

Dr. Alan Jotkowitz is a Senior Lecturer and Director of the Jakobovits Center for Jewish Medical Ethics, Faculty of Health Sciences, B.G.U. and a Senior Physician at Soroka University Medical Center both in Beersheva, Israel.

ON THE METHODOLOGY OF JEWISH MEDICAL ETHICS

INTRODUCTION

The remarkable medical advances of the second half of the twentieth century, which have included such astonishing achievements as organ transplantation and in-vitro fertilization (IVF), have also led to numerous ethical dilemmas. In response to these moral quandaries, the discipline of bioethics was born.

The field, in its infancy, was heavily influenced by the works of primarily Protestant theologians, such as Joseph Fletcher and Paul Ramsey, who responded to the new challenges. They developed moral principles to help guide modern ethical decision-making in bioethics. In many instances, they responded to traditional Catholic morality, which has been heavily influenced by natural law theory. Daniel Callahan has written that the field of bioethics was started by religious thinkers who have been gradually replaced by more recent authorities writing from a secular perspective.¹ Beginning with the pioneering work of Lord Rabbi Immanuel Jakobovits in 1959, entitled *Jewish Medical Ethics*, there have been numerous works published in the field from all denominations of the Jewish world. These decades also witnessed the flourishing of halakhic perspectives on these new ethical quandaries. In particular, R. Moshe Feinstein, R. Eliezer Waldenberg, and R. Shlomo Zalman Auerbach, each in their one way, developed an authentic Jewish response to these scientific and medical advances.

In the non Jewish world, much attention has been paid to the methodological issues in bioethics, or “How to do Bioethics,” but surprisingly, from a Jewish perspective, much less has been written on this crucial

¹ Daniel Callahan, “Religion and the Secularization of Bioethics,” Hastings Center Report, Special Supplement. *Theology, Religious Traditions and Bioethics* 20:4. (1990.), 2-4.

issue. The purpose of this essay is to summarize the various methodological models suggested as appropriate for Jewish Medical Ethics (JME) and to evaluate their strengths and weaknesses.

CASUISTRY AND ITS CRITICS

Traditionally, halakhic decision making has been based on the principles of casuistry – using analogical case analysis to render decisions – as opposed to reasoning from theoretically derived principles. Casuistry, as championed by Jonsen and Toulmin, has been suggested as the optimal methodology to analyze modern bioethical dilemmas.² They used this methodology extensively during their tenure on the National Commission for the Protection of Human Subjects of Biomedical and Behavioral Research. The members of the committee, instead of beginning by developing a set of principles which could then be applied to problematic cases, started immediately by analyzing the cases in order to reach a consensus on practical guidelines. According to Arras, “the new casuistry insists that our moral knowledge must develop incrementally through the analysis of concrete cases.”³ Bioethical principles emerge from the responses to particular cases. In fact, the Committee’s statement of principles was written only after the Committee reached consensus on many of the difficult issues. This method seems very similar to R. Soloveitchik’s contention that a true Jewish theology can only come from a halakhic, legal perspective.⁴ R. Jakobovits also endorses this view:

Secular medical ethics is the effort to turn ethical guidelines or rules of conscience into law, i.e., into legislation. Attempts are made constantly to choose ethical insights and then to gradually distill these into legislative laws adopted by different legislatures, Jewish medical ethics does the reverse. We determine law or legislation, distill it, and then come to the conclusion that it contains certain ethical guidelines. Thus Jewish medical ethics derives from legislation. It does not lead to legislation. We look at legislation as rulings of law that have been given, i.e., halakha which means law or legislation, and then try and extrapolate ethical rules from

² Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University Press, 1988).

³ John D. Arras, “Getting down to Cases: The Revival of Casuistry in Bioethics,” *The Journal of Medicine and Philosophy* 16 (1991), 29-51.

⁴ Joseph B. Soloveitchik, *The Halakhic Mind* (New York, Simon and Schuster, 1986), 101.

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the legislation. Therefore the Jewish concept of medical ethics is the very reverse of that commonly accepted in civilized countries of the world.⁵

This method works well when there are relevant precedent cases. For example, there is extensive discussion in the Talmud and responsa literature on the permissibility of abortion. The starting point for this discussion is the mishna in *Ohalot* (7:6) which states:

With regard to the case of a woman who is having difficulty giving birth, one may dismember the infant in the womb and remove it, limb by limb, because her life comes before the fetus's life. However, if most of the fetus has emerged, one may not touch it because we do not put aside one life for another.

The mishna establishes the principle that one may abort a fetus to save the life of the mother. Rashi explains that the reason one may abort the fetus prior to birth is that it is not considered a “*nefesh*.”⁶ Rambam explains the reason based on the principle of *rodef*.⁷ These reasons have obvious relevance to other cases of abortion. Later decisors discuss the issue of whether abortion is allowed for cases of “great need” of the mother even if her life is not directly in danger. These include issues of maternal health and even extend to situations where the child was conceived in an illegitimate relationship and its birth would cause great anguish to the mother.⁸ The issue of abortion for fetal abnormalities was not relevant to earlier decisors because there was no way of detecting these syndromes. With the advent of modern methods of pre-natal diagnosis and imaging techniques, the question of abortion for disease (such as Tay-Sachs) was faced by modern *poskim*. R. Waldenberg, building on the dispensation of abortion for maternal “great need,” comments:

Is there a greater case of pain and suffering than our case, where pain will be caused to the mother in giving birth to this child, which everyone says will suffer and surely die anyway within a few years... And therefore if there is a situation where halakha permits abortion for reasons of pain and suffering and great need, then this should be the ideal case for allowing it. And it makes no difference if the suffering is physical or emotional, because in many instances emotional suffering is greater than physical suffering.⁹

⁵ I. Jakobovits, “The role of Jewish medical ethics in shaping legislation,” in *Medicine and Jewish Law*, ed. Fred Rosner, 1-18 (Northvale, NJ: Jason Aronson, 1990).

⁶ Rashi, *Sanhedrin* 72b. s.v. *yatsa rosho*.

⁷ *Mishneh Torah, Hilkhot Rotse'ah* 1:9.

⁸ *Responsa She'elat Ya'avets*, part 1 #43.

⁹ *Responsa Tsits Eliezer*, 13:102, 1.

R. Feinstein, primarily basing himself on Rambam,¹⁰ rejects this whole line of reasoning and maintains that abortion is only allowed in the specific situation of *rodef* where the mother's life is in imminent danger. He therefore vehemently opposes abortion in the case of a fetus with Tay-Sachs.¹¹

Notwithstanding their significant disagreements, the methodology that Rabbis Feinstein and Waldenberg use in coming to their respective conclusions is one of casuistry and it is very useful in this situation.

However, as Newman perceptively points out, there are many other dilemmas in Jewish bioethics where the use of casuistry is fraught with difficulties.¹² In particular, he discusses the issue of end of life care. With the advent of new technologies, such as mechanical ventilation and dialysis, patients that would have died quickly in the past can now linger for months, dependent on machines for their survival. These developments force us to confront the question of whether all patients should receive these life extending treatments, or whether they should be allowed to die without aggressive treatment. The Western liberal answer to this question, based on the principles of autonomy and human freedom, has been to let the patient decide how they want to die. The Catholic Church has differentiated between ordinary care – which they require – and extraordinary care, which they leave to the patient's discretion.¹³ Naturally, Jewish decisors were also called upon to address the issue. The primary halakhic source for the discussion is the following gloss of Rema:

It is forbidden to cause the dying to die quickly; such as one who is moribund (*gosses*) for a prolonged time and cannot die. It is forbidden to remove the pillow from under him because of the assumption that certain bird feathers prevent his death. So too, one may not move him from his place. Similarly, one may not place the keys of the synagogue beneath his head [because of the belief that their presence may hasten death], or move him that he may die. But if there is something that delays his death, such as a nearby woodchopper making noise, or there is salt on his tongue,

¹⁰ *Mishneh Torah, Hilkhot Rotse'ah* 1:9.

¹¹ *Responsa Iggerot Moshe, Hoshen Mishpat*, Part 2 #69.

¹² Louis E. Newman, "Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics in Cases and Principles in Jewish Bioethics: Towards a holistic model," *Contemporary Jewish Ethics and Morality: A reader*, ed. Elliot N. Dorf and Louis E. Newman, 140-160 (Oxford: Oxford University Press, 1995).

¹³ John Paul II, "Euthanasia," in *On Moral Medicine: Theological Perspectives in Medical Ethics*, ed. Stephen E. Lammers and Allen Verhey (Grand Rapids, MI: William B. Eerdmans Pub Co., 1998).

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and these prevent his imminent death, one may remove them, for this does not involve any action at all, but rather the removal of the hindrance to death.¹⁴

Newman wonders: do “these texts provide appropriate analogies, and so precedents, for contemporary case of euthanasia?”¹⁵ For example,

1. How does one define “dying” in an age of mechanical ventilation, left ventricular assist devices, and dialysis? Due to the advance of modern medicine the dying can be kept alive for a prolonged period of time; are they therefore no longer considered “dying?”
2. The medieval ruling deals with practices that, from a modern perspective, are difficult to understand. For whatever reason, one is not allowed to move the pillow but one is allowed to remove the salt from his mouth. How do these “treatments” relate to modern medical care, such as the use of antibiotics and insulin, not to mention mechanical ventilation or artificial nutrition? Are these treatments also preventing the dying process, or are they more akin to the feathers of the pillow which one is not allowed to remove, or do they belong to another category altogether?

Newman is correct in pointing out the difficulty in applying these medieval halakhic texts to contemporary problems in medical ethics. However, the conclusion he reaches is, in my opinion, a misunderstanding of the halakhic process. He argues:

The job of the modern ethicist/exegete is to extract this meaning from the texts and apply it to contemporary moral problems. The texts themselves contain meaning and the interpreter merely retrieves this meaning and draws our attention to the inherent connection between the text and the contemporary world. On this view, the interpreter’s role appears to be rather limited, for it is really the texts themselves which yield fruit while the exegete is only, so to speak, the midwife.¹⁶

In this context he quotes the literary theorist Owen Fiss:

The idea of objective interpretation accommodates the creative role of the reader. It recognizes the meaning of a text does not reside in the text as an object might reside in physical space or as an element might be said

¹⁴ Rema, *Yoreh De'ah* 339:1. The gloss is based on *Sefer Hasidim* 723.

¹⁵ Newman, “Woodchoppers and Respirators,” 145.

¹⁶ *Ibid.*, 149.

to be present in a chemical compound, ready to be extracted if only one knows the correct process; it recognizes a role for the subjective...At the same time the freedom of the interpreter is not absolute. The interpreter is not free to assign any meaning he wishes to the text. He is disciplined by a set of rules that specify the relevance and weight to be assigned to the material.¹⁷

Newman maintains that modern *poskim* are in a sense trapped by the text and do not realize the impact of the subjective on an interpretation of the text. R. Moshe Feinstein did not feel this way, and in many instances was not hesitant to put his personal stamp upon the meaning of a text by labeling it a textual error or even a forgery (without any apparent historical support). We mentioned previously R. Feinstein's passionate opposition to abortion. *Tosafot*,¹⁸ however, comment that "one is allowed to kill a fetus in the womb." R. Feinstein maintains that this statement is a scribal error and it should read instead, "not liable for killing." There is also a responsum of Maharit which implies that abortion is not considered murder and can be performed for the needs of the mother. R. Feinstein considers this responsum, which apparently contradicts his opinion, a "forgery written by a mistaken student in his name."¹⁹

In applying precedence texts to contemporary legal dilemmas, Newman quotes the legal theorist Ronald Dworkin:

A judge forced to decide a lawsuit will find, if he looks in the appropriate books, records of many arguably similar cases decided over decades or even centuries past by many other judges of different styles and judicial and political philosophies, in periods of different orthodoxies of procedures and judicial convention. Each judge must regard himself, in deciding the new cases before him, as a partner in a complex chain enterprise of which these innumerable decisions, structures, conventions and practices are the history; it is his job to continue the history into the future through what he does on that day. He must interpret what has gone before because he has a responsibility to advance the enterprise in hand rather than strike out in some new direction of his own.²⁰

¹⁷ Owen M. Fiss, "Objectivity and Interpretation," *Stanford University Law Review* 34 (1982) 744-45.

¹⁸ *Niddah* 44a, s.v. *ihu*.

¹⁹ *Responsa Iggerot Moshe, Hoshen Mishpat*, Part 2 #69. It should be pointed out, however, that most *poskim* would not feel as free as R. Moshe in their approach to texts.

²⁰ Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985) 159.

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Newman feels that a modern Jewish ethicist has to strike a balance between his own individual interpretations and a reliance on precedent in reaching a decision. This formulation is very consistent with R. Feinstein, who writes:

I maintain that it could lead to the end of the Torah, God forbid, if we only decide issues that are written in the books. If new questions arise that are not in the books and we do not decide them – even if we have the ability to do so – in my opinion, this is forbidden because the Torah should also grow in our time. And someone who is able to decide questions that come before him after exploring and analyzing the Talmud and previous decisors with logic and vision, even if the issues are related to a new matter that the books did not address, is obligated to do so.²¹

Newman also faults contemporary halakhists for failing “to defend their particular way of selecting and reading the sources against other possible or actual readings.”²²

However, the responsa literature is full of decisors arguing the merits of their positions. For example, R. Waldenberg responds incredulously to R. Feinstein’s suggestion that the words of *Tosafot* are a scribal error:

With all due respect, no sir, this is not the way; we live according to the words of the great sages of the past who have all tried in their own way to explain the words of *Tosafot* in *Niddah* and none of them suggested the easy and simple way out that there was a mistake in the text.²³

To R. Feinstein’s assertion that the responsum of Maharit is a forgery, R. Waldenberg comments,

What does R. Feinstein do with these words of Maharit, he takes the easy way out and writes that you should not rely on this responsum because it is definitely a forgery from a mistaken student who wrote it in his name. I am perplexed on how one is able to uproot a whole responsum on [this basis]...and that is even if I didn’t have a proof against this. But I do have a proof against this (that the responsum is a forgery).²⁴

R. Waldenberg then cites a student of Maharit who quotes the disputed responsum in his name, thus testifying to its veracity.

²¹ *Responsa Iggerot Moshe, Yoreh De’ah* Part 1 #101.

²² Newman, “Woodchoppers and Respirators,” 155.

²³ *Responsa Tsits Eliezer*, Vol 14, #100:2.

²⁴ *Responsa Tsits Eliezer*, Vol 14, #100:5.

THE USE OF AGGADA

If, as Newman suggests, legal casuistry is not sufficient to reach decisions in JME, what other methodologies might be useful? R. Ezra Bick was also keenly aware of the problem of application in JME.²⁵ In trying to answer the question about who the mother is considered to be in a case of a donated ovum, he admits that conventional halakhic methodology fails because of a lack of relevant legal sources. He therefore suggests that we try to determine how the sages conceptually viewed motherhood through an analysis of aggadic sources. He attempts to prove that the sages viewed motherhood as akin to an agricultural process and the role of the mother is to nurture and cultivate the seed of the man. Paternity is determined by sperm donation, but maternity is established by becoming pregnant and giving birth. When there are no specific halakhic parallels, many *poskim* use aggadic sources, particularly in the field of JME. For example, in answering the question alluded to above – whether a dying patient should be treated aggressively – R. Feinstein looks to the story of R. Yehudah ha-Nasi's death to determine the halakha:

On the day that Rebbe was dying, the Rabbis instituted a fast and begged for mercy and proclaimed that anyone who said that Rebbe is dying should be stabbed with a knife. The housemaid of Rebbe climbed to the roof and said, “The heavens are requesting Rebbe, and the earth is requesting Rebbe. May it be Your will that the earth should overcome the heavens.” When she saw how many times Rebbe had to go to the bathroom and remove his *tefillin*, and the suffering involved, she said, “May it be your will that the heavens will overcome the earth.” When she saw that the students continued to pray, she took an urn and threw it to the ground. The students stopped praying (because of the sound of the urn breaking) and Rebbe's soul departed.²⁶

In a different gemara, R. Dimi says that someone who does not visit the sick does not have the opportunity to pray for them to live or to die.²⁷ Ran explains this statement based on the story of Rebbe's housemaid that at times it is appropriate to pray for a patients' death if they are suffering greatly.

²⁵ Ezra Bick, “Ovum Donations: A Rabbinic Conceptual Model of Maternity,” *Tradition* 28:1 (1993) 28-45. Reproductive and therapeutic cloning would be another obvious example of the difficulty in using an approach based on casuistry in determining the moral permissibility of a new technology.

²⁶ *Ketubot* 104a.

²⁷ *Nedarim* 40a.

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R. Feinstein infers from the gemara in *Ketubot* and Ran's comments that in addition to seeing that at times it is appropriate to pray for a suffering patient to die,

With regard to terminal patients, if doctors are unable to cure them or relieve their suffering, but they are able to give the patients medications that will extend their suffering life, one should not give them these medications but should rather leave them alone.²⁸

The halakhic lesson that R. Feinstein learns from the story is that there are instances where one is not required to extend life, such as the suffering of a terminally ill patient.

However, the far-reaching conclusions that R. Feinstein learned from the story of Rebbe's death are certainly open to dispute on many points:

1. It is not clear from the story that the actions of the handmaid were correct in stopping the students from praying for Rebbe's. The students obviously felt otherwise, and felt it was appropriate to pray for Rebbe's recovery.
2. The reason that the handmaid wanted Rebbe to die was apparently the great suffering he was experiencing. Rashi says the suffering was due to him having to take on and off his *tefillin* each time he went to the bathroom.²⁹ A far simpler solution than praying for his death would have been for Rebbe to stop wearing his *tefillin*. But even if one maintains that the suffering was due to the gastrointestinal disease Rebbe was suffering from, and not the repeated removal of his *tefillin*, is this level of suffering sufficient to maintain that one would rather die? How do we evaluate suffering? According to R. Feinstein the sole reason for not offering life extending treatment is suffering. This obviously is very subjective and difficult to measure.
3. Even if one accepts the interpretation of R. Feinstein and Ran with regard to prayer, does that necessarily mean that one should extend the principle to medical interventions? How does this principle abrogate our obligation to heal the sick?
4. In addition to praying for Rebbe's death, the handmaid also did an action (throwing the urn to the ground) to stop the students from praying. In modern terminology this seems more akin to a question of withdrawing therapy, rather than not starting therapy. Is this also allowed according to R. Feinstein?

²⁸ *Responsa Iggerot Moshe, Hoshen Mishpat*, Part 2 #73:1.

²⁹ Rashi, *Ketubot* 104a.

5. The handmaid apparently reached her conclusion that death would be preferable to life without consulting Rebbe. Was it her decision to make?

All these points demonstrate the difficulty in using aggadic sources to determine the halakha. In addition, those who disagree with R. Feinstein point to other sources that suggest that Hazal preferred a life of suffering over death. For example, a guilty *sotah* typically died immediately from the potion she was given to drink, but if she had certain merits, her life was extended in pain³⁰ – there, an extended life of suffering seems to be viewed as a positive development.

COVENANTAL THEORY

In response to the same moral dilemmas faced by Jewish thinkers, Protestant theologians such as Paul Ramsey, Joseph Fletcher, and Stanley Hauerwas began searching for a methodology to answer these ethical questions. Based on a thoughtful analysis of the scriptures they developed a covenantal theory of ethics. Each thinker formulated his own particular theology, but they are all based on the existence of a covenant between man and God; man's moral actions should reflect this holy partnership. The basic problem with this perspective is that there can be many, even contradictory, interpretations of this covenant. For example, Fletcher argues for a covenant based on almost limitless human freedom and autonomy and this leads him to argue for the legalization of euthanasia and support for all methods of artificial reproduction.³¹ For Fletcher, the overriding ethical principle is *agape*, or love, and what is moral is determined by how this principle is best served. In this consequential approach, which he labeled "situational ethics," the ends always justify the means.

However, Ramsey, also based on covenant, maintains that human ethical relations should be modeled on the relationship of God to man, and therefore there exists an unbreakable bond of covenantal loyalty between men.³² This is interpreted to mean that man must always act with love and charity towards his fellow man. In most instances this means using all of one's power to cure their illness, but in the case of the suffering terminal patient it means easing the dying process. The emphasis for

³⁰ Maimonides, *Sotah* 3:20.

³¹ Joseph Fletcher, *Morals and Medicine Princeton* (Princeton, NJ: Princeton University Press, 1954).

³² Paul Ramsey, *The Patient as Person* (New Haven, CT: Yale University Press, 1970).

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Ramsey is on relieving the suffering of the patient and on maintaining a human presence until his last breath. Active euthanasia is considered a violation of this covenant. Ramsey was also opposed to many forms of artificial reproduction because he viewed them as intruding upon the power of God, and as a violation of the holy covenant of marriage ordained by God.³³ In Ramsey's deontological approach, the covenant is expressed in rules and ethical principles that govern moral behavior.

In response to the difficulties in using casuistry, Jewish thinkers also attempted to develop an authentically Jewish approach to medical ethics based on covenant.

In the thought of R. Irving Greenberg, God makes a covenant with mankind to control His power in order to enable man to become a partner in creation.³⁴ However, man must learn to use the gift of power wisely. This dialectic, as it relates to medicine, requires the physician to do everything in his power to fight disease, but at the same time to recognize the dignity of the patient and the image of God that resides in him. This obligates the physician to involve the patient in decisions relating to his care and be sensitive to the particular physical and psychosocial needs of the patient. In translating this covenant to practical terms, R. Greenberg maintains:

The original birth control prohibition in Jewish law reflects the fear that human control over who shall be created, who shall be given life, is somewhat robbing God of his power. What is really involved in birth control is an ethical trade off: the quality of life versus the quantity of life. It is necessary to know that quantity is important. It's also essential to know that quality matters. If the marriage needs more time, if the mother needs more time or cannot handle the number of children, then it is ethical not to have the child rather than have it...The same holds true on questions of abortion. There is a profound ethical truth behind all those who oppose abortion. It is important for doctors to see it; when ending life, even during this prenatal stage, becomes casual, there will be a weakening of respect for all life. Yet abortion can also be an act of taking responsibility for the quality of life of a mother; it can be the difference between life and a blasted life.³⁵

³³ Paul Ramsey, "Preface to The Patient as Person," in *On Moral Medicine: Theological Perspectives in Medical Ethics*, ed. Stephen E. Lammers and Allen Verhey, 53-56 (Grand Rapids, MI: William B. Eerdmans Publishing Co., 1987).

³⁴ Irving Greenberg, "Toward a Covenantal Ethic of Medicine," in *Jewish Values in Bioethics*, ed. L. Meier (New York: Human Sciences Press, 1986).

³⁵ *Ibid.*, 145.

Not surprisingly, the use of covenantal theory has not caught on among traditional decisors. As mentioned previously, it is open to a myriad of interpretations, and *poskim* are very hesitant about using non-Talmudic sources in reaching halakhic conclusions. However, echoes of it can be found in the works of some authorities. For example, R. Waldenberg was opposed to cosmetic surgery because, “one should know and believe that there is no creator like God and He created each person in a unique way and one should not add or detract from this creation.”³⁶ In performing plastic surgery, the physician oversteps his boundaries and competes with God for power.

TELEOLOGICAL APPROACHES

In the midst of the great American abortion debate, the theologian James Gustafson published an article entitled *Abortion: A Protestant ethical approach*.³⁷ He presents a hypothetical case of an unemployed healthy woman from a broken home who was raped by her former husband and now approaches her Pastor for guidance with regard to the question of abortion. Rather than simply giving his opinion on the morality of abortion in this case, Gustafson makes three significant points:

1. The role of the Pastor should not be one of an impassionate external judge basing his decision on a thoughtful analysis of philosophical rules or theological or civil law. The moralist should recognize that he has an interpersonal relationship with the woman and try to comprehend her and her particular situation. This requires empathy and open communication with the goal of understanding her past and of determining her moral values.
2. The role of the Pastor is not to offer an authoritative decision but to help her explore the options open to her, and to analyze the various moral claims at stake. Gustafson concurs that fetal life is to be protected rather than destroyed, but recognizes that there are exceptions to this rule. The moralist has an obligation in this context to render a judgment, all the while recognizing the liberty of the woman’s conscience.
3. The responsibilities of the Christian moralist do not end after a decision is made; he is obligated to offer continued social and moral support to this unfortunate woman.

³⁶ *Responsa Tsits Eliezer*, 11:41.

³⁷ James M. Gustafson, “A Protestant Ethical Approach,” in *On Moral Medicine: Theological Perspectives in Medical Ethics*, ed. Stephen E. Lammers and Allen Verhey, 600-611 (Grand Rapids, MI: William B. Eerdmans Publishing Co., 1987).

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In this particular case, due to the fact that the pregnancy occurred as a result of a sexual crime and the particular situation of the woman, Gustafson felt an abortion was justified.

Carol Gilligan has famously pointed out that ethical thinking takes place differently depending on gender,³⁸ and one of the powerful critiques of modern bioethics by feminist scholars is that the distinctive moral voice of women has been overlooked in the field. Men tend to decide moral quandaries based on rules, while women look at the particulars of a case. Gustafson's approach to the question of abortion is consistent with this feminine approach. While halakha is famous for being a rule-based legal system, it also recognizes the importance of the particulars of a case in rendering a decision. In this context, notwithstanding his relatively restrictive attitude towards abortion, R. Aharon Lichtenstein writes:

The question of abortion involves areas in which the halakhic details are not clearly fleshed out in the Talmud and Rishonim, and in addition the personal circumstances are often complex and perplexing. In such areas there is room and in my opinion an obligation for a measure of flexibility. A sensitive posek recognizes the gravity of the personal situation and the seriousness of the halakhic factors.He may reach for a different kind of equilibrium in assessing the views of his predecessors, sometimes allowing far-reaching positions to carry great weight and other times ignoring them completely. He might stretch the halakhic limits of leniency where serious domestic tragedy looms, or hold firm to the strict interpretation of the law, when as he reads the situation, the pressure for leniency stems from frivolous attitudes and reflects a debased moral compass.³⁹

R. Hayyim David Halevy's responsum on the permissibility of living organ donation also reflects a feminine ethical perspective: "And particularly regarding the mother and father as donors (because the parents always have mercy on the children), in this regard they are like the patient himself who is allowed to put himself at risk in order to have the operation. And therefore it is obviously allowed."⁴⁰ R. Halevy was sensitive to the contextual circumstances and relational bonds that motivate a parent as an organ donor. A mother or father as a donor is different from an

³⁸ Carol Gilligan, *In a Different Voice* (Cambridge, MA: Harvard University Press, 1982).

³⁹ Aharon Lichtenstein, "Abortion: A Halakhic Perspective," in *Leaves of Faith*, vol. 2 (Jersey City, NJ: Ktav, 2004). R. Lichtenstein expands on these views in "The Human and Social Factor in Halakhah," in the same volume.

⁴⁰ Hayyim David Halevy, *Asei Lekha Rav*, vol. 4, 322.

ethical standpoint than any other donor. There is no real sound halakhic rationale for stating that “they [the parents] are like the patient himself” in allowing the transplant; his position is rather based on a profound psychological understanding of the parent-child relationship.

REFLECTIVE EQUILIBRIUM

Because of the inadequacies of other methodologies, Reflective Equilibrium (RE) is currently thought of as the best way to “do” modern bioethics, and Mackler has argued for its use in JME.⁴¹ RE, as envisioned by Rawls, is a method of ethical decision-making that attempts to develop ethical principles from the ethical intuitions of “component moral judges.”⁴² These time-tested moral principles can then help us decide if our moral intuitions are sound. According to Rawls, there is a constant back and forth between our intuitive or considered judgments and between theoretical ethical principles, until a morally accepted conclusion is reached. In this holistic method, the decisor draws on various methodologies and resources in reaching a decision. The role of the competent moral judge who is intelligent, impartial, well informed, and empathetic is crucial to this process. This description of Rawls is consistent with how the halakhic process works; with the addition of the element of legal casuistry when appropriate. In rendering a decision, the *posek* who plays the role of competent moral judge in Rawls lexicon bases his decision on precedent legal cases, his halakhic intuitions and moral principles developed from a Torah perspective. Haym Soloveitchik,⁴³ in pointing out the importance of intuition in *psak*, cites the *Hatam Sofer*, who maintained that the halakhic intuition of a *posek* in answering a question is more important than his actual arguments.⁴⁴

On the other hand, Marvin Fox argues,

Religious and philosophical accounts of Jewish spirituality are sound and meaningful only to the extent that they derive from the Halakha. The

⁴¹ Aaron L. Mackler, “Cases and principles in Jewish Bioethics: Towards a holistic model,” *Contemporary Jewish ethics and morality: A reader*, ed. Elliot N. Dorf and Louis E. Newman, 177-193 (Oxford: Oxford University Press, 1995).

⁴² John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971).

⁴³ Haym Soloveitchik, “A Response to Rabbi Ephraim Buckwold’s Critique of ‘Rabad of Posquieres: A Programmatic Essay,’” *The Torah u-Madda Journal* 14 (2006/7) 193-214.

⁴⁴ Shelomoh Sofer, *Ha-Hut ha-Meshullash*, Tel Aviv 1963, 97-99.

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deepest religious emotion, the subtlest theological understanding, can only be Jewishly authentic to the extent that they arise from reflections on matters of Halakha.⁴⁵

It is obvious that there are times where moral principles are influencing halakha, as opposed to being derived from them. For example, R. Waldenberg's strident opposition to artificial insemination (AI) is not based on strictly halakhic objections, but is rooted in theological concerns:

This whole question of using AI is an abomination to the tents of Jacob, and there is no greater desecration of the family in the tents of Israel. This (AI) destroys all the principles of purity and sanctity in the life of a Jewish family which have distinguished us from the time we became a nation. It also breaks the chain between sons and fathers...and who are those who donate their sperm for this purpose, in order to receive money? They are the lowest of the low, and what kind of children can come from this seed? And the seed of the father is what creates the brain in the fetus...the *Sefer ha-Hinnukh* teaches us that the nature of the father is hidden in the child. And how can the holy children of Israel think we can build from these seeds and not see that it will bring destruction upon the family?⁴⁶

R. Feinstein, who permits it, responds:

But in truth, there is nothing in what I wrote and instructed that will cause any desecration of the sanctity of Israel, but rather it is the eternal truth from our Rabbis, the *Rishonim*. And your objection comes from philosophies based on external knowledge, which influences even very wise people to understand the *mitsvot* of the Torah based on this alien knowledge...but I am not like that, and all my philosophies come only from knowledge of the Torah without any outside influences...And any reasons that come from external knowledge or explanations that come from the heart are worthless, even if they are more stringent and are thought to increase the purity and sanctity of Israel.⁴⁷

⁴⁵ Marvin Fox, "The unity and structure of Rabbi Joseph B. Soloveitchik's thought," *Tradition* 24:2 (1989), 49.

⁴⁶ *Responsa Tsits Eliezer*, Vol. 9#51;4:5,1. See Daniel J. Lasker, "Kabbalah, Halakhah and Modern Medicine: The Case of Artificial Insemination," *Modern Judaism* 1988 8:1-14, who maintains that kabbalistic thought influenced R. Waldenberg's position on the issue.

⁴⁷ *Responsa Iggerot Moshe, Even ha-Ezer*, Part 2#11. This response is part of a correspondence between R. Feinstein and R. Breisch on this issue.

The argument between Rabbis Waldenberg and Feinstein is not based on legal casuistry but on theological principles related to the sanctity and uniqueness of the Jewish people which are not obviously relevant to questions in JME.

As R. Soloveitchik has pointed out, the halakhic “competent moral judge” must have a mastery of all aspects of Jewish law, accept the sacredness and totality of the halakha, and interpret the halakha in accordance with traditional methods.⁴⁸ In addition, as R. Feinstein has noted, “You can’t just wake up in the morning and decide you’re an expert on answers. If people see that one answer is good, and another answer is good, gradually you will be accepted.”⁴⁹ This implies that, in addition to knowledge and discernment, the *posek* also has to be accepted by the people. These conditions obviously limit those who can be viewed as competent halakhic judges to answer the difficult question in modern bioethics.

NEW DIRECTIONS

“Transhumanism” has emerged as one of the defining principles of modern bioethics. As defined by Bostrom, it maintains that “current human nature is improvable through the use of applied science and other rational methods, which may make it possible to increase human health-span, extend our intellectual and physical capacities, and give us increased control over our own mental states and moods.”⁵⁰ Opposed to this philosophy is a school of thought labeled “bio-conservatism” which is generally against the use of technology to improve human nature, for fear that it will undermine human dignity. Its most prominent proponent, Dr. Leon Kass, writes, “To turn a man into a cockroach – as we don’t need Kafka to show us – would be dehumanizing. To try to turn a man into more than a man might be so as well. We need more than generalized appreciation for nature’s gifts. We need a particular regard and respect for the special gift that is our own given nature.”⁵¹ Most contemporary Orthodox Jewish bioethicists do not identify with the concerns of the bio-conservatives.

⁴⁸ Joseph B. Soloveitchik, *Community, Covenant, and Commitment: Selected Letters and Communications of Rabbi Joseph B. Soloveitchik*, ed. Nathaniel Helfgot (Jersey City, NJ: Ktav, 2005).

⁴⁹ Quoted in *The New York Times*, May 5, 1975.

⁵⁰ N. Bostrom, “In Defense of Post Human Dignity,” *Bioethics* 19:3 (2005) 202-14.

⁵¹ L. Kass, “Ageless bodies, happy souls, biotechnology and the pursuit of perfection,” *The New Atlantis* Spring (2003) 1.

TRADITION

For example, regarding in-vitro fertilization, Prof. Avraham Steinberg writes,

Judaism does not espouse the philosophy that absolutely prohibits tampering with the laws of nature and forbids man and technology to modify natural processes. On the contrary, man is a partner of God in the improvement and perfection of the world in all its aspects.⁵²

This theme is echoed by R. J. David Bleich in discussing cloning:

It is abundantly clear that human intervention in the natural order is normatively interdicted only to the extent that there are explicit prohibitions limiting such intervention.....Jewish tradition, although it certainly recognized divine proprietorship of the universe, nevertheless, gratefully acknowledges that while “The heavens are the heavens of God,” yet “the earth has He given to the son’s of man” (Psalms 115:16). In bestowing that gift upon mankind, the Creator has granted man dominion over the world in which he lives, and over the living species that are co-inhabitants of that world.⁵³

Perhaps the most vocal proponent of this activist approach is R. Dr. Moshe Tendler, who, over the course of his long career, has argued eloquently for the compatibility of science and halakha and the normative obligation for man to wisely use all available technological means to improve the human condition.⁵⁴

Students of R. Soloveitchik will see echoes of this approach in many of his writings.⁵⁵

It will be interesting to see if more conservative positions begin to emerge in the Orthodox world, along the lines of R. Waldenberg’s belief that “there is no Creator like God and He created each person in a unique way and one should not add or detract from this creation.”

No one methodology can adequately account for the complexity and diversity of opinions in JME, but RE is helpful in that it attempts to account for the various legitimate sources that a *posek* can use in rendering

⁵² Avraham Steinberg, “In-vitro Fertilization,” in *Encyclopedia of Jewish Medical Ethics* (Jerusalem, Feldheim Publishers, 2003) 575.

⁵³ J. David Bleich, “Cloning: Homologous Reproduction and Jewish Law,” *Tradition* 32:3 (1998), 56.

⁵⁴ Most recently, see John D. Loike, and Moshe David Tendler, “Ethical Dilemmas in Stem Cell Research: Human-Animal Chimeras,” *Tradition* 40:4 (2007), 20-50.

⁵⁵ See, for example, Joseph B. Soloveitchik, *The Lonely Man of Faith*, Northvale, Jason Aaronson, N.J 1997.

a decision. Modern science continues to present humanity with complex moral quandaries. New technologies on the horizon, such as reproductive cloning and the creation of human-animal chimeras, all necessitate that empathic decisors mobilize the wealth of the halakhic, aggadic, and philosophical tradition in rendering authentic Jewish responses to these difficult questions.

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