

ON THE ABSENCE OF METHOD
IN JEWISH BIOETHICS:
RABBI YEḤEZKEL LANDAU ON AUTOPSY**

by

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At the outset of his magisterial *Matters of Life and Death*, Elliot Dorff briefly discusses the question of method in Jewish bioethics, surveying the familiar spectrum of opinion on the subject.¹ On the one extreme are Orthodox Jews who regard “medical ethics” as a department of the *halakhah*, or traditional Jewish law.²

** To Stephen Passamaneck: a scholar, a colleague, and — for me, especially — a blazer of trails.

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¹ Elliot N. Dorff, *Matters of Life and Death. A Jewish Approach to Modern Medical Ethics* (Philadelphia: Jewish Publication Society, 1998), 5-13, and, more comprehensively, in the Appendix to the work, 395-415. See also his earlier statement in “A Methodology for Jewish Medical Ethics”, in B.S. Jackson and S.M. Passamaneck (eds.), *The Jerusalem 1990 Conference Volume* (Atlanta: Scholars Press, 1992; Jewish Law Association Studies VI), 35-57. The word “magisterial” in the text hardly begins to describe the importance of this monograph to the field, especially for liberal Jews who seek to join (or at least to confront) the claims of both Jewish law and contemporary moral theory in their medical-ethical discourse.

² The past generation has seen an explosive growth in works of this sort, books bearing titles like “Jewish Medical Ethics” that summarize and analyze the discussions of Orthodox halakhic authorities (*poskim*). I offer a few of the more important ones here: J. David Bleich, *Contemporary Halakhic Problems* (New York: Ktav, 1977-1995), 4 vols.; *idem*, with Fred Rosner, *Jewish Bioethics* (Hoboken, NJ: Ktav, 2000); *idem*, *Judaism and Healing* (New York: Ktav, 1981); Fred Rosner, *Biomedical Ethics and Jewish Law* (Hoboken, NJ: Ktav, 2001); *idem*, *Medicine and Jewish Law* (Northvale, NJ: Aronson, 1990); *idem*, *Modern Medicine and Jewish Ethics* (New York: Ktav, 1991); *idem*, *Practical Medical Halachah* (Northvale, NJ: Aronson, 1997); Daniel B. Sinclair, *Jewish Biomedical Law* (Oxford: Oxford University Press, 2003); Avraham Steinberg, *Hilkhot Rofim Urefu'ah* (Jerusalem: Mossad Harav Kook, 1978); *idem*, *Encyclopedia Hilkhatit-Refu'it* (Jerusalem, Makhon Schlesinger, 1988). Mention should be made of A.S. Avraham, *Nishmat Avraham* (Jerusalem: Makhon Schlesinger, 1984-1997), 5 vols., a compilation of the rulings of the *poskim* on the entire range of medical issues, arranged according to the order of the *Shulḥan Arukh*. The halakhic medical journal *Assia*, published by the Falk-Schlesinger Institute in Jerusalem, is an invaluable source of material by rabbis, physicians and ethicists, written from an Orthodox-halakhic perspective. Other articles appear in general-interest Orthodox journals such as *Tradition*, *Teḥumin*, and others.

In this view, contemporary moral sensitivities, to the extent that they are not validated by *halakhah*, play no useful role in the determination of Jewish responses to medical issues. At the other end stand some Reform Jewish thinkers who would eliminate halakhic discourse altogether and replace it with a medical ethics based entirely upon those contemporary moral sensitivities that the Orthodox reject as irrelevant. Dorff himself, a Conservative rabbi, stakes out the middle ground between these views: a genuinely Jewish bioethics must encompass both sources of knowledge. Its practitioners will of necessity proceed from the analysis of the classical halakhic sources and precedents, but they will read these texts (as halakhists have always done) from the vantage point of their own understanding of the right and the good, an understanding deeply influenced by present-day trends in ethical thought.

I cite Dorff's methodological introduction here, not as a target for critique — indeed, I'm quite sympathetic to his approach, and I'm a *Reform* rabbi!³ — but as an example of a growing preoccupation with “method” in Jewish bioethical conversation. This preoccupation reflects the more basic concern among practitioners to define the field as its own legitimate area of academic research: what, after all, *is* “Jewish bioethics”? If it is a *Jewish* form of inquiry, how does it differ from *halakhah*, the traditional mode of Judaic discourse on questions of praxis? If it is *ethics*, which as a department of philosophy seeks to justify its findings in accordance with universal criteria of reason, how can it be at the same time particularly *Jewish*?⁴ Jewish bioethicists, therefore, especially those who take a non-Orthodox perspective,⁵ search for a method that will characterize their discipline as its own unique subject and differentiate it from *halakhah*, enabling the practitioners in the field to claim that its processes and conclusions qualify as “identifiably Jewish.”⁶ A number of writers have made notable attempts to address this methodological problem.⁷ Their approach, for the most part, has been cross-

³ I try to explain my own stance in Mark Washofsky, “Halachah, Aggadah, and Reform Jewish Bioethics: A Response”, *CCAR Journal* 53:3 (Summer, 2006), 81-106.

⁴ Hence the enduring question: “can there be such a thing as a particularly Jewish ethics?” On this, see Noam Zohar, *Alternatives in Jewish Bioethics* (Albany: State University of New York Press, 1997), 1-4; Aharon Lichtenstein, “Does Jewish Tradition Recognize an Ethics Independent of Halakha?”, in M. Fox, ed., *Modern Jewish Ethics* (Columbus: Ohio State University Press, 1975), 62-88; and Eugene Borowitz, *Exploring Jewish Ethics* (Detroit: Wayne State University Press, 1990), 26-38.

⁵ “It is striking that none of the major works in contemporary Jewish bioethics by Jakobovitz, Bleich, Feldman, or Rosner [i.e., those that operate explicitly within a halakhic framework — MW] addresses ... methodological or hermeneutical issues ...”; Louis Newman, “Woodchoppers and Respirators: The Problem of Interpretation in Contemporary Jewish Ethics,” *Modern Judaism* 10:1 (1990), 17-42, at 41, n.62.

⁶ I take the term from Dorff, *supra* n.1, at 10.

⁷ See the monograph of Elliot N. Dorff, *supra* n.1; Noam Zohar *supra* n.4; and Benjamin Freedman, *Duty and Healing. Foundations of a Jewish Bioethic* (New York: Routledge, 1999). See as well the articles by Louis Newman (*supra* n.5), and Ronald Green, “Jewish Teaching on the Sanctity

disciplinary. They begin their inquiry with the *halakhah*, construed either narrowly (i.e., the *halakhah* is precisely what contemporary Orthodox *poskim* say it is) or broadly (i.e., the *halakhah* can support alternative solutions to those favored by contemporary Orthodox *poskim*), and bring their findings into some sort of conversation with other fields: anthropology, theology, legal and ethical theory, and the like. This multiplicity of approaches, however, means that no one, single, discrete set of procedures has emerged that would qualify as the unique “method” of “Jewish bioethics.” It is therefore, to say the least, unclear just what “Jewish bioethics” (as distinct from *halakhah*) *is* and how it would frame, analyze, and discuss issues that are generally categorized under the heading of medical ethics.

My uncertainties over this question, which are of long standing, deepened when, not long before this writing, I attended a conference of the Academic Coalition of Jewish Bioethics. The Coalition, a joint project of a number of liberal Jewish and general academic institutions, declares in its mission statement:⁸

The Academic Coalition for Jewish Bioethics seeks to engage the Jewish community in considering biomedical decisions. While recognizing that any coherent Jewish bioethics rests on the legacy of our inherited norms, values, and experience, the Coalition advocates the development of a variety of methodologies that bring clarity and authenticity to difficult life choices. The ACJB strives to broaden and deepen biomedical conversation in Jewish life and to create models of cooperation across the spectrum of Jewish practice.

Jewish bioethics, therefore, is defined as the attempt to advance beyond the “legacy” of tradition (read: *halakhah*) toward not one but a “variety of methodologies,” a plurality of approaches to the subject. Pluralism, of course, is not necessarily a bad thing. Yet this explicit openness to several or many different ways of doing the work suggests that it may be easier to define what “Jewish bioethics” is not (i.e., it’s not *halakhah*, or at least not exclusively that) than to define what exactly it *is*. The presentations at the conference did nothing to resolve this lack of clarity. They were, in the main, couched in terms and language that would have been at home at any general bioethics meeting. The only recognizably “Jewish” feature of the proceedings, aside from the presence of a number of rabbis, was that some of the participants occasionally were called upon to interject “what

and Quality of Life,” in E.D. Pellegrino and A.I. Faden (eds.), *Jewish and Catholic Bioethics: An Ecumenical Dialogue* (Washington: Georgetown University Press, 1999), 25-42.

⁸ Available at <http://society.bioethics.net/acjb/about.pxp>. By “liberal Jewish” I mean that the sponsoring organizations do not identify themselves as specifically “Orthodox.” This differentiates the Coalition from such self-consciously Orthodox organizations as the Falk-Schlesinger Institute for Medical-Halakhic Research of the Shaare Zedek Medical Center in Jerusalem (see http://www.szmc.org.il/index.asp?id=98&top=1&page_id=110).

the *halakhah* would say” about this or that ethical conundrum. There seemed to be no rhyme or reason, no plan or, well, *method* guiding these contributions. What, exactly, were these Jewish bioethicists supposed to *do* with the halakhic information that was being supplied? No participant’s reading of the *halakhah* was held to resolve any ethical conundrum in any conclusive way. How, then, and to what extent was the halakhic information supposed to influence the thinking of the participants and of the audience in attendance? At no time did the participants offer answers to these questions. Clearly, the devotion to a “plurality” of approaches would have frustrated any effort to arrive at such answers. And that, it seemed to me, was precisely the problem. If “Jewish bioethics” is in fact its own academic discipline, and if the existence of such a discipline is contingent upon its “methodological autonomy,” a unique way of processing knowledge that enables it to differentiate itself from other disciplines,⁹ then a multiplicity of approaches might well signal a lack of intellectual coherence, a weakness rather than a strength.

Coming away from the conference, however, I put these fears to rest. It is true that the practitioners of “Jewish bioethics” represented at the Coalition have not succeeded in constructing a unique method for their discipline, but I have stopped worrying about this apparent lacuna. Upon further review, as they say at American football games, I have decided that the concern over method in Jewish bioethics is exaggerated. On the contrary: I believe that if Jewish bioethics is a distinct and coherent discipline (more on this at the conclusion of this essay), it can maintain its disciplinary integrity even in the absence of a discrete method. I say that because even *halakhah*, the traditional Jewish discourse for reaching “bioethical” conclusions, lacks a method, if by that term we mean a formula that defines legitimate halakhic practice and that permits the determination of uniquely correct answers to questions of Jewish law.¹⁰ And if *halakhah*, which *is* a distinct and coherent discipline, can reach its decisions on medical questions without a single characteristic methodology, we have good reason to posit the same for the newer field we call Jewish bioethics.

Halakhic “Method”: An Eighteenth-Century Responsum

It is difficult, even in the most controlled of circumstances, to prove the absence of a thing. It is therefore especially difficult to prove that *halakhah*, a two thousand

⁹ The study of disciplines (“disciplinarity”) — how different communities of professionally trained knowers organize and delineate themselves from other such communities — has become a discrete field of academic research. The concept of methodology is crucial to this discourse; the term “methodological autonomy” is taken from R.H. Roberts and J.M.M. Good (eds.), *The Recovery of Rhetoric: Discourse and Disciplinarity in the Human Sciences* (Charlottesville: University Press of Virginia, 1993), x.

¹⁰ On this definition, see *infra* at notes 44ff.

year-old tradition of thought embodied in a massive literary corpus, lacks a “method.” I certainly do not pretend on this essay to offer sufficient proof for that proposition. What I can do is point to an example that calls into serious question the assumption that *halakhah* does in fact operate in accordance with a specific disciplinary method. I want to consider a prominent rabbinical ruling on a “bioethical” issue: the responsum (*teshuvah*) of Rabbi Yehezkel Landau of Prague, the *Noda Bi’hudah* (1713-1793), on autopsy.¹¹ I say “prominent,” because Landau’s responsum is recognized as foundational to the halakhic discussion of this issue; all subsequent halakhic rulings of autopsy take place within the framework that he establishes here.¹² His decision, in other words, sets the parameters of the Jewish legal discussion of autopsy and is crucial to the development of the *halakhah* on the subject. And yet, as I hope to show, that decision rests upon no sort of procedure that would justify the label “method.” This is not to say that Landau approaches the question (*she’elah*) in a “non-halakhic” way, nor is it to say that his conclusion is arbitrary, something akin to a legislative fiat that rests upon nothing more than the will of the law-maker. It is to say rather that his answer to the question “does *halakhah* permit autopsy?” does not depend upon a uniquely “halakhic methodology.”

The *she’elah* originates in London. A patient suffering from kidney stones has died during surgery intended to relieve that ailment. The physicians want to perform an autopsy, a process recently developed,¹³ “in order to examine the disease according to its root causes,” so that future operations might be performed in a less radical manner “and thereby reduce the danger inherent in the surgery.” The rabbis of London have been asked whether Jewish law permits such an autopsy on the grounds that it may lead to the saving of life (*hatsalat nefashot*) or forbids it on the grounds that the postmortem examination constitutes contemptible treatment of a corpse (*nivul hamet* or *bizayon hamet*). A correspondent has referred the question to Landau for his opinion.

Landau begins by summarizing the arguments already presented in the London debate. Those who would permit the autopsy build their case, first of all, upon Biblical precedent, the embalming (*hanitah*) of Jacob and Joseph.¹⁴ Although normally forbidden by Jewish tradition as an act of *nivul hamet*,¹⁵ the embalming was done as a sign of honor and respect for the dead (*kevod hamet*); thus, an autopsy aimed at discovering life-saving information is arguably an act of respect

¹¹ *Resp. Noda Bi’hudah* 2, *Yoreh De’ah* 210.

¹² See Rosner, *Modern Medicine and Jewish Ethics*, *supra* n.2, at 315.

¹³ Giovanni Batista Morgagni, known as “the father of pathology,” published his comprehensive text *The Seats and Causes of Diseases Investigated by Anatomy* in 1769.

¹⁴ *Gen.* 50: 2, 26.

¹⁵ For details and exceptions, see Y. Greenwald, *Kol Bo Al Avelut* (New York: Feldheim, 1956), 51.

for the corpse. A more recent precedent is the ruling of R. Shelomo ben Adret (Rashba, Catalonia, d. 1310),¹⁶ who permitted mourners to put quicklime on the corpse of one who was being transported, as per his instructions, for burial in a distant family grave. The quicklime was necessary to facilitate the transport, hastening the body's decomposition and thereby forestalling the otherwise inevitable stench and rotting. The problem is that the act of hastening the body's decomposition, akin to cremation, would seem to be an act of contempt. Rashba, however, allowed it on the grounds that it is a *mitsvah* to fulfill a person's wish to be buried alongside his ancestors. In the same way, it might be argued that the dissection of a corpse should be permitted in order to fulfill the *mitsvah* of saving life. On the other hand, those who rule against autopsy cite a talmudic passage in which Rabbi Akiva forbids the relatives of a deceased person to exhume his body and conduct a postmortem examination: "you are not entitled to submit him to such degrading treatment."¹⁷ Against this argument, those in favor of autopsy respond that Rabbi Akiva's case involved a monetary issue, the claim that the deceased had been a minor at the time of his death and that, therefore, his sale of family property should be invalidated. While Rabbi Akiva considered an exhumation and autopsy aimed at establishing the age of the deceased to be an unacceptable act of *nivul*, he would not necessarily rule the same way if the procedure were aimed at the discovery of life-saving medical information.

To these arguments, Landau's correspondent adds his own critique of the position of both sides. To begin with, neither the embalming of Jacob and Joseph nor the use of quicklime as permitted by the Rashba responsum is truly an act of "contempt" (*nivul*). In each case the intention was to render honor to the corpse, not to insult it; hence, none can be cited as a precedent for medical autopsy, which despite its lofty goals is still an act of *nivul*. Meanwhile, the ruling of Rabbi Akiva offers little support for the prohibition of autopsy, because the Talmud suggests that although the family of the deceased may not be entitled to demand a postmortem examination, such a demand would be accepted if made by those who had purchased property from him.¹⁸ The correspondent, for his part, adds an argument of his own to permit medical autopsy. The Talmud seems to countenance the

¹⁶ *Resp. Rashba* 1:369.

¹⁷ *B.B.* 155a.

¹⁸ *B.B.* 154b. The purchasers would want a postmortem in order to prove that the deceased was an adult at the time he sold the property to them. In other words, what makes the act one of *nivul* is not so much the act itself but that it is done by the deceased's family, who ought to be more concerned with honoring his corpse. Landau notes a similar distinction between the relatives of the deceased (who are not entitled to demand an exhumation and postmortem) and his creditors (who are permitted to do so) in Isserles, *Shulḥan Arukh Ḥoshen Mishpat* 107:2.

possibility of a postmortem examination¹⁹ to determine whether the victim of a murder was a *tereifah*, a person afflicted with a terminal illness.²⁰ In such an instance the killer is not technically a “murderer” and is spared from capital punishment.²¹ If, therefore, an autopsy might be permitted in a forensic context, to save the life of the murderer, it might also be permitted as a medical measure to save the lives of future patients. Landau, however, rejects this proof. If the Torah indeed requires a postmortem examination of the victim as a forensic medical necessity, then by definition the postmortem is not an act of *nivul* at all. Indeed, because a postmortem might reveal that the victim was *not* a *tereifah* and thereby enable us to bring his killer to justice, we might say that the examination, far from being an act of contemptible treatment of the deceased, is actually done as a means of honoring him. In short, this case is no precedent for our own, because the autopsy that the physicians seek to perform, however important its medical justification, is neither a legal necessity nor is it done for the explicit purpose of rendering honor to the deceased. It remains a *nivul*, an instance of prohibited contemptible treatment of the corpse, and we do not yet know that the prohibition can be lifted under these circumstances.

At this point, Landau remarks that he has been discussing the topic in the manner in which his correspondent and the rabbis of London have framed it, namely, “that you call (autopsy) a matter of life-saving import (*pikuaḥ nefesh*).” But if there is even a potential for saving human lives (*safek pikuaḥ nefesh*) through the performance of an autopsy, then he wonders “why you need all this abstruse argumentation (*pilpul*)? The law is clear and explicit (*arukh umeforash*) that in such a case the action is permitted, even if it should violate the prohibitions of labor on the Sabbath.”²² In other words, an autopsy can be permitted *a fortiori* even if it is a *nivul hamet*, for if *pikuaḥ nefesh* permits us to set aside the laws of the Sabbath, which are ordained by the Torah and which are enforceable by the death penalty, then surely it would override the Rabbinic strictures against contemptible treatment of the corpse. Yet here Landau insists upon a crucial proviso: this permit must be

¹⁹ *Hull.* 11b. I say “seems to countenance” because the suggestion is introduced by the phrase *vekhi teima*, “if you should say.” That is, the possibility of conducting an autopsy is raised in the course of debate and is ultimately rejected because, even if the procedure were permissible, it would be useless, since it could not establish with absolute certainty that the victim was or was not a *tereifah*. See Maimonides, *Yad, Rotseah* 2:8, who notes that the murder victim is presumed to be *shalem* — that is, not afflicted with a terminal illness — unless it is certain that he or she was a *tereifah*.

²⁰ The concept of *tereifah* is a complex one. That one is a *tereifah* if afflicted with a terminal disease (as indicated in the text) is the standard adopted by Dorff (*supra* n.1, at 154), among others. Other authorities, however, define *tereifah* as a fatal physical injury, akin to such injuries in animals that render them unfit for consumption. See the article on *tereifah* in *Encyclopaedia Talmudit* 21:4-7.

²¹ Rashi, *Hull.* 11b, s.v. *tereifah havah*; Maimonides, *Yad, Rotseah* 2:8.

²² Landau cites *M. Yoma* 8:6 and *Shabbat* 84b. He might well have cited *Shabbat* 85a-b, where the theory that “*pikuaḥ nefesh* overrides the Sabbath” is developed.

restricted to cases where the life to be saved “is in our presence” (*lifaneinu*), a person who faces mortal danger at this moment. The talmudic precedents that we have mentioned,²³ after all, deal precisely with such a case, namely that the persons who might benefit from information gleaned through the autopsy are “in our presence.” In the present context, by contrast, “there is no patient who needs this information right now; the physicians simply want to study (the corpse) in the event that some other patient might come along with the same condition. On the basis of such a mere conjecture (*hashashah kalah*; alternately, “an insubstantial concern or possibility”) we surely do not override any prohibition, whether Toraitic or Rabbinic.” For if we were to define this situation as one of *pikuaḥ nefesh*, “then all the labors associated with medicine — the preparation of drugs and of instruments — would be permitted on Shabbat, on the grounds that perhaps some patient who needs these things will turn up today or tonight.” It is unthinkable (*halilah*) that we would permit an autopsy under these circumstances. Even Gentile doctors will perform the procedure only on the bodies of executed criminals or upon those who agreed during their lifetimes to allow their bodies to be used for this purpose. If we, God forbid, should permit autopsies on the grounds of “medical necessity,” nothing would stop physicians from performing them on *all* corpses (*kol hametim*), asserting that to do so would increase our store of medical knowledge and thus save lives. “Therefore, this lengthy discussion is truly unnecessary, for there is no basis upon which to rule leniently.”

Thus Landau concludes. I want to focus primarily on the final portion of the responsum, summarized in the above paragraph. Up until this point, Landau has assumed the role of the outside observer, summarizing and critiquing the arguments of others. Now he presents his own contribution to the discussion, namely that autopsy is permitted only when the lives that might be saved by the knowledge gained are *lifaneinu*, known to exist at this moment. As we have seen, this determination has exerted a critical influence upon all subsequent halakhic conversation on the subject. It is useful, therefore, to inquire as to the legal basis upon which he supports it. I am interested, obviously, in the question of method: *how* does Landau establish that *this* decision, as opposed to the others that could plausibly have been reached, is the correct interpretation of the *halakhah*? The answer: it is a choice, a judgment call, a pragmatic effort to draw a balance between competing goods. Landau’s conclusion is intuitive, rather than rationally demonstrable. No “methodology” produces it; no formula determines its correctness. Nothing inherent in the texts, sources, and procedures of the *halakhah* requires *this* decision against any other. Although Landau presents his ruling as the “correct” one, he cannot demonstrate that correctness as the objective and inevitable outcome of a rule-governed process that would demand the assent of his reader. On

²³ *Hull.* 11b and *B.B.* 154b-155a.

the contrary: the decision is “correct” only to the extent that Landau justifies it by way of rhetoric, an act of persuasive discourse that is the very antithesis of “method.”

The essentially rhetorical of Landau’s “proof” becomes clear when we consider in some detail the two primary arguments with which he justifies his conclusion. He begins with the assertion that the talmudic precedents for autopsy all presume that the benefit to be derived from the procedure is clear and present (*lifaneinu*) rather than theoretical or academic. This resort to precedent would appear to be an application of standard halakhic “method,” given that the practice of deciding a present case on the basis of an earlier decision or series of decisions is both characteristic of and unique to the activity of law.²⁴ And though Jewish law does not recognize the doctrine of binding precedent in a technical, formal sense, halakhists commonly identify precedential cases and rulings that, in practice, will guide the resolution of the present case.²⁵ The means by which this identification is accomplished is analogical reasoning, the claim that the present case is similar in its relevant points to the fact pattern of the earlier case and that, consequently, the resolution of the present case should likewise follow that of the earlier one. The Talmud acknowledges that the drawing of analogies (*dimu’i milta lemilta*) is the essence of halakhic reasoning,²⁶ just as jurists make that claim for legal reasoning in general.²⁷ Landau, by citing precedent, is simply doing what all good halakhists do. Yet the reader will detect an obvious difficulty in Landau’s interpretation of those precedents. The relevant passages indeed deal with cases where the potential beneficiaries of the postmortem examination are “*lifaneinu*.” That is because both cases emerge from the milieu of civil and criminal law, where the issue concerns a specific set of litigants or a specific defendant. In each instance, the court’s task is to resolve questions of law and fact that by definition apply to the litigants or the defendant “in our presence” at this time and place. The proposed postmortem

²⁴ For an argument of this proposition see Anthony T. Kronman, “Precedent and Tradition,” *Yale Law Journal* 99 (1990), 1029-1068.

²⁵ See Menachem Elon, *Jewish Law: History, Sources, and Principles* (Philadelphia: Jewish Publication Society, 1994), 945-986; Zorah Warhaftig, “Hatakdin bamishpat ha’ivri,” *Shenaton Hamishpat Ha’ivri* 6-7 (1979-1980), 105ff.; and Mark Washofsky, “Taking Precedent Seriously: On Halakhah as a Rhetorical Practice,” in Walter Jacob and Moshe Zemer (eds.), *Re-examining Progressive Halakhah* (New York: Berghahn, 2002), 1-70.

²⁶ Cf. *B.B.* 130b: *veha kol hatorah kula damoyei medaminan lah.*

²⁷ See, for example, Steven J. Burton, *An Introduction to Law and Legal Reasoning* (Boston: Little, Brown, 1985), 25ff.; Edward H. Levi, *An Introduction to Legal Reasoning* (Chicago: University of Chicago Press, 1949), 1ff., and Cass R. Sunstein, *Legal Reasoning and Political Conflict* (New York: Oxford University Press, 1996), 62-100. I leave aside at this point the question whether there exists a discrete, identifiable form of thought that can be called “legal reasoning” at all. That question is part of the broader issue of “method” or the lack thereof in the social sciences and the humanities, to which I will make reference below.

examinations could not possibly reveal information that would be relevant to individuals who do not presently exist. None of this necessarily implies that medical autopsy must be similarly restricted. Medical autopsy partakes of the experience of science, of anatomical study, which by its nature is as concerned with theoretical measures (the gathering and amassing of data) as it is with practical ones (the application of that data to a specific case). The talmudic passages, in other words, do not obviously apply to the question before Rabbi Landau.²⁸ That they should be considered “precedents” to define the permissible limits of medical autopsy is dubious in the extreme. They are, in fact, “precedents” only because Landau says they are, because he reads the passages to mean that all autopsies, including those undertaken for medical reasons, must meet the *lifaneinu* standard. That reading, as we have seen, is entirely his choice; it is not demanded by the texts themselves.

In this, Landau is reflecting a phenomenon already observed in other legal traditions. The American jurist Karl Llewellyn noted decades ago that, although the conventional rules of legal discourse demand that the judge decide the present case in accordance with pre-existing authoritative statements of the law,²⁹ those statements do not *determine* the judge’s decision. The court is always free to decide that the rule set forth in an ordinance or a prior judicial decision does not apply to the facts of the case at bar.³⁰ Through extensive study of American appellate court opinions, Llewellyn compiled a long list of techniques, “canons of construction,” by which courts may interpret the language of statutes and precedents either broadly or narrowly.³¹ By selecting one such canon over its contrary number, the judge may

²⁸ There is in fact a talmudic passage, which Landau does not mention, that might serve as a precedent in favor of autopsy for the purpose of anatomical study: *Bekhorot* 45a, which describes how the students of R. Yishmael “boiled” the body of a prostitute to count the number of its organs. See Julius Preuss, *Biblisch-talmudische Medizin* (Berlin: Karger, 1911), 46. Preuss notes that the passage contradicts the accepted law in talmudic times, which would have regarded autopsy as *nivul hamet*. He suggests that this particular case may have involved the body of a non-Jewish prostitute (*einer heidnischen Prostituierten*), which would not fall under the prohibition against *nivul*. That may be, but the text itself is silent as to the corpse’s ethnic identity. For our purposes, at any rate, it is a text that poses a *prima facie* difficulty to Landau’s position here.

²⁹ These statements may take the form of legislative enactments, the primary source of legal authority in civil law jurisdictions, or of prior judicial decisions, which predominate in classical common law. For purposes of my argument, this distinction does not matter much. And in any event, the differences between civil and common lawyers over the extent to which judicial precedent is to be respected may be more a matter of theory than of practice. See John H. Merryman, *The Civil Law Tradition* (Stanford: Stanford University Press, 1969), 48: “(T)he fact is that courts do not act very differently toward reported decisions in civil law jurisdictions than do courts in the United States.”

³⁰ In the case of judicial precedent, this sort of thing is known as “distinguishing,” the determination that, in the Talmud’s language, *shanei hatam*, “that other case was different” and its rule therefore does not apply to this one. See Rupert Cross, *Precedent in English Law* (Oxford: Clarendon Press, 1977), 176ff.

³¹ See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little, Brown, 1960), 19–61. See also *The Case Law System in America* (Chicago: University of Chicago Press, 1989), 76–78. Paul Gewirtz offers an excellent introduction to the latter work (ix–xxiii). An early statement of

with equal legitimacy follow or ignore, restrict or expand, redirect or even “kill” a precedential holding. Llewellyn moreover stressed that the judge always enjoys “leeways” in the choice of the canons of construction that he shall bring to bear upon the precedents. No independent procedural rule controls or determines that selection, directing the judge to employ one canon of construction as opposed to another. This means quite simply that judicial decision is not simply a matter of deduction from premises (precedents) to conclusions; the “law,” understood as the existing body of legal rules and principles, does not dictate uniquely correct solutions to legal questions. The current judge does not merely read precedent; she rewrites it. In every citation of a prior rule, the judge chooses what its meaning shall be in the present context, and that choice is not determined by any “higher” systemic rule or principle of law. As one observer has noted, this portrayal of the process of judicial decision “has contributed to a crisis from which legal thought has not yet fully recovered.”³² The claim that judicial decision is largely indeterminate (that is, not required by the texts of existing law and the procedural rules of the legal system) is frequently perceived as an assault upon the ideology of “the rule of law.” To the extent that legal decision is more a matter of judicial discretion than of the impersonal workings of rule, principle, and precedent, it is correspondingly difficult to say just how law differs from politics.

Landau’s responsum provides evidence that Karl Llewellyn’s “leeways” operate in Jewish law as well as in other legal systems. The *posek*, as is customary, identifies “precedents” that would limit medical autopsy to cases where the person who might benefit from the findings is “in our presence.” Yet, as we have seen, he could easily have gone the other way. He could have argued just as persuasively that those passages bear little likeness to the present question and that consequently they tell us nothing at all about medical autopsy. Both “leeways” are equally legitimate as a matter of law. And no principle or procedural rule of *halakhah* requires that he pursue one of these paths rather than the other. His decision is therefore not determined by legal process or legal “method”; it is instead the result of his personal judicial³³ choice.

many of his findings is Llewellyn’s “Remarks on the Theory of Appellate Decision and the Rules or Canons about how Statutes are to be Construed,” *Vanderbilt Law Review* 3 (1950), 395-406.

³² Gewirtz, *supra* n.31, at xvii. He is referring to the tendencies toward skepticism in legal theory, which denies that the existing rules and procedures constrain a judge’s decisional discretion in any meaningful way. In the American context, these tendencies are often traced to the work of Oliver Wendell Holmes, Jr., and are most pronounced in the American academic legal “movements” known as Legal Realism and Critical Legal Studies. The literature is vast; for a good introduction, see Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995), 65-160 and 421ff. And see *infra* at notes 74ff.

³³ The word “judicial” should be understood, well, judiciously. Although the responsa literature has been called the “case law” of the Jewish legal system (see Elon, *supra* n.25, at 1466-1468), this analogy

The element of choice also dominates the second of Landau's arguments, namely the potential for abuse of the doctrine of *pikuaḥ nefesh*. Landau contends that to permit autopsy for general medical study (i.e., when there is no patient "in our presence" whose life might be saved by the information thus gathered) would lead to the intolerable result of post-mortem examination of "all corpses" and quite possibly the wholesale violation of Shabbat. This, of course, is a classic example of the "slippery slope," an argument built upon "the contrast between a tolerable solution to a problem now before us and an intolerable result with respect to some currently hypothetical but potentially real future state of affairs."³⁴ I call the slippery slope argument a "choice" because its conclusion is not inevitably determined from its premises. The argument — "if you allow A (the tolerable solution), then Z (the intolerable result) will inevitably happen" — is always vulnerable to refutation on empirical grounds.³⁵ There is no formal logical reason why A *must* lead to Z, why the slope cannot stop at B, or C, or even X, before it reaches the intolerable result. Rather, one can defeat the argument by demonstrating a relevant substantive difference between the "top" and the "bottom" of the slope.³⁶ The validity of a slippery slope argument is therefore not a matter of formal procedure; it does not depend upon the immanent processes of logical demonstration. Indeed, it cannot depend upon such processes, because it rests inevitably upon the substantive choice(s) of its creator. It is in the nature of the slippery slope that "in virtually every case ... the opposing party could with equal formal and linguistic logic also make a slippery slope claim."³⁷ In other words, Landau could have argued with equal validity that to *prohibit* autopsy in cases of no immediate medical need would lead inexorably to the intolerable prohibition of autopsy in cases of immediate *pikuaḥ nefesh* and that, therefore, we must permit autopsy even for purposes of

has its critics; see, for example, B. Lifshitz, "Ma'amdah hamishpati shel sifrut ha-shu"t," *Shenaton hamishpat ha'ivri* 9-10 (1982-1983), 265-300. It is important to remember that the author of a responsum is not a judge presiding over an actual case. His is a more advisory role, resembling that of the ancient Roman juriconsults, and his *teshuvah* bears a close likeness to the Romans' *responsa prudentium*. See Barry Nicholas, *An Introduction to Roman Law* (Oxford: Clarendon Press, 1962), 31-32.

³⁴ Frederick Schauer, "Slippery Slopes," *Harvard Law Review* 99 (1985) 361-383. The quotation is at 364-365. See also Douglas Walton, *Slippery Slope Arguments* (Oxford: Clarendon Press, 1992), 1: a slippery slope argument is one in which "a dangerous outcome of some contemplated course of action is warned of ... (and) (t)he dangerous outcome is put forward as a reason for not taking a first step in the contemplated course of action."

³⁵ Schauer, *supra* n.34, at 382, calls the argument "eliminable": that is, since its form is not purely logical, it is not technically valid on its face.

³⁶ G.D. Hartogh, "The Slippery Slope Argument," in H. Kuhse and P. Singer (eds.), *A Companion to Bioethics* (Oxford: Blackwell, 1998), 284.

³⁷ Schauer, *supra* n.34, at 381.

general medical study. That he argues one way and not the other — i.e., in the direction of prohibition rather than permission — is not required by the immanent logic of legal reasoning. The argument flows instead from a substantive choice, the author's determination that the empirical fact situation makes one of these equally logical possibilities more likely to occur than the other.

In saying that Landau's argument does not rest upon formal logic, I do not mean to imply that the argument per se is fallacious.³⁸ On the contrary: the slippery slope is recognized as an appropriate exercise in "informal logic" or practical reasoning,³⁹ which accounts for its prominence in both legal⁴⁰ and ethical⁴¹ discourse. The metaphor is attractive precisely because it is *reasonable*. It makes the eminently plausible claim that once you have taken the first step you have transgressed upon a vital line of principle, so that you *cannot* cite principled, non-arbitrary criteria for identifying intermediate stopping-points between the top and the bottom of the slope. Where, in other words, do you draw the line between A and Z? The irony, of course, is that this is precisely the point of much of what lawyers do; as Justice Holmes once remarked, "(W)here to draw the line ... is the question in pretty much everything worth arguing in the law."⁴² We could even say that Landau's own *lifaneinu* standard is just such an arbitrary line, because it forestalls the slippery slope argument that to permit autopsy for *any* reason, even when the patient is in our presence, would lead inexorably to unacceptable abuses. Be that as it may, his own slippery slope argument — namely, that to permit autopsy when the patient is *not* in our presence would lead inexorably to such abuses — is not required by formal logic. It is not the conclusion of a formula that distinguishes correct from incorrect interpretations of the *halakhah*. It is a *judgment*, a reasoned but not logically required (and therefore defeasible) choice between plausible alternatives based upon an evaluation of substantive fact.⁴³

I emphasize "reasoned": Landau's judgment is by no means an arbitrary act. The *teshuvah* reveals a *posek* confronting a fundamental tension between received standards of Jewish ritual practice and the realities of a new scientific age. On the

³⁸ To be sure, the *causal* form of the slippery slope quite possibly counts as a fallacy. There is, after all, no reason that A *must* lead to B and so on until we reach Z. See Wayne Grennan, *Argument Evaluation* (Lanham, MD: University Press of America, 1984), 344.

³⁹ See Walton, *supra* n.34, at 11-12, on the framework in which "slippery slope argumentation can be seen as a legitimate, proper, and common species of goal-directed, knowledge-based, action-concluding reasoning in its own right."

⁴⁰ Schauer, *supra* n.34, at 364: the slippery slope "pervades legal argument."

⁴¹ See Hartogh, *supra* n.36, on the ubiquity of slippery slope arguments in bioethics.

⁴² *Irwin v. Gavit*, 268 U.S. 161, 168 (1925). I am indebted to Schauer for this wonderful reference.

⁴³ See Schauer, *supra* n.34, at 381: "a persuasive slippery slope argument depends for its persuasiveness upon temporally and spatially contingent empirical facts rather than (or in addition to) simple logical inference." And: "(s)lippery slope claims deserve to be viewed skeptically, and the proponent of such a claim must be expected to provide the necessary empirical support."

one hand, he does not condemn the notion of medical autopsy as an unacceptable violation of Jewish tradition. Accepting the contention that autopsy can be a valuable aid in the gathering of knowledge to combat disease, he acknowledges that it is permitted under the traditional halakhic rubric of *pikuah nefesh*. On the other hand, he worries that a wide permit of autopsy would pose a danger to other vital Judaic values. To solve this difficulty requires a restriction upon the concept of *pikuah nefesh*, a limitation imposed upon its logical development so that it does not become a justification for such unhappy results. The *lifaneinu* standard, the line Landau draws between acceptable and unacceptable uses of autopsy, serves this purpose well, and it may strike the reader as a reasonable and persuasive resolution of the difficulties with which he wrestles in this *she'elah*. But that line, to repeat, is founded upon a judgment rather than the workings of any formal system or method.

Rhetoric v. Method

Again, one responsum can hardly supply the proof required to establish far-reaching conclusions about the nature of Jewish law. Still, this is a widely cited *teshuvah* by an eminent rabbinical authority on an important subject that has shaped all subsequent halakhic discussion of that subject. Thus, we can safely consider it as exemplary of rabbinical legal practice, so long as, to repeat, we do not forget that it is but one responsum. And when we consider this one responsum as an example of how rabbis decide halakhic questions, we find that its author does not derive his answer through the application of a formal method. Landau, indeed, does not truly “derive” his ruling; that word suggests a formal, logical process that produces a “valid” conclusion. It is more accurate to say that he supports or justifies his ruling by means of argumentative devices — citation of precedent and the slippery slope — that, whatever their persuasive power, do not require or demand the answer he has reached. One may agree with his conclusion; one may even find it compelling. But one cannot declare it to be “the correct answer” to the halakhic issue of the permissibility of autopsy, for neither of the devices that Landau employs proves in any formal sense that *this* answer is right and that all other plausible answers are wrong.

My definition of “method”⁴⁴ in this paper follows the positivistic understanding of that term as “an independent, systematic set of arguments or criteria which claims to arrive at a true or accurate account of the subject matter under consideration.”⁴⁵ Method's goal is to arrive at objective knowledge, in a manner

⁴⁴“(A) formula that defines legitimate halakhic practice and that permits practitioners of *halakhah* to determine the correct answer to a question of Jewish law”; see *supra* at n.10.

⁴⁵Edward L. Rubin, “The Practice and Discourse of Legal Scholarship,” *Michigan Law Review* 86 (1988), 1838 n.21.

akin to that employed in the natural sciences. Such was the aspiration of most of the social sciences and even the humanities until quite recently.⁴⁶ It was an aspiration embedded in “the fundamental proposition of the Enlightenment, namely that methodologically disciplined use of reason can safeguard us from all error.”⁴⁷ If natural scientists believed that their scientific method could reveal actual physical reality and the laws of nature,

... social scientists — particularly economists and political scientists — believed that they were describing with similar, if more modest accuracy, the behavior of human beings and the operation of human society. Historians viewed themselves as developing an account of what had really happened in the past, and literary critics felt that they were discovering the real, and generally intended, meanings that lay embedded in literary texts.⁴⁸

Participants in the social sciences and humanities were aware, of course, that their fields of study differed from mathematics and the hard sciences and that, therefore, the goal of sure and certain knowledge might forever elude them. Yet their disciplines, working from the same methodological assumptions as the physical sciences, aimed at the discovery of objective (*wertfrei*) knowledge and the establishment of certainty. Stanley Fish describes these tendencies as examples of “foundationalism,” the intellectual project that seeks “to ground inquiry and communication in something more firm and stable than mere belief or unexamined practice.” That project succeeds to the extent that “it will have provided us with a ‘method,’ a recipe with premeasured ingredients which when ordered and combined according to absolutely explicit instructions ... will *produce*, all by itself, the correct result,” including “the valid interpretation” of literary texts.⁴⁹ In the field of jurisprudence, the search for the proper legal “method” has been a central

⁴⁶ As Hans-Georg Gadamer reminds us, the very history of the word *Geisteswissenschaften* testifies to the aspiration of the “human sciences” to operate in accordance with a methodology modeled after the natural sciences. See H.G. Gadamer, *Truth and Method* (New York: Continuum, 1993, 2nd Revd. ed.), 3. A number of observers trace this tendency to the dawn of philosophical modernity, to Descartes’ identification of true knowledge with the logically-demonstrable and the self-evident. That which is plausible or probable, in his view, is not “rational,” a designation he reserves for conclusions derived via scientific method. On this, see Chaim Perelman and L. Olbrechts-Tyteca, *The New Rhetoric* (Notre Dame: University of Notre Dame Press, 1969), 1-10, and Richard J. Bernstein, *Beyond Objectivity and Relativism: Science, Hermeneutics, and Praxis* (Philadelphia: University of Pennsylvania Press, 1983).

⁴⁷ Gadamer, *supra* n.46, at 277. Numerous observers use “the Enlightenment project” or some related phrase to refer to the efforts of thinkers beginning in the eighteenth century to ground all inquiry in rational and methodological procedures. See, for example, the discussion by Alisdair MacIntyre, *After Virtue* (Notre Dame: Notre Dame University Press, 1981), 35ff., on the “Enlightenment project” in the field of ethical philosophy.

⁴⁸ Rubin, *supra* n.45, at 1839.

⁴⁹ Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (Durham, NC: Duke University Press, 1989), 342-343.

concern of many modern theorists: from Blackstone's notion of law as a "rational science";⁵⁰ to Bentham's utilitarianism;⁵¹ through the "legal science" of Christopher Columbus Langdell;⁵² the "faith in reason" that motivated the American Legal Process scholars of the mid-twentieth century;⁵³ the legal positivism of John Austin⁵⁴ and H.L.A. Hart;⁵⁵ the rise of post-war natural law theory;⁵⁶ and the "one right answer" thesis championed by Ronald Dworkin.⁵⁷ These thinkers, though differing widely in their intellectual approaches and assumptions, are united in the conviction that there exists a method of legal scholarship that can produce objectively correct answers to questions of law.⁵⁸

The drive for method has been countered in recent decades by a movement sometimes designated as the "critique of methodology."⁵⁹ This phrase, too, is an umbrella term that covers a variety of approaches, but all of them display, to one extent or another, a pervasive skepticism about the existence of objective criteria

⁵⁰ Blackstone, *II Commentaries* 2. On this point generally see Gerald Postema, *Bentham and the Common Law Tradition* (Oxford: Oxford University Press, 1986), 33ff.

⁵¹ Postema, *supra* n.50, throughout, but especially at 424: "Bentham believed that the method he spelled out ... could yield a body of law of unprecedented clarity and comprehensiveness ... As this ideal is approached, the need for interpretation is increasingly diminished, to the point where it withers away."

⁵² C.C. Langdell, *A Selection of Cases on the Law of Contracts* (Boston: Little, Brown, 1871), viii: "Law, considered as a science, consists of certain principles or doctrines ... If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number." On Langdell generally, Duxbury, *supra* n.32, at 11-25, and Thomas C. Grey, "Langdell's Orthodoxy," *University of Pittsburgh Law Review* 45 (1983), 1-53.

⁵³ See Duxbury, *supra* n.32, at 205-299. The "classic" expressions of this approach include H.M. Hart and A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Cambridge, MA, tentative edition, 1958) and Herbert Wechsler, "Toward Neutral Principles of Constitutional Law," *Harvard Law Review* 73 (1959), 1-35.

⁵⁴ J. Austin, *The Province of Jurisprudence Determined*, with an introduction by H.L.A. Hart (Indianapolis: Hackett, 1998).

⁵⁵ H.L.A. Hart, *The Concept of Law*, with a postscript edited by Penelope A. Bulloch and Joseph Raz (Oxford: Clarendon Press, 1994).

⁵⁶ The concept of "natural law," of course, has been around for a long time. I refer here to the efforts of a number of legal theorists to ground the concept on a secular, rational foundation. I describe these efforts as "post-war" because they picked up steam in response to what many perceived as the tendency of legal positivism to empty law of its moral content and, accordingly, to give aid and comfort to totalitarianism. See, in general, Duxbury, *supra* n.32, at 224-227. For representative examples, see Lon Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969), and John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Press, 1980).

⁵⁷ For the most developed presentation of his views see Ronald Dworkin, *Law's Empire* (Cambridge, MA: Belknap Press, 1986).

⁵⁸ On the manner in which "objectivity" functions in law, see the collected essays in Brian Leiter (ed.), *Objectivity in Law and Morals* (Cambridge: Cambridge University Press, 2001).

⁵⁹ I draw the term directly from Rubin, *supra* n.45, at 1840. See also Edward L. Rubin, "On Beyond Truth: A Theory for Evaluating Legal Scholarship," *California Law Review* 80 (1992), 905ff.

for knowledge that are not based in human experience. All knowledge, that is to say, is situated within the social and historical circumstances of particular communities and ongoing traditions; indeed, our very perception of reality is conditioned upon the “prejudices”⁶⁰ we develop through our participation in culture. It follows that the act of inquiry cannot entirely escape its grounding in cultural particularity; there can be no “method” based in some value-free rationality that serves as the index to objective knowledge. We encounter this approach in the work of the American pragmatists of the late-nineteenth and early-twentieth centuries,⁶¹ European hermeneutical⁶² and critical theorists,⁶³ contemporary neo-pragmatic philosophers,⁶⁴ rhetoricians,⁶⁵ literary theorists,⁶⁶ and social scientists.⁶⁷ The critique appears even in the writings of some physical scientists, whose

⁶⁰ I use the term in the sense that Gadamer (*supra* n.46, at 270ff.) uses it, namely as the “condition of understanding” a prior judgment that is necessary for a subsequent act of judgment.

⁶¹ The classic survey is Morton White, *The Revolt Against Formalism* (Boston: Beacon Press, 1957).

⁶² See especially Gadamer, *supra* n.46. On Gadamer’s “critique of method” see Josef Bleicher, *Contemporary Hermeneutics* (London: Routledge and Kegan Paul, 1980), 122-127. An extraordinarily good summary is Bernstein, *supra* n.46, at 34-45. His words at 36 deserve extensive citation. “The idea of a basic dichotomy between the subjective and the objective; the conception of knowledge as being a correct representation of what is objective; the conviction that human reason can completely free itself of bias, prejudice, and tradition; the ideal of a universal method by which we can first secure firm foundations of knowledge and then build the edifice of a universal science ... all of these concepts are subjected (by Gadamer) to sustained criticism.”

⁶³ See Beatrice Hanssen, “Critical Theory and Poststructuralism: Habermas and Foucault,” in F. Rush (ed.), *The Cambridge Companion to Critical Theory* (Cambridge: Cambridge University Press, 2004), 280-309.

⁶⁴ See, for example, Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton: Princeton University Press, 1979), Hilary Putnam, *Reason, Truth, and History* (Cambridge: Cambridge University Press, 1981), and Morris Dickstein (ed.), *The Revival of Pragmatism* (Durham, NC: Duke University Press, 1998).

⁶⁵ Perelman and Olbrechts-Tyteca, *supra* n.46, at 1-10, especially at 2, attacking the Cartesian presumption that “(w)hat conforms to scientific method is rational.” See also Stephen Toulmin, *The Uses of Argument* (Cambridge: Cambridge University Press, 1958); *Return to Reason* (Cambridge, MA: Harvard University Press, 2001) and *Cosmopolis: The Hidden Agenda of Modernity* (New York: Free Press, 1990). Finally, I would place the later Wittgenstein, he of *Philosophical Investigations* (translated by G.E.M. Anscombe [Oxford: Blackwell, 1953]), in this category. Although the correct reading of Wittgenstein is a notoriously controversial issue, he can be and has been claimed by rhetoricians as one who “renounced this craving of certainty in favor of a practical and rhetorical emphasis on human languages as games among speakers, listeners, and actors. The metaphor of the game encourages attention to the back and forth, the give and take, of real argument”; see J.S. Nelson, A. Megill, and D.N. McCloskey, *The Rhetoric of the Human Sciences* (Madison: University of Wisconsin Press, 1987), 8-9.

⁶⁶ For a long list of these see Stanley Fish, *supra* n.49, at 345. Fish’s term “antifoundationalism” corresponds roughly to what I am calling here the “critique of methodology.”

⁶⁷ See, e.g., Clifford Geertz, *The Interpretation of Cultures* (New York: Basic Books, 1973), 193-233 (understanding replaces objective “truth” as the goal of social scientific inquiry).

disciplines are classical examples of methodological inquiry.⁶⁸ These thinkers in general share the assumption that truth and correctness, the objects of inquiry, are the products of *socially-constructed* criteria, matters “intelligible and debatable only within the precincts of the contexts or situations or paradigms or communities that give them their local and changeable shape.”⁶⁹ Put differently, the disciplines through which we organize our search for truth and correctness are themselves symbolically mediated and socially constructed, determined not by the application of scientific method but by consensus arrived at among practitioners. *Consensus*, as opposed to “truth” or “validity,” is a standard that is more rhetorical than logical, more sophistic than Socratic; thus, “the practice of inquiry might more usefully be understood in rhetorical terms.”⁷⁰ It is common now for scholars in many fields to speak of a “rhetoric of inquiry” that directly opposes itself to “method.” This rhetoric rests upon two assertions: first, that “every scientist or scholar, regardless of field, relies on common devices of rhetoric” such as metaphor, invocation of authority, and appeal to audience; and second, that “every field is defined by its own special devices and patterns of rhetoric,” such as existence theorems, arguments from invisible hands, and appeals to textual probabilities or archives. Working on the basis of this understanding of inquiry, by treating each other’s claims as arguments rather than findings “scholars no longer need implausible doctrines of objectivism to defend their contributions to knowledge.”⁷¹ Following Richard Rorty, we might call this approach “normal discourse,” or “that which is conducted within an agreed-upon set of conventions about what counts as a relevant contribution, what counts as answering a question, what counts as having a good argument for that answer or a good criticism of it.”⁷²

The move away from method in the social sciences and the humanities is far from universal. Many share the fear that, unless knowledge is grounded in firm and sure foundations and produced by procedures that share that pedigree, the very possibility of rational inquiry has evaporated. Those associated with the critique of

⁶⁸ The notable examples here are Thomas S. Kuhn, *The Structure of Scientific Revolutions* (Chicago: University of Chicago Press, 1970), and Paul Feyerabend, *Against Method* (London: Verso, 1988, revd. ed.). On the functioning of persuasive speech in the physical sciences, see Jeanne Fahnestock, *Rhetorical Figures in Science* (Oxford: Oxford University Press, 1999).

⁶⁹ Fish, *supra* n.49, at 344.

⁷⁰ H. W. Simons (ed.), *The Rhetorical Turn* (Chicago: University of Chicago Press, 1990), 1-2. The contemporary “revival of rhetoric” has carried with it a positive reconsideration of the Sophists after centuries of Platonic condemnation. For examples, see Anthony Kronman, “Rhetoric,” *University of Cincinnati Law Review* 67 (1999), 677-709, and James Boyd White, *Heracles’ Bow: Essays on the Rhetoric and Poetics of Law* (Madison: University of Wisconsin Press, 1985), 251-237.

⁷¹ “Introduction: The Rhetoric of Inquiry,” in Nelson, Megill, and McCloskey, *supra* n.65, at 3-5. As the editors conclude: “the masks of methodology are wearing thin.”

⁷² Rorty, *supra* n.64, at 320. The citation continues: “Abnormal discourse is what happens when someone joins in the discourse who is ignorant of these conventions or who sets them aside.”

methodology, for their part, discount this concern; the alternative to method, in their view, is not irrationality and chaos but the kind of certainty that, based upon the consensus of scholars, is the hallmark of a social practice. Practitioners, even when they have rejected method, do not necessarily believe that anything goes, that no rules and procedures govern their activity. Rather, the object of inquiry “is always and already tethered by the local and community norms and standards that constitute it and enable its rational acts ... (T)he one thing it cannot be is free to originate its own set of isolated beliefs without systematic constraints.”⁷³ The processes of inquiry, like all other forms of human thought, are embedded within the practices that constitute any particular community of practitioners. There is stability in these processes, even rationality. But they are not to be identified as a “method” for arriving at objective knowledge grounded in a set of fundamental and indubitable premises independent of those practices.

The critique of methodology has enjoyed a wide influence in legal theory. Nineteenth-century pragmatist philosophy shaped the thinking of such jurisprudential luminaries as Holmes,⁷⁴ Cardozo,⁷⁵ Pound,⁷⁶ and the “Legal Realists.”⁷⁷ Against the prevalent formalism of their time, these thinkers were united in advocating that law be understood according to its “real” causes and that these do *not* include the immanent logic of legal concepts, which do little to determine judicial decision. One of the most prominent legal realists was Karl Llewellyn, who as we have seen⁷⁸ demonstrated how the law’s formal structure does not constrain a judge’s choice as to the interpretation of statutes and

⁷³ Fish, *supra* n.49, at 346.

⁷⁴ See Thomas C. Grey, “Holmes and Legal Pragmatism,” *Stanford Law Review* 41 (1989), 787-870. The themes display themselves in a number of Holmes’ famous writings and aphorisms. See especially his address “The Path of the Law,” *Harvard Law Review* 10 (1897), 457-478, where he develops his theory that “law” is better understood as the “prophecies of what the courts will do in fact” rather than through all its “deductions and axioms.” Also memorable is his declaration that “general principles do not decide concrete cases. The decision will depend on a judgment or intuition more subtle than any articulate major premise”; *Lochner v. New York*, 198 U.S. 45, at 76 (Holmes, J., dissenting).

⁷⁵ Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale University Press, 1921), 98ff.: when the force of logic is insufficient to produce a decision, the judge must make new law on the basis of such factors as his conception of social welfare (“the method of sociology”) or even his instincts, prejudices and emotions.

⁷⁶ Roscoe Pound, “Mechanical Jurisprudence,” *Columbia Law Review* 8 (1908), 605-623; legal thinking is a means to an end, rather than a logical deduction from abstract concepts. The law must be judged not by its coherence with first principles but by its results, by its applicability to the human condition.

⁷⁷ A “school” of American jurisprudence (Duxbury, *supra* n.32, at 65ff., prefers to describe it as a “mood”) that flourished during the early twentieth century and that exerted enormous influence upon subsequent trends in legal thought.

⁷⁸ *Supra* n.31.

precedents. This is not to say that constraints do not exist; far from it. Law is, if anything, a conservative discipline whose practitioners are noted for their devotion to established form and in which change, when it occurs, tends to be slow and evolutionary. Yet, as Llewellyn argued, the stability of law is *not* to be found in its rules and procedures — i.e., in a method that produces uniquely correct answers to legal questions — but in law’s embodiment as a social practice, a tradition of craft and technique that defines a particular group of practitioners who have been socialized into a common professional discourse.⁷⁹ The Realist heritage has in turn greatly influenced the movement known as Critical Legal Studies, a grouping of primarily left-leaning scholars who emphasize the law’s dependence upon the dominant “liberal” tradition in American ideology and jurisprudence,⁸⁰ and the legal pragmatists, a more eclectic collection of theorists whose work reflects the neo-pragmatist currents in contemporary philosophical thought.⁸¹

From among this group of pragmatists, Richard Posner provides a most cogent statement of the understanding of law that I have been describing.⁸² Although he does not deny the existence of formal elements in legal thinking, and although he acknowledges the proper role of logic in legal decision making, he rejects what he calls the “essence” of legal formalism: the conception of law “as a system of relations among ideas rather than as a social practice.” To Posner, “legal reasoning” — i.e., the “method” of thinking that some claim distinguishes law as a unique form of inquiry — is neither unique to law nor even distinctly “legal” in nature. It is better understood as a species of *practical reason*, “a grab bag of informal methods of reasoning that ... often succeed but sometimes fail; in any event they owe less than one might think to legal training and experience.” “Scientific method plays little role in legal reasoning,” because law contains none of the “penetrating and rigorous theories, counterintuitive theories that are

⁷⁹ Llewellyn, *The Common Law Tradition*, *supra* n.31, at 19-61: “Major Steadying Factors in Our Appellate Courts.”

⁸⁰ The major contribution of Critical Legal Studies in this area was to expose “the purportedly apolitical or neutral Enlightenment standards of reason, morality, generality, and justice as themselves intensely and inevitably political”: Robin West, *Narrative, Authority, and Law* (Ann Arbor: University of Michigan Press, 1993), 265. As is the case with many legal “schools,” Critical Legal Studies is the focus of a voluminous polemical literature, and neutral accounts are virtually impossible to find. Duxbury, *supra* n.32, at 421-509, offers a comprehensive if not entirely sympathetic summary. For a good “inside” view, and especially for emphasis upon the “indeterminacy thesis” (i.e., that “correct” answers to legal questions *cannot* be derived through legal method), see the essays collected in David Kairys (ed.), *The Politics of Law: A Progressive Critique* (New York: Basic Books, 1998, 3rd ed.).

⁸¹ See the essays in Michael Brint and William Weaver (eds.), *Pragmatism in Law and Society* (Boulder, CO: Westview Press, 1991), an anthology that encompasses authors from the political left (Richard Rorty) to the political right (Richard Posner) with various stops in between.

⁸² On what follows in this paragraph, see Richard Posner, *The Problems of Jurisprudence* (Cambridge, MA: Harvard University Press, 1990), 454-469 (his “Pragmatist Manifesto”), as well as 62, 69, 203, and 97-98.

falsifiable but not falsified ... a clear separation of positive and normative inquiry ... and above all ... objectively testable — and continually tested hypotheses” that are the hallmark of scientific procedure. The evident stability of legal decision results not from the operation of some formal method but from a set of pragmatic choices made by legal officials who are able to arrive at “objective” interpretation of the law because they make up a homogeneous interpretive community. These officials wield the power to draw analogies, to declare a prior decision a precedent, to interpret that precedent broadly or narrowly, and to ascribe little or much weight to it. Their choices, it must be emphasized, are precisely that: choices not determined by logic, by reasoning or by method. They are at bottom pragmatic decisions, exercises in drawing the proper balance between two social goods: legal stability (which occurs when we follow a line of past decisions) on the one hand and legal change and growth (which is enabled by recognizing exceptions to the established understandings) on the other. Legal reasoning may be useful in offering arguments in favor of that balance, but the techniques of analogy and appeal to precedent do not *produce* the balance or demand one particular plausible conclusion over another.

The Critical Legal scholar Allan C. Hutchinson sounds a similar note:⁸³ legal reasoning is “a general and non-specific style” of thinking. It is distinctive “to the extent that it works upon a particular set of materials (cases and statutes), is framed in a professional jargon (e.g., *stare decisis* and *obiter dicta*), and is engaged in by a restricted community of professionals (lawyers and judges). However, that is as far as it goes. Legal reasoning is not the elusive grounding that jurists have sought for the legal enterprise.” His colleague Duncan Kennedy adds:⁸⁴

Teachers teach nonsense when they persuade students that legal reasoning is distinct, *as a method for reaching correct results*, from ethical and political discourse in general. It is true that there is a distinctive lawyers’ body of knowledge of the rules in force. It is true that there are distinctive lawyers’ argumentative techniques for spotting gaps, conflicts, and ambiguities in the rules, for arguing broad and narrow holdings of cases, and for generating pro and con policy arguments. But these are *only* argumentative techniques. There is no “correct legal solution” that is other than the correct ethical and political solution to that legal problem. (Italics in original)

These critiques, emanating from both the “right” and the “left” of the academic legal spectrum, suggest that legal “method” is essentially no more and no less than

⁸³ Allan C. Hutchinson, *It’s All In The Game: A Nonfoundationalist Account of Law and Adjudication* (Durham, NC: Duke University Press, 2000), 151.

⁸⁴ Duncan Kennedy, “Legal Education as Training for Hierarchy,” in David Kairys (ed.), *The Politics of Law: A Progressive Critique* (New York, Pantheon Books, 1990, revd. ed.), 38-58. The quotation is at 45.

what lawyers *do*, the sum total of the intellectual tactics, procedures, and moves that construct and govern the social practice called “law.” Unlike scientific method, law does not produce answers to questions and solutions to problems through the formal operation of its own immanent processes. Answers and solutions lie in the realm of choice; legal “method” is simply the language in which lawyers render those choices and communicate them to each other and to the general community.⁸⁵ It is, to use a term we have already seen, a *rhetoric* of inquiry as opposed to a true method. Like any such rhetoric, the language of legal inquiry encompasses both special and general elements and devices.⁸⁶ The “special” devices are those terminologies, usages, and appeals to particular bodies of text that are unique to legal discourse. The “general” devices, by contrast, are the means of reasoning by which lawyers argue for and support their conclusions. They are “general” because they are not specifically “legal”; they are the same means by which all other human beings utilize reason in order to work through the alternatives they face. At its best, this rhetoric functions to constitute law as a culture of argument, a community united by a “self-reflective, self-corrective body of discourse that will bind its audience together by engaging them in a common language and a common set of practices.”⁸⁷ To put this differently, the rationality of legal discourse does not testify to the existence of a specifically legal “method” but simply to the fact that lawyers communicate in a language specific to their discipline, their particular and identifiable culture of argument.

These considerations should help to explain why it is useful to think of *halakhah*, too, as a rhetorical rather than a methodological enterprise. Like lawyers, halakhists speak a specific, text-based language, comprising appeals to authority (that is, precedents), a recognized hierarchy among the available literary sources, and a body of acceptable “moves,” techniques employed in the interpretation of those sources. This language is a social practice, a medium of communication and persuasion, the rhetoric through which halakhists construct the unique literary world of Jewish law. It is not, however, a method for identifying correct answers to Jewish legal questions in any scientific or pseudoscientific sense. This is true because, as we find in R. Yehezkel Landau’s ruling on autopsy, the means by which halakhists argue for one possible answer as opposed to another are not logically

⁸⁵ See, again, Posner, *supra* n.82, at 99: “(W)hat law school teaches on the methodological side is a language rather than a method of reasoning: a culture, a vocabulary, a set of representative texts and problems. Courses in foreign languages do not claim to teach methods of reasoning.”

⁸⁶ See *supra* at n.71

⁸⁷ James Boyd White, *When Words Lose Their Meaning* (Chicago: University of Chicago Press, 1984), 251. White is perhaps the most prominent spokesperson for the position that law is a rhetorical culture and practice. See, for example, at 266: law “is a way of creating a rhetorical community over time. It is this discourse, working in the social context of its own creation, this language in the fullest sense of the term, that *is* the law. It makes us members of a common world.”

conclusive or compelling. His argument from precedent, which requires an analogical identification of the relevant case prior to its deductive application to the present case, could have gone (as that argument always can go) either way. The decision as to which cases are precedential and as to whether those rulings should be construed broadly or narrowly is itself not determined by methodological rule; it is a matter of judicial choice. That choice, as Landau's invocation of the slippery slope demonstrates, can well be the result of the *posek's* attempt to strike an acceptable balance between competing goods, between the advancing world of scientific medicine with all its benefits on the one hand and the accepted, traditional understandings of the concept of *pikuaḥ nefesh* on the other. And as we have seen, that balance is based in the halakhist's pragmatic judgment of the requirements of the situation; no method can determine in advance just what that balance should be.

None of this means that there are no limits and boundaries in the *halakhah*, that the rabbinical decision is a matter of individual taste and caprice or a flip of the intellectual coin. As is the case with law, there is much stability and determinacy in halakhic decision making. My suggestion, rather, is that these result from *halakhah's* nature as a social practice, the activity of practitioners who utilize a common rhetoric to persuade their colleagues that they have "gotten it right." The techniques of argumentation that define their rhetoric can go either way, supporting one or the other plausible solution to a given problem. Stability and determinacy are therefore rooted not so much in that rhetoric as in the fact that this group of scholars shares a set of theological and ideological commitments, as well as a devotion to what Karl Llewellyn called the "craft-tradition" that defines the social practice of appellate judging.⁸⁸ By "craft," Llewellyn meant, again, a practical wisdom born not of logical acuity but of experience, "a significant body of working know-how, centered on the doing of some perceptible kind of job," a "situation-sense" transcending the law's formal rules and principles that allows the practitioner to grasp the appropriate response in a given set of circumstances. Halakhic *poskim* are not usually professionals in the manner of elected or appointed judges; nonetheless, they do form a community of scholarship and practice that can be said to operate in accordance within its own craft-tradition and situation sense. It is this communal identity, rather than the operation of a formulaic halakhic "method," that accounts for the stability in halakhic decision,⁸⁹ to say

⁸⁸ Llewellyn, *The Common Law Tradition*, *supra* n.31, at 213-235, "Appellate Judging As a Craft of Law." The citation is at 214.

⁸⁹ To be sure, there are other factors that can account for this stability. Llewellyn, in his list of "major steadying factors" in appellate jurisdiction (*supra*, n.31), includes such things as "legal doctrine" and "known doctrinal techniques," and the cursory reader may conclude from this that the law itself, as a doctrinal system, produces its own right answers. The careful reader, however, will note that Llewellyn does not regard these intellectual or literary elements as self-interpreting, automatic

nothing of the differing approaches to halakhic decision among different communities of rabbis.⁹⁰

A “Method” for Jewish Bioethics?

For these reasons, I think that the field called Jewish bioethics can function quite well in the absence of a method or methodology that defines its “correct” practice. When even *halakhah* reaches its conclusions through the informal techniques of practical reasoning, we should not worry that when the practitioners of Jewish bioethics do exactly the same thing they are risking their disciplinary integrity. The contemporary “critique of methodology” in the social sciences and the humanities permits us to imagine and conceptualize these forms of inquiry in decidedly non-methodological terms. Jewish bioethics, precisely like those other disciplines, requires no “method” in order to stand upon its own disciplinary feet.

The above, though, presumes that Jewish bioethics *has* “disciplinary feet” upon which to stand. Does it? When I think back to that conference of the Academic Coalition for Jewish Bioethics, I find the evidence decidedly mixed. On the one hand, as I have noted, the conference participants did share a common discourse. Yet that discourse, “a language that would have been at home at any general bioethics meeting,” can hardly be defined as an academic vernacular. It was a comfortable common-denominator mode of communication for the physicians, the philosophers, the rabbis, the historians, and the social scientists who participated in the event, but it lacked the depth and the specificity that characterize the professional languages of all those disciplines. The difficulty, ultimately, is not that Jewish bioethics lacks a “method” but that it has no *rhetoric* of its own. That is to say, to the extent that a discipline is rhetorically constructed and defined and that “every field is defined by its own special devices and patterns of rhetoric,”⁹¹ then “Jewish bioethics” does not yet qualify as a recognizably distinct form of inquiry. Its practitioners have yet to develop modes of professional speech that mark it off

limitations upon judicial discretion. The real constraints, he emphasizes time and again, are those based in the socialization of the judges, in their membership in a profession and craft tradition. I suggest here that much the same is the case with *poskim*.

⁹⁰ A number of researchers have studied the unique approaches that various communities have taken toward halakhic decision making. As examples, see Zvi Zohar, *He'iru peney mizrah* (Tel Aviv: Hakibutz Hame'uhad, 2001) on the rabbinates of the “Oriental” communities (i.e., the Jewries of North Africa, the Middle East, and the land of Israel) in recent generations; Jacob Katz, *Halakhah vekabalah* (Jerusalem: Magnes, 1984), 353-386, on R. Moshe Sofer and the creation of “Hungarian Orthodoxy” in the nineteenth century; and David Ellenson, *Rabbi Esriel Hildesheimer and the Creation of a Modern Jewish Orthodoxy* (Tuscaloosa: University of Alabama Press, 1990), on nineteenth century German Orthodoxy.

⁹¹ *Supra* n.71.

from other discourses. They have yet to show just how their own conversation concerning medical-ethical problems and principles differs from *halakhah* on the one side and from secular Western bioethics conversation on the other. We do not yet know just what counts as proof, as persuasive argument in their discourse. We do not yet know the sorts of narrative and metaphor that serve as tools for the construction of meaning within disciplinary conversation. We do not yet know whether Jewish bioethicists, like halakhists, will successfully develop a common vernacular with which to communicate and to make meaning *as* “Jewish bioethicists” rather than as participants in other defined and distinct modes of inquiry.

We do not yet know, in other words, whether “Jewish bioethics” will come to resemble a social and rhetorical practice like *halakhah*. At the moment, it amounts to a convenient interdisciplinary meeting-place for practitioners who represent a number of intellectual communities. There is, of course, nothing objectionable about this, and there is much to be gained from interdisciplinary approaches to knowledge. Yet should those who work in the field aspire to something more specialized — that is, should they wish to become a recognized and recognizable discipline of their own — they shall have to create a particular rhetoric in which to speak to each other and from there to the wider world. On the other hand, they will not have to set out a precise method for arriving at sure and correct answers. Like the practitioners of *halakhah*, they will find that their discipline can grow, prosper, and get along very well without one of those.