

## ***The Intersection of Halakhah and Science in Medical Ethics: The Approach of Rabbi Eliezer Waldenberg***

By: ALAN JOTKOWITZ

### **Introduction**

The relationship between halakhah and scientific advancement is a complex one. Halakhah was developed in the context of ancient and medieval scientific knowledge and this certainly had an impact on rulings in many areas of the law. The question then arises how halakhah should be affected when modern science disproves the scientific foundation on which the law is based. Various approaches have been suggested to this dilemma. One can simply deny the validity of modern scientific knowledge and maintain that the scientific theories of the ancient Talmudic sages are based on divine revelation and therefore there is no question. Another possible approach is to maintain that both the sages and modern scientists are correct, the contradictions being due to a change in the natural world over time. The approach then begs the question whether the law should also change in response to these changes in the physical world. A third approach is to accept that the sages made mistakes not due to any fault of their own but because they were limited by the scientific knowledge of their time. This position maintains that notwithstanding the spiritual uniqueness of the Talmudic sages, they had no special insight into the scientific workings of the natural world. This essay will demonstrate that over the course of his long and distinguished rabbinical career, Rabbi Eliezer Waldenberg had a consistent approach to this dilemma.

R. Waldenberg was one of the most prolific halakhic decisors of the last century and had special expertise in questions at the intersection of medicine and halakhah. In answering these queries, R. Waldenberg developed a distinct approach that gained much prominence in the halakhic discourse on these important issues. He dealt with all the modern dilem-

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mas in medical ethics, including but not limited to end-of-life-care, abortions, artificial reproduction, triage, confidentiality, definition of death and organ transplantation. He also wrote extensively on the questions of ritual such as circumcision and Shabbat observance that relate to medicine. Despite these achievements there has been relatively little written on his impressive corpus. Professor Rabbi Avraham Steinberg did the initial work in collecting most of his responsa relating to medical ethics in one volume, and this essay will attempt to continue that work by discussing his opinions in greater detail and comparing and contrasting them with opinions of other decisors.

R. Waldenberg was born in Jerusalem in 1915 and spent his whole life in the city learning and serving as a Rabbi in a variety of official and semi-official positions.<sup>1</sup>

He studied with the ultra-orthodox former Chief Rabbi of Jerusalem Tzvi Pesach Frank and with Chief Rabbi of Israel Isaac Halevi Herzog. He was a member of the Supreme Rabbinical Court in Jerusalem and the unofficial Rabbi of Shaare Zedek Medical Center for decades. He had no formal secular education and very little exposure to modern western culture. In addition to being an authority on medical ethics, he was an acknowledged expert on all aspects of Jewish law. His masterpiece is the 21-volume set of responsa called *Tzitz Eliezer* in which are answered questions on practically every field of Jewish law. He also wrote a multivolume series called *Hilkhot Medinah* on the relationship of Jewish law to modern governance, a topic that it became necessary to address with the birth of the State of Israel. He died in Jerusalem in November 2006.

### **Definition of Death and Organ Transplantation**

R. Waldenberg wrote extensively on how halakhah defines death and his position remained remarkably consistent over decades. The classic Talmudic source for defining death is the gemara in *Yoma* 85a: “If a building collapses on Shabbat and someone may be trapped in the rubble, one must desecrate the Shabbat to try to save the victim. If one finds him

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<sup>1</sup> Adapted from Avraham Steinberg, “Rabbi Eliezer Yehudah Waldenberg,” *Pioneers in Jewish Medical Ethics*, edited by Fred Rosner (Northvale, NJ: Aronson, 1997). For a summary of R. Waldenberg’s responses on medical ethics see Avraham Steinberg, *The Laws of Physicians and Medicine according to the Tzitz Eliezer* (Jerusalem: Mossad HaRav Kook, 1978) [Hebrew]; RD Strous, E. Shenkelowsky, “The world of medicine encounters the world of halakha—the great medical halakhist and Israel Prize awardee Rabbi Eliezer Waldenberg (1915–2006),” *Ha-Refuah*, vol. 147, 2008, pp. 85–8, 92 [Hebrew].

alive, one extricates him and tries to save his life. If he is found dead, one leaves him there until the end of Shabbat. How far does one dig to determine whether he is alive or dead? Up to the nose. An additional view is up to the heart. The main sign of life is in the nose, as it is written, “All in whose nostrils is the breath of the spirit of life.” Based on the gemara in *Yoma* and a responsum of the *Hatam Sofer*, R. Waldenberg maintains that “death is determined by the cessation of respiration.”<sup>2</sup> But R. Waldenberg also accepts the explanation of the *Hakham Tzvi* that absence of respiration is a sign of lack of heart function. In the words of the *Hakham Tzvi*, “everything depends on the heart.”<sup>3</sup> This assertion is apparently based on the ancient understanding that the heart was primarily a respiratory organ and its function was to distribute air throughout the body, an understanding that persisted until William Harvey elucidated the circulatory system in the 1600s. The *Hakham Tzvi* brings a number of proofs for this position with which R. Waldenberg concurs:

1. Rashi in *Yoma*, explaining how far one has to check to ascertain if a person buried under rubble is still alive, states that “one says until the heart to see if he is alive because his **soul** beats there, and another says until the nose because sometimes there is no sign of life in the heart but it is recognizable in the nose.”<sup>4</sup> Apparently, Rashi feels that life is dependent on heart function, and even according to the opinion that one checks until the nose, that is only if there is no sign of detectable heart function.
2. The *Hakham Tzvi* cites an argument between ancient Greek philosophers whether the source of locomotion is the heart or the brain, and asserts that we follow Rambam, who agrees with Aristotle that the source of movement is the heart.<sup>5</sup> R. Waldenberg himself follows in this direction and quotes Rabbeinu Saadiah Gaon, who feels that the soul resides in the heart, and the Zohar, which asserts that “it is impossible for all the limbs of the body to live even one minute without the heart.”<sup>6</sup>

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<sup>2</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25:4.

<sup>3</sup> Responsa, *Hakham Tzvi*, 77. See E. Reichman, “The Halachic Definition of Death in Light of Medical History,” *The Torah U’Madda Journal*, vol. 4, 1993, pp. 148–74 for a discussion of the erroneous circulatory physiology on which the *Hakham Tzvi* based his ruling.

<sup>4</sup> Rashi, *Yoma* 85a., s.v. *ad hotmo*.

<sup>5</sup> Responsa, *Hakham Tzvi*, 77.

<sup>6</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25:4:7.

R. Waldenberg was also aware of the modern brainstem definition of death (referred to in the medical literature as the Harvard criteria) and was adamantly opposed to it. But R. Feinstein's last responsum on the issue, written in 1985 one year before he died, explicitly accepts the Harvard criteria: "The definition (of death) called the Harvard criteria is considered as if the patient is decapitated because the brain has already been destroyed. And even if the heart is able to beat for a few days, all the time the patient has no ability to breathe independently he is considered dead."<sup>7</sup>

R. Waldenberg quotes the Hatam Sofer that lack of respiration "is a principle that is the accepted definition from the time when we became a holy nation and all the forces in the world will not move us from the place of our holy Torah."<sup>8</sup> Following in the footsteps of the Hatam Sofer, R. Waldenberg did not accept that modern medicine could change the medical principles that the ancient Rabbis maintained were true. Therefore advances in neuroscience, which have shown that respiratory function is controlled by the brainstem, would have little impact on his halakhic decision making.<sup>9</sup> In this context he quotes a responsum of the Rivash, who maintains that we do not follow contemporary science if it conflicts with Rabbinical tradition in determining if an animal or person is a *treifah* (doomed to die within thirty days): "We rely on our Rabbis and even if they say right is left because they received the truth and the explanation of the commandment man from man until...And we will not believe the Greek or Muslim wise men who only speak based on their own reasoning."<sup>10</sup> According to this perspective, not only do the laws of the Torah represent the ultimate truth but so do the scientific principles espoused by the Rabbis. Once Rambam decided the source of life resides in the heart, modern science can do little to change this viewpoint. It is not clear why the medieval medical opinion of Rambam should be eternally binding. Rambam himself was apparently relying not only on Torah wisdom but also on the medicine of his time as he understood it. Why then shouldn't modern authorities be allowed to incorporate contemporary medical knowledge into their halakhic rulings? As we will see in other contexts as well, R. Waldenberg adhered to this perspective on the relationship between the Torah and modern science.<sup>11</sup>

<sup>7</sup> Responsa, *Iggerot Moshe, Yoreh De'ah*, IV:54.

<sup>8</sup> Responsa, *Hatam Sofer, Yoreh De'ah*, 338.

<sup>9</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25:4:6.

<sup>10</sup> Responsa, *Rivash*, 447.

<sup>11</sup> For example, Rabbi Waldenberg does not feel that one can use modern scientific tests (e.g., blood typing or DNA testing) to establish paternity in halakhah.

In his last responsum on defining death, written in 1995 when heart transplantation had become commonplace around the world, R. Waldenberg writes, “I was astounded to read in your letter that it has been suggested that I revoked my ruling prohibiting heart transplants or other organ transplants in critically ill patients from donors whose heart still beats but whose brain including the brainstem no longer functions, which is called brain death. I want to emphasize clearly that I have not changed my mind and I strongly forbid it on the basis of halakhah.”<sup>12</sup>

R. Waldenberg accepts the principle based on Ramban in *Torat Ha-Adam* that a physician may perform a dangerous operation in order to save the life of a patient.<sup>13</sup> Ramban maintains that a fundamental component of the dispensation given to a physician to heal is the knowledge that he may harm patients with his treatments. But the principle of Ramban might not apply to our situation, because Ramban stated his principle only when the physician is convinced that this intervention is appropriate, but there is always the chance that the patient will have an unanticipated reaction to the medication or the physician will make a mistake in judgment, as opposed to the present situation where even from the onset the physician recognizes the great risk involved.<sup>14</sup> R. Waldenberg is alluding to the different reasons for adverse outcomes recognized in the medical literature.<sup>15</sup> Notwithstanding this distinction, based on the gemara in *Avodah Zarab* 27b he allows one to take a risk in order to attempt a cure. The gemara states: “If a patient will possibly live and possibly die if not treated, he may not be treated by a pagan doctor. But if he will surely die if not treated, he can be treated. Can this be? He still has momentary life that is put in danger by receiving treatment from the pagan doctor. We are not concerned about momentary life.” Rashi comments that even if it is definite that the pagan doctor will kill the Jew, one is allowed to take the risk because without going to the doctor one will surely die.<sup>16</sup> The gemara brings support for this assertion from the story in Kings II: 7 where the army of Aram laid siege to a Jewish town suffering from starvation. Four Jewish lepers decided to surrender to the enemy based on the reasoning that if they stay near the city they will surely die of starvation so what do they have to lose by giving themselves up. The question for R. Waldenberg is whether the physician is allowed to attempt a cure that may harm

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<sup>12</sup> Responsa, *Tzitz Eliezer*, Vol. 21, 28.

<sup>13</sup> Ramban, *Torat Ha-Adam*.

<sup>14</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25:5:5.

<sup>15</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25:5:5.

<sup>16</sup> Rashi, *Avodah Zarab* 27b, s.v. *safek hai safek met*.

the patient. For R. Feinstein the discussion centers on whether the patient may take the risk. This is consistent with their general view on patient autonomy. R. Waldenberg feels a patient has little or no autonomy in medical decision making,<sup>17</sup> while R. Feinstein attaches much more weight to patient preferences.

Regarding heart transplantation, R. Waldenberg:

1. Agreeing with R. Feinstein, maintains that there has to be at least a 50% chance that the patient will live from the operation.<sup>18</sup>
2. If the patient does not receive the operation he will die soon, but if there is a chance that he can live for years without the operation, it should not be done. With better survival after transplantation and better prognostic tools, these two objections are potentially surmountable.
3. It is possible that heart transplantation does not fall under the dispensation given for a doctor to heal for two reasons. Firstly, the sages were not aware of this operation and secondly, one is not allowed to obtain the heart for the transplantation.<sup>19</sup> Regarding the first contention it is difficult to understand why if the sages were unaware of the operation this should affect the dispensation given to a physician to heal. If that is true then almost all of modern medicine should be halakhically problematic. This position might be easier to understand if one accepts R. Waldenberg's preference for Rabbinic medicine over modern medicine alluded to previously. Regarding the second contention, other decisors have addressed the question whether one is allowed to accept a donor heart from a patient not considered halakhically dead.<sup>20</sup>

R. Waldenberg quotes authorities who raise the possibility that only a non-Jewish physician is allowed to perform a risky operation because the case of the gemara in *Avodah Zarah* is concerned with a Jewish patient being cared for by a non-Jewish physician.<sup>21</sup> It is difficult to understand why there should be a difference between a non-Jewish and a Jewish doctor in this regard, and R. Feinstein rejects this contention. He points out that the case in *Avodah Zarah* may be about a non-Jewish physician pre-

<sup>17</sup> See for example Responsa, *Tzitz Eliezer*, Vol. 18, 62.

<sup>18</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25:5:5.

<sup>19</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25:5:5.

<sup>20</sup> Aharon Soloveichik, "Determining the Time of Death," *The Journal of Halacha and Contemporary Society*, vol. 17, 1989, pp. 41–8.

<sup>21</sup> Responsa, *Tzitz Eliezer*, Vol. 4, 13:6, quoting the Responsa, *Bnei Tzion*, 11.

scribing a medicine to the Jewish patient, so that, when the patient swallows the medicine, he is a full participant in the act and even so it is allowed. We see that a Jewish patient can act to save himself and therefore we should also allow a Jewish physician to act to save others.<sup>22</sup>

### **Abortion**

R. Waldenberg also wrote extensively on the issue of abortion in halakhah. His opinions on abortion helped solve many difficult personal and family dilemmas but subjected him to criticism from many parts of the rabbinic world. R. Waldenberg felt strongly that the fetus is not considered a “person,” and based his position on Rashi’s understanding of the gemara in *Sanhedrin*.

The mishnah in *Oholot* 7:6 states: “A women who is having difficulty giving birth, one may dismember the infant in the womb and remove it limb by limb because her life comes before the fetus’s life. If most of the fetus<sup>23</sup> has emerged, one does not touch it because one does not put aside one life for another.” The gemara in *Sanhedrin* 72b quotes Rav Huna: “A child *rodef* [the halakhic name for a person trying to kill another person] may be killed. He must [then] maintain that a child or adult *rodef* does not need to receive a warning before he is killed [because a child cannot receive or understand a proper legal warning]. Rav Hisda challenged Rav Huna [from the mishna in *Oholot*]: If most of the fetus’s head has emerged one does not touch it, because one does not put aside one life for another. But why [not kill it], the baby is a *rodef*. [The gemara responds:] It is different here [in the case of *Oholot*] because the mother is being pursued from heaven [this is not a classic case of *rodef* because the mother’s life is threatened by the natural phenomenon of childbirth].” Rashi comments: “all the time that the fetus has not been born he is not a **nefesh** [person] and you can kill him to save the mother, but when his head has been born one may not touch him because it is as if he has been born and one does not put aside one person for another.”<sup>24</sup> Rav Waldenberg feels it is clear from Rashi that before birth the fetus is not considered a person and that is why abortion is not considered murder by a Jew.<sup>25</sup>

R. Feinstein disagreed with him and even attacked him in one of his responsa:

<sup>22</sup> Responsa, *Iggerot Moshe*, *Yoreh De’ah*, III:36.

<sup>23</sup> There are different versions of the text of the mishnah whether the case is of most of the body or most of the head being born.

<sup>24</sup> Rashi *Sanhedrin* 72b. s.v. *yotza rosho*.

<sup>25</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 51:3:1:3.

"I was shocked when I saw the responsum of a certain sage [R. Waldenberg] in Israel who permitted abortions in fetuses greater than three months who according to the tests of doctors had Tay-Sachs disease ... and one should not err and rely on the responsum of this sage."<sup>26</sup>

R. Feinstein bases his opinion on the Talmud in Sanhedrin 57b, which cites the opinion of Rabbi Yishmael that a non-Jew who aborts a fetus is liable and sentenced to death. Rambam (*Hilkhot Melakhim* 9:4) codifies the law as follows: "A non-Jew who kills a person, even a fetus in its mother's womb, is sentenced to death." R. Feinstein deduces from this law that abortion performed by a non-Jew is a form of murder punishable by death. There is no parallel formulation in the Talmud or Maimonides regarding the law if a Jew performs an abortion. Regarding this point R. Feinstein cites the tosafot who, based on the principle "there is nothing prohibited to a non-Jew that is permitted to a Jew," assert that "even though a Jew is exempt (not punished for abortion) it is not allowed."<sup>27</sup> From this comment of tosafot, R. Feinstein assumes that the prohibition is equivalent for a non-Jew and a Jew.<sup>28</sup> Abortion is a form of murder; the only difference is that a Jew is exempt from punishment. One can challenge this assertion of R. Feinstein's in three ways.

1. R. Waldenberg cites another opinion in Sanhedrin against Rabbi Yishmael's contention that a non-Jew is liable for abortion.<sup>29</sup> The weakness of this argument is there no record of any subsequent decisor explicitly accepting this opinion.
2. R. Waldenberg argues that not everyone accepts the principle "there is nothing prohibited to a non-Jew that is permitted to a Jew."<sup>30</sup>
3. This assertion of R. Feinstein is valid only if you accept that the principle "there is nothing prohibited to a non-Jew that is permitted to a

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<sup>26</sup> Responsa, *Iggerot Moshe, Hoshen Mishpat*, Part 2, 69:3.

<sup>27</sup> Tosafot, *Sanhedrin* 59a, s.v. *lekhha*. As will be discussed further, the law that a non-Jew is liable for aborting a fetus can be understood in one of two ways: 1. a fetus is considered a person and therefore one is liable for its murder as for any other person, or 2. a fetus is not a person but a non-Jew is also liable for aborting a potential life. It is easier to understand that a Jew would not be liable for aborting a fetus according to the second explanation. The text of Rambam (*Hilkhot Melakhim* 9:3) may be more consistent with the first explanation.

<sup>28</sup> Responsa, *Iggerot Moshe, Hoshen Mishpat*, Part 2, 69:1.

<sup>29</sup> Responsa, *Tzitz Eliezer*, Vol. 14, 100.

<sup>30</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 51:3:2:2. For example, the *Hatam Sofer* (*Yoreh De'ah*, 19) maintains that this is the position of Rambam (*Hilkhot Melakhim* 9:13) based on his ruling that a Jew can eat an animal while it is still twitching but a non-Jew cannot.

Jew” creates an equivalent prohibition: If abortion is considered murder for a non-Jew then it must also be murder for a Jew. But R. Feinstein himself cites others who see in the principle not an equivalent prohibition but a more general lower-level edict. If so, tosafot’s use of the principle may not support his contention that abortion is murder.<sup>31</sup>

Based on a responsum of Rabbi Yaakov Emden, R. Waldenberg maintained that an abortion could be performed solely for maternal need (even if it is not life threatening), in particular in the case of a pregnancy resulting from illicit relations.<sup>32</sup>

The development of new technologies in the twentieth century raised new halakhic issues relating to abortion. Physicians now can diagnose severe genetic conditions such as Tay-Sachs disease *in utero*, and the question arises whether to permit elective abortions in such cases. R. Feinstein was strongly opposed, but R. Waldenberg ruled differently. In a case of a fetus with known Tay-Sachs, he writes:

“Is there a greater case of pain and suffering than what will be caused to the mother in giving birth to this child, which everyone says will suffer and surely die within a few years? ... And add to this the pain and suffering that the child will experience. And therefore, if there is a situation where the halakhah permits abortion for reasons of pain and suffering and great need, then this should be a classic case for allowing it. And it makes no difference whether the suffering is physical or emotional, because in many instances emotional suffering is greater than physical suffering.”<sup>33</sup>

The main focus here is on the needs of the mother, be they physical or psychological. On these grounds, he allows a late-term abortion, in the seventh month of pregnancy, for a fetus with Tay-Sachs.

R. Waldenberg was subsequently asked about the permissibility of abortion for a fetus with Down Syndrome—a much more complex question, because of the varied prognosis of such children and the differing ability of families to cope with them. He was reluctant to give a general dispensation, but instead told the couple to talk to their own rabbi, who would be better able to ascertain their ability to raise the child. He noted,

<sup>31</sup> Responsa, *Iggerot Moshe, Hoshen Mishpat*, Part 2, 69:1. For example, Tosafot in *Hullin* 33a s.v. *ehad* maintain that a Jew is not liable for the prohibition of eating flesh from a live non-kosher animal, because in any case a Jew is not allowed to eat a non-kosher animal even when it is dead.

<sup>32</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 51:3.

<sup>33</sup> Ibid., Vol. 13, 102:1.

however, that there is room to permit abortion in selected cases, because the birth of a child with Down Syndrome has the potential “to destroy the psychological well-being of the wife and husband and also to put them at risk for a serious or not-serious illness and also to destroy their way of life.”<sup>34</sup>

R. Waldenberg’s permissive approach is based partly on the opinion of the medieval decisor R. Yair Haim Bacharach, who views the prohibition of abortion as an extension of the prohibition of masturbation. For R. Waldenberg, this makes abortion much less of a halakhic problem, since women are not forbidden to “waste seed.” For this reason, R. Waldenberg suggests it is optimal for the procedure to be performed by a woman doctor.<sup>35</sup>

It is clear that R. Waldenberg’s relatively liberal position on abortion is not based on a woman’s right to choose. In other contexts, as we will see, he has written forcefully that a person does not have the right to decide what will happen to their body because all life belongs to God. Regarding terminal care, for example, he maintains that the physician is required to do everything in his power to compel the patient to extend his life.<sup>36</sup> Ronald Dworkin has written that one could oppose abortion because one believes “that human life has an intrinsic, innate value; that human life is sacred just in itself; and that the sacred nature of a human life begins even before the creature whose life it is has movement or sensation or interests or rights of its own. According to this claim, abortion is wrong in principle because it disregards and insults the intrinsic value, the sacred character, of any stage or form of human life.”<sup>37</sup> He labels this the *detached* objection because it does not depend on any particular rights or interests, as opposed to the *derivative* position, which maintains that fetuses share the basic rights and interests of all humans, including the right not to be killed. Rabbi Waldenberg’s position is best understood from a *detached* perspective, and hence his difficulty in formulating a precise legal reason for his reluctance to approve the procedure himself, besides an obvious discomfort with ending a potential life prematurely.

His permissive stance on abortion in halakhah seems unaffected by the emergence of new technologies such as prenatal ultrasound, which enables one to see clearly the developing fetus and to which we owe the increasing success in treating premature infants. One might expect this

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<sup>34</sup> Ibid., Vol. 14, 101:2.

<sup>35</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 51:3:3:2.

<sup>36</sup> Responsa, *Tzitz Eliezer*, Vol. 5, Ramat Rahel, 28.

<sup>37</sup> Ronald Dworkin, “Life’s Dominion: An Argument About Abortion, Euthanasia, and Individual Freedom” (New York: Vintage Books, 1994).

success to work against abortion in the fetal stage. In fact, third-trimester abortions are illegal in many countries. But this point does not seem to affect R. Waldenberg's position that halakhic decisors do not have to consider technological advancements.

### **End-of-life Care**

R. Waldenberg in his book *Ramat Raḥel*<sup>38</sup> addresses the questions 1. whether one is allowed or even required to do everything in one's power to extend the life of a *goses* (a dying patient),<sup>39</sup> and 2. whether you are allowed to desecrate the Shabbat in order to do so. It is interesting that he connects these two questions but as we shall see for him they are interdependent. In answering the second question he begins by examining why one may desecrate the Shabbat to save a life. The Talmud in Shabbat 151a gives a reason when the life is that of a day-old infant: so that it will be able to observe many more *Shabbatot*. From this reason it is not clear that saving a life takes preference over Shabbat observance. Perhaps one may not violate the Shabbat to save a *goses* who may not live for more *Shabbatot*. Based on this reasoning R. Waldenberg quotes the *Ohr HaHayim* who claims that one is not allowed to save a non-Shabbat observer because the potential for further Shabbat observance doesn't apply. R. Waldenberg rejects this line of reasoning for two reasons. 1. It's not just the potential for further Shabbat observance that allows one to violate the Shabbat to save a life, but the potential to do any mitzvah, and in our case for example, the *goses* may repent in his last hours of life 2. But in reality R. Waldenberg rejects this whole line of thinking and based on the Talmud in Yoma 85b claims that the dispensation given to save a life on the Shabbat has nothing to do with future mitzvah observance but is based

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<sup>38</sup> Responsa, *Tzitz Eliezer*, Vol. 5, Ramat Raḥel, 28. Ramat Raḥel is not a collection of classic responsa but R. Waldenberg's commentary on sections of the *Arukha Ha-Shulḥan*. Other responsa of his relating to end-of-life care deal with real-life cases while others are more theoretical. R. Feinstein's responsa are also a combination of real and theoretical cases. It would be interesting to see if the form of the question has any impact on the response. Rabbi Moshe David Tendler ("Introduction," in *Responsa of R. Feinstein*, New York: Ktav, 1996) has previously pointed out that at times R. Feinstein just responds with a brief discussion and the practical answer to the question, and at other times with a detailed analysis of the relevant sources and his understanding of them. In this case it appears that R. Feinstein is using the question as a springboard for a detailed presentation of his opinion on the manner.

<sup>39</sup> There is much confusion and uncertainty nowadays on how to define a *goses*. The standard halakhic definition is one who is expected to live less than three days.

on the principle of you should live by them and not die by them. Not based on any utilitarian decision making, saving a life simply takes precedence over Shabbat observance. If that is the case, it should also apply to a *gosses* who as the mishnah in *Semahot*<sup>40</sup> tells us is considered alive for all purposes. He brings proof for this principle from the Talmud in *Yoma* 85a, which says that you are allowed dig out from the rubble on Shabbat even someone who will live for only a short period (*hayei sha'ah*),<sup>41</sup> and this halakhah is quoted by Rambam<sup>42</sup> and the *Shulhan Arukh*.<sup>43</sup>

R. Waldenberg then claims that if one is allowed to desecrate the Shabbat for a *gosses* then it follows that is one is required to do everything humanely possible to extend the life of a terminal patient in every situation, even if they are suffering.<sup>44</sup> According to R. Waldenberg, the reason for this requirement to extend life in every situation is that every moment of life is valuable, for there are people who justify their entire existence with a thought of repentance at the end of life.<sup>45</sup> In addition, suffering has the potential to erase one's culpability from sin.<sup>46</sup> He brings further proof that a life of suffering is preferable to death from the case of the *Sotah* (a women found guilty of adultery who in ancient times was given a potion to drink that either caused her to die immediately or if she was worthy after a delay of a few years), whose life is extended in pain if she merits it, as opposed to dying immediately.<sup>47</sup> Rambam quotes the halakhah as follows: “A *sotah* who has merit of learning Torah, even if she is not obligated in it does not die immediately ...but suffers greatly for a year or two or

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<sup>40</sup> *Semahot* 1:1.

<sup>41</sup> There is no clear halakhic definition of a *hayei sha'ah*. Some consider it to be someone who will die within 12 months, while others think it is closer to a *gosses*. For a full discussion of the precise definition of a *hayei sha'ah* see Avraham Steinberg, “Terminally Ill,” *Encyclopedia of Jewish Medical Ethics* (Jerusalem: Feldheim, 2003).

<sup>42</sup> Maimonides’ *Shabbat*, 2:18, Rav Waldenberg.

<sup>43</sup> *Shulhan Arukh, Orach Hayyim* 329:4.

<sup>44</sup> He explicitly says that as much pain medicine should be given as necessary even if the medicine has the potential to shorten life as long as that is not the purpose of giving the medication. The reason that one is allowed to give the pain medication even if it has the potential to shorten life is based on Ramban in *Torat Ha-Adam* that part of the permission given to doctors to practice medicine is that they are allowed to give medications that also have the potential to harm.

<sup>45</sup> Responsa, *Tzitz Eliezer*, Vol. 5, Ramat Rahel, 28.

<sup>46</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 47.

<sup>47</sup> Responsa, *Tzitz Eliezer*, Vol. 14, 80.

three according to her merit and dies with a swollen abdomen and with her limbs falling off.”<sup>48</sup>

What happens if the patient does not want his life extended? Do we listen to him? R. Waldenberg cites Rav Yaakov Emden<sup>49</sup> who discusses a case of a patient who prefers to die rather than live in suffering and requires the doctor to amputate a limb even against his own will because it is not his decision to make. R. Waldenberg explains Rav Emden's opinion based on the principle that a person's soul belongs not to him but to God.<sup>50</sup> He says in similar situations that it is not the patient's or the family's decision to make whether to extend life but the physician is required to do everything in his power to compel the patient to extend his life.<sup>51</sup>

He brings halakhic proof that a person does not have ownership over their body and hence does not have decision-making capacity from the halakhah that one is not allowed to injure oneself,<sup>52</sup> and the law that a relative is not allowed to accept *kofer* (monetary restitution) from a murderer because in the words of Rambam “the soul of the deceased does not belong to the redeemer but to God.”<sup>53</sup>

R. Waldenberg maintains that the normative obligation requiring a physician to heal the sick is all-encompassing and applies to all patients at all times even in the midst of great suffering.<sup>54</sup> He has harsh words for physicians who “wrap themselves in the cloak of mercy” and actively end a patient's life, and he is also concerned about the slippery slope if we allow physician-assisted suicide.<sup>55</sup>

R. Waldenberg also addresses the practical implications of his ruling. He was opposed to the practice common among physicians of stopping chemotherapy, radiation and even antibiotics in patients with metastatic cancer in whom there was no hope for a cure.<sup>56</sup> R. Waldenberg's insistence on full treatment for all patients obliquely addresses the issue of medical futility. Many bioethics believe that if a patient requests a treatment that has no potential to extend life in a meaningful way or improve their quality of life then the physician and society is not required to offer

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<sup>48</sup> Maimonides, *Sotah* 3:20.

<sup>49</sup> Rabbi Jacob Emden, *Mor u-Ketz'ah, Orah Hayyim* 328.

<sup>50</sup> Responsa, *Tzitz Eliezer*, Vol. 18, 62.

<sup>51</sup> Responsa, *Tzitz Eliezer*, Vol. 18, 62.

<sup>52</sup> Maimonides, *Hovel u-Mazik* 5:1, *Shulhan Arukh, Hoshen Mishpat*, 420:31.

<sup>53</sup> Maimonides, *Rotzeah* 1:4.

<sup>54</sup> Responsa, *Tzitz Eliezer*, Vol. 14:80.

<sup>55</sup> Responsa, *Tzitz Eliezer*, Vol. 5, Ramat Rahel #29.

<sup>56</sup> Responsa, *Tzitz Eliezer*, Vol. 14:80.

or provide it.<sup>57</sup> Apparently, R. Waldenberg would advocate for any treatment in any patient that could extend life even for a short period.

To summarize R. Waldenberg's approach to the terminally ill patient:

1. The halakhic justification for his position that one must extend life at all times is based on the comparison with Shabbat. If you are allowed to violate Shabbat in order to extend the life of a *gosses* than you must be required to do so. The first assumption is almost universally accepted, but the extension to all situations is open to debate. Just because you are allowed to desecrate the Shabbat for a *gosses* doesn't necessarily mean you are required to extend his life in all circumstances.<sup>58</sup>
2. R. Waldenberg's position that essentially a person has no autonomy in his medical decision making and can be compelled to accept treatment is also open to debate. One can accept his theological claim that a person's body doesn't belong to him but still accept the idea that in certain instances God gave man a certain degree of control over his body. It is a far cry from decreeing that man is not allowed to harm himself to maintaining that man must always choose a life of suffering over death.
3. R. Waldenberg maintains based on Talmudic sources that a life of suffering is always preferable to death. As we will see there are other sources that suggest otherwise. His acceptance of suffering is based on the proposition that any time living is beneficial for one has the potential to do mitzvoth during that time, and that suffering has the potential to erases ones culpability for past actions.
4. R. Waldenberg claims that in order to fulfill his normative obligation to heal, a physician must always work to extend life and in no circumstances may hasten death.

Taken as a sum total, R. Waldenberg's positions are a strident critique of Western bioethics. Modern secular bioethics are primarily based on the principle of unlimited personal autonomy and a deep concern with quality of life. In addition, many ethicists feel that at a certain point a physician is

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<sup>57</sup> Albert R Jonsen, "Forgoing life support: The quality of life," *Bioethics Beyond the Headlines: Who lives? Who dies? Who decides?* (Lanham, MD: Rowman and Littlefield, 2005).

<sup>58</sup> This might depend on the well-known question of whether *pikuah nefesh* on Shabbat is *butra* or *dukhuva* (for example see *Teshuvot Ha-Rashba* I:689). If it is *dukhuva* it might be easier to accept Rav Waldenberg's claim, but even in that case I still think it is debatable.

no longer morally obligated to work to extend life but his therapeutic interventions should be used to ease the dying process.<sup>59</sup> This is the ethical underpinning of the hospice and palliative care movement, which has gained great acceptance in the Western world. Whether the physician should have an active or passive role in easing the dying process is open to great moral and legal debate in the modern world. R. Waldenberg is obviously opposed to any such role for a physician and stridently upholds the position that every minute of life in this world has infinite value. In addition, the fact that the question of how one cares for the terminally ill patient might be different in the modern environment due to the development of new technologies that can extend life in even the most dire of circumstances does not seem to be an issue for R. Waldenberg.

### **Artificial Reproduction and Surrogate motherhood**

R. Waldenberg has argued forcefully against the use of artificial insemination using a donor's semen (AID) and is even hesitant to permit it using the husband's sperm (AIH). In his own words:

This whole question of using AI is an abomination to the tents of Jacob and there is no greater desecration of the family in the tents of Israel. This [AI] destroys all the principles of **purity and sanctity** in the life of a Jewish family which has distinguished us from the time we became a nation. It also breaks the chain between sons and fathers ... and who are those who donate their sperm for this purpose in order to receive money. They are the lowest of the low and what kind of children can come from this seed. And the seed of the father is what creates the brain in the fetus. ... the *Sefer Ha-Hinukh* teaches us that the nature of the father is hidden in the child. And how can the holy children of Israel think we can build from these seeds and not see that it will bring destruction upon the family. ... and when we are speaking about the sperm of a non-Jew all words are extraneous to describe the disgust and the horror of the act and the great spiritual destruction it will bring into the house of Israel and the individual homes.<sup>60</sup>

R. Waldenberg also raises the possibility that AID would be considered a form of adultery.<sup>61</sup> He postulates that there are two components to the prohibition of adultery: 1. Forbidden sexual relations even without ejaculation and 2. the placement of another man's sperm into the women's

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<sup>59</sup> Baruch A. Brody and H. Tristram Englehardt, "Hospice Care," *Bioethics: Readings and Cases* (Englewood Cliffs: Prentice-Hall, 1987).

<sup>60</sup> *Arukha-Shulchan, Even Ha-ezer*, 23:1.

<sup>61</sup> *Responsa, Tzitz Eliezer*, Vol. 9, 51:4:1,3.

vagina even without intercourse. He brings proof for this idea from Ramban,<sup>62</sup> who infers from the use of the word “seed” in the text of the verse in Leviticus 18, 20 which prohibits adultery (“Thou shall not lie carnally with thy neighbor’s wife for seed”) that the reason for the prohibition of adultery is that there should be no confusion who the father of the child is. If that is the reason it should also apply to AI. He also quotes the *Sefer Ha-Hinukh*<sup>63</sup> who says the reason for the prohibition of adultery is that people should know who their father is.

On a halakhic level he claims that it is possible that the position of Rabbenu Peretz by a *ben niddah* [a child who was conceived while the mother was ritually impure] would not be applicable to the case of AI. Rabbenu Peretz writes, “a woman in *niddah* can lie on her husband’s sheets; however she should be careful about lying on the sheets on which another man lay for the fear that she may become pregnant. And why shouldn’t we be afraid that she might become pregnant from her husband’s semen and the child will be the son of a *niddah*. And he answered because there were no illicit relations the child is completely legitimate and even if she became pregnant that way from another man we see that Ben Sira [who according to the aggada was the son of the prophet’s Jeremiah’s daughter who became pregnant in a bathhouse from the sperm of her own father] was completely legitimate. But we are concerned about the semen of another man because it might happen that the child will marry his father’s sister (unknowingly).”<sup>64</sup> In the case of lying on the sheets there was no conscious action by the woman to try to get pregnant; in the case of AI there was a conscious act by the woman’s donor and doctor to impregnate her and in this case maybe Rabbenu Peretz would consider it adultery.<sup>65</sup> Rav Waldenberg admits this contention is tenuous because Rabbenu Peretz himself says that the reason for his ruling was that there was no “illicit relations.” But he quotes another medieval authority, Rabbi Shlomo of London,<sup>66</sup> who writes, “A woman should not wash on the day of her immersion in the bath that her husband washed in because she might become pregnant and the child will be a *ben niddah*.” Apparently, Rabbi Shlomo considers a child born from a bathhouse conception problematic. Furthermore, he quotes the *Shiltei Gibborim* in tractate *Shevivot*:<sup>67</sup> “I found that it was asked of Rabbi Meir [the Maharam of

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<sup>62</sup> *Ramban al ha-Torah*, Leviticus 18,20.

<sup>63</sup> *Sefer HaHinukh, Mitzvah* 35.

<sup>64</sup> Quoted in *Taz, Yoreh De’ah*, 195;7.

<sup>65</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 51:4:1,8.

<sup>66</sup> Quoted in the *Birhai Yosef, Even ha-Ezer*, 1:14.

<sup>67</sup> *Shiltei Hagibborim*, Talmud Babli, *Shevivot*, beginning of the second chapter.

Rottenburg], Why aren't we careful that a women should not lie on her husband's sheets because maybe she will become pregnant and the child will be a *ben niddah*, like we don't let a women lie on the sheets of another man because of the concern that she might become pregnant with the semen left on the sheets like Ben-Sira. And he answered that because the child of a *niddah* is legitimate in every sense [not considered a *mamzer*] we are not concerned." Implicit in his answer is that Rabbi Meir accepted the contention that the child is a *ben niddah* and in the case of semen from another man that the child is a *mamzer*. Remarkably, R. Waldenberg suggests that this responsum of Rabbi Meir is the same responsum of Rabbenu Peretz that is quoted above and the name was mistakenly changed from Rabbi Meir to Rabbenu Peretz along with the real meaning of the responsum, which should be that the child is considered a *ben niddah*. We therefore cannot determine halakhah from this possibly distorted opinion of Rabbenu Peretz.<sup>68</sup>

Regarding the legend of Ben Sira which implies that there is no concern of *mamzerot* after a bathhouse conception, R. Waldenberg doubts the veracity of the legend and cites Ramban quoted by the *Hatam Sofer*<sup>69</sup> who maintains that one does not have to believe in the truth of stories not found in the Talmud or Midrash and certainly cannot learn halakhah from them. In conclusion, he feels that a child born from AID is a *safek* [possible] *mamzer* [bastard] and the husband should divorce the wife.<sup>70</sup> It is worth noting that in an earlier responsum, R. Waldenberg was less forceful in his conclusions and maintained that the "woman is not forbidden to her husband because there were no illicit relations."<sup>71</sup>

R. Feinstein was aware of R. Waldenberg's proof from Ramban in Leviticus and objects to it for a number of reasons:<sup>72</sup>

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<sup>68</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 51:4:1,8. It is not the intent of this paper to evaluate the correctness of Rav Waldenberg's assertion regarding the validity of the text, rather I think it shows the length he is willing to go to support his thesis. For a further discussion on the text in question see Green, J. *Asia* vol. 5. 1986, pp. 112–24.

<sup>69</sup> Responsa, *Hatam Sofer, Orah Hayyim*, 16.

<sup>70</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 51:4:1,8. In another responsum (*Tzitz Eliezer*, Vol. 13, 97) he quotes the Responsa, *Minhat Yitzhak*, Part 4, 5:14: "Is it possible to doubt that the fact that the women is lying naked before the physician with her genitals uncovered and he repeats the procedure over and over again injecting the sperm until it is absorbed that this is illicit behavior?" The implication of this approach is that the actual procedure of AI is akin to adultery. It is not clear to what extent R. Waldenberg agrees with this notion.

<sup>71</sup> Responsa, *Tzitz Eliezer*, Vol. 3, 27.

<sup>72</sup> Responsa, *Igerot Moshe, Even ha-Ezer*, Part 2, 11.

1. He cites the Ibn Ezra<sup>73</sup> who rejects the interpretation of Ramban and explains that the use of the word “seed” teaches that adultery is forbidden even for the purpose of procreation.
2. R. Feinstein himself interprets that the use of the word “seed,” based on a rabbinical teaching, is to exclude liability if the relations were with a dead man.
3. The concern about not knowing who the father is is only a rabbinic edict and therefore could not be the reason for the Torah prohibition.
4. The Ramban himself in the same piece stresses that relations with a married woman even without ejaculation is equally punishable so the concern about lineage could not be the reason for the prohibition.

R. Waldenberg’s primary concern is the effect that AID will have on the family. Even though illicit sexual relations did not occur, he considers AID a form of adultery and encourages the husband to divorce his adulterous spouse. In addition, he is concerned about the lineage of the child and the influence of the donor father on the spiritual development of the child. In his world view, knowledge of one’s predecessors is of crucial import.

R. Waldenberg’s harsh words are partly directed at R. Feinstein, who permits AID using a non-Jewish donor. R. Feinstein responds to another contemporary who also criticized his ruling:

It appears from your letter that I would be insulted by your rebuke, but on the contrary I am satisfied that there are spiritual people that are not afraid or embarrassed to give rebuke. But in truth there is nothing in what I wrote and instructed that will cause any desecration of the sanctity of Israel but it is the eternal truth from our Rabbis, the *Rishonim*. And your objection comes from philosophies based on external knowledge that influence even very wise people to understand the mitzvoth of the Torah based on this alien knowledge ... but I am not like that and all my philosophies come only from knowledge of the Torah without any outside influences . . . And any reasons that come from external knowledge or explanations that come from the heart are worthless even if they are more stringent and are thought to increase the purity and sanctity of Israel.<sup>74</sup>

R. Waldenberg responds to R. Feinstein’s arguments by stating, “How awful is the thought that someone would entertain the possibility that it is permissible to cause mixture with non-Jews through AI. My feelings on

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<sup>73</sup> *Ibn Ezra al Ha-Torah*, Leviticus, 18,20.

<sup>74</sup> Responsa, *Iggerot Moshe, Even ha-Ezer*, Part 2, 11.

this are as clear as daylight and are not from external sources or come from the heart but from a holy place, the core of Jewish law, and from the great knowledge of the obligation placed upon us to be a kingdom of priests and a holy nation. This true philosophy comes from the living Torah.”<sup>75</sup>

R. Waldenberg holds that a child born of in vitro fertilization has no legal mother (even if the same woman is the egg donor and birth mother) and prohibits the procedure.<sup>76</sup> He advances this theory based on his contention that parenthood is established only through natural sexual relations between a man and woman and not through the manipulations of a “third power.” In order to be recognized as a mother, the woman must have fertilization take place inside her body. R. Bleich has already pointed out the lack of halakhic precedent for these ideas.<sup>77</sup> I agree that using conventional halakhic methodology there does not seem to be much room for R. Waldenberg’s opinion, but it appears to me that he is using another more controversial methodology. The primary reason for his opposition is theological in nature. He quotes approvingly the words of the *Arukh Ha-Shulhan* [late 19<sup>th</sup> century legal decisor] who comments that “a person who was created in the image of God should understand that (sexual) desire that was created in him is not for the purpose of the desire because this is illogical....it was only created for the purpose of populating the world. ....Because if God did not create this desire no person would have relations because of the disgust associated with it.”<sup>78</sup> In R. Waldenberg’s thought the only reason for sexual relations is propagation of the species. The Catholic Church also had great reservations about permitting all forms of artificial reproduction because they believe there is no substitute for natural fertilization. The prominent Protestant theologian Paul Ramsey was also bothered by the separation of the sexual act from conception.<sup>79</sup> R. Waldenberg further writes:

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<sup>75</sup> Responsa, *Tzitz Eliezer*, Vol. 9, 51:4:5,2.

<sup>76</sup> Responsa, *Tzitz Eliezer*, part 15, 45.

<sup>77</sup> J. David Bleich, “In vitro fertilization: questions of maternal identity and conversion,” *Jewish law and the new reproductive technologies*, ed. Emanuel Feldman and Joel B. Wolowelsky, (Hoboken: Ktav, 1997), pp. 47-8.

<sup>78</sup> *Arukha Ha-Shulhan*, Even ha-Ezer, 23:1. For further discussion on this topic see Alan Jotkowitz, “The Role of Theology in Contemporary Jewish Ethical Decision-Making: The Case of Artificial Insemination,” *Journal of Contemporary Religion*, vol. 28, 2013, pp. 141–53.

<sup>79</sup> Paul Ramsey, “Moral and Religious Implications of Genetic Control,” *On Moral Medicine: Theological Perspectives in Medical Ethics*, ed. Stephen E. Lammers and Allen Verhey (Grand Rapids: William B. Eerdmans, 1988).

The future of the process of artificial reproduction is to create a “laboratory child” which means that the pregnancy and birth will all occur outside the body of the woman in the laboratory. And there is also a plan to create a human clone.....and this will cause destruction and loss of the human spirit and will rule in all problems of conception and it will turn into a science without any humanity. Many scientists have already expressed their deep fears about this future...that will create a new being without free choice and without familial relationships and this will also create fear and confusion among many regular people. And therefore what have we accomplished with the creation of these new beings that do not fulfill the obligation to procreate found in the holy Torah and only cause complicated problems that are bound to set the human race back a thousand degrees.<sup>80</sup>

R. Waldenberg is essentially identifying with the concerns of the bioconservative stream of modern bioethics, which is hesitant to accept new technologies that upset the natural order. For example, expressing similar sentiments as R. Waldenberg, the prominent bioethicist Leon Kass has written:

1. “Man is defined partly by his origins and his lineage; to be bound up with his parents, siblings, ancestors, and descendants is part of what we mean by human. By tampering with and confounding these origins and linkages, we are involved in nothing less than creating a new conception of what it means to be human.”
2. “The new procedures for making babies all involve a new partner: the scientist-physician. The obstetrician is no longer just the midwife, but also the sower of seed. Even in the treatment of intramarital infertility, the scientist-physician who employs in vitro-fertilization and laboratory culture of human embryos has acquired far greater power over human life than his colleague who simply repairs the obstructed oviduct. He presides over many creations in many patients.”
3. How and why dehumanizing? Because human procreation is not simply an activity of our rational will... Is there possibly some wisdom in the mystery of nature that joins the pleasure of sex, the inarticulate longing for union, the communication of love, and the deep and partly articulate desire for children in the very activity by which we continue the chain of human existence? Is biological parenthood a built-in device selected to promote the adequate caring for posterity? Before we embark on new modes of reproduction, we should

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<sup>80</sup> *Responsa, Tzitz Eliezer*, part 15, 45.

consider the meaning of the union of sex, love, and procreation, and the meaning and the consequences of its cleavage.”<sup>81</sup>

Another example of this conservative tendency is R. Waldenberg’s opposition to plastic surgery because he feels that it does not fall under the general dispensation which is learnt from the verse “he shall surely be healed,” which gives a physician permission to heal. He continues, “one should know and believe that there is no creator like God and he created each person in a unique way and one should not add or detract from this creation.”<sup>82</sup> This concern of the doctor playing the role of creator does not enter at all into the thinking of R. Feinstein, who permits cosmetic surgery.

### **Methodological issues**

Newman has written that that halakhists make moral judgments by using a three-step process:

1. they identify precedents from the Rabbinic literature
2. they adduce principles from these texts
3. they apply these principles to new cases<sup>83</sup>

a process Ellenson has labeled halakhic formalism.<sup>84</sup>

While there is debate among scholars of halakhah on the relative weight of formalism versus values-driven *psak* in halakhic decision making, it is probably true that no authority exclusively uses one of the methodologies. But certain tendencies can be appreciated. Rami Reiner in a review of Rabbi Elyashiv’s decision making makes the argument that especially in his later opinions he was very formulistic as opposed to some of his contemporaries<sup>85</sup> and I have argued that Rabbi Haim David Halevi following in the footsteps of his teacher Rabbi Uziel took very seriously

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<sup>81</sup> Leon R. Kass, *Toward a More Natural Science* (New York: The Free Press, 1985).

<sup>82</sup> *Responsa, Tzitz Eliezer*, 11:41.

<sup>83</sup> Louis E. Newman, “Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics,” *Modern Judaism*, vol. 10, 1990, pp. 17–42.

<sup>84</sup> David H. Ellenson, “How to Draw Guidance from Heritage: Jewish Approaches to Mortal Choices,” *A Time to be Born and a Time to Die*, ed. Barry Kogan (New York: Aldine de Gruyter, 1990), pp. 219–32.

<sup>85</sup> Avraham (Rami) Reiner, “R’ Yosef Shalom Elyashiv as a Halachic Decisor,” *Modern Judaism*, vol. 33. 2013, pp. 260–300.

meta-halakhic values in his decision making.<sup>86</sup> Others have argued that Rabbi Shlomo Zalman Auerbach was similarly inclined.<sup>87</sup> I do not think that Rabbi Waldenberg fits nicely into one of these categories. On the one hand his position on end-of-life care appears very formulistic while his position on abortion seems driven by a concern for the suffering of the baby and mother. In addition, his distaste for all new forms of artificial reproduction seems to be based on a specific value system.

Walter Wurzberger has written on the role of intuition in halakhic decision making. He praises the halakhah for making “space for the input of individuality and subjectivity on religiously significant issues.”<sup>88</sup> He maintains that halakhic intuitions are necessary to provide normative guidance in many instances that do not fall under explicit rules (like many cases in modern bioethics) and to resolve situations of conflicting moral principles. He is aware of the difficulties that this very subjective system relying on individual idiosyncrasies could theoretically face but is confident that “the residual influence or exposure to halakhic categories of thought makes itself felt in areas where the law itself cannot be applied.”<sup>89</sup>

Newman has thoughtfully written on the difficulty of doing modern bioethics from a Jewish perspective as in many instances there is a paucity of ancient sources from which to build a response.<sup>90</sup> For example how does one formulate a Jewish response to the ethical dilemma of reproductive cloning when the ancient and medieval authorities never even dreamed of the possibility? In response to these dilemmas modern authorities have taken different approaches. For example in his responsum on end-of-life care, R. Feinstein bases his answer on a Talmudic narrative and other authorities use the midrash of Leah and Rachel switching fetuses to help determine parenthood in surrogacy. R. Waldenberg in a sense denies the question, there is nothing new because the sages knew everything. And if the sages did not discuss it his “intuition” is not to allow it, as we have seen in his responsum dealing with transplantation

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<sup>86</sup> Alan Jotkowitz, “Gentleness and Patience in the Medical Ethics Decision Making of Rabbis Benzion Uziel and Haim David Halevy,” *Modern Judaism*, vol. 29, 2009.

<sup>87</sup> Amir Moshiach, “Rabbi Shlomo Zalman Auerbach’s Halakhic Philosophy in a Dynamic Era of Socio-technological Transformation” (Ramat Gan: Bar Ilan University, 2013).

<sup>88</sup> Walter S. Wurtzberger, *Ethics of Responsibility* (Philadelphia: JPS, 1994).

<sup>89</sup> Ibid.

<sup>90</sup> Lewis E. Newman, “Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics,” *Modern Judaism*, vol. 10. 1990, pp. 17–42.

and artificial reproduction. This approach is based on a specific world view in which all wisdom is contained in the Torah and there is no notion of scientific progress. He believes that the Talmud's scientific principles based on revealed wisdom are infallible. R. Waldenberg is skeptical of modern science and comments that medical knowledge is constantly changing, casting doubts on its veracity.<sup>91</sup> In contrast he believes in the absolute truth of the wisdom of the Talmudic sages even regarding scientific matters. This is reflected in his acceptance of the Rivash's explanation of the eternal truth of the *treifah* halakhot and his adoption of this conservative position when opposing a redefinition of death. Lurking behind this attitude of R. Waldenberg's is more than just skepticism towards science but it reflects a certain theological position on the nature of halakhah. R. Feinstein recognizes the gradual progression of scientific knowledge and comments that the Talmudic definition of a human *treifah* changes according to the medical knowledge of the time.<sup>92</sup>

This understanding can help explain his vigorous opposition to artificial insemination from a non-Jew, because the Talmud maintains that the "father supplies the semen, the white substance, out of which are formed the child's bones, the sinews, the nails, the brain and the white of the eye" (*Nidda*, 30a). It is inconceivable according to R. Waldenberg that the infant's "brain" should come from a non-Jew. As we have seen, R. Waldenberg permitted even third trimester abortions in some instances and was not at all concerned with such modern medical terms as viability or the ability to see the growing fetus with ultrasound. Since these concepts were unknown to the sages they were irrelevant to him. It is worth noting that at times even R. Feinstein who did not shy away from the use of modern science in developing his halakhic positions used similar reasoning to discount the halakhic importance of microorganisms or electrocardiographic evidence of heart function.<sup>93</sup> This attitude towards modern science can also be seen in two other positions of R. Waldenberg. A child born with female external genitalia is halakhically considered a female even if his genetic phenotype is male.<sup>94</sup> The fact that the child has a Y chromosome is irrelevant to R. Waldenberg because the Talmud was concerned only with external appearance, not genetic makeup. He goes as far as to suggest that a woman who undergoes a sex change operation becomes halakhically a man as reflected in the external genitalia (and vice

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<sup>91</sup> Responsa, *Tzitz Eliezer*, Vol. 13, 104.

<sup>92</sup> Responsa, *Iggerot Moshe, Yoreh De'ah* III:36.

<sup>93</sup> Responsa, *Iggerot Moshe, Hoshen Mishpat*, vol. 2:73:4.

<sup>94</sup> Responsa, *Tzitz Eliezer*, Vol. 11, 78.

versa) and does not need a bill of divorce from her spouse because a man cannot be married to another man.<sup>95</sup>

Nowhere is this attitude demonstrated more conclusively than in a response he gave to the question whether blood typing has any validity in halakhah.<sup>96</sup> The exact query was whether one can use blood to exclude paternity, a fact that modern science takes for granted. Relying on the above-quoted form the Talmud in *Niddah* that the mother provides the red part of the child, which includes the skin, muscles, hair and the black of the eye, R. Waldenberg concludes that obviously the red part of the child includes the blood and therefore all the child's blood comes from the mother. Therefore blood typing is irrelevant when it comes to paternity determination. R. Waldenberg continues, "and there is no contradiction between the scientific test and the words of our sages because even if we accept the scientific fact that the father's blood type is not consistent with the child's, this does not mean that he is not the father because we know that the blood does not come from the father."<sup>97</sup>

He further writes "that it sometimes occurs that a person's blood type can change, because when a person receives a transfusion doesn't his blood type change, and this is perhaps the reason that sometimes the child's blood type is not consistent with his mother's."<sup>98</sup>

He also makes the point that "we see in many circumstances that what science thinks is true today after a while changes and that is because of the new advances and discoveries. And the view of the great poskim is that we do not adjudicate halakhah based on the opinions of physicians and this is clearly different from when we accept the opinions of physicians based on x rays or on what they see."<sup>99</sup>

In order to explain Rabbi Waldenberg's thinking, one can invoke Rabbi Soloveitchik's conception of an autonomous halakhic universe as described in *Halakhic Man*: "Halakhah has a fixed a priori relationship to the whole of reality in all of its fine and detailed particulars. Halakhic man orients himself to the entire cosmos and tries to understand it by utilizing an ideal world which he bears in his haklakhic consciousness. All halakhic concepts are a priori, and it is through them that halakhic man looks at the world... And when many halakhic concepts do not correspond with the phenomenon of the real world, halakhic man is not distressed. His

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<sup>95</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25.

<sup>96</sup> Responsa, *Tzitz Eliezer*, Vol. 13, 104.

<sup>97</sup> Ibid.

<sup>98</sup> Ibid.

<sup>99</sup> Ibid.

deepest desire is not the realization of the Halakhah but rather the ideal construction which was given to him at Sinai, and this ideal construction exists forever...the foundations of foundations and the pillar of halakhic thought is not the practical ruling but the determination of the theoretic Halakhah.”<sup>100</sup>

But as Rabbi Soloveitchik himself notes, he was more concerned with developing a model for the theoretical understanding of halakhah than with explaining how practical halakhic decision making should operate.

Rabbi Waldenberg’s approach has Kabbalistic overtones in explaining the nature of Torah and its relationship to the world. As we have seen, he was not averse to quoting the Zohar in explaining that “it is impossible for all the limbs of the body to live even one minute without the heart,”<sup>101</sup> and as Danny Lasker has pointed out, his opposition to artificial insemination is also indebted to a Kabbalistic understanding of human procreation.<sup>102</sup>

This essay has attempted to demonstrate that over the course of a lifetime of work, R. Waldenberg developed a distinct halakhic approach to bioethical dilemmas characterized by an “intuitive” bioconservative mindset combined with an understanding that all wisdom, including scientific knowledge, is to be found in the revealed Torah. ☩

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<sup>100</sup> Joseph B. Soloveitchik, *Halakhic Man* (Philadelphia: JPS, 1983), pp. 23-4.

<sup>101</sup> Responsa, *Tzitz Eliezer*, Vol. 10, 25:4:7.

<sup>102</sup> Daniel Lasker, “Kabbalah, Halakhah, and Modern Medicine: The Case of Artificial Insemination,” *Modern Judaism*, vol. 8, 1988, pp. 1-14.