the child may die first, to avoid her being disgraced."<sup>67</sup> As Green comments, "[t]he sages are clearly demonstrating concern for the mother rather than for the child. Saving the child's life does not merit inflicting even a few hours more suffering on the condemned woman. Likewise, the prospect of her disgrace also looms larger in the sages' view than any claims of prenatal life."<sup>68</sup>

Biale argues that the ruling in *Arakhin* suggests a general principle that a fetus may be aborted to avoid mental anguish or disgrace to the mother. But the very ghastliness of the story presents its interpreters with problems. Even assuming that it is more compassionate to the woman to expedite her death than to allow her to see her child born, we are left with the difficulty of finding analogies to this paradigm case. Short of fear of death itself, which is already covered by the *Oholot* passage, what kinds of "great distress" does this narrative present? Rabbi Uziel, a twentieth-century *halakhist*, uses this precedent and argues that: "It is clear that abortion is not permitted without reason. That would destroy and frustrate the possibility of life. However, the paradigm allows destroying a fetus if there is a reason to do so even if it is a *slim reason*, such as to prevent her *nivvul* [disgrace]."<sup>69</sup>

Uziel also used the *Arakhin* precedent to permit abortion for a woman whose pregnancy threatens her with permanent deafness. Uziel reasoned that such a condition would cause her total disgrace because it would "ruin the rest of her life, make her miserable all her days, and make her undesirable in the eyes of her husband."<sup>70</sup>

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compassionate grounds, to condemn anyone to death. See Gerald J. Blidstein, *Capital Punishment—The Classic Jewish Discussion*, in CONTEMPORARY JEWISH ETHICS 310–325 (Menachem Kellner ed., 1978); Israel Kazis, *Judaism and the Death Penalty*, in CONTEMPORARY JEWISH ETHICS 326–329 (Menachem Kellner ed., 1978).

<sup>67</sup> Babylonian Talmud, *Arakhin* 7a-b.

<sup>68</sup> Green, *supra* note 58, at 261.

<sup>69</sup> FELDMAN, *supra* note 51, at 291.

<sup>70</sup> BIALE, *supra* note 63, at 234.

The decisive principle here is that the woman's pain comes first. Thus, abortion for a genetic defect, while difficult to argue on the basis of the child's quality of life, can be warranted on the grounds of the mother's anguish.<sup>71</sup> This is similar to the example of the selective termination of multiple pregnancy, justified on the basis of the risk to the mother.<sup>72</sup> The mother's pain is decisive even when her suffering appears rather trivial. Rabbi Moshel Zweig of Antwerp cites a ruling of Maimonides, the great medieval sage, in the story of a woman who experienced unusual pregnancy cravings: "Her husband may not [try to] stop her, saying if she eats too much or eats wrong food she might miscarry, for her physical pain [the cravings] is to be considered first."<sup>73</sup>

## V. ISSUES AND QUESTIONS

### A. *The Immutability of Halakha*

Medical science, more than any other modern challenge, has forced traditional Judaism to confront the problem of change.<sup>74</sup> The most rigid of the Orthodox bioethicists is probably Rabbi David Bleich, who states categorically: "Jewish law does not change."<sup>75</sup> Although Bleich embraces the challenge of applying Jewish law to changing conditions, he insists that the law itself is immutable. "The application of normative, unchanging legal canons to multifarious situations is not at all a process of change."<sup>76</sup> An example of this approach can be seen in Bleich's stance on the question of whether fetuses known to have Tay-Sachs disease may be aborted. Modern techniques of carrier screening, amniocentesis and abortion offer affected couples new choices that must be evaluated in the light of *halakhah*.<sup>77</sup> Bleich grounds his condemna-

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<sup>71</sup> FELDMAN, *supra* note 51, at 291-292; Ronald M. Green, *Genetic Medicine in the Perspective of Orthodox Halakhah*, 34 JUDAISM, 263, 277 (1985).

<sup>72</sup> See *supra* note 55.

<sup>73</sup> FELDMAN, *supra* note 51, at 291.

<sup>74</sup> Marc Gellman, *On Immanuel Jakobovits: Bringing the Ancient Word to the Modern World*, 17 SECOND OPINION 97, 102 (1991).

<sup>75</sup> David Singer, *The Unmodern Jew*, 14 FIRST THINGS 19, 21 (1991).

<sup>76</sup> *Id.*

<sup>77</sup> This is a serious issue within the Ashkenazic Jewish community (*i.e.*, those with European roots) where the incidence of this gene is one hundred times more common than in the population at large. When both parents are carriers, each pregnancy has a one-in-four chance of producing a fetus with the disease. All children with Tay-Sachs disease die before their fourth birthday. Fred Rosner, *Screening for Tay-Sachs Disease: A Note of Caution*, 2 J. CLINICAL

tion of selective abortion of affected fetuses<sup>78</sup> on the *halakhic* principle that abortion is not permitted for fetal indications.<sup>79</sup>

In contrast, scholars such as Robert Gordis (a Conservative) argue that *halakhah* has a history, i.e., that it has changed in the past and will continue to do so. In fact, Gordis claims that Judaism's capacity to survive is linked to *halakhah's* sensitivity and responsiveness "to the age."<sup>80</sup> One Scholar compared the Torah to a mirror, saying: "While the mirror stays the same, the reflections seen in the mirror constantly change. Similarly, the text of the Torah remains the same, but how it is perceived and how it is applied undergo constant change."<sup>81</sup>

Thus, returning to the example of the Tay-Sachs disease, Dorff and others would argue that traditional sources recognized only direct threats to the mother as warrants for abortion because in earlier times it was not possible to know anything about the health of the fetus before its birth. Advances in genetics and neonatology ought to establish the fetus' health as an "independent consideration."<sup>82</sup> In other words, Dorff argues that some fetal anomalies are so devastating that abortion is appropriate to spare the child suffering, independent of considerations of the mother's anguish.<sup>83</sup>

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ETHICS 251, 251 (1991).

<sup>78</sup> Bleich notes that the commandment to procreate is not suspended for Tay-Sachs carrier couples so that refraining from conception altogether (and perhaps completing their family through adoption) is not an option. Fred Rosner, *Tay-Sachs Disease: To Screen or Not to Screen*, in *JEWISH BIOETHICS*, *supra* note 28, at 184-86. Bleich supports the screening of young, unmarried adults so that they can refrain from entering into such tragic unions, but if their carrier condition is discovered after marriage, their only choices appear to be divorce, or the heartrending anguish of fearing that each pregnancy may produce a child who is doomed to an early and protracted death.

<sup>79</sup> See *supra*, pp. 13-17.

<sup>80</sup> Singer, *supra* note 75, at 19.

<sup>81</sup> SHERWIN, *supra* at 34 (quoting Abraham Isaach Kook).

<sup>82</sup> DORFF, *supra* note 38, at 11.

<sup>83</sup> Dorff's position still raises issues about which fetal conditions would make abortion morally defensible by his criteria. Dorff mentions Tay-Sachs and Lesch-Nyhan as appropriate cases, but his logic is not clear. It is probable that Tay-Sachs and Lesch-Nyhan children do not themselves suffer physical or emotional pain, so aborting those fetuses "for their own sake" is not a coherent position. Aborting them for the sake of the mother's anguish is not an "independent consideration" but simply the extension of the accepted principle that the mother's life and health take precedence over the life of even a healthy fetus. If Dorff's goal is to take into account the emotional, physical, and financial burden on other members of the baby's family, he can find precedent for that argument as well. Feldman cites two rabbis, one in our century and one two centuries earlier, who would permit an abortion where an older child was dependent for life on her mother's milk, which the pregnancy threatened. FELDMAN, *supra* note 51, at 187.

### B. *The Problem of Interpretation*

If one does not accept that the law itself can change, one can often effect the same results by admitting that the interpretation of the law changes over time and context. The role of interpretation is currently a topic of controversy in Jewish bioethics. The most conservative ethicists refuse to acknowledge that they are interpreting the law or that the law is open to more than one interpretation. Thus, most contemporary Orthodox *halakhists* appear to be working on the assumption that the texts virtually interpret themselves, with the decisors no more than passive conduits and the right answers a foregone conclusion.

Newman argues that the role of interpretation cannot be ignored.<sup>84</sup> All decisors work with the same body of literature and the same basic principle, but the way in which they apply the sources is inescapably interpretive. Thus, Newman claims that “the rhetoric of Jewish ethics should change from what Judaism teaches to what we, given our particular interpretive assumptions and our particular way of construing the coherence of the tradition as a whole, find within the traditional sources.” He concludes, “[a]ny reading of the text that we produce, and any conclusions we draw from them, are as much our work as theirs.”<sup>85</sup>

Dorff is a frankly interpretive *halakhist*. He characterizes the Orthodox approach as “literalism,” which “ignores the historical context of past medical decisions and the crucial differences between medical conditions then and now.” Dorff asserts:

[I]f a decision is going to be *Jewish* in some recognizable way, it must invoke the tradition in a serious, and not a perfunctory, way. One can do this without being devious or anachronistic *if one does not pretend that one's own interpretation is its originally intended meaning . . . or its only possible reading*. The Conservative objection to many Orthodox readings of texts is thus both to tone and method: not only do many Orthodox responsa make such pretensions, often with an air of dogmatic certainty, but they do so with blatant disregard for the effects of historical and literary context on

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<sup>84</sup> Louis E. Newman, *Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics*, 10 MODERN JUDAISM 17 (1990).

<sup>85</sup> *Id.* at 35.

the meaning of texts and for the multitude of meanings that writings can often legitimately have.<sup>86</sup>

An interpretive approach could justify the abortion of a fetus with Tay-Sachs disease by appealing to the threat to the mother's mental health where that would be adversely affected by the fear of carrying and caring for a doomed child.

### C. *The Relevance of Halakhah*

In contrast to the debates outlined above, which agreed on the precedential value of *halakhah* but disagreed on the roles of historical context and interpretation, there are some commentators who argue that *halakhah* is often irrelevant to modern questions of medical ethics and that the attempt to squeeze contemporary dilemmas into ancient legal categories results in a fatal distortion of the real issues. Not only Reform commentators make this claim. Daniel Gordis, a Conservative, asserts that the precedent-based *halakhic* approach is "incapable" of addressing many of the new issues raised by medical progress.<sup>87</sup> Gordis argues that Jewish law should use the classic texts as a resource for formulating a "Jewish conception of human life" from which answers to specific dilemmas could flow.<sup>88</sup> The classical, case-oriented approach often "stresses a non-essential trait which the cases share in common at the expense of never addressing the new ethical agenda at hand."<sup>89</sup>

Scholars who reject the case-oriented approach often focus instead on the Jewish understanding of human nature. As Ellenson points out, when the question is the Jewish conception of humanity, the answer must say something about the relationship of God and mankind.<sup>90</sup> Orthodox Rabbi Irving Greenberg, and other "mavericks" across the denominational spectrum, argue that mankind was created to be God's partner in completing the work of creation; this partnership points to a "covenantal" ethic of shared power.<sup>91</sup> Greenberg imports this notion into an ethic of the physician-patient relationship, noting, "[t]he

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<sup>86</sup> Dorff, *supra* note 38, at 8.

<sup>87</sup> Daniel H. Gordis, *Wanted-The Ethical in Jewish Bio-Ethics*, in JUDAISM 28, 28-29 (1989).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 29.

<sup>90</sup> Ellenson, *supra* note 17, at 228.

<sup>91</sup> Irving Greenberg, *Toward a Covenantal Ethic of Medicine*, in JEWISH VALUES IN BIOETHICS 124 (Levi Meier ed., 1986).

patient is the image of God; then the greater the [patient's] role in the patient's own therapy, the greater the patient's own dignity. The greater the patient's say in those matters which affect the patient's life, the more Godlike is the patient."<sup>92</sup>

#### *D. The Trend Toward Conservatism*

A number of commentators have noted that Jewish bioethics, at least since World War II, has become increasingly conservative.<sup>93</sup> This observation is probably based on two factors. There is both the *appearance* of conservatism (due to a paucity of liberal contributions) and a very real conservatism among conservative and Orthodox writers.

First, Reform Judaism as well as the more liberal elements in traditional Judaism, has not been energetic in writing and publishing about bioethics in a Jewish vein. Although Gordis and others inveigh against "*halakhic* formalism," they have not filled the gap with issue-oriented, carefully argued books and articles that would present liberal Jewish views on medical ethics. Either they employ the same secular concepts of justice and autonomy as their non-Jewish colleagues, without a distinctively *Jewish* element of the argument, or they fall back on the *halakhic* formalism they claim to eschew, simply because "it is there."<sup>94</sup> Maibaum argues that progressive (*i.e.*, Reform) Judaism has a lot to say about medical ethics and related issues, and "it is time to codify and collect it all and not abandon the primacy of the 'world of what is written' to the traditionalist."<sup>95</sup> Ironically, although Reform *responsa* on medical issues do exist,<sup>96</sup> they tend to fall back upon an uncreative invocation of *halakhah*, coexisting awkwardly with comments meant to adapt traditional views to Reform usage.

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<sup>92</sup> *Id.* at 142.

<sup>93</sup> Gordis, *supra* note 87, at 30–32; Novak, *supra* note 10, at 15; Green, *Critical Assessment*, *supra* note 58, at 262–63.

<sup>94</sup> Maibaum lampoons Reform rabbis who respond to lay questions in the following manner:

Well, we, or I, don't have much to say about that, because my colleagues and I think about that a good deal, but we never formulate anything coherent and write it down. The Orthodox indeed have a lot to say. I'll tell you what they say, because there is much more of that conveniently collected, and it seems to impress people even if they ultimately don't go along with it.

Matthew M. Maibaum, *A "Progressive" Jewish Medical Ethics: Notes for an Agenda*, 33 *J. REFORM JUDAISM* 27, 31 (1986).

<sup>95</sup> *Id.*

<sup>96</sup> SOLOMON B. FREEHOF, *TODAY'S REFORM RESPONSA* (1960).

Because there is a lack of progressive Jewish materials on bioethics and a host of traditionalist writings, the non-Jewish scholarly world has tended to focus on the latter, if only by default.<sup>97</sup> The prestigious *Encyclopedia of Bioethics*, for example, includes seven articles on Jewish topics, all by traditionalist scholars.<sup>98</sup>

This situation is exacerbated by the fact that Reform writers (and "maverick" traditional writers) tend to identify themselves as such and to make clear to what extent they agree with or differ from the traditional sources they quote. Orthodox writers tend to publish books with titles such as *Jewish Bioethics*,<sup>99</sup> which talk about "the" Jewish view on various questions without giving the reader a clue that there might be other Jewish perspectives.

So the first point is that the hegemony of conservative Jewish bioethics is partly illusory, a function of deception on the part of conservatives and a void left by the liberals. But, within the traditional schools is an increasingly conservative stance. Ronald Green, a severe critic of this trend, suggests a number of reasons why this might be so, including the shift in Rabbinical scholarship from the practical rabbinate to the academy.<sup>100</sup> Green speculates that the divided state of contemporary Judaism may compel traditional scholars to distinguish themselves from their liberal colleagues by "elaborating a deliberately anti-modern perspective" and concludes that "religious-ethical thinking tends to fare badly when it is made hostage to deeper social, political, or religious conflicts."<sup>101</sup>

### *E. The Role of Women in Jewish Bioethics*

Throughout Jewish history, women have been excluded from the study of *halakhah*.<sup>102</sup> Today, a few Orthodox and some Conservative Jews are beginning to accept the idea of women as full Talmudic scholars. Orthodox Judaism (and a significant minority in Conservative

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<sup>97</sup> Novak, *supra* note 10, at 15. "[N]ot only has bioethics raised the whole field of normative Jewish ethics to a level of public prestige it has not enjoyed since premodern times, it has also placed more traditionalist rather than more liberal scholars in a new position of authority as spokespersons for Judaism to the wider non-Jewish world." *Id.*

<sup>98</sup> GEORGETOWN UNIVERSITY, *ENCYCLOPEDIA OF BIOETHICS* (Warren Reich ed., 1978).

<sup>99</sup> BLEICH, *supra* note 60.

<sup>100</sup> Green, *supra* note 58, at 259 (quoting Jakobovits).

<sup>101</sup> *Id.* at 263-64.

<sup>102</sup> Dena S. Davis, *Beyond Rabbi Hiyya's Wife: Women's Voices in Jewish Bioethics*, 16 *SECOND OPINION* 11-31 (1991).

Judaism) does not accept the ordination of women to the rabbinate. While ordination is not technically a precondition for being considered a *posek* (expert on Jewish law), in practice that has always been the case.

The last two decades have seen an upsurge of feminist energy in all the branches of Judaism, but the focus has been on the ritual element in Judaism, as women have fought to be counted in the daily *minyan*, to say *kaddish* for the dead, to dance with the Torah scroll on *Simchat Torah*, among others.<sup>103</sup> Very few women have focused on Jewish ethics. In all the English-language collections of essays on Jewish bioethics, there is not one contribution by a woman.<sup>104</sup>

This exclusion would be troubling in any scholarly discipline, but it is particularly disturbing in bioethics, where so many of the issues are experienced differently by men and women. In addition to the obvious examples of contraception, abortion, and assisted reproduction, there are also issues such as aging,<sup>105</sup> informed consent and medical paternalism,<sup>106</sup> and research with human subjects.<sup>107</sup> If one accepts that interpretations in historical contexts have some role to play in *halakhic* thought,<sup>108</sup> the exclusion of female scholars should be intensely problematic. It is surprising that the liberal critics of bioethics do not address this issue.<sup>109</sup>

One example will suffice to suggest why the problem is so acute. In Jewish law, the commandment "be fruitful and multiply" is understood to apply to men but not to women. This Talmudic ruling allows

<sup>103</sup> See SARA REGUER, *Kaddish from the "Wrong" Side of the Mehizah*, and DEBORAH E. LIPSTADT, *And Deborah Made Ten*, both in *ON BEING A JEWISH FEMINIST: A READER* (S. Heschel ed., 1983).

<sup>104</sup> There are two volumes by women which include discussions of abortion and contraception: RACHEL BIALE, *WOMEN AND JEWISH LAW: AN EXPLORATION OF WOMEN'S ISSUES IN HALAKHIC SOURCES* (1984); BLU GREENBERG, *ON WOMEN AND JUDAISM: A VIEW FROM TRADITION* (1981). It is noteworthy that I have not seen either of these two works quoted in any of the men's writings.

<sup>105</sup> Stephen G. Post, *Women and Elderly Parents: Moral Controversy in an Aging Society*, 5 *HYPATIA* 83 (1990).

<sup>106</sup> Steven H. Miles & Allison August, *Courts, Gender, and "The Right to Die"*, 18 *L. MED. & HEALTH CARE* 85 (1990) (courts are more likely to pay serious attention to the previous statements of male than of female patients now in persistent vegetative states).

<sup>107</sup> Marcia Angell, *Caring for Women's Health—What Is the Problem?*, 329 *NEW ENG. J. MED.* 271 (1993); Rebecca Dresser, *Wanted: Single, White Male for Medical Research*, 22 *HASTINGS CENTER REP.* 24 (1992) (documenting the exclusion of women from many research protocols important to their health).

<sup>108</sup> See *supra* pp. 17–21.

<sup>109</sup> Gordis, *supra* note 87; Green, *supra* note 58; Maibaum, *supra* note 94; Newman, *supra* note 84



women greater latitude in birth control devices and family planning than is allowed to men. Rachel Biale comments:

Although the exact rationale for this exemption is only alluded to, it is clear that the Rabbis felt it necessary not to require women to do something that "puts their lives on the line." The Rabbis were concerned primarily with the physical dangers of childbirth, but they were also aware of the emotional and social dimensions: the way in which women's lives were devoted to and determined by childbearing.<sup>110</sup>

Biale's comment raises a number of questions. If the rabbis' "awareness" of the emotional and social dimensions of childbearing played a part in their decision, one can only wonder if that awareness might have been even more sensitive, more accurate, if some of the rabbis had been women. Perhaps women view the burdens of child bearing very differently than do men. Perhaps they would take different emotional and social factors into account or weigh them differently.<sup>111</sup> (Perhaps women might want to limit their number of progeny so as to give themselves the time and energy to become Talmudic scholars!) Contemporary awareness of the exclusion of female scholars at the time of the Talmudic ruling raises questions about whether the ruling might not be the product of a flawed process. Perhaps a contemporary reevaluation of the various rulings on contraception might be in order. Perhaps the *halakhic* debate might result in a better set of decisions today if women were part of the discussion. But, then we come up against the reality that so few women have been trained as Talmudic scholars and that there is still intense male resistance to sharing with women this most powerful role in Jewish culture.<sup>112</sup>

The exclusion of women is equally problematic when ethicists reach beyond *halakhah* for their conclusions. For example, in his discussion of abortion, David Novak employs philosophical, theological, and historical arguments.<sup>113</sup> But because Novak never acknowledges the exclusion of women from scholarly debate, his treatment of abortion reveals deep flaws. Novak relies heavily on the "covenantal theology" of Judaism, without addressing the problematic membership of women

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<sup>110</sup> Rachel Biale, *Abortion in Jewish Law*, 4 *TIKKUN* 26, 28 (1988).

<sup>111</sup> Dorff, *supra* note 38, at 12.

<sup>112</sup> Davis, *supra* note 102.

<sup>113</sup> NOVAK, *supra* note 23, at 114-24.

in the covenant.<sup>114</sup> Further, he states that the “modern” approach to *halakhah* is characterized by a concern with the historical context of the law. However, because he never seems to notice that abortion and childbirth have something to do with women, he never addresses the status of women as an historical element to take into account.<sup>115</sup>

Judaism has escaped the spotlight that has lit up, if not illuminated, the Roman Catholic Church’s exclusion of women from positions of authority. However, if Jewish bioethicists continue the current trend of appearing in public forums and publishing in secular journals, they will eventually be asked to clarify for whom they claim to speak and on what grounds they claim to speak. In a society increasingly committed to gender justice, a system of law that continues to function largely as a male-only province can only be embraced with severe reservations.

### *F. Is Anyone Listening?*

To speak of “Jewish bioethics” is not necessarily to shed much light on what most Jewish people actually do. For example, as we have seen, all Orthodox and Conservative commentators have quite strict views on abortion, limiting it to cases where pregnancy threatens the life or health of the mother, or occasionally for devastating fetal indications.<sup>116</sup> In practice, however, Jews are twice as liberal as other Americans on this issue.<sup>117</sup> Dorff concludes a discussion of abortion

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<sup>114</sup> *Id.* at 121. (“[T]he covenantal theologies of both Judaism and Christianity provide a more profound basis for the ‘right to life’ by emphasizing not only the imminent dignity of man, but even more, the transcendent sanctity of the human person, to whom, of all His creatures, God has chosen to reveal his presence.”)

Judith Plaskow has done an excellent study of women’s exclusion from the central covenant of Judaism and the theological implications of that marginalization.

Entry into the covenant at Sinai is the root experience of Judaism, the central event that established the Jewish people. Given the importance of this event, there can be no verse in the Torah more disturbing to the feminist than Moses’ warning to his people in Exodus 19:15, ‘Be ready for the third day; do not go near a woman.’ For here, at the very moment that the Jewish people stand at Sinai ready to receive the covenant . . . Moses addresses the community only as men . . . . At the central moment of Jewish history, women are invisible . . . . In this passage, the Otherness of women finds its way into the very center of Jewish experience.

JUDITH PLASKOW, *STANDING AGAIN AT SINAI: JUDAISM FROM A FEMINIST PERSPECTIVE* 25 (1990).

<sup>115</sup> NOVAK, *supra* note 23, at 123.

<sup>116</sup> *See supra*, pp. 13–17.

<sup>117</sup> In a 1989 survey conducted by the American Jewish Committee, 75% of Jews responded “Yes” when asked, “Suppose your unmarried teenage daughter told you she was pregnant and

with the comment: "In practice, much of this discussion is moot. Jews engage in abortion almost indiscriminately, to the extent that in recent years there were more abortions than live births among Jews in Israel."<sup>118</sup> Where contraception is concerned, there seems to be almost an *inverse* relationship between Jewish law and American Jewish practice.<sup>119</sup>

It is tempting, but ultimately inconclusive to speculate on why theory and practice are so out of step. Perhaps the "cognitive dissonance" between leaders and laity in a religious community can be quietly ignored if there are no mechanisms forcing the issue into the public arena. Such "publicizing mechanisms" would include, first, taking a stand on the issue in the wider political community, or second, the public nature of the act itself.

Taking the first point, this has not become the kind of public issue for Judaism that it has in the Roman Catholic Community, because Orthodox and Conservative leaders have rarely attempted to influence public policy or to gain a high political profile on the abortion issue. If they did, they might find themselves challenged by the "pro-choice" elements in their congregations and the issue would be thrashed out. Another reason we don't see a public "Jewish" stand on abortion is that there is no hierarchical structure to hold disparate views together and present "the official view." We don't see Jewish "pro-choice" politicians publically castigated by religious leaders, a recent phenomenon of Roman Catholic political life.<sup>120</sup>

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intended to have an abortion. Would you support her decision to have an abortion?" (35% of non-Jews answered "Yes" to that question.) S. M. COHEN, *THE DIMENSIONS OF JEWISH LIBERALISM* 45 (1989).

<sup>118</sup> Dorff, *supra* note 38 at 12.

<sup>119</sup> Jakobovits grades the various methods of birth control, from most to least halakhically acceptable: (1) the pill or the IUD (if not an abortifacient); (2) female sterilization; (3) postcoital douche; (4) cervical cap; (5) spermicides; (6) diaphragm; (7) IUD as an abortifacient; (8) condom, "to be used only in extreme cases of acute danger and if other means are unavailable or unacceptable." Male sterilization doesn't even make the list; it is never acceptable as a contraceptive measure, but permitted "only if urgently necessary as a therapeutic measure." Immanuel Jakobovits, *Judaism*, in *ENCYCLOPEDIA OF BIOETHICS* 791, 800 (1972). In reality, the diaphragm is the contraceptive of choice, used by 23% of American Jewish contraceptors, closely followed by the condom, with 22%. The pill is somewhere in the middle, at 15%, and sterilization is also popular, with 18% of Jewish women and 13% of Jewish men. Calvin Goldshieder and William D. Mosher, *Patterns of Contraceptive Use in the United States: The Importance of Religious Factors*, 22 *STUDIES IN FAMILY PLANNING* 102 (1991).

<sup>120</sup> *CHICAGO TRIBUNE*, Nov. 24, 1992, § Chicagoland, at 1. (Archdiocese of New York auxiliary Bishop Austin Vaughan said New York Governor Mario Cuomo was "in serious risk of going to hell" because of his pro-choice stance on abortion, and Diocese of Brooklyn Bishop Thomas Daily threatened to bar Cuomo from speaking in diocesan parishes; San Diego Bishop

As to the second point, contraception and abortion are practiced in private. Even if there is wide acceptance of abortion among Jews, it is simpler to go about one's business, have the abortion, and not bother the rabbi.<sup>121</sup> In contrast, when Jewish women challenge ritual restrictions in Judaism, they have no choice but to engage in public battle. A number of women have written movingly about their struggle to say *Kaddish* for their dead parents, a ritual which must be performed in public, with at least nine other Jews.<sup>122</sup> Other women have created new rituals for the traditional Passover *seder*, naming rituals for the birth of a baby girl, and so on.<sup>123</sup> It appears that opening ritual to women's participation has absorbed the energies of feminist religious Jews.

This is an important point. As stated above, Jewish clergy are beginning to have a strong presence on ethics committees and in policy-shaping groups. Their presence in such groups is meant to signal respect for religious diversity and to ensure that all Americans have their views heard on such important bioethical issues as, for example, research with fetal tissue. However, this democratic impulse is not well served when someone who puts himself forth as a representative of a religious community is in fact taking positions that have relatively few adherents. This is not to say that the moral wisdom of a Rabbi Bleich might not be useful, but American Jews would find many of his views unpalatable.

## VI. CONCLUSION

In its case-oriented, analogical approach to ethical-legal questions, traditional Jewish scholarship is not unlike Anglo-American legal thought. It has a rich and powerful tradition, which has lasted thousands of years and still retains the flexibility to confront the challenges presented by modern technology and medicine. Ethicists and legal scholars from other traditions can learn much from a foray into

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Leo Maher barred California state senate candidate Lucy Killea from taking communion because of her pro-choice stand.).

<sup>121</sup> Greenberg, *supra* note 91.

<sup>122</sup> Sara Reguer, *Kaddish from the "Wrong" Side of the Mehitzah*, in *ON BEING A JEWISH FEMINIST* 177-181 (S. Heschel ed., 1983).

<sup>123</sup> Contemporary Voices, in *FOUR CENTURIES OF JEWISH WOMEN'S SPIRITUALITY 1960-1990*, 191-334 (Ellen M. Umansky and Dianne Ashton eds., 1992); Nadine Brozan, *Telling the Seder's Story in the Voice of a Woman*, *N.Y. TIMES*, Apr. 9, 1990, § B, at 4, col.1.; PENINA ADELMAN, *MIRIAM'S WELL: RITUALS FOR JEWISH WOMEN AROUND THE YEAR* (1990).

Jewish bioethics.

At the same time it is important, especially for policy makers, health care providers, and others for whom practical concerns are primary, to remember that, at least on issues such as contraception and abortion, the vast majority of Jews in America do not conform their thinking or their behavior to the tenets of Jewish law. As people sharpen and finalized their thinking on issues concerning the "other end" of life, it will be interesting to see whether the very conservative stance of traditionalist scholars on issues such as withdrawing treatment and physician-assisted suicide<sup>124</sup> are reflected in the private choices and public attitudes of the majority of American Jews.<sup>125</sup>

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<sup>124</sup> See J. David Bleich, *The Quinlan Case: A Jewish Perspective*, in JEWISH BIOETHICS, *supra* note 28; J. David Bleich, *Risks Versus Benefits in Treating the Gravely Ill Patient*, in JEWISH VALUES IN BIOETHICS 57 (Levi Meier ed., 1986); Abraham S. Abraham, *Euthanasia*, in MEDICINE & JEWISH LAW 123 (F. Rosner ed., 1990).

<sup>125</sup> Evidence is beginning to accumulate on Jewish attitudes toward treatment withdrawal, active euthanasia, and physician-assisted suicide. The surveys suggest that American Jews are among the most liberal in our society on this issue. In data derived from National Opinion Research Center surveys in 1977 and 1978, 75.4% of Jews favored allowing euthanasia for the terminally ill (defined as doctors being allowed by law to take a person's life by painless means if patient and family request it). This is a significantly higher percentage than even liberal Protestants; the only group more accepting of euthanasia were those who professed no religious affiliation. Barbara Finlay, *Right to Life vs. the Right to Die: Some Correlates of Euthanasia Attitudes* (sic), 69 SOCIOLOGY & SOCIAL RESEARCH 548-559 (1985).

The 1988 San Francisco Medical Society survey shows that, among Jewish physicians, 74% felt that euthanasia should be an available option for patients faced with terminal illness, 57% felt that physicians were the appropriate persons to carry it out, and 44% responded that they might themselves participate. These were the highest percentages of any religious group in the survey. Steve Heilig, *The SFMS Euthanasia Survey: Results and Analyses*, SAN FRANCISCO MEDICINE 24-26, 34 (May 1988).