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BIOETHICS

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THE WOODCHOPPER REVISITED ON ANALOGY, *HALAKHAH*, AND JEWISH BIOETHICS

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Two decades have elapsed since the appearance of Louis Newman's article titled "Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics."¹ The essay has been frequently cited, and rightly so. It deserves mention in particular because it is one of the earliest efforts to apply developments in recent Anglo-American legal theory to help elucidate "the problem of interpretation" of Jewish legal texts. That problem, simply stated, is this: legal texts do not interpret themselves, nor do they usually admit of a single determinate meaning. Despite this fact, many jurists and Jewish ethicists write as though the texts they study do contain such meaning and that the task of the interpreter/exegete is to isolate and extract it, drawing upon the writings of such legal and literary theorists as Terrance Sandalow,² Paul Brest,³ James Boyd White,⁴ Stanley Fish,⁵ Owen Fiss,⁶ Karl Llewellyn,⁷ and Ronald Dworkin.⁸

Newman argues that "the meaning of a text lies less in the words themselves than in the interpretive framework the exegete brings to them."⁹ Jewish ethicists, therefore, should beware of speaking in the name of "Judaism," as in "Judaism teaches that...." Rather, they should adopt a more nuanced style that reflects the nature of the interpretive process: the Jewish view on a particular ethical issue is "what we, given our particular interpretive assumptions and our particular way of construing the coherence of the tradition as a whole, find within the traditional sources."¹⁰

Newman uses these theoretical insights to analyze and critique the writings of a number of Jewish ethicists concerning the treatment of the terminally ill. As is the case with the discussion of most ethical issues, this one is textual and interpretive in nature: the Jewish ethicist identifies a set of texts in traditional Jewish literature that are relevant to her topic and then interprets them in order to derive an answer or

answers to the problem she is addressing. In this particular case, one of the most prominent of these "relevant" texts is *Shulchan Arukh Yoreh Deah* 339:1, which lists the actions that one is permitted and forbidden to undertake with respect to the *goses*, a dying person whose death is considered imminent. The *goses*, the text tells us, is considered a living person in all legal respects. It is forbidden, therefore, to take any action that might cause him to die more quickly, since such an action is tantamount to bloodshed. On the other hand, it is permissible to remove from the scene a factor defined as an impediment to his death, such as the sound made by a woodchopper doing his work (hence, the title of Newman's article). A number of Jewish ethicists see this text, among others, as a precedent for the contemporary bioethical question of euthanasia, particularly the familiar distinction between "active" euthanasia ("mercy killing," assisted suicide; positive actions taken to hasten the patient's death) and "passive" euthanasia [discontinuation of futile medical treatment; "allowing nature to take its course," etc.].¹¹ As Newman sees it, this move—from the text to its contemporary application—is seriously problematic, for at least two reasons. First, as indicated, the text addresses the specific example of the *goses*, whose death will in all likelihood occur within 72 hours,¹² and it is not obvious that its conclusion would apply as well to patients considered terminally ill but who are not at this moment in the throes of death. Second, it is also not obvious that the "impediments" spoken of in the *Shulchan Arukh* — the woodchopper and the rest — are substantially akin to the panoply of technologies utilized nowadays in the treatment of the terminally ill. The latter are classified as "medical" whereas the former never enjoyed that designation; what then can this text teach us concerning the ethics of the contemporary medical situation? For Newman, this disconnect between the text and the (varying) lessons that Jewish ethicists tend to draw from it is symptomatic of the larger theoretical issue he explores in his article. Traditional texts do not *necessarily* prove the conclusions are derived from them; indeed, it is misleading to say that these conclusions are "derived" at all, as though they lay at

the end of a process of logical or scientific reasoning that identifies the one true meaning of the source(s) at hand. The conclusions, rather, cannot be imagined in the absence of the interpretive assumptions the ethicists bring to their reading of the texts. "I would propose that contemporary Jewish ethics be conceived not as an attempt to determine what past authorities would say about contemporary problems if they were alive today, but as a dialectical relation in which finally no sharp distinction can be made between our voices and theirs.... Any reading of the texts that we produce, and any conclusions we draw from them, are as much our work as theirs."¹³

Newman's article is important in a number of ways. It is, as I indicated earlier, one of the first efforts to integrate the work of contemporary legal theorists into the study of halakhic texts, an approach that greatly contributes to our understanding of Jewish legal thought and the halakhic process.¹⁴ It is also exemplary of the scholarly direction called the "interpretive turn" – the recognition of "the importance of interpretation in all inquiry"¹⁵ – that has characterized the humanities and social sciences for more than a generation. Practitioners of a number of disciplines have moved away from the old positivist model of study that idealizes the objective analysis of empirical data and toward an approach that emphasizes that all reason is rooted in history, tradition, and human experience. Hence the observer, even the "hard" scientist,¹⁶ cannot know an object or explain his data without interpreting them; "all understanding is interpretation,"¹⁷ a process that is not *wertfrei* but always proceeds from a contingent and historical position, the framework of practices, interests, and problems within which one lives, works, and thinks. Newman's presentation helps us to see the activity of Jewish law as an ongoing interpretive (hermeneutical) process that attempts to arrive at a constructive understanding of the *halakhah* through argument rather than an effort, akin to scientific method, to deduce the single correct answer from the data. Finally, and with specific reference to our topic here, Newman challenges the way in which many thinkers pursue the

enterprise of Jewish bioethics. To cite sources as precedents without asking what makes them precedential, to rely upon analogies without acknowledging that one is operating from within a previously constructed interpretive framework that dictates both the analogies and the meaning to be drawn from them – these things smack of unreflective habit rather than a careful, self-aware methodology. This challenge is a good thing, because no scholar, whether “traditional” or “academic,” should pursue her work in an unreflective manner.

But what if the challenge proves to be too much of a good thing? Could it be that Newman’s critique does more than simply call upon writers in the field of Jewish bioethics to examine their interpretive assumptions? Is it possible that his observations undermine the very enterprise of Jewish bioethics? Much of that enterprise has operated within the field of *halakhah* and Jewish legal thought. Scholars investigating the question “what does Judaism say?” about a particular issue relating to medical practice have followed the standard methodologies of Jewish law, combing the corpus of authoritative halakhic texts for sources that, through the application of analogical reasoning, might serve as precedents that offer possible answers to their question. This legal (perhaps a better term is “judicial”) methodology characterizes the work of liberal¹⁸ as well as Orthodox halakhists as well as of those academic scholars whose work has been described, inaccurately, as “nonhalakhic.”¹⁹ Newman, to be sure, does not advocate the abandonment of this traditional, text-based approach to Jewish bioethics, even as he calls upon those who engage in it to do so with care and intellectual self-awareness.²⁰ Yet, since the publication of his article, a number of critiques have taken aim at precisely this approach and on very similar grounds.²¹ The authors of these critiques tend to work from liberal Jewish perspectives;²² for that reason, and for the sake of convenience, I will call them “the liberal critics.” Their objections, though varied, coalesce around the assertion that traditional modes of halakhic thinking, based upon analogy, precedent, and something called—imprecisely—“halakhic formalism”²³

are inadequate to the task of contemporary Jewish bioethics. The texts, they contend, provide an insufficient basis from which to extrapolate meaning for today's Jew who confronts a brave new world of medical choices and dilemmas. The analogies are forced, artificial, and morally irrelevant. Moreover, the traditional Jewish activity of deriving guidance from authoritative texts simply fails to capture that which is essentially "human" and "ethical" in Judaism's teachings concerning the practice of medicine. This attack carries some serious implications for those of us who work in the field of progressive *halakhah*, for it suggests that our approach to bioethical questions, an approach firmly rooted in the discipline of traditional halakhic thinking as taught and practiced by our teacher R. Solomon B. Freehof, is not sufficiently progressive or, for that matter, ethical. My goal here is to examine these criticisms in both a general and a specific light. In general, I want to discuss the pivotal role of analogy in traditional legal and halakhic reasoning. Specifically, I want to consider how analogy has served halakhists, both Orthodox and progressive, in their efforts to confront the difficult life-and-death issues surrounding the treatment of the terminally ill. The findings, I think, will reveal both the strengths and weaknesses of the traditional case-and-text-based approach in *halakhah* as it relates to contemporary bioethical questions, and they will also reveal that the strengths outweigh the weaknesses. That is to say, the method of analogy, when used in the way it ought to be used, can lead the progressive halakhist to bioethical conclusions both progressive *and* ethical. I will argue that progressive halakhists, as long as they heed Newman's call to examine their interpretive assumptions and make them clear, need not reject the traditional methodologies to create a progressive Jewish bioethic. On the contrary: Jewish bioethics, even of the progressive variety, is best understood and practiced as a subspecialty within the discipline of *halakhah*.

I. *Analogy in Law and Ethics*. There is no question that analogy, the process of reasoning by cases or by examples, plays a pivotal role in

the work of lawyers and judges. Some scholars go so far as to deem analogy (or casuistry, as it is sometimes called) *the* distinctive method of legal reasoning.²⁴ Others recognize it as one mode of reasoning, albeit an important one, out of a number of modes that jurists customarily employ.²⁵ It is essentially a four-step process, beginning with the identification of a problem or target case (*B*), that is, a situation that requires an answer or solution. Step two is to find a base-point or source case (*A*), a case that has previously been decided and that seems to be an appropriate starting point from which to reason and to analyze the problem or target case. In step three, one points out the respects in which the problem or target case is similar to the base-point case as well as the respects in which the two cases differ. Step four, finally, requires that one determine whether the two cases are sufficiently similar so that the solution or answer reached in the base-point case should apply to the problem case as well or that they are sufficiently different so that the solution to the earlier case does not apply to the case at hand. In legal terminology, one argues that case *A* either serves or does not serve as a suitable precedent for case *B*, so that, on the basis of the principle that like cases ought to be treated alike, the solution to *A* should (or should not) control our response to *B*.

The phrase "legal terminology" raises an important theoretical issue. We say that analogy is a mode of something called *legal* reasoning, an approach to analysis presumably unique to the community of jurists and the practice of law, yet we recognize that this form of reasoning is precisely the way we think about and analyze many problems we encounter in everyday life. To take but one example:²⁶ Mother allows older brother to stay up until 9:00 p.m., and younger brother seeks the same treatment (step one). Younger brother argues (step two) that the rule governing older brother's bedtime (*A*) is a source-case for his own issue (*B*), the problem case. He does so (step three) by pointing to the similarities between him and older brother: both are children in the same family, and this shared factor

suggests that the two should receive equal treatment in the form of the same bedtime rule. For her part in step three, mother questions the analogy, arguing that there is a significant difference between the two cases: older children need less sleep than younger children. In step four, mother determines that the difference is more important than the similarity. The analogical reasoning process employed in this family setting is much the same as that employed in law, with the exception, of course, that legal argument is more formal and stylized.²⁷ This perception, in turn, raises the question whether "legal reasoning" is at all a distinct form of reasoning or simply the application of general forms of reasoning within a specifically legal context.²⁸

In any event, lawyers do resort to analogy and precedent in order to extend the accepted understandings of the law to cover new cases that offer similar, though not identical, circumstances. Consider the following problem case (step one): are wiretapping and electronic surveillance undertaken by law-enforcement agencies permissible in the absence of a judicially issued warrant? This was the question put before the U.S. Supreme Court in the 1928 case *Olmstead v. United States*.²⁹ Olmstead was a bootlegger convicted on the basis of evidence gathered through a wiretap placed by Federal officials who had not obtained a warrant to do so. He contended (step two) that the wiretap violated the Fourth Amendment of the U.S. Constitution, which provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated; and no Warrant shall issue but upon probable cause... particularly describing the place to be searched and the persons or things to be seized." In steps three and four, both the majority of the court and the dissenters offer analogical arguments as to whether the analogy is successful: is the Fourth Amendment an appropriate source from which to derive the rule that governs this case? Writing for the court's majority, Chief Justice William Howard Taft declared that the circumstances of this case were fundamentally dissimilar from those provided for by the relevant constitutional text:³⁰

The amendment itself shows that the search is to be of material things—the person, the house, his papers, or his effects. The description of the warrant necessary to make the proceeding lawful is that it must specify the place to be searched and the person or things to be seized.... The amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants. By the invention of the telephone 50 years ago, and its application for the purpose of extending communications, one can talk with another at a far distant place. The language of the amendment cannot be extended and expanded to include telephone wires reaching to the whole world from the defendant's house or office. The intervening wires are not part of his house or office any more than are the highways along which they are stretched.

In dissent, meanwhile, Justice Louis Brandeis rejected this understanding of the Fourth Amendment as overly literal. The specific examples the amendment mentions are to be understood in light of its general purpose. When the text was adopted, to be sure, “force and violence” – the invasion of a person’s private domain – were the only means by which the government could seize evidence from him without his consent. “But ‘time works changes, brings into existence new conditions and purposes.’³¹ Subtler and more far-reaching means of invading privacy have become available to the government. Discovery and invention have made it possible for the government, by means far more effective than stretching upon the rack, to obtain disclosure in court of what is whispered in the closet.”³² In other words, said Brandeis, the Fourth Amendment *is* a valid source case from which to draw the analogy, because the essential similarities between it and the problem case outweigh the material differences between them.

Both the informal example sketched above and the opinions in the *Olmstead* case suggest the strengths and relative advantages of analogical reasoning over deductive reasoning, thinking that begins with general principles and thereupon moves to solve specific cases. One of these strengths is the power of analogy to promote consensus in matters involving legal, ethical, or political disagreement. People who differ over broad, general principles might nonetheless be able to come together over specifics. "[I]n the face of persistent disagreement or uncertainty about what morality generally requires, people can reason about particular cases by reference to analogies. They point to cases in which their judgments are firm. They proceed from those firm judgments to the more difficult ones. This is how judges often operate; it is also how ordinary people tend to think."³³ Suppose, for example, that we were to approach either of our two exemplary cases (bedtime rules and wiretapping) on the basis of deductive reasoning. We would first have to affirm, as our major premise, either of two controversial principles: a commitment to a "lenient" or a "strict" theory of parenting, or a commitment to one side or the other of the age-old debate between the right of the individual to privacy and the responsibility of the government to protect the community. It would be difficult in either case to resolve the dispute between the principles or to identify the theoretical happy medium or point of balance between them. It would be simpler and surer, however, to come to consensus on specific problematic instances by working from examples over which we have already reached agreement. This is perhaps another way of expressing the insight that broad, general principles tend to be useless in resolving legal and moral controversies.

Albert Jonsen and Stephen Toulmin stress this point in their vigorous defense of casuistry, or reasoning from particulars in the discipline of ethics.³⁴ Although people tend to think of general principles as the whole of ethical discourse, this is a drastic oversimplification of the state of affairs. "Taken by themselves, the

general rules and maxims that play a part in people's ethical deliberations are only rarely matters of serious dispute.... On the contrary, it is just those situations that are *not* covered by appeal to any single simple rule that begin to be problematic; and in just those cases our concern to act rightly gives rise to genuinely moral 'questions' and 'issues' [emphasis in original]."³⁵ Generalizations, in other words, are empty of substantive content beyond the obvious and uncontroversial examples – cases – which gave rise to them in the first place. Once we move past those obvious areas of agreement to the more difficult (and interesting) questions of morality and ethics, it is only through the application of casuistry, the identification of similarities and differences between types of example, that moral thought can productively proceed. Rules are important, even essential, but it is by considering examples – that is, through casuistry and analogical reasoning – that we determine just what those rules cover and how far they extend.³⁶ Such an approach, which Jonsen and Toulmin attribute to such distinguished contemporary writers as Michael Walzer and Sissela Bok, "is wholly consistent with our moral practice."³⁷ On the other hand, analogical thinking has its weaknesses, too. The most obvious of these lies in step four of our description of the process of analogy, the determination that the similarities between the two cases outweigh or do not outweigh the differences between them. This raises the "problem of importance": how exactly do we evaluate the relative legal or moral significance of the similarities and differences?³⁸ Analogical reasoning does not by itself solve this problem. It can suggest possible precedents, but it cannot assure us that these prior decisions are *in fact* precedential, because *that* decision must rest with the interpreter. "At most, analogical thinking can give rise to a judgment about probabilities, and these are of uncertain magnitude."³⁹ Unlike deductive reasoning, in which the conclusion is said to follow logically from the premises, analogy cannot make a methodological, quasi-mathematical claim for the validity of its conclusions. It rather *suggests* its conclusion, the correctness of which must therefore be *argued* by its advocate on the

basis of something other than formal demonstration. All of this is reminiscent of the famous remark of Justice Oliver Wendell Holmes, Jr.: "General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise."⁴⁰ In dealing with issues of moral or legal import, it is rare that we proceed from a general concept to the solution of a specific case, for the applicability of that concept to the case is itself a matter of analogical reasoning.⁴¹ (How do we know that principle *X* covers case *Y* unless we have already identified the similarities between them?) Yet that reasoning itself requires a *judgment* of the relative importance of those similarities. And such judgment, by its nature, is not determined by logical necessity. Some theorists, to be sure, make a stronger claim for analogy, namely that it is a "valid" (and not merely "probable") approach to truth in that its conclusions are supported by the professional skills and craft virtues of those who employ it.⁴² This notion strikes me as excessively mystical,⁴³ an all-too-sure confidence in the capacity of the jurist or the ethicist to make correct inferences. The very fact that analogical inference involves an act of the imagination (one "sees" or intuits a potential similarity between cases and then tests that intuition) suggests that we should be careful about speaking of its "validity," a term more suited to deductive analysis. The weaker claim, at any rate, is more easily defended. Analogy is a necessary and ubiquitous element of human reasoning, but it requires an act of judgment on the part of its advocate in order to prove its point. That judgment, to win wide acceptance, will necessarily draw upon the advocate's educated sense of what the relevant interpretive community will generally hold to be the correct legal or ethical resolution of the case. Such is perhaps the best that anyone can do in the field of legal or ethical reasoning, and for that reason, the conclusion will probably pass the test of legitimacy: that is, the interpretive community will accept it as a legitimate (if not the *only* legitimate) answer to the question. It remains, however, a *judgment*; it does not enjoy the status of demonstrable proof.⁴⁴

II. *Analogy in Halakhah*. Given that *halakhah*, traditional Jewish law, displays the characteristics of both law and ethics,⁴⁵ it should not be surprising that analogy plays a major role in halakhic thinking. Any discussion of that role must distinguish between two major subject areas. The first of these concerns the extent to which the sages, the rabbis of the formative era of rabbinic Judaism, included analogy among their "hermeneutical principles" (*midot she-hatorah nidreshet bahen*), which served them in linking the content of the Oral Torah to the verses of the Written Torah. The various listings of these principles contain forms of comparison (*hekesheh, kal vachomer, binyav av*) that can be termed "analogical," although the precise characterization of each of them has long been a matter of controversy.⁴⁶ My concern here is not with these talmudic-midrashic *midot* but with the second large subject area: the use of analogy by rabbis in the Talmud and in the post-talmudic period as a means of learning the law in new cases by reasoning from already decided cases or rules. The term for this sort of analogical thinking is *ledamoyei milta lemilta*, "to compare one thing to another." The ability to employ analogy to derive answers to new and difficult questions is considered central to the activity of halakhic scholarship and to the very conception of a rabbinical sage.⁴⁷ At the same time, as we shall see, halakhic authorities express a distinct wariness over the process, out of concern that its unchecked or improper use can lead to mistaken conclusions. Rabbinical discussion of analogical reasoning tends to begin with a *baraita* in *B. Bava Batra* 130b: One should not derive the *halakhah* either from theoretical learning (*limud*⁴⁸) or from a ruling in an actual case (*maaseh*) until one is instructed that "this *halakhah* is to be followed in an actual case (*halakhah lemaaseh*)." If one asks and is told "this is *halakhah lemaaseh*," one may apply that ruling in an actual case, as long as one does not draw an analogy (between cases; *uvilvad she-lo yedameh*). The thrust of this text, as it is generally explained,⁴⁹ is that each of these methods of learning is afflicted with defects that can be corrected only when the two are combined. A student should not draw practical halakhic conclusions from his teacher's theoretical discussion

of the law, for were the teacher to consider an actual case rather than to speculate in abstraction, he might well study the issues more carefully and rule differently. The student should also beware of learning from his teacher's decisions in case, lest he mistake the teacher's reasoning for the decision and then go on to apply the same ruling, incorrectly, to another case. The student may follow the teacher's theory or decision only when he has been told that "yes, this is the theory of the law, and you may rely on it in matters of practice." The *baraita's* concluding caveat – "so long as one does not draw an analogy" – puzzles the *setam Talmud* (i.e., the anonymous editor[s] of the passage), which objects: "We use the entire Torah for the purpose of analogy (*veha kol hatorah kulav damo 'i medaminan lah*)!" How can you prohibit the student from drawing analogies from his teacher's rulings when "the entire Torah" – all our legal learning – is based upon that process of reasoning? To resolve this difficulty, the Talmud quotes Rav Ashi, who emends or reinterprets the *baraita* as follows: "So long as one does not draw an analogy in matters of *tereifot*," those physical injuries that disqualify kosher species of animals from consumption by Jews. In support of this emendation, the Talmud cites another tanaïtic passage, which reads: "We do not draw analogies between *tereifot*. And do not be puzzled by this, for one can cut an animal on one side and it will live and on the other side and it will die." This second *baraita* (as well as the first one, under Rav Ashi's reinterpretation) instructs us not to reason analogically when learning the specific field of animal anatomy. We should not, for example, draw conclusions about injuries to an animal's liver by comparing them to similar injuries to its lung, because the physiology of each of the bodily organs is unique.⁵⁰ The objection – "so long as one does not draw an analogy" – is thus restricted to a condemnation of analogy when pursued in one particular field of law. This would lead to the inference that, in all other fields, reasoning by analogy is an appropriate method of deriving legal meaning. Various *rishonim* do make that inference. R. Meir Halevy Abulafia (13th-century Spain) writes: "But in all other matters of Torah we do

draw analogies, for not all laws, either of a monetary or ritual nature, are written explicitly. Should an issue not explicitly written present itself, we have no choice but to compare it to a similar matter discussed explicitly in the Talmud. Indeed, the rabbis of the Talmud themselves draw conclusions by analogy in their formulations of the law (*shemateta*) and in their rulings in actual cases (*uvdei*).⁵¹ Similarly, R. Asher b. Yechiel (Rosh, 13th–14th century Germany and Spain) declares: “We learn from case to case, by analogy, for the Sages of the Talmud were unable to provide legal guidance for every case and every new problem that would one day arise. Those that have succeeded them follow in their footsteps and use analogies therefore to learn the law.”⁵² As Rashi (11th-century France-Germany) notes, the very process called *talmud* consists of “the deducing of conclusions from the words of the Mishnah and the use of analogy” (*medamei milta lemilta*).⁵³ Consider the following example, one of many that obviously could be chosen to illustrate. In *B. Kidushin* 59a, we read that Rav Gidal was “examining” (*mehafikh*) a plot of land, that is, he was engaged in efforts to purchase it (Rashi, *s.v. mehafekh behahi ara*). Before he concluded his negotiations, Rabbi Abba came along and purchased the land. Rav Gidal filed a formal protest before the sage Rav Yitzchak bar Napacha, who confronted Rabbi Abba and asked him: “Suppose a poor man is examining a cake, and another man comes along and takes it from him. What is the rule in that case?” Rabbi Abba responded: “That other man is called ‘wicked’.” “Then why,” asked Rav Yitzchak, “did you behave in that manner in this case?” Rabbi Abba answered: “I did not know that Rav Gidal was seeking to purchase that plot of land.” Here, the poor person seeking to acquire a cake is the source case from which we learn the law concerning the target case, Rabbi Abba’s purchase of land over which negotiations are taking place. Just as in the source case, so in the target case: the acquisition of the cake/land is valid, but the one who acquires it is branded as “wicked” and subject to public condemnation⁵⁴ because he acquired it while the poor person/other prospective buyer was seeking it. Although Rav Yitzchak

might have used the figure of the poor person purely as a rhetorical device, the Talmud and the subsequent codifiers accept the comparison as halakhically determinative: "If one is seeking to purchase or rent an object, whether land or chattel, a second person who preempts him and acquires that object is branded as 'wicked.'"⁵⁵ Given that the rule is based on an analogy, the commentators accordingly debate the extent of the comparison. Some say that the rule applies only when the property in question is ownerless (*hefker*) or a gift, for such would likely be the case when a "poor person" is attempting to acquire a "cake." Others contend that the law covers only those cases where the second person buys the property, since that condition matches the case of Rav Gidal and Rabbi Abba. It is only because Rabbi Abba buys the property that he deserves to be called "wicked," since he could have left Rav Gidal alone and bought some other property. Such would obviously not be the case if the property was ownerless, since no such bargain probably exists elsewhere.⁵⁶ Meanwhile, early halakhists extended the analogy to matters of marital law: an agent appointed to betroth a wife for his client is called "wicked" if he betroths that woman to himself.⁵⁷ And in 1956, R. Moshe Feinstein, the preeminent *posek* (halakhic decisor) of North American Orthodox Jewry, was asked whether the rule of "the poor man examining a cake" extended to the case of *shidukhin*, a couple who were informally engaged to be married. While Feinstein answered in the negative, he did so by first examining whether the analogy to the target case (*shidukhin*) was an apt one. In any event, none of the development of this area of the law could be imagined without recourse to argument from analogy. Yet even though analogy is central to the process of talmudic and halakhic thought, both the sages and their rabbinical successors express considerable ambivalence over the use of analogy in the learning of the law. In *B. Yevamot* 109b, R. Yitzchak interprets Proverbs 11:15 to say that "evil upon evil will befall...the one who nails himself (*tokea atzmo*) to the matter of the law." The Talmud offers two explanations for this expression. According to the first, the one who "nails himself" in this manner is he who studies Torah but

does not fulfill other *mitzvot*.⁵⁸ The second explanation is that the term refers to a scholar that reaches a decision in a case by relying on (*i.e.*, *toke`a*, “nailing himself to”) his own power of analogy rather than consulting a more knowledgeable scholar. This is contrasted to the dictum of R. Yonatan: “A judge should always imagine that a sword is pointed at his loins and that Hell lies open below him.”⁵⁹ The judge must approach the task of halakhic decision in a spirit of the utmost seriousness, and he who decides on the basis of his own analogical reasoning without seeking the help of a more competent scholar fails in this task. Both Maimonides⁶⁰ and the *Shulchan Arukh*⁶¹ cite this passage as authoritative *halakhah*: one must not decide a case on the basis of an analogy that one has drawn if one can consult a more knowledgeable judge (“if there is a more knowledgeable judge in the city”). R. Menachem HaMe’iri (13th–14th century Provence) expresses this idea in stronger terms:⁶² “Whoever is able to clarify a matter with his teacher or a competent scholar but chooses instead to rely upon his own knowledge, drawing analogies and ruling on the basis of his own logic, deserves the curse of the sages (*kelelat chakhamim*)⁶³ and the severest condemnation, for he does not approach the task of halakhic decision with the proper reverence.”

None of these talmudic and halakhic statements, of course, criticize analogical reasoning *per se*. Their concern is that an unqualified or mediocre scholar can easily abuse that method of thought. His decision, based upon improper analogies, may well be incorrect; moreover, his determination to rule on his own in this way is an improper arrogation of authority in the presence of his teacher⁶⁴ or of a more competent scholar. From this it would follow that there is no objection to the use of analogy (1) by a truly competent scholar, (2) by a lesser scholar when no greater authority is available for consultation, or (3) by a student who has received permission (*reshut*) from his teacher to rule on matters of *halakhah*.⁶⁵ Still, these passages, which underscore the risks inherent with analogy, hardly constitute a ringing rabbinical endorsement of that method

of reasoning. Analogy in this context is contrasted unfavorably with *rules*, clear statements of the *halakhah* that one receives from a teacher or a knowledgeable scholar: we would much prefer to decide a case based upon the latter source of information than upon the former. Analogy may be the path we take when we have no other, better recourse for learning the law. But it is and remains a speculative and uncertain means of proof; as the Talmud rhetorically puts it: "Shall we issue a ruling in an actual case merely because we can draw an analogy?"⁶⁶ This, perhaps, is simply another way of saying that, just as lawyers and ethicists have never conclusively solved the "problem of importance" that attaches to every analogy, neither have the rabbis succeeded in removing the element of judgment that exists in each use of this form of reasoning. As we have seen, analogy by its nature requires a measurement of probabilities. The author of the analogy must argue that the similarities between the two objects of comparison are more important, legally and ethically speaking, than the differences between them. Such an argument will never be completely free of uncertainty, simply because analogy will always fall short of demonstrable proof. To adopt Newman's terminology, an analogy will be deemed persuasive largely to the extent that its intended audience accepted the interpretive assumptions upon which it is tacitly based, yet the validity of those assumptions may remain irremediably controversial. For this reason, the texts tell us not to rely upon analogy as a basis for halakhic decision when other, more authoritative sources of the law (books;⁶⁷ the advice of a competent scholar) are available.

III. *Analogy in Contemporary Halakhah: The Treatment of the Terminally Ill.* Analogy, therefore, is accorded a decidedly mixed reception in the Jewish legal tradition. As in law and ethics, analogy is a "necessary and ubiquitous" tool in halakhic thought. Without it, rabbis from talmudic times onward would have been unable to derive knowledge of the law in new and unprecedented matters and cases. If anything, analogy is even more important in Jewish law than in other legal traditions. Given the absence of a universally recognized

legislative authority empowered to create new law, halakhists have utilized "judicial" tools, interpretation of texts and analogical reasoning from previous cases, as their (almost) exclusive mechanism for deriving legal guidance for new situations. At the same time, like their counterparts in other legal and ethical traditions, the rabbis recognize the uncertainties inherent in the analogical method, which as we have seen inevitably involves the element of judgment and the reliance upon indemonstrable interpretive assumptions to solve the "problem of importance."

All this leads to my reexamination of the issue that serves as the springboard for Louis Newman's observations: the cessation of medical treatment for a terminally ill patient. As he has noted, much of the Jewish ethical discussion of this question involves analogies based upon traditional texts that, to put it mildly, do not mention respirators, heart-lung machines, feeding tubes, aggressive experimental surgeries, and any of the other sophisticated technologies that can maintain a patient's vital signs or extend her life for a brief or extended span of time long after any realistic hope for curing or containing her disease has vanished. There exists, in other words, a "technological gap" between the traditional texts (source or basepoint cases) and the contemporary medical situation (the target or problem case) that questions the cogency of any analogy drawn from the latter to the former. My reexamination therefore will focus upon whether halakhic writers display an awareness of this gap and whether and to what extent they succeed in bridging it. I want to confine this study to specifically *halakhic* as opposed to ethical writings. As I have noted, there is considerable overlap between these subject areas in Jewish thought. Most Jewish writing on "ethical" subjects draws heavily upon halakhic sources, for the simple reason that *halakhah* is the genre of Jewish literature in which questions of praxis, ethical as well as ritual, tend to be most thoroughly analyzed, elaborated, and argued. The difference between the two may lie more in the realm of identification than of essence: by "halakhic" writings, I mean literature

produced by scholars who work self-consciously within the framework of Jewish law, who see themselves as "halakhists" addressing a community of readers with a similar interest, rather than as "ethicists." By *halakhah*, moreover, I mean Jewish legal thought of the liberal as well as the traditional variety; hence, I will survey five such statements produced by Orthodox writers as well as the Central Conference of American Rabbis Responsa Committee's 1994 *teshuvah* "The Treatment of the Terminally Ill." I choose this halakhic focus—both because of my own interest in halakhic literature and because Newman largely ignores this genre in his article.⁶⁸ Analogical reasoning, in addition, figures prominently in these halakhic writings, and this will afford us sufficient data with which to consider how (and how well) analogy functions within both Orthodox and progressive halakhic discussion of this critical issue of medical ethics.

I want specifically to explore two questions, the first procedural and the second somewhat more substantive. The procedural question is one that I have already indicated: I want to know whether those who make these analogies display an awareness of the technological gap and, if so, do they inform us of the "interpretive assumptions" that enable them to overcome that gap and use the traditional texts as analogical sources for bioethical guidance. That is, I want to know how well halakhic writers succeed in meeting the challenge that Newman poses to Jewish bioethicists. The substantive question asks whether these analogies *work*: Do the authors who use them make a plausible case on behalf of their argument? Do they solve, or at least come close to solving, the "problem of importance" that attaches to analogies in general and to the "woodchopper" analogy in particular? Or, as the liberal critics charge, is the gap between the source and the target cases so wide as to render the analogies irremediably forced and artificial? The substantive question, of course, requires an evaluative judgment, which means that it lies beyond the realm of objectivity and is not subject to demonstrable proof. Still, we have no choice but to attempt

evaluation simply because analogy is so vital to halakhic and ethical thinking. If the analogies *work*, then halakhists and Jewish bioethicists can claim a degree of success for their approach to the material. Conversely, to the extent that analogical thinking cannot overcome the gaps, technological or otherwise, between the traditional sources of Jewish law and the bioethical questions we face today, it will become correspondingly harder to defend "Jewish bioethics," of either the Orthodox or the Progressive variety, as a coherent discipline that has much of a future.

We begin with a consideration of three texts that have tended to serve as the basepoint or source cases for these analogies. The first of these is *Shulchan Arukh Yoreh Deah* 339:1:⁶⁹

The *goses* is like a living person in all legal respects. It is forbidden to bind his cheeks, or to anoint him or to cleanse his body or stop up his orifices. It is forbidden to remove the mattress from beneath him or to place him upon sand, clay, or earth. It is forbidden to place vessels of water or a grain of salt upon his abdomen. It is forbidden to announce his death or to hire musicians or wailers for his funeral. It is forbidden to close his eyelids until his soul has departed. Indeed, whoever closes the eyelids of the *goses* as his soul is departing is a shedder of blood....

From here we learn that the dying person is still alive and therefore must not be treated as though he is dead. Some of these forbidden acts describe measures taken to prepare a corpse for burial.⁷⁰ Others relate directly to our issue: to touch a *goses*, to move his body, or even to close his eyelids at the moment of death is tantamount to an act of murder. The tanaïtic sources for this rule cite the following analogy:⁷¹ the *goses* is like a dripping candle, which will extinguish at the slightest touch. "Likewise, one who closes the eyelids of the *goses* is considered as having released his soul [i.e., killed him]."⁷²

Rabbi Moshe Isserles pursues the theme in his gloss to this passage:⁷³ Similarly, it is forbidden to hasten the death of the dying person. For example, in the case of one who has been a *goses* for an extended period of time and is unable to die [literally, “whose soul is unable to separate from his body”], it is forbidden to move the pillows and mattress from beneath him, which is done because some people believe that the feathers of certain birds hinder the person’s death. Likewise, it is forbidden to move him from his place or to place the keys of the synagogue underneath his head in order that his soul might depart.

On the other hand, he continues:

If there is present any factor which prevents the soul from departing, such as the sound of a woodcutter near the house or salt on the patient's tongue...it is permitted to remove that factor. This is not considered an act of commission (*maaseh*) but merely the removal of an impediment.

Herein, according to the Jewish ethicists whom Newman critiques, lies a major Jewish textual warrant both for the distinction between killing the terminally ill patient and letting that person die as well as for the permit to withdraw or discontinue life-sustaining therapies regarded as medically futile. The respirator is analogized to the woodchopper and to the salt: if the latter may be removed, so, too, may we disconnect the former.

The second text is the narrative in *B. Ketubot* 104a concerning the death of Rabbi Yehudah HaNasi (“Rabbi,” Judah the Prince). Rabbi’s students have gathered at their dying teacher’s bedside to pray for his life. Their prayers have the effect of keeping him alive, but they cannot bring about his recovery. Rabbi’s maidservant climbs to the attic and adds her prayer to theirs, but when she sees that Rabbi is

suffering great pain, she prays for his death. When the students do not cease their own prayers, she drops a glass vessel from the attic to the floor. The students, startled by the crashing sound, cease their prayers for an instant, and in that instant Rabbi dies. The ethicists draw an *analogy* from the students' prayer to modern medical technologies that are successful in keeping terminal patients alive even as they offer no hope for recovery. If we are entitled to interrupt the prayers, the reasoning goes, we are similarly permitted to turn off the machines and to discontinue the futile treatment.

The third text (*B. Avodah Zarah* 18a) is the story of the martyr's death of R. Chaninah b. Teradyon during the Hadrianic persecutions of the second century C. E. The Romans tied R. Chaninah to a stake, wrapped him in a Torah scroll, and set him ablaze. In addition, they placed wet woolen sponges on his body to retard the flames in order that he die more slowly and painfully. R. Chaninah's students implored their teacher to open his mouth, swallow the flames, and thus die more quickly. He responded: "Let the One who gave me life take it away; one should not bring physical harm to oneself."⁷⁴ Eventually, a Roman officer at the scene offers to remove the wet sponges and to increase the intensity of the fire in return for R. Chaninah's assurance that the officer might receive life in the World to Come. R. Chaninah accepts the offer; and "his soul departed quickly." A heavenly voice thereupon affirms the righteousness of both men when it declares: "R. Chaninah b. Teradyon and the officer are destined for life in the World to Come." Some obvious problems are associated with learning bioethics from a narrative concerning a martyr's death. And a glaring contradiction is to be resolved: Whereas removing the wet sponges could conceivably be defined as the removal of an impediment to death, to increase the intensity of the fire seems more akin to an active measure designed to hasten death. Still, provided that these difficulties can be successfully addressed,⁷⁵ the story might serve as an analogy or precedent for the removal of life support and other therapies when these are judged to

be medically futile.

1. *R. Immanuel Jakobovits*. One of the early pioneers of the discipline that came to be known as Jewish bioethics,⁷⁶ R. Immanuel Jakobovits discusses the treatment of the terminally ill in a 1956 article that appeared in an Orthodox halakhic journal.⁷⁷ Then chief rabbi of Ireland, future chief rabbi of the United Kingdom, and a preeminent figure in the discipline that came to be known as Jewish bioethics, having previously established that Jewish law forbids any positive action undertaken to shorten human life,⁷⁸ Jakobovits declares that “the rules are entirely different” when it comes to taking no action to extend the life of the *goses* or to remove an impediment to his death. Basing his analysis upon all three of our “basepoint” texts, he adds an important element to the discussion of Isserles’s permit to remove an impediment to death. The commentators to the *Shulchan Arukh* notice an apparent contradiction among the list of examples that Isserles cites. It is forbidden to remove the pillows and mattress from beneath the *goses*, even though this action could be defined as the removal of an impediment to death (the feathers), because it necessarily involves the physical movement of the *goses*. If so, why is it permitted to remove the salt from his tongue? Doesn’t that also require physical contact and the movement of his body?⁷⁹ An answer is anticipated in *Shiltey Giborim*, a 16th-century commentary to the *Halakhot* of Alfasi:⁸⁰ just as it is forbidden to hasten the death of the dying person, it is also forbidden to introduce a factor into his situation – such as placing salt on his tongue – that would unnecessarily delay his otherwise inevitable and imminent death. For this reason, it is permitted to remove that factor from the scene, even if the removal involves a minimal amount of contact with the patient’s body.⁸¹ “From this,” writes Jakobovits, “we learn that not only is it permitted to remove an impediment to death but also that it is forbidden to hinder unnecessarily the departure of the soul and thus extend the suffering of the patient (*hacholeh*).”

Although Jakobovits, speaking of the removal of “impediments to death,” has suggested the medical implications of these texts, he has to claim explicitly that they bear such meaning. It is therefore at this point that he makes a crucial methodological observation:

Admittedly, (in this question) we are not concerned with non-natural factors. At any rate, it would seem that as a matter of principle the spirit of the Torah is not utterly indifferent (*ein ruach hatorah mitnaker legamrei*) to the plea of the suffering to be released from their affliction. From that standpoint, these texts are very important to us, especially because they emphasize once again the significant difference between taking active measures to shorten life and removing that which is merely an impediment to death.

This, of course, is a powerfully rhetorical passage. What good Jew would imagine that “the spirit of the Torah” is so callous as to ignore human suffering? Yet the rhetoric is hardly a superfluous effort; it cannot be dismissed as a mere literary flourish. Jakobovits, like every author of an essay in persuasive communication, wants his intended audience to accept his claim of meaning upon the data (in this case, the canonical Jewish texts). He therefore bases his claim in a statement of what he perceives as a value commitment to which his audience will certainly assent, namely the belief in the Torah’s compassion for the dying. That statement, in turn, formulates the interpretive assumption through which Jakobovits validates his analogies. He recognizes clearly the technological gap between “non-natural factors” (prayer, the woodchopper, the salt, the keys to the synagogue, etc.) and the world of modern biotechnology. The analogy from the former to the latter is therefore a problematic one. Nonetheless, our commitment to relieve human suffering, rooted in and validated by the “spirit of the Torah,” allows us to read – and, indeed, demands that we read – the traditional texts as legitimate basepoint cases from which to derive

guidance concerning contemporary medical dilemmas. By making his assumption clear, Jakobovits responds to one of the two principal criticisms that Newman raises against some Jewish bioethicists who have addressed our topic.

With respect to Newman's second critique, Jakobovits is also clear. He acknowledges the limits of the analogy, that the ruling of Isserles applies only to a patient who is already a *goses*. A different theoretical approach is required to justify the discontinuation of medical treatment for a *choleh noash*, a patient who, though not yet in the very last stages of life, has been diagnosed as terminal with no hope of recovery. Jakobovits offers that rationale in the form of a *chidush*, an idea of his own derivation that he uses to resolve a conflict between Nachmanides and Maimonides concerning the toraitic source of the *mitzvah* to practice medicine. Whereas the intricacies of that *chidush* do not concern us here,⁸² Jakobovits uses it to distinguish between permitted and obligatory medical treatment. While a terminal patient is *permitted* to undertake medical measures "that keep him alive in a state of suffering," he is not *obligated* to do so. One practical conclusion of this distinction, writes Jakobovits, applies to the instance of a diabetic who develops terminal cancer. The insulin injections that she takes for her diabetes and that heretofore have been regarded as part of a successful regimen of treatment can be said now to function so as to extend her agony. Though she is permitted to continue with those injections, "one should not object" should she decide to cease them. In his essay, then, Jakobovits makes extensive though not unlimited use of the analogies that figure prominently in Jewish bioethical discussions of the treatment of the terminally ill. He addresses "the problem of importance" by arguing forcefully that the similarities between the baseline cases and the target case outweigh the differences between them. He also recognizes that the analogies have their limits and should not be extended farther than they can plausibly take us.

2. *Rabbi Barukh Rabinovitz*. Writing in 1979 in the medical-halakhic journal *Asya*,⁸³ Barukh Rabinovitz addresses the ruling by Isserles (i.e., the woodchopper, the salt, etc.) as follows:

This *halakhah* is quite significant in considering the workings of modern medicine. In their efforts to save a patient's life (the doctors) will attach him to all sorts of machines (*kol miney mekhonot*) that deliver oxygen and medications to all parts of his body. As long as the body is connected to these devices, it can remain alive in what the physicians call "a vegetative state" for a very long time.... The question: is it permissible to disconnect these devices so long as the patient's vital signs continue to function? The physician has indeed given up all hope of restoring the patient to normal (*tiviim*) and spontaneous life, but the patient can continue to exist in this state of artificial life (*chayim malakhutiim*). Is the physician permitted to bring an end to that life? This is a problem that we encounter in hospitals almost every day. Many physicians ask what they are supposed to do, for the patient will die at the moment they disconnect the device. Is this not to be defined as causing death by active means...?

This *halakhah*, which distinguishes between shortening the life of the *goses* and the removal of an impediment to the departure of his soul – **that is, the artificial extension of the life of the *goses*** [my emphasis –. MW] supplies a clear answer to this question. The machine operates for all practical purposes to delay artificially the departure of the soul.... It is obligatory, therefore, to disconnect the patient from the machine and to allow nature to take its course until he dies.

Rhetoric is present here as well. The phrase "all sorts of machines" expresses something of the bewilderment and frustration of the layperson at the vast array of modern technological marvels that,

at the end of the day, offer not healing but extended suffering and medical futility. The vegetative state is emblematic of that futility: Who would regard such an outcome as successful treatment, and who would want it for herself or her loved ones? The doctors, for their part, are described as being at wit's end as to how to care for patients who are so obviously beyond all medical help. The repeated use of the word "artificial" (*malakhuti/malakhutiim*) in counterpoint to the reference to "normal" (or "natural"; *tiviim*) also emphasizes the situation of futility: "artificial life" strikes the reader as no life at all, a state of existence we would wish to end as quickly as possible.

Rabinovitz thus invites his readers to join him in a quest for a practical and compassionate solution that, presumably, they desire as much as he does. In addition, the notion of "artificial life" serves as Rabinovitz's interpretive assumption: the nonmedical impediments of which Isserles speaks share with modern biomedical technology the capacity to extend life *artificially*, in a condition not contemplated in the natural or divinely-intended order of things. The artificiality that defines both the woodchopper and the respirator is the significant link between them, and in this way Rabinovitz claims to solve the "problem of importance" that plagues every analogy.

3. *Dr. Ya'akov Levy*. A physician and Torah scholar, Ya'akov Levy addresses our subject in an essay appearing in the 1973 edition of *Noam*, a halakhic annual published by the Chief Rabbinate of Israel. In direct response to the words of Rabinovitz cited above, he writes:⁸⁴

As a physician, I perceive substantial biological distinctions between the situation that Isserles describes and that of the heart-lung machine, with respect to both the patient's condition and to the physician's role.... The patient of whom Isserles speaks rests with certainty at the last moment before death. The patient who is connected to the machine, by contrast, is in an uncertain situation. The physicians cannot

declare with absolute confidence that he is dead or even that he is going to die. It may yet be possible to save his life, for it was for that purpose that he was connected in the first place to the machine.

Another difference: there are substantial biological differences between the actions taken in the two cases. The machine serves a vital medical function, supplying oxygen, nutrition, and hydration to every part of the body. To turn off the machine would prevent these vital substances from reaching the body. Such is not the case with removing the sound of the woodchopper or the grains of salt from upon the tongue. It is difficult to define the interruption of the flow of oxygen as, to use the terminology of Isserles, "not an act of commission."

Unlike Jakobovits and Rabinovitz, Levy rejects the relevance of the woodchopper analogy, for reasons that parallel both aspects of Newman's critique of the bioethicists. The patient of whom Isserles speaks is a *goses*, a state in which the imminence of death is a certainty. Yet *our* patient, precisely because she is connected to machines that perform vital medical and biological life-support functions, *cannot* be described as a *goseset*. Levy's guiding interpretive assumption is a negative one: it is improper to compare modern medical technology (particularly the heart-lung machine) to the supernatural elements described in the *Shulchan Arukh*. The analogy fails, therefore, because the differences between the target and the baseline cases are substantially more significant than their similarities. Here, too, we detect the author's use of rhetoric as a means of supporting his interpretive assumption. Levy introduces his comments here and elsewhere⁸⁵ by reminding the reader that he is a physician and that he speaks from a basis of medical knowledge that, by definition, lies beyond the expertise of some rabbis who write about the subject. He presents his *bona fides* as a scientist as a reason why his readers should reject the attempts of other Torah scholars to make the woodchopper analogy: It is as a *doctor* that he declares the source

and target cases more dissimilar than similar. The opposing point of view, which accepts the analogy as cogent, must consequently rest upon a basis of medical ignorance or naiveté. The appeal here, in classical rhetorical terms, is to *ethos*, the speaker's reliability on the subject as evidence on behalf of his argument.⁸⁶

4. *R. Eliezer Yehudah Waldenberg*. The author of the multivolume series of responsa entitled *Tzitz Eliezer*, Rabbi Eliezer Yehudah Waldenberg, is a widely recognized authority on matters of medical *halakhah*.⁸⁷ In a reply to a 1976 inquiry by Dr. David Meir, the administrator of Shaare Zedek Medical Center in Jerusalem, Waldenberg wrote a lengthy responsum in support of Meir's suggestion that patients who display no signs of "independent vitality" (*chayim atzmi'im* or *chayut atzmit*) be disconnected from the artificial respirator that maintains their breathing.⁸⁸ In Meir's description, this category of cases includes patients brought to the emergency room following a major trauma, often a serious traffic accident that has left them with crushed skulls. In the effort to stabilize their vital signs and determine whether their lives can be saved, the patients are immediately placed on respirators. These machines function entirely "from the outside," pumping oxygen into the lungs, and they can continue to do so almost indefinitely even after the patient has lost all ability to breathe on his own. Only later during the treatment does it become apparent that the patient has no "independent vitality" – "the brain has no control over the inflation of the lung" – and has thus lost any chance for recovery. Meir mentions the ruling of Isserles in *Shulchan Arukh Yoreh Deah* 339. May we compare the two cases? Are we entitled at this point to define the respirator as an "impediment," a factor that does nothing but prevent the otherwise imminent death of the patient, and thus to disconnect it?

Waldenberg accepts the analogy. He focuses particularly on the conclusion, which some authorities have derived from the Isserles text, that just as it is forbidden to take an active step to hasten death, so is

it forbidden to introduce a factor that will unnecessarily delay death.⁸⁹ He asks why this is so, given that Jewish law generally teaches that it is a *mitzvah* to preserve life, even *chayei shaah*, the brief amount of life that remains for a dying person? Why then are we forbidden to introduce “impediments” into the situation? Why, indeed, are we not obligated to *delay* the death of the dying person for as long as possible? He locates the answer to this question in the common denominator running through Isserles’s examples (the woodchopper, the salt, the feathers), namely, their externality. That is, it is forbidden to introduce these measures precisely because they do not contribute anything to the independent vitality (*chayut atzmit*) of the *goses*, his ability to maintain life on his own. Any factor that simply maintains the vital signs from outside the patient’s body but does not contribute to his recovery of independent vitality is by definition an impediment to death that should not be introduced *ab initio* and that, if introduced, may (and perhaps must) be removed.⁹⁰

We do not conclude that this would be considered an act to hasten death, for such is contrary to the will of God. Indeed, the sort of life that he has now is entirely the product of human artifice, and we learn that to extend such a life is contrary to the will of God from *Sefer Chasidim*, chapter 234: “We do not cry out at the moment of the soul’s departure, lest it return and the person suffer terrible agony. Why did Kohelet write that ‘there is a time to die’ (Eccl. 3:2) if not to tell us that the *goses* should not be forced to endure another day or two of needless suffering?”.... Thus we learn that we should undertake no act to resuscitate the patient when it is clear to us that it is his “time to die.”... This is contrary to the will of God, who has declared that “man exercises no control over the day of his death,”⁹¹ and it is not within human authority to continue to live in this state when it is obvious that “the time to die” has arrived.

Waldenberg therefore applies the woodchopper analogy to the contemporary medical scene. He does so, even though the respirator is quite different technologically from the supernatural factors that Isserles mentions because it resembles them in terms of function: like the woodchopper and the salt, the respirator at this moment is an entirely external force, pushing life into the patient from the outside but unable to help him recover the power to live on his own.⁹² His “interpretive assumption”—the general theoretical approach that justifies the analogy and that determines the similarities in the cases to be more important than their differences—is that God has decreed that the *goses* has reached the “time to die” and that God does not wish him to continue life under these circumstances. Waldenberg’s repeated reference to “the will of God” is therefore a theological claim on behalf of his interpretive assumption. His rhetoric appeals to his religious reader’s presumed agreement that not everything in the world is subject to human control and that some medical measures, though materially within our power, lie beyond the sphere of legitimate human authority.

5. *R. Moshe Feinstein*. Responding in 1982 to a series of questions on medical ethics submitted by two physicians, Rabbi Moshe Feinstein takes up the following issue: Is it permissible to refrain from administering life-extending treatment to some patients?⁹³ He begins by reciting the story of the death of R. Yehudah HaNasi (*B. Ketubot* 104a). “The Talmud tells this story,” he writes, “in order to teach that there are times, when a person is suffering and when neither medicine nor prayer suffices to restore him to health, that one must pray for his death, as did Rabbi’s maidservant.” Feinstein notes that he derives this conclusion from the 14th century R. Nissim Gerondi, who makes the point in his commentary to *B. Nedarim* 40a. Feinstein thereupon makes the analogy to the contemporary medical situation: In the absence of a medical remedy that will enable the patient to survive his illness (*efshar lo sheyichyeh*) and when the patient is suffering terrible pain (*yisurin*), physicians should not provide treatment that can do

nothing but extend the patient's life in its present state. In saying this, Feinstein is careful to affirm the traditional Jewish teachings concerning the value of even the shortest span of human life. Thus, only "passive" actions (the removal of an impediment) are permitted, "since to initiate any action that will shorten life by even a moment is considered bloodshed." A near-death patient must be given oxygen, "because to do so will ease his suffering." When the oxygen in the tank runs out, however, the physicians may examine the patient to see whether he has died. "In this way, there is no concern that the doctors will kill the patient... even by depriving him of the briefest moment of life (*cahyei sha'ah haketzarah beyoter*)."

Feinstein's ruling stirred some further questions, to which he addressed himself two years later in a *teshuvah* to R. Sholom Tendler.⁹⁴ In this second missive he restates his opinion that doctors should not administer therapy that cannot offer recovery to the terminal patient and that promises only to extend his life in its present condition of suffering. He once again cites *B. Ketubot* 104a, along with R. Nissim's commentary, but this time he emphasizes not the maidservant's prayer but the action she took to interrupt the prayers of Rabbi's students. This marks a significant shift from his earlier *teshuvah*, in which he stressed the lesson that just as the maidservant prayed for Rabbi to die, "there are times when we must pray for the death" of the terminal patient. Feinstein now rejects the analogy from the maidservant's prayer to our own: "our prayers today are not so readily accepted, so we should not learn from the ineffectiveness of our prayers for the patient's recovery that it is permissible to pray for his death, God forbid." The analogy that *does* work, however, is the analogy of the maidservant's interruption of the prayers and the withholding or withdrawal of medical treatment that merely extends pain and suffering but offers no hope for recovery. Yet while Feinstein reasserts his support for the discontinuation of futile treatments, he introduces here two limitations on his otherwise permissive ruling. First, he declares that the patient must be kept alive,

even in his suffering, if there is a chance that another, more knowledgeable physician can in the meantime be consulted about the case. Second, he emphasizes that his permit applies only to situations where the patient is experiencing *yisurin*, physical suffering.

It is obvious (*pashut*) that R. Moshe Isserles would agree. Although in *Yoreh Deah* 339 he permits the removal of a factor that impedes the departure of the soul, it is obvious (*pashut*) that he does so solely because of the *yisurin* that the *goses* experiences. In the absence of pain, there is no reason to permit even the removal of a factor that impedes the departure of the soul. On the contrary, we would be obligated to introduce such a factor into the situation.... Why would we endeavor to remove impediments to death if the patient were not in pain? Rather, it is certain (*vadai*) that the permit to remove impediments is because the *goses* suffers pain when his death is an extended process. It is certain (*vadai*) that R. Moshe Isserles and those who preceded him possessed an authoritative tradition on this point.

Here Feinstein states the interpretive assumption that governs his use of the analogy. Despite the technological gap that separates the target case (the contemporary question of withholding medical treatment from the terminally ill) and the basepoint cases (*B. Ketubot* 104a and, to a lesser extent, Isserles in *Yoreh Deah* 339), the two are significantly similar in their concern that we not prolong the suffering of a dying person when there is no medical remedy for him. Yet even as he draws the analogy, Feinstein sharply restricts its scope. The warrant to discontinue or withhold treatment exists only in cases where two factors are present: the patient has no hope for recovery and is suffering great pain. This would exclude the comatose patient and the one lying in a persistent vegetative state, let alone the person who is terminally ill but not yet experiencing *yisurin*. Feinstein supports this limitation not by citing texts but by claiming that the limitation is

“obvious” or “certain.” This may weaken his argument to some extent, since assertion is hardly the same as demonstrated proof. Still, an assertion can be quite effective when its intended audience regards it as axiomatic, as a self-evident starting point for argument. By calling the limitation “obvious,” Feinstein invokes as his audience precisely that community of readers who will in fact regard it as obvious, namely those Orthodox Jews who share his belief in the sanctity of even the shortest span of human life (*chayei shaah*) and the concomitant requirement that medicine do everything possible to preserve life to its very last instant.⁹⁵ This audience would presumably accept Feinstein’s claim that intolerable physical suffering constitutes an exception to the rule; after all, the story of Rabbi’s maidservant seems explicit on that point, and Feinstein thinks it “obvious” or “certain” that pain is the dominant factor in the Isserles text as well.⁹⁶ At the same time, the audience would probably oppose any effort to extend the range of this exception to other sets of circumstances, and Feinstein, accordingly, makes clear in this second *teshuvah* that no warrant other than severe pain suffices to justify the discontinuation of medical treatment for a terminal patient.⁹⁷ Taken together, these shared beliefs – that every moment of human life is sacred and that we have a moral obligation to spare the dying needless suffering – constitute the interpretive assumption that on the one hand allows him to read the texts as supporting the discontinuation of medical treatment while on the other hand limiting that warrant to cases in which the *goses* is suffering physical pain and agony.

6. Central Conference of American Rabbis *Responsum no. 5754.11*. In 1994 the Responsa Committee of the issued its *teshuvah* “On the Treatment of the Terminally Ill.”⁹⁸ The responsum addresses the “woodchopper” analogy in section II, “The Cessation of Medical Treatment for Terminal Patients,” citing the Isserles passage along with the extensive commentary it has received, as “the classic source” for the halakhic discussion of the issue. The Committee notes that despite the obvious differences between Isserles’s “impediments” and

the world of modern medicine, various halakhic authorities have adopted the analogy and argued for its relevance.

This theory⁹⁹ helps to translate the medieval language of the texts into a usable contemporary vernacular. Does there not come a point in a patient's condition when, despite their obvious life-saving powers, the sophisticated technologies of modern medicine – the mechanical respirator, for example, or the heart-lung machine—become nothing more than mere “salt on the tongue,” mechanisms which maintain the patient's vital signs long after all hope of recovery has vanished? Answering “yes” to this question, some contemporary *poskim*¹⁰⁰ allow the respirator to be disconnected when a patient is clearly and irrevocably unable to sustain independent heartbeat and respiration.

Here the responsum identifies and clarifies the interpretive assumption by means of which halakhists can usefully analogize from the Isserles text to contemporary medical technology: when treatment can do nothing more than keep the “vital signs” going in the absence of any hope for recovery, they become the functional equivalent of the woodchopper and salt on the tongue. This assumption is stated in the form of a rhetorical question that suggests that the responsum's authors expect their readers to accept its cogency. The text goes on to say, however, that not all halakhic writers accept the analogy, since woodchoppers and bird feathers and salt can be described as “scientific” or “technological” only with great difficulty. Moreover, even if we did draw the analogy from medieval “science” to that of our own day, the classical source speaks only of the *goses*, whose death is imminent; it tells us little or nothing about the terminally ill patient for whom the physicians see no hope for recovery but whose death may be weeks or months away. The responsum presumes, in other words, that “we” (the audience it addresses) agree that the respirator *can* be compared to the woodchopper, but it also posits that “we” would not

want to stretch that analogy beyond its reasonable breaking point.

For these reasons the responsum develops, in section III, "another conceptual framework for thinking about the terminally ill patient whose death is not yet imminent." This framework is the commandment (*mitzvah*) to heal the sick. The argument, reminiscent of if not identical to the theory presented by R. Immanuel Jakobovits,¹⁰¹ is that like the more general duty to save life, the *mitzvah* of medicine is obligatory only as long as it promises a reasonable chance of success.¹⁰² Treatments that do not effect "healing" are not, therefore, regarded as "true medicine" (*refuah vadait or bedukah*)¹⁰³ and are not obligatory. Under this logic, a person who is terminally ill may refuse treatment that may extend her life expectancy a short time but that holds no prospect of curing or controlling her illness. The predominant consideration here is not necessarily that the patient will experience prolonged or greater suffering by accepting the treatment, although such might be the case, but rather that the treatment is medically futile.

The Responsa Committee acknowledges the difficulty in defining the term "medical futility"; "[i]n many situations it will be problematic if not impossible to determine when or even if the prescribed regime of therapy has lost its medical value." In the face of this systemic uncertainty, the text suggests, some may prefer to take refuge in the traditional Jewish doctrine of the sanctity of every moment of human life, which may lead them to the conclusion that one is never permitted to refuse medical treatment but is rather obligated to fight disease and cling to life until its very last instant. The Committee responds to this objection in the following manner:

To this argument we would simply ask: is this truly "medicine" as we conceive it? Our answer, as liberal Jews who seek guidance from our tradition in facing the moral dilemmas of our age, is "no."... [W]e cannot and do not believe that

those texts, which bid us to heal the sick and to preserve life, demand that in fulfilling these duties we apply in indiscriminate fashion every available technological device to prolong the death of a dying person. Medical science has made immeasurable advances during recent times, and we are thankful for that fact. Doctors today are able to prevent and to cure disease, to offer hope to the sick and disabled to an extent that past generations could scarcely imagine. Yet there comes a point in time when all the technologies, the chemicals, the surgeries, and the machines which comprise the lifesaving arsenal of modern medicine become counterproductive, a point when all that medical science can effectively do for a patient is to indefinitely delay his inevitable death. This is not *pikuach nefesh*; this is not medicine; this is not what physicians, as agents of healing, are supposed to do. There is neither meaning nor purpose in maintaining these treatments. **They are salt on the tongue and the sound of a woodchopper** [emphasis added—MW]. They are not *refu'ah* [medicine; healing]; no commandments are fulfilled thereby. Yes, life is a precious thing, and every moment of it should be regarded as God's gift. But we are not required under any reading of the tradition that makes sense to us to buy additional moments of life undertaking useless and pointless medical treatment.

This rhetorically charged passage serves much the same purpose as R. Moshe Feinstein's use of the terms "obvious" and "certain" in his argument. The Reform responsum, no less than the Orthodox *posek*, wishes to invoke a community of interpretation, to identify the readers who are most likely to find its words persuasive and compelling. Where Feinstein's community consisted of those who hold the sanctity of even the shortest span of life to be of the ultimate value, the community envisioned by this responsum comprises those "who cannot and do not believe" that Torah demands that we undertake every conceivable technological measure to delay the otherwise

inevitable death of a terminally ill patient. As with Feinstein, this invocation of an audience has less to do with proof and evidence than with assertion: if these words resonate with you, the responsum seems to be saying, then you are the audience to whom they are addressed. Notice that the rhetoric of this passage enables the responsum's authors to rehabilitate the woodchopper analogy, which it had set aside because of its apparent weaknesses (it does not cohere with modern technology and it does not apply precisely to the case of the terminally ill patient who is not yet a *goses*). Now that the theme of therapeutic futility has become the dominant organizing principle of the *teshuvah*, the Responsa Committee is in a position to claim that medical measures that are useless in the face of terminal illness are tantamount to "salt on the tongue and the sound of a woodchopper." The Isserles text, although it speaks literally to the situation of the *goses*, is now understood to refer to any and all measures that serve to delay death while offering no medical benefit. This passage calls upon its readers to assent to the logic of the analogy, and the rhetorical question with which it commences suggests a confidence that they will do so.

IV. *Conclusions*. What has the foregoing analysis revealed about the use of analogy in the halakhic discussions concerning the treatment of the terminally ill? Let me set forth some tentative conclusions in accordance with the two questions I posed at the outset of our study.

1. Our first question was the procedural one: do these halakhic writers make clear the interpretive assumptions that enable them to use the traditional sources for purpose of analogy? We have seen that each of these authors does mention the well-known analogy between the woodchopper (or the prayer of Rabbi's maidservant, or the death of R. Chaninah b. Teradyon) and the life-sustaining technologies of modern medicine and that all, with the exception of Dr. Ya'akov Levy, do so positively. Yet we have also seen that none of them regard the analogy as self-evident and problem-free. Each one recognizes the "technological gap" that separates the source cases (the talmudic

and halakhic passages that they wish to use as precedents) and the target case (today's medical treatment of the terminally ill). Each acknowledges that the texts must be interpreted or, as the CCAR Responsa Committee puts it, "translated" into a vernacular that can speak to the contemporary medical context. Each author that accepts the analogy therefore offers reasons for *why* he accepts it, why it is proper and fitting. They are at the same time keenly aware of the analogy's limitations and take care to distinguish the cases to which it applies (the *goses*) from those to which it does not (the terminally ill patient who is not yet a *goses* or is not suffering severe pain). The exception here is the CCAR responsum, which both admits the limitation of the analogy and subsequently (following its development of an alternative theory to permit the discontinuation of futile treatment) reinterprets it so that the woodchopper and the salt function as symbolic expressions of medical futility. These writers, in other words, are cognizant that the woodchopper analogy can work only when accompanied by or filtered through what Louis Newman calls an interpretive assumption that renders it coherent and meaningful. Nothing is hidden about these assumptions. Their presence is obvious in each of these writings, and the reader can identify them with relative ease.

This last point deserves a closer look. Newman poses his challenge to Jewish bioethicists as follows: "To defend cogently any particular ethical position... requires that one offer reasons for adopting the interpretive stance that one has.... And if one wishes to urge others to adopt a particular interpretation, that theory must be stated explicitly and defended."¹⁰⁴ That is to say, those engaging in Jewish bioethical discourse must pass a two-stage test: they should both clearly *articulate* the interpretive assumptions that make their analogies possible and *justify* those theoretical frameworks against other possible interpretations. Our halakhic authors would clearly seem to meet the first part of this test because they do indicate for us the theoretical frameworks that justify their acceptance or rejection of the woodchopper analogy. To recap, these include: Jakobovits's remark

that "as a matter of principle the spirit of the Torah is not utterly indifferent to the plea of the suffering;" Rabinovitz's invocation of "artificiality" as the common denominator between the woodchopper and the respirator; Levy's citation of his own medical expertise to justify his rejection of the woodchopper analogy; Waldenberg's conclusion that "to extend such a life [i.e., of the patient who has lost the capacity for "independent vitality"] is contrary to the will of God"; Feinstein's declaration that "it is obvious" that the impediments to the death of a *goses* may be removed precisely but only because she is suffering great pain; and the CCAR Responsa Committee's rhetorical questions ("Does there not come a point in a patient's condition when, despite their obvious life-saving powers, the sophisticated technologies of modern medicine... become nothing more than mere 'salt on the tongue'...? "To this argument we would simply ask: is this truly 'medicine' as we conceive it?"). On the other hand, not all our halakhic authors fare as well with Newman's second requirement. In particular, Rabbis Waldenberg and Feinstein are satisfied to state their own interpretive positions and do not explicitly "defend" those views and assumptions against alternative understandings of the texts. Newman, perhaps, would see this as a weakness in the halakhic discourse on this issue, similar to the one he finds in Jewish bioethical writing. We should keep in mind, however, the influence of legal genre upon these writings. Waldenberg and Feinstein write here not as bioethicists or as academic legal scholars but as *poskim*, decisors handing down definitive rulings. Their function is akin to that of judges, and judges, too, are often silent as to alternative interpretive possibilities. The judicial opinion, it has been noted, is often characterized by the "rhetoric of inevitability," in which the judge assumes a "monologic voice" or a "declarative tone" as a means of persuading the reader that he could not reasonably have come to a different conclusion. The judge may see this, in fact, as a requirement of the judicial role and hence of the opinion as a literary genre: the task of the judge, after all, is to tell us what the law is, which places a premium upon stating the law with finality and certitude.¹⁰⁵ By contrast,

the author of a law review article reading the same legal materials the judge considers will confront other views in a much more systematic way, since that author is under no obligation to write as though only one correct answer exists. Indeed, the goal of such an article may be precisely to explore the varying possible interpretations and to raise the questions, doubts, and uncertainties the judge strives either to resolve or to ignore. Like the judge, the *posek* may not see it as his job to defend his interpretive position against all plausible alternatives, especially if in the process he suggests doubt and uncertainty as to the correctness of his own *pesak* (ruling).¹⁰⁶

This suggestion – that there is a meaningful genre difference between the writing of *poskim* handing down rulings and that of halakhists engaged in a more general study of their subject – is offered here as a hypothesis; the question deserves further study. To the extent that there is something to the distinction, however, we might conclude that the primary responsibility for producing thorough and balanced analyses of alternative halakhic assumptions and positions rests not with the *poskim* but with the wider community of halakhic interpretation, just as it has been the task of scholars writing in law reviews to examine and criticize the reasoning of published judicial opinions. Such a community of halakhic “law review” scholarship does exist, especially with respect to bioethics.¹⁰⁷ As long as the members of that community continue to write and publish – and there is little indication that they intend to stop doing so (!) – they will ensure the continuation of a healthy discourse in the field.

2. Our second question was the substantive one: how well do these analogies work, and do they solve the “problem of importance”? As I have indicated, this question may seem difficult to address, since it demands the sort of evaluative judgment that cannot be quantified. How, after all, do we measure objectively the degree of an argument’s persuasiveness? In fact, though, my question concerns not so much the persuasiveness of these analogies, the extent to which they persuade

you, or me, or some other reader(s), is their *plausibility*: Can the analogy from the woodchopper text and the other traditional passages serve as the basis of a plausible discourse concerning medical treatment for the dying? Framed in this manner, the question is much easier to answer. We can say with confidence that the woodchopper analogy *does* work and it *is* plausible, provided that the audience to which it is addressed accepts the interpretive assumptions upon which it depends. Let's take as our example Rabbi Jakobovits's analogy, based on all three of the talmudic and halakhic texts discussed at the beginning of section III. Each of these texts affirms the correctness of an action that removes an impediment to the otherwise imminent death of a *goses*. Jakobovits wishes to draw an analogy from those texts and actions to the medical treatment of the *goses*. Although conceding that the texts speak not of medical but of "non-natural" impediments to death, Jakobovits argues that they teach that "as a matter of principle the spirit of the Torah is not utterly indifferent to the plea of the suffering." On this point he bases his claim that truly medical impediments may also be removed, for even though used by physicians in fulfillment of the *mitzvah* of healing they can function at life's final stage to prolong the same sort of suffering that the Torah wishes to bring to a speedy end. Does this analogy persuade every reader? Clearly not; Dr. Ya'akov Levy, for one, doesn't accept it. Yet it is not difficult to imagine the existence of an interpretive community that *would* accept it, that would with Jakobovits find the analogy a plausible basis on which to argue that Jewish law permits the discontinuation of life-prolonging medical treatment for the terminally ill under certain circumstances. That audience would agree with Jakobovits precisely because it identifies with his interpretive assumption, the claim that "the spirit of the Torah" would have us extend compassion to those who suffer from disease and who lie near death. To adopt the assumption, in other words, is to be persuaded of the analogy's cogency. The same could be said of the writings of Rabinovitz, Waldenberg, Feinstein, and the CCAR Responsa Committee. In each case, analogies are built on interpretive assumptions that, persuasive or

not, cannot readily be dismissed as implausible. I see no reason, in other words, why an audience *cannot* gather around an interpretive assumption concerning the lack of obligation to maintain "artificial" life or the claim that it is not God's will that we maintain patients in such a state, or that the suffering of the dying constitutes a reason for withdrawing medical care, that the commandment to heal does not require the indefinite continuation of measures that are medically futile. In each case, the author or authors invite their readers to identify themselves as a particular sort of Jewish audience, an audience that recognizes the interpretive assumption in question as a core value of its Judaism. To the extent that it accepts this invitation, the audience is likely to find the woodchopper analogy persuasive.

I have used the term *rhetoric*, which encompasses the techniques of persuasive speech and writing, to describe the manner in which our authors put forth this invitation to their readers. What I am describing, more specifically, is *constitutive* rhetoric, speech that does not so much persuade an already existing audience as to create (to "constitute") a new audience through its language, speech that forms the identity of the community within the message itself. In none of these cases does the interpretive assumption work to persuade the audience of its correctness. The assumption after all, is simply that: an assumption, or, if made explicit, an assertion, a claim of meaning upon the texts, but the claim does not prove itself to be true, any more than the analogy it supports can prove itself to be true. Jakobovits, for example, never demonstrates that his interpretive assumption about "the spirit of the Torah" is the correct lesson to be learned from the traditional texts; he simply asserts that lesson. Other explanations are possible, and were we to accept those explanations we might not follow Jakobovits to his conclusion about the propriety of discontinuing life-prolonging but otherwise futile medical treatment for the *goses*. Yet this lack of demonstrated proof does not doom the argument, for the interpretive assumption is the way in which Jakobovits *constitutes* the audience that will find it persuasive. By accepting his claim of

meaning upon the texts, his readers answer his invitation to become his audience, identifying themselves as precisely the community to whom he addresses his words, as the community that speaks as he does about these texts and about the question of the proper medical treatment of the terminally ill. The crucial point is that his audience does not exist *prior* to his rhetorical act but *because* of it. The same would apply to the writings of the other authors we have surveyed. In each case it is the rhetoric itself, that asserts, though it does not prove, the author's interpretive assumptions, that invokes the audience he wishes to address, causing its members to become the community that understands and speaks of the bioethical issue as he does. That community, in turn, once it has been constituted by the author's words, is the community most likely to be persuaded that his analogies are fitting and correct.¹⁰⁸

V. *Two Final Observations.* I have argued in this paper that the woodchopper and related analogies do support an intelligent bioethical discourse on the question of the treatment of the terminally ill. Again, this does not imply that the analogies in fact persuade all readers or that they are free of difficulty. It is to say, though, that they furnish the tools required for bioethical conversation. In other words, traditional halakhic reasoning, *characterized by its heavy reliance upon analogy*, can plausibly claim to possess the resources to analyze and respond to the challenge of this particular problem of bioethics. And this leads me, finally, to the following two observations:

The first is the simple truth that analogical reasoning, notwithstanding all its inherent difficulties, is an essential feature of halakhic discourse, just as it is an essential feature of legal and ethical discourse. One cannot operate within the field of *halakhah* and ignore this reality. There is no such thing as "Jewish legal thinking" without analogy, and Jewish legal analogies tend to be drawn from Jewish legal texts, the bulk of which are found in ancient and medieval literary sources. Those sources, by dint of their historical and cultural

provenance, do not often speak explicitly to the issues raised by contemporary bioethics. They most certainly do not mention respirators and heart-lung machines. For this reason, analogies drawn from very old Jewish texts to very contemporary social and technological realities will tend to strike us as forced and artificial. Yet there is no alternative: were halakhists to abandon the method of casuistic reasoning, they would be unable to apply the classic texts of Jewish law to those realities. Therefore if we wish to do *halakhah*, if we wish to pursue the study of Torah as Jews have always done as the royal road to deriving guidance on matters of religious practice, we have no choice but to reason analogically from our traditional texts to the problems that confront us. I suppose we might be able to imagine an alternative methodology, a sort of *halakhah* or law or ethics that functions without problematic analogical thinking. Yet such an imaginary thing belongs to the realm of thought experiment or fantasy. In the real world of intellectual practice, all these modes of thought depend on analogies drawn from very old canonical texts for their growth, development, and creative energy. Yes, analogies can at times be forced and unpersuasive, and they may never yield absolute certainty; the woodchopper, at the end of the day, is not exactly the same thing as an artificial respirator, and the comparison of the one to the other is bound to leave some of us unconvinced. The halakhic analogies we have been dealing with here can claim persuasiveness only because of the controversial (if congenial) interpretive assumptions with which our authors have approached the texts. But that is the case with *all* analogies: the only way to solve "the problem of importance" is by way of an assumption or assertion or translation that enables us to argue that the similarities between the source case and the target case outweigh the differences between them. At times, perhaps frequently, those who argue from analogy do not make explicit the assumptions upon which their argument rests. Louis Newman has criticized Jewish bioethicists for not doing so, yet he takes pains to reject the suggestion that those bioethicists stop studying – and, necessarily, drawing analogies from – Jewish texts, even as he calls

upon the scholars to pursue their work more critically and reflectively.¹⁰⁹ And that is precisely my point with respect to *halakhah*. The gaps, technological and otherwise, between the traditional texts and the contemporary issues that confront the halakhist may be significant, but their existence should not deter him or her from the study of Torah. Indeed, the bridging of those gaps is precisely what the study of Torah, historically considered, is all about.

My second observation has to do with the relevance of all this to our enterprise of progressive *halakhah*. I have mentioned “the liberal critics,”¹¹⁰ those predominantly Reform and Conservative Jewish writers who doubt or deny that traditional halakhic thought can provide an adequate basis for a contemporary progressive Jewish bioethics. Our study, at the very least, calls their claim into question. If the traditional analogy based halakhic process is capable of supporting an intelligent bioethical discourse, it is also capable of supporting an intelligent *liberal* halakhic discourse. In particular, the CCAR responsum we have considered offers a good example of how Reform rabbis can work within the intellectual boundaries of that process, citing sources and making analogies, and arrive at interpretations of *halakhah* that are fully expressive of liberal values. Indeed, the record of liberal halakhic writing shows that the same is true with respect to the entire range of moral concerns that arise from the contemporary practice of medicine.¹¹¹ Reform and Conservative rabbis, working within the discipline we call progressive *halakhah*, have produced a large and vital bioethical literature. In short, while some of the liberal critics do not care for the so-called “formalism” of halakhic thinking, and while others are convinced that *halakhah*, even in its progressive variety, is simply incapable of supporting the particular answers and conclusions that they define as “liberal,” our position is that there is no obvious need for liberal Jews to abandon halakhic thinking in favor of some more suitable bioethical methodology.

Our task, therefore, is to continue to emphasize the value of our work and the purposes behind it. We work in this field in the knowledge that one cannot do Jewish bioethics (or "ethics," for that matter) in any convincingly *Jewish* sense of the term without engaging in the study of classic Jewish texts, that provide the material with which we draw analogies to our own experience. And the fact remains that the texts one must study to this end are halakhic texts, sources that have served for centuries as grist for the mill of Jewish legal thought. Since we are liberal Jews, who necessarily read the halakhic texts from a liberal perspective, the conclusions we draw from them will often differ from the conclusions of Orthodox *poskim*, who necessarily interpret the texts from *their* angle of vision. But then, disagreement (*machloket*) has always been an endemic feature of halakhic discourse, and the fact that we disagree with Orthodox authorities over any number of conclusions does not mean that we have abandoned the field of *halakhah* to their exclusive control. On the contrary: it means that we are committed to intellectual openness, to the existence of a plurality of legitimate interpretations, and to the preservation of a *halakhah* that can continue to grow and develop and respond to the needs of every generation.

Notes

1. Louis E. Newman, "Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics," *Modern Judaism* 10:1 (1990), pp. 17-42.
2. Terrance Sandalow, "Constitutional Interpretation," *Michigan Law Review* 79 (1981), pp. 1033-1072. Newman might well have quoted Sandalow's words at p. 1068: "Constitutional law thus emerges not as exegesis, but as a process by which each generation gives formal expression to the values it holds fundamental in the operations of government."
3. Paul Brest, "The Misconceived Quest for the Original Understanding," *Boston University Law Review* 60 (1980), pp. 204-238.

4. James Boyd White, *Heracles' Bow* (Madison: University of Wisconsin Press, 1985). See, in addition, his *Justice as Translation* (Chicago: University of Chicago Press, 1990) and "What's An Opinion For?" *University of Chicago Law Review* 62 (1995), 1363-1369. White is a leading figure in the "Law and Literature" movement, the adherents of which have contributed much to our understanding of the nature of legal rhetoric and interpretation.

5. Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Cambridge: Harvard University Press, 1980). Fish sharpens his arguments considerably in the essays collected in his *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham: Duke University Press, 1989).

6. Owen Fiss, "Objectivity and Interpretation," *Stanford Law Review* 34 (1982), pp. 739-764.

7. Karl Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oceana, 1951). For a more thorough explication of Llewellyn's understanding of legal interpretation, see his *magnum opus*, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown and Company, 1960), pp. 19-61.

8. Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977); *A Matter of Principle* (Cambridge: Harvard University Press, 1985); and *Law's Empire* (Cambridge: Harvard University Press, 1986).

9. Newman (note 1, above), p. 18.

10. *Ibid.*, p. 35.

11. The distinction between "killing" and "letting die" is not unique to Jewish thought; it appears frequently in bioethical literature. See Bonnie Steinbock and Alastair Norcross, eds., *Killing and Letting Die, Second Edition* (New York: Fordham University Press, 1994). For a discussion of the distinction, the criticisms lodged against it, and a defense of the distinction against those criticisms, see Tom L. Beauchamp and James F. Childress, *Principles of Biomedical Ethics, Fifth Edition* (New York: Oxford University Press, 2001), pp. 139-143. The distinction between killing and letting die also forms the basis of the position of the American Medical Association (AMA) on the issues under discussion here: the AMA countenances the withholding and withdrawal of futile medical treatment but stands

opposed to euthanasia and physician assisted suicide. See CEJA Report B – A-91, “Decisions Near the End of Life,” adopted June 1991 (JAMA. 1992; 267: 2229-2233); Updated June 1996) <http://www.ama-assn.org/ama1/pub/upload/mm/codemedical-ethics/221a.pdf> (accessed August 13, 2010).

12. See *Hilkhot HaRosh, Moed Katan* 3:97 in the name of his teacher R. Meir of Rothenburg; *Tur* and *Shulchan Arukh Yoreh Deah* 339:2, and *Beit Shmu'el* to *Shulchan Arukh Even Haezer* 17, note 94 (end).

13. Newman (note 1, above), p. 37.

14. I, too, owe much to the writings of these scholars of jurisprudence, and a great deal of my own academic work has attempted to apply their insights to the halakhic context. See, for example, “Torture, Terrorism, and the *Halakhah*,” in Walter Jacob, ed., *War and Terrorism in Jewish Law* (Pittsburgh: Solomon B. Freehof Institute of Progressive *Halakhah*, 2010), pp. 13-50; “Narratives of Enlightenment: On the Use of the ‘Captive Infant’ Story by Recent Halakhic Authorities,” in Walter Jacob, ed., *Napoleon’s Influence on Jewish Law* (Pittsburgh: Rodef Shalom Press, 2007), pp. 93-147; “Halachah, Aggadah, and Reform Jewish Bioethics: A Response,” *CCAR Journal* 53:3 (Summer, 2006), pp. 81-106; “Against Method: On *Halakhah* and Interpretive Communities,” in Walter Jacob, ed., *Beyond the Letter of the Law: Essays on Diversity in the Halakhah* (Pittsburgh: Rodef Shalom Press, 2004) pp. 17-77; “Taking Precedent Seriously: On *Halakhah* as a Rhetorical Practice,” in Walter Jacob and Moshe Zemer, eds., *Re-Examining Reform Halakhah* (New York: Berghahn Books, 2002), pp. 1-70; “*Halakhah* in Translation: The Chatam Sofer on Prayer in the Vernacular,” *CCAR Journal* 51:3 (Summer, 2004), 142-163; “Responsa and the Art of Writing: Three Examples from the *Teshuvot* of Rabbi Moshe Feinstein,” in Peter S. Knobel and Mark N. Staitman, eds., *An American Rabbinate: A Festschrift for Walter Jacob* (Pittsburgh: Rodef Shalom Press, 2001), pp. 149-204; “Abortion and the Halakhic Conversation: A Liberal Perspective,” in Walter Jacob and Moshe Zemer, eds., *The Fetus and Fertility in Jewish Law* (Pittsburgh, Freehof Institute of Progressive *Halakhah*, 1995), pp. 39-89; “Responsa and Rhetoric: On Law, Literature, and the Rabbinic Decision,” *Pursuing the Text: Studies in Honor of Ben Zion Wacholder* (London, Sheffield Press, 1994), pp. 360-409; and “*Halakhah* and Political Theory: A Study in Jewish Legal Response to Modernity,” *Modern Judaism*, October, 1989, pp. 289-310.

15. See David R. Hiley, James F. Bowman and Richard Shusterman, eds., *The Interpretive Turn; Philosophy, Science and Culture* (Ithaca, NY: Cornell University Press, 1999), p. 1.

16. The proper citation here is Thomas Kuhn's celebrated work *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970), which famously described the influence of existing "paradigms" of knowledge upon the work of scientists.

17. "Alles Verstehen ist Auslegung"; Hans-Georg Gadamer, *Wahrheit und Methode: Grundzüge einer philosophischen Hermeneutik*. (Tübingen: J. C. B. Mohr, 1975, pp. 366, 375, and 377. See also H.G. Gadamer, *Truth and Method*. Translated by J. Weinsheimer and D. C. Marshall (New York: Crossroad, revised edition, 1989), pp. 307-308: "Understanding always involves something like the application of the text to be understood to the present situation of the interpreter." Gadamer's influence is crucial in the writings of most contemporary hermeneutical theorists, including many who work in the discipline of jurisprudence. See, in general, Gregory Leyh, ed., *Legal Hermeneutics* (Berkeley: University of California Press, 1991) and Menachem Mautner, "Gadamer vehamishpat," *Iyunei Mishpat* (Tel Aviv University Law Review) 23:2 (March, 2000), pp. 367-419.

18. By "liberal" I have in mind those scholars who consciously identify themselves with non-Orthodox movements and whose bioethical writings are exercises in halakhic methodology. Exemplary among these is Elliot Dorff, *Matters of Life and Death: A Jewish Approach to Modern Medical Ethics* (Philadelphia: Jewish Publication Society, 1998). See as well the various essays in Walter Jacob and Moshe Zemer, eds., *Death and Euthanasia in Jewish Law* (Pittsburgh and Tel Aviv: Rodef Shalom Press, 1995). Particularly instructive is the article by Peter Knobel in pp. 27-60 of that volume, an article substantially reprinted in William Cutter, ed., *Healing and the Jewish Imagination* (Woodstock, V.: Jewish Lights, 2007), 171-183. A number – though not all – of these essays argue that active euthanasia or physician assisted suicide are justifiable Jewish responses to terminal illness. While this position clearly runs counter to the accepted traditional consensus, as well as to the position enunciated in most Reform responsa, those authors defend and elaborate their view by means of halakhic reasoning – that is, by appeal to precedential texts.

19. See Benjamin Freedman, *Duty and Healing: Foundations of a Jewish Bioethic* (New York: Routledge, 1999), and Ronald Green, "Jewish Teaching on the Sanctity and Quality of Life," in E.D. Pellegrino and A.I. Faden, eds., *Jewish and Catholic*

Bioethics: An Ecumenical Dialogue (Washington: Georgetown University Press, 1999), pp. 25-42. Philip M. Cohen, "Toward a Methodology of Reform Jewish Bioethics," *CCAR Journal* 52:3 (Summer, 2005), pp. 3-21, calls the approaches of these authors "nonhalakhic." In my response to Cohen ("Halachah, Aggadah, and Reform Jewish Bioethics: A Response," note 14, above), I argue that both Green and Freedman work well within the parameters of halakhic discourse.

20. See Newman (note 1, above), p. 37: "Finally, in no sense do I wish to suggest, given the subjective nature of interpretation as I have described it, that Jewish ethicists should quit reading Jewish texts. Rather, it has been my assumption that what makes contemporary Jewish ethics Jewish is its attempt to develop positions which carry forward the views contained within that long textual tradition."

21. See, especially, the following: Daniel Gordis, "Wanted: The Ethical in Jewish Bioethics," *Judaism* 38 (1989), pp. 28-40; Irving Greenberg, "Toward a Covenantal Ethic of Medicine," in Levi Maier, ed., *Jewish Values in Bioethics* (New York: Human Sciences Press, 1986), pp. 124-149; David H. Ellenson, "How to Draw Guidance from a Heritage: Jewish Approaches to Mortal Choices," in Barry S. Kogan, ed., *A Time to be Born and a Time to Die: The Ethics of Choice* (New York: Aldine de Gruyter, 1991), pp. 219-232; Peter Knobel (see note 18, above), and Philip M. Cohen (see note 19, above).

22. Irving Greenberg, of course, is an exception to this rule. He regards himself as an Orthodox rabbi, whether or not the preponderance of today's Orthodox Jews would accept him as such. At any rate, he does not formally identify with one of the liberal Jewish groupings.

23. "Formalism" is a term of art in legal theory. It is generally used to denote the theory that legal decision is determined more or less exclusively by the process of logical deduction from preexisting legal materials. Formalists hold that legal decisions are constrained and determined by the law's rules and systemic procedures, which yield a uniquely correct answer to every legal question. Not all legal method is "formalist." In particular, as we shall see, analogy requires a crucial non-formalist component, since the argument that a particular analogy is compelling demands a judgment that itself is not the product of logical or formal necessity. The real target of these critics' ire, it seems to me, is *legalism*, the very idea that answers should be sought by any sort of legal method.

24. "The basic pattern of legal reasoning is reasoning by example"; Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), p. 1. "[L]egal argument is often associated with its own distinct method, usually referred to as 'reasoning (or argument) by analogy'"; Scott Brewer, "Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy," *Harvard Law Review* 109 (1996) pp. 923-1028 (quotation at p. 926). "So what is it that lawyers and judges know that philosophers and economists do not? The answer is simple: the Law. They are the masters of 'the artificial Reason of the law.' There really is a distinct and special subject matter for our profession. And there is a distinct method.... It is the method of analogy and precedent"; Charles Fried, "The Artificial Reason of the Law; or, What Lawyers Know," *Texas Law Review* 60 (1981), pp. 35-58 (quotation at p. 57). Richard Posner calls reasoning by analogy "the heart of legal reasoning as conceived by most modern lawyers," even as he criticizes it as having "no definite content or integrity"; *The Problems of Jurisprudence* (Cambridge: Harvard University Press, 1990), p. 86.

25. See Steven J. Burton, *An Introduction to Law and Legal Reasoning* (Boston: Little, Brown and Company, 1985), 59-82, describing "the two forms of legal reasoning," deductive and analogical, that lawyers combine in their work. See also James R. Murray, "The Role of Analogy in Legal Reasoning," *UCLA Law Review* 29 (1982), pp. 833-871 ("Analogy is a vital tool in legal reasoning"; p. 833).

26. See Burton (note 25, above), p. 26.

27. Burton (note 25, above), p. 27.

28. Posner (note 24, above), pp. 99-100, argues that "legal reasoning" is not a method but a language, "a culture, a vocabulary, a set of representative texts and problems." I make a similar point with respect to halakhic reasoning in general in "Against Method" (note 14, above) and "On the Absence of Method in Jewish Bioethics: Rabbi Yehezkel Landau on Autopsy," in Alyssa Gray and Bernard Jackson, eds., *Jewish Law Association Studies XVII* (2007), 254-278.

29. *Olmstead v. U.S.*, 277 U.S. 438 (1928).

30. *Ibid.*, at 464-465.

31. The citation is from *Weems v. U.S.*, 217 U.S. 349, 373, an important precedent – analogy – upon which Brandeis relies.

32. *Olmstead* (note 29, above), at 473.
33. Cass Sunstein, *Legal Reasoning and Political Conflict* (Oxford: Oxford University Press, 1996), p. 8. Sunstein sees analogical reasoning as a key element in a democratic society's ability to arrive at what he calls "incompletely theorized agreements": that is, "when people diverge on some (relatively) high-level proposition, they might be able to agree when they lower the level of abstraction" (p. 37). Analogy is thus an example of "bottom-up" thinking, which proceeds from agreed-upon particulars and reaches agreement at a comparatively modest level of abstraction, as opposed to "top-down" thinking that starts from controversial general propositions and therefore has difficulty yielding agreement on particulars (p. 68). For a good example of how such low-level agreement is obtained in a situation of profound disagreement over basic moral principles, see Jonsen and Toulmin (note 34, below), pp. 18-19.
34. Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: University of California Press, 1988). The authors defend casuistry against the bad reputation that has attached to it since (in their reckoning) the days of Pascal's strictures against the Jesuits. What Pascal should have attacked, they write, is not casuistry per se but the wrongful use or abuse of the method; hence, the title of the book (see p. 11ff.). A similar note is struck by Richard B. Miller, *Casuistry and Modern Ethics: A Poetics of Practical Reasoning* (Chicago: University of Chicago Press, 1996).
35. Jonsen and Toulmin (note 34, above), p. 7 (emphasis in original).
36. See Lloyd L. Weinreb, *Legal Reason: The Use of Analogy in Legal Argument* (Cambridge: Cambridge U. Press, 2005), p. 66: "[O]n its own the principle is too broad to express the court's holding and requires reference to the analogy to ascertain its true scope. The direction of thought is from the analogy to the principle, rather than the other way around."
37. Jonsen and Toulmin (note 34, above), p. 13. The examples are Michael Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations* (New York: Basic Books, 1977) and Sissela Bok, *Lying: Moral Choice in Public and Private Life* (New York: Pantheon Books, 1978).
38. See Burton (note 25, above), pp. 31-40. The entire second section of his book is devoted to this question. Brewer (note 24, above), p. 951, uses the term "rational

force" to describe the degree to which an analogical inference is judged to be compelling or valid.

39. Sunstein (note 33, above), p. 65.

40. *Lochner v. New York*, 198 U.S. 45, 76.

41. The same point is made by Michael Avraham in his discussion of the traditional rabbinic "hermeneutical principles"; "*Ma-amadan halogi shel darkhei haderash*," *Tzohar* 12 (2003), p. 20.

42. Weinreb (note 36, above), pp. 12-13: "In law as in life, analogical argument is a valid, albeit undemonstrable, form of reasoning that stands on its own and has its own credentials, which are not derived from abstract reason but rooted in the experience and knowledge of the lawyers and judges who employ it. Some analogical arguments are good and some are bad. Ordinarily, we know how to tell one from the other and are able to reach a fair degree of agreement about which is which. The human capacity for reasoning by analogy presents complex and difficult epistemological questions, but its use is commonplace and, carefully used, its conclusions are generally reliable." Charles Fried (note 24, above) makes a similarly strong claim for analogy.

43. The term is drawn from Brewer (note 24, above), pp. 951ff, who classifies the theorists into the categories of "mystics" (those who have strong confidence in the reliability ["rational force"] of analogical argument) and "skeptics," who have little such faith. Brewer places himself firmly in the soft middle ground, in a category he calls "modest-proposal rationalists." I'd place myself there, as well.

44. See Burton (note 25, above), pp. 165-166.

45. I do not wish here to enter the venerable controversy over the precise relation between law and ethics, whether as a general matter or in the context of Jewish observance. For the latter see Avi Sagi, *Yahadut: bein dat lemusar* (Tel Aviv: Hakibbutz Hameuchad, 1998). I have previously touched on the question, at least as it relates to the issue of halakhic judgment and rabbinical decision making. Put briefly, my view is that it is inappropriate to distinguish between the strictly "legal" and the "nonlegal" ("metalegal," "ethical") aspects of the rabbinical decision, inasmuch as the ruling cannot help but draw upon both sorts of consideration. See "Against Method" and "Halachah, Aggadah, and Reform Jewish Bioethics: A Response," note 14, above).

46. For example, is *kal vachomer* an example of an Aristotelian syllogism or an inductive-analogical form of reasoning? Aviram Ravitsky offers a comprehensive summary of the scholarship on the *midot*, primarily that which has taken place among traditional rabbinical authors but also with a look to contemporary academic researchers as well; see his *Logikah aristotalit umetodologikah talmudit* (Jerusalem: Magnes Press, 2009). See also Avraham (note 41, above).

47. See Menachem Elon, *Jewish Law: History, Sources, and Principles*, Translated from the Hebrew by Bernard Auerbach and Melvin J. Sykes (Philadelphia: Jewish Publication Society, 1994), p. 947: "The judgments and the conduct of a recognized halakhic authority are understood to be the result of his profound understanding of the *Halakhah*, his ability to discern the similarities and distinctions between cases, and his sound perception of the spirit and purpose of the Torah."

48. Rashbam ad loc. reads *gemara* in place of *limud*. However, the reading most frequently attested in the MSS and in the *rishonim* is *talmud*. See Dikdukei Soferim ad loc.

49. Rashbam, *B. Bava Batra* 130b, s.v. *lo mipi gemara, velo mipi maaseh*, and s.v. *ad she-yomeru lo halakhah lema-aseh*.

50. See Rashbam, *B. Bava Batra* 130 b, s.v. *beterifot*.

51. *Yad Ramah, Bava Batra* 130b, s.v. *seifa debaraita*, end.

52. *Resp. HaRosh* 78:3.

53. Rashi, *B. Sukah* 28b, s.v. *vetanoyei*. See also *Or Zarua* II, *Hilkhos Sukah*, ch. 304.

54. See *Sefer Me'irat Einayim to Shulchan Arukh Choshen Mishpat* 237, no. 1: a public declaration of his wickedness is made in the synagogue.

55. *Shulchan Arukh Choshen Mishpat* 237:1.

56. Rashi, *B. Kidushin* 59a, s.v. *ani hamehafekh bechararah*; *Tosafot ad loc.*, s.v. *ani*; and see especially *Chidushei HaRitva, Kidushin* 59a.

57. *Yad, Ishut* 9:17, and see the commentators ad loc.

58. See Rashi, *B. Yevamot* 109b, s.v. *toke`a atzmo ledevar halakhah*, and *Hagahot HaBaCh*, *B. Yevamot* 109b, no. 2.
59. The dictum is codified in *Yad, Sanhedrin* 23:8 and *Shulchan Arukh Choshen Mishpat* 8:2.
60. *Yad, Sanhedrin* 20:8.
61. *Shulchan Arukh Choshen Mishpat* 10:2.
62. HaMe'iri, *Beit HaBechirah, Yevamot* 109b. For similar sentiments see *Beit HaBechirah, Bava Batra* 130b, although there he does not explicitly mention analogy.
63. A reference, perhaps, to *M. Avot* 2:10. And see Rashi, *B. Avodah Zarah* 27b, s.v. *chiviya derabanan leit leh asuta kelal*.
64. Compare *Shulchan Arukh Yoreh De`ah* 242:9: a student is permitted to issue halakhic rulings while his rabbi is alive, provided that those rulings are clearly attested in written works ("in books and in the rulings of the *geonim*"). He may not, however, "rely upon his own power of argument and analogy." The source for this is *Hagahot Maimoniot, Talmud Torah* 5, no. 2, in the name of R. Meir of Rothenburg.
65. See R. David ibn Zimra (16th century Egypt/Eretz Yisrael), *Resp. Radbaz* 6:2 (1147) and his commentary to *Yad, Sanhedrin* 20:8: all the limitations, including the use of analogy, apply only to the student who has not yet achieved the status of "scholar" (*she-lo higia lehoraah*).
66. *Vekhi mipnei she-anu medamin naaseh maaseh?*; *B. Gitin* 19a and 37a. The phrase occurs frequently in the responsa literature to the same effect: our analogies can all too easily lead to uncertain conclusions, and it is best not to rely upon them.
67. The authoritative literary sources of *halakhah* have the same status as "competent scholars." See R. Yaakov Reischer, *Resp. Shevut Yaakov* 2:64: "Our rabbis are the texts that have circulated throughout the Jewish community." And see note 64, above.

68. Newman (note 1, above) does discuss (at his note 10) a 1969 responsum of Rabbi Solomon B. Freehof, but he cites no other liberal halakhic writings. One of those available to him is found in Walter Jacob, ed., *Contemporary American Reform Responsa* (New York: CCAR, 1987), pp. 138-140. He barely mentions the works of Orthodox halakhists. Though he does (at note no. 30) briefly refer to a decision by R. Moshe Feinstein, he draws this from a secondary source and does not analyze Feinstein's reasoning.

69. The original source for R. Yosef Karo's ruling in the *Shulchan Arukh* is Tractate *Semachot* ch. 1; see also *M. Shabbat* 23:5 and *B. Shabbat* 151b. The Talmudic passage is cited in *Halakhot Gedolot, Hilkhhot Avel* (ed. Hildesheimer, v. 1, pp. 444-45); Alfasi, *Moed Katan*, fol. 16b; *Yad, Avel* 4:5; *Hilkhhot HaRosh, Moed Katan* 3:75; and by numerous other *rishonim*.

70. See *M. Shabbat* 23:5 and *Yad, Avel* 4:1.

71. Or metaphor. The close relation between metaphor and analogy is addressed in D. Gentner, B. Boedle, P. Wolff, and C. Boronat, "Metaphor Is Like Analogy," in D. Gentner, K.J. Holyoak, and B.N. Kokinov, eds., *The Analogical Mind: Perspectives from Cognitive Science* (Cambridge, Mass: MIT Press, 2001), pp. 199-253.

72. *Semachot* 1:4, in the name of R. Meir; *B. Shabbat* 151b (*baraita*).

73. Isserles's source for much of this material is *Sefer Chasidim*, ch. 723 (ch. 315, Wistinetzki-Freimann ed.)

74. The term *chovel beatzmo* is used in tort law to refer to self-inflicted wounds in general; see *M. Bava Kama* 8:6 and *B. Bava Kama* 90b and 91b.

75. Various halakhists have sought to do just that. R. Eliezer Yehudah Waldenberg suggests that R. Chaninah's promise to the officer, which was not accompanied by any offer of material gain, amounts to mere words and is not considered an "act" for which he would otherwise be held liable; *Resp. Tzitz Eliezer* 17:72, sec. 4. R. Shelomo Luria (16th century Poland), commenting on the story, draws a distinction between a concrete act undertaken to shorten one's life (forbidden) and requesting from others that they take such an action (not forbidden); *Yam shel Shelomo, Bava Kama* 8:59. Presumably, those who hear this request are not obligated to fulfill it; thus R. Chaninah did not give an authoritative instruction that his life be terminated. Finally, we should make note of R. Yaakov Reischer (18th century Germany) in his

Iyun Yaakov commentary to the *Ein Yaakov*, *B. Avodah Zarah* 18a: it is possible that during times of religious persecution one is indeed permitted to commit suicide in order to escape physical torture that would otherwise lead one to commit heinous sins. (He cites *Tosafot, Gitin* 57b, *s.v. kaftzu kulan*; see also *Tosafot, Avodah Zarah* 18a, *s.v. veal yechavel beatzmo*.) R. Chaninah's refusal to open his mouth to the flames is therefore an expression of his special piety (*midat chasidut*) and not a decision that he was obligated to make. If so, says Waldenberg (*Resp, Tzitz Eliezer* 18:48), the implications of the case of R. Chaninah are restricted to situations of persecution, and his example should not be analogized to a medical context.

76. Jakobovits, *Jewish Medical Ethics* (New York: Bloch, 1959) is to my knowledge the first monograph published in English on the subject. It was subsequently translated into Hebrew as *Harefuah vehayahadut* (Jerusalem: Mosad HaRav Kook, 1966).

77. R. Immanuel Jakobovits, "Badin im mutar lekarev mitato shel choleh no'ash hasovel yisurim kashi," *HaPardes* 31:3 (1956), pp. 16-19.

78. The first part of Jakobovits's article appears in *HaPardes* 31:1 (1956), pp. 28-31.

79. See *Turey Zahav, Yoreh Deah* 339, no. 2 and *Nekudot Hakesef* ad loc.

80. *Shiltey Giborim* to Alfasi *Moed Katan*, ch. 3, folio 16a (*siman* 1237). The answer is "anticipated" because the *Shiltey Giborim* dates prior to the commentators cited in the preceding note.

81. See *Beit Lechem Yehudah, Yoreh Deah* ad loc., *s.v. mikoach she'omrim*.

82. Nachmanides writes (*Torat Haadam, Shaar Hasakanah*, ed. Chavel, pp. 41-42) that the source of this *mitzvah* is Exodus 21:19, which establishes medicine as a permitted activity (*reshut*; see *B. Bava Kama* 85b). Nachmanides infers that this "permission" is in fact an obligation, inasmuch as we learn from a number of sources that medicine is a sub-species of *pikuach nefesh*, the commandment to preserve human life. His argument is summarized in *Tur, Yoreh Deah* 336, and see *Beit Yosef* ad loc. Rambam (Maimonides; *Commentary to M. Nedarim* 4:4) locates the source of the *mitzvah* in Deuteronomy 22:2 (a midrash on the word *vehasheivoto*; *B. Bava Kama* 81b and *B. Sanhedrin* 73a). Jakobovits implies that each of these sources applies to its own specific medical situation. The Rambam source covers obligatory treatment (medicine that offers a successful or tolerable

outcome), while the Nachmanides theory refers to medical treatment that promises only "to extend his illness and lengthen his suffering." The latter sort of treatment is permissible but not obligatory.

83. Barukh Rabinovitz, Comments in a Symposium on Determining the Moment of Death, *Sefer Asya* 1 (Jerusalem: Rubin Mass, 1979), pp. 190-198. The quotation is at pp. 197-198.

84. Ya'akov Levy, "Davar hame'akev yetzi'at hanefesh," *Noam* 16 (1973), pp. 53-63. The cited passage is at p. 61.

85. On p. 57 of his article (see preceding note), Levy chastises those who would draw conclusions on the basis of these classic halakhic texts in cases where, presumably, "there is no chance of improving the patient's condition." "What self-confidence! Any experienced physician knows how often he has erred in diagnosis and all the more so in prognosis." It is impossible to maintain such self-confidence in the case of a comatose patient who could live on "for weeks or even months."

86. Aristotle, *On Rhetoric*, translated by W. Rhys Roberts (New York: Modern Library, 1954), Book I, Chapter 2, 1356a: "Of the modes of persuasion furnished by the spoken word there are three kinds. The first kind depends on the personal character of the speaker..."

87. One example of his reputation is the book compiled by Dr. Avraham Steinberg, *Hilkhot rof'im urefu'ah: al pi shu"t tzitz eliezer lehagra"i waldenberg* (Jerusalem: Mosad Harav Kook, 1978) / Avraham Steinberg, *Jewish Medical Law: Compiled and Edited from the Tzitz Eliezer*. Translated by David B. Simons (Jerusalem: Gefen, 1980). One of Waldenberg's positions was that of rabbi of Shaare Zedek Medical Center in Jerusalem. Steinberg was the first director of the Schlesinger Institute for Medico-Halakhic Research at Shaare Zedek (<http://www.medethics.org.il>) and the founder and first editor of the quarterly *Asya* devoted to issues in medicine and *halakhah*.

88. *Resp. Tzitz Eliezer* 13:89.

89. See at notes 79-81, above.

90. *Resp. Tzitz Eliezer* 13:89, sec. 8. The following citation is at sec. 11.

91. *Bereishit Rabah* 96:3 and elsewhere.

92. For a very similar argument see R. Chaim David Halevy, "Nituk choleh she'afsu sikuyav mimekhonat haneshamah," *Techumin* 2 (1981), 297-305. At p. 304 he describes Isserles's example of salt on the tongue as "the perfect analogy" (*hadimayon hashalem*) to the case of the artificial respirator.

93. *Resp. Igerot Moshe, Choshen Mishpat* 2:73.

94. *Resp. Igerot Moshe, Choshen Mishpat* 2:74.

95. The most powerful formulation of this principle would seem to be that of R. Yaakov Reischer (18th century Germany), *Resp. Shevut Yaakov* 1:13: the laws of Shabbat are set aside for the purpose even of extending the life of a *goses*. For his part, Feinstein declares that "everyone accepts" this rule; *Resp. Igerot Moshe, Orach Chayim* 3:69.

96. Note that the Isserles passage does *not* mention pain and suffering as the reason for allowing the removal of impediments to death. Still, one of Isserles's sources *Sefer Chasidim*, ch. 234 does mention pain in relation to the treatment of the *goses*; see above at note 90. *Beit Lechem Yehudah, Yore Deah* 339, s.v. *mikoach she'omrim*, cites the *Sefer Chasidim* passage and is seemingly the first authority to make the connection between removing impediments and the issue of pain and suffering.

97. The language Feinstein uses in the responsum indicates Tendler's concern that the permissive ruling in the earlier *teshuvah* might be used to justify withholding medical treatment from the insane, from those in a comatose state, and other cases where the patient lacks sufficient quality of life. By restricting the warrant to discontinue treatment to cases involving pain and suffering Feinstein explicitly rejects the inference. At the same time, he does not categorically reject "quality of life" as a relevant consideration. On the subject in general, see Moshe D. Tendler and Fred Rosner, "Quality and Sanctity of Life in Talmud and Midrash," *Tradition* 28:1 (1993), pp. 18-27.

98. W. Gunther Plaut and Mark Washofsky, eds., *Teshuvot for the Nineties* (New York: CCAR, 1997), pp. 337-361; <http://data.ccarnet.org/cgi-bin/respdisp.pl?file=14&year=5754> (accessed September 15, 2010).

99. "This theory" is that of *Shiltey Giborim* (see at note 80, above)

100. The responsum cites the opinions of Waldenberg, Halevy, and Rabinovitz discussed above.

101. See above at note 82. Unlike Jakobovits, the CCAR responsum does not base its conclusions upon the theoretical differences between Maimonides and Nachmanides, since “[b]oth approaches see the obligation to practice medicine as a subset of the more general commandment to save life.” According to either theory, goes the argument, that obligation ceases when life cannot be saved.

102. Thus, the language of Maimonides: “whoever is able to save another (*kol hayakhol lehatsil*) and does not do so has violated the commandment: you shall not stand idly by the blood of your neighbor”; *Yad, Rotzeach* 1:14.

103. This refers to the classic distinction between “certain” and “unproven” medical treatments in R. Yaakov Emden’s *Mor Uketzi’ah*, ch. 328. See, in general, R. Moshe Raziell, “*Kefiat Choleh Lekabel Tipul Refui*,” *Techumin* 2 (1981), at pp. 335-336.

104. Newman (note 1, above), p. 36.

105. The terminology cited is that of Robert A. Ferguson, “The Judicial Opinion as a Literary Genre,” *Yale Journal of Law and the Humanities* 2 (1990), pp. 201-219, especially at p. 213ff. See also Paul Gewirtz, “On ‘I Know It When I See It’,” *Yale Law Journal* 105 (1996), at p. 1042: “The typical judicial opinion is marked by a rhetoric of certainty, inevitability, and claimed objectivity, a rhetoric that denies the complexity of the problem and drives to its conclusion with a tone of self-assurance... This rhetoric of certainty seems connected to judges’ perceived need to preserve the institutional authority of the court.” See also Richard A. Posner, “Judges’ Writing Styles (and Do They Matter?),” *University of Chicago Law Review* 62 (1995), at p. 1430.

106. The CCAR responsum is an exception to this observation, since it is a ruling on a specific question that yet takes pains to defend its position against the alternatives. The difference may lie in the nature of liberal *halakhah*, which tends to emphasize the plurality of views within the Jewish legal tradition over the need to locate the one correct answer to a question of Jewish law. On this subject in general, see Mark Washofsky, “Abortion and the Halakhic Conversation: A Liberal Perspective” and “Against Method: On *Halakhah* and Interpretive Communities” (note 14, above).

107. In particular, I would cite the publications of the Dr. Falk Schlesinger Institute for Medical-Halachic Research (<http://medethics.org.il>), including the Hebrew Journal *Assia* and the English Collection *Jewish Medical Ethics and Halacha*. Important studies are also available at the website <http://jlaw.com/Articles>, sponsored by the Center for Halacha and American Law of the Aleph Institute. In addition and number of the publications of the Freehof Institute of Progressive Halakhah (<http://www.jewish-law-institute.com/publications.htm>, accessed October 11, 2010) deals with medical subjects. See the following volumes: *Death and Euthanasia in Jewish Law* (1995), *The Fetus and Fertility in Jewish Law* (1996), *Aging and the Aged in Jewish Law* (1998).

108. The theory of constitutive rhetoric is developed by Maurice Charland, "Constitutive Rhetoric: The Case of the *Peuple Quebecois*," *Quarterly Journal of Speech* 73 (1987), pp. 133-150; see also his article "Constitutive Rhetoric," in Thomas O. Sloane, ed., *Encyclopedia of Rhetoric* (Oxford: Oxford University Press, 2001), pp. 616-619. The theory departs from the classical rhetorical understanding of the audience as an entity that exists *prior* to the rhetorical act, with its prejudices, interests, and motives already intact and waiting to be persuaded. On the contrary: an audience does not exist prior to the rhetorical act but is in fact constructed by the rhetorical act itself. While Charland uses the theory to analyze acts of political rhetoric, James Boyd White applies it to the language of the law. See his "Law as Rhetoric, Rhetoric as Law: The Arts of Cultural and Communal Life," *University of Chicago Law Review* 52 (1985), at 692-693: "What I have been describing [as rhetoric] is not merely an art of estimating probabilities or an art of persuasion, but an art of constituting culture and community. It is of this kind of rhetoric that I think the law is a branch... The establishment of comprehensible and shared meanings, the making of a kind of community that enables people to say 'we' about what they do and to claim consistent meanings for it – all this at the deepest level involves persuasion as well as education, and is the province of what I call constitutive rhetoric." See also James Boyd White, *Heracles' Bow* (note 4, above), at pp. 28-59.

109. See note 20, above.

110. See note 21, above.

111. I have argued this point in detail; see my "Halachah, Aggadah, and Reform Jewish Bioethics: A Response," note 14, above.