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REVIEW ESSAY

HALAKHAH AND PHILOSOPHICAL APPROACHES TO ABORTION

For You have thrust me from the womb; made me fall upon my mother's heart. Upon You I was hurled from the womb; from my mother's belly You are my God.

(Psalm 22:10-11)

True, we love life, not because we are used to living but because we are used to loving.

(Nietzsche, *Thus Spake Zarathustra*)

"I didn't ask to be born; if I did, Mama would have said No!"
(Lily Tomlin, in role of 5-year old Edith Ann)

For me, as for most of the readers of *TRADITION*, abortion on demand is prohibited because *halakhah* says so; and that's that. Thus a philosophical argument on abortion, as presented by Dr. Brody,* Chairman of the Department of Philosophy at Rice University, is primarily of philosophical interest and without practical implications for our own lives.

In fact, however, this is not so. Should we not present the Torah position on abortion to others, to non-observant Jews, perhaps to Gentiles and encourage legislation outlawing abortion on demand, or at least resist efforts to liberalize existing restrictions? Once we consider such decisions, the possibility and availability of supportive philosophical arguments become important on several different levels:

*Baruch Brody: *Abortion and the Sanctity of Human Life: A Philosophical View* (MIT Press, 1975).

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1. The desirability of legislating Noahide prohibitions may depend (*halakhically*)¹ on the ethical justifiability of the particular prohibition.
2. The socio-political "contract" within which we operate may explicitly or implicitly preclude the imposition of purely religious norms. If such norms are shared, as it were, by general ethics, however, their legislation could be justified.
3. The severity with which we view an act may depend on the general ethical evaluation of it: we are more likely to punish murder than *Hillul Shabbat*. If abortion, let us say, belongs in the same category as murder, we are wrong to react as if it were "just another *issur*."
4. On purely pragmatic grounds, we are more likely to persuade non-observant Jews to accept the Torah-position if we are able to submit philosophical and ethical reasoning to support it.

The Orthodox community should come to grips with the social and political problems raised by the abortion issue, both in the United States (where all four of these factors arise), and in Israel, where—alas—liberalized abortion is being urged, and all but the first of the factors is operative.

Professor Brody believes that the fetus is a human being from the brain-wave stage on (approximately equivalent to the forty-day mark). From this moment abortion is an act of killing a human being and must therefore be prohibited by law. He reaches these conclusions, it must be stressed, through what he views to be a correct application of the methods of modern philosophy. While Dr. Brody is an Orthodox Jew, and occasionally quotes from Rabbinic literature, his conclusions are based on rational, rather than Divinely revealed, grounds. In his Introduction, he states:

It seemed to me . . . that the moral opposition to abortion one still encountered was based solely upon dubious theological claims.

While it would be interesting to know what these "dubious theological claims" were and why Dr. Brody changed his mind, the important point is that a theological treatment of Dr. Brody's position is a double task. First we must understand Dr. Brody's thesis as a philosopher; then we must examine its acceptability to us as Jews. That Dr. Brody seems to be working "on the side of the angels" does not exempt us from the second responsibility.

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Dr. Brody proceeds as follows: He first attempts to prove that *if* the fetus is a human being, abortion is wrongful killing. He goes on to reject the view that abortion may be wrongful killing but should not be punishable by civil law. He then returns to the difficult ontological question: is the fetus truly a human being?

II

In his first chapter, Brody, assuming the humanity of the fetus, deals with the situation in which the fetus poses a threat to the mother. Does she have the right to kill the fetus to protect herself? Brody dismisses the view of Pope Pius XI that one may kill the pursuer only if the pursuer is responsible for the act (ruling out all abortions, since the fetus never *intends* to kill the mother): for if, let us say, *X* is innocently about to shoot *Y*, mistaking him for an antelope, and I cannot warn him in time or otherwise prevent the accident, I would be justified in killing *X*, despite his lack of knowledge and intent. On the other hand, one does not have the right to kill anyone who is a danger to one's existence: if there is only enough medicine to save one person, the first patient on line, by his continued existence, threatens the life of the second applicant; yet the second is not justified in killing the first to save himself. Brody formulates a condition of attempt and a condition of action: a pursuer must either attempt to take the victim's life or to do some action that will lead to the victim's death (p. 10).

Brody holds, against the Protestant moral theologian Paul Ramsey,² that the condition of action does not apply, and so cannot justify abortion to save the mother's life:

Furthermore, there is on the part of the fetus no action that threatens the life of the mother . . . It seems to follow, therefore, that aborting the fetus could not be a permissible act of killing a pursuer (p. 11).

Brody identifies this view with the Talmudic dictum: "Heaven is pursuing her," i.e., the fetus is not doing any action.^{2a}

Brody goes on to discuss possible permitted cases, and he concludes that one may permit abortion if, without the abortion,

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both mother and fetus will perish. Killing the fetus is the only way to save the mother. Note, however, either (1) taking the mother's life (or doing anything else) will not save the fetus or (2) taking the mother's life (or doing anything else) would save the fetus; but, one has, by some fair random method, determined to save the mother rather than the fetus (p. 23).

The last condition is meant to ensure that the mother's life is not given priority over the fetus. If the fetus is indeed a human being, there is no reason to give the mother's life greater weight. Only in exceptional cases would Brody permit abortion to save the life of the mother.

This view of abortion is challenged by the approach conveniently summed up in the phrase "a woman's right to her body." A philosopher taking this position could concede the humanity of the fetus, yet maintain that the woman is not obligated to continue with her pregnancy. This view has been argued in a well-known article by Professor Judith Thomson.³

Thomson claims that the fetus in its mother's womb has the status of an uninvited guest. Imagine that you wake up one morning plugged into another individual—a famous violinist, let's say. You are told that he suffers from some organic disfunction which would kill him were you not available to be plugged into him. You must remain plugged in for nine weeks, nine months, maybe nine years; your life-style will be altered substantially as a result. Thomson believes that you would not be obligated to maintain the violinist (though to do so would be morally commendable). Similarly, a woman may argue: true, my fetus has a right to life—a right as strong as the famous violinist's. Yet *I* am not obligated to offer *my* body to the fetus, any more than I am obligated to accommodate the violinist.

This position does not justify abortion on demand: abortion remains the taking of innocent human life. The moral (though not the morally obligatory) thing to do would be to refrain from the abortion: One could justify legal sanction against particularly wanton abortions (e.g., a woman who suddenly realizes, way into the seventh month, that she is likely to come to term during the World Series). In general, though, legislation would be inappropriate and logically inconsistent so long as similar

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"Good Samaritan" types of behavior are not codified and enforced in areas other than abortion. In short, the moral and even legal parameters adumbrated by Thomson are relative.

This relativity is reinforced by Thomson's characterization of the fetus as an *uninvited* guest. Excepting rape and allowing for the fact that contraceptives are not infallible, there is a measure of awareness on the part of women engaged in sexual relations as to the possible consequences. Such considerations would raise questions about the relative maturity of different women; they would also depend upon the extent to which sexual enjoyment is regarded as a necessary ingredient to human well-being. In any event, Thomson's reasoning would permit abortion in cases of rape or the seduction of imbecile adults. On the other hand, if the fetus is not a human being at conception, but at a later date, it would be imperative for a woman to assert her right to her body *before* she is faced with another human being's right to life; otherwise she will have forfeited her own right.⁴

Brody, for his part, rejects Thomson's basic assumption, that a woman's right to her body includes her right to kill another human being who is using her body against her will. Brody asserts "that Professor Thomson has not . . . sufficiently attended to the distinction between our duty to save *X*'s life and our duty not to take it" (p. 30). In other words, while we are not required to grant a fetus, or a violinist, use of our bodies, we are, at the same time, not permitted to take their lives in order to regain control of our bodies.

A more radical assertion of women's freedom is the claim that the fetus owes its very existence to the mother's act of intercourse, so that "What she once gave, she may now withdraw" (p. 31). It is now claimed that the mother owns, not merely her own body (a relatively uncontroversial claim), but also her products (i.e., the fetus). It is not clear at what stage such proprietary rights end. What about infanticide?

What is really interesting about this claim is its paternalism (or rather maternalism—what rights the father might have are unclear). At a time when society tends, more and more, to limit the right of parents to control the behavior and education of children, one finds here a reactionary movement granting the

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mother life-and-death proprietary rights over the child. If the fetus is indeed a human being, we are faced with a remarkable inconsistency of the *Zeitgeist*.

If anything, the appeal to some special relationship between mother and child should support the anti-abortionist: having created the child, she may have greater obligations toward the child than toward a stranger. In fact, it is generally assumed that mother and father have a special obligation to care for the child for several years after birth.

III

Next Brody considers the question of legal sanctions. That an action is morally wrong is, after all, not always justification for the legal prohibition of the act, particularly in a non-theocratic polity. As Brody puts it: "[Q]uestions about the rightness (or appropriateness) of laws prohibiting certain actions cannot be settled by decisions about the rightness or wrongness of the actions themselves or even by coupling such decisions with decisions about why the actions are wrong" (p. 44).

In Chapter 3, Brody attempts to formulate some principles that will either justify the legal prohibition of abortion or legal neutrality towards abortion, granted that abortion itself constitutes the unjustifiable taking of human life. He concludes that the law ought to prohibit abortions:

Why should not there be a law prohibiting such an action? Surely one of the main functions of the state, through its legal system, is to prevent us from being harmed or killed by others (pp. 61-62).

To argue that, in a democratic pluralistic society, the very existence of controversy regarding abortion should impose a "hands off" policy on the government, is, according to Brody, incorrect. While pluralism may involve a degree of deference to moral sensibilities which we consider mistaken there are actions so wrong and evil-producing, that "the possible benefits from preventing this evil by passing and enforcing laws against such actions may well override the rights even of the majority to follow its conscience" (p. 48). If, for example, many people be-

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lieve that Jews or Blacks are not full-fledged human beings and may be destroyed, it would still be right for the minority to pass and enforce laws that would prohibit such behavior.

It should be noted that Brody's argument rests upon the assumption that abortion is not a victimless crime. If it were, the abortionist would only be harming his own moral character; the state would have no responsibility in the matter. It is in the interest of the fetus that the state intervenes. Which brings us back to the unexamined question: is the fetus a human being, that it should be a violation of his rights to kill him?

IV

The problem with defining the term "human being" is that it is neither a pure value word like *right* and *good*, or a descriptive term like *fetus*, *chromosome*, or *hair follicle*. As a scientific concept, it is confusing. If we start from adulthood it is difficult to work back and define a point before which the entity was pre-human; if we start from nothingness, it is impossible to grasp some moment at which it suddenly became a human being. Much of the debate between pro- and anti-abortionists amounts to arguing which side of the so-called "slippery slope" one starts from.

Brody analyzes no fewer than thirteen definitions before reducing them to two categories:

1. Humanity begins at conception: This eliminates the slippery slope, an advantage that does not, however, make it correct—it is still possible that the fetus becomes human at some point along the slope, but in a gradual, indiscernible way.
2. There is some property that is essential to humanity: brain activity, quickening, independent viability, birth, etc. These suggestions may express purely biological criteria; or they may conjoin some social dimension (quickening for example, includes both motility of the fetus and the mother's awareness of this).⁵

All of these possibilities share an Achilles' heel:

Naturally, all of these arguments stand or fall on their claims as to the property that is essential and as to when it is acquired. They therefore

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raise the question as to how we are to determine whether a given property is essential to an object of a given type (p. 93).

There are two possible approaches to this difficulty: either show how to determine that a certain property is essential to being human; or find some way to deal with the moral problems raised by the humanity of the fetus without determining logically the ontological status of the fetus. The first possibility is neater, and is adopted by Brody. But first let us treat the alternative solution, which is represented in the philosophical literature by Roger Wertheimer, among others, and to Brody's reasons for rejecting such an approach.

For Wertheimer⁶ argument over the ontological status of the fetus is rhetorical rather than logical. It is not possible, at this time, to demonstrate the humanity of the fetus any more than, centuries ago, one could prove the full humanity of Negroes. There may be total agreement about the facts, yet the similarities of the fetus to the adult human will no more wring assent from the pro-abortionist than the similarities of the fetus to the non-human will convince the anti-abortionist: just as the racist might, in theory, agree on all facts about the Negro, yet deny him the rights belonging to human beings.

In confronting the racist, we attempt to alter, not his logic, but his perspective. We show him that Blacks can, in fact, be treated quite naturally like other human beings; we challenge his belief that skin color is a relevant criterion in distinguishing the human from the non-human. It may be assumed that greater knowledge and more acute self-examination help liberate from prejudice, and enable us to judge correctly. Today we are generally agreed that Blacks are full-fledged human beings.

Given our limited opportunities for interaction with the fetus, it will be more difficult to reach a consensus than in the case of the Negro. Modern science, at a plebian level photography, may acquaint us with the fetus, and argue its right to life more eloquently than the representatives of organized religion. For the moment, however, the status of the fetus cannot be agreed upon: neither, therefore, can its right to life be determined.

This, of course, does not mean that everyone has the right to

their own opinion: there are true and false opinions, only most of us are not sure which is true. Those who believe a particular position with absolute certainty would be in the situation of an American abolitionist in the middle 1850's: one who believed that abortion was murder would have a strong obligation to prevent it; those who denied the humanity of the fetus would have as strong a duty to perform abortions, under certain circumstances, e.g., where the mother's life is endangered.

Brody objects strenuously. An appeal to attitudes fails to yield criteria that will enable us to distinguish between correct responses and incorrect ones: "appeals to what is a natural response seem to lead to hopelessly conflicting results" (p. 79). Therefore, in Brody's view, we must identify "a single objectively correct account of the criterion for humanity, one that makes no reference to the decisions and attitudes of human beings" (p. 79).

But if Brody rejects Wertheimer's analysis because it cannot be *proved* to be correct, how does this differ from his own reliance upon intuition?:

I cannot imagine a moral argument that is not ultimately founded in intuition. Whatever we do, we act with what we have, and there is no way of getting beyond it. I suppose that is what the psalmist had in mind when he sang, "It is He Who has made us, and not we ourselves" (p. 133).

If Brody claims privileged status for his intuitions, why should others not make the same claim for intuitions regarding the status of the fetus? If his intuitions are open to modification by reflected-upon experience, how does this differ from the type of reasoning advocated by Wertheimer? There is no reason, *a priori*, why, despite the apparent difference in grammar, the assertion "Jews (Blacks) are/are not human beings" should be treated differently from "One ought not kill Jews (Blacks; human beings) without justification." The reason Brody differs, it seems, is that he believes it possible to decide the question of humanity without recourse to intuition. Whether he can pull this off we must now examine for ourselves. If he cannot, we may be forced back upon some variant of Wertheimer's position.^{6a}

V

What does it mean that an object or a class has a certain property *essentially*? To some philosophers this is a pseudo-question: the claim that a certain property is essential to being a certain object or a member of a certain class is no more than a convention, a matter of how we choose to classify and name various objects. For others, essences have a legitimate metaphysical status: one speaks of an object having a property essentially if that object has the property in every possible world. If these views are correct, determining the essence of humanity will not be helpful in analyzing the abortion issue: in the first case, the status of the fetus would become a matter of convention; in the second, one would be forced back upon one's intuitions regarding humanity of the fetus, with the added burden of attempting to introduce logical necessity into one's determinations.

Fortunately, for him, Brody rejects these theories of essentialism. He objects to conventionalism on common-sense grounds (that, for example, a tree that has been burnt to the ground is no longer a tree, or that a cadaver is no longer a human being, are not matters of convention); he argues the inferiority of modal logic theories of essentialism⁷ on technical grounds. This leaves him free to develop his own account of essences, which he applies to the abortion problem.

Brody's view is rooted in the classic Aristotelian doctrine of substance. An object, according to Brody, has a property essentially if it has that property and could not lose it without going out of existence. A genius may lose his intellectual abilities without going out of existence; it is the same man only now he is a moron. Intellectual abilities, then, are essential to being a genius (by definition), but the genius has these abilities accidentally, in the technical sense, since he can lose them without going out of existence. If the genius is ground up by a meat-processing machine, we do not say, "That genius is no longer a genius" but rather "That genius is no longer."

Brody proceeds to define "natural kind," which is "a set of objects each of which has a certain property necessarily (with the proviso that nothing else has that property)" (p. 98). The

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set of morons is not a natural kind, since one may cease being a moron without ceasing to exist. The set of trees is a natural kind, since a tree that ceases to be a tree ceases to exist.

Now, says Brody, human beings all have the property of "being human"; nothing else does. Human beings have this property essentially, since no human being could stop being human without ceasing to exist: one could not (logically) survive ceasing to be human. When does a man cease to be human? When he dies. However, if for example, he experiences amnesia, or his loss of memory is irrevocable, he has not gone out of existence.

So a human being goes out of existence when he stops being human, being human is therefore an essential property of every human being, and humanity is a natural kind (p. 100).

The next step is to define death or those properties essential to being human. Here Brody cites two prevalent theories of death: the irreparable cessation of brain function, and the more traditional stringent view when brain, heart, lungs have all ceased to function naturally.

Utilizing these criteria, one concludes that there is only one property which is essential to humanity, namely the possession of a brain (or according to the second view: a brain or heart or lung) that has not suffered an irreparable cessation of function (p. 108). Ergo a fetus possessing a brain (or a heart, if one depends on the second theory) that has not ceased to function irreparably, is a human being, since by having the properties essential to being human, it has fulfilled the sufficient condition for membership in the natural kind humanity.

Neither criterion, to be sure, yields a precise moment at which the fetus becomes human. While brain function begins about the end of the sixth week, one may require brain function complex enough to support movement, which could push the date up to the third month. Heart function may also be an ambiguous concept, and may vary from occasional contractions as early as the first fortnite to functional completeness after seven weeks.

After this time, according to Brody, abortion is the unjustified taking of human life. Before this time, it is not. Nonetheless

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Brody is unsure of the situation before this time, since the fetus may have some status other than full humanity that would prohibit its destruction: it may be wrong to destroy potential human life; or the fetus might have a status similar to that of non-human creatures—to destroy an embryo might be comparable to unthinkingly shooting a dog.⁸

VI

How does Brody's position stand up to examination? Well, first we must distinguish several different elements in his argument:

1. An account of the meaning of the term "essential property."
2. A justification of the *use* of the term "essential property" in certain contexts. This is not the same as (1); here the concern is not for the meaning of the term, but for its application.
3. The identification of death with the human being's going out of existence.
4. The definition of death.
5. The application of the whole argument to the abortion problem.

Let us assume the correctness of Brody's theory concerning the meaning of the terminology related to essences, and focus on its use in daily life. A car is insured and then painted or the engine is changed—it will still be insured. If, however, it is turned back into sheet metal and a new car is then made, the policy will not cover the new car. "It's not the same car," the insurance man will claim, chucklingly. What if it became technically feasible, at a reasonable cost, to flatten out a car and re-manufacture it? It seems to me that, once this solution to the parking crisis became common, people would no more speak of the reconstituted car as a different car than they would call a man rising from sleep a different man. Insurance policies would be interpreted differently, and those slightly silly (or Buberian) owners who give their cars names could commune unconfused with Annabel and Faith. A substantial change, in Brody's terms, would now occur if the car were flattened and the reconstitution process irreparably damaged. The *meaning* of the concept of essential change would remain the same, but its *application* would be dif-

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ferent, depending on the human ramifications of something being a car. One might perhaps maintain the old definition of the "same car" by insisting that when a car is flattened it ceases to exist, and the entity that persists is the "type" of that car, so that cars come and go, each one belonging to the same type; but most people would not normally talk that way—it would be like speaking of men dying each time they went to sleep, with some man-type persisting, of which the individual men are representations. We may conclude from this that while the determination that some object has essential properties may not be arbitrary, our perception of essential properties may depend upon our existential relationship with the object.

Moreover, something may go out of existence from one perspective but not from another, a difficulty of which Brody is cognizant:⁹

I am not also saying that no part of him continues to exist. His body exists for some time after his death, and in some views what is called the soul does as well. But the human being has gone out of existence (p. 100).

What justifies Brody's insistence on this specific identification of "human being"? I don't know that it derives clearly from ordinary language. Presumably Brody means that human beings lose their legal and moral rights at death. But legal status may be a matter of convention: a rational legislative body may determine that the wives of all octogenarians be declared legal widows and inherit from their husbands, without violating the metaphysics of substance. If Brody appeals to moral status (e.g., natural rights), he argues in a circle: an object has a moral status because it is a human being; we don't call it a human being because of its predetermined moral status.

Brody apparently is not concerned with this problem because there seems to be a consensus about human beings going out of existence and the definition of death. This presumes that the accepted definition of death indeed determines the moment when an individual need not be treated as a human being. How can we know this? As Rabbi J. D. Bleich has argued in this journal:

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Determination of time of death, in so far as it is more than a mere exercise in semantics, is essentially a theological and moral problem, not a medical or scientific one.¹⁰

And probably not, for the same reason, a matter of logical categories and metaphysical definitions.

Let us assume, however, that one of Brody's two definitions of death is acceptable, can he infer from the definition of death that the definition of humanity be applied to the fetus? Brody would have us believe that this step is uncomplicated: in the critical ward, we judge a man human until certain organs conk out; conversely, we should consider the fetus human when those organs begin functioning. The logic of this inference is impeccable. Unfortunately, the premise of the argument—the definition of death—has been formulated misleadingly.

Observe: Brody has defined humanity (in opposition to death) as the possession of a functioning brain (heart, etc.) and then argued that possession of a functioning brain is a criterion for the humanity of the fetus. In fact, however, the dying human being not only has a brain, but *has had* a brain that did support independent human life before his present coma; the fetus has not. Brody would argue that this difference is morally irrelevant. I suspect it *is* relevant: one of the important ways in which the human world differs from the inorganic is that human beings are partially defined by what they have been.

VII

One major difficulty underlies all of these objections: *Brody has argued for the sanctity of fetal life without establishing the sanctity of human life.* Were he to explain why regular human life cannot be taken without justification, we could then inquire whether these reasons apply to fetal life, as well; were he to indicate those features of humanity which justify its special status, we could then examine fetal life for these features. Those writers whose arbitrariness Brody rejects, have at least perceived the necessity of justifying the fetus's right to life by showing that the fetus possesses characteristics that are *morally relevant* to its having title to the sanctity of human life.

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To say that Brody *intuits* the sanctity of human life will not do. One may *intuit* the rightness or wrongness of actions, the sanctity of human beings, etc. But how? If Brody had intuitive knowledge that the *fetus* possesses the sanctity of human life, the entire discussion would be superfluous. If Brody *intuits* the sanctity of "regular" human life, but is unsure about the fetus, he must articulate those features of humanity which are worthy of being granted "humanity" in the honorific, obligation-begetting, sense. To define "human being" in purely metaphysical-biological terms, as he does, would make sense only if he *intuits* the *proposition*: "All human beings have sanctity-of-human-life" and then proceeds to ask "What is a human life?": I do not know that one would *intuit* in that way.

There is a good, profound reason why Brody does not isolate the features that make human life worthwhile. The reason is that it is very difficult to define worthwhileness or value with regard to human life. We cannot identify human worth with intellect or capacity to love or physical achievement, for we ascribe human worth to persons devoid of these attributes. Happiness or virtue do not make humanity worthwhile being, for few of us are happy or good. The most worthwhile human existence is usually some great suffering, often lived without even the satisfactions of certain accomplishment or the smugness of virtue. Old honored Yeats, smiling at the schoolchildren, "sixty or more winters on [his] head," wondered what youthful mother, seeing what awaited him, would think her son

A compensation for the pang of his birth,
Or the uncertainty of his setting forth.

That the worthwhileness of human life cannot be assigned an unambiguous value is, of course, a thorn in the flesh of utilitarianism, compounded by the corresponding difficulty in assigning a positive or negative value to non-being.¹¹ The utilitarian is forced to assume that to be a human being is a benefit so great that it outweighs both the painless nullity of non-being and the pleasures of those who would benefit from one's death: otherwise, utilitarians would be obliged to relax the strict views gen-

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erally held about the immorality of murder. That the worthwhileness of human existence cannot be evaluated within the utilitarian calculus does more than undermine utilitarianism; the ambiguity in attempting to determine the value of human life questions our deepest feelings about our existence. Our ambivalence about this ambiguity is at the root of much self-contradictory behavior on the part of the *Zeitgeist*: when an individual decides to do away with himself, the world tells him that life will make him happy ("You have everything to live for."); on the other hand, when it is suggested that a mother's rejection will cause an unwanted fetus to develop into an unhappy child, the same world gives the fetus even less of a voice than it gives the candidate for suicide, only this time the verdict is thumbs down. That the same individuals often embrace both positions must indicate a very deep insecurity about the value and meaning of existence (or alternatively, a belief that a potentially negative attitude on the part of a mother more surely determines the negative value of a life than the articulations of a desperate adult—a strange notion in the age of general parental impotence).

Because of such considerations, it is difficult to situate questions of a "to be or not to be" sort within any stable scale of values. While it is fairly obvious in what sense it may be said that pleasure is better than pain, or success better than failure, it is not clear that to live is better than not to live in the same sense: this is part of the meaning of Nietzsche's epigram. At the ultimate spiritual level, this is perhaps the basic philosophical problem confronting the individual: is it better for man that he was created, or is it better that he not have been created? At the level of social ethics, however, it must be assumed that human existence is worthwhile (if not, society would have no justification to continue). This does not mean that, from the standpoint of a secular social ethic, one must impose belief in the blessedness of existence, as some psychological engineers would wish. It does mean that, *ceteris paribus*, we must consider being a human being a benefit: we may not randomly kill human beings (including fetuses, if they are human beings) simply because their existence doesn't seem to benefit anyone else, their happiness does not meet our standards for the way people should

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be happy, and, once painlessly dead, they will not object to remaining non-existent.

Because of the ambiguities and ambivalences surrounding the notion that "being is preferable to non-being" one cannot directly appeal to the qualities that make human life worthwhile—one may need to resort to the biological-metaphysical definition of "human being." Remember, however, that the inextricability of "worthwhileness of human life" from humanity does not *necessarily* make these categories coextensive.

Brody's arguments for the humanity of the fetus from the brain-wave stage on do not prove his position, as they are open to objections of varying strength at several points. He does, however, succeed in making his opinion *reasonable*. In this situation, Wertheimer's option must remain open, that the ontological status of the fetus cannot be determined philosophically, but that true opinion may possibly be attained through further sensitization of our intuitions and rational analysis, within which one may include that of Brody.

VIII

At this point we are ready to examine the data offered by *Halakhah*. To what extent can Brody's, or some other philosopher's, analysis adequately articulate the Torah-position? If not, must we submit to the existence of a gap between what we accept as true ethics and what can be justified within the modern ethical framework? Must we, alternatively, place the Torah's laws on abortion in a separate category from the imperatives of ethics, just as we do not place, let us say, the laws of *kashrut* and the laws of *geneivah* in the same category?

It is not my intention to survey the significant *halakhic* literature on abortion; to do so would considerably expand this paper—how much so one may judge by consulting the several fine discussions already available in English.¹² I should like instead to adumbrate certain aspects of that literature that are relevant to the formation of a philosophical view of abortion with the aim of clarifying the relationship between the two approaches, and, if possible or necessary, renovating our previous philosophical conclusions.

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There are four theses of Brody with regard to which it may be important to contrast the data of *halakhah* and Jewish belief:

1. First Ontological Doctrine: The fetus is not a human being before the brain-wave stage (for which we may substitute "forty days").
2. Second Ontological Doctrine: After forty days the fetus is a human being.
3. Normative Doctrine: If the fetus is a human being, it is to be treated like individuals who are indubitably human beings: to kill it is to take human life.
4. Principle of Action: The fetus is *not* doing an action endangering the mother's life even if its continued existence does endanger the mother's life: the fetus does not have the status of pursuer in such a case.

First, let us examine material relevant to the first two theses together: can we point to some fetal ontology asserted, entailed, presupposed, by normative Jewish belief? There are, to be sure, many *amoraic* statements describing vividly the spiritual life of the fetus: Jacob and Esau struggling in the womb,¹³ for example, or when the fetus becomes eligible for the World to Come,¹⁴ or when the *neshamah* enters the body.¹⁵ It is not at all clear, however, that these *aggadic* discussions are relevant to the legal status of the fetus. There are the usual problems involved in the application of *aggadah* to *halakhah*, plus an uncertainty as to the congruence between the concepts discussed by *Hazzal* in the *aggadic* contexts and the terms employed by *halakhah* (e.g., does the *neshamah* entering the body make the fetus a *nefesh* or an *adam*?¹⁶). These numerous statements are germane to the subject, but cannot be thought of as an ontological framework within which the abortion issue is to be analyzed.

It has been maintained, however, that the technical term *Ubbar Yerekh Immo*—the fetus is part of the mother, does imply a position with regard to abortion. This position has generally been rejected by Talmudists. To begin with, as E. G. Elinson has recently pointed out,^{16a} the absence of any explicit reference to the principle in the context of abortion militates against reading that thesis into the Talmudic discussion. The Talmud discusses this principle with regard to more mundane questions such as the right of a fetus to acquire property or the ownership

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of an embryo found inside a purchased animal. It would appear then, that the principle merely asserts that fetus does not constitute a separate "juridical personality."¹⁷ Several modern scholars, from Zechariah Frankel^{17a} to Aptowitzer^{17b} have judged the disagreement whether the fetus is *Yerekh Immo* or not, to be a fundamental metaphysical question. Rabbinic statements implying that abortion is not murder are identified with the view that the fetus is part of the mother. Statements on the wrongness of abortion are not assimilated to other statements, but attributed to a more stringent approach, according to which the fetus is not part of the mother, but an independent (ergo fully human) being. Those rabbis who believe that the fetus is not part of the mother may now be recruited alongside the Septuagint, Philo, possibly Josephus, to represent an extreme anti-abortion platform within Talmudic Judaism. The novel interpretations of Tannaitic views occasioned by this position have been criticized by scholars.

One classical analysis of this term with regard to abortion, by the Ran,¹⁸ does not substantiate the Frankel-Aptowitzer thesis. Discussing the law¹⁹ that one may abort the fetus of a woman condemned to death, to spare her disgrace, Ran suggests two explanations:

1. The fetus is part of the mother; therefore we have no compunctions about aborting.
2. The fetus is an independent entity but the mother's disgrace takes precedence.

Both views appear to make sense only on the assumption that the fetus is not a full-fledged human being.

Thus we cannot point with confidence to any unified normative Jewish metaphysics of the fetus that would support Brody's position. If anything, the case of the condemned woman implies that the fetus is not a full-fledged human being.²⁰

IX

Let us now examine Brody's two theses concerning fetal ontology: that the fetus is not a human being before the fortieth day

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(corresponding to Brody's brain and/or heart criteria) is suggested in rabbinic literature. The operative phrase: "It is only water" (*maya b'alma*) appears in the Talmud in other contexts only,²¹ but the application to abortion has been made by some recent halakhists. The phrase itself would strongly suggest that, whatever the legal implications might be, the fetus cannot be considered a human being at this stage. This leaves one with several options: one might ignore the distinction completely as far as abortion is concerned; one might permit abortion during the first forty days; or one might prohibit abortion even during the first forty days, but give a different reason for the pre-forty prohibition than for the post-forty prohibition. This last possibility is in fact maintained by the late R. I. Y. Unterman.²²

It is not difficult to introduce these distinctions within Brody's philosophical framework. While Brody clearly believes the pre-forty day fetus is not a human being, he leaves open the possibility that before forty days abortion may still be morally wrong for other reasons (destruction of potential human life; wanton destruction of living beings, etc.) other than the taking of actual human life.

The difference in the nature of the prohibition would have several practical implications. R. Unterman, for example, exempts Noahides from any prohibition before forty days, because the obligation to sustain *potential* human life, or to be fruitful and multiply, does not apply to Noahides. Within Brody's philosophical view, the severe limitations on abortion even to save the mother's life would, of course, be set aside. It would also appear that, following the basic trend of R. Unterman's logic, there would be no room for legal penalties during the first forty days, within a secular social contract (since the abortion would be a "private" offense against religion and/or morality, comparable to contraception or failure to reproduce, rather than to homicide).

X

The Second Ontological Doctrine, though, flies in the face of Halakhah. No source can be found to equate the mature unborn

fetus with the already born infant. We find universal agreement that the life of the mother takes precedence over that of the fetus.²³ How can this be squared with Brody's insistence on the full humanity of the fetus, which he is willing to follow through consistently in his strict judgment of life-death conflicts between mother and fetus?

There are several available options:

a. The fetus is a human being, fully protected by the law of homicide. His prospects for survival, however, are dubious. For this reason his status is inferior to that of the mother. In effect, because we are not sure he'll make it, every threatening of the mother's life comes under the nothing-to-lose situation: if we permit the mother to die, it is still quite possible that the fetus will die as well, and it is possible that doing nothing will not save either. This apparently is the position of R. Eliyahu Mizrahi.²⁴ Such a view would force revision of Brody's strict ruling on saving the mother's life but would retain his philosophical argument intact. Nothing would prevent the state from inflicting non-capital punishment on those who engage in non-life saving abortions, especially as advances in medicine would lower the likelihood of the fetus not surviving.

b. The fetus is a human being, as Brody had argued, and this includes having a human being's right to life, from a moral point of view. Halakhah, however, grants a special dispensation to the human community to kill the fetus in order to save the mother. Such a stance is theoretically possible, given that Halakhah may permit actions that remain morally objectionable (e.g., *Yefat Toar*), but nevertheless slightly bizarre: I do not believe offhand that we would tell a woman: "You may have an abortion to save your life, but the Torah would rather you sacrificed yourself."²⁵ This view is adequate to Brody's philosophy. It would again, however, curtail his legal program: in the face of the Torah's permission and the strong opposition of many members of society, it would be difficult to maintain that abortion to save the life of the mother should be legally prohibited.

c. Brody's analysis pertains to the Noahide laws of abortion, which equate abortion with homicide. This position involves two questionable assumptions:

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1. That differences between Noahide laws and laws pertaining to Jews derive from ontological differences—the Noahide fetus is a human being and the Jewish fetus is not!
2. That abortion to save the life of a Noahide mother is prohibited (a *mahloket*).

Brody could maintain his legal conclusions according to this option in Gentile countries (though it would be very difficult to explain why), only at the risk of placing Jewish citizens in an agonizing bind.

d. Brody is correct in granting the fetus full humanity. He is wrong in stating that the fetus is not a pursuer. Abortion to save the life of the mother is based on the idea of pursuit. This requires investigation of Brody's Principle of Action (for which, see below). This view pretty much does away with Brody's ban on abortion to save the life of the mother.

The following possibilities involve the rejection of Brody's second thesis regarding the ontological status of the fetus:

e. The halakhic prohibition of abortion is based on solicitude for the well-being of the mother. The transgression involved in abortion would be a tort (*habbalah*). This position seems to exist in the Responsa of *Maharit*²⁶ (Joseph of Trani), but does not belong to the mainstream of rabbinic writing. The status of the fetus would, in this opinion, be ignored completely. The view of *Maharit* is, however, susceptible to possible reinterpretation which would assimilate it to (f).

f. On this view, the fetus is not a full-fledged human being. This does not mean that he is not a human being at all. Thus to commit abortion is to take human life without justification and would be wrong. At the same time the fetus is not equal to adult human beings; his mother's life takes precedence over his. Contemporary writers on abortion like to use the Rogachover's phrase "similar to murder,"²⁷ i.e., an attenuated kind of murder. This approach is consistent with the halakhot and also fits the rabbinic terminology regarding the fetus (e.g., the non-use of *nefesh* to describe the fetus).

If this analysis is accepted we must abandon Brody's view that the fetus becomes a full-fledged human being at approximately forty days after conception.²⁸ We would arrive at the fol-

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lowing ontological chronology of ontogeny:

1. Before forty days—the fetus is not a human being.
2. After forty days—the fetus is human, but not a full-fledged human being.
3. At birth—the fetus is equal to other human beings with regard to his right to life.

If, as I believe, (f) is the most adequate statement in terms of Halakhah, these categories are probably correct, not merely within the *halakhic* frame of reference, but *within the realm of moral discourse as well*. For to deny this involves either (i) Brody's belief that the fetus is fully human coupled with interpretations (b) or (c) of the relationship between Halakhah and philosophical ethics; /or (ii) that the fetus is not a human being between forty days and birth and therefore has no right to life, contrary to (f)'s halakhic reasoning which tied the prohibition of abortion to that of murder; /or (iii) that the fetus is human but that fetal life (and human life) is "sacred," from a general ethical perspective only by virtue of a quality of worthwhileness or utility for lack of which the fetus may be aborted (this view was rejected in *Section VII* of this essay).

If we accept the Torah position as relevant from the viewpoint of general ethics, we are prepared to say that it is a reasonable position. If we wish to make it the basis for legislation in the secular state, we must maintain that it is strongly reasonable, that it is probable. Wertheimer's conception (*Section IV* above) may be helpful here. One would argue that the fetus gradually becomes human over a period of time. It is certainly not unreasonable to accept forty days as the point of humanization and birth as full humanity, on the basis of religious tradition. Brody's arguments for the fortieth day may be powerful enough to make this view probable rather than merely reasonable.

Similarly the general intuitive acceptance of birth as the beginning of a radically new stage of human existence (witness the general horror of infanticide) would tend to give very strong support to birth as the beginning of full-fledged humanity.

I should like to submit the argument in the last paragraph as a *respectable presentation of the Torah understanding of the*

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*philosophical issues involved in the abortion problem, which could be used to justify state prohibition of certain cases of abortion.*²⁹

XI

From our previous discussions we may conclude that the third Brody thesis we are now examining, which I have called the Normative Doctrine, is quite likely true. We have only modified it by revising the antecedents: the fetus is human, but not as human as other humans. The only theological question derives from the contrast between Noahide law and laws pertaining to Jews. Noahide abortion is a capital crime. This is not in itself disturbing, as it would only instantiate the principle "Noahides—the warning of their punishment means the warning of death," i.e., death is the only penalty provided by Noahide law. It has been suggested,³⁰ however, that the actual structure of the laws differs in the case of Noahides, so that, for example, one might not be able to abort to save the mother's life. According to one reason for this putative stringency,³¹ one arrives at the view that the Torah attributes full humanity to the Gentile fetus but not to the Jew. Such a view would compel a radical reconsideration of our entire analysis. Fortunately this outcome may be avoided, even if one accepts this severe *psak*; one may equate the ontological status of the Noahide fetus with that of the Jewish fetus, but simply hold that the Torah commands us to disregard the ontological gap between fetus and adult in the case of Noahides.³²

XII

Brody's application of the *principle of action* to the fetus does not touch directly upon the great issues connected with abortion. Nonetheless, one's views on this question determine one important practical aspect of fetal status—is the fetus a pursuer?—and halakhic sources have their own perspective on the matter.

R. Huna's statement³³ quoted by Brody in support of his contention that the fetus is not a pursuer refers to the process of birth itself—the emergent infant cannot be killed to save the

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mother, for it is not a pursuer: Heaven is pursuing her. What of the period before birth? Offhand it does not matter whether the fetus is or is not a pursuer: as we have explained, the Talmud (but not Brody) does not regard the fetus as a full-fledged human being; this is the view of Rashi. Maimonides,³⁴ however, in speaking of the right to abort to save the life of the pregnant mother, specifically uses the fetus's status as pursuer to justify the abortion.

It would appear then that Maimonides, at least, does believe that the fetus is performing an action of pursuit. I will not cite all the attempts to reconcile Maimonides' view with R. Huna (there are over a dozen), except to note that most of these discussions assume that Maimonides rejects Brody's principle of action. Furthermore, R. Hisda (who in the Babylonian *sugya* serves as R. Huna's interlocutor) offers, in the parallel *Yerushalmi*³⁵ discussion, a different formulation of the reason for the irrelevance of the pursuer-concept during the birth process: "it is not clear who is pursuing whom," i.e., whether the mother is pursuing the child or vice versa. This reasoning again presupposes that the fetus is doing an action.

The aforementioned disceptations indicate that what constitutes an action is a complicated question. To me it seems clear that when a fetus thrashes about causing internal damage, it certainly is doing an action. There are, however, more difficult cases: if a fetus releases a poison into the mother's bloodstream, I don't know that it can be compared to, let us say, an individual who is about to (unintentionally) drop poison in the water supply. Or to go a step further: if (the example is fictional), for some reason, the existence of the fetus interferes with the efficacy of the mother's cancer medication, one can hardly accuse the fetus of doing an action that harms the mother—it is merely rendering the drug useless. If one requires pursuit on the part of the fetus as a condition for abortion, these distinctions may become a matter of life and death. The details, however, are beyond the scope of this article.³⁶

XIII

Having come to the conclusion that legislation against some

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cases of abortion is justified, we must now indicate some of the problems that arise when we try to translate this judgment into practice.

Some of these are halakhic in nature. On several practical issues, we cannot count on a consensus of rabbinic decision. These areas involve primarily questions about the kind of danger to the mother that would justify abortion³⁷ (e.g., is danger to the mother's sanity equivalent to a threat to her life?). It would be unreasonable to prohibit legally, on moral grounds, an act of abortion that would be permitted by a mainstream halakhic decisor. On the other hand, it is not always obvious what constitutes a lenient ruling within the mainstream of halakhic development: does a theoretical suggestion count as a mainstream ruling (e.g., R. Jacob Emden's startling suggestion about abortion for bastards)?;³⁸ what if the *Posek* later changed his mind?³⁹ To formulate the desirable limits of legislation would thus require the services of rabbis who are not only competent to rule on these issues but also able to formulate the acceptable range of decision. That such cooperation need be relied upon is not the least Utopian aspect of the project.

It goes without saying that I am neglecting here the purely legal problems. These matters require the attention of lawyers. Insofar as the mother's state of health would be important in deciding to permit abortion, one would envisage some sort of committee containing a physician or physicians. It is obvious that such committees, in the present moral atmosphere, would be almost uniformly liberal without limit. The mere existence of legal limits on abortion would, however, decrease the number of immoral abortions and maintain awareness of the moral dimension of the abortion decision.

It goes without saying that the right of the individual physician to refrain from performing legal abortions should be supported, so that a surgeon who believes a specific abortion to be immoral or merely anti-halakhic, need not participate.⁴⁰ From a democratic point of view, the same right should be extended to Catholics who believe in humanity from the moment of conception.

XIV

But is it worth the trouble? If abortion, however immoral it may be, is not identical with murder, if many honorable men and women do not regard it as immoral (however mistaken they might be), and we do not necessarily consider them reprehensible for holding the belief that the fetus is not a human being and/or does not have the right to life⁴¹—is it worthwhile to make an issue of abortion? Is it necessary to risk dividing well-meaning individuals by advocating legal restrictions on abortion?

For Brody, of course, abortion is murder, and, while honest controversy may justify a lower penalty for abortion than for homicide, it cannot justify indifference. Similarly one may argue that even if abortion is not full-fledged murder, it is nevertheless kindred enough to mandate unflagging vigilance.

The concern underlying this position is deeper than the straightforward moral problem regarding the fetus. The decision about the fetus, if the fetus is human (or as we maintained, human but not fully a human being), has a bearing—as is argued, albeit shrilly, by the militant anti-abortionists—on our attitude towards humanity in general.

To speak of large-scale progress or regression in matters of the spirit is foolhardy, and those who would like us to think of ourselves as morally advanced may point to the significant achievements of Blacks and women in breaking through the stereotypes and unjust discrimination of centuries. Despite this, however, one cannot call our century, or our generation, a good one for the cause of human rights. If the powerful oppressed have wrung respect from the world, it is (one sometimes feels) only to join them in dehumanizing the powerless still more.

Not too many generations ago, birth control was urged by its advocates on the grounds that contraception would prevent the horrors of abortion. Why have the intuitions of so many altered? Science? To the open-minded observer our new knowledge would, if anything, strengthen our identification with the fetus as human. That this shift has occurred at a time of decline in respect for the rights of the powerless, and cheapened regard for

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life in general (Who can rationalize the world's response to terrorism?), should give pause to the most ardent and intellectually honest supporter of abortion.

For those of us who believe that abortion is morally wrong, the contemporary breakdown of the concept of human dignity is all the more reason to make a stand. Each of the erosions of human right to life may be separate from the others: war, terror, violence, euthanasia, abortion, neglect, indifference. Some, in themselves, may conceivably be justified morally (abortion, for its philosophical supporters; certain aspects of patient dehumanization within the medical establishment). But all of them, regardless of their etiology and moral structure, contribute to the same general disease.

Those who are inclined to downplay the likelihood of abortion leading to even more extreme violation of human rights should note that no defense of abortion on demand has been produced that would fail to justify infanticide as well.⁴² Even if such a theory were to be presented, the very difficulty of devising it should lead us to suspect that at the psychological level liberalized abortion would tend to further cheapen regard for human life in general.

There is another fear that guides our desire not to involve ourselves. To take the part of the fetus also means to take responsibility for it. If we wish the benefit of the fetus, we must continue our solicitude into its infancy. If we tell women not to abort, we may not display indifference to their fate and the difficulties they experience in doing the moral thing. This concern is voiced several times by Brody:

If all the moral tenderness that rises in some quarters so self-righteously against abortion had been turned in decades past to an alleviation of those conditions that have driven so many individuals to seek abortions, I think we should find the crucial judgment we now must make much easier. Any individual or group that now *only* opposes abortion seems to me immediately suspect (p. 2).

Whether the intellectual concern articulated by Brody will bear fruit in the society at large, and specifically in the Orthodox Jewish world, both here and in Israel, may depend upon our

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courage to risk the responsibilities entailed by a responsible opposition to abortion. Whatever criticisms and flaws we may have discovered in Brody's argument, whether from the philosophical or theological viewpoints, one cannot deny that his contribution to the discussion is both valuable, and, in the present academic milieu, courageous.

XV

It would be unrealistic of me to ignore, as we so often do, the major practical problem facing those of us who are convinced that legislation limiting abortion should be adopted and preserved. I mean our fear to be conspicuous, to crucify ourselves to unpopular positions. Once we have penetrated the liberal defense, that abortion is purely a theological issue, unsuitable for the agenda of the pluralistic state; once we have concluded that there are not sufficiently strong reasons for a policy of benign neglect—we must examine seriously the bedrock reluctance.

Perhaps our reluctance derives from doubts about our motivation in seeking to impose moral categories. Puritanism in its worst form may express itself in moralistic opposition to abortion: if a woman has indulged in sexual pleasure and—heaven forbid—enjoyed it, one chortles inwardly at her having to pay the “inevitable” consequences. It is often suggested that men are incapable of judging correctly a woman's burden.

The only solution to this challenge is thorough self-examination. That our judgment and intuitions are usually clouded by twisted motives does not exempt us from making moral judgment: instead we must strive to understand these factors, and in understanding partially liberate ourselves. This applies also to the motivations of pro-abortionists.

NOTES

1. See R. Meir Simhah of Dvinsk's *Meshekh Hokhmah* (and of *Mishpatim*), but cf. *Or Sameah*, end of Hil. *Melakhim*.

2. “The Morality of Abortion” in *Moral Problems* (ed. J. Rachels, Harper & Row, 2nd Edition, 1975). Ramsey has also discussed these issues in his contribution to *The Morality of Abortion* (ed. J. Noonan, Harvard University Press, 1971).

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- 2a. See Section XII, below.
3. "A Defense of Abortion," *Philosophy and Public Affairs*, vol. 1, no. 1; reprinted in Rachels and several other anthologies.
4. One could conjure up difficult cases: e.g., if a woman refrains from contraception or very early abortion on religious grounds and then loses her faith. In such a case there is a genuine acquiescence albeit under what she now considers a misapprehension. It would be difficult to justify an abortion in these circumstances. Life is not an Indian gift.
5. It is often felt that criteria based upon our perception of the fetus, as opposed to the fetus's biological development, are outright irrelevant. I don't see that this must be so.
6. "Understanding the Abortion Argument," *Philosophy and Public Affairs*, vol. 1, no. 1; reprinted in Rachels.
- 6a. See Section X.
7. See Brody's Appendix and the literature cited on p. 157, notes 6, 9, 10, 11.
8. Brody (p. 155, n. 11) raises, appropriately, the problem of animal rights. The article he cites ("Morality and Religion Reconsidered" in Brody's anthology *Philosophy of Religion: The Analytic Approach* (Prentice Hall, 1974) is an interesting return to the Euthyphro-problem, but does not serve within a not explicitly theistic moral philosophy. One sometimes has the feeling more philosophers proselytize for animal rights than for fetal rights: see recently Peter Singer's *Animal Liberation* (New York Review, 1975) and *Animal Rights and Human Obligation* (Englewood, 1976). The eschatological nature of the animal rights movement was already recognized by Rav Kuk—but this is a matter for another time.
9. This methodological point with regard to halakhic conceptions of death is brought out by G. J. Blidstein in a note in *HaDarom*, 37 (5733), pp. 73-75.
10. "Establishing Criteria of Death," *TRADITION*, vol. 13, 3, p. 93. See also the statements of Dr. Henry Beecher, cited by Bleich on p. 92.
11. The problems raised by the application of utilitarian calculus to death and non-being have been recently dissected in Richard Henson "Utilitarianism and the Wrongness of Killing," *Philosophical Review*, vol. 80.
12. F. Rosner: "The Jewish Attitude Towards Abortion," *TRADITION*, vol. 10, 2; J. D. Bleich: "Abortion in Halakhic Literature," *TRADITION*, vol. 10, 2; D. Feldman: *Marital Relations, Birth Control and Abortion in Jewish Law* (Schocken, 1974).
13. *Bereshit Rabba*, 63:6.
14. *Sanhedrin* 110b.
15. *Sanhedrin* 91b; see Feldman's discussion pp. 271-5.
16. The analysis of these terms in relation to the fetus occurs primarily with regard to desecration of Shabbat to save the fetal life. See Netziv *Ha'amek Shealah* (on *Dvarim*) 177, and *Meshekh Hokhmah* (beginning of *Vayakhel*).
- 16a. "*HaUbbar baHalakhah*," *Sinai*, vol. 66, pp. 20-49.
17. The phrase is derived from Y. Miklishanski's "*Mishpat haUbbar*" now available in *Arakhim veHa'arakhot* (Jerusalem-Tel Aviv, 1975) Vol. I.
- 17a. *MGWJ* vol. 8 (1859), pp. 400f.

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- 17b. "Status of the Fetus in Jewish Criminal Law" *Sinai*, vol. 4 (Hebrew)
18. Commentary on Alfasi for *Hullin* 58a.
19. *Arakhin* 7a. Rashi, *ad. loc.* adopts Ran's first approach (see R. Akiva Eger's note to Mishnah *Arakhin* 1, 4).
20. At least one recent writer has interpreted the principle of *Ubbar Yerekh Immo* to imply total obliviousness to the rights or interests of the fetus in Talmudic literature. If this were correct the opposing view, that the fetus is not part of the mother, should lead to a radically different view of abortion, and raises the problems already faced by scholars like Urbach (*Hazal*, Jerusalem, 1969, pp. 214ff. and notes 90 and 99) in dismissing Aptowitzer. The tendency of this writer is to argue that we should permit abortion for the benefit of the fetus. Whether her contention is valid should be examined independently of the *Ubbar Yerekh Immo* concept.
21. *Niddah* 30a; *Yevamot* 69b. See Bleich's discussion, pp. 82ff.
22. "On Preserving the Life of the Fetus," *Noam*, Vol. 6 (Hebrew).
23. *Ahilot* 7:6; *Sanhedrin* 72b.
24. Commentary on Rashi, Exodus 21:12 and 22. One could reinterpret his view in conformity to (f): the uncertain prospects of the unborn might objectively constitute the fetus as a separate category. Cf. R. David Hoffman *Responsa Melammed leHoil*, no. 69.
25. Cf. R. M. Y. Zweig "On Abortion," *Noam*, Vol. 7 (Hebrew) on this possibility.
26. No. 97 and no. 99. One may argue that the tort involved may be directed against the fetus as well. On this, and on the right of an individual to submit willingly to a tort, see Bleich, pp. 79f. and note 57.
27. Res. *Zofnat Pa'aneah*, no. 59 (Dvinsk Edition, 1935). Elinson describes this position with the interesting but curious phrase "half a *shiur* of murder."
28. In an earlier version of chapter 1 (*American Philosophical Quarterly*, April 1973). Brody recognizes, in a closing note, that the Talmud does not attribute full humanity to the fetus, but gives no explanation.
- Noonan, in "An Almost Absolute Value in History" (in Noonan: *The Morality of Abortion*) attributes an ensoulment by stages view, to St. Augustine and Aquinas. The modern Catholic doctrine of full ensoulment at conception is apparently influenced by Cartesian dualism. In addition, the dogma of Immaculate Conception tends to imply and reinforce the belief that there is humanity from the beginning.
29. Sections XIII-XV will deal with some of the practical problems of this position.
30. See *Tosafot Sanhedrin* 59a, s.v. *leha*.
31. See Bleich, pp. 105ff. The theoretical possibilities are outlined in *Minhat Hinukh* no. 296. See also the interesting reasoning on punishment in *Gur Aryeh* to Exodus 21:12.
32. See quotation from Resp. *Koah Shor* in Feldman, p. 261.
33. *Sanhedrin* 72b.
34. Laws of Homicide, 1, 9. See interpretations listed by Feldman, pp. 276-281.
35. *Sanhedrin*, end of ch. 8 and parallels. Indeed, it is possible Rambam

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brought this back into the Bavli concept.

36. See sources quoted by Bleich, pp. 89f.

37. Rosner discusses these areas with an eye to practical decision-making.

38. *She'elat Yaavetz*, no. 43. See Bleich's discussion, pp. 102ff.

39. E.g., R. Benzion Uzziel, as noted by Bleich, pp. 95f.

40. It is interesting to note that R. Yehiel Weinberg responded to a physician who feared legal difficulty if he failed to cooperate with the then abortionist law of Britain.

41. The Rogachover (*Ibid.*) did not consider a woman's having engaged in abortion sufficient reason for her husband to divorce her!

42. Michael Tooley, "Abortion and Infanticide," *Philosophy and Public Affairs*, vol. 2, advocates liberalized infanticide. Most arguments against him have tended to attack postnatal abortion on pragmatic utilitarian grounds. R. Hare's "Abortion and the Golden Rule," *Philosophy and Public Affairs*, vol. 4 is basically no exception. The root of the problem is that one requires "personhood" to guarantee right to life, and not mere humanity, and the infant does not exhibit "personhood" until he has progressed substantially from his stage of development at birth. F. C. Wade, in "Potentiality in the Abortion Discussion" (*Review of Metaphysics*, 29, 2), argues that humanity itself confers prima facie right to life, because it represents potential personhood, where potentiality is understood in an active way. Socialization presupposes, rather than defining, personhood, according to Wade: one treats an infant in a certain way because one already views him as a person. Nor can personhood be regarded as a quality acquired by the fetus-infant at some stage (since, as Strawson argues, persons have states of consciousness, whereas qualities don't; it could be countered, however, that personhood may be viewed, not as a quality-acquired, but as a performance). In addition Wade's article stresses the role of the body as "intentional arc" (phrase borrowed from Merleau-Ponty); to the point that a definition of personhood in advanced intellectual terms, à la Tooley, reflects an unsophisticated philosophical anthropology. Cf. also T. Engelhardt Jr.: "The Ontology of Abortion" (*Ethics*, 84).