

Abortion and Kant's Formula of Universal Law

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Where in Kant's ethical theory may we find principles, guidance, or at least insights, about the morality of abortion? The formula of universal law is a natural place to begin looking. There is a long tradition of focusing on Kant's formula of universal law as a principle for evaluating maxims, resting in part on the belief that Kant intends the formula of universal law to be so used (G 4:437-38).¹ It is hardly surprising that some philosophers have already turned to this principle searching for the — or at least a — Kantian view of abortion. Universalization tests promise a relatively clear and straightforward way to discern the morality of actions. The formula of universal law seems to offer a method for evaluating maxims of abortion that eschews the contentious question of whether the fetus is a person. This method also appears to render unnecessary the task of locating one duty, among Kant's vast network

1 I use the following abbreviations and translations of Kant's texts. Volume:page number citations refer to the Prussian Academy edition of Kant's works. Ant: *Anthropology from a Pragmatic Point of View*, trans. Mary J. Gregor (The Hague: Martinus Nijhoff 1974); G: *Groundwork for the Metaphysics of Morals*, trans. James W. Ellington (Indianapolis: Hackett Publishing Company 1981); KpV: *Critique of Practical Reason*, trans. Lewis White Beck (New York: Macmillan 1956); KU: *Critique of Judgment*, trans. Werner S. Pluhar (Indianapolis: Hackett Publishing Company 1987) MS: *Metaphysics of Morals*, trans. Mary J. Gregor (Cambridge: Cambridge University Press 1991).

of duties discussed in the *Metaphysics of Morals*, in relation to which to understand abortion.

I begin this paper with a brief look at two philosophers' attempts to use Kantian universalization to generate a general prohibition of abortion. I then explore how three interpretations of the formula of universal law's contradiction in conception test and one interpretation of the formula of universal law's contradiction in will test might evaluate abortion maxims. I show that none of these interpretations does much to generate plausible prohibitions on maxims of abortion, though one of them — Barbara Herman's interpretation of the contradiction in the will test — does allow us to think about abortion (and fetuses) in compelling ways. I close by suggesting how we may build on the insights from our examination of the most helpful universalization test, and on other resources of Kant's ethical theory, to forge a more complete picture of Kantian considerations regarding abortion.

In the end, then, this paper emerges as largely negative and preparatory: it delineates the limitations of even the most persuasive interpretations of the formula of universal law tests in shedding light on the problem of abortion, in order to point the way to potentially more fruitful approaches. These negative, preparatory tasks are crucial in view of both the prominence that Kant gives to the formula of universal law in the *Groundwork for the Metaphysics of Morals*, and the dominance that the formula of universal law has had within Anglo-American Kantian ethics. Achieving a clear understanding of the shortcomings of the formula of universal law for considering the morality of abortion is necessary in order to move the debate on abortion within Kantian ethics into other, more promising, areas. Moreover, the failure of this much-favored formulation of the categorical imperative to provide guidance regarding the morality of abortion is of philosophical interest in its own right.

I Two Kantian Universalization Arguments

The formula of universal law (FUL) is the first formulation of the categorical imperative that Kant introduces. It states: 'Act only according to that maxim whereby you can at the same time will that it should become a universal law' (G 4:421). FUL has a variant, the formula of universal law of nature (FULN): 'Act as if the maxim of your action were to become through your will a universal law of nature' (G 4:421). FUL is the formulation of the categorical imperative that most clearly captures the notion of morality as a categorical imperative, that is, as a universal law that commands us to act on certain principles independent of our inclination-based ends or our personal characteristics. Kant says, 'if I think of a categorical imperative, I know immediately what it contains.

For since, besides the law, the imperative contains only the necessity that the maxim should accord with this law, while the law contains no condition to restrict it, there remains nothing but the universality of a law as such with which the maxim of the action should conform' (G 4:420-21).²

Kantians have traditionally understood FUL/N as providing a test for the moral adequacy of agents' proposed maxims. If a proposed maxim can be consistently willed along with its universal form, it is morally permitted to act on it; if not, it is not.³ Many philosophers have attempted to use Kant's notion of universalization to shed light on issues of contemporary moral controversy, including abortion. In 'A Kantian Argument Against Abortion,' Harry Gensler argues 'that abortion is wrong and that certain Kantian consistency requirements more or less force us into thinking this.'⁴ And in 'A Kantian Approach to Abortion,' R.M. Hare uses the 'Kantian' notion of universal prescriptivity to argue that 'abortion [is] prima facie and in general wrong' and 'that a principle forbidding it *in general* is the one we should adopt' for use at the intuitive level of moral thinking.⁵

Hare's argument goes like this. Imagine a 'time-switch into the past' in which I can speak with my mother when she is considering aborting the pregnancy that would result in my birth. Assume that I am a 'normally happy person' and that my existence is valuable to me. Also assume that my mother will not die if she goes through with the pregnancy. Under these circumstances, I would tell her not to have an abortion. Indeed, I would morally advise her that she ought not to have an abortion, for my preference to live and enjoy all life has to offer outweighs my mother's preference for an abortion. If it is wrong for her

2 FULN makes more explicit than FUL that when we universalize, we are to imagine a world in which agents necessarily act on the maxim in question, not simply may act on it. See Allen W. Wood, *Kant's Ethical Thought* (New York: Cambridge University Press 1999), 78-80.

3 For some objections to this understanding of how to use FUL/N, see *ibid.*, 97-110.

4 See Harry G. Gensler, 'A Kantian Argument Against Abortion' *Philosophical Studies* 49 (1986), 83.

5 R.M. Hare, 'A Kantian Approach to Abortion' and 'Abortion: A Reply to Brandt,' *Social Theory and Practice* 15 (1989), 29. Hare distinguishes between the 'critical level' of moral thinking, which we should rarely try to translate immediately into practical guidance, and the 'intuitive level' of moral thinking, which contains the kind of simple, general principles useful in our day to day moral life, in *Moral Thinking: Its Level, Method and Point* (Oxford: Clarendon Press 1981), esp. chapters 1-3.

to have an abortion in these circumstances, then it would be wrong for anyone in relevantly similar circumstances to have an abortion. Most circumstances in which a woman considers abortion are relevantly similar to that one. So abortion is usually wrong; that is, it is wrong except perhaps in such cases as those in which the woman would die if she completed the pregnancy, or the fetus would not grow into a person who would 'be glad to be alive.'⁶ So we should adopt a principle rejecting abortion in general, but allowing for exceptions.

Gensler's approach is similar to Hare's. Gensler locates the Kantian nature of his approach in certain consistency requirements, the most important of which he sees as derived from requirements of universalizability and prescriptivity, and which he describes as 'a version of the golden rule': 'If you are consistent and think that it would be *all right to do A to X*, then you will consent to the idea of someone *doing A to you* in similar circumstances.'⁷ This principle furnishes the major premise in Gensler's abortion argument: 'If you are consistent and think that abortion is normally morally permissible, then you will consent to the idea of your having been aborted in normal circumstances.' The minor premise is, 'You do not consent to the idea of your having been aborted in normal circumstances.' Therefore, Gensler concludes, 'If you are consistent then you will not think that abortion is normally permissible.'⁸

Neither Gensler's nor Hare's notions of consistency or universal prescriptivity reflect any recognizable interpretation of FUL/N. Nor do Gensler's and Hare's arguments obviously reflect the sort of concern that Kant has in talking about willing only those maxims that are consistent with their being willed as universal laws of nature.⁹ Gensler, for example, asks us to think about how we in fact now consent to being treated, and what follows from universally permitting treatment to which we consent or forbidding treatment to which we do not consent. Gensler argues that 'most people can be presumed not to consent to (or approve of) the idea of this act [abortion] having been done to them' and so 'insofar as most people take a consistent position they will not think that abortion is normally permissible.'¹⁰ Hare's universaliz-

6 Hare, 'A Kantian Approach to Abortion,' 6-8

7 Gensler, 'A Kantian Argument Against Abortion,' 89-90

8 *Ibid.*, 94-5

9 There is no pretense of hewing tightly to Kant by either philosopher. For example, Hare describes his theory as 'of a more or less Kantian sort' ('A Kantian Approach to Abortion,' 5). Hare makes a similar argument that appeals even less to Kant in 'Abortion and the Golden Rule,' *Philosophy and Public Affairs* 4 (1975): 201-22.

10 Gensler, 'A Kantian Argument Against Abortion,' 94; see also 89-94.

ability and prescriptivity operate only on the metalevel. In normative moral thinking, Hare is a two-level, preference utilitarian. (Hare sees the utilitarian requirement of weighing others' preferences on an equal basis with one's own as embodying the Kantian requirement of respect for persons.) Even though Hare uses the term 'will' occasionally, he just as often uses other terms which suggest a tenuous connection to Kantian universalizability concerns. For example, Hare says that the 'general ban on killing has a point, . . . namely that people *want* not to be killed.'¹¹ He also says, 'I have argued that most people *prefer* not to *have been* killed when they were foetuses; and that this gives us a general reason for having a principle that we ought not to kill foetuses.'¹² I do not deny that what people actually consent to, or prefer, or want, is relevant to ethics. My point is that Kant's FUL/N does not amount to a rule that one should treat others only as you (or most people) actually consent to be treated, or want to be treated, or prefer to be treated. Although there is debate about which interpretation of FUL/N is best, all such interpretations show that in grounding duties, Kant is concerned with willing — not wishing, wanting, or preferring. And the question is not what an agent can will based on some inclinations or feelings she has, but what reason commits her to, or precludes her from, willing. Moreover, insofar as consent is crucial for figuring out the morality of various types of maxims, what is key is whether consent is in principle possible, or what rational people with proper respect for themselves and others would consent to, what free and reasonable people would agree to, etc., not whether some particular agent happens to consent.¹³

Furthermore, the arguments that we would not consent to our mother's aborting us, or would want her not to have aborted us, so abortion is (in general) wrong, give rise to a host of problems, many of which have been discussed at length by other philosophers.¹⁴ Some such arguments imply that contraception is just as wrong as abortion; some

11 Hare, 'A Kantian Approach to Abortion,' 10, my emphasis.

12 Ibid., 10, first emphasis mine.

13 See Thomas E. Hill, Jr., *Human Welfare and Moral Worth* (New York: Oxford University Press 2002), chapter 3; and Onora O'Neill, *Constructions of Reason: Explorations of Kant's Practical Philosophy* (Cambridge: Cambridge University Press 1989), chapter 6.

14 See R.B. Brandt, 'Hare on Abortion,' *Social Theory and Practice* 15 (1989) 15-24; Bryan Wilson, 'On A Kantian Argument Against Abortion,' *Philosophical Studies* 53 (1988): 119-30; George Sher, 'Hare, Abortion, and the Golden Rule,' *Philosophy and Public Affairs* 6 (1977); and Susan Feldman, 'From Occupied Bodies to Pregnant Persons: How Kantians Should Treat Pregnancy and Abortion' in *Autonomy and Community*, Jane Kneller and Sidney Axinn, eds. (Albany: SUNY Press 1998), esp. 269-70.

imply that if one was conceived as a result of rape and is happy to be alive, then one cannot morally condemn rape; some versions suggest that if one wishes one had never been born, one may approve of abortion; some make it hard to see how to justify exceptions to the general prohibition against abortion. I will not further consider these loosely Kantian arguments. Instead, I will turn to the main interpretations of FUL/N to see whether and how, if carefully applied, they can shed light on the morality of abortion.

II FUL/N Contradiction in Conception Tests and Maxims of Abortion

Kant talks about two kinds of FUL/N contradiction tests: contradiction in conception (CC) and contradiction in will (CW). Kant claims that maxims violating perfect duties are picked out by the contradiction in conception test, whereas imperfect duties are indicated by the contradiction in will test (G 4:424). The CC test is supposed to identify maxims of action whose universal forms cannot be conceived as laws of nature. The CW test is supposed to show that certain maxims of ends are obligatory by revealing that one cannot rationally will as a universal law of nature that everyone renounce the promotion of those ends. It seems most reasonable to consider maxims of abortion in light of the CC test. What we want to know, after all, is whether acting on certain maxims of having an abortion is wrong. As we will see, however, the various interpretations of the CC test have serious shortcomings. So we should not hesitate to consider also whether the CW test could, despite Kant's initial account of its purpose, help us identify maxims of abortion on which it is wrong to act.

There are three main interpretations of the CC test: logical, practical, and teleological.¹⁵ I will discuss each in turn.

1. *Logical Contradiction*

On the logical account, the test identifies the impossibility of a maxim's universal form being conceived as a law of nature. Take the lying promise maxim for example.

15 So Christine M. Korsgaard terms them in *Creating the Kingdom of Ends* (New York: Cambridge University Press 1996), chapter 3 [originally published as 'Kant's Formula of Universal Law,' *Pacific Philosophical Quarterly* 66 (1985) 311-40]. My discussion of these formulations owes much to Korsgaard.

LP-M: 'When I believe myself to be in need of money, I will borrow money and promise to pay it back, although I know that I can never do so' (G 4:422).

LP-U: (It is a law of nature that) whenever anyone believes himself to be in need of money, he will borrow money and promise to pay it back, although he knows that he can never do so.

According to the logical interpretation of the CC test, the universal law of making false promises to procure loans is not coherent as a law of nature. A world in which people made false promises to repay money whenever they needed loans could not *also, at the same time*, be a world in which people's promises to repay loans were taken as genuine promises. Thus, Kant says that in a world of the universalized maxim, the promise in question would be 'impossible.' In a world where people made false repayment promises as a matter of course, people 'would merely laugh at all such utterances as being vain pretenses' (G 4:422). But if that is the case, then the universalized maxim is self-contradictory; it cannot be conceived as a law of nature. In this way, the logical interpretation picks out the lying promise maxim as wrong.

Let us see whether it designates some sample maxims of abortion as wrong.

ABC-M: If my birth control fails and I become pregnant, I will have an abortion in order to avoid going through with an unwanted pregnancy and the difficulties of carrying, and then raising — or giving away — a child I am unprepared to care for.

ABC-UL: (It is a universal law of nature that) whenever anyone's birth control fails and she becomes pregnant, she will have an abortion in order to avoid going through with an unwanted pregnancy and the difficulties of carrying, and then raising — or giving away — a child she is unprepared to care for.

ABF-M: If I become pregnant and my boyfriend threatens to leave me, I will have an abortion so that he will stay.

ABF-UL: (It is a universal law of nature that) whenever a woman becomes pregnant and her boyfriend threatens to leave her, she will have an abortion so that he will stay.

ASA-M: If I become pregnant and the fetus is severely abnormal, I will have an abortion in order to avoid suffering for the child, me, and my family.

ASA-UL: (It is a universal law of nature that) whenever a woman becomes pregnant and the fetus is severely abnormal, she will have an abortion in order to avoid suffering for the child, her, and her family.

The circumstances the women see as salient to their deliberation, and the reasons they cite for wanting an abortion, differ among these maxims. Some of these maxims may strike us as morally more dubious than others. ABF-M, for example, may suggest that the agent is cowardly or weak; her reason for abortion may intuitively seem inadequate. But none of the maxims fails the CC test as interpreted on the logical account. There is nothing incoherent about a universal law according to which women abort pregnancies in order to avoid the physical, financial, and emotional difficulties of pregnancies they did not want and tried to prevent; nor to placate a lover; nor to prevent the continued gestation of a severely abnormal fetus, and possibly the birth of a severely damaged infant, with the suffering attendant to the infant and the infant's family. In a world in which women aborted for these reasons as a matter of course, abortion for these reasons would remain possible.

So the logical interpretation of the CC test does not indicate that these maxims of abortion violate a perfect duty. And maybe they do not. It is worth noting, however, that unlike individual repayment promises, which depend on an accepted convention of promising, the desired abortions are possible as long as there are people willing and able to perform them. So what creates the contradiction in the false promising case, the need for an accepted practice, is not present in abortion—or in most other cases of killing.¹⁶ Thus we cannot conclude much about the morality of abortion from the logical interpretation of the CC test.

2. *Practical Contradiction*

Closely related to the logical interpretation is the practical interpretation. On the practical interpretation, the contradiction is not within the very conception of the universal form of the maxim as a law of nature (as it is on the logical interpretation). Instead, the contradiction is between the maxim and its universal form. On the practical interpretation, the contradiction in conception test picks out maxims of action

16 This problem of natural actions, including actions of violence, has been discussed by many, including Korsgaard in *Creating the Kingdom of Ends*, chapter 3, and Barbara Herman in *The Practice of Moral Judgment* (Cambridge, MA: Harvard University Press 1993), chapter 6 [originally published as 'Murder and Mayhem: Violence and Kantian Casuistry,' *Monist* 72 (1989): 411-31].

that could not rationally be willed in a world in which the universal form of the maxim is a universal law. More specifically, it picks out maxims of action that would be irrational for the agent to will in such a world because they would be ineffective in achieving the maxim's end in that world. Let us look at the lying promise example again. In the world of LP-UL, in which it is a matter of universal law that agents in need of money lie in order to obtain loans, an agent could not successfully use LP-M in order to obtain the needed money. For in a world in which people necessarily lied about their ability and intent to repay loans, no one would take such a lying promise seriously, and so no one would be duped into giving the loan. FUL/N asks us whether our proposed maxim could be willed 'at the same time' as a universal law of nature. And one cannot rationally will both LP-M and LP-UL. For willing both amounts to willing to use a lying promise as a means to obtaining a loan, and willing a state of affairs in which a lying promise is not a means to that end.

On the face of it, the practical interpretation of the contradiction in conception test, like the logical interpretation, does not indicate any problems for our sample abortion maxims. An agent's use of abortion to spare herself from the difficulties of an unintended pregnancy, delivery, and surrender or raising of a child she's not prepared to care for, is not rendered ineffective in a world in which all women in her situation use abortion as a means to that end. Nor do maxims of aborting to placate a boyfriend, or to prevent the birth of a seriously disabled infant (and all the attendant misery), lose efficacy in a world in which women universally use abortion as a means to those ends in those situations.

This initial failure of the practical interpretation to find a problem should neither surprise us, nor make us conclude that there is no problem. Like the logical interpretation, the practical interpretation is better at finding contradictions regarding conventional actions than natural actions, including actions of violence. Christine Korsgaard, however, has argued that we can appreciate the greater potential for the practical interpretation to detect problems with maxims of natural violence if we look for contradictions between the universal form of the maxim and the end of the maxim *together with the conditions of our enjoyment of that end*. Drawing on Mill, Korsgaard argues thus: 'To want something is to want to be secure in the possession of it. The use of violent natural means for achieving ends cannot be universalized because that would leave us insecure in the possession of these goods, and without that security these goods are no good to us at all.'¹⁷ So for example, I

17 Korsgaard, *Creating the Kingdom of Ends*, 99

could not will as a universal law my maxim of killing off someone who owns a house I like so I can buy it without defeating my purpose *if* we understand my purpose as being not only to buy the house (in which case my being killed soon after by someone else who wants it does not defeat my purpose), but as including living in that house and enjoying having that as my home for years to come. Thus, if we broaden our understanding of the agent's end (in a way that more accurately captures what her end is), we can use the practical interpretation to find contradictions among a greater range of maxims, including some maxims of natural violence.

So we must ask whether taking into consideration this broader notion of the women's ends allow us to find contradictions between the abortion maxims we have been discussing and their universal formulations. The first thing to see is that, on the face of it, this new strategy does not appear to generate contradictions between our sample abortion maxims and their universal counterparts. A woman's freedom from the burdens of an unwanted pregnancy is not made insecure by its being a law of nature that women who find themselves with unwanted pregnancies have abortions to free themselves from the burdens of unwanted pregnancies.¹⁸ A woman's relationship with her mate is not rendered insecure in a world in which women have abortions whenever their boyfriends demand that they do. A woman and her family are not insecure in their freedom from the suffering involved in witnessing the short, painful life of a severely disabled infant in a world in which women have abortions whenever they find that they are carrying a severely abnormal fetus.

The second thing to see is that one could argue that our first impression (i.e., of the permissibility of ABC-M, ABF-M, and ASA-M) is wrong. In particular, one could argue that there is a contradiction of this broader sort because if the women's maxims were universalized in perpetuity — for all time, including before their existence as agents — the women could not feel secure that they would now exist.¹⁹ Thus, the universalization of at least the first two of these sample abortion maxims would render the women's enjoyment of all their ends

18 There would be a contradiction of sorts if a woman were in a situation where having an abortion would be more dangerous than continuing the pregnancy. But universalization is irrelevant here; the woman would simply have chosen her means badly. This is not the sort of contradiction that we need FUL/N's CC test to identify.

19 On temporal universalization, see Joshua M. Glasgow, 'Expanding the Limits of Universalization: Kant's Duties and Kantian Moral Deliberation,' *Canadian Journal of Philosophy* 33 (2003) 23-48.

insecure, for if these maxims were universalized in perpetuity, these women might not exist as agents. They might not have been born, for their mothers, grandmothers, or great grandmothers (etc.) might have fallen under the description in ABC-UL or ABF-UL. In that case, the women would not now be agents capable of bringing about and enjoying various ends, including the ends they hope to achieve through their maxims of abortion.

Yet extending our thinking backward in this way (i.e., to find conflicts between our current maxims of abortion and worlds in which, were such maxims universalized the agents considering those maxims might not have been born) generates highly implausible results, similar to those generated by Hare's and Gensler's methods. The strategy under discussion implies that agents could not rationally will maxims that include acts that could have prevented their own current existence as human agents. But some such maxims are clearly permissible—for example, maxims of having sex only with a willing partner, or only when one is in the mood, or only while using contraception until one can financially support a child. These maxims, too, would be ruled out because of the possibility that if those maxims were universalized in perpetuity, the agents willing them would not have been born (or even have been conceived).

Now there is no point in using the CC test, or any other test for the moral adequacy of maxims, if we are going to reject its results whenever they conflict with our pre-test intuitions. Thus, that an application of the CC test challenges some intuitions is not an objection to that application of the test. When an application of the test has the capacity to generate infinitely many, deeply implausible results, however, one may conclude that there is something wrong with this application of it. This application of the practical contradiction test yields such implausible results about the wrongness of non-abortion maxims that I am unwilling to use it to draw the conclusion that the first two of our abortion maxims are impermissible. Given these counter-intuitive implications, the burden of proof falls on those who would use this method to show that abortion (on certain maxims) is wrong. Until someone can explain how we can get such a conclusion regarding abortion without getting other, bizarre conclusions, we should not test maxims of abortion by asking whether, if willed as universal laws, the women willing those maxims might themselves not exist as beings with the ends they hope to promote by having an abortion. With this stipulation, the practical interpretation, like the logical, finds no contradiction in conception with ABC-M, ABF-M, or ASA-M.

The third thing to see about Korsgaard's broader reading of the end, however, is that some maxims of abortion might be shown to be immoral this way — without relying on a contradiction that involves the

woman's never having been born. Consider: **E-M**: 'In order to advance my professional success, I will eliminate anyone or anything that threatens to slow it (as far as prudence allows).' Terminating an unwanted, poorly timed pregnancy could certainly be a prudent way of eliminating a threat to maximal professional advancement; so E-M could be a maxim underlying abortion for reasons of professional ambition.²⁰ But many other actions could fall under this maxim as well: killing off professional rivals, destroying the products of a competitor, blackmailing an unimpressed boss into retirement, and so on. In a world of **E-UL**, everyone would eliminate anyone or anything that threatened to slow her professional success as a means to advance that success, as far as prudence allowed. In such a world, E-M would be an effective means to the agent's end considered narrowly, but not considered broadly. For if everyone were eliminating threats to their success in such an unrestrained way, the agent would be able to make some professional advancements, but she could never be secure in them. She might be holding a position coveted by a rival and so be a candidate for murder, blackmail, sabotage, or other methods of attack. So if we accept Korsgaard's revision to the practical interpretation, we can see that some maxims on which women might perform abortions would fail the CC test.

Note, though, that this approach makes it morally wrong in the same way to kill or destroy *anything* on the maxim of E-M — say, a clever parrot, who is your competitor for a job in the entertainment industry, or a computer program that can grade logic tests faster than you can.²¹ So the fact that abortion is wrong on this maxim does not indicate anything about the moral status of the fetus, or special about abortion. Rather the maxim gets the verdict it does because it is so general that it does not recognize limits on what one can do to other rational agents in one's self-interested striving. It would thus be wrong of an agent to act on this maxim even when the beings or things actually destroyed or impaired by her acting are not rational beings; for in acting on this maxim, the agent regards the whole world, rational beings included, as expendable for her ambition. E-M may not be a very common maxim on which abortions are performed. But it would be a maxim of abortion

20 E-M is a fairly general, high-level maxim. We could understand its relation to more specific maxims syllogistically. E-M is the major premise. 'Continuing this pregnancy threatens to interfere with my professional development, while aborting it has few and minor negative consequences for me' is the minor premise. The decision to abort the pregnancy is the conclusion of the practical syllogism.

21 Kantians could of course appeal to Kant's doctrine of right to explain the special, juridical wrongness of depriving a rational being of his external freedom through violence.

on which this broader interpretation of the practical contradiction test could show that it would be wrong to act.

3. Teleological Contradiction

The third interpretation of the CC test is the teleological interpretation.²² It makes more explicit use of FULN than the other interpretations do. On this interpretation, the CC test picks out maxims that cannot be conceived as a universal law of nature, where nature is understood teleologically. Kant takes it to be the case that we must, given our cognitive capacities, think of nature as if it operated teleologically, with various drives, feelings, and organs aiming at certain ends. The maxims FULN's teleological CC test picks out as violations of perfect duties are maxims of using a drive, feeling, organ, or some other part of nature, in a way that interferes with its promotion of its natural end.²³

Because the teleological interpretation of the CC test detects maxims in which natural (not conventional) means-end connections are simultaneously presupposed and acted against, it holds greater promise than the logical interpretation for identifying immoral natural actions, including maxims of violence. Kant clearly relies on the teleological interpretation of the CC test when he explains the wrongness of a suicide maxim in light of FULN:

S-M: 'From self-love I make it my principle to shorten my life when its continued duration threatens more evil than it promises satisfaction' (G 4:422).

S-UL: (It is a law of nature that) from self-love, everyone will make it her principle that whenever her life threatens more evil than it promises satisfaction, she will shorten her life.

22 I discuss only the version of the teleological contradiction interpretation that Korsgaard calls the 'simple view,' since it is the only one that Kant relies on in this context. For a more complicated teleological interpretation of the CC test, see H.J. Paton, *The Categorical Imperative: A Study in Kant's Moral Philosophy* (Philadelphia: University of Pennsylvania Press 1947), 146-64; also see Korsgaard, *Creating the Kingdom of Ends*, 87-92.

23 Note that for Kant, natural teleology is a regulative principle of reflective judgment (KU 5:376-7, 389). Kant employs teleology at MS 6:419-28, but leaves unclear whether, to be problematic, a maxim has to use a drive (etc.) in a way that prevents it from fulfilling its natural purpose, or merely in a way that does not promote that purpose in the situations covered by the maxim. See my 'Kant on the Wrongness of "Unnatural" Sex,' *History of Philosophy Quarterly* 16 (1999) 225-48.

According to Kant, the problem with the universalized form of the maxim is that in a world in which it holds, self-love cannot effectively promote its natural end: preservation of the individual's life. An obvious objection to this claim is that it is at least as plausible to think of the natural end of self-love as the preservation of life so long as it seems worth living to the individual (or promises in the future to seem so), as to think of its end as the preservation of life no matter what. On this understanding of the natural end of self-love, the universalized form of the proposed maxim poses no problem for the teleological efficacy of self-love. The maxim that Kant wants to show as a failure succeeds. Alternatively, we may object that if the natural end of self-love is self-preservation regardless of the agent's situation or quality of life, then the assumption that we are rationally committed to the drive's optimal performance in achieving its end seems implausible. These objections do not bode well for the usefulness of this interpretation of the FULN test. But let us see if we come up with anything interesting when we look at the abortion maxims.

None of the abortion maxims as stated refer to a drive or feeling that is inclining the agent toward her end. But we can supply fairly plausible feelings and drives for each. Let us say that the maxim of aborting in order to avoid the difficulties of carrying, and giving up or raising, a child one did not intend to conceive and is unprepared to care for (ABC-M) is based in self-love. Let us say that the maxim of aborting in order to keep one's mate from leaving (ABF-M) is based in sexual, romantic love. Finally, let us say that the maxim of aborting the severely abnormal fetus (ASA-M) is based in love of one's family — including parental love.

Does the teleological interpretation find a problem with any of these maxims? There is no contradiction between self-love's function of promoting self-preservation and 'the preservation of the capacity to enjoy life ... on the animal level only' (MS 6:420) and its prompting every woman who is pregnant, who cannot care for the child, and who does not want to endure completing the pregnancy and raising or giving away the child, to have an abortion — at least not in circumstances in which this can be done without great risk to the woman's health or life. In countries where abortion is legal, abortion (especially during the first trimester) is physically much safer for women than full-term pregnancy and childbirth.²⁴ And though abortion has emotional costs, so does

24 See, e.g., R.B. Gold, S.K. Henshaw, and L.D. Lindberg, *Abortion and Women's Health: A Turning Point for America?* (New York: Alan Guttmacher Institute 1990); E. Ahman and I. Shah, *Unsafe Abortion: Global and Regional Estimates of the Incidence of Unsafe Abortion* (Geneva: World Health Organization 2004); and C. Abou Zahar

giving a child away, or raising a child one does not want. If we assume that the maxim to be universalized implicitly stipulates that abortion is relatively safe, there is no problem with this maxim according to the teleological interpretation of the CC test.

On the face of it, there seems to be a contradiction between the drive for romantic and sexual love's prompting abortion when that is necessary to keep one's mate, and that drive's fulfilling what Kant takes to be its natural function: preserving the human race (MS 6:420). If sexual love prompts women to kill their offspring, it cannot optimally promote the continuance of the species. One objection to this argument is that the species might better be promoted by a sexual love that sometimes prompts women to terminate their pregnancies than one that does not. When a woman's mate is not ready to have children now, though he wishes to have children with her in the future; when she is unable to support herself and a child alone, and her mate is committed to supporting her and their children later; or when she already has children with him who will suffer seriously if he leaves: in such cases, propagation of the species might better be served by her aborting this fetus. Another objection is that there may be other natural ends for the sexual drive (such as pleasure or companionship). One might argue that as long as a maxim promotes some of these ends, it may permissibly fail to promote others.

Finally, it may appear that there is a contradiction between the drives of familial love, especially parental love, and ASA-M. We may assume that the natural end of parental love is the care and protection of one's offspring; it would appear to generate a teleological contradiction to kill one's in-utero, developing offspring from the motive of parental love — especially given that the parental love is, in this maxim, directed at the fetus, not simply at existing children.²⁵ In ASA-M, however, the fetus is severely damaged. It will not, if born, develop into a healthy human being or a full-fledged rational agent. It may die as a child; it may suffer greatly while it lives; and it will exact a tremendous emotional and financial toll on its parents and siblings. With all this in mind, it seems that the end of caring for one's offspring can be served at least as well by a parental love that sometimes prompts women to abort their

and T.M. Wardlaw, *Maternal Mortality in 2000: Estimates Developed by WHO, UNICEF, and UNFPA* (Geneva: WHO 2003). For up to date information on mortality and morbidity among women due to pregnancy, abortion, and childbirth, see the Alan Guttmacher Institute's website <www.agi-usa.org>.

25 Kant holds that women have certain emotional tendencies designed by nature specifically to ensure the protection of the developing fetus. He singles out timidity at Ant 7:305-306.

severely abnormal fetuses. In doing so, the woman is able to spare the fetus from the pain its short life would contain and limit the suffering of her other children (as well as her mate and herself). At the very least, it is not clear that the drive of parental love best functions when it prompts a woman to carry all pregnancies to term, no matter what the effect on the fetus she is carrying, or on existent children. Thus, none of these maxims of abortion obviously fails the CC test as interpreted teleologically.

Perhaps these three maxims of abortion are permissible, and so should pass the CC test. And surely some maxims of abortion would uncontroversially fail the teleological interpretation's version of the CC test. But the preceding discussion of ASA-M highlights the indeterminacy — and substantial room for disagreement — regarding how best to understand the scope of the end of parental love and other natural drives. This indeterminacy calls into doubt whether the teleological interpretation can furnish a test of the clear-cut, decisive kind implied by talk of a 'contradiction in conception' and offered by the logical and practical interpretations. Some of us judge ASA-M to pass the CC test easily because we think that parental love best promotes the end of the protection and care of offspring if it prompts women to abort seriously abnormal fetuses; others of us think parental love best promotes its end only if it prompts women with seriously abnormal fetuses to seek the best possible life-sustaining and health-promoting pre- and post-natal care. Some of us take killing or letting die to be — in certain situations — part of what the care and protection of one's offspring requires; others do not. The teleological interpretation itself does not show us how to decide among competing accounts of nature's ends. In the absence of a rational, conclusive way to decide precisely what these ends consist in, the teleological interpretation of the CC test gives us little more than a way of talking about some of our morally relevant intuitions. Depending on their particular ideas about how best to understand the scope of (e.g.) the care and protection of one's offspring, different people will often get from this 'test' different verdicts about the same maxim.²⁶ This indeterminacy problem does not impugn all uses of natural teleology in Kant's (or Kantian) ethics. But it does suggest that determining the natural ends of our drives is not the sort of straightforward task that can be smoothly incorporated into a CC test procedure.

26 Different verdicts about the same maxims would result from the teleological interpretation of the CC test also if the end of parental love were defined relative to the sensibilities of each parent — i.e., if the purpose of parental love were to move people to do whatever seemed to them to be most caring and protective of their offspring.

III The Contradiction in Will Test and Maxims of Abortion

The fourth approach we can consider with FUL is the contradiction in will (CW) test. This is the least obvious option of those we are considering. Kant says he intends perfect duties, prohibiting maxims of action, to be revealed by the CC test, and imperfect duties, requiring maxims of ends, to be revealed by the CW test (G 4:424). We want to know whether certain maxims of abortion — maxims of action — are wrong. But as we have seen, we do not get very far with the main interpretations of the CC test. Indeed, Barbara Herman has argued that even a maxim of killing other human agents for selfish ends passes the CC test when understood on her preferred interpretation, the logical interpretation. Herman argues that it is the CW test, not the CC test, that is able to reveal the wrongness of the general maxim, 'To kill whenever it is necessary to get what I want.'²⁷

Herman's view is that the contradiction in will test allows us to identify generic maxims (or 'maxim types') that, if universalized, would undermine the conditions of human agency.²⁸ The *imperfect* duty of beneficence is grounded in the fact that we humans cannot rationally will that we universally ignore one another's needs and desires. As human rational beings, we will all sorts of ends; we are not self-sufficient, able to achieve our ends without help from other human agents; we need others' help as means to our ends. Thus we cannot will a maxim of non-beneficence as a universal law without undermining the efficacy of our own agency. Instead, we must adopt a maxim of beneficence (63, 123). Similarly, the *perfect* duty not to kill for convenience is grounded in the fact that human agents cannot rationally will that we universally treat human life as expendable for discretionary ends. As human rational beings, our agency depends on the continuation of our physical life. Our lives are vulnerable to attack from others; if others are not willing to restrain themselves from acts that kill us, the physical conditions of our agency are under threat. Thus, we cannot will a maxim of killing other people in order to get what we want without forfeiting any claim

27 See Herman, *The Practice of Moral Judgment*, chapter 6, esp. 117. Wood agrees with Herman's denial of what he calls 'the correspondence thesis': that all and only perfect duties are detected by the CC test and all and only imperfect duties are detected by the CW test. But Wood denies that the CW test's rejection of the maxim 'To never help anyone' implies a requirement to adopt the maxim 'To help others sometimes.' See *Kant's Ethical Thought*, 97-102.

28 In the remainder of this section and early in the next, I draw heavily on Herman, *The Practice of Moral Judgment*, chapters 6, 7, and 3. In this paragraph, I draw mainly on 122-6.

to others' restraint, on which one of the most basic conditions of our agency, our living body, depends.

1. The Deliberative Presumption Against Convenience Killing

According to Herman, what the CW test reveals about killing for self-interest is the wrongness of regarding people as expendable tools for our purposes, or as obstacles to things that we want (124). This argument establishes a deliberative presumption against maxims of killing others in order to achieve an inclination-based end. In order to justify a maxim of killing someone, the agent has to show that there is some property of the person to be killed, or of the situation more generally, that rebuts the presumption against killing (117, 128, 147-51). For example, in the case of an agent killing to protect herself from the aggression of someone trying to kill her, Herman argues that killing in self-defense is justified as a means of resisting the attacker's attempt to use her life for his own selfish purposes. The attacker himself is discounting the agent's agency, whereas she is defending her agency from that devaluation. In the case of an agent needing an organ transplant, however, an agent's need does not justify killing someone else whose organs she could then use. A maxim of so doing would treat the victim as an expendable resource for the continuation of the agent's own life. Such a maxim does not rebut the presumption against killing, despite the severity of the agent's need (129-30).

Granting the deliberative presumption against convenience killing, can a woman considering abortion rebut the presumption? The most obvious tack for such a woman to take is to claim that a human fetus is significantly different from the person who is the victim in the generic maxim because the fetus is not a person, and the victim in the generic maxim is. Of the generic maxim, Herman says, 'the agent who would kill in pursuit of his interests fails to acknowledge what follows from the fact that the life he would take is the life of a person. ... The correct moral complaint from the victim [speaks of] the lack of proper regard from him as a rational agent' (124). Yet the woman contemplating having an abortion does not seem to make the stated mistake; nor is the stated complaint one we can make on behalf of the fetus killed in an abortion. From all we know about the fetus, we have no basis on which to ascribe to the fetus the capacities to set, order, and pursue ends in accordance with reason that characterize agency. The fetus does not reason and reflect about what to do, see him or herself as an agent, or act according to a conception of morality. (The fetus does not even attain rudimentary consciousness or sentience until late in its gestation.) For a particular maxim to be rejected on the basis of a deliberative presumption against a generic maxim, the particular maxim must 'exemplif[y]

the form of 'moral devaluation' of the relevant impermissible generic maxim' (127 n. 13). If it is plausible to deny that a fetus is a rational being, then it is plausible to deny that a maxim of killing a fetus exemplifies the moral devaluation of the generic maxim, and thus to claim that no maxims of abortion, including ABC-M, ABF-M, and ASA-M, can be shown to be wrong by appeal to the deliberative presumption against convenience killing.

There are at least two ways one might object to the argument that all abortion maxims escape the deliberative presumption against killing persons. The first way is to claim that for Kantians, the question of whom to consider a rational agent is not settled simply on *theoretical* or *empirical* grounds (e.g., by observing their behavior and inferring what capacities they have), but must ultimately be decided on *practical* grounds.²⁹ As Korsgaard has emphasized, moral freedom is an ideal concept. No human being fully exemplifies it. More importantly, it is not a concept that we ascribe to ourselves and others only if we closely approximate this ideal; it is a concept we ascribe to ourselves as an inescapable aspect of taking up the practical standpoint of deliberation, and that the moral law requires us to attribute likewise to others. So if practical reasons favor considering human fetuses rational agents, some maxims of abortion might well exemplify the moral devaluation of the generic maxim of killing persons for convenience.³⁰

Should we consider human fetuses rational agents?³¹ There may be reason to consider more beings rational agents than we might if we used empirical observation alone and held up normal adult human agency as our standard. Empirical observation might lead us to exclude beings who act for reasons but do not display this in a way that we easily recognize — dolphins, for example. The history of humans' exclusion of other species, and humans of other races, from the scope of agency suggests a human tendency to narrow our conception of agency to beings very much like us physically, psychologically, and behaviorally. So there may be good practical reasons to push against our chauvinistic tendencies and to consider as agents all those who display hints of

29 See Korsgaard, *Creating the Kingdom of Ends*, chapters 7 and 12, esp. 352 and 355-57. Onora O'Neill makes a similar point in *Towards Justice and Virtue: A Constructivist Account of Practical Reasoning* (Cambridge: Cambridge University Press 1996), chapter 4, esp. 91-3.

30 If one extends agency only to those fetuses who may become agents in the narrower sense, ASA-M might not fall under the generic maxim of killing agents.

31 Kant seems to consider infants this way, and perhaps could be read as viewing fetuses this way as well. See MS 6:280-82, 422.

practical rationality — thus most human beings, including young children and many adults with developmental, cognitive, or psychological disorders, and perhaps also members of some other species. But fetuses do not seem to fit this story, for with fetuses it is not a matter of underdeveloped, fluctuating, fledgling, degenerating, or impaired agency that makes us hesitate in calling them agents, but an absence of any traces of agency. The practical attributions and attitudes constitutive of our ascribing freedom to others are not naturally elicited by fetuses. Further, they make no sense when directed toward fetuses. We cannot see ourselves as literally cooperating with fetuses, nor can we properly hold them morally responsible for anything or ascribe maxims to them. And in the case of a fetus, unlike an unconscious but otherwise normal adult human, we have no reason to think of the fetus as someone who has maxims on which she is simply unable to act on because of her physical state.

One might argue that we should consider human fetuses agents because many of them have the potential to become beings to whom we must ascribe agency. Perhaps considering these potential persons agents would best express respect for rational nature. Let us grant that there is something to be said for regarding human fetuses as valuable because of their potential: many people do think of fetuses this way; and thinking of them this way seems proper to an attitude of respect for rational nature. But since the potential in question is most easily understood as the potential to *become* rational beings, it seems like a confusion to use that as a basis for considering them rational beings *now*. Instead, it may spur us to reject Kant's dichotomy between rational beings (with absolute, intrinsic value) and mere things (with contingent, merely derivative value). Allen Wood does this by rejecting what he calls the 'personification principle,' according to which all duties to respect rational nature are duties to respect rational nature *in persons*. Wood holds that we better understand the requirement to respect rational nature if we understand it as a requirement to respect not only rational nature in persons, but also partial and potential rational nature, and rational nature 'in the abstract.'³² This strategy expands the range of beings with

32 See Wood, 'Kant on Duties Regarding Nonrational Nature,' *Proceedings of the Aristotelian Society* 72 (1998) 189-210 and *Kant's Ethical Thought*, 142-5, 370-1. Onora O'Neill also wants to extend 'the scope of moral concern' to include incipient and quasi-agents, though she does not explicitly challenge the personification principle. O'Neill says that including potential agents in the scope of moral concern tells us nothing about how we should treat them. See O'Neill, *Toward Justice and Virtue*, chapter 4, and 'Kant on Duties Regarding Nonrational Nature,' *Proceedings of the Aristotelian Society* 72 (1998) 211-28.

intrinsic value to include fetuses and infants, the severely brain damaged and comatose, and nonhuman animals. Although precisely how this widened scope is to be expressed in duties is unclear, Wood indicates that differences between persons and nonpersons continue to have moral significance.³³

Alternatively, one could argue that we should consider fetuses agents because doing so will discourage pregnant women from doing things (such as smoking and drinking) that will disadvantage the fetuses in the future, when (as children) they strive to come into their own as rational beings; it will also encourage pregnant women to do things now that will later facilitate their children's self-development. A problem with this argument — *as an argument ultimately intended to show that women considering abortion cannot rebut the deliberative presumption against convenience killing* — is that its proper conclusion is narrower than its purported conclusion. Concern with supporting the fledgling agency of future children does not provide a reason to consider as rational beings all fetuses; in particular, it does not provide a reason for considering as rational beings fetuses whom women are considering aborting. Nothing done to a fetus that is then aborted, nor the abortion itself, can disadvantage a child whose life began as that fetus, for the abortion ensures that there is no such child. It is plausible, then, to claim that concern for the budding agency of future children warrants viewing as rational beings only those fetuses who in fact will be born³⁴, or who we can reasonably assume will be born³⁵, or — from the standpoint of the pregnant woman — whom one is committed to birthing.³⁶ Moreover, there are ways of discouraging behavior (now) toward

33 Wood's view does not imply that abortion is the moral equivalent of murder. Furthermore, it does not imply that there is a duty to maximize rational nature in the abstract. See *Kant's Ethical Thought*, 371, and 'Kant on Duties Regarding Non-rational Nature,' 208-9.

34 Along these lines, see Elizabeth Harman, 'Creation Ethics: The Moral Status of Early Fetuses and the Ethics of Abortion,' *Philosophy and Public Affairs* 28: 310-24. Harman defends 'the actual future principle': 'An early fetus that will become a person has some moral status. An early fetus that will die while it is still an early fetus has no moral status' (311).

35 If abortion is a real possibility available to women, a third party's expectation that a fetus will be born is reasonable only if a woman is committed to carrying it to term. More importantly, if a woman is considering abortion, she is not assuming that it will be born; whether it will be born is an open question, the answer to which depends in large part on her decision to seek the completion or the termination of her pregnancy.

36 This alternative supposes that certain attitudes appropriately accompany certain rational commitments.

fetuses that would negatively affect them (later) as children that do not involve the oddness of making particular fetuses' status as rational beings hinge on particular pregnant women's choices. One is Wood's approach of creating space within Kantian ethics for valuing potential rational beings from the start of their biological lives; this would apply to all except the most severely abnormal fetuses. Another, which would not apply to all fetuses, is by arguing that by deciding to have a baby, one commits oneself to taking permissible, necessary means in one's power to deliver a healthy infant.³⁷

Finally, one might argue that a fetus should be considered an agent because the alternatives are unacceptable. Suppose that considering the fetus a thing, with merely derivative value if it is wanted by the pregnant woman or someone else, does not do justice to what the fetus is. One could argue that the alternative of considering the fetus a *potential* rational being presupposes an unacceptable picture of agency: one that is merely phenomenal or empirical. To regard the fetus as a potential rational agent seems to imply that the fetus develops gradually, over time, into a rational agent as its brain matures and as it develops various mental capacities. Understood this way, rational nature (or agency) is an empirical concept. For Kantians, though, agency is to be understood more fundamentally as a *practical* concept — as something attributable to the agent, independent of time and causal processes.³⁸ Each human agent enters the world in such an undeveloped state that he requires much parental help to learn how to 'master[] the use of his members and understanding' (MS 6:281). But, this argument claims, we should see agency inherent in the earliest incarnation of the human being so as to avoid the implication that agency itself is a causally determined feature. For if it is so determined, if that is all agency is, then freedom and morality are illusory.

37 This possibility — which is inspired by the principle of the hypothetical imperative that 'whoever wills the end also wills (insofar as areas has decisive influence on his actions) the indispensably necessary means to it that are within his power' (G 4:417) — would not preclude an agent's abandoning the end. It is not obvious that a commitment merely to complete a pregnancy rationally entails a commitment to produce a healthy infant, however. Where abortion is illegal, one might have completing the pregnancy as mediate end, which is itself a means to the end of avoiding the dangers of procuring an illegal abortion.

38 Kant seems to have a concern related to this in mind at MS 6:280. He raises the problem of understanding how humans or God can create a being endowed with freedom. Kant says we must regard procreation as the act of bringing a person into the world; that we cannot regard a person as something created through a physical act. He also says that we must understand God's creation of free beings as taking place atemporally. See also KpV 5:102.

It is not true, however, that thinking of fetuses as potential rational beings who may later be properly called rational beings commits us to seeing agency as caused by physical processes and is thus destructive to moral freedom, though I can see why talk of fetuses 'becoming' or 'growing into' rational beings raises the concern. We can say that agency is properly ascribed only, for example, to those beings with whom we can reason, whom we can fairly hold responsible, or at least attribute conscious, intentional action. Observable, gradually developing characteristics of human beings help us decide whom to try to reason with, etc. (no toasters, for example), and thus to whom we should attribute agency. But no set of observable traits is agency, nor proves that any particular being is a moral agent. Calling a human an agent from as soon as there is a distinct entity (e.g., at conception, or once twinning is no longer possible), avoids the oddness of distinguishing empirical, biological identity from practical identity ('At last: I can consider Amy a rational being!'). But reserving the attribution of agency until we can (e.g.) reasonably attribute maxims to the human being avoids the oddness of attributing a (latent? dormant?) practical identity to a human being to whom the attribution of maxims seems perverse, and who lacks a developed brain and other things that constitute necessary material conditions for *human* agency ('I'm sixteen weeks pregnant with a female rational being!').

In sum, I see no decisive practical reasons favoring the extension of the scope of human agents to include human fetuses, at least not those whom women are considering aborting. The most obvious practical reason *not* to extend the scope of agency to include human fetuses is an interest in the well-being and reproductive freedom of women. Women are rational agents. Their lives can be seriously marred by pregnancy — sometimes due to rape, sometimes with grave medical implications. In addition, many of the projects and plans women have can be disrupted by pregnancy. In some cases, women will judge the projects and plans more worthwhile than having a child at that time. If a fetus is a rational agent, it becomes much harder to show that most maxims of abortion rebut the presumption against killing; indeed, it seems likely that relatively few maxims of abortion could then rebut the presumption.³⁹ Thus, the cost to women of expanding the scope of those we con-

39 Judith Jarvis Thomson has famously and compellingly argued that even if a fetus is a person, abortion is often permissible, because often a woman's killing the fetus inside her is neither unjust nor indecent. See 'A Defense of Abortion' *Philosophy and Public Affairs* 1 (1971) 47-66. ABC-M, for example, seems permissible on Thomson's account because (a) given the woman's use of contraception, not killing the fetus entails allowing the fetus to continue using her body despite her not having given

sider agents to fetuses is very large, with little justification for making them bear those costs. So practical considerations suggest that we need not, and should not, consider all fetuses rational beings.⁴⁰

A second objection one could raise (against the argument that because fetuses are not rational agents, abortion cannot be shown to be wrong based on the generic maxim of convenience killing) is that the devaluation *is the same* in abortion maxims and maxims of killing persons because the human body, which is a material condition of human rational agency, is at some point a fetal body. All human agents depend on their bodies; and all their bodies pass through the vulnerable stages of embryo, fetus, infant, and young child. During these stages they are extremely vulnerable to damage and death. If killing is wrong when it destroys the essential material condition for human agency that is a human body, then killing is wrong regardless of whether the body destroyed is a fully formed body of an adult, or the developing body that may, with time and help, come to support and embody such an agent. So there is no morally significant difference between the bodies of fetuses in these maxims and the bodies of human agents in the generic maxim sufficient to rebut the presumption against these two abortion maxims.

The problem with this objection is that the alleged devaluation of rational nature seems to be significantly different in the case in which the body is that of an embryo or fetus and in the case in which it is the

the fetus a right to do so; and (b) given pregnancy's demands, not killing the fetus entails her going beyond mere moral decency in allowing this fetus to continue to use her body. But Thomson's ethical framework is not identical with Kant's or Herman's. Point (a) is not sufficient to show that ABC-M does not devalue the agency of the fetus — a rational being to be killed so the woman can avoid certain unpleasant, taxing, and uninvited experiences. Regarding (b), I take seriously the possibility that maxims of abortion rebut the presumption against killing when the killing is an unavoidable aspect of a woman's discontinuation of non-obligatory aid to the fetus. As we will see early in III.2, however, Kant's standards for satisfying the duty of mutual aid, as Herman understands them, are more demanding than Thomson's standards for being a minimally decent Samaritan.

40 Korsgaard employs another strategy that could get fetuses into class of beings whose killing would be prohibited by the generic maxim. In *The Sources of Normativity*, she argues that our fundamental practical identity is as human beings. This argument seems inadequately to distinguish between humanity in the species sense and humanity in the species neutral sense. Moreover, as others have pointed out, making human nature rather than rational nature basic throws out a fundamental, distinguishing feature of Kant's ethics. See *The Sources of Normativity*, ed. Onora O'Neill (Cambridge: Cambridge University Press 1996), chapters 3 and 4, esp. 100-3, 120-5; also see G.A. Cohen, 'Reason, humanity, and the moral law,' same volume, chapter 5, esp. 170-4.

body of an adult or a child. In the former case, the devaluation seems to be the devaluation of potential agency, or of (as Wood puts it) 'rational nature in the abstract'; in the latter, the devaluation seems to be the devaluation of a rational agent. We may think that women contemplating abortion do devalue rational agency in general if they do not consider that the fetus they are carrying could become a co-legislator of the moral law, a being with dignity, a participant in the realm of ends, etc. If this is right, then we are again left wanting something that Kant does not give us, a sense of what kind of duties we could have to rational nature generally or potentially, as opposed to rational nature in particular agents. But we are not left with thinking that maxims of abortion are best understood as exemplifying the moral devaluation of the generic maxim against killing persons.⁴¹

One might hope that considering a generic maxim of abortion for convenience in light of the CW test would help us clarify the distinctive problem with destroying beings who are potential rational agents. Consider:

AC-GM: To have an abortion whenever it would best promote my happiness or self-development.⁴²

AC-UL: It is a universal law that whenever it would best promote her happiness or self-development, a woman will have an abortion.

In the world of AC-UL, people would not recognize allowing embryonic or fetal life to develop as a constraint on their pursuit of their ends. Yet I must will my continued existence as an agent if I am to will anything at all (and as an agent, I must will). And the completion of the fetal stage of my life is a necessary condition of my present and continuing existence as an agent. So AC-GM seems to fail the CW test. But this attempt to clarify things does not help. Indeed, it leads to the same sorts of problems we have seen before. If we cannot will maxims that, if universal-

41 One might also devalue rational nature in the abstract by refusing to promote (or directly working against) the continuation of the human race (e.g., though abstinence or contraception) on inclination-based grounds, even when the population was steadily and dangerously declining. But if so, this seems like a third mode of devaluing rational nature, distinct from that of abortion, as well as from that of killing persons.

42 Feldman emphasizes that many so-called 'abortions of convenience' are sought by women so as to avoid the disruption of projects that are part of their plan for fulfilling their duty of developing their talents. See 'From Occupied Bodies to Pregnant Persons.'

ized, would undermine any of the necessary conditions of our agency, many things that seem permissible cannot consistently be willed. In particular, a parallel argument to this one about abortion shows that a generic maxim of contraception (or even abstinence) for convenience, is wrong — and in the same way as abortion is. Take **CC-GM**, ‘To use contraception whenever avoiding pregnancy will best promote my happiness or self-development.’ In the world of **CC-UL**, people would not recognize the formation of embryonic life as a constraint on their pursuit of their ends. Yet I must will my continued existence as an agent if I am to will anything at all (and as an agent, I must will). And my conception is a necessary condition of my present and continuing existence as an agent. So **CC-GM** fails the **CW** test. These results are sufficiently implausible to undermine the argument when applied to the generic maxim of abortion for convenience.

One might object that by equating **CC-GM** with **AC-GM**, I ignore a morally important difference between abstinence and contraception, which prevent the formation of any physical individual that could become a human fetus, and then a rational being, and abortion, which destroys an existing human fetus, thus preventing it of ever becoming the rational being it might otherwise have become.⁴³ But I agree that an agent’s destruction of a particular, existing human fetus that could become a rational being is morally problematic in a way that her prevention of any fetus’s creation is not: that is why I find the **CW** test as applied to a generic maxim of abortion for convenience frustratingly unilluminating and unconvincing. On this approach, **CC-GM** (or a similar maxim of abstinence) would give rise to the same sort of conflict as **AC-GM**: if universalized, both undermine necessary conditions of agency that the agent considering the maxim is rationally committed to securing; one can no more act on **CC-GM** without producing a conflict in will than one can act on **AC-GM**. Thus, insofar as one finds the distinction between destroying a particular fetus and preventing the creation of any fetus to be morally significant, one should not look to this strategy in order to reveal what is distinctively problematic about abortion.

At this point, then, the **CW** test has not shown that any particular maxims of abortion are wrong because of the deliberative presumption against killing persons. The problematic devaluation in the generic maxim of killing persons is not exemplified in maxims of abortion. Nor was the **CW** test able to establish a deliberative presumption against

43 One influential attempt to emphasize the moral significance of an existing fetus’s particularity and prospects is Don Marquis, ‘Why Abortion is Immoral,’ *Journal of Philosophy* 86 (1989) 183-202.

abortion for convenience. Consideration of the CW test did suggest that there may be a kind of immoral devaluation in some maxims of abortion. But this devaluation has to do with failing sufficiently to value potentially rational beings, or rational nature in the abstract.

2. *The Duty of Mutual Aid*

There is another way we may try to use the CW test in thinking about abortion. We could consider continuing a pregnancy as aiding a fetus, and terminating a pregnancy as a refusal of aid that implies the death of the fetus.⁴⁴ According to Herman, a proper understanding of the CW test grounds a narrower and more demanding version of the duty of beneficence than commentators have usually recognized, the duty of mutual aid.⁴⁵ This duty requires that human agents adopt a maxim of helping others to sustain their agency; a self-regarding refusal to aid is permissible only when helping would imperil one's own agency. As our earlier discussion of the CW test suggests, the duty of mutual aid is grounded in our inescapable interdependency as human agents. In particular, the duty of mutual aid is grounded in the fact that as human agents, there are 'true needs' without which we cannot function effectively as agents, and which we cannot be sure we will always be able to achieve independently of others' help (KU 5:430; MS 6:393).

Does a duty of mutual aid rule out our three maxims of abortion as impermissible? If we could show that we must count fetuses as members of the community of mutual aid, the duty would give us contextually sensitive, genuine guidance about abortion — guidance indicating that acting on ABC-M and ABF-M may well violate the duty of mutual aid.⁴⁶ Kant is explicit that it is for each agent to decide for herself 'in view of [her] sensibilities' what her true needs are, and (presumably) at what point she is genuinely endangering them (MS 6:393).⁴⁷ So wheth-

44 This way of viewing abortion is suggested by Thomson, 'A Defense of Abortion,' and by Frances M. Kamm, *Creation and Abortion: A Study in Moral and Legal Philosophy* (Oxford: Oxford University Press 1992), esp. chapter 4.

45 See Herman, *The Practice of Moral Judgment*, chapter 3 [originally published as 'Mutual Aid and Respect for Persons,' *Ethics* 94 (1984) 577-602].

46 The fetus in ASA-M would probably not qualify as a member of the community of mutual aid, even under the extended notion membership (discussed below). Given the severe abnormality of the fetus, it is unlikely that any resulting child would become someone who is even 'in principle' able to help others.

47 This does not imply that it is up to each agent to decide, based on her empirical desires, whether she ever wants help (such that if and only if she does, she has a

er agents acting on ABC-M or ABF-M violated the duty of mutual aid would depend on their judgment of whether the things they stood to lose from completing their pregnancies were crucial for satisfying their true needs or otherwise safeguarding their agency.⁴⁸

Herman is explicit that all and only dependent rational beings are members of the community of mutual aid; and we have already seen that one need not consider all (or any) fetuses rational beings. Moreover, no fetus is capable of the kind of reciprocity Kant and Herman describe as obtaining among members of a community of mutual aid. But just as we must include rational beings who are temporarily incapable of giving aid at present, Herman suggests that we should perhaps broaden the community of mutual aid to include those humans who are not yet agents: 'Since it is not the possibility of another's being of use to me that is the ground of his claim on my help, but our both being dependent beings, capable in principle of providing help, we might regard an infant as one whose present inability to help will be overcome in the passage of time. In time, he will come to have the necessary resources to provide help, as his now "dormant" physical and rational capacities come into use.'⁴⁹ Could we use this reasoning to argue that our duties of mutual aid extend to fetuses?

The response that I find most plausible to the proposed extension of the community of mutual aid to include infants and fetuses is that although one *may* see the community of mutual aid as extended to include infants and fetuses, one *need not*. I find the extension of the community of mutual aid more compelling with (a) those fetuses and infants one already reasonably assumes will be joining the community of mutual aid as full-fledged members (i.e., as agents) than those one cannot make such an assumption about, and (b) with infants than with fetuses. When it is an open question whether a given fetus will born, as

duty of mutual aid). Instead, the agent's assessment of her own needs comes in when she determines how she should go about fulfilling this imperfect (though often demanding) duty of mutual aid — e.g. what sorts of things can she reasonably sacrifice in order to promote the true needs of others, how far should she go, what approach should she take? The duty of mutual aid, like the more standard duty of beneficence, is grounded in consideration of what the agent can rationally will.

48 See Herman, *The Practice of Moral Judgment*, 66-8. A clear example of a maxim of abortion one could act on without violating the duty of mutual aid is **APA-M**: 'If continuing a pregnancy endangers my life, I will have an abortion in order to protect this basic condition of my agency.'

49 *Ibid.*, 62. Herman sees the fact of being contemporaries within the community of mutual aid as morally arbitrary. She uses this reasoning to suggest that future generations also be included.

is the case when a woman is considering abortion, there seems to be no practical necessity to view that fetus as a member of this community. Without an argument that one must include fetuses in this community, the duty of mutual aid can provide a pregnant woman with no definitive guidance about abortion.⁵⁰

One may not implausibly view a relatively healthy infant, a fetus one reasonably expects to be born, or a fetus one is committed to birthing as a junior member of the community of mutual aid, who at this stage enjoys benefits but no burdens of membership. There are even strong practical reasons to do so. Under these conditions, one should make decisions for one's offspring with a view to its future life as a rational being. One does not relate to one's infant or fetus best if one just ignores her, or tries to avoid causing her pain (once that is possible). One may take vitamins to assure healthy cognitive and physical development of a fetus, begin saving money for later childcare, or start thinking about his moral education. One may relate to an infant in ways that help him develop cognitively and emotionally, and make him feel safe in meeting new people and in beginning to explore the world. In all these things, we think it best if parents have in view their mission to shepherd this little human into his own agency, and are sensitive to the demands of this task.⁵¹ If a woman is committed to carrying a fetus to term, she may well already think of herself as his mother, or at least see herself as responsible for doing her best to make sure her child is born healthy.⁵² She may even start seeing the fetus as part of the community of mutual aid as soon as she knows she is pregnant, prior to (and perhaps obviat-

50 The focus of this discussion is whether the pregnant woman—not third parties—should regard the fetus as a member of the community of mutual aid. There are several reasons for this. One is that this focus fits best with the way abortion is being considered throughout the rest of the paper, which is in terms of the morality of acting of various maxims of having an abortion (rather than, say, of performing an abortion), and of whether the pregnant woman can consistently act on such maxims. Another is that delineation and resolution of the interpersonal conflicts that emerge if everyone should (or at least may) view all fetuses as members of the community of mutual aid, and if some women seek abortions on maxims that are not obviously consistent with the duty of mutual aid (if fetuses are so considered), are beyond the scope of this paper.

51 Tamar Schapiro discusses childhood as a 'normative predicament' in which human agency is forged, and which places certain demands on the parents (and others) who have duties to help fledgling agents through this difficult stage. See 'What is a Child?' *Ethics* 109 (1999) 715-38.

52 She may not view herself as its mother if she is planning to put the child up for adoption, or if she is a surrogate mother.

ing the need for) any conscious decision about whether to continue the pregnancy.

Yet there seems to be no reason that she must view the fetus as a member prior to her commitment have the child. The problem has to do with arguing that one must now aid a being because that being will later become an agent, when withholding the aid in question will prevent that being from later becoming an agent. It seems question-begging to say that a pregnant woman must view her fetus as a member of the community of mutual aid now, if what makes it reasonable to so view it is regarding the fetus as a being who will in time develop the physical and rational capacities of an agent; for what the woman is considering is whether she may refuse aid that is a necessary condition of the fetus's developing those capacities, and so also a condition of the reasonableness of regarding the fetus as a being who will develop those capacities. Indeed, a pregnant woman may plausibly regard abortion as preventing the transformation of the fetus into a rational being with needs; and this does not violate the duty of mutual aid.

Furthermore, it is more plausible to view an infant as a junior member than it is to view a fetus this way. We ascribe intentions to infants in ways that seem less metaphorical than when we do so with fetuses, simply because infants consciously interact with us and with their environment. We say such things as 'she's trying to grab my breast' or 'she's trying to reach that toy.' Though her intentions are no more reflected upon than a cat's, we can plausibly see her behavior as rudimentary human agency, and so see her as a rudimentary human agent. This is not so with the fetus. I am not saying that based on 'the facts' we cannot think of the fetus as a member of the community of mutual aid. I am saying that because we lack the kind of contact and interaction with the fetus we have with the infant, and because of what the fetus herself is like in contrast to the infant, the facts that may lead us to see infants as members of this community do not lead us to see fetuses that way.⁵³ The fetus seems more like a prospective member. Again, some women may immediately think of the fetus as a member of the community of mu-

53 Roger Wertheimer suggests 'that what our natural response to a thing is, how we naturally react to it cognitively, affectively, and behaviorly, is partly definitive of that thing, and is therefore partly definitive of how we ought to respond to that thing,' so that such things as the kind of interactions we have with infants and fetuses are not irrelevant to how we ought to regard and treat them. He further notes that one may argue that 'what is special about fetuses, what distinguishes them from babies ... is that they essentially are and relate to us as bundles of potentialities.' See 'Understanding the Abortion Argument,' *Philosophy and Public Affairs* 1 (1971) 67-95, esp. 91-3.

tual aid and thus be unlikely to consider an abortion except in the most grievous circumstances. The point is that a fetus's nature, potential, and mere existence in a woman does not rationally require that she consider it part of the community of mutual aid. Thus, though consideration of a duty of mutual aid leads to some interesting ideas about how we *reasonably may* regard fetuses, it does not tell us how we *rationaly must* regard them.

The CW test then, as explained by Herman, has furnished us with the richest and most interesting ideas about the morality of abortion. It has not generated prohibitions of general or specific maxims of abortion — though it has come closer to doing so than any interpretation of the CC test. The CW test has, however, forced us to focus on what strikes many as troubling about some maxims of abortion: a lack of practical recognition of the value of the fetus as a potential rational being. This result is not special to Kant. Articles in philosophy journals as well as nonacademic discussions of abortion are full of references to the fetus as a potential person. But this approach is different in that it offers a way to recognize the value of the fetus without claiming that the fetus has the same moral status as the women carrying them who are rational agents. Moreover, the moral problem raised by this interpretation is not one of violating any rights of potential persons, nor even duties to them;⁵⁴ it is one of failing to respect rational nature generally. It makes the moral failure in abortion, when there is such a failure, a failure of appropriate valuation. This analysis of abortion is important for Kant's ethics generally because if our interest in having something plausible to say about the morality of abortion leads us to reject the personification principle, it will have effects well beyond the issue of abortion.⁵⁵

IV Conclusion: FUL/N and Beyond

The three main interpretations of the CC test showed themselves to be generally unilluminating regarding the morality of abortion. The CW test, as interpreted by Barbara Herman, emerged as far more fruit-

54 It is not clear that one would have to say that one has duties to nonrational beings such as fetuses. One could say that one has duties with regard to them in virtue of their potential rational nature.

55 Again, see Wood, 'Kant on Duties Regarding Nonrational Nature.' And for a more recent discussion of this issue, see Wood, 'Humanity, Personality, and Dignity,' lecture 3 of the Isaiah Berlin Lectures on Kantian Ethics, Oxford University, October 25, 2005.

ful. Regardless of interpretation, however, FUL/N is unable to deliver much in the way of verdicts on maxims of abortion independent of decisions about whether to consider the fetus a rational agent (or member of a community of mutual aid). In that respect it has not delivered something that we hoped it would, and that would have been extremely useful. And yet, this failure is so unsurprising that disappointment is perhaps unwarranted. In order to universalize, one must demarcate the class of beings over which to universalize; and later formulations of the categorical imperative make explicit that Kant takes rational agents to be that class (G 4:426-39).

Yet our consideration of whether our three abortion maxims could rebut the deliberative presumption against killing persons made Kant's stark contrast between rational beings and things seem unsatisfactory. We lack compelling reasons for considering fetuses rational beings — especially if their birth and development is not something we assume, but something about which we are deliberating. But considering them mere things, with value only if we value them, does not seem quite right, either. For even if a woman does not want to continue her pregnancy, she seems to view the fetus wrongly if she thinks of it primarily as a parasite, or akin to a tumor. Among the many reasons pregnant women ought not to take abortion lightly, surely one is that their fetus may, with their help, become a person, a legislator and a subject of the moral law. So this discussion has pointed us toward Allen Wood's suggestion that we understand the formula of humanity as requiring us to respect rational nature not only in persons, but also in the abstract — perhaps giving us duties to (or regarding) any being that has rudimentary rational nature, or even potential rational nature.

Our discussion of abortion and the duty of mutual aid took us in a similar direction. It makes sense for a woman who intends to carry the fetus to term to view the fetus as a junior member of the community of mutual aid. Doing so is conducive to her providing for the true needs of the developing child to emerge. It reminds her that loving this little being is not enough; respect also must come into play, informing that love.⁵⁶ It reminds her that she should not view her baby, once born, as a doll or a pet, but as an incipient agent, someone whom she must assist in attaining a reasonably full (and virtuous) agency.

All this points us beyond Kant's formula of universal law, to his formula of humanity. We must consider more seriously whether Wood's

56 For a different, broadly Kantian, analysis of love and respect in this context, see Jeffrey Reiman, *Abortion and the Ways We Value Human Life* (Lanham, MD: Rowman & Littlefield 1999), esp. chapter 3.

expanded notion of respect for rational nature is the best or only way adequately to capture the particular kind of moral devaluation that may be inherent in some maxims of abortion, and that agents considering abortion must guard against. We must ask whether respect for rational nature in the abstract, or potential rational nature, differs as an attitude from the attitude of respect for rational nature in persons. We must ask how, in the context of abortion, one respects or fails to respect the rational nature potentially in a fetus. Finally, we should consider how much of third parties' treatment of the fetus is properly guided by respect for the rational nature potentially in the fetus, and how much by respect for the woman who loves the fetus and very much wants to nurture and protect it, or who has decided to abort it.

There are other questions, too, such as about women's duties to themselves. Given the impact that pregnancy and motherhood, as well as abortion, have on women's lives, we must ask what a woman owes humanity in her own person regarding her sexual and reproductive behavior.⁵⁷ We must also ask how a woman considering abortion should take into account the views and feelings of others; and about whether abortion is properly subject to any legal regulations beyond those concerning informed, free consent to a medical procedure. A complete account of Kantian considerations regarding abortion could extend as far as Kant's ethics itself. FUL/N has not taken us far. But it has gotten us started. Maybe that is an appropriate role for what is, after all, only the *first* formulation of the categorical imperative.⁵⁸

Received: June 2005

Revised: May 2006, August 2006

57 Feldman discusses women's duties to themselves at length in 'From Occupied Bodies to Pregnant Persons.' I critique Feldman in 'Abortion and Women's Agency: Learning from Feldman's Kantian Approach' (unpublished manuscript). I develop my own Kantian approach, grounded in women's duties to oneself, in 'Animality and Agency: A Kantian Approach to Abortion,' *Philosophy and Phenomenological Research* (forthcoming in issue 76 [1] [2008]).

58 For their comments on earlier drafts, I thank Marcia Baron, James Mahon, Roger Wertheimer, Allen Wood, and the anonymous referees for the *Canadian Journal of Philosophy*.

