Halakhah in a Theological Perspective

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JUDAISM AND CONTEMPORARY BIOETHICS

1. The Interest in Normative Ethics

An essay on Judaism and bioethics implies that bioethics, as a method of inquiry, is interested in Judaism and that Judaism lends itself to such an interest. Before any specific issues can be systematically examined, this relation between an interested method of inquiry and an interesting datum must be constituted.¹

Ethical inquiry can be conducted in three distinct ways corresponding to three distinct fundamental questions. Ethical inquiry of the analytic variety asks: What is ethics? It apprehends an area of human discourse conventionally called "ethics" and seeks to delineate its boundaries and designate its content. Its scope is essentially descriptive. Ethical inquiry of the metaphysical variety, on the other hand, asks: Why is there ethics? It seeks to understand ethics in the context of something more fundamental than the ethical area with which the analytic spectator is concerned. It attempts to constitute the apodictic background out of which ethics is to subsequently emerge.² Finally, ethical inquiry of the normative variety asks the practical question: How is one to act?

Normative ethical judgments are made in the context of historical situations or cases. The assessment of the facts in the case will influence the judgment by suggesting the application of one norm or several.³ In the formulation of a judgment a specific set of human circumstances is described. The circumstances contain either an element of conflict or an element of lack between individual or collective members within society. Hence a resolution of the conflict or lack is called for. An ethical judgment is the response to this call for resolution. The social inadequacy of what is leads to the judgment of what is to be done.

Now if the normative ethical judgment in one situation is taken to have broader significance than its specific application in the case for which it was initially formulated, then it becomes a general prescription, a norm.⁴ This process of application involves analogy. Thus a new situation B is considered similar enough to the old situation A to warrant the application of norm C in both situations. Norm C in situation B is based on its precedent in situation A. Only historical experience can enable this process of
analogous application to be effective, because only historical experience can enable one to see situations in the context of a normative continuum. Analogical reasoning is essentially an exercise in estimation. Thus the normative effectiveness of ethics requires an acceptance of historical experience and continuity. The use of this historical experience is required if ethical concepts are to be adequately schematized. We will see how this analogical reasoning functions in the Jewish ethical tradition when we analyze a specific ethical paradigm from it.

Clearly the normative question is the one which is most often asked today. As such it is the question which concerns a greater number of thoughtful people in our society than either the analytic or the metaphysical questions. For the analyst looks at ethics after the fact, and the metaphysician looks at ethics before the fact, but practical ethical concern begins within the ethically significant situation. Therefore, the normative question is the *terminus a quo* of ethical inquiry because it is the most practical. In ethics, theory is ultimately for the sake of practice.

This search for a wider number of precedents by contemporary ethical inquiry seems to be the result of the wider range of situations calling for ethical judgments. In areas of bioethical concern the explosion in medical research and treatment has led to a great number of new and increasingly complex cases. Very often these new and complex cases do not appear to have much in common with the older, more simple cases wherein traditional ethical principles were explicated. Because of this a wider range of precedents is called for so that these principles may be adequately schematized in the new cases. In other words, we need precedents which approximate in some way or other the new cases so that we may continue to apply ethical principles by the process of analogy.

Moreover, the gradual decline of what may be called "medical absolutism," namely, the assumption that all dilemmas concerning proper medical practice can be solved by value-free "scientific" criteria, has contributed to a renewed respect for the wisdom of the past embodied in historical traditions. The most evident social manifestation of the attempt to qualify medical absolutism is the current rise in the number of medical malpractice suits before the courts. If medical practice is seen to require ethical controls, then the data of ethical precedents will be seen as at least equally important for medical judgment as the data of scientific experimentation.
Finally, the recognition of the ever-present danger of subjective fallibility in medical practice has led to a renewed emphasis on personal responsibility. Here again, this recognition has led to a renewed respect for those historical traditions which have emphasized personal responsibility for individual action. Thus, words like "sin" and "transgression" seem to be reentering contemporary ethical discourse. The use of such words and the concepts they name requires a renewed ethical interest in the religious traditions which are their cultural matrix.

Considering the rich history of normative ethics in Judaism, it is no surprise that this historical tradition is of increasing interest to many normative ethicists today, especially bioethicists. It is also no more surprising that several contemporary Jewish theologians are addressing themselves to this general ethical interest. I do not believe that this interest nor the response to it would be nearly as intense if current ethical discussion were primarily of the analytic or metaphysical variety. This is not because Judaism has nothing to offer these types of ethical inquiry, but, rather, because neither of these types of ethical inquiry is very much concerned with historical traditions. Analytical ethical inquiry in our day seems to be concerned with the analysis of "ordinary" language about ethical concerns. As such it is rather horizontal in its horizon of interest. History is essentially beyond its scope. On the other hand, metaphysically inclined ethical inquiry strives to construct ethics sub specie aeternitatis, that is, to understand ethics within some "perennial" philosophy or other. History is essentially beneath its scope.

2. Religious Response

Despite the fact that Judaism, along with other religious traditions, can provide a rich and varied number of precedents for contemporary ethical inquiry, it cannot simply be regarded as a historical source. This would only be possible if Judaism were exclusively an entity of the past. There have been times when Christianity or Islam or Secular Humanism has tried to reduce Judaism to the role of a "fossil"; however this has always been belied by the continuing life of the Jewish people and the continuing development of Jewish thought. Therefore, if philosophical ethicists are interested in Jewish tradition as a living tradition with its own interiority, then they must ask Judaism, either through its texts or through its teachers, three questions. (1) What
aspects of Jewish tradition are ethically valid for the non-Jewish world? (2) Why are these aspects of Jewish tradition ethically valid for the non-Jewish world? (3) How are these aspects of Jewish ethical teachings to be applied to non-Jews? Thus we see that the analytic, metaphysical, and normative questions which we discovered at the beginning of this chapter characterize ethical inquiry in general, now characterized ethical inquiry into Judaism in particular. This is so because Judaism is a living tradition and its teachings should not be regarded simply as information to be taken by the outside world but as a gift which this tradition presents itself. The giving of such a gift presupposes an understanding of how the tradition itself makes such a giving possible. This understanding is a process of philosophical inquiry. Therefore, if the philosophically interested ethicist wishes to truly receive from Jewish tradition, rather than merely pick from it, he must ask of Jewish tradition the same questions he asks in his general ethical inquiry. Which particular questions he begins to ask will most likely be determined by his own immediate situation. We have seen that in current ethical discourse the question is most likely to be the normative one, namely, how does Judaism apply to current cases? Nevertheless, this question cannot exclude the analytic or the metaphysical questions about Jewish ethics without losing an appreciation of the inherently Jewish matrix of what has been given.

Jewish theologians responding to this general ethical interest should be at least equally precise in their method of presentation. Although they are understandably flattered that after so many centuries of obscurity their views are finally being sought by the non-Jewish world, they should, nevertheless, remember that the tradition itself recognized that there are times when it can speak directly to the non-Jewish world and other times when it can only speak indirectly, even metaphorically.5

Throughout Jewish tradition I detect three distinct approaches to the problem of the relevance of Judaism to universal ethical concerns.

The first approach may be termed "dogmatic." It is based on the assumption that Judaism has something to say concerning universal ethical questions precisely because Jews should teach, if not actually politically enforce, certain of their own minimal moral laws among all humankind. This approach was explicitly stated by Maimonides. He writes, "And so Moses our master commanded by Divine revelation to force all humanity to accept the commandments commanded to the sons of Noah. And whoever does not
accept them is to be executed. Whoever accepts them is called a 'resident-alien'.

This is the approach taken by certain Jewish traditionalists today. When interest is expressed in Jewish ethical teaching they simply enunciate those aspects of Jewish tradition which apply to non-Jews. However, the presupposition for this simple enunciation is that the non-Jewish inquiry is based on an acceptance, at least a tacit acceptance, of the authority of Jewish law. Thus Maimonides indicated in one of his legal responsa that Jews are permitted to teach Scripture to Christians, but not to Muslims, because only Christians accept the revealed authority of the Hebrew Bible. By so responding he was reinterpreting the earlier Talmudic prohibition of teaching Torah to non-Jews, namely, the Torah can only be taught to those who accept its revealed authority. Christians are now excluded from this class of non-Jews. Nevertheless, one can hardly assume that current non-Jewish interest in Jewish ethical teaching is founded on any such acceptance of the authority of Jewish law. Therefore, based upon the very criteria of this traditionalist approach, it is questionable whether Judaism has anything to offer current ethical inquiry, with the exception, perhaps, of the ethical inquiry conducted by certain Christian fundamentalists. Most ethical inquiry today cannot be characterized as approaching Judaism with the attitude described by the prophet, "And many nations will go and say, 'Come let us go up to the mountain of the Lord, to the house of the God of Jacob, and He will instruct us in His ways and we shall walk in His paths!'" (Micah 4:2). Furthermore, it should be recognized that most current ethical inquiry is conducted within the context of a pluralistic democratic society. The very foundations of such a society preclude the religious authority of one segment of the population over another, not only by means of overt political coercion but, also, by means of covert historical triumphalism.

The second approach might be termed "apologetic." This approach is based on the assumption that Judaism's ethical teaching is essentially the same as that of either liberal Christianity or Secular Humanism. Jewish apologists used to like to speak of the Jewish ethical "genius" and the "mission of Israel" to teach monotheistic ethics to the world. The problem with this approach as the basis for the giving of Jewish ethics to the world is that it is essentially redundant. At most it simply reconfirms the consensual ethical principles held by the majority culture at any particular point in history. Jewish apologetics responds to non-Jewish ethical inquiry something like this. "We already have
said what you are now saying; indeed we said it better." However, if this is the case, then the intrusion of Judaism into what is in fact an ethical fait accompli is actually a diluting element. It adds nothing to ethical discourse except reconfirmation or obscure applications, when intellectual effort would be far better spent in searching either for metaphysical foundations for ethical principles now only held by informal consent or for further normative applications of these principles. In other words, apologetics, as I have defined it here, is tedious. Furthermore, it adds an element of chauvinism which is itself ethically objectionable, perhaps even more so than the dogmatic triumphalism just described above.

The third approach to ethical inquiry into Judaism, and the one I wish to advocate in this chapter, might be called "phenomenological." In this approach the inquirer enters into the intelligible structure of Judaism and attempts to see the method of ethical judgment at work. Only this approach enables the inquiring ethicist to ask all three fundamental ethical questions. Thus he asks: What is universally relevant in Jewish ethics? Why is one obliged by it? How is it to be applied? Of course one might very well object to this approach with the same objection raised against the dogmatic approach, namely, it presupposes an acceptance of the authority of Jewish tradition. However, further examination will indicate that this is not precisely true.

Ethical discussion in Judaism involves three distinct areas of interpersonal relationship: (1) the relationship between God and the Jews, (2) the relationship between Jews and their fellow Jews, (3) the relationship between Jews and non-Jews.

The ethics of the first area of relationship might be termed "covenantal"; that is, the relationship between God and the people of Israel, revealed in Scripture and developed by tradition, is the context for a series of mutual obligations. It presupposes God's election of Israel and Israel's acceptance of that election. A universal method of inquiry cannot be ethically interested in this area of relationship because it has no practical meaning outside of the religious Jewish community.

The ethics of the second area of relationship might be termed "ethnic"; that is, the relationships among Jews are the context for a series of mutual obligations. Such obligations presuppose membership in the Jewish people, if not as a religious entity then, minimally, as an ethnic entity. A universal method of ethical inquiry here also cannot be ethically interested in this area of relationship because it has no practical meaning
outside the ethnic Jewish community.

In the area of relationship between Jews and non-Jews, however, we discover a subarea which can be relevant to the ethically interested non-Jewish inquirer.

Now the area of relationship between Jews and non-Jews can be divided into three subareas: (1) ritual, (2) political, (3) personal.

In the ritual subarea the constitution of the relationship between Jews and non-Jews is based upon the prior relationship between the Jews and God. Here the ritual status of non-Jews is defined by their not being members of the covenantal community but as being still related to God. As such the ritual import of their interaction with Jews is determined by their specific proximity to or remoteness from the Jewish relationship with God.\(^{10}\)

In the political subarea the relationship between Jews and non-Jews is constituted on the basis of the prior relationship between Jews themselves. Here the political status of non-Jews is defined by their not being members of the Jewish community taken as a political entity but being, nevertheless, not totally unrelated to the political workings of the Jewish community. As such the political import of the interaction with Jews is determined by their particular empathy or enmity toward the Jewish people.\(^{11}\)

It is now clear that neither the ritual nor the political subareas of the general relationship between Jews and non-Jews is relevant to the ethically interested non-Jewish inquirer. For in both these subareas there is no real mutuality of judgment; in both the non-Jews are judged but they themselves make no judgment. In other words, the non-Jews are not active participants in the process of ethical judgment which Jews are to make about them. This does not in any way imply that the whole area of relationship itself is not ethically significant. For Jews there is a definite and objective ethical structure for dealing with non-Jews on the ritual or the political level. However, non-Jews, by not being members of the Jewish community in either the covenantal or the ethnic sense, cannot very well be participants in the process of ethical judgment here.

3. **Noahide Law**

In the area of relationship between Jews and non-Jews, specifically in the subarea of personal interrelationships having no immediate ritual or political overtones, we finally locate the one specific context wherein general ethical inquiry into Judaism is truly
possible. For at this level we discover ethically interesting data dealing with man qua man, data which, at least theoretically, involve human participation in the process of judgment, irrespective of whether or not one is a member of either the covenanted or the ethnic community of Israel.

This area of relationship between humans qua humans was outlined by the rabbinic sages, if not fully constituted by them, in the doctrine of "Noahide law." This doctrine proclaimed that all human beings, who are by Scriptural definition "sons of Noah," are bound by seven basic norms, namely, the prohibitions of (1) anarchy, (2) blasphemy, (3) idolatry, (4) murder, (5) sexual promiscuity (that is, adultery, incest, and homosexuality), (6) theft, and (7) brutality to animals. Furthermore, this law was considered to have preceded historically in Sinaitic covenant. Thus, although Jews were bound by the Sinaitic covenant to observe 613 laws, these subsequent laws were not seen as contradicting the earlier seven Noahide laws. Indeed, in those cases where the subsequent development of Jewish law seemed to contradict these basic human norms, the Jewish law was revised on the assumption that it would be immoral to let such a contradiction with the basic Noahide law stand. A late Talmudic principle summarizes this whole approach by stating, "There is nothing prohibited to the gentiles which is permitted to the Jews." Moreover, it was recognized that the gentiles did not and could not limit their norms to the seven basic Noahide laws. Here, as in the development of Jewish law, the only requirement was that the basic Noahide law not be contradicted. However, the inevitable process of historical specification of these basic laws, as well as the addition of new laws and customs, was recognized and accepted. Thus, for example, differing criteria in the areas of incestuous relationships, marriage and divorce, witness, and property were specifically noted and accepted in the Talmud and its related literature. Hence we see that Noahide law was conceived of by the rabbis as the necessary (but not sufficient) foundation of morality, whether Jewish or non-Jewish. This common moral foundation is not obliterated by the subsequent religious and ethnic distinctions within humankind. An such it is the area wherein Jewish tradition provides data of universal ethical interest and significance.

It would be misleading of me, however, not to mention that my characterization of the significance of the doctrine of Noahide law is not and has not been accepted by many Jewish theologians. There have been those who have insisted that this doctrine
presupposes non-Jewish acceptance of either the Jewish doctrine or revelation or the political right of Jewish authority to include non-Jews in its domain. To refute these assertions, or even to show that they only represent one theological strain within Judaism, would take me far beyond the parameters of this chapter. Such a discussion would involve a minute analysis of Jewish law and theology. Suffice it to say, the interpretation of the significance of the doctrine of Noahide law, which I have presented here, represents a line of Jewish interpretation having enough precedent in the history of Judaism to be plausible. It was expressed best by the person who I believe was the greatest Jewish philosopher in modern times, Hermann Cohen: "The concept of the Noahide is the foundation for natural law not only as an expression of the objective law but also as the determination of the subject of the law... The precepts required of the Noahide are moral precepts. The belief in the Jewish God is not required." Although I differ from Cohen's Kantian approach to Judaism, especially to Jewish ethics, I think he was correct in characterizing the noncovenantal (in the Jewish sense of "covenant") character of Noahide law and the Noahide in Jewish theology.

4. Noahide Reasoning

Our discussion heretofore has led us to an answer to the analytic question: What is universally significant in Jewish ethics? We can now answer that it is the subject matter of Noahide law. It has been necessary to reach the answer to this question by a precise and explicit methodology. Only such a methodology can lead to answers which avoid the extremes of dogmatism and apologetics, both of which speak in the name of Judaism chauvinistically, thus making themselves irrelevant to ethical inquiry in a democratic society.

Next we must turn to the normative question. How does Noahide law prescribe for non-Jews? A full examination of this general question would take us far beyond the parameters of this chapter. One specific presentation of such a universal ethical norm, as enunciated by Jewish tradition, should be sufficiently illustrative. It deals with what is no doubt one of the most important normative questions ethics can deal with: How do we establish priority when two lives are threatening each other?

In the Mishnah we read, "If a woman is in hard labor, the fetus is to be cut up in her womb and brought out limb by limb, because her life takes precedence over its life. If
the greater part of the fetus' body has already come out, it must not be destroyed because one independent life is not to be pushed aside for another independent life.\textsuperscript{17} Maimonides indicates in his discussion of this case that the principle enunciated is one "to which reason inclines" and, therefore, he does not seek to ground it in either a specific Scriptural verse or a rabbinic tradition or edict.\textsuperscript{18} As such it is rational and universally binding. The rule is presented in the context of a specific case to which it is applied. We must now see how the rule applies more generally, how it functions as a general norm not just a specific judgment. As the case has been interpreted, prenatal life is seen as clearly different from postnatal life. In cases of unavoidable conflict postnatal life takes precedence over prenatal life. The factor of physical independence seems to be the criterion of distinction.\textsuperscript{19} All life, both physically independent and dependent, is designated by the general term, hayyim. Physically independent life is specifically termed nefesh as in Genesis 2:7, "And He blew into his nostrils the breath of life and the man became a living being (nefesh hayyah)." The reason, then, it seems that the mother's life takes precedence over that of her unborn child is that while both are "living" (hayyim), only she is a nefesh, a physically independent living being. In a later Talmudic passage the fetus is considered to be a "limb" of its mother and, hence, may be amputated as one would amputate any other life-threatening limb.\textsuperscript{20} After a majority of the child's body is out of the mother's body, however, it itself is considered to be as much of a nefesh as is the mother. Her precedence ceases and both are now equally proximate to us as human persons.

In a later text the Babylonian Talmud considers the life-threatening fetus to be "like a pursuer."\textsuperscript{21} The principle of the pursuer applied here was originally presented in another passage in the Mishnah where it is stated that a victim may be saved from either his or her mortal pursuer even if this requires that the victim or a bystander kill the pursuer to prevent the mortal assault on the victim.\textsuperscript{22} The reasoning behind this principle seems to be as follows. Lives are taken to be equal in value, that is, they are all considered to be equally proximate to our moral concern. The pursuer forfeits his right to life by threatening another life. The balance of equality is broken if the pursuer is successful in his assault upon the victim. What the victim by acting in self-defense, or the bystander by acting as a rescuer, is doing is to affirm this threatened equality. To protect the pursuer, or to ignore him, would be to practically approve of the act about to
be done. As the sage Rava said to one contemplating murder to satisfy the order of a tyrant, "How do you know that your blood is redder? Perhaps the victim's blood is redder than yours?" The life of the victim is considered to have priority over the life of the pursuer when only one life can be saved. This is presented as a rationally evident principle.

A number of scholars questioned why this principle was introduced in the discussion of abortion. Can the fetus be considered as a "pursuer" in that it is not conscious or rational and, hence, not morally culpable? R. Ezekiel Landau, an eighteenth-century Bohemian authority, answered that the introduction of this additional principle limited abortion to life-threatening situations alone. Without it one might assume that the life of the fetus has no protection at all. The analogy with the pursuer grants fetal life a greater dignity and protection. That is, just as a pursuer only forfeits his life by his pursuit which can only be stopped by killing him, but would otherwise retain his right to life, so does a fetus have a right to life except when it becomes a threat to the life of its mother, a threat that can only be prevented from becoming lethal by killing it. Earlier, in a nonlegal context, the prenatal humanity of life was expressed by a Roman sage, Antoninus, in a dialogue with a second-century C.E. rabbi, Judah the Prince. The rabbi agrees with the Roman sage and finds scriptural support for his view in Job 10:12. Two generations earlier the Palestinian sage R. Ishmael had ruled that feticide merited the punishment for murder, based on his exegesis of Genesis 9:6.

This addition of the factor of pursuit qualifies the principle, "One life is not pushed aside for another life." Whereas the basic principle seems to define equality in terms of the physical proximity of the lives before us, the qualification indicates that the life of a victim of assault has a moral proximity over the life of its pursuer. It requires our most immediate attention. This same type of reasoning is used to justify one's saving his own life even if that will deny life-sustaining materials to someone else. One is not himself considered a pursuer in this situation because he is not actively threatening the other person's life; he is only saving the most proximate life—his own. With this qualification we can see how the law developed from a simple distinction between prenatal and postnatal life into a more complex distinction between proximate and inapproximate human life, first in the physical sense and then in the moral sense. Thus, in the final analysis the principle one life is not to be pushed aside for another is qualified, not only
in the case of abortion, but in any threatening situation where a victim is clearly identifiable.

Here we see the importance of analogy in normative Jewish ethics, an importance I have already indicated characterizes the historical component required by normative ethics in general. This designation of the fetus who threatens its mother's life as "like a pursuer" is an explicit use of analogy. The problem with analogy, however, is that there are as many or more points which distinguish the two cases compared as there are those which identify them. How, then, does one decide whether the difference or the identity is to be emphasized?

An important medieval gloss on the Talmud states that normative analogies are made by selection, that is, they are made by subjective means.31 This acknowledgment reveals a number of important points about the analogical method of normative Jewish ethics as developed in Halakhah.

1. Although there is a factor of subjective selection, that selection is limited to precedents already found within the normative continuum. Thus, selection presupposes the primacy of the tradition and cannot function over and above it. This enables Halakhah to be both stable and flexible because the internal possibility of analogical reasoning indicates that Halakhah is an open system.

2. The use of analogy enables the halakhic system to be more sensitive to the ambiguities of human experience to which it must address itself. In the question of abortion which we have just examined, we have the ambiguity inherent in the conflict between two lives. A simple deduction from the principle that postnatal life has priority over prenatal life might indicate that postnatal life may destroy the prenatal life for any or no reason. The introduction of the principle of the pursuer indicated that only when the postnatal life is unavoidably victimized by the prenatal life can it defend itself even if the only such defense is to kill its "pursuer." This analogy is required because of the essential ambiguity involved in a conflict between two lives within one body. So, analogy here and elsewhere is sensitive to the phenomenology of morally complex situations.

3. Finally, the use of analogy by means of subjective selection, if it is not to be arbitrary, must look to criteria beyond the strict precedents of the law itself. These criteria are either theological or philosophical. In cases involving relationships between Jews the criteria will be theological, that is, one's understanding of the covenant will
have to constitute the general background for a specific ethical judgment. Thus, for example, Maimonides permits a convert to Judaism to recite the liturgical formula "God of our fathers," basing his judgment on the recognition that the convert's acceptance of the covenant between God and Israel makes him as much a son of Abraham as a native-born Jew. The theological recognition of the common covenantal involvement enabled Maimonides to select an earlier norm which permitted this recitation and to reject another earlier norm which prohibited it. In the case of abortion, dealing as it does with a universally human situation, we have seen how the philosophical criteria of the value of life and moral proximity were operative in the legal analogy developed.

As an example of how Jewish normative reasoning operates, using rationally evident principles that are by no means limited to Jews, the development of this law indicates that normative conclusions in cases of complex moral conflict are not simply deduced from one principle. Rather, the analysis of the situation calls for the use of several principles. In the attempt to dialectically correlate these several principles a coherent conclusion emerges. This type of dialectical normative reasoning characterizes the method of Halakhah, whether the case concerns the relationship between God and the Jews, between Jews themselves, or between the Jews and non-Jews. We have now seen such a dialectic at work in the subarea of interpersonal relationships where covenantal or ethnic identity is not an issue. By delineating this area and showing how it functions normatively, we can see that Judaism offers the non-Jewish world an ethical exemplar without requiring anything more than practical ethical interest and concern on the part of the non-Jewish world.

5. **Metaphysical Considerations**

If one defines normative ethics as a self-sufficient system, then it is possible that Jewish normative ethics can be seen to fit this definition. And, moreover, I have both delineated and specifically described an area of Halakhah which is universally significant in the ethical sense; that is, it deals with man qua man as both the subject and the object of an area of law. Nevertheless, such a characterization of Jewish normative ethics is only correct if we assume that Judaism is simply a form of "revealed legislation." My late, revered teacher, Professor Abraham J. Heschel, called this outlook "religious behaviorism." Clearly Judaism, even on the most empirically evident level, is more
than a system of behavior. It contains ideas as well as norms. Therefore, we must ask
the metaphysical question: Why is there universal ethics in Judaism? In other words,
what grounds this type of normative ethics?

Most traditionalists would answer this question with the reply: Jewish ethics,
whether specific or universal, is an expression of the will of God. Such an answer is a
correct statement about the way ethics has been presented in Jewish tradition. Norms
are either presented as explicit Divine commandments revealed in Scripture, or as
inferences from Scripture, or as specifically humanly legislated decrees generally
sanctioned by Scripture. However, several outstanding classical Jewish theologians, most
notably Maimonides, argued that a revealed source does not preclude rationality.35
Indeed assuming that revealed law is the product of Divine wisdom precludes ascribing it
to Divine caprice.36 A noncapricious will is by definition rational. Furthermore, the
rationality of those universal laws, which do not involve a specific covenant with the
people of Israel, is most readily discoverable. Hence, a theological metaphysics of
morals does not necessarily entail a theological epistemology of morals in all cases.
Therefore, such a simple dogmatic assertion as we have just heard does not limit the
rational character of Jewish ethics defined as universal in scope, as long as its general
acceptance itself does not preclude rational explanation.

Nevertheless, despite the fact that such an assertion of Divine authority does not
compete with the rationality of the area of ethics Judaism accepts as universal, it is not
metaphysically satisfying. It is not because it itself is an ethical assertion. It provides a
general prescription, a Grundnorm, to ground all of the specific norms found in the
ethical system.37 But such a provision does not and cannot answer the basic
metaphysical question: Why is there ethics? Metaphysical inquiry seeks a transethical
foundation for ethics, a conditio per quam.

In the areas of ethics dealing with Jews in their relationship with God and with each
other, metaphysical inquiry has attempted to constitute the covenantal relationship
between God and the people of Israel as the foundation presupposed by the promulgation
of God's commandments in the Torah. Such inquiry has had to deal with the specific
caracter of the relationship between God and the people of Israel. The commandments
of the Torah specifically addressed to Jews explicitly involve this relationship and,
indeed, are meaningless if it is not taken into constant consideration.
If the covenant at Sinai is taken to be the relational context for specifically Jewish ethics, what then constitutes the relational context for universal ethics in Judaism? Two approaches to this question can be located in Jewish theology.

The first approach to this question attempts to see the covenant between God and the Noahides in Genesis 8-9 as functioning similarly for non-Jews as the covenant between God and Israel functions for Jews. Just as God covenanted with the people of Israel and the Sinaitic law was revealed to concretize that covenant, so God earlier covenanted with the Noahides and the Noahide law was revealed to concretize that covenant. However, the problem with this interpretation is that whereas the covenant with Israel is the necessary context for the Sinaitic law, as indicated by the numerous admonitions to remember the exodus from Egypt wherein this covenant began to become manifest to the whole people of Israel, the covenant with Noah and his progeny plays no such necessary role for Noahide law. None of the Noahide laws in any way involves the recognition of an historical event. Furthermore, whereas Israel's acceptance of the covenant is an indispensable element in its effectiveness, the acceptance of Noahide law by the gentiles is not explicitly mentioned in Scripture. Therefore, although the term berit (covenant) is mentioned in both the context of the Noahide relationship with God and the Israelite relationship with God, the respective contexts wherein this word is used indicate very different meanings.

The second approach to this question about the relational context for universal ethics in Judaism, and by far the more widely explicated approach, sees this relational context to be expressed in the doctrine, "Man is created in the image of God." Indeed, Scripture itself presents this doctrine of the imago Dei as the metaphysical grounding for the prohibition of bloodshed and its punishment. "_whosoever sheds the blood of a human being, his blood shall be shed by a human being, because in the image of God He made man" (Genesis 9:6; my italics). In the history of Jewish theology there have been basically three interpretations of the meaning of this metaphysical doctrine.

The first interpretation, formulated by Jewish theologians beginning with Philo, sees the image of God as being man's intellect. This is what he shares with God and this is what distinguishes him from the animals. Such a doctrine was earlier put forth by Plato, Aristotle, and the Stoics. Their doctrine undoubtedly influenced this interpretation of the imago Dei. Aside from the question of whether the human distinction from animals
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is only one of degree rather than one of kind, we must see whether such an interpretation adequately explains the doctrine of imago Dei as the metaphysical ground for universal ethics in Judaism.

I believe it is inadequate because, whereas God's intellect is unlimited, human intellect is limited due to human finitude: "My thoughts are not your thoughts" (Isaiah 55:8). Therefore, intellect does not constitute a relationship of mutual presence between man and God. All this interpretation can assert is that man's intellect is somehow derived from God's intellect. However, without a special mutuality we get back to creation in general, namely, the assertion that all being is somehow contingent on God. As such we cannot constitute the human distinction from the rest of creation because such an assumption does not indicate how the relation between human and Divine intellect is any different from the relation between all created being and Divine Being. And since this relation between created and Uncreated Being cannot be intelligibly constituted, as Maimonides astutely observed, the interpretation which sees the imago Dei as being intellect cannot function as an intelligible metaphysical ground for ethics, anymore than the doctrine of creatio ex nihilo can function as an intelligible metaphysical ground for cosmology.

The second interpretation of the doctrine of man created in the image of God sees the image of God as being man's freedom. This is what he shares with God and this is what distinguishes him from the rest of creation. However, here again whereas God's freedom is unlimited, man's freedom is limited by the world which precedes his emergence. Only God can say, "I will be whatever I will be" (Exodus 3:14). If God freely wills that man be free, then that can only mean that human freedom is entirely different from Divine freedom and cannot limit it in any way. Here again we do not have a relationship of mutual presence. Here again we get back to creation in general and are unable to distinguish the creation of human freedom from the creation of anything else in the universe. This is why Kant and his Jewish followers, who saw rational autonomy as the ground of ethics, would not constitute the relationship between man and God as being in any way metaphysically prior to the relationship between man and man. For them man creates his own autonomy. God at best simply endorses it and enables it to emerge in history.

These two interpretations of what the doctrine of imago Dei signifies—the first
designating human intellect and the second designating human freedom—are not only inadequate to explain the uniqueness of the human relationship with God, they are also inadequate to explain the fullness of human existence itself. For both involve a reduction of existence to essence.

To assert that the intellect is the *imago Dei* is to theologically reassert Aristotle's philosophical assumption that "man is the only animal who possesses rational speech (*logon)*." Thus the value of everything in human existence which is not rational is determined solely by its potential for rational use. Its value is, then, clearly relative and subordinate. Such a metaphysical assertion is inadequate to ground an ethical system which regards human life as inviolable, even if it has not the capacity for ratiocination and rational communication (*logos*). Thus, such an assertion cannot ground, for example, the traditional prohibitions of abortion, infanticide, or the euthanasia of the comatose, the catatonic, or the severely retarded. Persons who are the objects of these acts are not rational by any definition of that term. This does not mean that this metaphysical assertion necessarily leads one to advocate these practices. However, by being unable to ground their prohibition this metaphysical assertion leaves room for further assertions which do lead to the permission of these practices, or even advocate them. And these subsequent assertions do not contradict the prime assertion that humanness is rationality and, therefore, can function in harmony with it.

To assert that freedom is the *imago Dei* is to theologically reassert Aristotle's philosophical assumption that "man is a political being by nature." In this way the value of everything in human society which is not a free political participant is determined solely by its political potential. Here, too, the nonpolitical aspects of human society are clearly relative and subordinate. Such a metaphysical assertion is even more inadequate than the first to ground certain fundamental, traditional ethical norms. For whereas the assertion that humanness is rationality regards ratiocination and rational communication as the *conditio per quam* of human life, the assertion that humanness is freedom means that the value of human life is determined by the degree of its participation in human society. Freedom is clearly a political idea, that is, it manifests itself as the presupposition of legislation. Only free beings are the subjects of law. Now it is conceivable that one can be rational but politically useless—a paraplegic or a terminal cancer patient, for example. It is inconceivable, however, that one can be
politically useful without being rational. Therefore, human freedom, as a politically determined reality, is even more restrictive than human rationality which is a verbally determined reality. Hence, if freedom is what makes one human, then the ethical prohibition of treating another human being as a thing rather than a person has no grounding. This is why the Roman Code of Justinian acknowledged that slavery was sanctioned by the *ius gentium* because it was present in every society (*consensus gentium*) but was, nevertheless, contrary to the natural law itself. What was recognized here is that human freedom is determined by an external relation, namely, one's status in society. Rationality, on the other hand, is determined by an internal relation, the relation between mind and body. This distinction between rationality and freedom was missed by Kant, who saw no difference between a rational person's relationship with himself and his relationship with society. Therefore, the assertion that human freedom is humanness allows for the permission of even more acts that traditional ethics has prohibited than the older assertion that humanness is rationality.

It should be noted, furthermore, that both of these assertions are extremely vulnerable to the critiques of Feuerbach and Freud, who see God as an idealized human projection. For both assertions see immanent human characteristics as finite participants in an infinite Divine reality. However, since the mode of participation is never constituted it is easier to interpret such assertions as occasioned by human feelings of finite helplessness, since one is able to describe the human desire for infinity. Participation in Divine reality is not required for an intelligible description of either human rationality or human freedom. Hence one can see how the theological assertions that the *imago Dei* is either rationality or human freedom so easily lend themselves to the atheistic assertion that, in truth, God is the *imago hominis*.

The third interpretation of the doctrine that man is created in the image of God asserts that humanness is man's whole presence before God and man's apprehension of this presence. As the early rabbinic sage, R. Akiba, put it, "Beloved is man who is created in an image (*tzelem*); by additional love was this made known to him as it is said, 'in the image of God He made man.'" Whereas the other two interpretations of this Scriptural doctrine reduce humanness to a predominant factor within human existence, this transcendent definition asserts that man's uniqueness is God's intimate knowledge of him and his awareness of this relationship and his ability to respond directly to God. God
knows man in his whole existence and, unlike man, does not have to abstract any qualities from that whole existence. "Man sees appearances, but God sees the heart" (1 Samuel 16:7); and the rabbinic tradition emphasizes that "heart" refers to both the cognitive and the noncognitive, the volitional and the nonvolitional, aspects of human existence. Thus the image of God does not refer to human properties but to the possibility of a God-initiated relationship of mutual presence between God and man. It is the context of man's response to the commandments of God. This was best brought out, I believe, by the 19th century Hasidic master, R. Menahem Mendel of Vishnitz, when he commented on the use of the plural in Gen. 1:26, "Let us (nu'aseh) make man in our image according to our likeness": "God said to man, 'let us make man in our image according to our likeness.' ... to make the whole man (adam ha-shalem) ... you and I must make him. First there must be an awakening below and afterwards it is aided above."

Here we find expressed the idea that humanness consists in the capacity for a relationship with God. Man's true dignity, his inviolable sanctity, comes from his being capable of being in the presence of God and being called to respond to God's revelation to him. From this follows the most basic norm—human blood is not to be shed. The norm follows from this basic metaphysical assertion because to violate it is to practically contradict the truth of human existence. It further leads us to conclude that, since a human person's existence in its entirety is uniquely present before God, only the absence of breath, the conditio sine qua non of both independent physical life and rational discourse, indicates the "passing away" of that presence. "And the Lord God formed man of the dust of the earth and He breathed the breath of life into his nostrils and man became a living being" (Genesis 2:7). To limit the definition of human life only to the manifestation of rationality or freedom indicates that the conditio per quam of humanness is either man's relationship with himself or with society. On the other hand, the doctrine of the image of God asserts that man is an inseparable mental and physical presence and that one cannot be abstracted from the other. And, moreover, since in cases of doubt the benefit of the doubt should always be in favor of human life, one should not be regarded as dead, that is, passed away from human life, unless the signs of both mental and physical life are clearly absent. This principle of the benefit of a doubt can also be extended to prenatal life as well. For, in the absence of conflict with a fully present human life, a life as soon as it is conceived by an act of intercourse
between two fully present human beings should be inviolable. This metaphysical
criterion, then, enables all human life, from conception to mental and physical death, to
be included within the basic norm: Human blood is not to be shed.

6. Conclusion

I have tried to show, at least in outline, that Judaism is indeed of interest to the
philosophical ethician—that it gives itself to his analytic, normative, and metaphysical
inquiry. I have also tried to indicate an approach to this interest, working from within
the classical texts of Jewish tradition, an approach which attempts to be phenomeno-
logical rather than dogmatic or apologetic. By participating in this process of inquiry, by
enabling the ethical riches of Jewish tradition to show themselves to an ethically
concerned seeker, Jewish theologians are thereby fulfilling Moses' admonition, "See, I
have imparted to you laws and norms, as the Lord my God has commanded me....
Observe them faithfully, for that will be proof of your wisdom and discernment to other
peoples, who on hearing of all these laws will say, 'Surely this is a great nation of wise
and discerning people' " (Deuteronomy 4:5-6). According to one rabbinic tradition the
Israelites were commanded to write the Torah, or at least its most universal teachings,
on stones in all the languages of humankind. However, it was the non-Jews themselves
who came to take what they believed pertained to them. The dialogue between Judaism
and the ethically interested world is a relationship of careful giving and equally careful
taking.