

ON BEING AT HOME IN OURSELVES AND THE WORLD: LOVE, SEX, GENDER, AND JUSTICE

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INTRODUCTION

Helga Varden's *Sex, Love, & Gender: A Kantian Theory* (2020) is a rigorous, beautiful, and transformative book, which does vital work not only in fully developing how Kant's complex understandings of desire, reflection, and relationality should inform our understanding of his arguments about sex and love but also in positioning these Kantian arguments as absolutely critical resources to contemporary debates about gender identity, sexual orientation, and sexual (in)justice. Rarely is a book so comprehensive, so coherent, and so grounded in a vulnerability we rarely find in philosophy; rarely does it so radically expand the resources we have for dealing with what seems like a familiar problem in such a well-read figure. The literature on Kant and sex is extensive, and yet this book absolutely revolutionizes the kinds of questions we can ask about Kant on sex, love, and gender.

Beyond its attendance to essential questions about love, sex, gender, and the phenomenology of human embodiment, Varden's book makes several key methodological moves. First, she offers a rigorous defense of a "bottom up" approach to Kant, which allows theorists (largely, and not coincidentally, women theorists) to square the sorts of non-ideal experiences with which she is concerned in this book with the systemic features of Kant's practical philosophy. This is not, as she argues, to decenter freedom in his philosophical project, but to read in a direction that allows these questions to "surface" in our lived, embodied, human experience of freedom. Varden's Kant, then, is an ideal Kant who is concerned with non-ideal dilemmas, desires, and experiences; he is a reconstructed Kant, whose ample resources for theorizing human experience, morality, teleology, and justice are no longer hampered by his own sexist, homophobic, and cisist preoccupations. There are critical resources here for those drawing on Kant to address a range of non-ideal questions that are beyond the scope of this project.

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Second, Varden opens with a lineage of both Kantian scholarship by women and feminist Kant scholarship, demonstrating the rich and varied ways that Kant scholarship has been transformed over the past four decades by the influx of women into the field, and revealing Kant scholarship as a site of (perhaps surprising) feminist philosophical innovation. For me, this is both resonant and comforting. I came to Kant because it was, at the time, the only seminar taught by a woman in my graduate department, and as such, was the only seminar in which I was not harassed, belittled, or silenced. Writing about Kant not only allowed me to work with a woman advisor; he provided cover for pursuing questions about love, sex, gender, and race that were not understood as “philosophical” within my graduate department, at least at the time I took them up. Varden’s book articulates my own sense of Kant scholarship as a gateway into feminist philosophy, as a rare space in mainstream philosophical scholarship that passes, if you will, a kind of philosophical Bechdel test. My engagement with Varden’s book is oriented through this gratitude, and through the sense of belonging that is at the center of Varden’s project here: an attendance to the ways that women belong in Kant scholarship, that non-ideal questions of love, sex and gender belong in Kantian philosophy, and that the experiences, desires, and traumas of women and LGBTQIA people belong in philosophical inquiries into what it is to be human.

Accordingly, I begin by tracing Varden’s argument through a central theme of the book: that one way to think about problems of love, sex, and gender, from both a phenomenological and a political perspective, is to tend to the importance of being at home with oneself, in the world, and with others. I explore how this framework allows Varden to develop a distinctly and innovatively Kantian account of our sexually loving and gendered selves, and their implications both for questions of virtue and morality, and for questions of justice. I then consider the ways that Varden’s analysis provides us with much needed resources to think about how inhabiting a self-defensive stance in the face of oppression may violate our duties to resist our own oppression. Finally, having traced the arguments at the heart of the book, I turn to two puzzles in Varden’s account of the just state: her understanding of sexual consent, and her defense of the state’s right to restrict abortion.

OUR SEXUALLY LOVING AND GENDERED SELVES: ON BEING “AT HOME” IN OURSELVES AND WITH OTHERS

At the heart of Varden’s argument is a study of our sexual selves, which can be understood as a Kantian map of what Linda Alcoff has called the “making capacities” of our sexual selves (2018). Varden teases out the phenomenology of our humanity, including the moral psychology of our sexual selves, laid out across Kant’s practical philosophy, in order to make clear that developing or realizing our sexual and gendered is a particularly important human project, one that not only integrates and develops our rational capacities, but our predispositions to animality and humanity, as well. For Varden, any account of our sexual selves must make space for the ways in which sexual desire, sexual identity, and gender identity are part of how we feel at home in the world and in ourselves, and so are not entirely reflective. This means tending to the tension between the “importantly unreflective” dimension of our sexual selves, and the

fact that we can nevertheless be responsible for the sexual ends we choose for ourselves: despite the “givenness” of much of our desires, preferences, and limitations, our faculty of desire is reflective, allowing us to step back and consider what we want, and how it fits into our broader life projects.

Varden’s key innovation is in drawing on Kant in order to attend to the structure of this self: how our animality, humanity, and personality as distinctively human (and not “embodied rational”) beings allows us to both tend to the “importantly unreflective” dimension of our sexual selves, and to the fact that we can nevertheless be responsible for the sexual ends we choose for ourselves. Thus, for Varden, “sexuality concerns deeply unreflective aspects of us, namely basic ways in which we feel at one with ourselves, at home in the world as who we are, including when together with others” (129). How one orients sexually, then, is not only a question of desire, but of “tracking something true about oneself with regard to how one feels others can complete one safely in sexual and/or affectionately loving activities as an us” (125). Our sexuality is an essential dimensions of how we feel safe in ourselves (our animality), of how we feel at home in relationship to others and in the social world (our humanity), and of how we express and integrate ourselves in these relationships, morally and otherwise, in ways that make us responsible to ourselves and others (our personality).

Varden’s analysis emphasizes our practices of setting and pursuing ends for ourselves, while at the same time insisting that while our end-setting projects “develop, transform, and integrate” these aspects of our being, they are not simply subject to choice: they are integral to self-preservation, our social embeddedness, and our moral lives. This allows us to make space for the “givenness” of the ways we feel most at home in the world, including how we feel most at home with others (125). On Varden’s account, this is a significant strength of the Kantian account over both essentialist-determinist and social construction accounts, in that it can make sense of the ways in which there is an unreflective “givenness” to our desires, our sexual orientations, and our sense of ourselves as gendered beings.

For Varden, this is a particularly powerful framework in that it makes sense of trans experiences, understood as a “deeply felt need to adjust one’s physical embodiment so that it fits better with one’s subjective experience of oneself” (126), in both embodied and expressive ways. If there is a “givenness” to the unreflective parts of ourselves, and we are required to set and pursue ends in the world in ways that put us at odds with these unreflective parts of ourselves – if we are expected to orient ourselves sexually towards those we do not desire, or required to move through the world in a physical body that does not fit with our deeply felt subjective experience – then it becomes impossible for us to “develop, transform, and integrate” all the aspects of our being. We cannot be at home in ourselves, we cannot be at home in the world, and we especially cannot be at home in our intimate relations with others. Therefore, failing to get this right, and so creating or reproducing a world in which people are not able to feel at home in themselves and with others in these ways are particularly harmful, as reflected by the high rates of suicide amongst LGBTQIA folk, even in our most liberal states: these are “high stakes” questions of human phenomenology, morality, and justice (113). In its attention to the kinds of suffering experienced by those who face violence, oppression,

or belittlement in the project of making their sexual and gendered selves, this book makes a particularly important contribution to our ability to articulate why our gender, sex, and sexual identities are so important to us, and why our freedom to set and pursue ends that allow us to integrate, develop, transform, express, and share these identities are central to our experiences as human beings.

Varden's approach refuses Kant's framing of sex as a "cannibalistic" use of another person, and centers the question of what it means to be sexually loving, such that "being sexually attracted to someone is to want their person – and not just their body – as we want the other person to show us their aesthetic, creative playfulness and invite us to be part of their endeavor to develop themselves as who they are, an endeavor that requires us to learn to show respect for one another in this process, and so, pushes us towards morality" (120). By exploring the ways that our sexually loving selves are key to our ability to feel at home in ourselves, in the world, and with others, Varden's account has ample resources to think through sexual violation and trauma in innovative and important ways. As the propensity to good orients her account of the structure of our phenomenological selves, the propensity to evil organizes her account of violation and trauma. Violation and trauma may take the form of frailty (giving into temptation, or being wronged when another does so), impurity (acting on the wrong motives, or being wronged when another does so), and depravity (self-deceptively acting on the wrong motives while telling ourselves they are good, or being harmed in the process). Varden draws on Kant's anthropological writings – including his analysis of the ways that women "dominate" men, and vice versa – in order to show how these violations shape persistent patterns of domination and oppression, and to identify the failures of justice that arise when these patterns shape "pockets" of barbarism or depravity within the state.

Thus, the question of what it means to be "at home" in oneself, in the world, and in relationships with others is at the center of Varden's account of justice. Her analysis of the relationship between the minimally just and the robustly just state is developed through a compelling argument about why access not just to housing, but to the "private" space of a home is particularly critical to LGBTQIA ways of being. Varden argues that while ensuring "emergency" housing may be a sufficient form of poverty relief for a minimally just state, one of the first priorities of states working towards a more robustly just condition must be ensuring that LGBTQIA folk, as well as survivors of rape and domestic abuse, have access to a home in which they have the privacy to "realize [their] sexual, loving, gendered selves," to present themselves in ways that are "open and vulnerable," and to "ground the lives of human beings in their relationships to themselves and others" (308). There is a critical difference, here, between having access to "housing" and having a home which mirrors the ways that, in the first half of the book, she insists on an account of being "at home in oneself" in ways that are profoundly human, not limited to an abstract account of what rational, embodied beings might need to express themselves.

Home, in this sense, is not only housing: Varden describes the right to marry as the right to create a home together, emphasizing the ways that when same-sex and polyamorous couples are denied the right to marry, they are "not given access to laws constitutive of a rightful legal,

personal, domestic “us” (258), which is harmful because “creating a shared, legally recognized home is constitutive of creating such rightful relations with another person” (211). Being denied these rights forces one into a kind of relational “state of nature”, since one cannot rely on the public authority to authorize one’s rights to one another, and thus to a shared life, a shared home (290). In such cases, Varden argues, one may find oneself in a “pocket” of injustice in an otherwise just state, such as when laws exclude some people, like same-sex couples, from rights that are ostensibly open to all, or when the state creates conditions in which some parts of our lives are subject to unjust laws or barbarity (as in the case of trans people denied gender affirming surgery, or women denied abortions) (288). In these cases, oppressed people are forced into morally impossible situations, in which the duty to obey the law (e.g., not to engage in formal wrongdoing by breaking the law) is in tension with the duties one has to resist one’s own oppression.

MAKING AND PROTECTING OUR SEXUAL SELVES: END-SETTING AND THE DUTY TO RESIST OUR OWN OPPRESSION

Varden’s worry about the impossible positions people face when resisting one’s own oppression means breaking the laws of a (minimally) just state is informed by her claim that our duty to resist our own oppression – and particularly the oppression of our gendered, sexually loving selves – is a violation of our perfect duties. Other Kantian feminists have framed this as an imperfect duty (Hay 2013, Cudd 2006), allowing us significant latitude in how we fulfill it. But for Varden, because we have “perfect duties not to treat ourselves and each other in aggressive (destructive and damaging) ways” (153), our duty to resist being treated in such a way is a perfect duty (even when it conflicts with the law, placing us in an impossible situation). This is a demanding account – but one that provides us, I think, with important resources for thinking about how resisting our own oppression can shape our sexual selves, particularly under the kinds of pervasive conditions of sexualized oppression in which LGBTQIA folk and women continue to live.

Varden’s analysis of the structure of our sexual selves frames end-setting as a deep and grounding part of the project of being who we are, the mechanism through which we integrate all the parts of ourselves, including our sexually loving and gendered selves, and the ways we are at home both with ourselves and with others. Doing this in a way that is productive to each and all is, Varden argues, decidedly difficult, and so we must be attentive to both the harms that can come from being oppressed or violated in these projects, and the conditions of justice in the world that allow us to set and pursue ends that reflect the selves we develop, transform, and integrate. Both our perfect and imperfect duties play a role here: perfect duties alert us to self- and other-destructing behavior, for example by setting limits on the kinds of ends we can permissibly set (e.g. I can’t set sexual ends that violate others’ rights to set sexual ends of their own, like rape). Our imperfect duties, on the other hand, hold us accountable to our own happiness and development, and to our duties to assist others in theirs.

In other words, our duties to resist the oppression of our sexual and gendered selves must take both the form of resisting or refusing damaging and destructive pressures, and of actively promoting our own happiness by setting and pursuing the sorts of ends that allow us to feel at home in ourselves in the world. This provides us with a more robust model for thinking about what resisting oppression entails, and it avoids a pitfall of those accounts that take a kind of self-defensive resistance to oppression be our core duty. For example, Carol Hay argues that setting ends to resist our own oppression are imperfect duties to ourselves, and the examples she has in mind include taking active steps to report harassment, or engaging in internal resistance to make the wrong of emotional abuse apparent to ourselves (2013). These are indeed ends of resistance to the violations that might characterize our gendered, embodied, and sexual lives. But when we are oriented primarily through resistance, our duties to resist may come to shape our end-setting projects in ways that are transformative and limiting. I am thinking of cases where we prioritize ends of resistance, so that our sexual ends take the form of not wanting to be raped, or not wanting to be traumatized. In these instances, our – necessary -- attentiveness to our own oppression can become an orientation, in a sense: we no longer know what sorts of things we may want, because we are so busy orienting ourselves in response to our oppression. We see this when, for example, women are trained to be attentive to sexual threat or violation at the expense of an attunement to their own desires, limits, preferences, or ends; when women and LGTBQIA folk are trained to perform hyper-sexuality as a mode of self-defense; when we have no answer to “what do you want?” because we have not learned to want anything other than to not be violated. Varden’s framework allows us to identify such self-defensive sexual ends as a violation of both our perfect and imperfect duties to ourselves. These are violations of our perfect duties when we become complicit in being treated in damaging and destructive ways, and they are violations of our imperfect duties to develop our sexual desires, limits, and preferences, to set sexual ends of our own that align with our distinctive conceptions of happiness, and not merely with projects of self-defense.

This, in turn, allows Varden to make important interventions in Kant’s own infamous account of the distinction between “natural” and “unnatural” sex, which grounds his claim that because same-sex sex and sodomy involve the pursuit of “unnatural,” non-procreative ends, they ought to be legally impermissible. There is both a moral and a legal argument here. Morally speaking, if our perfect duties to ourselves set limits on the kinds of ends we can set in the ways I suggest above, then the relevant question for our sexual ends is not whether an end is “unnatural” but whether it is destructive or damaging to our projects of making – developing, integrating, and transforming – our sexual selves. This is not something that can “be alleviated by thinking about it” (129), as Varden argues: I can’t just reason my way out of what I want; it’s not just a choice. And so given this, and given the sorts of both perfect and imperfect duties I have to myself, I have a duty to set, and pursue, the sorts of ends that allow me to “develop, integrate, and transform” the varied ends that I have.

From a legal perspective, Varden emphasizes that Kant’s conception of innate right involves a robust conception of our bodies as an integral part of our person, essential to our capacity to set and pursue ends in the world. Kant’s conception of freedom does set some limits on the kinds of ends we can pursue: our pursuit of those ends cannot subject us to the

arbitrary choice of another, nor subject someone else, arbitrarily, to our ends, and it cannot violate our ability to set and pursue ends as rational, embodied, human beings. Thus, we can't sell ourselves into slavery, or consent to cannibalism, or consent to sell our organs for profit. This is both because these ends are self-destructive, and to set self-destructive ends violates, as we've seen, our perfect duties to ourselves; and because pursuing those ends, as these cases make clear, violate our freedom. Likewise, setting ends destructive to others (like rape or trafficking or cannibalism) violates our perfect duties to others, and pursuing those ends violates their freedom, necessitating coercive legal enforcement.

Otherwise, however, Varden argues that we are free to set any kinds of sexual ends that we want, and to pursue them together with others through consent – and therefore, Kant must be mistaken in his assertion that we ought to be legally barred from setting and pursuing so-called “unnatural” ends. On Varden's account, sexual relations – procreative or not – are “rightful as long as they are authorized by continuous consent” (237); there's no reason to accept distinctions between the sorts of sex that are “natural” and those that are “not”, nor to accept the Kantian line that sex is permissible only within marriage. Instead, “authorizing consent” is the mechanism through which we can permissibly pursue our sexual ends with one another, and that as long as we have a robust conception of consent -- one in which consent can be withdrawn at any point (so that access to my body cannot be authorized against my will), and which disqualifies minors, the incapacitated, impaired, coerced, or deceived from authorizing consent – then sex is permissible, regardless of the sexual ends in question (“unnatural” or otherwise).

In making this argument, Varden admits that she departs from Kant's own account, not only in that she rejects his own homophobic, cisist account of “natural” sex, but also in that she rejects his assumption that sex is particularly morally dangerous, and thus requires a special relationship – one that goes beyond consent – to authorize it (257). She has good reason to do so: as she points out, Kant's critique of sexual consent seems to hinge on the premise that sex is profoundly morally dangerous, and thus permissible only within marriage, and neither claim has withstood the test of time. Moreover, Varden's account of the central role of “authorizing consent” in sexual morality is in line with contemporary understandings of the “moral magic of consent”, transforming violations into impermissible actions. So, I think there are good reasons for accepting Varden's move here, and taking authorizing consent to be an essential feature of Kantian sexual justice and morality. But it is nevertheless valuable to explore how Kant's own concerns about sexual consent might inform Varden's conception of our sexual selves, and of sexual justice.

PUZZLES FOR THE PROJECT OF JUSTICE: CONSENT

For someone who had a good deal to say about sex, Kant has surprisingly little to say about consent, and what he does say is primarily concerned not with its power to authorize, but with mapping the ways that consent alone fails to authorize permissible sexual relations: in morganatic marriage, in prostitution, in concubinage, in same-sex relations, and in marriage

itself. This is because, as Varden notes, Kant had a decidedly grim understanding of sex, and he thought that it involved using ourselves and others in ways that violate both our duties to ourselves and our innate right. Since the body and the person are an analytic unity, to use the body of another is to use their person. So, all kinds of sex – “unnatural” or not – subject us to the danger of being used like things. In this sense, as feminist Kantians have long argued, Kant’s conception of sex is not radically unlike feminist concerns about objectification.

Kant solves this problem by proposing that sex is morally acceptable, and legally permissible, only within marriage. His conception of marriage, as Varden argues, is quite robust, organizing shared private lives, granting status relations that allow persons to set and pursue ends together in ways that do not violate one another’s external freedom. For Varden, Kantian marriage is important because it creates conditions in which persons can have legally recognized shared lives, with legally enforceable rights to one another. Marriage produces legal equality between spouses, by granting them reciprocal rights to one another’s persons, and shared ownership of their possessions. So, it checks the various inequalities that create power imbalances in other sorts of sexual relations, like morganatic marriage and concubinage. But in doing so, it gives married partners special standing with regards to one another’s ends: partners share their legal standing, their possessions, and their persons. In each of these ways, they are reciprocally bound to share one another’s ends.

For Kant, this is what does the magic: sex is permissible within marriage because marriage is a “shared community of ends.” Neither partner can make use of one another as a mere means, since they are united in their commitments to one another’s ends; by sharing ends, even the most objectifying, “cannibalistic” sex remains aligned with both partners’ ends (even when those ends are “unnatural” on Kant’s own account).

The central distinction between Varden’s account and Kant’s account is not the nature of marriage, but the nature of sex. For Kant, sex is morally dangerous and cannibalistic. Consenting to be used in a way that is cannibalizing and objectifying doesn’t solve the problem: you’re still being objectified and consumed, even though you consented. For Varden, sex is an essential feature of our sexually loving selves, and when we desire a person, we desire not just their body but their person in ways that can be profoundly humanizing and affirming. Consent affirms our right to pursue these sorts of activities with one another (provided we don’t pursue activities like actual cannibalism). In this sense, for Varden, consenting to sex is not significantly different from consenting to other activities, like a game of squash (132). For Kant, because sex involves the direct use of the body, consenting to sex is radically different from consenting to other sorts of activities. We can see the distinction most clearly in how Varden and Kant think about the relationship between sex and slavery: Varden clarifies the permissibility of consenting to sex by contrasting it to the impermissibility of consenting to enslavement (238). But for Kant, the relation sex was most like was enslavement, and much of his early political writings on sex focused on the difficulties of distinguishing sexual contracts from slave contracts, since both involved an impermissible use of a person’s body that could not be resolved by consent alone (Kant 6:360).²

As I said above, I think we have good reasons to side with Varden here: Kant's account of sex is unaccountably grim, and his insistence on the similarities between sexual use and enslavement should trouble us both because it hyperbolizes the moral dangers of sex, and underemphasizes the profound violations of enslavement. Sex is a central part of both our self-making and our ways of being at home with others, and consent is an essential mechanism for allowing us to engage in these ways with others. But I also think that we ought not to dismiss too easily Kant's worry that some sex is objectifying and dehumanizing (as MeToo powerfully reminded us) and that consent alone cannot resolve the kinds of violations that this sort of sex poses: if consent is necessary to ensure that sex does not subject us to the arbitrary will of another, it does not follow that consent is sufficient for ensuring that sex is consistent with our innate freedom. In Kant's account of marriage as a shared community of ends I think we have some valuable resources for thinking beyond consent in ways that are consistent with feminist, LGBTQIA, and kink concerns.

To see what I mean, let's turn to an example Varden offers to test the distinction between permissible and impermissible forms of consent. She argues that, while it might be permissible for me to donate an organ to a loved one, or even a stranger, in order to enhance their chances of survival, it would be impermissible for the law to allow me to sell that same organ for profit: in the latter case, the law is authorizing contracts that allow me to be harmed or partially destroyed in order to benefit another, thus authorizing the violation of my innate right (239). A libertarian might say: but of course you can consent to sell your organs; you can consent to anything you like, just as you can set any ends – like profit – that you like. But Kant will say both that the state cannot authorize my consent to sell my organs, and that I cannot pursue an end of selling my organs: there are limits on the kinds of ends I can pursue, and the state can regulate those ends by regulating the mechanisms through which I can pursue those ends with others in the world.

Now, we might look at this example and come away thinking that selling one's organs for profit is analogous to selling one's body for profit, and that if the state can prohibit organ sales, it can prohibit prostitution. And that may be, but it is not my point. Rather, I want to pay attention to the difference between selling and donating my organs, arguing that it doesn't map to the distinction between prostitution and consensual sex, but to the distinction between sexual consent and the sharing of sexual ends. When I contract to sell my organs for profit, the contract may fulfill my ends – profit – while fulfilling the other party's ends: access to life-saving organs. I don't care what their ends are, or what they plan to do with my organs. I care only about the profit: I've consented to the surgery required to remove my organs in order to achieve my ends. My ends, and my reasons, are what concern me.

And this is characteristic of consent: I agree to someone else's proposal because doing so allows me to pursue or fulfill ends I have set for myself. I don't much care about their ends, or their reasons; indeed, I don't really need to know what their ends, or reasons, are. We authorize consent to things we don't understand all the time to fulfill our own ends: when we click "accept" on an iPhone's terms of service; when we sign waivers; when we have sex with a

stranger for the first time. Consent is the mechanism through which we can pursue the ends we have set for ourselves in those cases where that pursuit involves others.

But when I donate my organs, to a loved one or to a stranger, the ends in question matter to me. I do not have an end of my own, without profit to motivate me. Rather, I am motivated by ends I share with others involved: to save a life, to extend the life of a loved one. This doesn't mean I can control or dictate those ends: I don't get to choose who gets my organ, unless I am donating it to a specific person, and I don't get to dictate what the person with my kidney does with their life. But I am acting on ends I have chosen to share with others; I have transformed the ends I set for myself through participation in an individual or institutional community of shared ends. The shared end, of saving lives, or of saving this particular life, is what matters to me. Organ donation involves a shared value – of a particular life, or of the value of life – while organ selling involves only exchange value. Because this shared end becomes my end, my freedom is not violated, and the state can authorize my agreement to share in these ends. Its authorization may hinge on some evidence that I, in fact, understand and share in these ends, that I understand both the scope and the limits of the ends I share. This evidence operates to ensure that my actions do not violate my innate right, that I am not authorizing the use or destruction of my body as a mere means to someone else's end.

Kant's account of the analytic relation between the body and the will grounds innate right, and requires heightened legal scrutiny for any relation that authorizes the direct use of our bodies. When we share our bodies, Kant says, we must share our ends. This implies an epistemic duty to know the ends we share, as well as a duty to transform our own ends accordingly. There's an internal check here, since I can't share ends that violate my right or my capacities to set my own ends, and I can't share ends that conflict with my other ends or projects. And this is importantly different from consent, since I can consent to someone else's ends to use me as a means as long as doing so gets me to my end. Sharing ends involves developing an understanding of the ends involved, transforming our own end-setting projects accordingly, and integrating those shared ends into our own, broader end-setting projects.

This doesn't mean that, to share an end, we have to share all our ends. I can donate an organ to someone without marrying them, and I can share my body with someone without marrying them, too. But when I donate an organ, or share my body, I must engage in a process of sharing the relevant ends in a context in which a determination of the relevance of the ends involved is part of the epistemic project of end-sharing. If donating my organ will change how I can eat, or what kind of exercise I can engage in, then those ends are relevant and would need to be transformed and integrated, as well. If my ends of being respected, pleased, and remaining disease-free, unpregnant, and independent are relevant to a sexual encounter, then those ends need to be shared by my partner to the degree that they are relevant.

Kant, of course, argues that this sort of end-sharing is possible only within marriage. Marriage, as we've seen, makes end sharing possible by creating a set of background conditions that mitigate the inequalities and power imbalances that organize sexual relationships out in the world, making a shared community of ends possible. Consent, on the other hand, is designed to protect, rather than to transform, power dynamics, by treating parties as if they were equal

for the purposes of consent. Kant is particularly attentive to how power dynamics operate through sexual consent, as in his discussions of prostitution, concubinage, and morganatic marriage.³ Kant's conception of marriage, as Varden points out, deserves to be distinguished from "marriage-as-it-has-usually-existed" (123) in that its primary structural purpose is to create a legally enforceable condition of gendered and sexual equality – e.g., a condition in which ends can be shared. As Christine Korsgaard has pointed out, this has much in common with the Kantian conception of creating a "kingdom of ends", which is also characterized by a relation of reciprocity and equality in which end-sharing becomes viable (1996, 194-5). One way of understanding Kant's ideal of marriage, then, is that it creates a "pocket" of "robust" justice even in a minimally just state, creating conditions for sexual justice even in a world which remains patriarchal (and heterosexist and cisist).

Thus, authorizing consent may provide a minimal step towards justice in the barbaric conditions of a patriarchal, heterosexist state, creating conditions in which sexual partners can interact as if they were equal, and meeting the minimal conditions of justice by ensuring that my pursuit of my own ends does not entail treating another as a means only. Varden makes clear that this sort of step towards justice is necessary when working to establish a rightful condition, and that an imperfect state may be entitled to enforce only minimal conditions of justice. Enforcing authorizing consent, then, is a critical step for any state on the way to justice. But this is not to say that it is sufficient for justice. Varden's argument provides a broad reframing of what a map of the route to sexual justice might look like – and a Kantian conception of just sex as a relation in which we share sexual ends in a condition of sexual and gendered equality and inclusivity is a valuable resource for that journey.

PUZZLES FOR THE PROJECT OF JUSTICE: ABORTION

In closing, I turn to another argument that hinges on this distinction between the minimal conditions of justice and a robust conception of a rightful state – a distinction which is amongst the most compelling features of Varden's book. There are a number of reasons to value Varden's analysis of abortion, particularly in the wake of the end of *Roe v. Wade* in the U.S., where the debate over abortion must adapt to a new reality of state-by-state abortion bans that are violating women's and pregnant persons rights in devastating ways.⁴ To begin with, Varden frames abortion as a question of innate right, which must deal with the ways that the relation between our bodies and our persons is "analytic", a necessary unity (218). Given this, Varden argues, "the reason why just states reject [strict] restrictions is that they enslave pregnant persons" (223) and create conditions in which the state denies pregnant persons equal protection under the law (229).

This is not a mere question of abstract rights: given Varden's attendance to the deeply embodied, phenomenologically human dimensions of our experience, she has ample resources to take seriously the profound wrong of being forced to gestate against one's will, particularly in cases where the pregnancy was the result of an "ungrounding" sexual experience (e.g. assault or deception) (224). And justifying abortion only in these sorts of cases is insufficient: "what

we are looking for...is a stronger argument, one that demonstrates the unjustifiability of outlawing ordinary abortions, not just exceptional ones” (226). Yet Varden’s own description of the ways that forced pregnancy in exceptional cases “means forcing them to endure (for nine months!) serious, increasing physical manifestation in their own bodies of the violence and deception done to them” (224) could hold equally for the experiences of those who are forced, by unjust state law, to endure pregnancy as the physical manifestations of state violence. Once we recognize forced pregnancy and gestation as a grave violation of innate right, then it matters less how one became pregnant, and the distinction between “exceptional” and “ordinary” cases becomes less important (particularly given the ways that attendance to and exceptions for such “exceptional” cases is often deployed to “soften” the blow of brutal abortion bans).

Varden is clear that the right to abortion is insufficient, and emphasizes the importance of universal access to abortions, including access to clinics in all geographical areas, legally supported access for minors, and public funding for abortion access for all who need it. A just state protects pregnant persons only when it both secures ready access to abortion (231) and ensures state support for those who choose to become parents (232). Where the state fails to be just in these ways – whether in the case of contemporary abortion bans, or in the case of infanticide which Kant considers in the Doctrine of Right (6:333) – “the authority that is supposed to enable their rightful co-existence with others is radically failing in its ability to do so by permitting some spheres of interaction to remain “barbarous” (234). Varden’s argument convincingly shows why rightful and accessible abortion is a key requirement for any state claiming to be just – and why outlawing abortion creates “pockets” of barbarity in which some citizens will face impossible choices.

However, having outlined the various ways that an imperfect state must protect rights and access to abortion, Varden argues that a robustly just state would place restrictions on abortion. Her claim is that such restrictions become rightful at the point in pregnancy at which the fetus is phenomenologically capable of “rationally unified spontaneous action,” and is, therefore, deserving of legal protection. Varden acknowledges that there might be “reasonable disagreement” about when this point is (230), and she insists both that such restrictions could be rightful only given true access to abortion up to this point and that restrictive laws must include exceptions, like the health and mental health of the mother, as well as fetal abnormalities (233). Her argument, then, is that as long as abortion is truly accessible during the first trimester or so of pregnancy, then no one can be said to be pregnant against their will, and so the state is justified in restricting abortion in order to protect the fetus: at twelve weeks or so, the fetus ceases to be the sort of entity that merely “divides and multiplies” but becomes a “rationally unified spacio-temporal being” with legal standing (229). This is not full legal standing, to be sure; Varden specifies that because the fetus remains inside the pregnant person, her rights outweigh fetal rights, and only at birth does a fetus become a legal person. But nevertheless, Varden’s defense of abortion takes the same line as that proposed by the state of Mississippi in the Dobbs case which overturned Roe: a justification of abortion bans past 12 or 15 weeks. And granted, her argument includes the provision that, where the state does not meet the requirements of justice – e.g., where abortions are not truly accessible (in a state

like ours) – no such restrictions should be enforced. But what follows from this is that were the state to meet the minimum requirements of justice, such restrictions would be justified.

I have several worries about this, not the least of which are the terrible harms we've seen women face in states with abortion bans, which reveal the ways that restrictions on abortion produce a ripple effect across women's and pregnant persons' access to health care. But my Kantian worry is that granting –and enforcing -- a fetus' legal standing when it is inside a woman conflicts with innate right. As Varden argues, innate right entails that the relation between one's body and one's self is analytic, which means that the law cannot adjudicate between one's body and one's self (218-219). And so, as long as the fetus is inside the woman, they can together be considered “an analytic unity” (223). Viability standards seek a way around this feature of pregnancy by encouraging us to treat the fetus as if it were outside the pregnant person, which by definition it is not. The question Varden's argument poses is: is it the case that “from a legal point of view, the extent of my body is the spatial extent of my legal personhood” (219), so that “the relation between my person and my body...must be seen as one of necessary unity” (218), or is it the case that the fetus becomes a “unified spatio-temporal being” (229) which can be considered legally distinct (even if dependent) upon the “analytic unity” of the pregnant person?

This is complicated by Varden's account of the scope of the law, which can “only regulate interactions between beings” (228). This is important: the law does not coercively regulate all actions, since if I were acting alone on a desert island, I would need no law to protect the rights of others. It regulates interactions, or “external freedom, which is limited to what can be rightfully hindered in space and time” (218). If the law can restrict abortions, it must be protecting external freedom and regulating interactions – but whose? If we agree with Varden that, at a certain point, a fetus is capable of “rationally unified spontaneous action” this would still get us only as far as action, not interaction. For the fetus to “interact” with the pregnant person, we would have to grant that they are two separate entities, which would seem to undermine the claim that the pregnant person's body and person are “an analytic unity.” To say that the fetus is capable of action – even minimally rational action – is not to say that it has external freedom, “tracking external interaction in space and time” (219). It's difficult to characterize the interaction between fetus and pregnant person – if interaction is the right word – as an “external interaction in space and time” if we grant that the pregnant person's body – where this “interaction” takes place -- is her person. And so, even if we grant that the pregnant person and fetus are separate beings who interact in these ways, it would not follow that these interactions can be “rightfully hindered in space and time” (218), since any such hindrance involves adjudicating within the analytic unity of the pregnant person's body.

Another worry is that, given Varden's emphasis on continuous authorizing consent to sexual interaction, it is difficult to see why consent to pregnancy should not be subject to the same scrutiny. If the danger of conclusive consent – in other words, a point at which I have consented and can no longer back out – is that it creates a condition in which my body is used against my will, then why would this not be the case in pregnancy, as well? No matter how thoroughly accessible abortion is in the first twelve weeks or so, there will be cases where

pregnant people subsequently experience their pregnancies as a use of their body against their will. We could, I suppose, argue that these cases are addressed by Varden's insistence that later abortions "should be legally permissible when continued pregnancy would threaten the pregnant person's mental health" (233). But this would mean that, should I want to rescind my consent to access to my body, I would need to claim a mental health concern, rather than simply claim, in accordance with innate right, that it is my body, and I want it back. It creates a condition in which women would need a "really good reason" to say no at this point (in much the same way that women have been disciplined to assume they would need a really good reason to say no to sex once it has begun). If my body is my person, then surely, my reasons are my own, and any reason I give to rescind consent to have my body used against my will is a good enough reason from the perspective of law. If we are to fulfill Varden's insistence that the law recognize pregnant persons as the moral authority on their own experience of pregnancy, it seems to me that these sorts of restrictions on abortion would violate innate right.

The question I want to ask is: why should legally – coercively -- restricting abortion be a feature of a just state? I take Varden's point about the distinction between the moral and legal question of abortion, and I acknowledge that claiming that the state should not restrict abortions at any stage may do little to assuage those who think it morally wrong. Once we have made the distinction between those moral worries and the legal question of justice, however, we need to consider whether restricting abortion can be consistent with justice. The evidence from (unjust) states with abortion bans suggests that there is simply no just way to restrict abortions, that any attempt to legally restrict abortions worsens the availability and quality of care for all pregnant patients, as well as for women who are not pregnant.⁵ There is no map of "exceptions" to abortion restrictions that covers every case, and that solves the problems created when doctors must consult with lawyers before providing care. And so my worry is that any attempt to coercively restrict abortions will undermine the project of a robustly just state by creating the sorts of "pockets" of injustice about which Varden worries.

This is not to say that a just state could not be in the business of actively seeking to reduce abortions. Many features of Varden's vision of the just state would be likely to reduce the number of abortions, from policies that protect women and LGBTQIA folk from assault and abuse, to poverty relief programs that specifically support families and survivors of domestic, sexual, and gender-based violence, and that prioritize providing permanent, safe housing; Varden's vision is likewise consistent with arguments for public investment in holistic sex education and broad, publicly supported access to contraceptives. We have much to learn from the Reproductive Justice platform about the broad range of legal interventions and social programs which could support reproductive justice and reduce the number of abortions, and most of these are consistent with Varden's vision of the robustly just, liberal republican Kantian state.⁶ But in the wake of the end of *Roe v Wade*, I think it is worth troubling the notion that legal, coercive restrictions are an effective or just means of responding to the moral quandries of abortion, and asking what non-coercive measures just states ought to consider, instead.

ABSTRACT: This paper reflects on the critical philosophical resources developed in Helga Varden's *Love, Sex, & Gender: A Kantian Theory*, focusing on a central theme of the book: that one way to think about problems of love, sex, and gender, from both a phenomenological and a political perspective, is to tend to the importance of being at home with oneself, in the world, and with others. This framework allows Varden to develop a distinctly and innovatively Kantian account of our sexually loving and gendered selves, and their implications both for questions of virtue and morality, and for questions of justice. The author then considers the ways that Varden's analysis provides much needed resources to think about how inhabiting a self-defensive stance in the face of oppression may violate duties to resist our own oppression, and then turns to two puzzles in Varden's account of the just state: her understanding of sexual consent, and her defense of the state's right to restrict abortion.

KEYWORDS: Kant, Gender, Sexuality, Philosophy of Sex, LGBTQIA philosophy, trauma, oppression, sexual consent, abortion, feminist philosophy

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NOTES

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² See Kant 2016, 27:1336, 27:1379, J19:557 *Refl* 7927; for further discussion of Kant's connection between sex and slavery, see Pascoe 2022.

³ His reflections resonate with many of the cases made famous through the MeToo era; consider Monica Lewinsky's 2018 reconsideration of her affair with Bill Clinton, in which she reflected that her consent to sexual relations with Clinton did little to redress either the power imbalance that shaped their relationship, nor the scope of the harm that it did to her life project going forwards. Lewinsky's insight – that consent was insufficient to make this sexual dynamic consistent with her innate freedom – is consistent with what I take to be the critical Kantian intervention for contemporary sexual politics: attention to both the permissibility of our sexual ends and to the mechanisms through which we pursue those ends with one another. See Lewinsky, Monica (2018). "Monica Lewinsky: Emerging from the "House of Gaslight" in the Age of #MeToo." *Vanity Fair*, March 2018. <https://www.vanityfair.com/news/2018/02/monica-lewinsky-in-the-age-of-metoo>

⁴ For a summary of impacts, see Valenti, Jessica (2022). "I write about abortion everyday. It's worse than you think." *The New York Times* November 5. <https://www.nytimes.com/2022/11/05/opinion/election-abortion-roe-women.html>

⁵ The end of *Roe* has transformed health care standards for women and other potentially pregnant persons, with impacts that reach far beyond pregnancy to access to medication, treatment standards for those with health conditions that make pregnancy dangerous (like cancer, heart and lung disease, MS), and privacy concerns for all menstruating persons. For examples, see Mark, Michelle. “Louisiana woman whose water broke at 16 weeks was forced into ‘painful, hours-long labor’ because of abortion ban, lawsuit says” *Insider*, July 19, 2022. Accessed January 20, 2023 <https://www.insider.com/doctor-louisiana-abortion-ban-affidavit-patient-miscarriage-2022-7> and Presser, Lizzie. “She Wasn’t Ready for Children. A Judge Wouldn’t Let Her Have an Abortion.” *New York Times*, November 29, 2022. <https://www.nytimes.com/2022/11/29/magazine/teen-pregnancy-abortion-judge.html>

⁶ Reproductive Justice, as framed by Loretta Ross (2017) and grounded in the experiences of Black women, involves three central rights: the right to have a child under the conditions of one’s choosing, the right not to have a child, and the right to parent children in just conditions. Reproductive Justice thus offers a broad vision of the kinds of transformative justice required to hold the state accountable for its long history of violation of women of color, by connecting the question of the right to abortion to the right to healthcare, childcare, food and housing security, education, poverty relief, environmental justice, gender and racial justice, and an end to private and state violence like rape, police brutality, and mass incarceration.

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