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# On Finding Yourself in a State of Nature: A Kantian Account of Abortion and Voluntary Motherhood

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**On Finding Yourself in a State of Nature:  
A Kantian Account of Abortion and Voluntary Motherhood**  
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**Abstract**

In this essay, I draw on Kant’s legal philosophy in order to defend the right to voluntary motherhood by way of abortion at any stage of pregnancy as an essential feature of women’s basic rights. By developing the distinction between innate and acquired right in Kant’s legal philosophy, I argue that the viability standard in US law (as established in *Planned Parenthood v. Casey*) misunderstands the nature of embodied right. Our body is the site of innate right; it is the means through which we can set and pursue ends in the world. The law, therefore, cannot adjudicate the relationship *between* the will and the body: it cannot require us to allow our bodies to be used against our will. By comparing unwanted pregnancy to sexual assault, I problematize the notion that consent to pregnancy, like consent to sex, can ever be conclusive. I examine Kant’s own account of unwanted pregnancy, in which he describes mother and child finding themselves “in a state of nature” in order to rethink the status of the fetus in law, and I argue that we should understand the fetus’s right to life as provisional, rather than as enforceable by law.

**Keywords:** abortion, voluntary motherhood, feminist philosophy, Kant, Kantian philosophy, embodied right, innate right, viability, fetus, feticide, infanticide, epistemic authority, philosophy of law, doctrine of right

**Introduction: You May Find Yourself Chained to a Hospital Bed**

When Laura Pemberton opted to deliver her second baby at home after a hospital refused her a VBAC (vaginal birth after C-section), the sheriff came to her house. While she was in active labor, he put her in custody, strapping her legs together and driving her across town to the hospital, where a hearing on her right to refuse a C-section was hastily convened (Paltrow and Flavin 2013, 306–307). The judge ordered a C-section; later, when Pemberton sued the hospital, the judge denied her claim, arguing that “whatever the scope of Ms. Pemberton’s personal

constitutional rights in this situation, they clearly did not outweigh the interests of the State of Florida in preserving the life of the unborn child.”<sup>1</sup>

Pemberton’s story illustrates the ways in which the debate over abortion demands a broader reckoning about reproductive justice and women’s rights to their bodies. The legal framework of abortion in the United States, which organizes itself around viability, frames the right to an abortion as a “balancing test” between a woman’s right to privacy and the state’s interest in protecting the life of the fetus. Viability—or the point at which a fetus might survive outside its mother—operates as the tipping point beyond which a pregnant woman’s privacy and right to her own body may be superseded by the state in a variety of ways. The legal requirement that state interventions should not create an “undue burden”<sup>2</sup> for a woman are undermined not only by legal restrictions to abortion access but by the emergence of fetal protection laws in a majority of US states (National Conference of State Legislatures 2018). These laws often extend the reach of child abuse and homicide laws, defining the fetus as a “person” within the meaning of those statutes.<sup>3</sup> But in many cases, the law may override a woman’s choices about her own body in a myriad of ways, whether, as in the case of Tamara Loertscher in Wisconsin, she is forcibly hospitalized because of a suspicion of drug use (Glenza 2014), or in the case of Samantha Burton in Florida, she is sentenced to court-ordered bed rest after a ruptured membrane (Cantor 2012). In these cases, the state may provide an attorney for a fetus, effectively requiring women to testify against the fetus inside them (Glenza 2014; Paltrow and Flavin 2013). Even as fetal protection laws often explicitly exempt the pregnant woman from prosecution for homicide, they frame pregnant women’s bodies as terrain into which the law can and must reach in order to protect fetal life, undermining women’s basic rights in significant ways.<sup>4</sup>

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<sup>1</sup> *Pemberton v. Tallahassee Memorial Regional Medical*, 66 F. Supp. 2d 1247 (N.D. Fla. 1999).

<sup>2</sup> This legal standard was strengthened in the 2016 case *Whole Woman’s Health v. Hellerstedt* (579 U.S. \_\_\_\_ (2016)).

<sup>3</sup> E.g., Code of Alabama 13a.6.1: “(3) PERSON. The term, when referring to the victim of a criminal homicide or assault, means a human being, including an unborn child in utero at any stage of development, regardless of viability.” See <http://www.ncsl.org/research/health/fetal-homicide-state-laws.aspx>.

<sup>4</sup> In Pemberton’s case, the judge agreed that her First, Fourth, and Fourteenth Amendment rights were at stake; he denied, however, her claim that the forced C-section had violated her Eighth Amendment rights by way of “cruel and unusual punishment.” In 2009, the Eighth Circuit Court found that shackling a woman in labor did constitute a violation of Eighth amendment rights (Griggs 2011, 252; *Nelson v. Correctional Medical Facilities*, 583 F.3d 522 (8th Circuit 2009)). In a more

In this paper, I will defend the right to voluntary motherhood<sup>5</sup> by way of an abortion at any stage of pregnancy as an essential feature of women’s basic rights. I argue that we need a better account of the embodied experience of pregnancy, as well as a more rigorous account of the relationship between our bodies and our exercise of rights. To do this, I propose subjecting pregnancy to the same scrutiny as other instances of embodied consent, such as the evolving legal frameworks around sexual consent. To think about pregnancy in these terms, however, we need to push back against an abortion discourse that demonizes and infantilizes pregnant women and to instead insist that pregnant women are rational, autonomous beings with epistemic authority over their own embodied experience. I will show that the tools we need to make these moves can be found in Kant’s legal philosophy, where he considers a story about unwanted pregnancy that offers insight into what a Kantian account of abortion might be.

In drawing on Kant to make this argument, I am pushing back on interpretations of Kant’s legal philosophy as it pertains to abortion, which have either rigorously argued against abortion (Gensler 1986; Hare 1989) or offered an argument in line with the viability standard.<sup>6</sup> I will argue that a Kantian account of bodily autonomy and embodied consent requires us to defend a right to abortion at any stage of pregnancy, and that this right must be particularly rigorously defended when women find themselves in unjust circumstances, such as lack of access to reproductive freedom, coercive sexual and marital relationships, poverty, or lack of

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recent case, Judge Brett Kavanaugh—now a Supreme Court justice—held that being forced to undergo an unwanted pregnancy or sent back to a hostile country in which abortions are illegal in order to obtain an abortion was not an “undue burden” on a 17-year-old immigrant in detention (*Garza v. Hargan*, 874 F.3d 735 (D.C. Circuit 2017)). These arguments point to a consistent denial of the ways that pregnancy and birth are often used as disciplinary tactics against women—as a form of cruel and unusual punishment.

<sup>5</sup> I build on Angela Davis’s (2003) use of this term.

<sup>6</sup> The viability model has been defended by contemporary Kantians, who largely accept the competing rights framework on which it is based. Lina Papadaki (2012, 145) draws out the difficulties of prioritizing the rights of the woman and the fetus from a Kantian perspective. Helga Varden (2012, 44), who develops a Kantian defense of the legal right to an abortion, draws the line at viability, arguing that “the state can rightfully determine the time at which the embryo/fetus acquires some legal rights.” Varden argues that the state can set some point in pregnancy as the point at which the fetus is recognized as “a minimally acting human being” at that, beyond this point, legal restrictions on abortion are justified, provided that certain criteria of justice are met.

public support for family leave, childcare, and health care. In other words, in circumstances like ours, we have a particularly strict duty to protect the right to abortion.

I develop this account of the right to abortion in four moves. First, I examine how pregnant women are positioned in moral and legal debates about abortion, and develop a Kantian account of bodily autonomy in order to ground pregnant women's epistemic authority over the experience of pregnancy. Second, I show that this account of bodily autonomy is consistent with a Kantian account of embodied rights and embodied consent. Third, I explore Kant's treatment of the infanticidal mother and draw out the parallels between this case and contemporary abortion rights in order to develop a distinctly Kantian framework of reproductive rights in non-ideal conditions. Finally, I explore the implications of this non-ideal approach for contemporary abortion discourse, arguing that debates about the legality of abortion should more broadly engage the barbaric conditions of reproductive injustice.

### **I. Infanticide, Abortion, and Reason**

In a curious passage in *The Doctrine of Right*, Immanuel Kant suggests that an unmarried woman who finds herself pregnant might be permitted to kill her baby (Kant 1996, 6:335–337).<sup>7</sup> The passage is part of Kant's famous discussion of retributive punishment, where he argues that, for murderers, the death penalty is a categorical imperative: those who commit murder *must* die. But he then goes on to consider two instances of killing that might not warrant this ultimate punishment: the case of military officers killed in a duel, and the case of the unwed mother who commits infanticide (6:336). In both cases, Kant makes a striking claim: there is a sense in which these acts of killing take place outside the law, in a state of nature, and cannot therefore be called murder (6:336).

Kant's central concern in this strange passage is the limit of law. In imagining the dueling soldiers and infanticidal mother in a kind of pop-up state of nature, Kant admits that there are times when unjust social conditions place one, in a sense, beyond the justice dictated by law. The infanticidal mother, like the dueling soldiers, is caught between a barbaric social order and a rigid legal code. In this context, he's not arguing that infanticide—or abortion, for that matter—is not awful. It is. But he recognizes that the full grappling with what's at stake is simply not something the law can do. Only the woman can know the details of the predicament she finds herself in, and only she can make the terrible choice of how to proceed. Kant says

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<sup>7</sup> Throughout this article, I refer to Kant's works in the Prussian Academie pagination. All references to *The Doctrine of Right* refer to Mary Gregor's translation in *Kant: The Metaphysics of Morals* (Cambridge: Cambridge University Press, 1996).

that in the case of the infanticidal mother, “penal justice finds itself very much in a quandary,” so that the law must be “either cruel or indulgent” (6:336). Kant’s point is not that the infanticidal mother’s action is not criminal but that her choice is forced on her by unjust circumstances: a pregnancy against her will in a social order that will punish and ostracize her and her baby. Seen in this way, infanticide is not a moral problem faced by the mother alone but a problem of systemic social injustice, exacerbated by a rigid legal code. This recasting of the infanticidal woman as a victim of social injustice is, as Jennifer Uleman (2000, 174) has pointed out, a surprisingly compassionate twist on an old tale of demonization. Kant takes the monstrous woman intent on killing her baby and asks us to consider her as a rational agent committing a monstrous act because of a lack of alternatives. In embedding this choice within an imaginary, pop-up state of nature, he asserts the moral authority of the woman in the context of an unjust social order, arguing that she, and not the penal code, must determine the fate, and status, of the unwanted child.

This paper is not a defense of infanticide, and I will draw a strict distinction between the status of the fetus and the rights of the infant. Rather, I note how the eighteenth-century debate about infanticide mirrors our own obsession with abortion, and how Kant’s insistence on the rationality of the infanticidal mother’s choice is particularly noteworthy in the context of our contemporary debates over abortion, which frequently undermine pregnant women’s status as rational and moral agents. The trope of the irrational, evil, selfish woman, which animated eighteenth century discourse about infanticide, continues to shape twenty-first century abortion discourse; legal restrictions on abortion are often justified on the grounds that pregnant women’s presumed irrationality requires the intervention of the state. In 2007, for example, the Supreme Court upheld a ban on late-term abortions on the grounds that women often suffer from “abortion regret.”<sup>8</sup> The court argued—without any evidence whatsoever—that pregnant women’s emotional states were so fragile that doctors hesitated to fully explain the abortion procedure to them. The court held that without this information, women could not make informed decisions about their medical choices. Instead of requiring doctors to give women the information required to decide for themselves, the court banned the procedure. In making this argument, the court articulates the ways in which we do not consider pregnant women to be reasonable persons, capable of autonomously making informed medical decisions. The law is justified in limiting

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<sup>8</sup> “While we find no reliable data to measure the phenomenon, it seems unexceptionable to conclude some women come to regret their choice to abort the infant life they once created and sustained” (*Gonzales v. Carhart*, 550 U.S. 124 (2007), at 159).

women's choices, the argument goes, because pregnant women are incapable of making good, rational choices.<sup>9</sup>

The discourse around late-term abortion, like the eighteenth-century debate about infanticide, tends to assume that women who seek out these options do so for purely selfish reasons. In her seminal "In Defense of Abortion," Judith Jarvis Thomson (1971, 66) admits that it would be "indecent" for a woman to seek out an abortion in her seventh month of pregnancy merely to avoid postponing a trip abroad. When I have defended the right to late-term abortions, I am often offered objections that share this assumption: what about the woman in her third trimester who wants to smoke crack or commit suicide? What about the woman who plans to give up her child at birth, who has no concerns for its future well-being and who therefore drinks, smokes, and does cocaine throughout her third trimester? Or the woman who wants to have a third-trimester abortion so she can wear a form-fitting dress or compete in a reality show? The women in these examples are inconstant, irrational, indecent. They illustrate the ways in which, within abortion discourse, pregnant women—like the eighteenth-century infanticidal mother—are all potentially monstrous. Surely, the argument goes, there are no good reasons for carrying a pregnancy so far and then ending it. Surely there are no justifiable liberty claims that allow women to endanger the well-being of future children so far into pregnancy. Surely we need abortion restrictions just in case women are evil.

While I will argue that the Kantian framework has resources to respond to these objections,<sup>10</sup> I am concerned first with the damage done to the discourse around abortion that our insistence on foregrounding these imagined cases. In these objections, women—and not their circumstances—are irrational and evil. They are wantonly enjoying the "perks" of pregnancy and then aborting the fetus; they are abandoning their babies at birth and so abusing them in the womb; they are criminals, sluts, drug addicts, mentally ill, child abusers.<sup>11</sup> In this discussion, these are the cases that we get stuck on.

I want to argue against privileging this kind of objection and instead follow Kant's example in his depiction of the infanticidal mother: let us assume that most women who seek abortions are responsible, rational agents choosing in morally

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<sup>9</sup> For an analysis of how these arguments operate under the Trump administration, see Cauterucci (2018).

<sup>10</sup> See section II, where I argue that a Kantian account of law is concerned only with the form, and not with the end, of our choices.

<sup>11</sup> Take, for example, the rumored cases of "abortion-doping" when female Olympian runners would supposedly get pregnant and secure an abortion before an important race, so that the surge of hormones would enhance performance (Manninen 2014, 85).

complex circumstances. Let us assume that they are persons, with full lives, difficult choices, and competing priorities. Like Kant's infanticidal mother, women who seek abortions generally do so in difficult, if not impossible, circumstances, and the full range of complexities confronting them as they make this decision are more complex than a balancing test can incorporate. The moral questions in any given case of abortion are rarely actually about whether or not the fetus is understood to be a person or about whether the woman therefore has obligations to that fetus. To frame the issue in this way is to relegate the woman and her fetus to a false moral bubble in order to make moral equivalence easier. In reality, the majority of women (59 percent) in the US who seek abortions already have children, and nearly half of those who do live in conditions of poverty (Guttmacher Institute 2016). Abortion is rarely a purely moral problem and is almost always embedded in a matrix of systemic social injustices, which force women to make the best possible choice in impossible circumstances.

While many moral defenses of abortion recognize these complexities, they tend to create their own balancing act between the rights of the pregnant woman and the duty to recognize the humanity of the fetus. Kantian moral defenses of abortion defend the pregnant woman's right to bodily autonomy and to be treated as an end in herself rather than a means to support the fetus, while at the same time holding that the fetus deserves respect as nascent form of human life (Denis 2007; Feldman 1998; Manninen 2014; Papadaki 2012; Wood 1998). In these formulations, many cases of abortion will be morally permissible, provided that the woman has the right sorts of reasons for seeking an abortion and that she does so while respecting the value of the fetus's life.<sup>12</sup> These accounts emphasize pregnant women's autonomy and capacity for making moral decisions in complex circumstances, and map an account of abortions that are morally permissible, and sometimes morally required, given women's embodied experience and moral duties to themselves.<sup>13</sup> But they also tend to follow Thomson in introducing distinctions

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<sup>12</sup> Manninen (2014, 85) puts it as follows: "If a woman does choose to abort, it is a decision that should be reached with care, judiciousness, and ideally in situations where the woman has other moral obligations that parenthood would render it difficult or impossible to fulfill (for example, if having another child would compromise one's capacity to care for existing children, or to continue in one's educational endeavors)."

<sup>13</sup> Susan Feldman (1998) argues that if we take women—and by, extension, pregnancy—to be the normal, rather than the exceptional case, then it will often be the case that women's duties to themselves outweigh their duties of beneficence to the fetus. I agree with Feldman's moral defense of abortion but will develop here a legal, rather than a moral, defense.



between those abortions that are permissible and those that are “indecent.” While these are explicitly moral arguments, their assumption that some abortions are morally indecent is potential fodder for an abortion discourse eager to cast women as indecent, selfish, and immoral. They also tend to accept some variation of the viability standard, holding that at some point, the fetus deserves moral respect or legal protection, and that beyond this point, the state is justified in restricting access to abortion, regardless of the incursions on women’s embodied rights this may involve.

In this paper, I will take a different approach, following Kant’s legal reasoning more closely than his moral arguments. That is to say, my concern here is not to defend a moral account of abortion but to emphasize the ways in which abortion law ought to respect the moral dilemmas of pregnancy and the moral and epistemic authority of pregnant women in that domain. In making this distinction between moral and legal questions, I will follow Kant in delineating a clear distinction between external freedom, which is the domain of law, and internal freedom, which is the terrain of morality. Kant is explicit that the law cannot interrogate reasons but must satisfy itself with an analysis of our external actions, particularly as they impact others (6:239–241). I will argue that in taking the fetus to be amongst the “others” who can be affected by my action, US law has misconstrued the nature of external freedom in a way that is deeply invasive and distinctly gendered. By clarifying the relationship between the body and the possibility of external freedom, and drawing on both Kant’s account of embodied consent and his story about the infanticidal mother and the “pop-up” state of nature, I will emphasize that respect for women’s autonomy requires that the reasons one seeks an abortion need not be intelligible from the perspective of law.

## **II. The Limits of Embodied Consent**

The right to an abortion, in the US, is grounded on the right to privacy, which is then balanced, under the viability standard, with the state’s interest in protecting the fetus.<sup>14</sup> I will argue that this framing misunderstands the nature of our relationship to our body and argue that there are other areas of law, like current modifications in sexual assault law, that are beginning to get a better grasp on how we should think about our relationship to our bodies, and our bodies’ relationship to our rights. In making these arguments, I will draw on Kant’s account of the relationship between our basic rights and the necessity of law. In this section, I offer a general account of embodied rights in Kant and show how they should apply to

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<sup>14</sup> *Planned Parenthood v. Casey*, 505 U.S. 833 (1992).

pregnancy and abortion; in the next section, I take up a Kantian argument that applies to abortion and the status of the fetus in law.<sup>15</sup>

Kant's account of the purpose and scope of law rests on the distinction between innate right and private right—a distinction that, I will argue, is collapsed in the way in which current US law understands privacy. Innate right refers to the natural right to freedom we are born with (6:237–238); private right, on the other hand, refers to the acquired rights through which we are able to extend our capacity for action in the world (6:246). We can acquire property, rights against other persons (contract), and rights to other persons (as in marriage); the state is necessary to assure those possessive rights. In a state of nature, we find ourselves competing with others for rights and resources; we therefore have a duty to enter a rightful state in order to both assure our possessive rights and to subject them to principles of distributive justice that ensure that we will each have what we need to be able to enact our external freedom (6:237; Varden 2010). To be a rights-bearing entity, in the Kantian sense, is to be a being whose external freedom is reciprocally defined against the external freedom of others and coercively defended by law (6:231).

But the law has a different relation to innate right than it does to private rights. If possessive rights are the reason we need the state, innate right is the reason we have standing in the state. Our body is the site of innate right in the same way that the world is the site of private right, but the ways in which we extend our external freedom out into the world are structurally different from the way innate right relies on embodiment to make external freedom possible. Thus, to say that agents must be embodied in order to enact rights is not to say that agents have rights *over* their bodies, as if their bodies were some kind of property they owned. To say that our bodies are our property in this way would suggest that our bodies could be sold, or leased, the way that other property can be. For Kant, to give someone else rights to my body is to give them rights to my *self*, since my person and my body cannot be separated (6:270). As we will see, this is why there can be no right to slavery (6:359), for example, or prostitution, since I cannot sell my body without selling myself (6:279).

My right to my body is an innate right, rather than a possessive right, and this produces a different set of rules governing our embodied rights. And so it is unintelligible, from a Kantian perspective, to say that a pregnant woman *houses* a

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<sup>15</sup> I am also offering this analysis of Kant as an intervention in reproductive justice frameworks, which have critiqued the privacy framework for reproductive rights in favor of a human rights framework; as my argument will show, if we take human rights frameworks to inherit the Kantian distinction between innate and possessive right, they may be more useful in grounding reproductive justice. For an overview of the reproductive justice framework, see Ross (2006, 2017).

fetus, in the sense that she has leased out some part of herself, or even that she *hosts* the fetus inside her: her body is simply not a thing to be disposed of in this way (6:270). Her body is the means through which she can act in the world, and therefore, part of what it means to say that she is a rights-bearing entity is that she has an absolute right to her body as an extension of her will. Or, to put it differently, the law can have no jurisdiction to adjudicate the relationship *between* a woman and her body, since that relation is the foundation of her status as a rights-bearing agent.

It is easy to see, however, why we make this category mistake with regards to pregnancy. The problem of private right arises in a state of nature only when there is more than one person competing over those rights (6:237; Varden 2008, 15). As long as a state of nature is inhabited by only one person, there is no need for justice, since we have no need for adjudicating rights in such a condition: we need law only when we are assessing competing and conflicting claims. Because our legal framework conceives pregnancy as such an instance of competing and conflicting claims, it assumes that those rights must be adjudicated, as in private right. But this misunderstands the kinds of rights involved: the right a woman has over her body is not a property right, a right over something to which someone can have a competing claim. It is an innate right: the right *to herself*. The very idea that women's interests should be "balanced" with the state's interest in protecting the life of the fetus fosters this category confusion, which denies women the domain of innate right. (And of course, this is easy to do, since we are used to thinking of women's bodies as not entirely their own, given the legacies of *couverture*, patriarchal marriage, and women's legal passivity.) In doing so, it denies her the innate right to external freedom, or the right to enact her will through her body.

Innate right has two features: equality, which means that I cannot be bound to another in ways that they cannot be bound to me, and the right to be my own master, which is the right to choose actions guided by my own will (6:237–238). Both of these requirements hinge on the unity of the will and the body, on the necessity of understanding the body as the mechanism of the will. This unity has important implications for the limits of consent. The Kantian model of consent is complicated in instances of consent to make use of one's body. Consent consists in granting someone else a right against me: if I consent to sell you my car, then you have a right against me, not a right to my car (6:275). If the deal goes south, then you may be able to sue me for breach of contract, but you wouldn't automatically have a right to the car. Only property right gives you a right to the car; contract merely gives you the right to expect me to fulfill my word. Likewise, when I agree to paint a house for someone, or to give them a massage, what I grant them is not a right to my body, as a kind of property, but a right against me as a person. The right they acquire is a right to my labor, which unites my will and my body to fulfill the terms of the contract. If I

were to agree to become someone's slave, what I would grant them is a direct right to make use of my body as their will dictates. In doing so, I would mistake my right to my body for a property right which could be transferred to another person, and I would unilaterally bind myself to their will, making myself a mere object at their disposal. Such a promise, Kant tells us, is incoherent and impossible: it conflicts with innate right and conflates innate right with acquired right (6:359).

The nature of embodied rights is perhaps clearest, however, in Kant's account of sex, which seems to entail giving someone a right to my *body* rather than merely a right against my *will* (6:278). Because sex is an embodied right in this way, Kant argues that no sexual contract can be conclusive. If a prostitute sells her body for money, this can't give her client a right to use her body against her will: if she changes her mind, he has no rights to her body, since she can't give rights to her body to someone else in this way. The law can't enforce this contract; it can't adjudicate one person's right to make use of someone else's body against their will, since no such right exists (6:279).<sup>16</sup>

Kant solves the sex problem by saying that we can only rightfully have sex in marriage, whereby we surrender ourselves wholly to each other, and we take each other's ends as our own, so that we get to make use of each other's bodies in the bargain (6:278). Contemporary Kantians have argued that this outlaws marital rape: if we have to take one another's ends as our own, we can't force ourselves on each other against the other's will (Varden 2006, 205). And the will is, of course, subject to change. So I may have said yes to sex twenty minutes ago, when we got started, and I may now prefer to sleep. And so, as my ends change, *even if we're already having sex*, you are required to respect those ends and take them as your own.

If this sounds familiar, it's because this is indeed the reasoning that now informs much sexual assault law, from the "no means no" variety, that assumes I can rescind consent at any point in an encounter, to the affirmative consent variety, which means that I must actively consent throughout a sexual encounter. Our increasingly rigorous attention to the provisional nature of sexual consent rests on an understanding of embodied rights that are strikingly similar to Kant's understanding of the relationship between the body and the will: you cannot have a right to my body that conflicts with my will.<sup>17</sup> Embodied consent is thus never conclusive: you can have a right to my body *until I say otherwise*. This means that the law's relationship to these acts of consent are very different from its relationship

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<sup>16</sup> Lori Watson's (2014) examination of the contradictions that arise if we treat sex work as work produces similar insights.

<sup>17</sup> I think that this lays the groundwork for a Kantian account of sexual consent that goes beyond the affirmative consent model and towards what Michelle Anderson (2005, 1401) calls the "negotiation model."

to other kinds of agreements, such as those that organize possessive rights. In agreements concerning possessive rights, the law can take my consent to be conclusive and can hold me accountable in various ways for going back on my word; it can ensure that, if I rescind my consent, no one's rights are violated. But it can play no such role when the consent in question deals with innate right, since innate right is not dictated by the law in this way. If I agree to sell you my car, and you pay me, and then I refuse to hand it over, the law can decide that the car—or the money—rightfully belongs to you. But if I agree to have sex with you and then change my mind, the law can't decide that you have a right to my body because the law doesn't have jurisdiction over my body in this way (6:278). My body isn't the law's to distribute. The right to my body can be dictated only by my will and never by the law; the law must instead assume and protect the unity of my body and will as the basis of my external freedom.<sup>18</sup>

But one of the curious features of affirmative, provisional consent is that we seem to assume that it holds for sexual use of my body but not for the repercussions of sex—namely, not for pregnancy. In other words, the law assumes that I can still say no at any point during sex, but that at some point during pregnancy, I lose the right to refuse to allow my body to be used against my will.<sup>19</sup> Under the viability standard,

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<sup>18</sup> Built into this framework for embodied right is a powerful argument against the assumption that men, or the state, can be entitled to a woman's body. For example, this account of embodied right is a useful counterargument to recent moves to argue that sex—and women's bodies—can be redistributed by the state. See Douthat (2018) and Bowles (2018).

<sup>19</sup> The Court was quite explicit about this in *Planned Parenthood v. Casey* (505 U.S. 833 (1992), at 870), where they argued that “in some broad sense it might be said that a woman who fails to act before viability has consented to the State's intervention on behalf of the developing child.” The idea that the right to consent ends when sex ends shows up frequently in abortion debates, perhaps most famously in Joel Feinberg's (2002) framework for determining when women are responsible for their pregnancies. There, the assumption is that any act of sexual intercourse, even with proper use of effective contraception, operates as consent to carry a child to term. Even more troublingly, Feinberg argues (779) that if the male partner fails to use contraception properly, the woman is on the hook for his contraceptive failure: even without knowing he was careless about birth control, she has consented to bear his child by having sex with him. But the kind of passive consent described in *Casey* and in Feinberg's framework is very much at odds with the critique of passive consent emerging in affirmative consent law and in public discourse in the wake of the recent Stanford swimmer rape case.

the provisional consent I grant during sex is transformed into conclusive consent to have my body made use of during pregnancy.

Given Kant's understanding of the relationship between the body and the will, however, no such conclusive consent is possible—at any point in pregnancy. My consent to make use of my body is always provisional. It can be rescinded, like consent during sex, at any point. This means that pregnancy, like sex, operates as an extended domain of choice. In sexual assault law, this means that sex requires a kind of heightened scrutiny in order to ensure that consent is occurring. But in sexual assault law, that domain of heightened protection need last, at most, only a few hours. In the case of pregnancy, that heightened domain of choice lasts for months.<sup>20</sup>

Because embodied consent can never be conclusive, the right to abortion cannot hinge on an analysis of how one becomes pregnant. The comparison to sexual consent helps to illustrate this in some classic arguments about the permissibility of abortion. In constructing her famous violinist example, Judith Jarvis Thomson (1971, 48–50) builds a case for the right to an abortion in cases where a woman finds herself pregnant through no fault of her own: imagine, she says, that you wake up one morning and find that the Society of Music Lovers have kidnapped you and connected you as a life support system for a famous violinist; he requires your support for 9 months, during which time, to unplug him would be to kill him. The example is meant to generate the insight that the violinist's right to life cannot obligate you to remain on bed rest to keep him alive, though doing so may make one a "good samaritan" (62). But in organizing itself around a kidnapping, it operates as an analogy to cases of pregnancy by rape. Thomson goes on to say that there are numerous ways I can find myself pregnant against my will; I may take precautions, analogous to putting bars on the windows to deter burglars and may yet still find myself pregnant (59). If I have not consented to be pregnant, Thomson asks, or if I have consented to a pregnancy but not to one that will endanger my life or health, then do I have the right to an abortion? The question is not then whether *any*

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<sup>20</sup> One objection to this argument is that the sexual consent and pregnancy cases are not analogous, since the sexual consent case concerns a specific other person claiming rights to my body, whereas the fetus cannot be conceived as an "assailant" in this way. This, we should note, is inconsistent with recent moves to give the fetus standing in law: if the fetus is to be construed as a "person," subject to the protections of law, then it should be subject to the *limits* placed on persons' rights to one another, as well. But the standing of the fetus is irrelevant here: whether or not we accept the idea that the fetus can have direct standing in law, the state, acting *on behalf of* the fetus, places itself in the position analogous to the assailant, claiming a right to the pregnant woman's body against her will.

woman might have the right to an abortion but whether one has the right to say no to something one did not give informed consent to. We may apply this question of consent to sexual assault cases. Thomson's article tracks cases where I have woken up to someone penetrating me—in which case I am being raped and clearly have the right to say no—and cases like Emma Sulkowicz's (2014), who consented to vaginal intercourse only to find herself pinned to a bed, having anal intercourse while she protested. Thomson's cases thus treat consent as conclusive, assuming that the relevant question is whether a woman can be said to have consented to her pregnancy *in the first place*, not whether she has the ongoing right to protect her body from being used against her will.

In another seminal paper on abortion, Joel Feinberg (2002, 779) ties the right to abortion to this question of culpability in pregnancy. Feinberg imagines a spectrum, ranging from cases where a woman becomes pregnant through rape and is not culpable for the pregnancy, to cases where she sought out the pregnancy and is therefore responsible. In between, Feinberg (780) distinguishes between cases where properly used contraception fails (in which case the woman is not responsible for the pregnancy) and cases where contraception has been improperly used (in which case she is—even if the fault is her partner's). In framing the question in this way, he ties the right to abortion to some conception of consent but assumes both that negligence constitutes consent and that consent to pregnancy is conclusive. In the sexual consent analogy, Feinberg's argument amounts to saying that falling asleep at a party constitutes consent to sex, and that having consented to sex in this way, one no longer has the right to say no.<sup>21</sup>

I think there are several further insights generated by this comparison between sexual consent and consent to pregnancy. One is that we have come to understand sex without consent, or past the point where consent has been rescinded, as a grave violation. We should understand pregnancy without, or beyond, consent as a similar kind of visceral violation, one that subjects women to a deep sense of invasion, physical and psychological hardship, and extreme pain and trauma, to say nothing of the deep moral burden of bearing a child one does not wish to raise. And we should, likewise, reframe the experience of labor against one's will as one of the most extreme forms of torture a person can be subjected to.

A second insight is that, just as I need not give reasons to say “no” to sex—even if it is already underway—my right to say “no” to pregnancy cannot hinge on an

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<sup>21</sup> Susan Feldman (1998, 271) argues that we cannot treat consent to sex as consent to pregnancy, any more than we can treat smoking as consent to cancer: because C is a possible consequence of A, it does not follow that when I consent to A, I consent to C. I think Feldman is right in this objection, but in making it, she assumes that consent to pregnancy is conclusive.

evaluation of my reasons for doing so. This does not mean, morally speaking, that I might not have better or worse reasons for terminating a sexual encounter or a pregnancy, but it does mean that these reasons are beyond the law's jurisdiction.<sup>22</sup> This does not preclude the possibility of something like Thomson's (1971, 62) "good samaritan" argument. I may, sometimes, continue to have sex with my partner beyond the point when doing so serves my ends, if I have taken his ends as my own. Sometimes, we may have, or continue, sex for reasons of duty or compassion; this willingness to offer ourselves out of moral feeling when doing so requires little enough sacrifice is something like Thomson's good samaritan argument. We may find we have a duty to our partner to have sex we do not want for our own reasons; we may feel that we can carry a pregnancy to term at no great costs to ourselves. But the calculation of those costs in cases of embodied consent belong entirely to the person who inhabits the body in question, who is the only person in the position to determine the relationship between the body and the will, and to decide when the former is being used against the latter in a manner that constitutes a violation or triggers a duty to resist being used in this way. Or, to put it differently, in respecting my right to my body as a species of innate right, rather than private right, the law must grant me epistemic authority over my body, recognizing that I am in a unique epistemic position to determine when my body is being used against my will in a manner that constitutes a violation or triggers a duty to resist being used in this way.<sup>23</sup>

Thus, when the law seeks to offer protection to the fetus through feticide law, as has increasingly been the case in US law, it violates this distinction between innate and private right. In holding that viability marks the point at which women conclusively consent to pregnancy, the law creates a condition in which a woman's body can be used against her will, which undermines her innate right to the unity of her body and her will: it undermines her right to her person.<sup>24</sup> In doing so, it misunderstands the law's relationship to our choices: the law should concern itself not with evaluating the *end* one chooses but with the *form* of the choice (Kant 1996, 6:230). So, I may want to buy something from you in order to make a profit. The law can protect my right to make the transaction, but it cannot protect my desired end:

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<sup>22</sup> Like Susan Feldman (1998), I think the protection of the right to make this choice is preferable to a consequentialist defense of abortion, which may open the door to arguments for outlawing abortion for consequentialist reasons.

<sup>23</sup> Cf. Carol Hay (2013), whose argument does not examine pregnancy but whose framework extends to many forms of embodied and reproductive oppression.

<sup>24</sup> It is critical to note that the *law*, rather than the *fetus*, violates the woman's innate right in these cases.



it can't protect my right to make a profit (6:230).<sup>25</sup> Much as the law can protect my right to consent to sex, but not—contrary to the wishes of the incel community—the right to *have* sex, the law can protect the *form* of the pregnant woman's choice: she may continue her pregnancy or not. But it cannot protect the end of that choice, whatever it may be. A healthy baby is an end of pregnancy, but she may miscarry late in her pregnancy or have complications during birth. The state can have a duty to support fetal health, through prenatal care and labor protections for pregnant women, but when it does so, it places value on the woman's innate right, which includes a right to choose pregnancy, rather than on its interests in protecting life.<sup>26</sup>

In protecting the *form*, rather than the *end*, of a woman's reproductive choices, the state must recognize pregnancy, like sex, as a domain of *ongoing* embodied choice. The distinction is illustrated by the legislative response to a feticide case in Colorado in 2015, when Michelle Wilkins, who was 7 months pregnant, responded to an ad on Craigslist for baby clothes and went to the home of Dynel Lane, where Lane attacked Wilkins and cut out her unborn fetus (Healy 2015).<sup>27</sup> Lane was charged under Colorado's Violence Against Pregnant Women Act and faced up to 120 years in prison for unlawful termination of a pregnancy; the state legislature, frustrated that she could not be charged with murder, proposed a fetal personhood law that was rejected by voters. The VAPW law, which explicitly offers heightened physical protection to pregnant women, identifies the woman, rather than the fetus, as the victim of violent crime, emphasizing that the protection offered by the law should not be interpreted as granting any legal status to the fetus,

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<sup>25</sup> Kant argues that external freedom is concerned with the matter of choice and not with a *mere wish* (6:230). I think we badly misunderstand the nature of pregnancy if we frame the fetus as a *mere wish*: as long as she is gestating the fetus, the woman is actively pregnant, actively supporting the development of the fetus, and thus actively engaged in the question of consent to have her body used in this way.

<sup>26</sup> Understanding pregnancy and labor in terms of the form of a woman's choice, rather than its end, also provides a better legal grounding for protecting women through the process of birth, both by prioritizing women's right to choose their birth plan and by protecting women from obstetric assault.

<sup>27</sup> Leaving Wilkins bleeding on the floor, Lane took the fetus to an emergency room, claimed it as her own, and told her husband she had had a miscarriage. Wilkins managed to call 911 and survived the attack; Lane was charged with attempted first-degree murder and, under Colorado's Violence Against Pregnant Women Act, with first-degree unlawful termination of a pregnancy and faces up to 120 years in prison. The VAPW, passed in 2013, distinguishes between harm caused to a pregnant woman by a third party, and cases of abortion, and explicitly denies that the fetus has any standing under the law. The fetal personhood bill was defeated in 2014.

and it explicitly protects women from being charged with harmful behavior with regards to their own pregnancy (Tuerkheimer, 2015). In emphasizing that an attack on pregnancy is both an attack on the woman and on *her commitment to her unborn child*—rather than an attack on the unborn child itself—the VAPW successfully protects the *form* of women’s reproductive freedom, while the defeated fetal personhood law would seek to protect the end of that choice. Other feticide laws, like the one under which Purvi Patel was charged with manslaughter for seeking an abortion and later miscarrying, directly protect the fetus, or the end of pregnancy (Bazelon 2015).<sup>28</sup> Both Patel and Wilkins lost their pregnancies, but in doing so, they were not equally wronged. In seeking out an abortion, Patel enacted her right to her own body; in having her body and pregnancy attacked, Wilkins’s right to her own body and to her pregnancy as a domain of choice were violated. A law that designates these cases as equal legal wrongs misunderstands the nature of one’s right to one’s own body, and mistakes the law’s duty to protect our right to set and pursue ends with a duty to protect those ends. Thus, the state is required to provide access to prenatal care and labor protections throughout pregnancy *and* the right to access a safe, legal abortion at any point in pregnancy.<sup>29</sup>

### III. Pregnancy and the State of Nature

I have defended the right to an abortion at any point in pregnancy as a necessary feature of innate right. But in doing so, I have said little about the standing of the fetus. To consider this, let us return to Kant’s infanticidal mother and the state of nature in which she apparently finds herself when contemplating her unwanted child. Kant offers this story as a complication to his theory of retributive punishment, wondering whether the law can duly punish the infanticidal mother or the dueling military officer, since their crimes are, in his terms, inspired by a desire to protect their own honor.

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<sup>28</sup> In July 2014, Patel went to an emergency room in South Bend, Indiana, where she said she had had a miscarriage; not knowing what to do with the fetus, she said she had wrapped it in a bag and put it in a dumpster. The doctor at the emergency room thought that her pregnancy had been quite far along and called the police to report Patel for child abuse; he later joined the police in the search for the fetus in a nearby dumpster. When texts were later discovered in which Patel told a friend she was ordering abortion-inducing medication online from China, she was charged with illegally terminating her pregnancy (Bazelon 2015).

<sup>29</sup> As Helga Varden (2012) has argued, ensuring that women can in fact make this choice will require not only that abortions be readily accessible but that they be affordable: to protect external freedom, the state may be required to subsidize abortions just as it is required to subsidize other health care for pregnant women.

In describing the dueling soldier and infanticidal mother as finding themselves “in a state of nature” (6:336), Kant likens their cases to what he calls “the right of necessity,” or the right to protect one’s right to life even if doing so involves violence against another who has done no harm (6:235). Kant argues (6:236) that “necessity has no law” because the law can impose no punishment greater than the threat to one’s own life.<sup>30</sup> The threat faced by the dueling soldier and infanticidal mother must, Kant suggests, be taken in the same spirit: these are threats to honor so severe that they constitute a threat to one’s *life chances*, so that killing in these cases constitutes a kind of self-defense. In making this claim, Kant recognizes that most women who become pregnant with an illegitimate child do so against their will and have few choices available to them in a social order that has no place for an illegitimate child or a “fallen” woman (Pascoe, 2011). Bearing an illegitimate child leaves her no place in the social order and thus few means to provide for her own survival or that of her child. In these conditions, the threat to her honor constitutes a subjective limit on external freedom: the challenges facing the unwed mother are so severe as to permanently undermine her capacity to set and pursue ends in the world.

This threat is so severe, on Kant’s account, that it invokes the right of necessity, placing the woman and her child in a state of nature, a condition in which their respective rights to life become merely provisional. Because her life chances are so threatened by this unwanted child, she will risk punishment to save herself from the conditions of poverty and abjection she would face as the mother of an illegitimate child. In this sense, Kant’s infanticidal mother finds herself in a predicament akin to that faced by women who seek dangerous, illegal abortions rather than bearing a child they do not want and cannot support (Stephens-Davidowitz 2016). Illegal abortion, like infanticide, tracks cases where coercive law cannot protect women from the threat to their life chances posed by an unwanted child. These actions, like self-defense on a sinking ship (6:235), arise because the threat to her life-chances is such that her own rights become provisional: she has found herself in a state of nature, which opens in the schism between coercive law and unjust social conditions. In this framing, it matters not whether the fetus is a person nor whether the fetus is an “innocent” person: the right of necessity grants that, in a state of nature, we are justified in defending ourselves even against innocent others. By refusing to protect women’s innate rights to their own bodies, the law treats those rights as merely provisional, and by placing those rights in

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<sup>30</sup> He says, “A penal law of this sort could not have the effect intended, since a threat of an ill that is still *uncertain* (death by judicial verdict) cannot outweigh the fear of an ill that is *certain* (drowning)” (6:235).

competition with those of the fetus, the state forces women into a state of nature, an unjust condition in which self-defense is necessary to protect one's rights.

But this is not the only way to understand the work that the state of nature is doing in Kant's argument. It also operates to explain the status of the fetus in law. Kant is clear that the illegitimate child has no automatic standing in the state: the mother would have to "smuggle" it in, as "contraband": to be born illegitimate is not merely to be born outside of marriage but outside the legal framework through which rights and recognition are granted (6:337; Pascoe 2011). The child is, in this sense, born outside the law, in a state of nature.<sup>31</sup> In such a condition, the child has only provisional rights, which are not subject to legal enforcement or protection.

This is not, as I have said, a defense of infanticide; Kant's distinction between the legal standing of legitimate and illegitimate children must be rejected. But the framework of provisional rights offered here provides a critical intervention to contemporary debate about the legal standing of the fetus. The state exists, on a Kantian account, to reciprocally enforce external freedom, grounded in innate right, protecting our respective capacities to set and pursue ends in the world (6:231). But the very idea of a fetus possessing external freedom is unintelligible on a Kantian account, since a fetus cannot set or pursue ends in the external world;<sup>32</sup> it exists not

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<sup>31</sup> Kant's emphasis on the distinction between legitimate and illegitimate children highlights the law's role in determining through what means new members of a community are formally recognized by the law. Since *Roe v. Wade* (410 U.S. 113 (1973)), birth has done this work in US Law. This is borne out by the concrete practices of granting legal recognition to infants when they are born: the date of birth is assigned to mark the identity of this new person, and it is at this point that one becomes eligible for the various benefits and protections of the law—it is at this point that one is granted a social security number, for example, with the potential benefits that go along with it. Despite the proliferation of feticide laws, there is no reasonable legal mechanism for formally recognizing a fetus as a rights-bearing person under law. The fetus's status as a legal entity is liminal in a manner similar to Kant's illegitimate child.

<sup>32</sup> A possible objection to my argument here is that Kant already establishes that children cannot independently set and pursue ends in the world, and thus argues that parents must act on behalf of children through parental rights (6:280–282). Parents must protect their children's *future* external freedom by caring for and educating them and taking their children's (future) ends as their own. One could argue that this relation already categorizes the relation between the pregnant woman and fetus, such that the woman must take their fetus's future ends as their own, and scholars who take this position generally cite Kant's comment that "there follows from *procreation* a duty to preserve and care for its offspring" (6:280). In this

in the world but in a woman's body. Viability claims tend to obscure this distinction, confusing the claim that a fetus *could be* viable outside the mother's womb with the notion that a fetus has rights *as if* it were outside the woman's womb, which it is not. The fetus is *by definition* inside the woman's womb; the unintelligibility of external freedom for a fetus places it outside the scope of the law.

Thus, the fetus exists, as it were, in a state of nature. This is not to designate a pregnant woman's body a wild space but to underscore the degree to which the unity of the will and the body is *prior* to law, not subject to the adjudication of law. In this sense, the body is a state of nature. But we rarely have to think of it this way, precisely because the problems of a state of nature arise only when competitions of rights arise: as long as only one person inhabits a state of nature, we need no conception of rights, since that person could lay claim to all things. Because the fetus's survival hinges on a claim to the woman's body, it asserts possessive rights to that body, as if in a state of nature. But like all claims to rights in a state of nature, these rights can only be provisional.

So, I think we can say that the fetus has a right to life, so long as we recognize this as a provisional claim made within a state of nature. The status of this right can be determined only by the woman, who has the sole epistemic authority to determine the standing of that right within her own body. It is up to her to decide if she has a duty to herself not to bring this child into the world, in order to retain her self-respect and agency in the world, and to protect her life chances. Or she may find that she has a duty to protect and provide for the child, regardless of its impact on her life. She may recognize the fetus as a beloved descendent whose ends she takes as her own. To say that this is her choice is to say that the provisional rights of the fetus are subject to the epistemic authority of the pregnant woman.

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case, the fetus's future external freedom could be weighed against the mother's embodied rights. But a passage just below this warns against this: Kant says that parents "cannot destroy their child as if he were something they had *made* (since a being endowed with freedom cannot be a product of this kind) or as if they were his property, nor can they even just abandon him to chance, since they have brought not merely a worldly being but a citizen of the world into a condition which cannot now be indifferent to them" (6:281). This double emphasis on the child as *worldly being* and *citizen of the world* suggests that Kant's understanding of children's rights must be tied to birth and to recognizable, embodied existence in the world. This reading, moreover, is consistent with the emphasis on external freedom throughout the passage on parental right: parents have a special duty to protect the external freedom of their children, because that external freedom is incomplete—not nonexistent, like that of the fetus.

To see what I mean, let us return to the feticide cases of Purvi Patel and Michelle Wilkins. Even if Patel and Wilkins were at exactly the same stage of pregnancy<sup>33</sup>, their respective losses would be very different. The fetus inside Wilkins was, *to Wilkins*, her future child, for whom she was procuring baby clothes. Wilkins's fetus had her consent to become a baby, which means that she was already behaving *as if* she had the same duties to the fetus that she would have to her future child. The moment at which a woman decides to treat the fetus inside her *as if* it were her future child need have nothing to do with viability or the advancement of pregnancy; for some women, a sense of obligation to respect the rights of the fetus, and to treat the fetus as a beloved dependent, occurs from the moment she discovers she is pregnant. For Patel, on the other hand, her unwanted pregnancy produced no such sense of obligation; she did not consent to be obligated to the fetus's provisional rights. Patel did not grant the fetus the status of a future child, and so when she miscarried the fetus, she did not—unlike Wilkins—lose a future child. Likewise, we can imagine a case where a woman carrying an unwanted pregnancy nevertheless has an embodied experience of the fetus as a being with rights of its own that she is bound to respect, who carries her pregnancy to term out of this sense of obligation, or who comes to feel, through embodied experience, that this unwanted fetus is indeed a beloved descendant. Part of understanding pregnancy as an embodied experience is granting epistemic authority to the person having that experience and granting that the person with the most direct standing to determine the status of a fetus's provisional rights is the woman carrying that fetus.

This argument holds, I should note, only as long as the fetus remains inside the woman. An infant, unlike a fetus, has external freedom, which can be coercively protected by law. External freedom becomes coercively enforceable not when one *could* survive outside the womb but when one *does* survive outside the womb. At this point, it becomes possible for the state to coercively enforce the infant's external freedom by ensuring that someone—the parents, the state, or some other agent—has the obligation to take its ends as their own.<sup>34</sup> As long as the fetus is

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<sup>33</sup> They were not; Wilkins was seven months pregnant while Patel was between four and five months. At Patel's trial, the prosecutors used a widely discredited "float test" to argue that the fetus, whose gestational age was between 25 and 28 weeks, had been alive at birth; other forensic experts argued that the fetus was only 23 to 24 weeks along and not yet able to breathe independently.

<sup>34</sup> The parent-child relationship is an instance of "the right to a person akin to the right to a thing" which, like marriage, involves a robust form of end-sharing. While the end-sharing of married partners is reciprocal, the end-sharing of parenting involves, as Tamar Schapiro (1999, 735) puts it, the duty to "make it our end to do what is in our power as adults to help children work their way out of childhood." But

inside the mother, it can have no capacity to set and pursue ends *in the world*; its right to do so is merely provisional, not enforceable.

The provisional nature of the fetus's rights mirrors the provisional nature of embodied consent: as long as it remains inside the woman, the fetus's rights cannot be coercively concluded by law. As long as the fetus is inside her body, the woman's consent to this arrangement cannot be conclusive. Because the law must respect, rather than adjudicate, the relationship between the will and the body, it must treat both the woman's consent and the fetus's right to life as merely provisional and protect the right to abortion at any stage of pregnancy.

#### **IV. The Knot Can Be Undone**

In envisioning a state of nature opening up around the infanticidal mother and illegitimate child, Kant recognizes the impossible choice a woman faces when confronted with a pregnancy that will undermine her life chances. Though he considers mercy for a woman who kills under these circumstances, he cannot square this with the retributive requirement of punishment. As Kantian claims about justice go, it is decidedly muddied. "The knot can be undone in the following way," he argues.

The categorical imperative of justice remains (unlawful killing of another must be punished by death); but the legislation itself (and consequently also the civil constitution), as long as it remains barbarous and undeveloped, is responsible for the discrepancy between the incentives of honor in the people (subjectively) and the measures that are (objectively) suitable for its purpose. So the public justice arising from the state becomes an *injustice* from the perspective of the justice arising from the people. (6:336–337)

Although Kant ultimately upholds the duty of the state to execute the woman found guilty of infanticide, his deeper conclusion is worthy of our attention: this sort of violence is the result of law that is "barbarous and undeveloped," when the law and social custom are misaligned in such a way that justice is impossible. A perfectly just state would not deny women innate right in this way because the social conditions that produce poverty, unwanted pregnancies, and coerced and unwanted sex would not exist. In an actual state, which falls short of these requirements of justice, the law must tread carefully, using institutional transformation to produce conditions of

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this project of end-sharing presumes that these ends are separable; as long as the fetus remains inside the mother, it can have no *external freedom* distinct from hers. Any claim of legally enforceable external freedom for a fetus inside a woman's body denies her innate right.

justice.<sup>35</sup> Likewise, in a perfectly just state—one with adequate access to, and information about, contraception, as well as public policies designed to ease the burdens of child-rearing and so on—there would perhaps be no need for abortion. The injustice is not infanticide itself, nor abortion itself, but a social, legal, and economic condition in which infanticide and abortion are necessary. The problem is not that abortion is barbarous but that legislation designed to criminalize it, without taking on the broader social context that makes it necessary, is “barbarous and underdeveloped.”

Kant’s surprising suggestion of leniency towards the infanticidal mother offers a vision of transformative reproductive justice as an alternative to coercive policies restricting abortion. Rather than seek to undermine women’s autonomy through feticide laws and restrictions on abortion, this vision of justice requires those who oppose abortion to fight for broader reproductive and gender justice, seeking access to contraception and health care, particularly for pregnant women and children, paid family leave policies, labor protections for pregnant and breastfeeding women, medical and legal protections for pregnant and laboring women, poverty relief, access to public childcare and education, as well as domestic violence, equal pay, and sex education policies that protect women from coerced sex and asymmetrical, dependent relationships. To legally restrict abortion without fighting for a broader platform of reproductive and gender justice is to heighten the discrepancy between legal justice and lived injustice, and to force women faced with these injustices into a state of nature.

The implication of Kant’s argument is that, were the state just, the conditions that create infanticide would no longer exist, and the law could punish it as murder. I cannot go as far as Kant here. Even in a perfectly just state, one with an ideal version of reproductive rights, gender justice, and childcare access, abortion might still be necessary. No social policy can change the fact that the embodied burdens of pregnancy fall exclusively on women, and that women, alone, can consent to bear those burdens. But Kant’s insight is nevertheless essential to the contemporary debate about reproductive rights: abortion is not a problem to be solved by

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<sup>35</sup> My account of institutional transformation in imperfectly just states builds on Helga Varden’s insight (2010, 345) that the Kantian state must provide unconditional poverty relief in order to ensure that all citizens have access to the material requirements necessary to enact external freedom. Varden’s account identifies poverty as a feature of all existing states, and offers unconditional poverty relief as an institutional mechanism for protecting external freedom, which in turn makes possible the political legitimacy of the state. A lack of unconditional poverty relief, then, is a feature of unjust states that must be institutionally remedied in order for the possibility of justice to exist.



restrictive legislation but by broad social and legislative change. In an unjust social and legal condition, in which women find themselves without adequate reproductive resources and support for childrearing, laws restricting abortion or protecting fetuses cannot be just.

### **Conclusion**

In rejecting the viability standard and its extension to feticide law, I have defended the right to an abortion at any stage of pregnancy. This right is grounded on an embodied conception of innate right, which requires us to treat our rights to our own body as structurally distinct from acquired rights. Understood in this way, embodied rights require heightened legal scrutiny in order to ensure that, as my will changes, rights granted to my body change, too. In this sense, respect for women's autonomy means respect for the *form* of their legal choices rather than their end. The Kantian argument I outline here emphasizes women's bodily autonomy as unassailable at any point in pregnancy and holds that the fetus can only have provisional rights granted by the mother within the unilateral jurisdiction of the woman's embodied state of nature. This account recognizes women as autonomous beings capable of setting their own ends and argues that the law's emphasis should be on protecting the freedom to set and pursue these ends by emphasizing the importance of informed, affirmative, and retractable consent throughout pregnancy.

By drawing on Kant's account of innate right and comparing our rights in pregnancy to our rights in sexual encounters, I have argued for understanding pregnancy as an example of innate right. This move involves drawing not only on Kant but on developments in one area of jurisprudence, sexual assault law, to support a transformation in another. In the wake of the #MeToo moment and ongoing revisions to sexual assault laws on college campuses and at the state level, we are radically rethinking how we understand women's rights to their own bodies, and there is good reason to extend these insights to how we think of pregnancy, as well.

It is clear, however, that jurisprudence has moved too far in the opposite direction for this move to gain traction. In 2014, the Supreme Court ruled, in *Burwell v. Hobby Lobby*,<sup>36</sup> that the religious freedom of for-profit corporations allowed those corporations to deny their women employees access to certain forms of birth control because of religious objections. In holding that corporations could have religious beliefs in this way, the court extended the Religious Freedom Restoration Act's definition of persons to include corporations. By extending the legal fiction of "personhood" in this way, the court has not merely extended those rights but subtly reprioritized them: as personhood rights are increasingly granted to disembodied

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<sup>36</sup> *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014).

entities like corporations, the centrality of embodiment to the exercise of those rights has been systematically de-emphasized (Harvard Law Review Association 2001). If corporate entities can have rights to speech<sup>37</sup> and religious freedom,<sup>38</sup> as well as certain Fourth and Fifth Amendment rights to privacy (Greenfield and Winkler 2015), the exercise of those rights is decoupled from the embodiment of the rights-bearing agent. And, as *Hobby Lobby* illustrates, these disembodied rights then outweigh rights to the body, since disembodied rights are then universal to this newly extended class of persons in a way that embodied rights no longer are.

In this legal landscape, asserting the centrality of embodiment to the exercise of rights is a necessary and radical move, and one that, I have argued, finds a useful philosophical grounding in Kant's account of embodiment as an essential feature of the rights-bearing agent. Under this framework, both the viability standard and fetal protection laws must be rejected, and the right to an abortion at any state of pregnancy must be a legally protected feature of innate right, which makes the exercise of other rights possible.

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<sup>37</sup> *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010).

<sup>38</sup> *Hobby Lobby*, 573 U.S.

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