Halachah, Aggadah, and Reform Jewish Bioethics
A Response
Mark Washofsky

In his essay in a recent issue of this journal, Philip Cohen considers the issue of methodology in bioethics: “by what method, or methods, do liberal Jews make decisions and come to opinions regarding newly emerging bioethical matters that are true to Judaism?” (p. 3). He challenges us to develop a uniquely “Reform” approach to decision-making on these questions, one that reflects our movement’s specific theological commitments. This is a goal that we all ought to share, and we owe Rabbi Cohen a vote of thanks for putting the subject on the agenda. This “response” is, therefore, not intended as a general critique of his article; indeed, I agree with much that he has to say. Rather, I want to focus upon his remarks concerning the role of halachah in the formulation of a Reform Jewish bioethics. Those remarks raise some fundamental issues that deserve a closer look.

There already exists a significant body of Reform Jewish writing on bioethics. I am referring to the literature of Reform responsa, specifically the t’shuvaot of the CCAR’s Responsa Committee that address numerous issues that fall under this rubric. Rabbi Cohen is aware of this material, of course, but he sees it as mostly irrelevant to his project. He argues that since the responsa are essentially halachic documents, they are out of place in a movement that “has been post-halachic since its founding.” Reform Judaism, that is to say, does not speak the language of halachah and does not accept the governing assumptions of the halachic process. For this reason, a process of ethical decision-making “confined to halachic conclusions, or halachic methodology, is constitutionally the diametric opposite of the Reform self-understanding.” The responsa litera-
ture, precisely because it works self-consciously within the tradition of Jewish legal thought, cannot be of much help to Reform Jews who “make few of their life’s decisions halachically.” In this way of looking at things, the halachic literature is a suspect element in the curriculum of Reform Jewish studies, at best a historical curiosity and at worst a hindrance to the achievement of our true religious purpose. A movement that lives much or most of its life “outside the bounds of normative halachic consideration” is, therefore, “always in search of an effective methodology”—a better methodology than halachah, at any rate—for making its ethical decisions. That methodology ought to be based in aggadah, “the arena of Jewish philosophy and mysticism, of midrash and midrashic method,” ways of thinking much better suited than halachah to the Reform Jewish spirit.  

This analysis has a familiar ring to it; it reflects much of the conventional wisdom on the nature of Reform Judaism and the parameters of “legitimate” Reform discourse. I, however, find it deeply problematic. Against the above assertions, I argue that the responsa are valid examples of Reform decision-making; that good Reform Jewish ethical decision-making, like good Reform Jewish ritual decision-making, requires an active engagement with the halachic tradition; and that the Reform responsa, which do actively engage with that tradition, therefore, make an invaluable contribution toward the development of a Reform Jewish bioethics. To put this more generally, I don’t believe in the existence of a “post-halachic” Judaism, and there’s no such thing as a substantive Jewish bioethics, Reform or otherwise, that is not at its core an expression of halachic thought.

This is most definitely not the conventional wisdom. It is, in fact, counterintuitive; we don’t usually talk this way about Reform Judaism. In swimming against the tide—that is, in proposing that we open ourselves to the possibility that halachic discourse can aid significantly in our efforts to develop a Reform Jewish bioethics—I want to make the following points.

1. Responsa: Perfectly At Home in the Reform Movement

I begin with the datum, to which I alluded above, that Reform responsa do exist. Lots of them, in fact. A careful calculation reveals a total of 1221 responsa published under the auspices of the North American Reform movement. Most of these are collated in books edited by chairs of the Responsa Committee of the CCAR. Many are
available at the Conference’s website, including (at the time of this writing) sixty more recent t’shuvot that do not yet appear in bound collections.\(^8\) While these responsa vary greatly in length and depth, taken together they constitute by far the largest extant body of texts devoted to the elaboration and justification of Reform Jewish religious observance. Moreover, these are legal texts, which, like all other rabbinical responsa, are “crafted within a halachic framework.”\(^9\) Thus, our supposedly “post-halachic” movement has produced a massive halachic literature. We could, perhaps, account for this oddity by dismissing the responsa as the product of a handful of rabbis whose idiosyncratic fascination with halachah placed them out of the mainstream of Reform Jewish thought and life. Yet this wouldn’t do. Consider that the CCAR Responsa Committee was established in 1906 and that its chairpersons have included Kaufmann Kohler, Jacob Lauterbach, Jacob Mann, Israel Bettan, Solomon B. Freehof, Walter Jacob, and W. Gunther Plaut. Consider, too, the colleagues who have served on the committee over the course of a century. For example, during the late 1970s and early 1980s, a period that saw the publication of the volume American Reform Responsa, we find t’shuvot signed and edited by Leonard Kravitz, Eugene Lipman, Simeon Maslin, Stephen Passamanecck, W. Gunther Plaut, Harry Roth, Herman Schaalmian, Rav Soloff, Sheldon Zimmerman, and Bernard Zlotowitz, in addition to Walter Jacob, the committee chair.\(^10\) I do not contend that any of these individuals or of the many more who have served on the committee before or since qualifies as the “typical” or “quintessential” Reform rabbi; a movement that prizes diversity resists such a designation. But they are without question Reform rabbis and, indeed, Reform rabbis of the first rank. As a group, they constitute a significant sampling of mainstream Reform rabbinical practice. In other words, you cannot marginalize these people or write them off as cranks. Nor can one easily assert that the writing of halachic responsa is somehow an “un-Reform” pursuit when these names (and the many others I could cite) are associated with that enterprise. Their involvement in the responsa process suggests that we have to take that process seriously as a mode of Reform religious expression.

2. “Reform Bioethics”: A Halachic Project

According to Rabbi Cohen, “the operant reason the founders of Reform Judaism rejected the authority of halachah is that they believed that the law significantly failed to address critical existen-
They may well have believed that. Yet this statement clashes with two inconvenient facts. First, the Reform Judaism that our founders created has produced a literature of halachic responsa that covers virtually every aspect of ritual or ethical practice that engages the attention of contemporary liberal Jews (see above); and second, many of these responsa are written on the assumption that the law does address subjects of “critical existential concern.” Prominent among these concerns is the subject of bioethics. The CCAR Responsa Committee has issued t’shuvot on the nature of the commandment (mitzvah) of medical practice; the economic structure of the medical profession, the role of the physician, and the right of every person to adequate medical care; medical malpractice; medical experimentation on human subjects; medical confidentiality (including the patient’s “right to know”); artificial insemination; in vitro fertilization; genetic engineering; stem cell research; birth control; the status of the fetus; abortion; end-of-life issues (including euthanasia and assisted suicide); criteria of death; organ donation and transplantation; cosmetic surgery and tattooing; priorities in the allocation of medical treatment and resources; smoking, alcohol and drug use; pain management; AIDS/HIV issues; Tay-Sachs testing; transsexual surgery; compulsory immunization; and more. These responsa should not be taken as the last word in Reform Jewish discourse on medical issues. One is certainly entitled to disagree with the reasoning or with the conclusion of any of them. (More on this below.) Nor are they a comprehensive and systematic treatise on “bioethics” as a whole. Responsa writers, as the label implies, work on a question-and-answer basis. They do not address themselves to an issue unless it is submitted in the form of a sh’elihah, and not every interesting or important question of bioethics has been referred to the Responsa Committee. Even so, this is still a quantitatively impressive and qualitatively deep collection of text and analysis. In fact, the Reform responsa literature contains the largest and most extensive discussion of bioethical issues ever produced by Reform Jews.

3. Halachah Is Central to Jewish—and Reform Jewish—Religious Practice

How do we explain this puzzling phenomenon? Our movement, after all, doesn’t “do” halachah. When it comes “to the lives they lead or their opinions concerning ethics or politics, (Reform) Jews generally do not turn to the halachah for advice.” We’re post-halachic,
remember? Why then have we written so many halachic responsa, especially on matters as fateful as the life-and-death challenges of bioethics?

The answer, I suspect, is that on matters of praxis and observance (maaseh), Judaism to an overwhelming extent is the halachah. When it comes to making “life’s decisions,” to translating the lofty abstract ideals of Jewish doctrine into the concrete reality of human action, our tradition tends to speak in halachic language. The contours and details of Jewish religious practice are discussed and debated, elaborated, argued, and decided (conclusively or not) within the literature of Jewish law rather than in that of the aggadah. If one wishes, therefore, to construct a religious practice that, however “liberal,” is informed by a close and living relationship to the sources of Jewish tradition, one has no choice but to go to where those sources are, to read halachic texts, and to engage in halachic discourse. To be sure, we don’t have to do any of this. We could always ignore the halachic literature in the hope of creating a brand new liberal praxis all our own. Historically, however, the Reform movement has rejected such a radical, yeish mei-ayin approach. While jealously guarding the right to make its own decisions, the Reform movement has preferred to nurture a religious practice that enjoys a substantive, palpable connection with traditional Jewish religious practice. This explains the extensive referencing of talmudic and halachic texts in our movement’s writings and statements on religious observance. It also explains the existence of Reform halachic responsa.

4. “Jewish Bioethics” Is an Inescapably Halachic Discourse

“Practice,” moreover, includes medical practice. In the universe of traditional Jewish discourse, bioethics is a subcategory of halachah. Consider Rabbi Cohen’s account of the “new world of biomedical possibilities” that demands our response as ethical decision-makers.

The elements of this world include the use of embryonic stem cells for treating disease; genetic engineering…cloning embryos…in vitro fertilization…organ transplantation and the issue of triage with regard to the availability of organs…our generally increasing ability to extend human life even when the quality of the individual life we might be extending has declined.
Consider as well the “numerous important questions” that these possibilities raise.

Are embryonic stem cells derived from a murdered human being? Is the genetic engineering of plants inherently dangerous? Is it ethical to “design” babies based on genetic engineering techniques… Is a cloned infant an ensouled human being? What is the moral status of “mixing and matching” sperm and egg with a host uterus for the sake of making babies and making parents? And who, indeed, are the mother and the father? Do we recognize the doctrine of “quality of life”…? How do we ensure distributive justice in the allocation of new (and older) therapies to guarantee that they are made as widely and fairly available as possible?

Every one of these possibilities and questions is a subject of halachic analysis. They have all been discussed and debated in the pages of halachic literature, the work of rabbis (Orthodox, Conservative, and—yes—Reform) who seek to answer them through the application of halachic texts. Jewish tradition has historically worked out its responses to these questions through the medium of law and legal reasoning, in the same way that it approaches all matters of ritual and ethical practice. And that reality leads rather inexorably to the conclusion that there is no such thing as a substantively Jewish bioethics that is not rooted in the halachic tradition and informed by the texts and discourse of Jewish law.

Rabbi Cohen disagrees with this conclusion. He believes that it is possible to construct a non-halachic “model” of bioethical thinking. This model would be based upon readings of Jewish tradition “in contradistinction to normative halachah,” approaches that are authentically “Jewish” even though they “do not confine themselves to the Jewish tradition’s dictates in making decisions.” He may be right, but the two examples he cites in support of his case actually prove the opposite point.

Let’s look at his first example, an essay by Ronald Green arguing that Judaism affirms the concept of “quality of life” as a basis on which to make critical bioethical decisions. This contradicts the view of some noted contemporary Orthodox poskim that Jewish law recognizes only the doctrine of the sanctity of life (i.e., human life is equally sacred and inviolable at all its stages) and thereby forbids the withdrawal of medical treatment from terminal patients based upon some measure of life’s “quality.” Rabbi Cohen contends that
Green reaches this conclusion “by stepping outside the bounds of halachah.” Yet, in fact, Green’s argument is a halachic one, firmly grounded in Jewish legal text and thought. For example, he bases his theory largely upon the fact that “the classical halachic tradition actually introduces a complex graded perception of the moral status of early human life in its various stages of development.” Critical here is the Talmud’s classification of the fetus during the first forty days of gestation as “mere fluid” (maya b’alma; B. Yevamot 69b). From this, Green deduces that human life at its earliest stages, “sacred” as it may be, receives a lesser degree of moral concern than would be accorded, say, to the day-old infant, a deduction that has obvious ramifications with respect to the permissibility of scientific research on human embryos. All this, of course, is an example of halachic argument, an argument that, in fact, has already appeared in Reform and Orthodox responsa on the subject. Next, Green applies what Rabbi Cohen calls an “independent judgment” to counter the view of the aforementioned poskim that medical treatment and life support may be withdrawn from a terminal patient only if he or she is a goses (one whose death is considered imminent) but not before the patient reaches that stage. This judgment is supposedly “independent”—i.e., non-halachic—because it flows not from the halachic sources themselves but from Green’s conviction that “even the most conservative classical rabbis who defined the status of the goses would be shocked” by that Orthodox claim. But again, Green is engaging here in a quintessentially halachic activity: he is interpreting the relevant legal texts and applying them to an unprecedented set of circumstances. Those texts, after all, do not explicitly forbid the withdrawal of treatment or life support from a patient who is irrevocably dying though not yet a goses. They must be interpreted to say so. Those Orthodox authorities who draw that stringent conclusion do not merely state it as undisputed fact; they justify it by interpreting the texts in a restrictive way. Green, as any good halakhist is entitled to do, interprets the texts differently and cites other sources that those poskim ignore.

Is Green’s interpretation the correct reading of the sources? That’s hard to say. An interpretation, by its nature, cannot be obviously “correct.” It is a claim of meaning upon the data (in this case, the texts and sources of the halachic tradition); as such, it must be argued, in the hope that one’s intended audience will accept this interpretation, as opposed to any alternative, as the best available reading of that data. On this issue, as with any halachic controversy,
one might be persuaded by the argument offered by either side. Alternatively, one might disagree with both sides and hew to a different path.\textsuperscript{48} The point, though, is that we are dealing with halachic argument rather than with some sort of non-halachic “independent judgment.”\textsuperscript{49} Green recognizes this. He acknowledges that his difference is not with the halachah per se but with a particular Orthodox version of it. He speaks of a gap between the viewpoints of “contemporary Orthodox bioethicists” on one side and “the classical rabbinic tradition” on the other (p. 33). He argues, not against “halachah” or “Jewish tradition,” but against a position taken by “modern Orthodox writers” (p. 34) and “modern Orthodox interpreters” (p. 35). He does not identify “the” halachah with the views of these authorities. On the contrary: he contends that the Jewish legal tradition supports a more varied range of decisions on end-of-life issues than some Orthodox scholars think it does. In this he joins other writers, whose Orthodox and halachic credentials can hardly be contested, who have reached conclusions similar to his.\textsuperscript{50} Green, therefore, does not “step outside the bounds” of halachah. Though he has not written a responsum in the formal sense of that term, his essay is an exercise in halachic reasoning and argument,\textsuperscript{51} one that stands well within “the classical rabbinic tradition” of bioethics.

Rabbi Cohen’s second example of a “non-halachic” approach to Jewish bioethics is Benjamin Freedman’s Duty and Healing.\textsuperscript{52} It is “non-halachic” because Freedman is prepared to criticize what he calls “a Jewish literature that sometimes adopts a reductive and parochial stance to issues, one that fails to mobilize the extremely rich resources of Jewish legal and moral reasoning deposited over many centuries of inquiry” (p. 13). Yet here again, the critique is not directed against halachah per se but against “a Jewish literature”—by which he means the writings of many contemporary Orthodox poskim—that does not do justice to the fullness of the “legal and moral” (i.e., halachic) tradition that it claims to represent.\textsuperscript{53} In this, Freedman resembles those “liberal” halachic writers who, while working within the methodological assumptions of traditional Jewish legal reasoning, argue that the halachah can and ought to be interpreted in a way that is consistent with progressive values and contemporary ethical concerns.\textsuperscript{54} In other words, one can disagree with the decisions of the leading Orthodox poskim and still be a halachist. Freedman’s project is to bring Jewish and secular bioethics, two very different traditions of thought, into fruitful conversation. In this, his approach resembles that of other Jewish bioethicists who
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seek to create a space in which each discourse may inform our understanding and application of the other. These writings are solidly located within the halachic tradition even as they challenge the conclusions of contemporary Orthodox authorities.55

To illustrate, let’s consider Freedman’s discussion of informed consent, “the right of every competent person to decide about proposed medical treatments after receiving the information that person finds necessary” (p. 139). This right, founded upon the doctrine of patient autonomy, is apparently “non-halachic” because it conflicts with the standard interpretation of Jewish doctrine, which holds that one has a covenantal duty to care for one’s health and that one may, therefore, not refuse medical treatment. Freedman, however, shows that this interpretation is based upon a conception of medical diagnosis and prognosis as objectively correct and certain: with this treatment, the patient will be healed; without it, the disease will worsen and the patient may die. If such were indeed the nature of medical knowledge, then surely there would be no moral justification on traditional grounds for refusing the treatment; we do not, after all, own our bodies, and we would be forbidden to endanger our lives by failing to follow the doctor’s orders. Experience has taught us, however, that objectivity is an impossible standard to meet in the medical realm. “(E)very aspect of care is riddled with uncertainty….Diagnosis is almost always presumptive, rather than conclusive.” Given the wide variations in treatment options and the significant differences among individual patients, physicians are much less confident than they used to be in the objective correctness of their recommendations. With these facts in mind, a proper understanding of Jewish duty would reject the authoritarian “doctor knows best” model in favor of one in which the patient him- or herself would assume much of the responsibility for determining the substantive content of that duty. Freedman’s analysis thus leads him to disagree with the conclusions drawn by some leading poskim that a patient is obligated to accept any treatment that medical science regards as proven or reliable (r’fuah b’dukah). Again, this is a halachic judgment. Friedman presents it not as a rejection of Jewish law but rather as a better interpretation of it, a more accurate application of the fundamental Judaic duty to preserve one’s life and health.

The same can be said of Freedman’s approach to other topics. There is nothing “non-halachic,” that is to say, about Duty and Healing. The book is a work of halachah, a contribution to the age-old
dialectic of Jewish law, the dialogue between rules and principles on the one hand and human experience on the other, a conversation given shape by the activity of textual reading and argument. Like Ronald Green, he does not present his work as one of p’sak, of authoritative rabbinical decision. Yet his work, like that of Green, is steeped in the texts of halachah and vitally concerned with their interpretation and application. Like Green’s, it presumes that the substantive content of a “Jewish bioethics” is the halachah and that any effort to work in the field requires that one work with the texts and sources of Jewish law. Neither Green nor Freedman supports the notion that a coherent “non-halachic” yet substantively Jewish bioethics is possible.

5. Legal Formalism Is Dead.56

The strongest objection to the use of halachah in Reform ethical discourse is that Jewish law is a closed system of reasoning that arrives at its conclusions exclusively through the operation of its own immanent processes. Translation: you can’t reach halachic decisions by using non-halachic methods. By contrast, as Rabbi Cohen notes, Reform Jews make their religious decisions on the basis of “independent criteria” of judgment that lie outside the boundaries of the halachic system. The autonomous liberal Jew seeks “to struggle creatively with the tradition.” Though taking the claims of that tradition with the utmost seriousness, he or she “is equally obliged to test the tradition according to the light of one’s own reason.” Halachah, which demands that we make decisions by staying inside the formal constraints of Jewish legal methodology, denies us the option of that independent judgment. We, therefore, cannot “do” halachah without surrendering the critical freedom, to say nothing of the specific ethical commitments, so characteristic of Reform Jewish thought.57

I call this the “strongest” objection not only because it expresses a central tenet of Reform Judaism but also because it reflects the way we think about law in general. We tend to understand law as a rule-governed activity that functions exclusively according to its own method. This point of view, often called “legal formalism,” holds that law exists independently from all other disciplines and that it aspires to be “an immanently intelligible normative practice.”58 Legal conclusions, in other words, are derivable through specifically legal means and are to be justified solely through legal argument. Legal analysis is based upon “the institutionally defined
materials” of a particular legal tradition and claims “to speak authoritatively within this tradition, to elaborate it from within.”\textsuperscript{59} As one theorist puts it:

The law wishes to have a formal existence. That means, first of all, that the law does not wish to be absorbed by, or declared subordinate to, some other—nonlegal—structure of concern; the law wishes, in a word, to be distinct, not something else. And second, the law wishes in its distinctness to be perspicuous; that is, it desires that the components of its autonomous existence be self-declaring and not be in need of piecing out by some supplementary discourse.\textsuperscript{60}

Therefore, says the legal formalist, one cannot legitimately criticize a legal conclusion from a stance external to the law itself. One may object to a law on political, economic, or moral grounds, and the formalist may be quite sympathetic to that objection. But as it is external to the law, such an objection is not a valid legal reason for overturning the conclusion. A dutiful judge will reject such arguments. To the extent that halachah follows this formalist model, it too will resist arguments imported from outside the disciplinary confines of Jewish law.

The formalist model, however, has been under attack for well over a century and has given way to a much more nuanced understanding of how judges decide cases.\textsuperscript{61} As Oliver Wendell Holmes, Jr., a prominent representative of this critique, wrote in 1881:

The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.\textsuperscript{62}

Since law is not a purely logical phenomenon, “legal reasoning” alone does not dictate a judge’s ruling. “General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise.”\textsuperscript{63} The formal elements of the law—the rules, principles, and precedents—
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do not lead in computer-like fashion to uniquely correct conclusions. The latter require judgment, and judgment requires cultural and intellectual resources that lie beyond the letter of the law. Benjamin Cardozo incorporated these resources into his own theory of judicial decision-making. When the logic of the legal rule runs out and cannot answer the question at hand, the judge turns for guidance to such sources as the history of the legal institution at issue, the custom of the community, and the welfare of society. Cardozo called this last factor “the final cause of law” because “the rule that permanently misses its aim cannot justify its existence… Logic and history and custom have their place. We will shape the law to conform to them when we may; but only within bounds. The end which the law serves will dominate them all.”

Legal thought has seen many trends come and go since the days of Holmes and Cardozo. Their writings, however, represent the emergence of an enduring consensus that has spelled the end of legal formalism. This is not to say that there is no such thing as a specifically legal methodology or that lawyers do not utilize reason to derive meaning from legal rules and principles. It is to say rather that legal logic does not function in a vacuum. Legal rules and principles lead to decisions—that is, they make sense—only within an environment shaped by other factors: the social and political background of the law, the judge’s conception of the function of that particular rule or legal institution, or the unconscious or intuitive processes that figure in all human decision-making.

Above all, legal decision takes place within a context of meaning that is not determined by the law’s formal rules or its inherent logic. As Robert Cover famously described this reality:

We inhabit a nomos—a normative universe… The rules and principles of justice, the formal institutions of the law, and the conventions of a social order are, indeed, important to that world; they are, however, but a small part of the normative universe that ought to claim our attention. No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic, for each decalogue a scripture. Once understood in the context of the narratives that give it meaning, law becomes not merely a system of rules to be observed, but a world in which we live. In this normative world, law and narrative are inseparably related. Every prescription is insistent in its demand to be located in discourse—to be supplied with history and destiny, beginning and end, explanation and purpose. And
every narrative is insistent in its demand for its prescriptive point, its moral.66

To readers of this journal, Cover’s notion of a symbiotic relationship between “nomos and narrative” should evoke Bialik’s famous treatment of the creative rapport between halachah and aggadah. As Bialik saw it, these two genres of Jewish religious expression are not sealed from each other by conceptual walls and methodological boundaries. They are rather “two facets of a single entity,” related to each other “as words are related to thought and impulse, or as a deed and its material form are to expression. Halachah is the concretization, the necessary end product of aggadah; aggadah is halachah become fluid again.”67 Cover’s interrelation of “nomos” and “narrative” in secular law, as some scholars have recognized, parallels the conversation between halachah and aggadah, the ongoing effort of the Jewish people to extract law from its own narratives and to set that law within a context of explanatory discourse.68 His “narratives” encompass the values “that any particular group associates with the law,” that “bespeak the range of the group’s commitments,” and that “provide the resources for justification, condemnation, and argument by actors within the group, who must struggle to live their law.”69 He might just as well have been talking about our own aggadic literature in its relationship to halachah.

6. Halachic Formalism Does Not Exist

All the above applies to the activity of poskim, as well as to that of judges. There is no halachic nomos that does not presume its aggadic narrative. A halachic decision (p’sak halachah) is and must also be an aggadic decision, for the posek’s ruling is coherent only within a context of values and affirmations that trace the contours of the community’s self-understanding and its vision of what God and Torah require of the faithful Jew. A voluminous amount of research reveals the powerful influence of such “aggadic” considerations upon p’sak halachah throughout the history of Jewish law.70 The same is true of our own halachic activity. Every decision in the Reform responsa literature is a combination of halachah and aggadah, a legal decision that speaks from within a world view defined by the underlying values of Reform Judaism. Let one example suffice to demonstrate what I mean.

In its 1994 decision concerning the treatment of the terminally ill patient,71 the CCAR Responsa Committee discusses among other
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issues the cessation of medical treatment (save for palliative or “comfort” care) for the dying. The *t'shuvah* considers the well-known halachic texts that distinguish between taking positive actions that hasten a patient’s demise (prohibited) and the removal of factors judged to be “impediments” to his or her death (permitted).72 Those texts, however, do not help us very much, because they address the situation of the *goses*, the person whose death is considered imminent. They offer only uncertain guidance for the case of one designated as “terminally ill” but whose death may be weeks, months, perhaps years away. Must that person, who is not a *goses*, continue to accept aggressive medical treatment, even though the physicians believe that the treatment cannot cure or control the disease and can at best buy some time at the cost of prolonging the individual’s pain and suffering? The responsum proposes that we consider this question not under the rubric of “removing impediments to death” but through the lens of the Judaic obligation to heal, to practice medicine. We are obligated to practice medicine to fight disease; the question is whether there is any “medicine” (*r’fuah*) to be practiced in this case? The focus is thus placed not so much on the patient’s immediate prognosis (is he or she truly a *goses*) as on the efficacy of the treatment: Is this therapy likely to bring about “healing,” defined as a reasonably acceptable medical outcome? If not, then we have grounds to say that the therapy does not constitute appropriate *r’fuah* and that no moral duty rests upon the physician to provide it or upon the patient to accept it. Given the imprecision of this criterion—the definition of “medicine” in any such case is likely to be controversial—some (perhaps many) Orthodox authorities will reject it, arguing instead that aggressive medical treatment may never be withdrawn until the patient is in fact a *goses*. The responsum counters:

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 (our) 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… 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.

These words may not strike us as “halachic” argument. We might judge them to be rhetoric rather than law, exhortation rather than legal reasoning. Yet the passage is absolutely essential to the responsum’s halachic conclusion; the p’sak would hardly be coherent without it. If these words are “rhetoric,” they are rhetorical in the classical sense of that term: they are persuasive discourse, arguments designed to win the adherence of a particular audience to the speaker’s proposition. As is often the case in the responsa literature, the authors of this t’shuvah confront the reality that the traditional sources can be interpreted in more than one way, that there exists more than one plausible halachic answer to the question of cessation of medical treatment. Like all responsa writers they seek to convince their readers (their “ideal reader,” the audience they conceive to be addressing) that this decision is the best one, a better understanding of the sources than the other plausible alternatives.

As I have indicated above, and as my own study of the responsa literature has convinced me time and again,73 such rhetorical justification is an inherent feature of all halachic decision. At times the rhetoric is obvious, standing front and center in the posek’s presentation. At other times it is implicit, subtly woven into the fabric of the responsum so that it appears only when we carefully reduce the argument to its component elements. But it is always there, for it is only through a justification of this sort that the responsum’s author(s) can persuade the reader that this interpretation of the halachic sources is the “correct” one. The legal sources—the “hard” or formal rules and principles of the halachah—cannot provide this justification, because they cannot interpret themselves. The justification must originate from outside those sources. To construct it, the posek must demonstrate, explicitly or implicitly, that his ruling is the best application of the basic values and religious commitments of his particular Jewish community, of the narrative that gives direction to its nomos, of the aggadah that guides its halachah.
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The passage cited above evokes just such a Reform narrative. It identifies an audience (“liberal Jews who seek guidance from our tradition in facing the moral dilemmas of our age”) and creates a community with them. In effect, it says: “This is how we, a group of Reform rabbis, understand the nature of refu’ah. We believe that you, those who read our teshuvah, share this understanding. If so, then we believe you will find our decision cogent and persuasive.” To repeat: this is an example of “aggadic” (i.e., rhetorical) as opposed to formal legal reasoning. It is at the same time “halachic,” because it is indispensable to the justification of the responsum’s legal conclusion.

Here, ultimately, is where I agree with Rabbi Cohen. He believes that halachah by itself cannot ensure sound Reform Jewish ethical decision-making, and I think he’s right. He believes that a good Reform Jew must always evaluate the findings of the halachah in the light of some extra-halachic set of criteria, whether we call this “reason,” or “contemporary ethical affirmations,” or something else, and I agree with him here, too. But where he holds that one must consciously step outside the tradition to do this,74 I suggest that such a process of evaluation is internal to the activity of rabbinical pesak. All halachic decision must be tested in the crucible of its “aggadic” context, the set of beliefs, values, and commitments that map the self-image of the community with which the posek identifies and to which he addresses his words. In the absence of this sort of evaluation, no substantive halachic decision could ever take place.

Conclusion

This essay, again, is not intended as a general critique of Rabbi Cohen’s proposal. My goal has been a much more limited one: to argue that Reform responsa on medical issues, like Reform responsa in general, offer an approach to Jewish religious thinking (in Rabbi Cohen’s terms, a “methodology”) that is at once halachic and Reform. It is “halachic” because it makes meaning in the way that halachic responsa have always made meaning, interpreting the sources of Jewish tradition to a particular community of readers from within a particular religious perspective and set of narratives. It is “Reform” because its authors and the particular community they address are united by a Reform religious perspective and a Reform set of narratives. Thus, one cannot say that our responsa are
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not “halachic” merely because they are Reform. Nor can one deny them the adjective “Reform” merely because they are responsa.

One final note. Those of us who engage in the activity of Reform responsa, whether as writers or as readers, take great pains to stress that our t’shuvoth wield no political power. No Reform Jew is obligated to follow the conclusion of any Reform responsum. In this connection, I am reminded of how Rabbi Solomon B. Freehof explained the relationship between Reform Judaism and the halachah: “the law is authoritative enough to influence us, but not so completely as to control us. The rabbinic law is our guidance but not our governance.” This passage is often quoted but, I fear, often misunderstood, for many who cite it to justify their rejection of the halachah’s “control” also seem to deny the Jewish legal tradition any significant degree of “influence” upon their religious decision-making process. And that, of course, is going much farther than Rabbi Freehof’s aphorism would justify. It is true that some Reform Jews would abandon the halachah entirely in their quest to create a praxis from non-halachic sources. That is their right, I suppose, and nothing I have said here is likely to change the mind of a Reform Jew who belongs to that camp. Those who take Rabbi Freehof’s words to heart, however, will perceive the need for a different path. In this particular case, if what we are after is a bioethics that is recognizably Jewish, that emerges from a conversation with Jewish tradition, texts, and ethical principles, then we must do what Ronald Green does, what Benjamin Freedman does, indeed what Jews have always done: turn for guidance (though not necessarily governance!) to the halachic literature. For it is there, in the Talmud and its ancillary commentaries, codes, and responsa, that we find the “tradition,” certainly that part of the tradition that speaks to issues of practice and observance. It is there, in the texts of Jewish law, that we discover the rules and the principles, the precedents and the arguments out of which all generations of Jews—including Reform Jews—have fashioned their approaches to questions of life and death. Each Jewish community has responded to that material from within its particular aggadic-narrative context of values and belief, creating its own bioethics in a process rooted deeply in the received tradition at the same time that it renews, translates, and transforms our understanding of that tradition’s literary sources. That is what Rabbi Freehof meant when he taught that the halachah offers us “guidance.”
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And it is for this reason that I argue that there is no such thing as a “post-halachic” Judaism. Our choice as Reform Jews is not whether we shall engage in halachah, for all Jews who want a substantively Jewish practice do that. The question, rather, is whether we shall make our own unique contribution to the Jewish legal tradition through our study and interpretation of it. This is the task that the Reform responsa literature has set for itself. Whether any particular responsum succeeds in that task shall always be a matter of debate. But the process itself remains vital to our efforts to create a bioethics and, indeed, a religious life that are unmistakably Jewish as well as liberal.

Notes

2. For the citations in the preceding paragraph, see Cohen, ibid., pp. 6–7.
3. Full disclosure: I currently serve as chair of the Responsa Committee and have participated in the drafting of a number of responsa. Okay, so I can’t very well claim to be “objective” on the matter of the role of halachah and the responsa process in Reform Judaism. Still, given that this question is absolutely central to any Reform rabbi’s self-understanding and to the definition of one’s rabbinate, I wonder whether any of us can make such a claim? Surely none of us can function coherently as a Reform rabbi without arriving at some sort of answer, however tentative, to questions concerning our right to speak in the name of “Torah,” our conception of the authority of “tradition” versus that of “autonomy,” and the like. The answer to every one of these questions is controversial; to accept one rather than another plausible answer is, therefore, to commit to a certain understanding of the rabbinical role. And “commitment” is difficult to square with a stance of value-neutral objectivity. Rather than aspire to such a stance, we’re better off acknowledging our value choices and recognizing that we are all participants in an ongoing argument over them. So long as we conduct that argument vigorously and respectfully, we can advance the cause of Reform Jewish thought without pretending to be objective about our deepest religious commitments.
4. A keen and subtle allusion to the fact that I am a graduate of the University of Alabama (B.A., 1974).
5. Conducted by the author. You have to be careful when you’re a mathematically-challenged liberal arts major. Nonetheless, I’ve checked the figures several times and can vouch for the total. I think.
6. That is, responsa acknowledged as “official” by the CCAR and indexed at the Conference’s website (http://ccarnet.org/documentsandpositions/responsa).
7. Eight of these are the product of Rabbi Solomon B. Freehof, published by the Hebrew Union College Press, Cincinnati. In order of appearance: Reform Responsa (RR) 1960; Recent Reform Responsa (RRR), 1963; Current Reform Responsa (CRR), 1969; Modern Reform Responsa (MRR), 1971; Contemporary Reform Responsa (CTRR), 1974; Reform Responsa for Our Time (RRT), 1977; New Reform Responsa (NRR), 1980; and Today’s Reform Responsa (TRR), 1990. The other four volumes are edited by Freehof’s successors as chairs of the Responsa Committee and published by the CCAR Press, New York. In order of appearance: Walter Jacob, ed., American Reform Responsa (ARR), 1983; Walter Jacob, ed., Contemporary American Reform Responsa (CARR), 1987; Walter Jacob, ed., Questions and Reform Jewish Answers (QRJA), 1992; and W. Gunther Plaut and Mark Washofsky, eds., Teshuva for the Nineties (TFN), 1997.

8. See the Topical Index of Reform Responsa at http://data.ccarnet.org/resp/tindex.html. The latest responsa are indexed as “Not Yet in Print” or “NYP.”

14. TFN, no. 5753.2, pp. 309–317; (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=2&year=5753); NRR, no. 50.
16. NYP, no. 5756.2 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=2&year=5756); TFN, no. 5753.2 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=2&year=5753); TFN, no. 5750.3 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=3&year=5750); CARR, no. 5 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=5&year=carr); ARR, no. 74 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=74&year=arr).
18. NYP, no. 5758.3 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=3&year=5758); NYP, no. 5757.2 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=2&year=5757); CARR, nos. 18–19 (http://data.ccarnet.org/cgi-bin/respdisp.pl?file=18&year=carr) and (http://data.
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carnet.org/cgi-bin/respdisp.pl?file=19&year=carr); NRR, no. 47.
22. *QRJA*, no. 163 (http://data.ccar.net.org/cgi-bin/respdisp.pl?file=163&year=narr); *CARR*, no. 21 (http://data.ccar.net.org/cgi-bin/respdisp.pl?file=21&year=carr); *TRR*, pp. 89–91; *CTRR*, no. 34.
25. *NYP*, no. 5763.3 (http://data.ccar.net.org/cgi-bin/respdisp.pl?file=3&year=5763); *QRJA*, no. 156 (http://data.ccar.net.org/cgi-bin/respdisp.pl?file=156&year=narr); *CARR*, no. 78 (http://data.ccar.net.org/cgi-bin/respdisp.pl?file=78&year=carr); *ARR*, no. 79 (http://data.ccar.net.org/cgi-bin/respdisp.pl?file=79&year=arr).
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org/cgi-bin/respdisp.pl?file=172&year=arr) ; TRR, pp. 119–21.
28. ARR, no. 75 (http://data.ccar.net/cgi-bin/respdisp.pl?file=75&year=arr).
31. TFN, no. 5750.1, 103–10 (http://data.ccar.net/cgi-bin/respdisp.pl?file=1&year=5750); QRJA, no. 102 (http://data.ccar.net/cgi-bin/respdisp.pl?file=102&year=narr); no. 161 (http://data.ccar.net/cgi-bin/respdisp.pl?file=161&year=narr); no. 162 (http://data.ccar.net/cgi-bin/respdisp.pl?file=162&year=narr); no. 164 (http://data.ccar.net/cgi-bin/respdisp.pl?file=164&year=narr); and no. 169 (http://data.ccar.net/cgi-bin/respdisp.pl?file=169&year=narr).
32. TRR, pp. 47–51.
33. TFN, no. 5750.8 (http://data.ccar.net/cgi-bin/respdisp.pl?file=8&year=5750); ARR, no. 137 (http://data.ccar.net/cgi-bin/respdisp.pl?file=137&year=arr); MRR, no. 22.
34. NYP, no. 5759.10 (http://data.ccar.net/cgi-bin/respdisp.pl?file=10&year=5759).
38. The Orthodox literature on medical halachah is vast, but I’ll mention two works here. J. David Bleich, Judaism and Healing: Halakhic Perspectives (Jersey City: Ktav, 2002) is a précis of Bleich’s extensive writings on medical subjects collected in books and journals (particularly Tradition magazine). S. A. Avraham, Nishmat Avraham (Brooklyn: Mesorah, 2000) is an English rendition of the author’s multi-volume Hebrew work, a compendium of medical halachah organized as a running commentary to the relevant passages of the Shulchan Aruch. Among the writings of Conservative rabbis, Rabbi Cohen (at note 6) cites Aaron Mackler’s Life and Death Responsibilities in Jewish Biomedical Issues (New York: JTS, 2000). We can add Elliot Dorff’s Matters of Life and Death: A
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Jewish Approach to Modern Medical Ethics (Philadelphia: Jewish Publication Society, 1998). Among Reform writings, in addition to the responsa, I can cite (ahem) chapter six of my Jewish Living (note 36), which summarizes the Reform responsa literature on medical-ethical issues and tries to draw some broad theoretical conclusions from those decisions.

41. Primary among these scholars is J. David Bleich, op. cit., pp. 175–85.
43. Rabbi Cohen’s version of this quote (“Green cites classic texts...,” p. 13), omits Green’s precise reference to “the classical halakhic tradition” [emphasis mine—MW]. The omission is unfortunate. Green’s actual statement is an explicit acknowledgment that he is working within, rather than “outside the bounds” of Jewish legal discourse.
44. Green, op. cit., p. 32.
47. According to all opinions, a goses may be allowed to die through the removal of any factor considered an “impediment” to his death; see Shulchan Arukh Yoreh De’ah 336:1.
48. The CCAR Responsa Committee, in fact, disagrees with both sides. It holds that the most effective justification for the cessation of medical treatment is grounded in the understanding of the mitzvah to practice medicine rather than in a determination based upon “quality of life.” See below in the text.
49. Mention should be made here of the story Green tells (at p. 36) of a ninety-four-year-old relative who suffered a massive head trauma and who, following a determination that treatment was ineffective in restoring vital organ functions, was allowed to die through the cessation of aggressive medical intervention. Rabbi Cohen (p. 14) describes this story as “a historical and extra-halakhic, empirical argument.” The opposite, in fact, is the case. Green does nothing more here than to suggest that “classical Jewish thought”—i.e., the halachah of the Talmud—would have permitted the cessation of treatment for this person even though he was not yet a goses. On the intimate connection of halachah and narrative, see below in the text.
50. Among these (see Green’s note 39) are Moshe D. Tendler and Fred
51. Not all examples of halachic writing take the form of responsa. The articles and studies that appear in halachic journals surely partake of the genre “halachah” even though their authors are not attempting to decide a particular sh’elah and commonly disclaim any desire to declare halachah l’masah. Prominent among these journals is Sefer Assia, a publication of the Falk Schlesinger Institute devoted to medical-halachic issues. We might also mention two volumes of articles published by the Freehof Institute of Progressive Halakhah, edited by Walter Jacob and Moshe Zemer, which include articles on Jewish law as it relates to medical subjects. These are Death and Euthanasia in Jewish Law (Pittsburgh: Rodef Shalom Press, 1994) and The Fetus and Fertility in Jewish Law (Pittsburgh: Rodef Shalom Press, 1995).

52. Benjamin Freedman, Duty and Healing: Foundations of a Jewish Bioethic (New York: Routledge, 1999). This is a fine book. Sadly, Freedman’s death at an early age has deprived us of the opportunity to learn more about Jewish bioethics from this gifted teacher.

53. As one prominent reviewer, himself a halachically-observant Jew, puts it, Freedman “reinterprets (the Jewish tradition) on some central points. In so doing he is not at all timid in criticizing the less sophisticated views of some of the most prominent contemporary spokespersons for that tradition in the popular area of bioethics.” See David Novak, “Reading Freedman,” Canadian Medical Association Journal 163:5 (2000), p. 577.


56. Ouch. One should beware of making such sweeping general statements, even in search of a pithy formulation. As the discussion and the references indicate, some modern theorists continue to defend formalism as an adequate account of the legal process. So as a doctrine it isn’t exactly “dead.” Still, it conflicts with the preponderant consensus within the legal academy. Perhaps I should have drawn upon our
present topic and said that legal formalism, if not “dead,” is at least in a state of *g’sisah*.


60. Stanley Fish, “The Law Wishes to Have a Formal Existence,” in Austin Sarat and Thomas R. Kearns, eds., *The Fate of Law* (Ann Arbor: University of Michigan Press, 1994), p. 159. Fish is anything but a legal formalist, but his description of the theory is one of the most cogent I have ever come across.


67. Chaim N. Bialik, “Halakhah veagadah,” in *Kitvei C. N. Bialik* (Tel Aviv:
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Devir, 1935), v. 2, pp. 260ff. The classic English translation, cited here (at 663), was published by the Education Department of the Zionist federation of Great Britain and Ireland, 1944.


70. And I do mean “voluminous”: I can’t possibly do justice to the number of studies that ought to be cited here. I should, however, mention the seminal researches of Jacob Katz, the doyen of the sociological study of the history of the halachah; see his Halakhah veKabalah (Jerusalem: Magnes, 1984), The Shabbes Goy (Philadelphia: Jewish Publication Society, 1989), and Hahalakhah bemeitzar (Jerusalem: Magnes, 1992). Also essential is Louis Jacobs, A Tree of Life: Diversity, Flexibility, and Creativity in Jewish Law (Oxford: Oxford University Press, 1984). Finally, there is the work of Zvi Zohar and his colleagues at the Shalom Hartman Institute. See especially Zohar’s excellent survey of the halachic decisions of “oriental” poskim during the modern age, He’ireu penei mizrach (Tel Aviv: Hakibitz Hameuchad, 2001).


72. See Shulchan Arukh Yoreh De’ah 339:1, including the gloss by Isserles and the standard commentaries ad loc. The Jewish expression of the distinction between hastening and removing an impediment to death goes back to talmudic times and to such medieval works as Sefer Chasidim. See the responsa for bibliographical details.

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74. Cohen, op.cit., p. 11 (on the need for an “independent examination” of the claims of tradition), and p. 15 (on the value of stepping “outside normative halakhic discourse”).

75. Reform Responsa, p. 22.