

19. This point helps to elucidate the bind within which feminism sometimes appears caught: between working within systems of domination that undermine the freedom sought or remaining unintelligible. An alternative sought and worked for by Frye and Lugones (among others) is to *intelligibly* live outside systems of domination to the extent that this is possible by building and working within alternat(iv)e knowledge communities.

20. See Marilyn Frye, "Some notes on Separatism" in *Politics of Reality*.

21. Maria Lugones, "Playfulness, 'World'-Traveling, and Loving Perception," in *Women, Knowledge and Reality*, ed. A. Garry, (New York: Routledge, 1996), 423.

## A Kantian Conception of Rightful Sexual Relations: Sex, (Gay) Marriage, and Prostitution

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**Abstract:** This paper defends a legal and political conception of sexual relations grounded in Kant's *Doctrine of Right*. First, I argue that only a lack of consent can make a sexual deed wrong in the legal sense. Second, I demonstrate why all other legal constraints on sexual practices in a just society are legal constraints on seemingly unrelated public institutions. I explain the way in which the just state acts as a civil guardian for domestic relations and as a civil guarantor for private property and contract relations—and thereby enables the existence of legally enforceable claims. Throughout the aim is to demonstrate that Kant's relational conception of justice entails that legally enforceable claims regarding sexual deeds are fully justifiable only insofar as they are determined and enforced by a public authority that we may refer to as a liberal democratic welfare state.

### I. Introduction

This paper defends a legal and political conception of sexual relations grounded in the *Doctrine of Right* in Kant's *Metaphysics of Morals*.<sup>1</sup> First, I argue that only a lack of consent can make a sexual deed wrong in the legal sense.<sup>2</sup> According to Kant's relational account of justice, consent is necessary to make any sexual actions rightful. This means that insofar as the actions in question are exactly *deeds*, and consequently are attributable to legally responsible persons who have voluntarily undertaken them, they cannot be justifiably outlawed. The only consensual sexual relations that can be outlawed are those involving persons who are incapable of consent in the legally significant sense, such as children.

The relational nature of Kant's account of right also underwrites my second claim, which is that all other legal constraints on sexual practices in a just society are constraints on the public institutions within which they operate. This argument begins with Kant's general view that we have a strict duty to enter civil society,

since just relations are possible only within a *public*, liberal legal framework. In particular, I argue with Kant that certain public institutions are required in order for consensual sexual relations to give rise to legally enforceable claims. I suggest that the stronger interpretation of Kant on this point maintains that the state must act as a civil guardian for domestic relations and as a civil guarantor for private property and contract relations in order to give rise to legal claims concerning sexual deeds.

Finally, I show that Kant's systematic position has an important contribution to make to the current debate over homosexual marriage and the legality of prostitution. After an exploration of Kant's position on domestic right ("status relations"), I show why denying homosexual couples the right to marriage is not primarily an issue of equal rights but rather an issue concerning the right of one person to establish a rightful domestic sphere together with another. By means of an exploration of Kant's arguments concerning rightful private property and contract relations I argue that though there is nothing legally impermissible about consensual trade in sexual services as such, the rightfulness of the industry depends upon the public institutions within which it operates. In my view, these conclusions are not readily seen because the interpretive tradition has focused too much on Kant's comments about the immorality of sexual actions. I suggest, contrary to most Kant interpretations and even to Kant himself, that these conclusions regarding homosexual marriage and prostitution actually follow from Kant's theory of justice.

## II. Kant's Account of Rightful Sexual Relations

Kant defends a relational conception of justice. This relational conception of justice is developed from what Kant takes to be the starting point of any liberal theory of justice, namely each individual's innate right to freedom. The innate right to freedom is understood as the right to "independence from being constrained by another's choice . . . insofar as it [the choice] can coexist with the freedom of every other in accordance with a universal law" (6:237).<sup>3</sup> The innate right to freedom is relational in that it conceives of justice as arising only amongst interacting persons, and it understands the rightfulness of their interactions as consisting in the relation established between them when they interact. Kant argues that a person's innate right to freedom is respected only if her choices, or the ways in which she sets and pursues ends with her rightful means (her body, her causality<sup>4</sup> and her rightful possessions), is never subject to another person's arbitrary choice, but only to universal law.<sup>5</sup> That is, a person's freedom is subjected to another's *arbitrary* choice when *the other* person decides how she uses her rightful means, namely by forcing her to use her body, to act or to use her private property in a certain way. To have one's freedom or one's ability to set and pursue ends of one's own subjected to another person's arbitrary choices in this way is to be

enslaved, according to Kant. Such wrongful subjection of one person's freedom to another person's arbitrary choice involves not only subjecting a person to another's *contingent* wishes and desires; the restrictions upon them as interacting persons are also *asymmetrical*. In contrast, rightful restrictions are *universal* restrictions. Interacting persons are constrained by universal restrictions if these restrictions are non-contingent and symmetrical. Non-contingent restrictions do not embody any particular person's private conception of what constitutes good restrictions, and universal restrictions limit the interacting persons' actions symmetrically or in the same way. Therefore, Kant's conception of justice is inherently relational in that it characterizes political freedom as the absence of arbitrary (contingent and asymmetrical) imposition of might amongst interacting persons by demanding that interacting persons are constrained only by universal (non-contingent and symmetrical) restrictions.

Given that Kant grounds his theory of justice in each person's innate right to freedom, it is most surprising to discover that his analysis of sexual practices is fundamentally informed by a distinction between natural and unnatural acts. In the "Doctrine of Right" Kant argues that

Sexual union is . . . the reciprocal use that one human being makes of the sexual organs and capacities of another. . . . This is either a natural use (by which procreation of a being of the same kind is possible) or an unnatural use . . . with a person of the same sex. . . . Since such transgression of laws, called unnatural . . . do wrong to humanity in our own person, there are no limitations or exceptions whatsoever that can save them from being repudiated completely. (6: 277)

'Natural' sexual union refers to sexual deeds involving two persons of opposite sex who make reciprocal use of each other's sexual organs and capacities in a way that is consistent with procreation. To engage in any other sexual practices, Kant appears to argue, conflicts with our innate right to freedom, because it is an unnatural use of our sexual organs and capacities. Heterosexual acts are the only natural acts, whereas all other acts are unnatural—including, of course, homosexual acts.<sup>6</sup> If this is the correct interpretation of Kant here, the problem is that he must be mistaken about his own theory. The reason is that homosexual acts, or acts not in line with procreation, are not in conflict with one's innate right to freedom. The innate right to freedom gives one a right to independence from having one's freedom subjected to another person's arbitrary choice, but there is no such wrongful subjection in *consensual* sexual interactions amongst morally and legally responsible persons.<sup>7</sup> That is, according to Kant's legal and political theory, sexual relations are rightful as long as they are consensual. So even if we can give an explanation of why consensual homosexual practices involve a *morally* more objectionable subjection to animal desires than heterosexual practices consistent with reproduction,<sup>8</sup> it simply appears irrelevant to the *legality* of these actions whether or not they are in agreement with some teleological conception of human

nature.<sup>9</sup> Rather, I suggest that Kant's considered opinion must be that a morally and legally responsible person has the right to choose any particular sexual end together with another consenting legally and morally responsible person. A person can, of course, change his mind at any point, and if his sexual partner does not respect his change of heart, then he is being wronged (raped).<sup>10</sup> But insofar as he voluntarily and continuously consents, the sexual deed must be legally permissible if we are to be consistent with Kant's account of justice.<sup>11</sup>

For this reason I do not think that Kant's own position can claim that certain sexual activities, such as same-sex practices, anal sex, oral sex, three- or more-somes, filming sexual activities, or providing sexual services in return for money, are legally problematic in themselves. In my view, Kant's distinction between natural and unnatural acts must be thrown onto the already considerable pile of unsustainable prejudicial attitudes towards non-traditional and non-heterosexual sexual practices held by prominent thinkers in the history of legal and political philosophy. Contrary to what seems to be the case, if we remain faithful to Kant's systematic commitment to the individual's right to freedom, it is impossible to consider the sex (a biologically-based distinction) or gender (an identity-based distinction) of sexual partners as relevant when determining the legality of their practices. For the remainder of this analysis I simply ignore the prejudice and instead concentrate on what I take to be the philosophically interesting aspects of Kant's explicit discussion of rightful sexual relations between persons. Those aspects are, first, Kant's argument that legally enforceable claims with respect to adult sexual relations (domestic or otherwise) can give rise to enforceable claims only within civil society, since only civil society can enable legally *enforceable* claims between persons. Second, within the state of nature any use of coercion against another person, such as against one's spouse or against someone with whom one has contracted for sex, is wrongful, since it is an arbitrary (contingent and asymmetrical) use of might.

### III. Rightful Domestic Sexual Relations between Adults

Kant's explicit discussion of enforceable legal claims with respect to our domestic sexual relations is found in his account of what he calls "status relations."<sup>12</sup> Kant enumerates three types of status relations: those arising when parents obtain children, when husbands obtain wives, and when families obtain servants (6: 277, cf. 27: 642).<sup>13</sup> At first glance it is most puzzling why Kant puts these three relations in the same category. Why does Kant judge there to be a similarity or link between these apparently very different relations? In my view, Kant considers these relationships similar to one another and distinct from all other legal relationships in that they involve legally enforceable claims concerning the private life of another person. This is why Kant explains that a status relation is a relation between persons in which one person has the right to 'make arrangements' affecting another person's private

life (6:259) and why he argues that status relations concern 'what is mine or yours *domestically*.' He also claims that the right to make arrangements for another is the 'most personal' of all rights (6:277). In fact, one of Kant's more remarkable claims is that this *personal* kind of right, or this type of "possession," can be analysed neither in terms of property right nor in terms of contract right.<sup>14</sup> This is because property right cannot capture that it is a *person* who is the "external object" of possession, whereas contract right cannot capture how "personal" rights result in one person obtaining legal standing or status in relation to how *another* person conducts her private life. Therefore, neither property nor contract right can provide the framework with which to analyze this type of right.

It is not hard to understand why property right cannot be the mode to analyse the marital relation between husbands and their wives. After all, if it were, then we would possess persons as things—and this is slavery. But why can we not analyse marriage as a contractual relation? Similar to the problem with a property analysis, a contractual analysis of marriage would make the marriage contract into a slave contract. This is why Kant argues that in status relations consent cannot do the legitimating work it does in contracts.<sup>15</sup> The problem is that status relations give rights *to* persons rather than rights *against* persons, which means that one person obtains a standing with regard to how another person lives her private life. The problem is that a person cannot, even if consenting, enter into a relation where her own person is no longer subject to her own choice but rather to another person's arbitrary choice. Such asymmetrical subjection is slavery. Hence, even if a woman consented to subject herself (her private life) to her husband's arbitrary choices in this way, their agreement cannot be a legally enforceable contract. To restate, wives are morally and legally responsible persons, and their consent is necessary for rightful relations. Yet their consent to give their husband a standing with regard to their private lives is insufficient to give rise to legally enforceable claims. The problem is not only that wives perform a rather open-ended set of (morally permissible) tasks that can be loosely understood as supporting their husbands. And the problem is also not only that wives are legally bound to assist their husbands *themselves*, in the sense that wives cannot sub-contract their tasks to others in the same way that, for example, a carpenter can hire another carpenter to do the job for him. Rather, the reason why the kinds of agreements involved in domestic relations are classified by Kant as belonging to the category of *status* is that husbands obtain legally enforceable claims against the private lives of their wives. In other words, through marriage the husband obtains a certain status in relation to his wife's private life. He obtains a right that she shares her domestic sphere, including her sexual life, with him only and that he has a say in how she lives her private life. The reason why contract right cannot be the vehicle for analyzing the marriage relation is that a contract that gives this kind of right is essentially a slave contract. Thus, a status relation regulated by contract right is not legally enforceable because it is tantamount to slavery.

The first step, then, to making such "status" relations rightful, Kant argues, must be to make the legal claims between the persons *reciprocal*. Husbands and wives therefore must have legal claims to *one another's* person. That is, it cannot be the case that only the husband obtains standing with regard to his wife's private life; the wife must obtain the same standing with respect to her husband. Giving husbands and wives reciprocal claims to one another's person is the only way in which to secure provisionally both parties' rights to freedom in the state of nature. That is, only through marriage can the husband obtain legal standing to the *person* of his wife, because marriage gives the wife the same rights to the person of the husband. Only through marriage can two legally responsible persons give one another standing within one another's private sphere.<sup>16</sup> The open-ended, subjection of one's private life to the choices of another that occurs in unifying one's private sphere with another must involve a reciprocal subjection to one another's choices. More specifically, the marriage contract achieves this reciprocity between spouses by giving each of them the same standing with respect to how they now make their private decisions, which, as we saw above, comprise decisions concerning their bodies, their causality and their private property.

In marriage two private spheres are unified into one rightful domestic sphere by providing the following conditions. First, the spouses' previous personal property and titles becomes common private property and titles. This is why Kant argues that the "morganatic marriage," meaning a marriage whereby one party does not get all the titles, privileges and estates of the other party, is not a true marriage. Kant argues a marriage of this kind is problematic, because it 'takes advantage of the inequality of estate of the two parties to give one of them domination over the other' (6:279, cf. 27: 641). True marriage requires that the two parties share each other's means fully—with no such restriction.<sup>17</sup> Their common private property is subject to their choices as a couple. Second, marriage achieves a rightful domestic sphere by each spouse giving the other standing with regard to how they use their causality, namely with respect to decisions concerning how to organize their individual work and leisure time. By marrying, persons give one another a right to have a say in choices that affect their shared life so that each is able to have a private life with the other in a way agreeable to both. Third, the spouses in a true marriage are under a legal obligation to restrict all their sexual activities to each other (6: 278f.). The two persons also authorize one another to participate in what otherwise are strictly personal decisions, say, decisions concerning one's own health or sexuality. For example, one spouse has the right to participate in decisions concerning any sexual activity outside the marriage. Prior to marriage, of course, there is no legal wrongdoing when one partner cheats, but after marriage decisions concerning sexuality (one's body) become shared decisions. So adultery, after marriage, for example, is legally wrongful. Obviously, this position is not inconsistent with sexual practices such as open marriages, but it maintains that the decision as to

whether to engage with other sexual partners is always a *shared* decision for the married couple.

It is important to note that the better interpretation of Kant's account will recognise marital rape as a criminal act. Remember that a lack of consent can make sexual relations wrongful; nothing Kant says about marriage changes this fundamental claim. Rather, Kant's conception of marriage is driven by the concern that consent alone is insufficient to give rise to legally enforceable claims to one's consensual sexual partner, such as claims to fidelity or to let decisions regarding one's shared private life be exactly shared (consensual). It is unreasonable, therefore, to think that Kant considers consent *after* marriage superfluous. What Kant wants to establish are the ways in which we can physically "make use" of one another's bodies without thereby disrespecting one another's innate right to freedom. Thus, though it is correct to argue that Kant's position outlaws adultery, it seems incorrect to argue that a husband is entitled to use coercion to obtain access to his wife's sexual organs. It seems fair to argue that the only thing that suffices to gain rightful access within the marital setting is still continuous consent. This reading is supported by Kant's argument that being married does not necessarily entail that one has a right to have sexual intercourse. He argues that if two persons marry with the 'awareness that one or both [partners] are incapable of it [sexual intercourse],' then the contract is not legally binding. However, he continues, 'if incapacity appears only afterwards, that right cannot be forfeited through this accident for which no one is at fault' (6:279). Here it is reasonable to interpret Kant as arguing that marriage does not give rise to a right to sexual services from one's partner. Rather, Kant argues that one remains obliged to stay sexually faithful towards one's partner *even if* they discover after being married that one party is incapable of enjoying sexual activities and therefore does not want to engage in them (cf. 6:426).

In the three ways briefly outlined above (joint decision making concerning private property, causality, and sexuality and health), two persons when marrying unite their previous, separate domestic spheres into a single domestic unit under their mutual control. Decisions regarding where to live, with whom to engage sexually, health, career, and private property become decisions in which they jointly participate. I believe that the better interpretation of the Kantian position will defend a person's right to divorce, but this does not change the fundamental claim that, *as married*, persons have unified their domestic lives, and therefore, one spouse does not have the right to unilaterally make decisions that have an impact on their shared life.

Though the reciprocal claims engendered through marriage give rise to *provisionally* rightful relations between husband and wife, Kant still argues that justice is not thereby realized. The problem is that in the state of nature marriage contracts are not rightfully *enforceable*. The reason is that within the conceptual framework of the state of nature, there is no person outside of a particular status

relation with the authorization to intervene in it. Hence, the judgement whether the parties are acting in accordance with the marriage contract when there is disagreement becomes the judgement of the stronger person in the relationship. Without a public authority to act as a "civil guardian" over the parties in status relations, it is impossible to ensure that the domestic relationship is rightful—rather than one of abuse and wrongdoing. Primarily, the problem is not that the terms of such contracts are indeterminate, namely, that it is impossible to determine exactly the rightful boundaries concerning choices that affect the common domestic sphere. Rather, the real problem with ensuring the rightfulness of domestic relations is that the contracts involved are open-ended and personal. And because they are open-ended and personal, it is impossible to characterize wrongful uses of coercion in status relations in the state of nature, since there is no position outside of these private relations from which one can evaluate their wrongfulness. In other words, in the state of nature, there exist only self-contained private domestic spheres, and no one outside of such a private sphere has the appropriate standing to evaluate whether or not the ends set for one another within this private sphere are set rightfully. So the problem is not one of determining what the contract involves, although that might be an issue; the problem is one of rightful uses of coercion within the contract, namely within the domestic relation. In the state of nature, there is no possibility of a rightful solution to a domestic conflict: the person who decides to enforce her decision will subject her partner to her arbitrary choice, whereas the one who lets the other have it her way will subject herself to her partner's arbitrary choice. The problem is that there is no rightful solution to marital, domestic conflicts in the state of nature. Therefore, because there is no rightful coercion, there can be no rightful domestic relation in the state of nature.

To establish domestic right there must be a public person with the appropriate standing to adjudicate disputes amongst adults sharing a domestic sphere. Only a public authority can have this standing, since only a public person can be the will of both individuals and hence make enforceable decisions when conflicts arise between the two parties. A private third person cannot be designated to adjudicate and enforce domestic right since no private individual can enjoy the requisite standing to coercively enforce rights. And consent cannot do the work of establishing appropriate standing, since, as we have seen, the contractual subjection of one's private sphere to the decisions of another private person is, essentially, a slave-contract. Hence the appeal to an impartial private individual to settle domestic disputes merely replicates rather than solves the original problem of legally enforceable claims involving the private lives of persons.

In order to overcome these problems, Kant argues that marriage must be given a public institutional setting. That is, a public authority is a necessary condition for enforceable domestic (marriage) rights, because only by constituting a *public* authority with standing in domestic relations can there be legally enforceable

claims between spouses. The solution must be a public authority, because it is both non-contingent in that it is the united will of interacting, private persons, and it enables the symmetrical subjection of individuals to a public authority to resolve their conflicts. Because the public institution of marriage can yield universal (non-contingent and symmetrical) restrictions upon the married couple, it can generate those enforceable claims with regard to the domestic sphere of a husband and a wife that are necessary for rightful domestic relations (6: 277f.). Hence, civil society is an enforceable precondition for domestic right. Only through a marriage contract that is authorized and enforced by a public authority in its role as a civil guardian with regard to domestic relations are both persons subject to rightful coercion.<sup>18</sup> The public authority specifies the content of marriage laws and as the civil guardian of domestic right it establishes those institutions necessary to ensure that all domestic relations are rightful. It is impossible, of course, conceptually to specify *exactly how* the state fulfils its role as civil guardian. The only thing we can say a priori is that it must set up institutions by which it aims to fulfil its role.

Kant's position on the rightfulness of domestic relations, correctly understood, sheds some much needed light on what most take to be three very puzzling, if not inconsistent, arguments in Kant's discussion of private right with regard to husbands and wives. First, most interpreters think that Kant's position entails that in order to justify rightful sexual relations between two persons, they must marry.<sup>19</sup> The reason is that sexual relations are considered immoral, and the only remedy is marriage, or reciprocal sexual exploitation. The puzzle is that it is unclear why Kant would think *reciprocal* sexual exploitation makes an otherwise immoral act okay. Second, as Howard Williams points out, '[A]n important premise of Kant's argument is that sexual relations necessarily involve treating oneself and one's partner as things. But there is no reason at all why this premise should be accepted. And, indeed, to demonstrate convincingly that marriage is the only ethically desirable context for sex, Kant ought to start from better premises than these' (H. Williams 1983: 117). The problem with Kant's argument, according to Williams, is that it seems to rest on a rather grim view of sexual relations, and there is no good reason to accept this premise. Consequently, Kant's argument that only marriage can make sexual relations rightful rests on rather shaky grounds. Third, because Kant argues that a husband is fully entitled to bring his wife back 'under his control' (6:278) if she runs away, it seems that when marrying, a husband obtains something close to private ownership of his wife. If marriage is supposed to solve the problem of treating others as things, then, clearly, arguing that the marriage relation is a private property relation cannot be the solution.

My interpretation of Kant's understanding of rightful domestic relations can solve these puzzles by bringing together the following points. First, we have seen that Kant's entire position is motivated by the thought that it is incorrect to try to analyze marriage in terms of private property. Therefore, we must understand

the relation between two persons in marriage to be different from the relation a person has to a thing when owning property. Second, we have also seen that any rightful access to another person's body always requires consent. Kant's account of marriage neither contradicts nor alters this fundamental claim, which underscores the important point that marriage is not needed to make sexual deeds rightful as such. Rather, the public institution of marriage is needed in order for an agreement between two persons to share a life to give rise to a rightful domestic sphere. Legal, public marriage is required to make sure the shared domestic sphere is free of abuse and one in which there are reciprocal enforceable claims to be mutually in control of two persons' shared private life. Rightful marital relations therefore require two things: reciprocal rights to one another's person (private right) and the establishment of a public authority with standing in the relationship (public right).

What exactly does Kant mean, then, when he asserts that a husband is entitled to bring his wife back 'under his control'? In part, the point of Kant's argument is that within the conceptual framework of the state of nature (private right), it is impossible to capture any wrongdoing when the husband forcibly brings his wife back under his control. From the perspective of *private right* he indeed acts rightfully. They have agreed to share a domestic sphere, and hence the wife cannot simply abandon her spouse when what she perceives as a better opportunity comes along. Nevertheless, the better reading of Kant never loses sight of the fact that he makes this comment about the husband fetching back the wife within his discussion of private right, or right in the state of nature. But it is crucial also to notice that Kant ends this discussion of private right by saying that one wrongs one another in the highest degree by staying in this condition, which means that to *enforce* one's rights in the state of nature is to wrong one another in the highest degree (6: 307). Consequently, when the husband enforces his domestic rights against his wife in the state of nature, he wrongs his wife in the highest degree, because he cannot rightfully enforce his domestic right to his wife in the state of nature. Rightful marital relations are possible only in civil society, and since in the state of nature he has not entered into truly rightful relations with his wife, he does not have the right to *enforce* his rights. The problem is that there is no rightful resolution to conflicts in marriages in the state of nature. Because there is no public authority, there is no one with the standing to judge whether a right has been infringed. And, enforcing one's own judgement as to whether or not one's rights have been infringed amounts to wrongdoing, since the potential wrongdoer has become the judge in his own case. Therefore, once we understand that marriage can make domestic relations between husbands and wives rightful only in civil society, we see that the three puzzles are solved: rightful sexual relations must involve reciprocity because obligations corresponding to rights to other persons must be reciprocal; the immorality of sexual deeds is irrelevant, and the argument concerning 'fetching back one's wife' serves to

highlight the wrongfulness (in the highest degree) of such an action rather than explaining its rightfulness.

If we discount Kant's personal prejudice against non-heterosexual practices, we can now capture why it is so important that gays and lesbians obtain the right to marry on Kant's position. Essentially, if these persons are not given the right to marry, then they are also not given protection against domestic abuse or wrongdoing in their shared, personal or domestic spheres. By denying gay and lesbian couples the right to marry, the state forces their relationship to stay in the state of nature thereby denying them domestic relations that are reconcilable with their innate rights to freedom. Since gay and lesbian couples have no legal claims to one another, consent with regard to each action constitutes the end of their legal rights with respect to each other. This means that it is impossible for a gay or a lesbian person to make sure that the unification of her private life with that of another does not entail that she potentially subjects herself to another person's unilateral decisions regarding her private life (and vice versa)—including those decisions we consider most intimate and up to us individually to decide. It means that when one party no longer consents to let her private life be under their reciprocal control, no longer wants to disclose information concerning how she conducts her private life, or simply wants to quit the agreement, the other party has no legal claims against her. Gay and lesbian persons, because they are not given the right to legal marriage, are forced to stay in a state of nature where it is impossible for them to avoid subjecting one another to a kind of abuse that only a public institution of marriage can solve.<sup>20</sup> Or to put the point more positively, the gay or lesbian person is precluded from the possibility of respecting his or her co-habiting partner's right to independence with regard to her private sphere, since it is impossible for them together to create a rightful common private sphere or enjoy rightful domestic relations.

I have been defending Kant's claim that marriage contracts are different in kind from other contracts and that to treat them as simply as examples of a regular contract is to fail to capture the *open-ended* and *personal* nature of the marriage contract. The alternative, of course, is to argue that there is nothing essentially different about the marriage contract from other contracts and that denying gays and lesbians the right to marry is simply to deny them equal contract rights. In my view, the problem with this alternative argument is that if marriage contracts are treated just like any other contract, then the open-endedness and personal character of their terms makes traditional marriage contracts more like slave contracts and therefore a type of contract that undercuts the very possibility of rightful relations. One might agree with my analysis and argue that rather than maintaining the position that gays and lesbians should have the same right to marry as do heterosexual couples, no one should have the right to marry in the traditional sense.<sup>21</sup> But neither does this strategy escape unscathed. The problem here is that if no one can marry, then we cannot make sense of any legal protections against *wrongdoing* in the domestic

sphere beyond non-consensual interactions. As long as something is consensual, there is no legal wrongdoing involved. For example, if there is no marriage, and a couple decides that one partner will take on the bulk of the domestic work to enable the other partner to pursue a professional career, no legally enforceable rights arise unless they sign a particular labour contract to handle this particular agreement. Similarly, if one partner improperly uses some piece of property belonging to the other, this in principle (through property right) can give rise to a legal suit, whereas infidelity cannot give rise to a legal claim since it only involves consensual use of one's own body. Therefore, rather than demonstrating a virtue of the alternative position, I believe that the argument calling for the dissolution of marriage altogether makes vivid the crucial issue involved in rightful domestic relations, namely that the persons involved actually *share* their private lives. Without marriage it is impossible for a person to remain in control of her own private sphere and yet unify it with that of another without the unification entailing the subjection of her private sphere to the arbitrary choices of her partner (and vice versa) rather than to their common choices.<sup>22</sup>

#### IV. Rightful Trade in Sexual Services

Rightful sexual relations falling within marriage are in my view the philosophically most interesting aspects of Kant's *explicit* discussion of rightful sexual relations. This is because of the distinction Kant draws between domestic relations and either regular contract or property relations. However, Kant's general account of private property and contract right has application with regard to rightful sexual relations falling *outside* of marriage. Again, what is fascinating about this argument is that it shows how legal claims with regard to trade in sexual services actually are legal claims on public institutions. In particular, the way in which Kant argues that public right is necessary to give rise to enforceable contract rights and rightful private property relations has significant implications for rightful sexual relations in the sex industry. It is consistent with Kant's account to consider trade in sexual services a kind of contract. To most people it is not particularly problematic to let go of Kant's assumption that sexual activities as such are inherently immoral. Even if we do not give up this view, however, it still seems impossible to explain why persons cannot legally contract to perform (immoral) sexual services for one another. Moreover, contrary to what many fear, what arises from such an assumption is not the rather scary libertarian analysis of rightful sexual contracts, namely that anything goes as long as the contractors are adults and they have voluntarily consented to a particular contract. Rather, the legality of sexual contracts gives rise to something much more appealing to a liberal mind. We can use Kant's understanding of the functioning of a just liberal state to show why contractual sexual relations need not threaten the freedom of either party.

In order to see why the legality of sexual contracts need not threaten individual freedom, we must incorporate into our Kantian account of rightful trade in sexual services three crucial aspects of Kant's analysis of rightful possession and acquisition of (external) things and services. These aspects are, first, that contractual relations cannot give rise to legally enforceable claims in the state of nature; second, the state can only fulfil its role as the guarantor of rightful private property if it provides unconditional poverty relief for the poor; and third, the state has the right to provide further protection to economically vulnerable groups by establishing institutions that secure vulnerable individuals access to resources that enable them to become fully independent, active citizens. I will give a brief treatment of each condition.

The reason why contract rights are not enforceable in the state of nature is that without a public authority there is no single, rational way to interpret the terms of a particular contract. Well-intentioned persons may very well find that they have differing conceptions of what they have agreed to. It is therefore impossible for any one of the parties to determine the "objective" content of the terms of contract. Consequently, contracts in the state of nature fall victim to a problem of rightful enforcement, since without an appropriately objective determination of the terms of the contract any coercive enforcement is merely the unilateral, coercive enforcement of some private person's arbitrary judgement.

It is important to appreciate that this problem of rightful enforcement of contracts requires not only some third person to arbitrate the dispute, but also that the *form* of this arbiter is impartial, which means that the arbiter must be in the form of a *public* judge. Of course private persons may consent to let a third party settle their disagreement, but this is insufficient to ensure contract right. If a private person is the arbiter, then there is still the possibility of the contractual problem arising again—this time between the original two parties and the judge. For example, one of the parties may disagree with the way in which the judge carries out his contracted duties, which entails that a new judge is required to settle the new conflict (between the judge and the original parties). The reason why a contractual solution is insufficient to solve the contractual problem is that it leads to an infinite regress of contracts. This is why a private person, regardless of how impartial to the conflict, cannot act as the judge in contractual conflicts. Only when the arbiter is a public authority, namely impartial in its form, does it enjoy the proper standing from which to adjudicate disputes and enforce contract rights independent of the contracting parties' actual consent. Moreover, this standing allows the public judge to determine the rightful use of coercion to resolve a conflict *even if* one of the parties would prefer to use private might to settle it.<sup>23</sup> The state enables enforceable contract—acts as the public guardian of contract right—by setting up a public court with public judges who adjudicate particular disputes in accordance with posited contract law. In a just state, then, all contracts, including trade in sexual services, are regulated and enforced by public institutions in the

sense that the public authority decides whether or not a contract was valid, was broken and if any compensation is to be paid. Furthermore, since contracts are relations between people with regard to things and services, Kant argues that one obtains title in the thing or service only once it has been delivered (6: 273ff.). This entails that if, for example, a prostitute fails to deliver the sexual service she has been paid to deliver, then the customer does not have a claim to have the service delivered, but a right to reimbursement and, possibly, compensation.

Second, the state provides for rightful contract relations *indirectly* by fulfilling its role as a guarantor of rightful private property relations. For reasons I will not go into here, Kant argues that problems of assurance for the right reasons and indeterminacy make private property relations impossible in the state of nature. Hence, the state is an enforceable precondition also for private property right. As a guarantor of private property right, the state, amongst other things, ensures that no person finds herself without any means whatsoever. This is important because according to Kant to be free in the external or political sense requires rightful possession of external things or means. Consequently, unconditional poverty relief is necessary if the state is to fulfil its role as the guarantor of private property right. Without such unconditional poverty relief the poor have no freedom, since they have no means; any access to means is dependent on some other private person's consent—either to hire her or to provide her with charity.<sup>24</sup> Moreover, if the state upholds its monopoly on coercion without a guarantee of unconditional poverty relief, its monopoly on coercion is irreconcilable with poor persons' rights to freedom, namely access to means. The state therefore has a right to tax the rich in order to provide unconditional poverty relief, even though no individual private person has the corresponding right. With respect to contracted sexual services, it follows that in a just and legitimate state no person finds himself in a situation in which he must enter the sex-industry, or any industry, in order to avoid poverty.<sup>25</sup> This at least partially alleviates the problem of mitigated consent or consent for the wrong reasons typically associated with those choosing to work in the sex industry.

In addition, the state also has the right to secure indirectly the rightfulness of contractual relations by providing its citizens with conditions under which they can work themselves into full private independence from one another. According to Kant, the just state ensures that poor citizens can move from a passive to an active condition by ensuring that the totality of legislation is such that all persons *actually can* work themselves into an active condition (6: 315, 8: 295f.).<sup>26</sup> The just state must not only ensure that no citizens enter the sex industry solely out of poverty, but also it must foster conditions under which anyone who actually chooses to enter this industry does so not due to a lack of other opportunities. The just state therefore makes sure that no one private person finds herself in a position with regard to other private persons that she must accept others' disagreeable offers because all other options are closed. The state ensures that paths leading to an active condition, in

which a person can set and pursue her own ends independent of others, are open to all citizens with the required abilities. To protect the rights of the employable poor, a group currently prone to provide workers for the sex industry, the state has the right and duty to establish institutions that not only make means available to them, but also provide ways to ensure access to opportunities in the work force. In this way the state ensures that its monopoly on uses of coercion is fully reconcilable with the freedom, equality and independence of each of its subjects. With regard to the sex-industry in particular this means that the state ensures that no person need enter it for a lack of other opportunities.<sup>27</sup>

Finally, I would like to mention one place where the state's right and duties with respect to contract right and the sex industry intersect with the state's role as guarantor of domestic right. This is in the area of children's rights. I do not engage the issue of children's rights here,<sup>28</sup> but it is important to note that in its role as guarantor of domestic right, the state must establish institutions that provide special protections for children, including those who have been exposed to psychologically damaging environments. Consequently, the state has special obligations with regard to sex-workers who choose their occupations because they believe that the sex-industry suits them due to a degraded self-image caused by an abusive past.<sup>29</sup> The state must invest extra resources to provide these persons with opportunities that will help them overcome such obstacles to making truly independent choices. This can include providing them with special educational opportunities, counselling or other psychological services, establishing support-groups, or whatever is necessary to deal with these problems. If a state is currently in the process of building such institutions, it seems reasonable to argue that it may issue more restrictions on the sex-industry than it would otherwise to protect the rights of vulnerable citizens.<sup>30</sup> Similarly, if a state judges that it currently cannot protect its citizens' private independence, it is reasonable to argue that it may, whilst building up the required public welfare institutions, outlaw prostitution altogether.

## V. Conclusion

In this paper I have presented and defended a view of rightful sexual relations that follows from Kant's conception of political freedom understood in terms of each person's innate right to independence from having her freedom subjected to the arbitrary choices of others. First, I argued that only a lack of consent makes specific sexual deeds illegal. Second, I defended Kant's view that any legal claims regarding sexual practices can be enforceable only in civil society, where the state acts as the civil guardian over domestic relations, the public adjudicator in conflicts, and as the guarantor of private property right. I argued that Kant's considered position must conclude that refusing homosexuals a right to marry is to deny them the possibility of rightful domestic relations, and I argued that the permissibility of prostitution

depends upon the extent to which a state is able to protect its vulnerable citizens' independence. In this way, I have shown that from the Kantian perspective the rightfulness of the sex-industry depends upon the existence of other, seemingly unrelated, public institutions, and that the state has the right to redistribute resources required to establish these institutions. Borrowing Onora O'Neill's (2000) "Godfather-phrase,"<sup>31</sup> we may say that, according to the position defended, in a just society no one private person is in a position where he can make offers that another private person cannot refuse due to a lack of options. In a just society, no one is forced to engage in trade in sexual services because refusing to do so entails denying oneself the only possible means of obtaining an income, and in a just society no one must accept that the only way in which she can unify her private life with the person she loves is by also relinquishing the possibility of remaining in control of her private life. Public institutions are required to make both the offering and the acceptance of such offers rightful, or reconcilable with each person's right to freedom: welfare provisions for the vulnerable enables rightful trade in sexual services, whereas (public) marriage enables persons to unite their private lives without thereby subjecting them to one another's unilateral arbitrary choices.

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### Notes

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1. Kant, Immanuel: *The Metaphysics of Morals*, trans. Mary Gregor (Cambridge: Cambridge University Press, 1996). Prussian Academy pagination: (6: 203–491).
2. The only possible exception here is violent S&M that can cause functional impairment to one's body. I believe this argument will depend upon whether or not suicide is legally permissible on the position I am here defending. I postpone this difficult topic for now.
3. Here and for the remainder of this paper I use the Prussian Academy pagination when referring to Kant's works.

4. By causality I mean a person's ability to do things or to act in the world, such as her ability to labour or to play.
5. The same thought informs Kant's Universal Principle of Right. It states "[a]ny action is right if it can coexist with everyone's freedom in accordance with a universal law" (6:230f.).
6. Kant expands on the problem of unnatural practices in the "Doctrine of Virtue." Here he also argues that masturbation or—even worse—masturbation in combination with a fantasy (6: 425) constitutes an unmentionable vice. He argues that the general problem with sexuality is that a person engaged in these practices "surrenders his personality ([by] throwing it away), since he uses himself merely as a means to satisfy an animal impulse," whereas the great problem with "unnatural lust" is that it involves a "complete abandonment of oneself to animal inclination" (6: 425).
7. This entails that we can, for the sake of clarifying the difference between Kant's moral and legal philosophy, accept that it is morally corrupt to masturbate or to engage in consensual non-reproductive sexual activities within marriage. From the point of view of Kant's theory of justice, the first act (masturbation) concerns one's own body only, whereas the second (non-reproductive, non-marital sexual interactions) involves consensual access to another person's body. In both cases, there is no wrongful relation established: in the first case there is no relation at all established between the masturbating person and any other person, whereas in the second, the relation (though immoral) is legally permissible because it does not involve depriving another person the right to control to which ends his body is being used. From the point of view of right, what matters is that we never use coercion to access another person's means, since this entails subjecting their freedom to our arbitrary choice. Consequently, both masturbation and non-reproductive, non-marital sexual interactions must be legally permissible.
8. This is the interpretation Kant seems to encourage here, namely that reproduction is morally permissible because it furthers human kind or rational agency as such. See, for example, Barbara Herman (2002) "Could It Be Worth Thinking About Kant on Sex and Marriage?" in *A Mind of One's Own* (2e), ed. Louise Antony and Charlotte Witt (Boulder, CO: Westview, 2002).
9. To some, the first of these claims may appear un-Kantian, since Kant explicitly argues that all sexual activities, with the possible exception of heterosexual practices between married adults, are morally problematic. As noted above, I do not address the moral questions concerning Kant's position on sexual relations, namely whether or not they are inherently immoral. For example, we may argue that developing one's ability to be sexually intimate is an imperfect duty. I do not explore Kant's moral theory of rightful sexual relations here. I simply focus on what follows from his theory of justice, namely the individual's right to freedom. Hence, I argue only that from the point of view of his political and legal theory Kant cannot outlaw any particular consensual sexual deed.
10. Of course, if one deceives another person in order to obtain consent, such as by lying when asked if one has a sexually transmitted disease, the consent is vitiated or "negatived" by the deceit, and the access to other person's body is unauthorized and to be considered battery. The deceiving party therefore commits a criminal wrong by obtaining access to another's person by lying, and she is legally responsible for the full consequences thereof.

11. If the consenting person cannot be seen as capable of deeds, either due to immaturity (children), mental impairment or intoxication (mental illness, alcohol, or drugs), or if the consent is empty because given in response to threats or threatening behaviour, then consent is insufficient to authorize sexual interaction. Moreover, if a person fails to take sufficient precaution in her sexual behaviour, such as if she fails to ensure that the person with whom she has sexual interaction is old enough to be capable of consent, then she presumably is culpable of some form of negligence. I am grateful to my audience at the 22nd International Conference in Social Philosophy (2005) for making me clarify this point.
12. Kant calls the right involved in status relations "Personal Right Akin to Right concerning Corporeal Things" (6: 276).
13. Immanuel Kant: "Notes on the lectures of Mr. Kant on the metaphysics of morals." Prussian Academy pagination (27:479–732). Notes taken by Johann Friedrich Vigilantius. In *Lectures on Ethics*, ed. P. Heath and J. B. Schneewind, 249–452. (Cambridge University Press, 2001).
14. Kant argues that the kind of possession involved neither be a right "to a thing [property right] . . . or a right against a person [contract-right]" (6:277).
15. My interpretation here is consistent with the writings of Barbara Herman (2002) and Arthur Ripstein ("Authority and Coercion," *Philosophy and Public Affairs* 32 (2004): 2–35), since they both emphasize that the problem Kant addresses in status relations cannot be solved by appealing to consent.
16. The structure of this argument does not change by assuming a world in which there is no historical oppression, namely one in which two people acquire each other rather than husbands acquiring wives. According to Kant's account, it is still necessary to give the two parties reciprocal claims against each other's person in order to make the claims legally enforceable in a way reconcilable with the demands of the Universal Principle of Right.
17. I am not sure if Kant's position must maintain complete unification of their private properties, but this issue is beyond the scope of my argument.
18. It is important to note that the above does not entail that consensual sexual relations outside of marriage in civil society are illegal. It merely means that they cannot give rise to any legally enforceable claims, since these only go through marriage or contracts. Hence, I agree with Kant that concubine contracts cannot be enforceable, since they lack the required reciprocity with respect to one another's person that characterise rightful status relations (6:279).
19. This kind of objection is commonly made to Kant's conception of marriage. For example, see Irving Singer, "The Morality of Sex: Contra Kant" in *The Philosophy of Sex*, ed. A. Soble. (Rowman & Littlefield, 2002); Alan Soble, "Sexual Use and What to Do about It: Internalist and Externalist Sexual Ethics" in *The Philosophy of Sex*, ed. A. Soble; and Martha Nussbaum, *Sex and Social Justice* (Oxford University Press, 1999).
20. This point is tragically clear in situations where longstanding homosexual partners are denied the right to make decisions (set ends) for each other in cases of incapacitation due to sickness or impairment. As we know, gay and lesbian couples have no legally enforceable claims against the families of their partners when sickness or the need for caretaking decisions occurs. Instead, the original family of the sick partner is given legally enforceable rights with regard to the partner, including the right to deny visitation to the

- healthy partner and the right to decide any other matter deemed in the best interest of the sick partner.
21. This line of argument was convincingly presented by Professor Hege Brækhus (University of Tromsø) in a public lecture (unpublished) in December 2005. She argues that the spouses should not unite their means and they should also not be legally required to fidelity.
22. I believe this argument may entail that a lengthy cohabitation gives rise to at least some legally enforceable claims against one another. Investigating this question is beyond the scope of this paper.
23. The common law legal system and the civil law legal system constitute two different ways to institute a public judge.
24. It is uncontroversial to claim that Kant affirms this view, as it is explicitly stated in section C of public right (6: 325–328). For example, Kant argues: 'To the supreme commander there belongs indirectly, that is, insofar as he has taken over the duty of the people, the right to impose taxes on the people for its own preservation, such as taxes to support organizations for the poor, foundling homes, and church organizations, usually called charitable or pious institutions' (6:325f.). See also (27: 539) where Kant argues that the state in virtue of its monopoly has a coercive right to redistribute resources to provide for the poor even though an individual does not have such a right. It is a much more complex task to explain why Kant is justified in holding this view, and to do so is not necessary here. See my paper, "Kant's Justification of the State's Right to Redistribute Resources to Protect the Rights of Dependents," *Dialogue—Canadian Philosophical Review* (forthcoming).
25. Consequently, even if the only reason why a person fails to work is due to laziness, this in itself is not sufficient to deprive him of the minimum income.
26. Kant, "On the Proverb: That May be True in Theory, But Is of No Practical Use" (1793). Prussian Academy Pagination: (8:273–313). In *Perpetual Peace and Other Essays*, trans. T. Humphrey, 61–92. (Hackett Publishing Company, 1983.)
27. This position does seem to support the establishment of unemployment benefits, or temporary support in order to increase a person's independence during a difficult time. Of course, the state will encourage persons to work, and insofar as individuals are simply unwilling to work they will receive fewer and more restricted kinds of resources. Moreover, it is reasonable to argue that the just state will draw a distinction between those who are simply unwilling to work and those who are willing but unable to find jobs that do not conflict with their fundamental religious beliefs or that are highly dangerous. For example, the just state will not economically or otherwise penalize a Catholic person who does not want to work as a pastor in a Lutheran Church or as a prostitute, since this conflicts with her Catholic convictions. If nobody wants these jobs, regardless of how much money is offered, then this in itself is not a problem from the point of view of justice. Scott Anderson ("Prostitution and Sexual Autonomy," *Ethics* 112 (2002): 762ff., 764n) notes this objection, but then proceeds by arguing in agreement with Sylvia Law that it is not clear that the constitution must be interpreted in such a way that protects persons from having to take a job in the sex-industry in order to maintain their welfare-benefits. On the account I have defended, poverty relief will be unconditional, though additional support, such as education and other services, requires effort on behalf of the person obtaining the support. In no case, however, will a person be forced into the sex industry or any other industry due to a lack of other options.

28. See my paper, "Kant and Dependency Relations—Kant on the State's Right to Redistribute Resources to Protect the Rights of Dependents."
29. Similarly, the state has a right to ensure that children grow up under conditions where they can obtain the self-image required to live one's life in a responsible manner. Hence, the state has a right to ensure that children at school and in their domestic sphere are not given self-destructive self-images. I am grateful to Patricia Marino for making me clarify this point.
30. For example, if a state is incapable of providing welfare to vulnerable groups, such as poor, abused children, mentally incapacitated persons etc., it can rightfully outlaw prostitution.
31. Onora O'Neill, *Bounds of Justice* (Cambridge University Press, 2000).

## Seeking Desire: Reflections on Blackburn's *Lust*

PATRICIA MARINO

**Abstract:** This paper is a critical discussion of Simon Blackburn's recent work on lust. Blackburn develops a view on which lust is decent only when part of a pure mutuality in sex, and is best left alone—we ought not tamper with its "freedom of flow." I argue that this treatment, which I believe reflects commonly held views, fails in several ways. First, it does not square with the fact that we pursue lust as a good in itself. Second, pure mutuality is hard to come by and almost impossible to recognize, so Blackburn's account is more restrictive than it may seem. Third, on such a view, masturbation is morally sanctioned only insofar as it mimics real sex; this doesn't seem right. Finally, such a perspective fits ill with some recent research on the biology of lust in women.

### I. Introduction

Simon Blackburn's recent work on lust<sup>1</sup> is part of a series: one book for each of the seven deadly sins. Not surprisingly, it argues for a sort of no-sin rehabilitation of lust. "Hey," it gently urges, "lust isn't so bad. After all, without it none of us would be here!" What is striking, though, is how gentle the urging is, and how puritanical and traditional the outlook remains. Lust, it seems, is worrisome but tolerable, an urge that comes from a biologically irrelevant place—more on that later—that we can, if we are careful and good, occasionally harness for happy ends for two people who care about each other. The book ends with an injunction: leave lust alone! Don't mess with its "freedom of flow," and everything will be all right.

Such a view of lust is, I believe, commonly held. And yet, as I will argue, it is not true to the behavioral facts, and it results in a distorting picture of the ethics of sexuality. First, it does not square with the fact that we pursue lust as a good in itself. Second, pure mutuality is hard to come by and almost impossible to recognize, so Blackburn's account is more restrictive than it may seem. Third, on such a view, masturbation is morally sanctioned only insofar as it mimics real sex; this doesn't