

# THE DEATH WITH DIGNITY BALLOT INITIATIVE: NARRATIVE TENSIONS AND JEWISH LEGALITIES

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INTRODUCTION: STORIES IN CIVIL PROCEDURE AND STORIES  
IN OUR LIVES AND WORK AS PULPIT RABBIS

In 2012, we confronted on both personal and communal levels the relationship between law and stories. On November 6, 2012, Massachusetts voted on the “Death with Dignity” ballot initiative (Question #2).<sup>1</sup> According to the text of the proposition, the measure would have allowed for a terminally ill patient to be given lethal drugs. Although the initiative was defeated, the topic generated significant debate both within political and religious spheres. More particularly, there was a division within the Jewish community as to how to resolve the complex ethical and legal issues in relation to the ballot initiative.

Orthodox Jewish interpretations of Jewish law suggested an opposition to the initiative. We, and our colleagues at Temple Israel, however, arrived at a different conclusion. As we have learned about civil procedure through this process, the first document in the equity petition is a story. In this paper, we will explore an early story (BT *Ketubot* 104a) and its pertinence to end-of-life decisionmaking; how this story has been read through the Jewish interpretive approaches known as Halakhic Formalism and Covenantal Ethics; and will comment on parallels that we perceive between Halakhic Formalism, Covenantal Ethics, and Rule and Discretion. Through researching and writing this paper, we discovered a convergence of processes in civil procedure and the place of the narrative in Jewish decisionmaking. Just as narratives play an important

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<sup>1</sup> See *Massachusetts “Death with Dignity” Initiative, Question 2 (2012)*, [BALLOTPEDIA, http://ballotpedia.org/Massachusetts\\_%22Death\\_with\\_Dignity%22\\_Initiative,\\_Question\\_2\\_](http://ballotpedia.org/Massachusetts_%22Death_with_Dignity%22_Initiative,_Question_2_) (last visited Oct. 27, 2015); *2012 information for Voters: Question 2: Law Proposed by Initiative Petition*, MASS. SECRETARY ST., [http://www.sec.state.ma.us/ele/ele12/ballot\\_questions\\_12/quest\\_2.htm](http://www.sec.state.ma.us/ele/ele12/ballot_questions_12/quest_2.htm) (last visited Oct. 27, 2015).

role in civil procedure, so, too, stories play a considerable role in Jewish decisionmaking.

### I. COVENANTAL ETHICS AND HALAKHIC FORMALISM

Rabbi David Ellenson, a leading Reform Jewish thinker, suggests that issues surrounding medical ethics and the Jewish legal tradition need to be understood in light of two principles: (1) Halakhic Formalism and (2) Covenantal Ethics.<sup>2</sup>

Halakhic Formalism, as defined by Ellenson, is the classical, traditional, text-based method for deriving resolution for all ethical issues: "This classical mode of doing Jewish ethics seeks to identify precedents from the rich literature of rabbinic Judaism in order to extrapolate principles and norms that would yield authentic Jewish prescriptions on specific issues."<sup>3</sup> Proponents of Halakhic Formalism are united by an approach to reading and interpreting relevant sources. This method of resolving complex ethical questions, however, transcends Jewish denominational categories: Orthodox, Conservative, Reform, and Reconstructionist. Although Halakhic authorities might read the same texts and employ the same methods, their conclusions and decisions may at times be subtly and strongly at odds. Halakhic Formalism frequently leads to lively debate within the Jewish community. Crucially, in Halakhic Formalism, "[i]ndividual autonomy is not prized."<sup>4</sup>

Thus, every Jew is not empowered to decide for himself a course of action based upon his own reading of a text or legal tradition. Although there is great concern for the individual, the suffering of the person, and compassion for each human life at the center of a moral dilemma, in this methodology, the ultimate arbiter is a skilled, learned Jewish moral authority.

The Covenantal Ethics approach was first articulated by Rabbi Irving Greenberg, a prominent Orthodox leader in the United States.<sup>5</sup> Ellenson provides a clear and helpful definition of this methodology:

This approach is marked by the dialectical, personal model of relationship between God and humanity found in the Bible. It affirms the belief that "human-kind is created so as to be God's partner in completing creation." This means that God's covenant with Israel does not restrict human freedom, but presupposes it.<sup>6</sup>

Like Halakhic Formalism this methodology transcends all Jewish denominational categories. Fundamentally, it asserts that neither God nor the individu-

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<sup>2</sup> See David H. Ellenson, *How to Draw Guidance from a Heritage: Jewish Approaches to Mortal Choices*, in CONTEMPORARY JEWISH ETHICS AND MORALITY 129 (Elliot N. Dorff & Louis E. Newman eds., 1995).

<sup>3</sup> *Id.* at 130.

<sup>4</sup> See *id.* at 135.

<sup>5</sup> See Irving Greenberg, *Toward a Covenantal Ethic of Medicine*, in JEWISH VALUES IN BIOETHICS 124 (Levi Maier ed., 1986).

<sup>6</sup> See Ellenson, *supra* note 2, at 136.

al possesses a greater authority than the other regarding a moral decision. This assertion of individual autonomy is an irreconcilable difference and a radical departure from Halakhic Formalism. As Ellenson explains:

Rabbi Greenberg argues that the dialectical interplay between “power and partnership” that is the mark of the relationship between God and humanity in the Bible provides the proper model for Jewish medical ethics as well. This means, in part, that people are empowered to become more and more like God. They are charged by God with responsibility for their lives and given permission to seek mastery and control over their environment. If someone asks, “What are the limits?” Rabbi Greenberg contends the covenantal response “is that the limit is non-existent.”<sup>7</sup>

Finally, Greenberg “desires to assert an ethic of power, an ethic of human beings charged with responsibility and control for their own decisions.”<sup>8</sup> This means that great emphasis is now placed upon the individual and deep regard is assigned for individual autonomy. Such autonomy suggests “not only that people frame actions and rules for their own lives in concert with the tradition, it also involves an affirmation of the person’s right to act upon that determination.”<sup>9</sup> In sum, the Covenantal Ethical model places partnership at the center point, which gives each human being the responsibility to exert personal autonomy in decisionmaking that controls his/her personal destiny.

## II. COMPARISONS BETWEEN HALAKHIC FORMALISM, COVENANTAL ETHIC AND COMMON LAW AND EQUITY

It is interesting to consider Halakhic Formalism and Covenantal Ethics and parallels to the relationship between common law and equity; or, in contemporary terms, rule and discretion. Admittedly, our understanding of common law and equity/rule and discretion is limited. However, based on what we have read of Subrin’s work, we find some basis for comparison. As Subrin has argued for twenty-five years, law and equity “need each other.”<sup>10</sup> This is also true for Halakhic Formalism and Covenantal Ethics.

### A. *Predictability and Flexibility*

Writing of the evolution of common law and equity in England, Subrin states: “Common law was the more confining, rigid, and predictable system; equity was more flexible, discretionary, and individualized. . . . The equity approach distinctly differed from the writ-dominated system.”<sup>11</sup>

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<sup>7</sup> *Id.* at 137.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> Interview with Stephen N. Subrin (on file with author).

<sup>11</sup> See Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 920 (1987).

In Halakhic Formalism, the judge, or the rabbi, infers the legal standard applicable to a particular situation from a body of accepted authoritative texts: The Hebrew Bible and Babylonian Talmud have a statutory status in the Jewish legal system.<sup>12</sup> As with common law, in Halakhic Formalism one plumbs the depths of Jewish law and “discovers there the resources to resolve a perplexing moral issue.”<sup>13</sup>

### B. *The Development of Equity and Covenantal Ethics*

We also take note of Subrin’s statement, “Equity grew interstitially, to fill in the gaps of substantive common law.”<sup>14</sup> Covenantal Ethics has emerged as a methodology to respond to contemporary issues that cannot be fully resolved through reading rabbinic texts that could not have anticipated, in the case of Physician-Assisted Death, advancements in medical technology and patient care. Just as Equity grew interstitially, so too Covenantal Ethics developed to fill the gaps when the application of Talmudic law was insufficient to respond to contemporary issues.

### C. *Who Is the Judge?*

Subrin also writes, “[t]he equity approach distinctly differed from the writ-dominated system. Judges were given more power by being released from confinement to a single writ, a single form of action.”<sup>15</sup> Covenantal Ethics emphasizes each individual’s autonomy. When making legal decisions concerning the course of their lives, each individual is “the judge.” However, in Halakhic Formalism, the judge is, first, a rabbinic legal authority. Second, Halakhic Formalism, is, like common law, similarly “writ-dominated.” The judge in Halakhic Formalism is much more bound by written precedent than the “judge” of Covenantal Ethics.

We recognize that in modern American jurisprudence what had begun with two courts and two judges in England (common law and equity) has been merged into one court with one judge. That single judge makes decisions based on rule and discretion. But this is analogous to the role of the judge in both Halakhic Formalism and Covenantal Ethics: whether the judge is a rabbinic authority or an individual Jew, both make legal decisions by balancing rule and discretion in order to reach an ethical decision.

## III. THE STORY: BABYLONIAN TALMUD KETUBOT 104A

Having outlined Halakhic Formalism, Covenantal Ethics, and general parallels between Equity and Common Law, we are now ready to turn to the perti-

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<sup>12</sup> See Ellenson, *supra* note 2.

<sup>13</sup> *Id.* at 131.

<sup>14</sup> See Subrin, *supra* note 11.

<sup>15</sup> *Id.*

nent narrative found in BT *Ketubot* 104a. In the textual tradition of Judaism we do not encounter the concept of Physician-Assisted Death. Rather, in a limited number of sources, rabbinic discussion addresses the dilemma of how to preserve human dignity in the face of impending death while balancing the belief that human life is given by God and in turn, God determines when an individual is to die.<sup>16</sup>

The principal texts that comprise the basis of Jewish law regarding these issues are: BT *Avodah Zarah* 18a; BT *Ketubot* 104a; *Semaḥot* 1:1–4; *Yalqut Shimoni* to the Book of Proverbs 943 (a medieval—twelfth to thirteenth centuries—collection of midrashic commentary on the entire Hebrew Bible); *Shulhan Arukh*; *Yoreh Deah*, 339; *Mapah*, Rabbi Moses Isserles. These issues are not addressed in the Bible. As we will investigate, much of the rabbinic exploration of these complicated moral concerns is pursued through narratives rather than through legal exegesis.

#### A. *Our Rendition of BT Ketubot 104a*

On the day when Rabbi died, the rabbis decreed a public fast and offered prayers for heavenly mercy. Rabbi's handmaid ascended the roof and prayed: "The immortals desire Rabbi [to join them] and the mortals desire Rabbi [to remain with them]; may it be the will [of God] that the mortals may overpower the immortals." When, however, she saw how often he resorted to the privy, painfully taking off his tefillin and putting them on again, she prayed: "May it be the will [of the Almighty] that the immortals may overpower the mortals." As the Rabbis incessantly continued their prayers for [heavenly] mercy she took up a jar and threw it down from the roof to the ground. [For a moment] they ceased praying and the soul of Rabbi departed.

#### B. *Analysis of the Story*

BT *Ketubot* 104a and BT *Avodah Zarah* 18a are the earliest discussions of the issues at hand found within rabbinic literature. Importantly, the "Rabbi" in this text refers to Judah ha-Nasi (2nd–3rd CE) the principal editor of the Mishnah, the earliest of codification of rabbinic Judaism (220 CE).<sup>17</sup> Thus, the main character in this short episode is a pivotal leader in early Judaism.

Of equivalent importance, at least to our minds, the central protagonist in this story is an unnamed woman (Rabbi's Handmaid) who is acknowledged in

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<sup>16</sup> For instance, 1 *Samuel* 2:6: The LORD deals death and gives life, Casts down into Sheol and raises up. Or, *Job* 1:21: He said, "Naked came I out of my mother's womb, and naked shall I return there; the LORD has given, and the LORD has taken away; blessed be the name of the LORD." And, *Psalms* 36:10: "With You is the Source of life; by Your light do we see light."

<sup>17</sup> See *Judah ha-Nasi: Jewish Scholar*, ENCYCLOPAEDIA BRITANNICA, <http://www.britannica.com/biography/Judah-ha-Nasi> (last visited Oct. 27, 2015).

rabbinic tradition as a person of sagacity.<sup>18</sup> Furthermore, as P.J. Hurwitz writes, “[t]his Talmudic story is told without any criticism, and we may draw the conclusion that the Maid’s action was silently approved or at least tolerated.”<sup>19</sup>

Against the backdrop of a rabbinically declared public fast and the offering of prayers, the story unfolds in three acts. First, it begins with the Handmaid ascending to the rooftop where she offers a prayer. In act two, from the vantage point of the roof, the Handmaid observes Judah ha-Nasi frequently and painfully using the outhouse. In response to what she witnesses, she changes her prayer. In the third act, it is as if a camera zooms out to show the rabbis engaged in their ceaseless prayer to extend Rabbi’s life, while Rabbi’s Handmaid is poised with a jar in her hand standing on the rooftop. She then hurls the jar to the ground, interrupting the rabbis’ prayers. At that moment, Judah ha-Nasi dies.

As with many well-written short stories, the brevity of the narrative masks a series of interwoven narrative elements that, when revealed, lead readers/interpreters into considerations of multiple layers of meaning.

### C. *Element 1: Spatial Relations*

Although the writers do not emphasize the physical location of the characters in the story, spatial relationships do convey meaning. Therefore, the placement of these characters—Handmaid on the roof, rabbis down below—contains implicit meaning. Roofs of buildings are, in other rabbinic stories, locations of prayer during times of adversity.<sup>20</sup> In this story we take note of two exceptions to this leitmotif: the first is that our story concerns a woman praying on a roof, and second, that the Handmaid not only prays in that location but also drops a vessel from the roof. We will further investigate this action by a female protagonist below.<sup>21</sup>

We also emphasize the Handmaid’s perspective both literally and figuratively. She is capable of seeing more, and therefore knows more than the (male) rabbis are capable of seeing or knowing since they are clustered together praying at ground level. Because of her vantage point, she has insight as to Rabbi’s suffering. Her observations affect the content of her prayer and subsequently her actions. We also note that the character in our story who sees the most and knows the most is a woman.

One thing she knows is an earlier detail about Rabbi Judah ha-Nasi’s illness. We read in BT *Ketubot* 103b (and continuing onto BT *Ketubot* 104a) that Rabbi was “living in *Beit Shearim*. When he fell ill, he was moved to Sepphoris

<sup>18</sup> See BT *Mo’ed Qatan* 17a; PT *Shvi’it* 9:a p.38; BT *Megillah* 18a; BT *Shabbat* 152a; BT *Ketubot* 104a.

<sup>19</sup> See P.J. Hurwitz, *Sources from Talmud and Mishnah on Dilemma’s End-of-Life Care*, 61 CCAR J.: REFORM JEWISH Q. 142 (2014).

<sup>20</sup> See OFRA MEIR, *RABBI JUDAH THE PATRIARCH: PALESTINIAN AND BABYLONIAN PORTRAIT OF A LEADER* 331 n.69 (1999).

<sup>21</sup> See *infra* Part IV.

because it was situated on higher ground and the air was temperate.”<sup>22</sup> In the geography of Israel, *Beit Shearim* is located in the Valley of *Jezre’el* (which in English means, “God sows”). Today it is a large fertile plain in central Israel. As the narrative describes, Sepphoris (938 feet above sea level)<sup>23</sup> is at a higher altitude than *Beit Shearim* (450 feet above sea level).<sup>24</sup> Here too, the location of the events conveys meaning. In Hebrew, Sepphoris is called *Tzipori*, which may be translated as “a bird, perched on a hill.”<sup>25</sup> The Handmaid’s vantage point is, as it were, “on high”: in a town already perched on a hill, she watches from an even higher altitude, on the roof of a house. All of these elements contribute to the sense that the Handmaid stands alone, towering over the drama unfolding below like a keen-eyed bird.

The Handmaid also knows the reasons for moving Judah ha-Nasi from a valley to the hill country, reasons that we, as readers, now know too: the air in *Tzipori* was considered salubrious. In search of a remedy to Judah ha-Nasi’s illness, he “takes the air” a common approach to curing illness that continued well into the nineteenth century.

#### D. Element #2: Public and Private Realms

Our story begins with a description of public activity: the decree of communal fasting and prayer. The narrative then quickly turns to the events within one household, thereby juxtaposing public and private activity. Typically, rabbinic narrative is laconic. Narratives contain only the most important details pertinent to a writer’s message: every detail matters. Therefore, the fact that we are given little information about the unfolding public activity but a plethora of detail about what occurs in the private realm indicates that the private activity is at the epicenter of this story in terms of meaning and structure.

From her vantage point, the Handmaid witnesses “how often [Rabbi] resorted to the privy, painfully taking off his tefillin, and putting them on again.” Based on the detail of going to the privy (which was located outside of the house thereby enabling the Handmaid to witness, from above, Rabbi’s travail), rabbinic commentators diagnosed Judah’s illness as an acute and painful diarrhea.<sup>26</sup>

It is the next detail—regarding Rabbi’s tefillin—that enters into the consideration of the reader, what we label, in contemporary terms, quality of life is-

<sup>22</sup> See MARCUS JASTROW, *DICTIONARY OF THE TARGUMIM, THE TALMUD BABLI AND YERUSHALMI, AND THE MIDRASHIC LITERATURE* 178 (1926).

<sup>23</sup> See *Sepphoris*, PROJECT GUTENBERG SELF-PUBLISHING PRESS, <http://self.gutenberg.org/articles/sepphoris> (last visited Oct. 27, 2015).

<sup>24</sup> See Israel Sites—Beit Shearim, MAKÖM, <http://makomisrael.org/blog/israel-sites-beit-shearim/> (last visited Oct. 27, 2015).

<sup>25</sup> See BT *Megillah* 6a; BT *Ketubot* 104a.

<sup>26</sup> Rashi BT *Ketubot* 104a explicitly states, “He (Rabbi) suffered from diarrhea (*choli b’me’ai-im*).” In BT *Baba Metzia* 85a, Rabbi’s bowel disease is descriptive rather than explicit.

sues. In present day Judaism, traditionally observant, male Jews don tefillin as a component of their morning prayer. There is evidence, however, that in the rabbinic period (third to seventh century CE), some men wore tefillin throughout the day.<sup>27</sup> The wearing of tefillin for Judah ha-Nasi symbolizes the routine of daily living. What the Handmaid witnesses is how Rabbi's illness disrupts his routines, and the phrase "painfully taking off his tefillin, and putting them on again" reflects the further deterioration of his quality of life.

#### E. Element #3: Prayer and Action

We also take note of the function of prayer and its relationship to the end-of-life issues explored in BT *Ketubot* 104a. In our story, prayer is a mechanism for maintaining the life of Rabbi. Prayer too, is used, by the Handmaid, first to pray for his recovery, but then, in a second prayer, to ask for his death.<sup>28</sup> Additionally, we track the relationship between the Handmaid's prayers and the subsequent action of hurling the vessel from the roof. First, she prays that Rabbi will live. Time passes, and seeing that his suffering is not alleviated, the Handmaid tries a different tactic: she offers a prayer seeking Rabbi's death.<sup>29</sup> When this second prayer does not prove efficacious—perhaps concluding that the prayers of Rabbi's disciples are countermanding her own—the Handmaid utilizes a different remedy for alleviating Rabbi's suffering: she hurls the vessel from the roof thereby interrupting the others' prayers and assisting in Rabbi's death. As we explore below, the prayers and actions of the Handmaid provoke debate among subsequent Jewish legal authorities as they read this ancient narrative and apply its meanings to contemporary decisions regarding end-of-life issues.

### IV. THE HANDMAID: ACTIVE OR PASSIVE ASSISTANCE?

Jewish interpreters have arrived at various legal conclusions from readings of this story, based upon their orientations as Halakhic Formalists or Covenantal Ethicists. The Halakhic Formalist tradition forbids humans from taking particular actions that hasten the death of a patient. This position has been well-summarized by Orthodox scholar J.D. Bleich, professor of Talmud at Yeshiva University. Bleich writes (in reference to the Karen Ann Quinlan case), "[t]he quality of life which is thus preserved is never a factor to be taken into consideration . . . . [N]ever is [man] called upon to determine if life is worth living—this is a question over which God remains the sole arbiter."<sup>30</sup>

<sup>27</sup> See DINA STEIN, TEXTUAL MIRRORS: REFLEXIVITY, MIDRASH AND THE RABBINIC SELF 175 n.49 (2012).

<sup>28</sup> See Leonard Kravitz, *Euthanasia*, in DEATH AND EUTHANASIA IN JEWISH LAW: ESSAYS AND RESPONSA 11, 15 (Walter Jacob & Moshe Zemer eds., 1995).

<sup>29</sup> See *id.* at 17.

<sup>30</sup> See J. David Bleich, *The Quinlan Case: A Jewish Perspective*, in JEWISH BIOETHICS 285, 293 (Fred Rosner & J. David Bleich eds., 1979).

For Bleich and certain other Halakhic Formalists, the belief that God is the master of life and death is a bedrock principle in their decisionmaking. Another principle that is operative in this discussion is *piqu'ah nefesh*: meaning that the saving of a human life overrides all other legal considerations.<sup>31</sup> Based on these tenets, *halakhah* states:

One may not hasten death, even that of a patient who is suffering greatly and for whom there is no hope of a cure, even if the patient ask that this be done. To shorten the life of a person, even a life of agony and suffering, is forbidden . . . . [I]t is equivalent to murder and is punishable accordingly.<sup>32</sup>

What, then, to make of the prayers and action of the Handmaid? Analogically, prayer is the life support system for Judah ha-Nasi. When the Handmaid hurls the vessel and interrupts the prayers of the rabbis, the mechanism for prolonging his life is disconnected and, effectively, the handmaid hastens Rabbi's death. As we noted above, the Talmud does not censure the Handmaid for her actions, even though it would seem that she contravened *halakhah*. How then, do Halakhic Formalists resolve this seeming contradiction? As we stated above, resolutions to this dilemma often cross Jewish denominational lines.

#### A. Orthodox

The Orthodox reading of this story is that the Handmaid's actions are not directly correlated to Rabbi Judah ha-Nasi's death. Bleich writes in regard to the Handmaid's prayer, "[a]lthough man must persist in his effort to prolong life, he may, nevertheless, express human needs and concerns through the medium of prayer."<sup>33</sup> In regard to her throwing of the vessel, Orthodox legal authorities find sanction for her action through the following statement of the sixteenth Century legal scholar Rabbi Moses Isserles (1520–72):

It is forbidden to do anything to hasten the death of one who is in a dying condition. . . . If, however, there is something that causes a delay in the exit of the soul, as, for example, if near to this house there is a sound of pounding as one who is chopping wood, or there is salt on his tongue, and these delay the soul's leaving the body, it is permitted to remove these because there is no direct act involved here, only the removal of an obstacle.<sup>34</sup>

According to this halakhic ruling, the Handmaid's action is like the removal of an obstacle, like salt or any other impediment. In our story, the prayer of Rabbi's disciples is the obstacle to his death; the Handmaid's throwing of the vessel removes this obstacle and allows Rabbi to die.

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<sup>31</sup> See *BT Yoma* 85b.

<sup>32</sup> ABRAHAM S. ABRAHAM, *THE COMPREHENSIVE GUIDE TO MEDICAL HALACHAH* 177 (1990).

<sup>33</sup> J. David Bleich, *Karen Ann Quinlan: A Torah Perspective*, in *CONTEMPORARY JEWISH ETHICS* 296, 302 (M. M. Kellner ed., 1978).

<sup>34</sup> ELLIOT N. DORFF, *MATTERS OF LIFE AND DEATH: A JEWISH APPROACH TO MODERN MEDICAL ETHICS* 199 (1998).

### B. Conservative

Conservative Jewish legal reading is equally fierce in its opposition to euthanasia but utilizes Isserles' ruling to make a further distinction between patient care and Physician-Assisted Death. "[I]n certain circumstances and under certain considerations[,] it may be permitted to withhold and withdraw a life-sustaining treatment"<sup>35</sup> in order to alleviate the pain of the patient.

Conservative Judaism occupies a middle ground between the Orthodox and Reform movements. "Torah and Talmud are regarded as both divine in origin, but significantly shaped" by historical development and human transmission<sup>36</sup>. However, the Conservative movement stipulates that its Committee on Jewish Law and Standards ("CJLS") of the Rabbinical Assembly decides upon halakhic questions. Thus, the arbiter of Jewish law is neither an individual halakhic authority as the Orthodox dictate, nor is it, as Reform Judaism holds, an informed individual. Rather, it is a committee of recognized halakhic scholars within the Conservative movement that renders a legal judgment.

### C. Reform

We have already indicated that the use of Halakhic Formalism, as an interpretive method, transcends denominations. As with the Conservative movement, Reform Judaism also has its own Responsa Committee that employs Halakhic Formalism to interpret Talmudic texts in order to render moral guidance for contemporary issues. However, the Committee's rulings, in accordance with Reform ideology, are not binding.<sup>37</sup> BT *Ketubot* 104a is interpreted in the Central Conference of American Rabbis' responsum entitled *On the Treatment of the Terminally Ill*.<sup>38</sup> The responsum asserts that there is a moral difference between taking action to hasten a person's death and withdrawing treatment so as to allow death to occur. The writers of the responsum conclude that the death of Rabbi Judah was not a result of action, but rather, of inaction.<sup>39</sup> It was not, in their opinion, the Handmaid's prayer for his death that caused him to die, but rather, the cessation of prayer by the surrounding rabbis that hastened Rabbi Judah's death.<sup>40</sup> The cessation, as previously discussed, was caused by the shattering of the vessel dropped from the roof. BT *Ketubot* 104a does not, then, provide guidance for euthanasia, but instead, the writers of the responsum conclude, the narrative gives license for the withholding and withdrawing of life-

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<sup>35</sup> Goedele Baeke et al., 'There Is a Time to Be Born and a Time to Die' (*Ecclesiastes* 3:2a): *Jewish Perspectives on Euthanasia*, 50 J. RELIGION & HEALTH 778, 786 (2011).

<sup>36</sup> See *id.* at 782.

<sup>37</sup> See *Reform Responsa*, CENT. CONF. AM. RABBIS, <https://ccarnet.org/rabbis-speak/reform-responsa/> (last visited Oct. 27, 2015).

<sup>38</sup> See TESHUVOT FOR THE NINETIES: REFORM JUDAISM'S ANSWERS FOR TODAY'S DILEMMAS 337-63 (W. Gunther Plaut & Mark Washofsky eds., 1997).

<sup>39</sup> See *id.*

<sup>40</sup> *Id.*

sustaining treatment: in the story, the Rabbis' prayers represent life support; the shattering of the vessel is analogous to the withdrawal of such a system. As the Responsa Committee wrote, "[t]he Maidservant did not kill rabbi but rather removed an inappropriate impediment to his death."<sup>41</sup>

D. *Leonard Kravitz: An Alternative Reform Position*

Leonard Kravitz of Hebrew Union College Jewish Institute of Religion, the Reform Jewish Seminary, offers a different and nuanced reading of our story from those of his Orthodox, Conservative, and even Reform colleagues. In his article, *Euthanasia*, Kravitz employs both interpretive methods: Halakhic Formalism and Covenantal Ethics. Whereas most Halakhic Formalists interpret the Handmaid's actions as the removal of an obstacle to death—a passive action that didn't hasten Judah's death—Kravitz asserts that the Handmaid's engagement with Rabbi's predicament is active: "[S]he interfered with Rabbi's life support system. She acted; he died. . . . [H]er act precipitated his death."<sup>42</sup>

Importantly, for Kravitz and for other medical ethicists, there is no ethical difference between active and passive forms of Euthanasia. For instance, the bioethicist James Rachel argues that: "[T]here is really no moral difference between the two, considered in themselves (there may be important moral differences in some cases in their *consequences*, but . . . these difference may make active euthanasia, and not passive euthanasia, the morally preferable option)."<sup>43</sup> As a result of his reading of the story emphasizing the handmaid's "active" actions, Kravitz concludes that "the notion that Judaism has always and everywhere been opposed to euthanasia simply cannot be maintained."<sup>44</sup> Kravitz bolsters his position on euthanasia by reinterpreting Isserles (*gloss*, 339) as an illustration of active euthanasia.<sup>45</sup> As Kravitz states: "[O]ne cannot truly call the 'removal of the impediment' a *passive* action . . . one must reach into the patient's mouth to remove the salt. There is certainly an 'act involved!'"<sup>46</sup> Kravitz's argument is that the Handmaid directly participates in the death of Rabbi Judah. Hers is an action done and not an action refrained from being done.<sup>47</sup>

Thus far we have reviewed how Kravitz re-reads, as Ellenson states, "the rich literature of rabbinic Judaism in order to extrapolate principles and norms that would yield [us] authentic Jewish prescriptions on specific issues."<sup>48</sup> Although Kravitz's conclusions are unorthodox, in both senses of the word, his

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<sup>41</sup> *Id.* at 358.

<sup>42</sup> See Kravitz, *supra* note 28, at 16.

<sup>43</sup> See James Rachel, *Active and Passive Euthanasia*, in CONTEMPORARY ISSUES IN BIOETHICS 313, 313–16 (Tom L. Beauchamp & LeRoy Walters eds., 1982).

<sup>44</sup> Kravitz, *supra* note 28, at 17.

<sup>45</sup> See *id.* at 18.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 19.

<sup>48</sup> See Ellenson, *supra* note 2, at 130.

methodology is part and parcel of classic halakhic debate. Kravitz employs Halakhic Formalism to dissect the meaning of classical Jewish legal texts. However, he ultimately finds this methodology insufficient for guidance in the contemporary world because Halakhic Formalism in relation to end-of-life issues can result in conflicting readings and can render the caretaker incapable of action. We might do nothing to alleviate the suffering of a patient.

To overcome this passivity, Kravitz employs the methodology of Covenantal Ethics in order to respond to the contemporary issues of Physician-Assisted Death. Kravitz emphasizes autonomy in decisionmaking. As he writes: "For us as Liberal Jews, texts of the past have votes but not vetoes." Thus, each of us functions as an authority for our own decisionmaking. Kravitz goes further to couple autonomy with compassion. Kravitz seizes on Lev. 19:18: *v'ahavta l'reicha camocha—you shall love your neighbor as yourself*—as the ethical basis for an individual, or if he is not sentient, for his family and doctors, to make not only ethical, but also merciful, end-of-life decisions. For him, it is "ethical and 'Jewish' to limit pain for that person whose life is coming to an end."<sup>49</sup> In sum, Kravitz's examination of the issues surrounding end-of-life decisionmaking illustrates how Covenantal Ethics aids us in responding to advances in medical technology and patient care. To us as pulpit rabbis, we see in this interpretative process a parallel to Subrin's perspective that equity/discretion "grew interstitially, to fill in the gaps of substantive common law." Similarly, Covenantal Ethics and Halakhic Formalism complement each other as we struggle to make ethical decisions in the contemporary world.

#### CONCLUSION: THE HANDMAID AS COVENANTAL ETHICIST

When confronted by the issues surrounding the Massachusetts Death with Dignity Ballot initiative, we found the story of Rabbi's Handmaid influential in formulating our own ethical conclusions. Clearly, the Handmaid is not an halakhic decisionmaker, but she is caring for the foremost halakhic authority in Rabbinic literature who is confronting his own death. As the story implies, Rabbi Judah is being sustained by the continuous prayers of his disciples, which function as (using contemporary language) a life-support system. The Handmaid watching from above has the most expansive view of this complex, unfolding situation. As Dina Stein writes,

Standing on the roof, the maid witnesses his agony at having to remove his tefillin and put them on again each time he goes to the toilet. The maidservant, unlike the rabbis, sees him in moments of physical intimacy. . . . On the roof, positioned between heaven and earth, she perceives the broader picture . . . . She realizes that her master ought to die . . . . She brings the rabbis' discourse to a halt . . . not by words but by the violent act of breaking the jug.<sup>50</sup>

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<sup>49</sup> See Kravitz, *supra* note 28, at 22.

<sup>50</sup> See STEIN, *supra* note 27, at 113–14.

This Talmudic story about a Handmaid's action influences how we function in our lives when confronting contemporary ethical issues: she is a role model embedded in an ancient narrative. To us, the Handmaid is a Covenantal Ethicist. Stirred by his suffering, she makes an autonomous decision to end Rabbi Judah ha-Nasi's life. She enacts the ethical principle: *v'ahavta l're'eicha, camocha*—*you shall love your neighbor as yourself*.<sup>51</sup>

Through the decades we have been fortunate to have Stephen Subrin embedded in our lives as both a friend and fellow student of the Jewish tradition. In the course of reviewing his writings and in developing this paper, we are grateful that he, too, consistently reveals himself as a Covenantal Ethicist.

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<sup>51</sup> See *Leviticus* 19:18.

