Aging and the aged in Jewish law

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The Elderly, The Medical System, and the Literature of *Halakhah*

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One of the most difficult of all the moral dilemmas pertaining to the field of "medical ethics" involves the decisions that must be made about allocating health-care resources. This problem can present itself in two forms. In the first, which we might call the "micro" situation, physicians or surgeons functioning in conditions of war or of mass trauma may find that they cannot care simultaneously for all the wounded or injured and must therefore decide whom to treat first. In the second, or "macro" situation, entire communities or societies must determine just how they will apportion their available medical resources among all those who offer a valid claim on them. As in the micro case, the predicament here is one of limited resources. Whether for reasons of absolute shortage (for example, organs for transplant) or for reasons of expense (say, with new and sophisticated medical therapies and surgical procedures), it is unlikely even in affluent societies that sufficient means can or will be made available to provide every patient with every useful treatment in existence. In either case, those who control the resources (the physicians, the hospital, society as a whole) must decide which person, group, or institution will be given a priority or preference in receiving an allocation of medical resources and how large that allocation will be. Ethicists refer to this as the task of "patient selection."[1] Jews, in the spirit of *unetanneh tokef,* the powerful *piyyut* of our High Holiday liturgy, might well call it the choice of "who shall live and who shall die." This question has a special application to our topic: given that physicians, hospitals, and the community at large must allocate scarce or expensive life-saving resources according to some set of criteria, are they permitted to use age as one of those criteria? Is it morally proper to grant to younger

persons a higher priority in the receipt of medical care and to limit or deny to the elderly access to those resources? Some rather persuasive reasons might be cited to justify such an age-based criterion. Aged persons are on the average less likely than younger ones to benefit from medical treatment; thus, if it is the essential purpose of medicine to heal, to cure disease, or to ensure an acceptable "quality of life," we might well argue that it is more efficient to spend our limited resources on those who can actually be restored to health and vigor. To deny expensive treatments to the elderly, who currently use a portion of health care resources far out of proportion to their statistical representation in society, would allow us to treat many more younger people, to invest more funds and energy into medical research, prenatal care, and care for children, particularly those who are poor. The social benefits that could accrue from this reallocation of resources are potentially enormous. And to those who would object that it is unfair to discriminate against patients on the basis of age, we might also defend our criterion as a matter of simple justice. The elderly, we would say, have succeeded in attaining the normal human life span; and once people have reached this age, medical science need no longer concern itself with helping them live longer and ought to direct its attention toward helping younger persons extend their own lives, fulfill their dreams, and achieve their purposes.

None of the arguments in the preceding paragraph, or others that might be raised to the same end, is free of difficulty. Each one can be criticized or refuted. I cite them here not to advocate the use of age as a criterion for setting priorities in medical treatment and resource allocation, but simply to indicate that a case can be made in favor of such a procedure. Indeed, many communities, convinced

by these and similar arguments, already use age as a standard by which to determine patient selection.[2]

My goal in this paper is to test this case—this reality—against the principles of the Jewish ethical tradition, both as it is formulated in our literary sources and as it might be understood by those of us of a liberal religious outlook. And it is for this reason that I turn to the discussion of this issue in the *Halakhah,* that genre of Jewish writing in which, over many centuries, the sages of Israel have worked out the contours of Jewish religious life. It is here, in the books of Jewish law, that the rabbis argue and deliberate in the most extensive and intensive manner the precise definitions of our obligations to God, to ourselves, and to our fellow human beings. Does the *Halakhah* offer us firm guidance as to how we should fulfill the awesome responsibility of determining priorities in health care and medical treatment?

To consider this question, I want to look at two *teshuvot,* or responsa, written by Rabbi Moses Feinstein, who during his lifetime was regarded as the outstanding Orthodox *posek* (halakhic authority) in North America and, perhaps, the world. These relatively brief responsa are not the only existing halakhic treatments of our topic, but taken together they constitute the most systematic and sustained ruling on setting priorities in medical care, including priorities based on age, ever issued by a leading *posek.* This fact alone warrants their careful study. Yet these responsa also provide us, in sharp detail, a particular example of *Halakhah* as a literary exercise and a rhetorical activity. By what he says, how he says it, and what he does *not* say, Rabbi Feinstein creates a textual environment in which he operates as an interpreter of Jewish law. His text thus invites us to participate in that environment, to share his view

not only of the substantive legal question, but also of his notion of the relationship of the *posek*, as the spokesperson of *Halakhah,* to his correspondent (the *sho'el*), the legal tradition, and to the wider halakhic community. These responsa, in other words, afford us an opportunity to ask some fundamental questions concerning the *Halakhah* and the way in which rabbis determine it. Does Rabbi Feinstein's decision correspond to what we would consider the correct answer to the question before him? Are other, arguably "correct" answers available? And in his choice of literary style, the manner by which he presents his decision, what does Feinstein reveal about his conception of *pesikah,* the process of halakhic decision making, and of the role of the halakhic authority in communicating *pesikah* to those who seek its guidance?

This essay will consider these questions. Since it *is* an essay and not an actual responsum, I do not pretend to offer firm answers to them; at times, all I will be able to provide is further questioning. Yet I think this is important, because confessing our uncertainty is the indispensable first step in the process of halakhic reasoning, a process that, I shall argue, is best understood not as a deductive activity leading to precise conclusions but as a conversation among plausible alternatives. And it is this understanding, I think, that informs our own approach as liberal Jews committed to *Halakhah* as a central language of Jewish religious expression.

THE RESPONSA

The first of R. Feinstein's rulings[3] addresses the following hypothetical situation. Two patients are brought to a hospital's emergency room. The first patient, according to the physicians' diagnosis, requires immediate and intensive treatment, but even

with this treatment it is unlikely that he will recover. At best, this patient's life will be lengthened by a relatively short span, but he will die of the disease or injury that has brought him here. The second patient, by contrast, does not appear to require immediate attention, but the doctors are confident that if he *does* receive that treatment he will recover from his disease or injury. There is but one bed in the emergency room. Which person is to be treated first? Rabbi Feinstein answers that if neither patient has yet been taken into the emergency room, we offer treatment first to the second patient, the one whom the physicians believe they can cure. If, however, the first patient has for some reason already begun to receive care, that treatment may not be discontinued. The reason for these priorities, says Rabbi Feinstein, is *pashut,* obvious:

> Clearly, one who we believe will live a normal lifespan takes precedence over those whom we cannot cure. But this principle applies only to the community at large. The patient himself has no obligation to save another at the cost of his own life, and once he has been offered medical treatment he has acquired a legal title to that treatment. Whether he pays for it or is accepted as a charity patient, he enjoys a lien *(shi'abudim)* over the hospital, its doctors, and its medical services. He is not required —and may even be forbidden—to sacrifice this legal title, through which he can live for whatever short time is left to him, even for the sake of one who can live a normal lifespan.

This is the case even if the second patient *does* require immediate intensive care. As long as the terminal patient has begun to receive

treatment, even if the decision to admit him into the emergency room was made in error (that is, we intended to admit the second patient but admitted the first one by mistake), that treatment may not be discontinued before it has been completed, even to save the life of the second patient.

In the second *teshuvah,* Rabbi Feinstein clarifies some of the terminology used in the above decision.[4] He explains that the patient with a "normal lifespan" is one whose illness can be successfully treated to the point that, according to medical prognosis, he will live for at least one year. The patient whom doctors believe they cannot "cure" is one who is expected to die from his disease or injury within one year. The latter patient is in the legal category of *tereifah,* to whom the halakhic sources refer as *gavra ketila,* an already-dead person, one who has lost his essential hold on life.[5] Although we are certainly not permitted to kill the *tereifah,* we are justified in allowing others to take precedence over him when the question involves the saving of life. If, however, the physicians believe that the second, terminal patient will live for longer than one year, he or she is no longer a *tereifah;* both patients now have an equal claim to our medical attention. Whom then do we treat first, when we cannot treat both simultaneously? Rabbi Feinstein writes that the doctor must first treat

> the patient who called first, or the one who is closest to the doctor's home. If they are equal in this regard, the doctor must observe the priorities set forth in the *mishnah* in *Horayot* 13a. And if this cannot be established, then lots *(goral)* must be drawn to establish the order of treatment.

Finally, there is a third decision, one that comes at the end of this second responsum.[6] Here, Rabbi Feinstein states simply that an elderly patient *(zaken muflag)* is entitled to treatment on an equal basis with a younger person. The same is true on the question of priorities: the doctor should not consider age as a factor in determining which patient to treat first.

From these decisions, we learn two things. First, there is a clear and precise order of priorities, a system of rules by which Jewish law would have us make the difficult decisions about allocating medical resources. Second, a person's age is irrelevant to setting this allocation. The elderly have an equal right to the community's life-sustaining resources that cannot be denied or limited to them for the simple reason that they are older than other legitimate claimants.

ON RESPONSA AS LITERATURE

Before we evaluate the specifics of Rabbi Feinstein's position, we ought to consider the grounds on which we make that evaluation. By what means do we ascertain that these decisions are "right" or "wrong"? How do we determine that they represent the correct interpretation of Jewish law or that other answers offer a better interpretation? Indeed, are these at all legitimate questions to ask? Is it possible to sit in judgment on the work of an eminent halakhic authority whose rulings are treated with enormous respect, and even reverence, by the religious community, which looks to him for authoritative instruction?

These questions do not, of course, admit of easy answers. But we might begin our thinking by noting that a rabbinic responsum is a *text,* a literary creation, and that like all literary

works—including the judicial opinion—it can be evaluated according to its success as an act of writing.[7] Accordingly, it may be of significance that Rabbi Feinstein composed these *teshuvot* in a distinctive, declarative literary style. They are short and to the point; in them, their author *recites* the *Halakhah* without supplying much in the way of source citation or accompanying argument. This does not mean, of course, that there are no talmudic or halakhic sources that could have been cited, since all Jewish legal decision proceeds from an interpretation and an application of traditional texts.[8] Feinstein has chosen, rather, for whatever reason, to omit these sources from his *teshuvot*. And, as a matter of fact, this choice of style has much to recommend it. It is clear and straightforward, leaving the reader in no doubt as to the *pesak,* the legal conclusion. If we assume that Rabbi Feinstein's readers are interested primarily in that conclusion, the halakhic "bottom line," these responsa certainly offer them what they want.

Yet if we determine to measure these responsa by a literary yardstick, we cannot let matters end there. The fact is that most responsa, including those of Rabbi Feinstein, are not written in such a simple and declarative style.[9] This is because the audience of a responsum, the community of rabbinic and lay scholars that constitute its primary readership, usually want a great deal more than the bottom line. Although these readers are certainly interested in the answer a *posek* gives to a question of *Halakhah,* they also want to know how he arrives at that answer, how he supports his ruling according to the texts and sources of Jewish law. They want this information because the law is seldom as simple, obvious, and free of doubt as Feinstein makes it appear in this case. The most interesting questions of *Halakhah* are those that are neither undisputed nor indisputable. For many issues, especially those of great

moment, we can maintain more than one plausible, arguably "correct" interpretation of the sources. Were it otherwise, were the answers to these questions truly obvious or self-evident, they would not have been submitted to the responsa process, to the judgment of the great *poskim,* the "appellate" jurisdiction of Jewish law, whose task it is to weigh the available alternative answers and to determine which one represents the best and most convincing understanding of the sources of Jewish law.

This is why most rabbinic responsa, like the Talmud itself, are written in a discursive style, a manner of speaking and writing that by its nature concedes that the law is not a one-sided phenomenon. The tone of such a responsum is not declarative but argumentative. It does not merely state its conclusion; it *justifies* it, making a case for the *posek*'s answer and against others that might be offered. It does not demand that we accept its ruling as a pronouncement *ex cathedra,* of oracular fact. Concerned as much about the "why" of the *Halakhah* as it is about the "what," it asks us to embark on an intellectual journey whose path is marked by the author's reasoning and whose destination is the *pesak.* It invites us not only to agree with that conclusion, but to think and to talk about the *Halakhah* in a particular way rather than in other ways. It suggests reasons why we should understand the *Halakhah* and our perception of our Jewish roles and responsibilities in the manner that this author understands and perceives them. In so doing, it allows us to participate in the discussion, the debate, the age-old *shakla vetarya* (dialectic) by which the rabbinic mind has sought to discern the will of God. This style, which we might designate the way of *conversation,* represents *Halakhah* not so much as an exercise of authority, but as a conversation, a process of thinking and talking and imagining ourselves as Jews.

It is for this reason that the responsum can usefully be studied as a form of literature, a genre of writing. In this study, the *posek* is perceived as, among other things, a writer, the author of a text; and his responsum, like any other text, is a literary performance. Through his choice of words and style, his description of the facts of the case, the arguments he uses and does not use, and his arrangement of those arguments, the *posek* effects a literary creation, a world that lives within the confines of his text. The text is no mirror of reality; it is rather a rhetorical reconstruction of it, an effort to persuade its readers to view the subject under consideration in the way the author views it. In our case, a literary evaluation of Rabbi Feinstein's work[10] would focus on his decision to invoke the declarative style, to frame his answer as though it is not at all a matter of doubt. It would judge the success of his rhetorical effort by imagining the alternative: how would these decisions have read had their author chosen to write them in the discursive style that characterizes most of the responsa literature? What sources, it would ask, might he have cited on the way to reaching his *pesak*? Do these texts naturally yield a single and coherent legal message, as Feinstein's univocal style implies? Or is that coherence a product of the *posek*'s construction, his combining of the materials in such a way as to remove—or ignore—contradiction, difficulty, and alternative interpretations?

The literary approach will show us that the latter is the case. There are other plausible and persuasive ways of constructing the message of Jewish law on allocating life-sustaining resources, and it is not *necessarily* true that the elderly have an equal claim to those resources. The goal here is to point out these alternatives in some detail. I do not intend to argue in favor of any one of the alternatives; I will leave that task to the authors of future responsa.

All I seek to do is to suggest that, in this instance, as with all other interesting questions, the appearance of halakhic simplicity is a literary product, the result of a conscious stylistic choice on the part of the author. In law, that is to say, as well as in literature, things are seldom as simple as they are made out to be.

THE CRITERIA FOR SETTING PRIORITIES

Rabbi Feinstein's responsa propose a single and coherent system for allocating medical resources. They do so by offering a ranking, an ordering of three distinct criteria that the *Halakhah* suggests for setting life-and-death priorities. For purposes of analysis, let us consider each of them separately.

The first criterion is what we might term the principle of medical efficiency: when we have a choice, when we have not yet begun to treat either patient, we treat first the patient whom we believe we can cure rather than the patient who, according to medical prognosis, is unlikely to recover from this illness. Rabbi Feinstein, as indicated, declares this point to be *pashut,* "obvious," and he provides no textual support for it. What in fact makes it *pashut,* I think, is that *Halakhah* views the practice of medicine as a *mitzvah,* a religious duty. Although the Torah nowhere explicitly commands us to practice medicine, and although some ancient rabbinic voices express a highly critical attitude toward physicians and the medical arts, most authorities define medicine as a species of *mitzvat piku'ah nefesh,* the commandment to save life.[11] This means that the purpose of medicine, the very warrant for its practice, is to cure disease.[12] It is to this end, after all, that we are permitted to administer harsh drugs and invasive surgeries to human beings. In the absence of any therapeutic value, even the most sophisticated

medical technologies are out of place; they cease to *be* medicine, and they are forbidden as *chabalah,* as needless damage to the body.[13] If medicine is the commandment to heal, to save life, it is plausible to conclude that in a case such as the one Feinstein addresses in his first responsum, we ought to give priority to the patient for whom we can truly do "medicine," whose life we can actually save. If we cannot treat both patients at the same time, we ought to invest our medical resources in such a way that we will more certainly fulfill the *mitzvah* of *piku'ah nefesh.*

The second criterion we find in Rabbi Feinstein's thinking can be called the principle of equality: the religious and moral commitment to the belief that each human life is infinitely precious in God's sight and that we are accordingly forbidden to decide that some lives are more worth saving than others. The classic rabbinic statements of this position can be found in two talmudic passages. The first, *B. Sanhedrin* 74a and its parallels, conveys the ruling that, although the preservation of one's life is considered a supreme Toraitic value, one is nonetheless forbidden to save one's own life by committing murder. Who are you, asks an amoraic sage, to say that your blood is any "redder" than that of the one you intend to kill? Perhaps his blood is "redder" than yours.[14] The converse conclusion is also implied in this judgment: who is to say that one's own blood is any less "red" than another's?

This theme is predominant in the second talmudic passage, *B. Bava Metzia* 62a, which recounts the case of two travelers wandering in the desert, one of whom possesses a container that holds just enough water to enable one—but not *both*—travelers to reach civilization. Ben Petura rules that the traveler that holds the water must share it with his fellow. Although this means that both

will die, at least the one will not be a causative factor in the death of the other. R. Akiva, however, cites Leviticus 25:36[15] as the basis for declaring that "your own life takes precedence over the life of your fellow"; hence, the wanderer that holds the water may keep it all, allowing himself to reach the next settlement though his companion die. And this is the generally accepted halakhic view.[16]

Although the practical outcomes of these two passages differ dramatically—in the first, I may not place my own life above my fellow's; in the second, I am allowed to do just that—they are united by a commitment to the equal value of each human life. Thus, when we are faced with making a qualitative choice between two human lives, of deciding that one life is more deserving of being saved than another, the only proper moral course of action is *shev ve'al ta'aseh*: "sit and do nothing." When either action we take leads to the destruction of a human life, we are not entitled to choose either; we must respond passively, allowing nature, outside forces, or chance to make it for us.[17] We are not allowed to commit murder to save our own life; on the other hand, we may keep the water, because to do so is merely to maintain the existing situation, to refrain from taking a positive action that places one life before the other.[18] Thus, says Rabbi Feinstein, when two patients are medically equivalent, when neither is a *tereifah* or obviously "terminal," we are forbidden to make a qualitative choice between them. The physician must treat first the one who calls first, the one whom she can reach first, the one who wins the "treatment lottery." In this way we avoid deciding "who shall live and who shall die." Moreover, once a patient has begun to receive treatment, even though his is a terminal condition, we do not discontinue his treatment, even if by doing so we might save the life of another. The patient himself, writes Feinstein, "has no obligation to save

another at the cost of his own life, and once he has been offered medical treatment he has acquired a legal title to it." This, we would say, is the analogy of medical treatment to the container of water. I enjoy a legal claim of ownership of this life-sustaining resource. I may not, on a "cosmic" scale, deserve this water any more than you do. But, then, neither do you deserve it more than I. And if I already possess it, I am under no obligation to share it with you or give it up to you at the cost of my life, no matter how brief my remaining time on this earth.

Then there is a third criterion, one we might call the principle of qualitative evaluation: when confronted with two persons who are both in mortal danger, we save first that person who ranks higher on a scale of religious value. This scale is found, as Feinstein notes, in the *Mishnah* and *Gemara* in *B. Horayot* 13a. When it comes to saving life, the male takes precedence over the female, whereas the woman precedes the man in terms of redemption from captivity. If both endangered persons are men, the *kohen* precedes the *levi,* who precedes the *yisrael,* who is followed in order by the *mamzer,* the *natin,* the convert, and the freed slave. All this applies only when the two men are equal in Torah learning; but if one is a scholar, a *talmid hakham,* he always takes precedence over the other, even over the High Priest. These priorities figure prominently in the halakhic discussion of the allocation of *tzedakah,* along with such qualitative criteria as "one's relatives take precedence over all others" and "the poor of one's own community take precedence over the poor of other communities."[19]

The three principles that play a role in Rabbi Feinstein's thinking are at their most basic level contradictory. The principle of equality of persons, for example, if we take it to its logical extreme,

suggests that all individuals enjoy the same right to treatment and that we as a community are never permitted to make rational and purposeful choices between persons who seek medical care. If we cannot treat all at once, the only proper solution would be to arrange a lottery or other system of random selection, so long as we ourselves do not effectively decide who lives and who dies. The principle of medical efficiency, by contrast, requires that we do make such choices, that we do not treat all patients in an indiscriminately equal fashion. We are to evaluate them based on the chances of their recovery and offer treatment first to those who, in our opinion, are more likely to survive and whose illnesses are more likely to be cured. The principle of qualitative evaluation, meanwhile, demands a different kind of choice: when two or more lives are at stake at the same time, we owe first duty of rescue to that person whose life is judged more worthy of being saved. This standard is the very antithesis of equality, and it likewise has nothing to do with medical prognosis, yet Rabbi Feinstein mentions it, along with the others, as part of his system for allocating life-sustaining resources.

With all this potential conflict, however, Feinstein does produce a *system:* that is, he arranges all three of these criteria in an order of preference. It is clear that among the three principles he ranks the second one, the principle of equality of persons, as the first in importance. In the ordinary or *setam* case, we treat and accept all patients on an equal basis, making no distinctions among them for any reason. The only exception to this rule is the *tereifah,* the clearly terminal patient, but even this exception is limited to the narrow circumstance of two patients that present themselves for treatment at the same time. True, the criterion of medical efficacy plays an important role in patient selection: when the physicians

cannot treat all patients simultaneously, they should offer treatment first to those whom they believe they can heal. Yet once we begin treatment, even of a dying patient, that treatment cannot be interrupted even to treat another person that might thereby be saved.

The third principle, that of qualitative evaluation, has an even more limited range of application. A Jewish physician would resort to this scale of priorities only when neither of the two (or more) persons in need of treatment is a *tereifah* and only if both (or all) arrive at the hospital simultaneously or if all are located at an equal distance from the physician. If, on the other hand, one patient enjoys either a temporal or spatial precedence, we employ the rule of "first-come, first-served." And, let us remember, the subject of age is not to be taken into account. If the patient already receiving treatment or closer to the physician is elderly, that is of no relevance: he or she enjoys the same right to treatment as the child or the younger adult. In this sense, Feinstein has constructed out of the halakhic sources a coherent and consistent system, one that offers in broad outline substantial ethical guidance on this most difficult of questions.

ANALYSIS

What Rabbi Feinstein has not done, however, is answer the questions that are likely to be raised about his system. He has ranked one of his three principles of medical resource allocation above the others, yet he does not explain why or on what grounds he sets this priority. This is where his short and declarative literary style serves him so well. By *reciting* the law as though it is obvious, as though the sources speak with such a unified and unambiguous voice to this topic that it is unnecessary to recount them, he gives

his readers the impression that questions and difficulties are unlikely to be raised against him at all. The difficulties, however, do exist; they have to do with the unspoken yet crucial assumptions on which his halakhic case must rest. If these assumptions can be challenged, it is clear that his ranking of the three criteria of resource allocation can also be challenged. Although Feinstein surely could have responded to such objections, these *teshuvot,* which survive as his literary testament on our subject, do not do so; they thus leave us intellectually unsatisfied, enunciating the law in *ex cathedra* fashion while doing little to persuade us that this *view* of the law is "the" correct one.

I therefore wish to turn to some of these challenges, in an effort to deepen the debate over this question, to suggest some alternative approaches, and to demonstrate why I think a long, discursive responsum, though less pleasant to read, is usually to be preferred to its shorter and simpler cousin.

Let us consider, first of all, the principle that Feinstein places at the epicenter of his system, the principle of equality of persons. This criterion works to forbid us, under virtually all realistic circumstances, to *choose* between patients. Those that are currently receiving treatment continue to receive it until the end; if patients are presented to us simultaneously, and neither is a *tereifah,* the determination of treatment must be left to chance, which means, again, that we do not choose between or among them. If we should ask why this principle predominates in Feinstein's system, we would have to conclude that he construes the question of medical resource allocation as one of *comparative evaluation* of human life. That is to say, decisions concerning patient selection are understood quite literally as decisions as to which person or persons are more

or less worthy to live than others. On the basis of this understanding, one quite naturally turns for guidance to those halakhic texts that speak most directly to the issue of the comparative valuation of human life. And as we have seen, those texts seem to require an attitude of radical passivity *(shev ve-al ta-aseh)* in the face of such an awesome conundrum: we are denied the right to choose which person is more worthy of being saved. True, as we read in the *Bava Metzia* passage, one may "hold on to the container of water," saving oneself while one's fellow dies. Yet this preference, too, is a product of the radical passivity with which we are to approach these life-and-death matters: since I am in possession of the water, I am under no obligation to alter (and perhaps am forbidden to alter) this ethical *status quo* by sharing it or giving it up to my companion. Even this exception to the "no choice" rule, writes one recent authority, is severely limited: the only reason one is entitled to enjoy the benefits of passivity and to keep the water is that a biblical verse—Leviticus 25:36, according to R. Akiva's *midrash*—allows one to conclude that "your own life takes precedence over the life of your fellow." Without this verse, one would not be permitted to favor one's own life over that of another.[20] It follows, therefore, that no third party is ever empowered to make this determination about two patients that come before it. No physician, no hospital, no community may favor one human life over another. And since the patient that is already receiving treatment, no matter how "terminal" his or her condition may be, is in possession of a legal claim to the "water," the life-sustaining resources that are being administered, no physician, hospital, or community can interrupt that patient's continued access to medical care, even if in doing so the resources might be redirected to aid a person who can recover from injury or disease.

Against this reasoning, we might propose two criticisms. The first objects to Feinstein's construction of the legal situation created by the patient's admission to the hospital. When he writes that the patient, once treatment has begun, enjoys a lien *(shiabudim)* on the provider's medical services, he assumes the existence of a particular kind of contractual relationship, a two-party agreement that establishes mutual obligations. The patient therefore "owns" the life-sustaining resources; and, according to the principle established in the *Bava Metzia* passage, he need not give them up. Yet we are not constrained to go along with him here. It might be contended, and more persuasively, that the patient does not "own" or enjoy a mortgage on medical resources that the community provides to him or her in fulfillment of its duty to save life. *We,* the community, own the resources; they are not the property of any individual. If so, the position of R. Akiva does not apply to our case.[21] In this view, the admission of a patient to the hospital does not necessarily constitute a legal commitment to continue providing care to that patient, come what may, no matter how terminal his or her condition, till the bitter end; rather, we commit our resources to the patient on condition that they may be redirected to others if and when the medical situation warrants such a step.

The second criticism is more fundamental, reaching to the very essence of Feinstein's analysis and conceptual process. Why, it asks, should we think about the problem of patient selection as one of the comparative evaluation of persons? True, it makes a certain sense to define this issue as a choice between individuals, a determination of who shall live and who shall die, which lends itself quite nicely to the ideas raised in *B. Sanhedrin* 74a and *B. Bava Metzia* 62a. Yet we might just as easily configure this issue in terms of another category: our duty to save life, to heal. That is to say,

when confronting the reality that we cannot provide all the required medical treatment simultaneously to all those who seek it, the question we ought to ask is: how can we utilize the resources at our disposal so as to maximize our ability to fulfill this *mitzvah?* This question does figure in Feinstein's calculations, to the extent that he rules that when treatment has not yet begun, we grant precedence to the patient whose life we can save, for whom we can actually *do* medicine. It is also completely consistent with a commitment to human equality. It does not require that we judge which patient is more deserving of life, for such a judgment surely lies beyond our intellectual and our moral capacity. It requires, rather, that we consider the best and most effective means of practicing medicine in a situation of severe material constraint. To ask this question, to define our situation in this light, is to conclude that the principle of medical efficiency, which Feinstein himself adopts in part but subordinates to the principle of the equality of persons, ought to be the central criterion for making decisions regarding resource allocation. Accordingly, we would grant priority in treatment in all, or virtually all, cases to the patient or patients that need it the most[22] or who could benefit from it the most, whether or not another patient or patients have already begun to receive it.

We see that our problem, which patient to treat first, can be defined in two different ways, classified under two different halakhic principles that rest on two different sets of texts. It is either, as Feinstein sees it, an issue of comparative evaluation of persons, or it is an issue of how best to fulfill the *mitzvah* of the practice of medicine, as I suggest here. The adoption of one or the other classification carries a great deal of practical significance, for, depending on the choice made, a patient already admitted for treatment might be displaced by another patient on the grounds that the physicians

believe that although the former will die in any event, the treatment will allow the latter to recover from his or her illness. Yet that adoption is not fixed by the *Halakhah*. Put differently, the legal sources on which the *posek* relies to justify his decision could support either classification, either criterion for determining the allocation of medical resources. The *Halakhah* allows of more than one possible answer, more than one conceptual approach to this question. The *posek*'s task is to choose between the alternatives.

It is indeed the *posek*'s central and essential task, in the performance of which he defines "Torah" for his community. *Poskim* exist and function as authoritative decisors precisely because the *Halakhah* does not admit of straightforward and obvious answers to all questions, precisely because on many complex issues the law can be persuasively interpreted either way. The same is true, of course, of law in general, a fact that has given rise to an extensive scholarship on the nature of judicial decision. What factors, these writers ask, determine the judge's choice when a choice must be made among two or more plausible alternative answers to a particular legal question, when the law or the legal system itself does not offer a clear and unambiguous rule or rules that require one decision or another? Some theorists hold that the judge enjoys no discretion whatsoever in arriving at the decision, which is dictated either by pure deductive logic, by obective principles, or by the judge's own sense of "political morality," a coherent theory by which the judge explains the rules and precedents, the "data" of the legal system.

According to this view, judges may contend legitimately that there is but "one right answer" to any legal question, that answer being the interpretation that makes the most sense of the

legal materials from which the judge derives her ruling.[23] This point of view has attracted legions of critics, who bear such labels as "positivists,"[24] "realists,"[25] "pragmatists,"[26] and "critical theorists."[27] They are united by the proposition that judges do have discretion, the power to *choose*—in effect, to create—an answer to an indeterminate legal question, and are divided primarily over the extent to which that discretion exists. The same question is manifest in halakhic decision. To what degree is Rabbi Feinstein actually constrained to define the question of medical resource allocation as one centering on the comparative evaluation of purposes—the analogy to the talmudic sources in *B. Bava Metzia* 62a and *B. Sanhedrin* 74a—rather than the *mitzvah* of lifesaving and medicine? Was this choice the one and only "right" answer to the question, at least in Feinstein's interpretation of the *Halakhah?* Or was it actually a choice, a decision between two "good" alternatives, that because of its very indeterminacy is left to the discretion of the inspired *posek?*

This is not the occasion to enter into a thorough analysis of these theories. Regardless of the extent to which halakhic decision is discretionary or determinate, it is customarily presented to the community of rabbinically literate readers in the form of *argument*. Even if the *posek* chooses one available answer over the other, and even if the "real" impetus for this choice is to be located in the social, economic, or cultural factors at work on his thinking, halakhic convention requires that should he convey his ruling in the form of a written responsum, he must justify it, explaining it in terms that his intended audience, though it might not accept it, will find potentially persuasive.

Halakhic decision is in this sense an extended argument or conversation within a particular, self-defined Jewish religious community united by a set of commonly held legal values, orientations, and principles. And it is in this sense that the literary model for understanding responsa that I described above comes into play. When the argumentation of a responsum or the justification for its ruling is either weak or virtually nonexistent, it is a failure from a literary perspective. It fails because it does not succeed in creating and maintaining the kind of community of legal argument and conversation that halakhic writing is intended to serve. To this extent, we can say that a poorly written responsum—that is, one that fails as halakhic *literature*—fails on a legal level as well. To survive, to perform its special role in advancing the halakhic conversation, a responsum must explain itself, must argue in persuasive language for the acceptance of its ruling as the best understanding of Jewish law on this particular subject. A responsum that merely states its ruling without arguing for it, without explaining why it favors one alternative and available answer over another, does not fulfill the literary and rhetorical expectations that its intended audience rightly demands of it.

A LIBERAL HALAKHIC RESPONSE

For the reasons enunciated above, Rabbi Feinstein's reponsa on medical resource allocation have to be regarded as literary and legal failures. They fail, that is, because, by providing but the barest and most minimal justification for their rulings, they do not help us as readers to understand why those rulings should persuade us that they are satisfactory and convincing interpretations of Jewish law. As such, their effect in the course of Jewish legal discourse is likewise bound to be a minimal one. To be sure, Rabbi Feinstein's

abiding prestige as an eminent halakhist will ensure that future generations will continue to turn to his *teshuvot* for learning and instruction. And often students will indeed find that his responsa are crafted with unmistakable literary and rhetorical power.[28] In this instance, however, that power is missing, and its absence is likely to limit the influence that these *teshuvot* will exercise over future discussions of the *Halakhah* of medical resource allocation.

In the meantime, we liberal halakhists can add our own insights to those discussions. At this juncture, we cannot identify a set of precise conclusions that command a consensus. That is not a fatal flaw, however, for, in truth, the process of "liberal *Halakhah*" values the asking of questions at least as much as the determination of answers. Ours is an approach that reflects a notion of Jewish law as a dynamic and developing phenomenon, one that finds its roots and draws its inspiration from the halakhic sources but that sees in those texts new possibilities and options of which others, who do not share our outlook, remain unaware.

What, then, are the questions and options that liberal halakhists would present for consideration? Given that the issue of medical resource allocation can be defined in several ways and analogized to several different sets of halakhic principles and texts, we would begin by asking whether Rabbi Feinstein's definition of the issue is the best available interpretation of the principles of Jewish law as we understand them. Although he asserts that the principle of equality of persons determines our answer to this *she'elah*, he neither adequately justifies this assertion nor explains why other competing principles ought not be favored.

We have seen that the principle of medical efficacy has powerful support in the sources and is arguably the better definition of this issue. Moreover, if we hold the reasonable presumption that a community's medical resources are the property of the community, that the community pays for them and provides them in pursuance to its duty to save life—to fulfill the *mitzvah* of *piku'ah nefesh*—we have every reason to conclude that their use is at all times subject to this condition. That is to say, they remain under the community's control so that no individual patient ever acquires a legal title to them. Since the community makes these resources available for the express purpose of saving life, it follows that the community must require them to be used in the way that will best fulfill this mitzvah.

Thus, in the cases considered in Feinstein's responsa, we would conclude that when a physician faces a choice between caring for two individuals when one is clearly terminal and the other has a chance for recovery, the latter patient comes first. This would be true even if treatment had already started for the former, for the physician's duty as the community's agent in the saving of life takes precedence over any claim the terminal patient may have on the physician or the community's resources.

Accepting the principle of medical efficacy as the criterion by which we allocate health-care resources carries some obvious and far-reaching implications when we turn to the wider social context. Just as a physician must at times make fateful choices of patient selection, so do we as a community face inescapable decisions concerning the funding of medical objectives. These determinations are no less questions of life and death than are the choices between or among individual patients: on what moral basis do we make them?

Following Rabbi Feinstein, we might hold that the principle of equality of persons controls this question. If so, we might conclude that, as we are not entitled to determine that any one person is more deserving of life than another (the question of "whose blood is redder"), we are similarly forbidden to offer a greater share of society's medical resources to any one person than to any other. On the other hand, should we conclude that this question is best defined according to the principle of medical efficacy, we would resolve to invest our monies and efforts in such a way as to ensure the creation of the most effective health-care system: that is, the kind of system that would allow us to fulfill the *mitzvah* of *piku'ah nefesh* in its best sense by saving the greatest possible number of lives.[29] To take this position would in turn justify a number of policy choices. We often hear calls, for example, to appropriate a larger share of society's available budgets to such objectives as prenatal care, nutritional education, mass vaccination, or basic research and to reduce expenditures on expensive and experimental technologies and therapies, on the grounds that the former allow us to save more lives, to cure more illness, and to safeguard the health of more persons than do the latter. The principle of medical efficacy would argue that we as a society adopt such priorities as the basis upon which we make our budgetary decisions with respect to medical care, and liberal halakhists might well see this principle and its resulting policy decisions as reflecting the best understanding of the Jewish legal tradition.

There is, meanwhile, another option to explore: the principle of qualitative evaluation, derived from *B. Horayot* 13a. Although Rabbi Feinstein mentions this principle, however briefly, as part of his system, we liberals would tend to reject it out of hand. We quite properly reject any suggestion that we make life and death decisions

according to a ranking based on gender, lineage, and intellect. Yet beyond the specifics of the *Horayot* text lies an intriguing thought. The rabbis of the *Mishnah* were able to make qualitative judgments of this nature because they possessed and acted on a picture of an ideal society. Rabbinic culture, we might say, was united by a common story the rabbis told about themselves, their world, and the values out of which that world was constructed. That story made it possible for them to measure persons according to the degree to which their lives cohered with these fundamental values. Theirs was a community defined by the performance of *mitzvot;* thus, when we have two lives to save, the man precedes the woman because he has more *mitzvot* to perform. The community was also dedicated to the proposition that certain of its male members were divinely appointed to perform special religious duties. The *kohen* and the *levi* therefore outrank the rest of the people on the scale of *kedushah,* or priestly holiness. And since the entire community is a "kingdom of priests," the *mamzer,* the *natin,* the convert, and the freed slave are ranked according to the degree to which they originated as Jews or to which their specific lineage deviates from the standards of permitted marriage. Finally, the supreme yardstick of value in this scholarly rabbinic world is that of Torah scholarship itself: the *mamzer* that is a scholar takes precedence over a High Priest that is ignorant of Torah. The authors of the passage in *Horayot* believed, in other words, that they could identify the purposes and goals of Jewish existence, and they could and did make the claim that each Jew should be ranked in accordance with his or her embodiment or attainment of those goals.

Are we so certain that we cannot perform similar evaluations in the context of our contemporary world? True, we regard ourselves unable to distinguish those who are more deserving of life

from those who are less deserving. Yet most of us do work with conceptions of the underlying values of our community, the ideals to which it aspires, and most of us are quite capable of identifying those individuals whose lives and characters, in our opinion, most closely personify those values, ideals, and aspirations. Moreover, it may be quite reasonable to suggest that when a community makes substantial resources available for the health care of its citizens, it does so on the implicit (if not explicit) condition that these resources be invested toward the welfare and the betterment of the community. And "welfare" and "betterment" are not necessarily to be identified with an unbending insistence on the principle that every person, every cause, or every possible social need enjoys an equal claim to our limited medical resources.

Let us consider the following hypothetical, albeit extreme, case. Two persons require a heart transplant. One is a respected social studies teacher at an inner-city high school, a woman beloved by her students as a mentor and a confidant and admired by all for the number of young people she has guided to college and to successful living beyond school years. The other is a prisoner serving a twenty-year sentence for the sexual molestation of a five-year-old child. On purely medical grounds, both candidates are found to be equally acceptable for transplantation. Are we entitled to award one of them priority in receiving the heart based on his or her lifestyle, moral record, or "contributions to society?" Even the most liberal among us, if we are honest with ourselves, would admit that we would prefer to award the heart to the teacher on precisely these grounds. To say this troubles us, of course, because of our deeply held commitment to the equality of all persons in the sight of God. We tend to believe it unjust to make decisions of this sort based on an argument that one person is a "better" human

being or citizen than another. On the other hand, we might just as well ask whether it is "just," from the point of view of society as a whole, to make no distinctions between persons who either do not contribute to the community or harm it in some significant way and persons whose lives are a blessing to all. More importantly, we can legitimately doubt that this issue ought to be framed in terms of "justice" at all.

Suppose we ask not whether our decision is "just" but whether it is *socially responsible?* That is to say, we approach the decision of medical resource allocation not as a question of the comparative worth of persons but as one that demands that we make the choice that best serves the interests of the entire community, that aggregation of people that both supply those resources and, as individuals and as a collective, will be directly affected for good or for evil by the choice we make. To ask *that* question is to suggest a very different answer, one that expresses a very different view of what our moral duty requires of us.[30]

THE ELDERLY AND MEDICAL RESOURCE ALLOCATION

We can now turn to a more informed discussion of our specific question, the place of the elderly in our medical-ethical decisions. Is it proper under our conception of *Halakhah* for physicians to use the age of a patient as a factor in patient selection? And is it proper for society as a whole to allocate its medical resources in ways that some might describe as "discrimination" against the aged? In the third of Rabbi Feinstein's responsa discussed near the outset of this paper, we are told that a *zaken muflag,* an elderly person, is entitled to treatment on an equal basis with one who is younger. Again, since Feinstein does not offer us much in the way

of discussion and analysis, we must attempt to locate the halakhic justification for this "clear and simple" statement of the law. This, to be sure, is not an excessively difficult task. Feinstein holds the principle of equality of persons to be central to decisions of patient selection, and this ruling coheres quite well with that principle: if no one person can be favored over another, then the elderly, as persons, must surely enjoy an equal right to treatment.

We might well agree with him that this principle corresponds to the best and most convincing understanding of the halakhic tradition available to us; if so, we might well adopt his ruling as our own position. Yet, as we have seen, it is not the *only* available understanding of the tradition, and it is not necessarily better than the others. Some halakhists, *contra* Feinstein, do declare that in matters of life saving "the young person precedes the old one, and the healthy old person precedes the old person who is sick."[31] And, again, it is not too difficult to imagine why this is so. If we were to begin our thinking about resource allocation from the criterion of medical efficacy, we would recognize that since physicians always take the age of a patient into account when planning a course of treatment, the age of the patient or patients before us is not an irrelevant detail.

Given that our duty is to create the best and most efficient health-care system possible, and given that the time, money, and effort we might allot to the care of one elderly patient might otherwise be invested in securing substantial health benefits for numerous others, we would be morally obliged to consider all these costs before making our fateful choices. On a societal level, we would be obliged to recognize the fact that medical expenditures for the elderly far outweigh those invested in any other segment of the

population. This, of course, is to be expected and is not necessarily unjust, since the aged are much more likely than younger people to experience serious medical problems. But if the sheer expense of providing care to the elderly is found to prevent us from investing in the creation of a system of public health that saves more lives and that improves the quality of life for large numbers of our citizens, the reevaluation of our priorities is both a practical and a moral necessity.

At the same time, we would not be *forced* to draw such a conclusion. The principle of medical efficacy that we locate in the halakhic sources is derived from the *mitzvah* of *piku'ah nefesh,* which translates into a duty to practice medicine. This can be understood as a requirement to spend our medical resources in such a way as to cure more disease rather than less, to save more lives than would be saved were we to invest those resources otherwise. Yet the overriding demand that issues from this *mitzvah* is the obligation to heal, to cure disease; and this forces us to ask: is old age itself a *disease?* The point is not a facetious one. It is a rhetorical custom, which, like all such custom, reflects deeper habits of mind in our culture, to speak of the elderly as though they are a diseased group, as in "the elderly and the infirm," a portion of the population that, like the sick, are viewed largely as consumers of medical services. It is certainly true that the elderly are statistically more likely to be "sick" than are younger persons, and it is also true that a sick elderly person is less likely to survive a severe disease than is a younger one afflicted with the same ailment. Yet it is by no means clear that we ought to view their advanced age in and of itself as a disease. On the contrary, although disease is an undesired and unintended interruption of the otherwise healthy state of human life, old age is an intended and fully natural stage of that life,

which, though it may be associated with infirmity and pain, is not to be treated as a *medical* objective, as an enemy to be liquidated.

Do we really mean to invite the conclusion that a person's advanced age is by itself a sufficient reason to withhold treatment from him or her, especially if that treatment involves any kind of substantial expenditure? Although some voices in our society call for precisely that kind of allocation scheme, it can well be criticized as the exacting of a mortal penalty upon an entire class of persons whose only crime is that they have remained alive. By this thinking an elderly person that does not suffer from any "incurable disease" other than age has a right to enjoy the remainder of his or her life that is in every way equal to the right enjoyed by a younger person. The criterion of medical efficacy, in other words, is a valuable tool in making our allocation decisions, but its application arguably should be restricted to objectives that are clearly *medical,* that involve the struggle against disease, rather than to those associated only with advanced age.

Likewise, were we to begin our thinking from the standpoint of the third criterion, that of qualitative evaluation, we might find ourselves morally permitted to inquire as to our vision of the good society, the model according to which we might determine our life-saving priorities. That vision of an ideal community may well require that we grant precedence to the health and welfare of our children, the generation of the future, over that of a generation whose capacity to shape the future is severely limited. Once again, however, this choice is by no means certain. Our notion of a "good society" might just as persuasively demand that we set no limits to the honor and compassion we bestow on our aged, and Jewish tradition would surely offer much support to this view. If the issue

comes down to a choice between the old and the young, therefore, this principle does not provide us with one obviously "right" answer; we are not, after all, living in the world of *B. Horayot* 13a, and we lack anything approaching societal agreement over any similar scale of priorities that might serve us in its stead. But that text and the broader ideals that we liberals might find within it may well empower us to make that choice.

TOWARD AN ANSWER

My goal in this paper has been to consider options rather than to offer conclusions. I am in this setting more interested in thinking about how "the" answer is arrived at than in what, specifically, that answer might be. I have thus tried to sketch a series of alternative approaches available to the halakhist. Given that these alternatives exist in and are attested to by the sources, the halakhist's task is to locate the "best" answer, that solution that most accurately expresses the religious and moral standard to which we believe Torah and *Halakhah* as a whole would have us aspire.

How, then, do we go about identifying that answer when more than one plausible response or approach seems available? On the question before us, the allocation of medical resources and the place of the elderly in our decision making, we find three such approaches. We can frame the issue, as does Rabbi Feinstein, as one that has primarily to do with the principle of equality, so that any decision of allocation or of patient selection must adhere to our belief that all are equal, that no person's blood is "redder" than another's. On the other hand, we can hold that the essential halakhic consideration here is the *mitzvah* of *piku'ah nefesh,* or the teaching that decisions concerning the saving of life might be made

according to an agreed-upon scale of social value. If we shape our thinking in accordance with either of those principles, we may reach conclusions that are radically different from those resulting from a discussion dominated by the equality principle. We can determine that, inasmuch as the elderly consume a disproportionate share of society's health-care resources, it would be preferable from either a purely medical or a socially responsible point of view to redirect those goods and services to persons who can derive a more lasting benefit from them. Or, conversely, we can say that old age is in and of itself not a disease and is therefore not a sufficient justification for the removal or the limitation of medical care.

The problem here is that each of these alternative approaches argues plausibly as a correct reading of Jewish law and the issues of patient selection, medical-resource allocation, and the role of age in the making of these decisions. But perhaps "problem" is too pejorative a description, since plurality lies at the core of Jewish legal thought. *Halakhah,* that is to say, yields multiple possible answers to many questions, and halakhic history can be narrated as a developing series of responses to the challenges of the environment in which plurality and variety are far more typical than unity.[32] And if plurality is a central feature of halakhic thinking, as I have suggested elsewhere,[33] then when more than one plausibly "correct" legal answer presents itself to the question at hand, there exist no clear-cut rules or formulae for determining with any kind of precision just which answer is better than the other possibilities. Any effort to simply declare the law, to state a conclusion as though there are no other available possibilities—an attempt made here by Rabbi Feinstein—is but an arbitrary attempt to squelch debate, to eliminate alternative approaches from our consideration. Although born of the reasonable desire to arrive at the "truth," it is a move that does nothing but distort the rich and diverse voice of the

Halakhah. Although in forging our response we often have to settle upon one possible answer and reject the others, all of them make a legitimate prima facie claim on our thoughtful attention.

As liberal halakhists, we are committed to the plurality of answers within the *Halakhah,* and we are rightly suspicious of rabbinic attempts to enforce a supposed unity on the law by asserting that one possible is the only "right" one. The correctness of an answer cannot be declared, announced, or assumed; it must rather be justified, argued for as the better or best one available. This requires an honest and extended conversation among all the plausible alternatives. *Halakhah,* in this conception, is much less a system of organized political authority empowered to declare answers than it is a structure of language, a set of texts and traditional responses to them out of which we as a community fashion our continuing discussion of the question: what is it that God and Torah demand of us? A rabbinic *teshuvah* on any halakhic issue is thus best viewed as an element of that conversation, a response to the arguments of previous speakers, and an invitation to its intended audience—that is, to the set of all Jews who share its author's commitment to the text-language of *Halakhah*—to accept a particular view of Torah and of themselves. As an invitation, its aim is to persuade, to convince those to whom it addresses itself that Torah is best understood in *this* way rather than according to the ways suggested by other speakers. And couched in the language of persuasion, a responsum is likewise an invitation to argument, to participation in that centuries-old dialogue by which our community, giving voice to its texts, has sought to work out its understanding of itself, its world, and its God.

A good liberal responsum on the *she'elah* before us would follow this royal road of *Halakhah,* the way of conversation, persuasion, and argument. As such, there is no way that I or any other observer can predict with certainty just what the conclusion of that responsum might be. All I can say with confidence is that the sources to which we look for guidance offer a variety of approaches and directions for our thought and that we, who seek to understand these texts from the perspective of our own religious world view, are quite capable of taking this discussion to new levels of meaning and profundity. We have, in short, much to argue about; let the argument, therefore, begin.

Notes

1. This is the language employed by John F. Kilner in *Who Lives? Who Dies?* (New Haven: Yale, 1990), xi. He prefers "patient selection" as a neutral alternative to such terms as "triage" or "rationing," which carry military or utilitarian connotations that might imply a bias in the criteria for decision making.

2. See Kilner, 77–79, and the literature cited therein.

3. *Resp. Igerot Moshe,* CM 2:73, sec. 2.

4. Ibid., CM 2:75, sec. 2.

5. The *tereifah* is traditionally understood as a person who suffers from one of the specific injuries that renders an animal *tereifah* (e.g., severed esophagus or windpipe). One who is so injured cannot survive: that is, even though he appears healthy at the moment, physicians declare that for this injury there is no cure and that it will eventually kill him. *B. Sanhedrin* 78a and Rashi *ad loc., s.v. hakol modim; Yad, Hil. Rotzeach* 2:8. Rabbi Feinstein defines the *tereifah* as anyone that suffers from an incurable illness, even if it does not involve one of the specific injuries referred to above; *Resp. Igerot Moshe* CM 2:73, sec. 4.

6. *Resp. Igerot Moshe* CM 2:75, sec. 7.

7. I argue this point more fully in "Responsa and Rhetoric: On Law, Literature, and the Rabbinic Decision," in John C. Reeves and John Kampen, eds., *Pursuing the Text: Studies in Honor of Ben Zion Wacholder on the Occasion of his Seventieth Birthday* (Sheffield: Sheffield Academic Press, 1994), 360–409. There I suggest that the observations of scholars associated with the legal academic movement known as Law and Literature offer an incisive set of tools with which to study the work

of halakhic authors and to understand the activity of *pesikah*.

8. The classic statement of this point is the Introduction to the *Mishneh Torah* (or *Yad Hahazkah*, or more simply, *Yad*) of Maimonides (Rambam). As opposed to the decisions and rulings of post-talmudic authorities, he writes, the words of the Babylonian Talmud are binding on all Israel, since the Jewish people declared their acceptance of them *(hiskimu aleyhem kol yisrael)*. The Talmud, in other words, is the ultimate and exclusive authority for halakhic decision, and a decision is binding only to the extent that it is based on an interpretation and application of the Talmud. Similarly forceful are the words of R. Asher b. Yechiel (Rosh), *Hilkhot Harosh, Sanhedrin* 4:6. Like Rambam, Rosh declares that the contemporary scholar is free to rule in accordance with his own best understanding of the Talmud, since only the Talmud (as opposed to the rulings of later scholars) is authoritative.

This portrait is somewhat simplified, of course, since sources other than the Talmud can be and are cited as support for halakhic decision. Prominent among these is *minhag*, or the custom of a particular community, a source of law that may or may not have clear roots in the Talmud. The force of *minhag* in the shaping of Jewish religious practice, even in contradiction to the apparent conclusions of the Talmud itself, has been particularly pronounced in Ashkenazic tradition, where the rabbinic response has over time sought to reconcile these two apparently conflicting sources of law; see I. Ta-Shema, *Minhag ashkenaz hakadmon* (Jerusalem: Magnes, 13–105), and Mark Washofsky, *"Minhag* and *Halakhah,"* in Walter Jacob and Moshe Zemer, eds., *Rabbinic-Lay Relations in Jewish Law* (Tel Aviv and Pittsburgh: Freehof Institute of Progressive Halakhah, 1993), 99–126. Yet the point remains: Jewish legal decision must be *justified*, warranted; supported by sources and argumentation other than the opinions and desires of any particular rabbi or group of rabbis.

9. The literary study of the responsa is a burgeoning scholarly field that is yet in its infancy. See, in general, Peter Haas, *Responsa: Literary History of a Rabbinic Genre* (Atlanta: Scholars Press, 1996); Solomon B. Freehof, *The Responsa Literature* (Philadelphia: Jewish Publication Society, 1955), especially pages 30–45; Menachem Elon, *Jewish Law* (Philadelphia: Jewish Publication Society, 1994), 1453–528; and Mark Washofsky, "Responsa and Rhetoric."

10. In a forthcoming essay I hope to demonstrate that some of Rabbi Feinstein's responsa do bear evidence of what we might best term literary-rhetorical artistry: that is, the careful construction of the responsum as a text whose literary elements help achieve its goal to persuade the reader to accept its conclusion as the correct answer to the problem under consideration.

11. The usually cited source for the *mitzvah* of *pikku'ah nefesh* is Lev. 18:5 and its *midrash* in *B. Yoma* 85b. Although the Talmud at first glance seems to define the practice of medicine as a voluntary rather than an obligatory act (*B. Bava Kama* 85a), medieval halakhists extended the "permit" to the status of *mitzvah*. See Nachmanides, *Torat Ha'adam* (ed. Chavel) 41–42: since we set aside the laws of Shabbat and Yom Kippur for the sake of *piku'ah nefesh* (see *SA OC* 328 and 618), and since we frequently make these determinations on the medical advice of physicians, it follows that medicine is the very definition of *piku'ah nefesh*. His formulation, in turn, is adopted by the *Tur* and the *Shulchan Arukh, YD* 336:1. Maimonides, for his part, derives the *mitzvah* of medicine from Deut. 22:2, which speaks of the obligation to restore lost objects and which, by

rabbinic interpretation, extends to the saving of life (*B. Sanhedrin* 73a; Rambam, Commentary to *M. Nedarim* 4:4).

12. For a Reform halakhic perspective, see our responsa 5754.14 and 5754.18 to be published in the forthcoming volume of *teshuvot* from the CCAR Responsa Committee, 1990–1995.

13. The prohibition is based on *M. Bava Kama* 8:5; see *Yad, Hil. Chovel* 5:1 and *SA CM* 420:31.

14. See *Yad, Hil. Yesodey Hatorah* 5:1–2 and *SA YD* 157:1.

15. In the Talmud's version of this passage, Ben Petura cites no biblical proof text for his position. This implies that his reasoning is based on *sevara* (logic; common sense; perhaps a kind of practical reasoning familiar in legal contexts). This, indeed, is suggested elsewhere by Feinstein himself (*Resp. Igerot Moshe* YD 1:145), who links this case with the passage in *B. Sanhedrin* 74a, where the prohibition against saving one's life by committing murder is derived by means of *sevara*. In Ben Petura's view, according to Feinstein, the traveler that holds the water has an obligation under the laws of *tzedakah* to aid his fellow. Refusal to let him share the water is therefore not an omission *(shev ve'al ta'aseh)* but a commission, the act of refraining from performing a positive commandment *(bitul 'aseh)*, the active removal of the life-sustaining resource: hence, it is tantamount to murder. Since the rule of *B. Sanhedrin* 74a requires the traveler to assume a passive stance and not take any action *(ma'aseh)* that favors one life over another, his only moral recourse is to share the water.

All this changes, of course, if we follow the version of this passage found in the *Sifra* to Lev. 25:36. There, Ben Petura and R. Akiva both derive their positions from a midrashic interpretation of the verse; neither relies in a formal sense upon *sevara* at all, a fact that takes this entire problem out of the realm of "plain" moral argument. The halakhic supremacy of the Babylonian Talmud means that the *Bava Metzi'a* version is the one more familiar to subsequent rabbinic discussion.

16. Alfasi cites the passage (*Bava Metzia*, fol. 34a), and R. Asher explains that R. Akiva's interpretation of Lev. 25:36 retains halakhic force even though the verse as a whole is used for other purposes (*Hil. Harosh, Bava Metzia* 5:6). See also R. Nissim Gerondi to *B. Nedarim* 80b, *s.v. ma'ayan shel beney ha'ir*, who refers to the *Bava Metzia* passage on the assumption that the *Halakhah* follows R. Akiva. And, finally, see Feinstein himself (*Resp. Igerot Moshe*, YD 1:145), who explains that Maimonides also regards R. Akiva's position as authoritative even though he does not mention it in the *Mishneh Torah*.

17. Rashi, *B. Sanhedrin* 74a, *s.v. sevara hu* and *mai chazit*.

18. This assumes, of course, that by keeping the water, one is not in some way committing a positive act; to do nothing, we might say, is also to make a choice. And see the much-discussed comment of R. Hayyim Soloveitchik, *Chidushey R. Chaim Halevy 'al Harambam*, Yesodey Torah 5:1, who suggests that in Maimonides' view one is forbidden in all cases from saving one's own life at the cost of another's, even if that other person dies as a result of one's passivity or failure to act. This would mean that to refuse to share the water is to commit murder (essentially Feinstein's

explanation of Ben Petura's position), were it not for the *midrash* on Lev. 25:36, which constitutes a special exception that allows one to say "my life takes precedence over yours."

19. *Yad,* Matanot Aniyim 7:13 and 8:15–18; *SA* Yore De'ah 251:3, 8–9.

20. See note 18, above.

21. The halakhic outcome changes if the "water" belongs to neither "traveler" but to a third party. In that instance, says R. Eliezer Waldenberg (*Resp. Tzitz Eliezer* 9:28), the life-sustaining resource may be given to the person who is in greater medical need of it; if both are in equal need, the law then follows the position of Ben Petura, who says the water must be equally shared. By "equal need," I would presume that Rabbi Waldenberg means that both patients can benefit equally from the medicine, that both of them enjoy the same chances of recovery.

22. See the ruling of R. Yosef Teomim (*Peri Megadim, Mishbetzot Hazahav* 328, near the beginning) that when we are confronted by two patients, one of whom is in mortal danger *(yesh bo sakanah)* and the other is not, and we have but enough medicine for one but not both patients, we treat first the patient whose condition is critical. In other words, it is our duty to save life, and medical efficacy is the criterion by which we determine how best to fulfill that duty.

23. This theory is most closely associated with Ronald Dworkin, who develops it in the following volumes: *Law's Empire* (Cambridge: Belknap Press, 1986); *A Matter of Principle* (Cambridge: Harvard University Press, 1985); and *Taking Rights Seriously* (Cambridge: Harvard University Press. 1977). Yet the effort to limit the theoretical scope of judicial discretion has a long pedigree in jurisprudence. We see it as well in the "Legal Process" school of American legal thought that arose as a critical response to the "realists" (cited below). See Neil Duxbury, "Faith in Reason: The Process Tradition in American Jurisprudence," *Cardozo Law Review* 15 (1993), 606–705. The most famous example of "process" thought may well be the article by Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959), 1–35, which argues that judges ought to justify their decisions according to principles that they could maintain consistently through all areas of the law.

24. Most notably H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961). Legal positivism holds that "law," as such, must be validated by systemic legal sources such as Hart's "rule of recognition." The judicial decision, inasmuch as it is not dictated by existing rules, is therefore an act of legislation and a matter of discretion. See also Aharon Barak, *Judicial Discretion* (New Haven: Yale University Press, 1988).

25. The "legal realists" tend to trace their intellectual origin to the legal skepticism of Justice Oliver Wendell Holmes, Jr., famously expressed in "The Path of the Law," *Harvard Law Review* 10 (1897), 457–458, and *The Common Law* (Boston: Little, Brown, 1881). Their central point was the rejection of rules and logic as the controlling, determining factor in legal decision. For a history of the movement see Gary Aichele, *Legal Realism and Twentieth-Century American Jurisprudence* (New York: Garland, 1990).

26. An outstanding contemporary representative is Richard Posner: *Overcoming Law* (Cambridge: Harvard University Press, 1995), and *Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990). For an important collection of essays see Michael Brint and William Weaver, eds., *Pragmatism in Law and Society* (Boulder: Westview Press, 1991).

27. This term includes the Critical Legal Studies movement, feminist legal theorists, and critical racial legal theorists, all of whom are committed to the notion that "law" is essentially politics by another name and that the dominant social group will designate its politics as "law" to give it the appearance of neutrality and objectivity. For comprehensive discussion and bibliography see Mark Kelman, *A Guide to Critical Legal Studies* (Cambridge, MA: Harvard University Press, 1988), and Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995).

28. I will make this argument, in fact, in a forthcoming essay entitled "Responsa and the Art of Writing: Three Examples from the *Teshuvot* of Rabbi Moshe Feinstein."

29. Although the principle of medical efficacy may differ from that of equality of persons, it does accept the premises on which the latter is based. Thus, since all lives are equal before God, one cannot determine that any one life is more worthy of saving than is any other. This *does* permit us, however, to argue that it is better to act in such a way as to save more lives than fewer.

30. The foregoing is clearly not a thorough discussion of the strengths and weaknesses of the use of social value criteria in medical resource allocation, and I do not mean these words as an endorsement of the use of such criteria in actual decision making. I merely suggest that a respectable case can be made on behalf of such a set of priorities and that liberal halakhists could find support for it in the sources. Responsible ethicists can and do argue in favor of the use of social value criteria in patient selection. For a judicious discussion of both sides of this issue, see Kilner, pp. 27ff, and the substantial literature he cites.

31. The language is that of R. Ya'akov Emden, *Migdal Oz,* Chap. "Even Bochen," sec. 1.

32. The best, most detailed and comprehensive version of this narrative is Louis Jacobs, *A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law* (New York: Oxford University Press, 1984); the title suggests the book's central argument. See also Moshe Zemer, *Halakhah shefuyah* (Tel Aviv: Devir, 1993). The vitality and variety of the study of *Halakhah* in medieval times is the stuff of the researches of a number of prominent academic scholars, the most outstanding of whom are Israel Ta-Shema, Hayyim Soloveitchik, and Jacob Katz. For a summary and bibliography see Mark Washofsky, "Medieval Halakhic Literature and the Reform Rabbi: A Neglected Relationship," *CCAR Journal* (Fall, 1993), 61–74.

33. Mark Washofsky, "Abortion and the Halakhic Conversation," in Walter Jacob and Moshe Zemer, eds., *The Fetus and Fertility in Jewish Law* (Pittsburgh and Tel Aviv: Freehof Institute of Progressive Halakhah, 1995), 39–89.