

## **Kant and the Marriage Right<sup>1</sup>**

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<sup>1</sup> Author's pre-print. Paper published in *Pacific Philosophical Quarterly*, 2004, Vol.85:1, p. 103-123.

## Kant and the Marriage Right\*

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**Abstract:** The provision of a marriage right is a distinctive aspect of Kant's political philosophy and seems, initially, difficult to reconcile with the general concern with ensuring external freedom of action apparent in the universal principle of Right and the sole innate right said to follow from this principle. I claim that this provision can be regarded as consistent with this general focus and that Kant's treatment of issue suggests an interesting secular argument for the institution of marriage.

### I

Although he regards us as social creatures, Kant thinks that our propensity for social living is qualified by a natural "unsociability" and "resistance" towards others. Moved to secure our own particular interests and desires, we are given to the "unsocial characteristic of wanting everything to go according to [our] own desires." And, appreciating that others do so also, we anticipate "resistance" from them in endeavoring to secure our interests just as we know we tend to resist others in the same way (UH, 8:21). Kant regards this "unsocial sociability", suitably circumscribed, as the central natural impetus to the development of our various talents and capacities, including our innate capacity for moral discrimination:

... [T]his resistance awakens all of man's powers, brings him to overcome his tendency towards laziness, and, driven by his desire for honor, power, or property, to secure status among his fellows who he neither *suffers*, nor *withdraws* from. In

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\* All references to Kant are to *Kants gesammelte Schriften, herausgegeben von der Deutschen Akademie der Wissenschaften* (Berlin: Walter de Gruyter, 1902-). Translations and abbreviations used are cited in the reference section.

this way, the first true steps from barbarism to culture, in which the unique social worth of man consists, now occur, all man's talents are gradually developed, his taste is cultured, and through progressive enlightenment he begins to establish a way of thinking that can in time transform the crude natural capacity for moral discrimination into definite practical principles and thus transform a *pathologically* enforced agreement into a society and, finally into a *moral* whole (UH, 8:21).

Against this background, Kant thinks civil society serves an essential moral purpose. Endeavoring to secure our interests in competition with others forces us from “laziness and inactive comfort into work and hardship”, towards the development of ourselves and our talents. However, the same “selfish animal propensities” that prompt us to develop ourselves also induce us to “abuse [our] freedom in relation to [our] equals” (UH, 8:23), exempting ourselves from the norms or rules that make social existence possible whenever doing so suits our purposes. In order to reap the benefits of our natural antagonism, Kant thinks we therefore require a “master” to curb our “self-will” and to force us to acknowledge and honor the claims of others despite our selfish natural tendency to do otherwise (UH, 8:23).

The purpose of a civil condition is therefore to constrain our “selfish animal propensities” while nonetheless allowing us to accrue the benefits associated with this aspect of our basic nature. Ensuring “the greatest freedom, and thus a thoroughgoing antagonism among its members,” a civil condition allows room for the kind of selfish competition between individuals that is central to the development of our person. By combining this with “a precise determination and protection of the boundaries of this freedom, so that it can coexist with the freedom of others” (UH, 8:22), civil society inhibits the “competitive vanity” and “insatiable desire to possess and also to rule” (UH, 8:21) associated with our natural unsociability that would otherwise make social living and its benefits impossible.

Kant's mature political philosophy in his later Doctrine of Right reflects this interest in ensuring the kind of protected social space within which our various capacities can be developed and our moral nature ultimately realized. In this first section of **The Metaphysics of Morals** he identifies what he sees as the supreme rational principle governing permissible external freedom of action and argues that this principle, in conjunction with two further postulates, requires us to enter into a civil condition under public laws. Governing only external freedom of action, the universal principle of Right makes no demands on our choice of ends or motives, protecting, instead, a basic sphere of external freedom within which individuals are to be free to pursue their ends in a manner consistent with the role Kant envisages for political society in fostering personal (and ultimately moral) development. Thus, for example, the sole innate right he takes to follow from this fundamental principle is a right to "freedom (independence from being constrained by another's choice)" (MM, 6:237) that extends to various specific titles authorizing us to claim the status of being our "own masters" and originally "beyond reproach" and an "innate equality" prohibiting us from being "bound by others to more than [we] can in turn bind them." These basic entitlements prohibit us from imposing arbitrary constraints on others or treating them differently just in virtue of the circumstances of their birth, thereby allowing agents to claim a basic freedom to pursue their ends as they see fit (and to be constrained in doing so only when they thereby infringe upon the same basic external freedom in others).

Taking into account the particular nature of our agency, the protections afforded us in terms of this innate right are then said to extend to concerns with the freedom of individuals to determine their spatial location (MM, 6:254) and to be free from various direct assaults on their person (MM, 6:248). There is, however, one right Kant includes here that stands out both in terms of its form and its object, namely, the provision made for a *marriage right* (*Eherecht*). He distinguishes between the natural pursuit of sexual enjoyment prompted by sexual appetites and the kind of "principled" union he associates with sexual relationships within marriage and claims that the former involves sexual union "in accordance with mere animal nature" in the course of

which a “human being makes himself into a thing” in conflict with “the Right of humanity in his own person” (MM, 6:278). A “right of both sexes to acquire each other as persons *in the manner of things* by marriage” is then said to follow from “one’s duty to oneself, that is, to the humanity in one’s own person” (MM, 6:280) and to derive as a “natural permissive law” from the “Right of humanity in our own person” (MM, 6:276).

In contrast to titles like those to innate equality and to the freedom to move from one location to another, the inclusion of this marriage right represents a distinctive and more positive requirement. Individuals cannot be married by the unilateral act of one party or by a private contract between two individuals (6:277). Instead, marriage is regarded as a social institution bound by law that is required by the Right of humanity and sets the terms of any legitimate marriage relationship. A rightful civil condition will encompass these laws and the marriage right therefore extends to the provision of a state sponsored institution of marriage within which the terms and conditions of the marriage contract will be set by public laws. Kant does not, however, explicitly identify the sense in which we are reduced to the status of mere “things” in natural sexual union in this section of the Doctrine of Right, making the provision of this right difficult to understand and assess. In particular, it is not obvious how an individual’s external freedom to act for the sake of chosen ends can be jeopardized in sexual activity, and therefore not clear how this right fits into the broader context of the Doctrine of Right.

In addition, the involvement of the state in the management of sexual conduct, together with Kant's particularly narrow construal of permissible forms of sexual activity, raise the specter of radically intrusive and objectionable state intervention into this deeply private sphere. More generally, the idea of treating marriage as a contractual matter involving the state in its enforcement and administration has been the object of extended criticism on the grounds that it represents a patriarchal social institution intended simply to continue the subjugation of women in civil society. For example, Carol Pateman claims that Kant is inconsistent in treating marriage

as a contract since he does not regard women as men's civil equals and argues that the effect of the arrangement he proposes is simply to codify this inequality in law:

.... [I]t is the husband who has use of a person, not the wife. Kant's marriage contract establishes the husband's patriarchal right: *he* possesses his wife's body, which is to say her person, as a thing, but she has no corresponding right. 'Personal right' is the right of a husband as a civil master (Pateman, 1988, p. 172).

More recently, some commentators have resisted such simple interpretations of Kant on the issue of sex and marriage. Barbara Herman, for example, argues that aspects of Kant's concern with sexual activity bear a striking resemblance to worries expressed in some contemporary feminist writing on the subject and that the treatment of marriage in the *Doctrine of Right* suggests a more interesting view than those typically associated with Kant (Herman, 1992).<sup>1</sup> My aim here is to move this discussion forward by examining the rationale for the inclusion of this right in the context of a concern with securing external freedom and by assessing the question of whether Kant's view extends the state's involvement into more radically intrusive sexual law. Doing so suggests, I will claim, that Kant's views on this subject are more subtle than analyses like Pateman's assume.

## II

In his *Doctrine of Right* discussion of marriage right, Kant insists that it is permissible for individuals to "surrender to and accept each other for enjoyment under the condition of marriage" (MM, 6:278). As such, the distinction Kant draws here between sexual union in accordance with mere "animal nature" and in accordance with "principle" cannot relate to any difference in the act itself or even in the end the parties to it seek. Sex, and *sex for pleasure alone*, is explicitly allowed. Instead, the distinction between permissible and problematic sexual union lies in a difference between: (i) "principled" sexual activity occurring under the auspices of a formal contract guaranteeing each party exclusive use of the other's sexual attributes and an equal claim

to any property; and (ii) sexual union in accordance with mere “animal nature” in the course of which individuals may engage in the *same* activity and with the *same* end but do so *in the absence of any formal constraints or devices of this sort* (MM, 6:277-278).

This contrast suggests that Kant's basic concern is one with the nature and influence of sexual appetites, a concern he discusses in some detail in the **Lectures on Ethics**. Having prefaced his discussion in the **Lectures on Ethics** of “Duties Towards the Body Itself” by noting the need to discipline without merely suppressing the various natural urges to which we are prone, Kant singles out sexual appetite for particular consideration, identifying the fact that this appetite takes as its object the sexual attributes of another person as the source of unique difficulties. The natural relation between persons in sexual activity is, he claims, one of use in which each party becomes “an object of enjoyment” (LE, 27:384) for the other:

The [sexual] desire of a man for a woman is not directed to her as a human being; on the contrary, the woman’s humanity is of no concern to him, and the only object of his desire is her sex (LE, 27:385).

Moreover, moved by this powerful appetite men and women “endeavour to lend attraction, not to their humanity, but to their sex, and direct all actions and desires entirely towards it” and by thus seeking to make themselves attractive as objects of specifically sexual interest “sacrifice” their humanity to sex (LE, 27:385).

Notice, in particular, it is quite clear that Kant thinks of this problem as a *symmetrical one* affecting the attitude of each party:

So if a man wishes to satisfy his inclination, and a woman hers, they each attract the other’s inclination to themselves, and both urges impinge on one another, and are directed not to humanity at all, but to sex, and *each partner dishonours the humanity of the other*. (LE, 27:385, emphasis added).

Under the influence of sexual appetite *each party* therefore seeks to make use of the other's body instrumentally in the pursuit of sexual gratification and allows, indeed encourages, the other to make use of their sexual attributes in this way. The body, however, is an integral part of the self which, "in its togetherness with the self," "constitutes the person" (LE, 27:387), and treating it in this way affects how we regard and treat the person. In particular, "as soon as a person becomes an object of another's appetite," Kant claims that, "all motives of moral relationship fall away; as object of the other's appetite, that person is in fact a thing, whereby the other's appetite is sated, and can be misused as such a thing by anybody" (LE, 27:385). Allowing oneself to be seen and used as an object of appetite thus reduces one to the status of object *both in the eyes one's sexual partner and the wider community*. Accordingly, individuals who encourage sexual interest from others and who make themselves available for sexual use (whether from their own sexual desire or in exchange for some material gain) thereby run a moral risk -- the risk of ceasing to be a person for all others and "being used by anyone as a thing, an instrument for the satisfaction of inclination" (LE, 27:386-7).

The general moral problem associated with sex is therefore a relatively familiar Kantian one involving the "objectification" of persons. Qua "person" a human being has an absolute value that must always be respected in moral choice and action. Insofar as sexual appetite takes as its object only an individual's sex, however, our own and others "humanity" is used in sex merely as an "instrument for satisfying desires and inclinations" and is thus "dishonored" in (or "sacrificed to") sex (LE, 27:385). While sexual interest may be accompanied by a genuine and proper moral regard for the object of one's sexual appetites ("human love"), taken "in and by itself," it is always an appetite directed at another person regarded as an object of use (LE, 27:384-5). As such, there is always a failure in proper regard or respect in sexual interest, making this an inherently problematic appetite requiring special handling.

This model of sexual appetite is likely to strike the modern reader as overly simple and, to the extent that it is thought to suggest that sexuality is, in itself, morally tainted, may well be viewed



with understandable suspicion. Kant emphasizes the mechanistic aspects of appetites, treating sexual appetite primarily as an original biological impetus to action that we can choose to pursue or forgo. Joined with the claim about the basic structure and orientation of sexual appetite, this simple picture has the effect of heightening the suspicion that Kant thinks our sexuality should be viewed with a kind of fastidious disdain. Assailed by a natural appetite that we cannot (as a species) simply forgo but cannot (as individuals) permissibly satisfy, the problem presents as one of *reluctant* accommodation.

This will no doubt strike many of us as an unlightened view of the matter. Human sexuality is much more plausibly thought of as a complex social and psychological phenomenon implicated in numerous aspects of our personal and social lives. Over and above the simple drive to seek sexual satisfaction, our sexuality is deeply connected with our sense of ourselves and our social identities and affords us the opportunity for a unique kind of intimacy with others widely regarded as a profoundly important good. Thinking of human sexuality in this more comprehensive way, we can distance ourselves from the simpler picture of naturally corrupted sexual appetite in the **Lectures on Ethics** and, by acknowledging the positive aspects of human sexuality, emphasize the need to see the problem Kant is raising as one of *integration* rather than accommodation.<sup>2</sup>

Far from alleviating the concerns we might have with our sexuality, however, this more plausible account of human sexuality only deepens the problems Kant is raising and, I will argue, plays an important role in justifying the need for the kind of state intervention we see in the Doctrine of Right account of marriage. In particular, this more inclusive picture does not diminish the basic worry about objectification that Kant focuses on. As Herman and Wood note, Kant's concern with sexuality is mirrored in the work of feminist philosophers who think of sexual intercourse as degrading and objectifying women (either because of the nature of the act itself or the as a result of the form it takes in the context of socially constructed gender roles). Whether we think of this worry, with Kant, as a function of the basic structure of sexual appetite

or, alternatively, as a phenomenon associated with the complex social and psychological dynamics of human sexuality, it seems that the central concern is a plausible and real one; one that is made evident in a spectrum of social phenomena ranging from sexual violence and harassment, through the dehumanizing images of women in some pornography, to the commonplace use of sex to sell everything from automobiles to soap.

We do not therefore have to accept Kant's seeming view that sexual interest in another is, by its nature, morally corrupt to share his basic concern. Nor do we have to deny the possibility of more collaborative or other-oriented forms of human sexuality. Indeed, I will argue below that the point of marriage is to endeavor to facilitate just these kinds of morally appropriate sexuality. However, while we can recognize the kind of problem Kant has in mind and think of this as a real issue, the solution he proposes in this work and the arguments he offers in its support are significantly flawed. Kant claims that because the body is an inseparable part of the person, to allow another to make use of you sexually is to allow them to “dispose” of your whole person (a person conceding a part of himself to another in sex, “concedes himself entirely” (LE, 27:387)). Qua “person,” however, a human being is a “[s]ubject, who can have ownership of other things” rather than a mere “thing” which can be owned. Belonging, therefore, to the category of “owners,” we cannot regard our own person as a thing that is our property (to dispose of as we see fit), since this would be to be both “a thing and a person, a proprietor and a property at the same time” (LE, 27:386) which is conceptually incoherent.

In agreeing to surrender ourselves sexually to another we therefore agree to surrender our whole person to them but cannot legitimately do so since we are not entitled to dispose of our person in this way. By way of solution, Kant suggests that both parties must give *each other* a right to dispose of their whole person (“the total state of happiness, and to all circumstances bearing upon that person” (LE, 27:388)). By doing so, he claims, each is then entitled to make use of the other's sexual attributes (as a part of the whole person in whom they now have rights); but, in giving themselves up as the property of another who surrenders their whole person in

return, they also reclaim their proper status. Thus, I surrender myself (my whole person) to another, but, in turn, “obtain the person of the other in place of it,” and thereby “regain myself, for I gain the person to whom I gave myself as property” (LE, 27:388). The only circumstances in which sexual activity is compatible with the requirements of morality are, Kant claims, those in which each party surrenders themselves completely to the other, “yielding” their person “his good or ill fortune, and all his circumstances, to have right over them” (LE, 27:388).

There are a number of problems that make this argument and the proposed remedy both hard to understand and difficult to interpret as an effective solution to the underlying problem. It is not, for example, clear why Kant regards allowing another to use your sexual attributes as involving giving them the use of (or rights to) your “whole person” but does not take the same attitude to other sorts of cases. In his discussion of domestic service Kant takes the servant’s status as a person precisely to limit the scope of uses to which he can legitimately be put, with no analogous suggestion that merely by giving another the use of their body, the servant thereby gives the employer the use of (or rights to) their whole person. Since the cases seem to be relevantly similar (with each involving allowing another to make use of your body and powers), some further argument seems to be required to motivate the idea that the former case is importantly distinguished and requires this kind of very special provision.

The point here is not that there is nothing to distinguish these kinds of cases. As Kant sees it, the interest in another associated with sexual appetite is *by its nature* always an interest in another as a “thing” and is therefore *different in kind* from an interest I may have in procuring the labor or services of another (which can be consistent with my regarding them also as a person and need not therefore have the same intrinsically problematic structure). More generally, having sex with someone is clearly a uniquely physically and psychologically intimate kind of personal contact, wholly unlike hiring them as a domestic helper. However, the argument Kant offers here involves the claim that the partial use of a person implies surrender of rights to one’s whole person. The claim here is therefore a formal one and, given that each of these cases involves the

partial use of a person, some further argument seems to be required to justify the suggestion that in the former but not the latter case, agreement to such use *necessarily* implies the surrender of one's whole person in this way.

Further, while we can understand the intent of the solution Kant proposes, the actual transfer of rights he envisages is very difficult to understand (both on its own terms and as a coherent exchange of titles) and seems significantly flawed as a practical solution to the problem of objectification. Kant claims here that when individuals “yield” themselves in marriage to each other, a “unity of will” is created in which “neither will be subject to happiness or misfortune, joy or displeasure, without the other taking a share in it” (LE, 27:388). What he seems to intend to realize through this process is a “moral condition” in which each party identifies with the interests and concerns of the other, recognizing and taking these seriously in a “union among persons” (LE, 27:388); a condition that serves to block the problematic failure of regard associated with sexual appetite by confining permissible sexual activity to a context in which each party views the other not merely as an object of use but also as another person whose interests and concerns they recognize and identify with.

Consider, however, the apparent form of the transfer of rights that Kant envisages. Each party is to surrender their “whole person” to the other giving them “complete rights” over it. In doing so, each “yields” him/her self becoming the “property” of the other (by giving them a complete right of “disposal” over “the total state of happiness, and to all circumstances bearing upon that person” (LE, 27:388). Because the other reciprocates, each is then said to “win” their person back (by reacquiring those rights to themselves which the other holds through the reciprocal acquisition of “complete rights” to the person whose property they have thus become). However, Kant says earlier that we cannot surrender ourselves unilaterally to another in sexual activity because we do not have the requisite title to dispose of our whole person in this way. If a self is not the kind of thing which can properly be owned by someone, it seems to follow that we cannot legitimately either dispose of ourselves, or acquire the person of another, in the reciprocal

transfer that Kant envisages. Nor, similarly, can we come to “win ourselves back” by acquiring rights to a new composite or “united” self (that is likewise not a proper object of ownership).

Moreover, even if we had the required titles, there seems to be no form of the kind of reciprocal transfer Kant envisages that could result in both parties *mutually* reacquiring themselves by acquiring the “whole person” of the other. The exchange of titles here cannot be simultaneous since, in order for either party to win themselves back from the other, the other must first have the requisite title to them. In order to reacquire myself by acquiring the “whole person” of another, I must therefore first surrender myself to them. What I then acquire, however, is myself and their “whole person” leaving them as my property, and, in subsequently giving myself to them, the situation is simply reversed (they win themselves back by owning my “whole person” leaving me as their property).

More significantly, however, even if this kind of transfer were intelligible, it does not seem to be an adequate practical response to the underlying problem of objectification. The problem here is a pervasive one associated with the tendency of sexual interest to interfere with the proper regard owed to ourselves and others as “persons.” What seems to be required is a mechanism that serves to facilitate or impose an ongoing regard of this sort both within particular sexual relationships and in the broader context of a community of agents given to the influence of this powerful natural appetite. The outcome of the kind of transfer Kant advocates, however, is presumably either: (i) a situation in which each party ends up with equal rights to dispose “over the welfare and happiness and generally over all the circumstances” of *both* him/her self and the other and thus effectively with no rights (since any claim made in terms of these rights can be resisted by the other on the same basis and with equal force); or (ii) a situation in which a *new* will is created that possesses complete rights to what were formally *two distinct persons* with rights of their own, and thus one in which *neither* party is effectively guaranteed a say in its direction (and in which, as Barbara Herman notes, “the threat to the autonomous agent” therefore seems to be “increased rather than resolved” (Herman, 1992)).

Nonetheless, while the solution Kant proposes in the **Lectures on Ethics** seems significantly flawed, the form of marriage he envisages in the Doctrine of Right can be regarded as a more practical solution intended to address the same basic concern with our sexuality. Thus understood, the marriage right provided for here is consistent with the kind of concern with the external freedom of agents to act for their ends associated with the other innate titles Kant identifies. According to the **Lectures on Ethics**, the problem associated with sexual appetite is that it causes us to regard others as objects of use (and, in turn, to allow ourselves to be used by them in this way). Whether we think of this as a claim about the essential nature of sexual appetite or simply as a worry associated with the complex social and psychological dynamics of human sexuality, our status in others' eyes (i.e., how they regard and interact with us) is important with respect to securing our external freedom. As limited and finite beings, our freedom to act in pursuit of our ends routinely depends on the willingness of others to enter into various formal and informal agreements and contractual arrangements with us and is therefore significantly compromised by a reluctance or refusal on the part of others to engage with us as persons pursuing our own plans and projects. This is presumably the kind of *practical* harm associated with racial or sexual discrimination that anti-discrimination laws are intended to address. We cannot force individuals to regard others as persons but we can address the adverse effects of their failure to do so by legislating against the practical consequences of this kind of discrimination, and it is reasonable to suppose that our concern with ensuring individuals' external freedom of action would extend to legislation of this sort.<sup>3</sup>

This is not, of course, to claim that any refusal on the part of another to enter into agreements with us constitutes a violation of our innate right to freedom. The freedom protected here is a general freedom to act for the sake of those ends we value that Kant sees as central to the proper development of human beings as autonomous moral agents and not, therefore, the freedom to realize any particular end we merely happen to desire. Others are equally entitled to act for the sake of *their own* interests and thus to be selective in deciding which agreements to make and

with whom they will be made. Nonetheless, to the extent that a case can be made that the racist's failure to engage with others as persons is incompatible with the conditions necessary to secure this kind of external freedom, their actions will be regarded as contrary to considerations of Right and can be prohibited on this basis.

To the extent, then, that sexual interest in another may take the form of an interest in a person merely as an object of use or gratification, our sexuality will be of concern on the same grounds. In this case, however, the constraints characteristic of anti-discrimination legislation prohibiting certain kinds of treatment and affording individuals recourse to legal remedies in the event of noncompliance are not sufficient. Our sexuality is a fact of our nature that serves an important biological function and typically figures prominently in our sense of self and our well-being. The problem here is thus not simply that we may be the *victims* of a failure by another to view us properly as persons. Desiring to be seen as sexually attractive and to have sexual relationships with others, we may be moved to actively encourage this kind of objectifying interest in us and to actively participate in relationships in which we are not properly viewed first and foremost as persons.

Notice, in particular, that the love the parties may have for one another in an ongoing committed sexual relationship cannot be relied upon to secure the proper regard they owe each other as persons. The profound intimacy associated with sexual relationships and the opportunity they afford for the expression of deep commitments to, and love for, another human being give these relationships a special significance in human life that transcends their biological function. However, the same intimacy that makes these relationships especially valuable also leaves individuals uniquely vulnerable to the influence of their partner. Possessing intimate knowledge of their partner's deepest hopes and fears, a lover may exploit this knowledge and the other's emotional attachment to them in order to pressure them to do as they wish and believe themselves justified in doing so on the basis of their "better" understanding of their partner's interests. Similarly, moved by their desire to sustain a relationship to which they attach great

significance, an individual may choose to acquiesce to demands or pressures of this sort they would ordinarily resist.<sup>4</sup>

The love one party may have for the other is thus no guarantee of respect for the other's autonomy and the special significance and complex personal and psychological dynamics of these relationships only add to the difficulties we face in managing them. Accordingly, what is required here is an *external* mechanism imposing on our mutual pursuit of sexual gratification the terms of a proper regard for ourselves and others as persons that sexual interest can endanger and which human love cannot be relied upon to secure. While aspects of Kant's discussion of marriage in the Doctrine of Right are clearly reminiscent of the **Lectures on Ethics** account, the form of marriage that he identifies in this work and the specific constraints on sexual activity he associates with it can be understood as providing the required external mechanism. Kant claims here that the only conditions under which sexual activity is permissible are those in which “one person is acquired by the other *as if it were a thing*” but “the one who is acquired acquires the other in turn” and “in this way each reclaims itself and restores its personality” (MM, 6:278). Rather than being a right to enter into the kind of obscure and private agreement he envisages in the **Lectures on Ethics**, the marriage right in the Doctrine of Right extends to the provision of a *social institution* that defines the roles and responsibilities of the parties to a sexual relationship and makes these a matter of the public culture and of law. In particular, this kind of marriage requires of the participants an *exclusive and ordinarily permanent commitment* to one party and entitles each party to an *equal claim to any marital resources* (6:278). These constraints serve to impose on sexual relationships a proper regard for the status of the parties involved as persons and to facilitate the appropriate management of this problematic appetite.

Committed exclusively to one sexual partner who is entitled to an equal claim to any marital property, we cannot exploit differences in wealth or power in an effort to leverage sexual favors from them, and we cannot use others merely for sexual gratification and subsequently discard them (“as one throws away a lemon after sucking the juice from it” (LE, 27:384)). Moreover, by



committing individuals exclusively to one partner entitled to an equal claim to marital property, marriage makes the parties involved equals in terms of their power to pursue their interests (sexual and otherwise). By doing so and by also prohibiting individuals from extricating themselves from this relationship merely by their own choice, marriage confronts each party with their partner's *other* interests and concerns, requiring them to take these interests seriously in the context of a continuing association. Forced to acknowledge and deal with the fact of their partner's other interests, the satisfaction of sexual appetites will have to be negotiated with another who is genuinely a sexual partner and whom we therefore engage with as a person rather than simply an object of use. Similarly, by attaching these responsibilities to our pursuit of sexual gratification, marriage imposes consequences on our own sexual activity that affect our capacity to realize our other ends and will require us to consider the effects of our sexuality on ourselves and thus the use we make of our own person in sex. More generally, by making available the public social status of being married and associating it with a continuing commitment to one person, marriage also facilitates the management of our sexuality in the broader context of the community as a whole, allowing married partners to remove their sexuality from the broader social agenda in their ordinary commerce with others.

Notice, however, that the effect of marriage in serving to confront each party with the fact of the other's personality *depends upon* the relationship being a *monogamous* one between *legal* equals. In a polygamous marriage, for example, it would always be possible for the other parties to conspire together to marginalize the interests of one of the individuals involved and the equal power of any one party *cannot* be assured. Moreover, to the extent that the sexual interests of the parties involved are heterosexual and the marriage is between one man and several women, the man will be capable of exploiting this to his advantage. (Hence, "in polygamy the person who surrenders herself gains only a part of the man who gets her completely and therefore makes herself into a mere thing" (MM, 6:278). Similarly, Kant insists that the kind of morganatic marriage<sup>5</sup> that makes the unequal status of one party a matter of the marriage contract, "takes

advantage of the inequality of estate of the two parties to give one of them domination over the other” and is therefore “no true marriage” (MM 6:279).

As Herman notes, the purpose of this institution is not therefore simply to regulate the pursuit of sexual appetites but also to “construct moral regard” (Herman, 1992, p 63) by imposing on sexual union a framework requiring us to take seriously the interests of our partner as a person and the effects of our sexual behavior on ourselves. In doing so, marriage does not, of course, necessarily solve the problems our sexuality poses and, while it can be regarded as serving importantly to facilitate an appropriate regard for one's sexual partner, it obviously does not ensure it. Conforming their actions to the requirements the constraints associated with marriage impose, an individual may not, for example, actually be unfaithful and may outwardly honor a commitment to equality within a marriage, but may nonetheless do so reluctantly harboring feelings of disdain or resentment towards the other. Worse, recognizing that their partner wishes to honor the terms of their agreement but nonetheless has sexual needs, they may seek to exploit the other's fidelity for their own purposes by, for example, attaching conditions of various sorts to sexual activity, or, more generally, may use their equal power over marital resources to extort some desired concession from their partner.

The success of marriage in securing an appropriate regard for persons cannot therefore be assured merely by its formal features, and, in the absence of any deeper commitment on the part of the parties involved to honor the spirit rather than merely the letter of their agreement, marriage may simply leave one party effectively hostage to the other's interests. Accordingly, the real solution remains the kind of idealized union Kant envisages in the **Lectures on Ethics** in which each party identifies internally with the interests and concerns of the other, recognizing and taking them as seriously as their own in a “union among person” (LE, 27:388) without having to be required or constrained by the rights of the other to do so. Nonetheless, in the context of a discussion of considerations of Right, no internal commitments of this sort can be required of us, and the institutional arrangements Kant recommends in the Doctrine of Right

represent a more limited and practical solution intended to facilitate this kind of union in the only way possible.

Notice that on this kind of account, the specific terms imposed in marriage will be determined by society's best judgment concerning how an appropriate regard for the status of the parties in sexual relationships as persons can best be assured in light of what we take to be the normal psychological dynamics of human sexuality and sexual relationships. Given, for example, the limited efficacy of marriage in securing this kind of regard for one's sexual partner, and the dangers associated with making it impossible for individuals to extricate themselves from a failed marriage, the terms of the marriage contract should include provision for divorce in circumstances in which there are irreconcilable differences between the parties or in which any deeper emotional bond has been irretrievably lost. Indeed, Kant seems to acknowledge the need for this kind of provision in including an "incompatibility and dissension between the parties, whereby unity and concord of will among them is impossible" (LE, 27:390) as grounds for ending a marriage.

In particular, a more sophisticated and inclusive view of the nature and dynamics of human sexuality will allow us to share Kant's basic concern with sexual interest without thereby having to endorse his narrow construal of forms of morally permissible sexual activity or any extension of this concern to more active state intervention in regulating sexual conduct. Distinguishing, for example, between the "natural" and "unnatural" use of sexual attributes in terms of the possibility of procreation apparent in the former case, Kant classifies homosexuality, with bestiality, as "unnatural" and claims that both are therefore "unmentionable vices" which, as such, are to be "repudiated completely" (MM, 6:277). His reasoning here is not either entirely clear or clearly consistent.

Kant explicitly claims that permissible sexual activity does not require the intention to procreate; "[t]he end of begetting and bringing up children may be an end of nature, for which it

implanted the inclinations of the sexes for each other,” but it is not, he insists, “requisite for human beings who marry to make this their end” (MM, 6:277), and it is “admissible for the sexes to surrender to and accept each other for enjoyment” (MM, 6:278). The mere fact that homosexuality is “unnatural” in the sense of being incapable of resulting in pregnancy is not therefore sufficient to warrant its rejection.<sup>6</sup> Rather, any injunction of this sort will require some argument to the effect that simply in virtue of the fact that it takes as its object a person of the same sex, homosexual sex involves an objectionable use of a person; one that, unlike the use made of others in heterosexual sex, cannot be redeemed by the context of rights and responsibilities the institution of marriage imposes or by the kind of idealized union of persons Kant envisages in the **Lectures on Ethics**.

While we might argue that bestiality should be regarded as impermissible, we are not committed to viewing homosexuality in this way. In bestiality, sexual interest takes as its object an animal regarded as a being without rights of its own that can therefore legitimately be used merely as a “thing.” In this case there is no possibility of any constraints on sexual activity deriving from the rights of the object of one’s sexual appetites and thus of the modification of sexual interest by responsibilities owed to its object. Nor, similarly, is there the possibility that one’s sexual interest here will be modified by the kind of profound commitment to another moral being with whom one shares a deep and intimate “union of wills” and whose other interests and concerns are therefore regarded as just as important as one’s own. Incapable of being constrained or transformed in these ways, bestiality might be regarded as irredeemably involving merely the “brutish” pursuit of sexual gratification, and, as such, as an abnegation of one’s self to one’s sexual appetites. Moreover, to the extent that an individual thus comes to dissociate the pursuit of sexual gratification from any concern with, or regard for, the object of their sexual interests, sexual activity of this sort may be thought to make more likely the subsequent mere use of other persons in sex and would thus also be of concern. Indeed, as Dennis notes, Kant makes just this

sort of argument when he claims that cruelty to animals is likely to desensitize individuals to the suffering of other persons and is of concern on these grounds (Denis, 1999).

The same reasoning does not, however, apply in the case of homosexuality. Here the object of sexual interest is another human being and thus a person with rights of their own whose other interests and concerns an individual may come to understand and share in the relevant deeply personal way. As such, homosexual interest is capable of modification both by the formal constraints Kant associates with marriage in the doctrine of Right and in terms of the kind of idealized union of persons he envisages as redeeming sexual interest in the **Lectures on Ethics**. Like heterosexual sex, homosexual sexual activity may be problematic but, in the absence of any compelling argument to the contrary, need not be regarded as inherently objectionable. Indeed, the arguments in support of heterosexual marriage also apply to the case of homosexual relationships and, acknowledging the possibility of sexual attraction between individuals of the same sex capable of making claims on each other in terms of rights, it is therefore plausible to suggest that the underlying view here would actually require us to socially provide for homosexual marriage.

Nor need Kant's position be regarded as routinely licensing objectionably paternalistic and intrusive state intervention into the conduct of our sexual lives. It is not clear from the text what Kant's position on this issue is; while he does claim that men and women who want to "enjoy each other's sexual attributes," "must necessarily marry" (MM, 6:278), and clearly regards homosexuality as morally impermissible, he does not explicitly advocate that extramarital or homosexual sex be prohibited by force of law (and, more generally, discussion of this kind of paternalistic legislation is conspicuously absent in the doctrine of Right). Setting aside the question of Kant's own position on this issue, however, there are reasons consistent with the above analysis which seem to count against this kind of intervention.

While the kind of formal constraints Kant associates with marriage have an important role to play in facilitating the appropriate management of our sexuality, they cannot, as we have seen, ensure it. What is ultimately required of us here is an appropriate attitude to our sexuality; one that reconciles this fact of our nature and the psychological and emotional significance it has for us with a proper regard for our own and other's status as persons. While *making available* an institution of this sort and educating individuals with respect to the moral problems associated with sex can reasonably be thought to importantly facilitate the management of our sexuality, forcing people to avail themselves of this institution in order to have sex and otherwise routinely policing this aspect of their lives is unlikely to do so. Sexual activity is a deeply private and personal aspect of human life in which we are routinely personally and psychologically "invested" in a very profound way. As such, active intervention by the state that seeks to police the sexual lives of consenting adults, by, for example, prohibiting extramarital sex or types of sexual activity viewed as inherently problematic, would require deeply intrusive intervention likely to produce only resentment, repression, or shame, none of which will be conducive to the end it is intended to serve.

### III

Understood in this way, the provision of this marriage right is consistent with the various other titles Kant identifies as innate rights. As limited and dependent beings, our freedom to act for the sake of our ends routinely depends upon the cooperation of others in providing us needed goods or services, and can thus be significantly compromised by the failure of others to acknowledge us as persons and engage with us in this way. To the extent that sexual interest in another can take the form of an interest in them as a "thing", sexual relationships are of concern in this context and, given our willingness to actively participate in relationships that may compromise our own and other's status as persons, managing these relationships can be said to require the kind of special institutional arrangements Kant envisages. Given, however, the deep intimacy of sexual relationships and their significance in how we see ourselves and our lives, this

kind of concern need not to be thought of as extending beyond the provision of an institution of this sort to more radically intrusive state intervention.

Thus understood, the kind of marriage contract Kant advocates need not be regarded as deeply flawed in the manner Pateman suggests. Pateman makes two apparently related claims in her assessment of Kant's view. She argues that:

- (i) Kant is inconsistent in treating marriage as a contractual arrangement because he thinks of women as lacking *civil personality* and hence the civil standing necessary to hold properly, enter into contracts, etc.;

And, given (i)<sup>7</sup>,

- (ii) Any subsequent marriage contract between a man and a woman is merely a sham in which the man acquires the woman as his property without her acquiring any rights in return (and the effect of Kant's marriage contract is thus simply to subjugate women, leaving them as the man's property).

The first of these claims is apparently based on a selective reading of a distinction Kant makes in the Doctrine of Right between *active* and *passive* citizenship. Drawing on elements of an earlier discussion of the issue of citizenship in one of Kant's political essays, Pateman suggests that he regards women as "passive citizens" *by their nature* (compared with men who are reduced to this status by mere "accidents of fortune and circumstances" (Pateman, 1988, p. 169)) and that this status implies that they lack civil personality *in the strong sense (i) assumes*.

Even if this were the case, it hardly seems to support the claim that Kant's marriage contract is a simple endorsement of male supremacy, since, by her own admission, the class

of passive citizens includes large numbers of men. On this reading, all men who are tenant farmers or private tutors, or who otherwise sell their skills or labor directly to another for a wage (as opposed to selling the products of their labor in an open market) would be reduced to this status also. Any marriage involving this large segment of the male population would then be one between two parties *neither of whom* could properly contract with the other. More significantly, a careful reading of the text suggests that Pateman's understanding of this distinction distorts Kant's view. Kant argues that anyone dependent on "arrangements made by another" for their "preservation in existence" lacks the necessary civil independence for enfranchisement and hence ought to be regarded as a *passive* rather than an *active* citizen (MM, 6:314). The nature of this distinction and the context in which it is made clearly suggest the reasonable underlying worry that individuals who are so *deeply dependent* on others will simply vote for the interests of their protectors. Moreover, it is clear that being classified as a passive citizen does not entail that you cannot own property and enter into contracts as an equal under the law. Kant explicitly insists that the dependence and unequal power of passive citizens is not to be understood as warranting legal treatment at odds with their innate rights:

This dependence upon the will of others and this inequality [of social status] is, however, in no way opposed to their freedom and equality *as human beings*, who together make up a people; on the contrary, *it is only in conformity with the conditions of freedom and equality that this people can become a state and enter into a civil constitution* (MM, p. 6:315, second emphasis added).

A community of people can therefore properly be called a state and their laws have rightful force *only* under conditions in which *all* their citizens are entitled to the same freedom and equality afforded them under the innate right to freedom. Lacking civil independence, *all*



*passive citizens are to be denied is the right to vote.* In addition, although Kant does suggest earlier that being a child or a woman are “natural qualities” that preclude one from citizenship (TP, 8:295), he does so prior to the more systematic treatment of this issue in the Doctrine of Right and the distinction he makes here between active and passive citizenship. In this later discussion, he continues to classify “all women” as passive citizens (apparently on the basis of the assumption that they depend on others for food and shelter and hence lack the necessary civil independence required for enfranchisement). He is, however, also quite clear that the attribute of civil independence is one individuals ought to lack *only by their own choice* and that it therefore has to be possible for any passive citizen to *work their way up* to the status of active citizen in a rightful civil community (MM 6:315).

A careful reading of the distinction between active and passive citizenship thus precludes Pateman’s interpretation of its significance. Even if we assume Kant thinks of women as *naturally* incapable of civil independence and that they can therefore *only* be passive citizens, nothing associated with this status suggests that passive citizens lack the standing necessary to hold property and enter into contracts and hence lack “civil personality” in the strong sense Pateman assumes. Without this assumption, the second claim is supported only by a series of selected quotations casting Kant’s view in the worst possible light. For instance, Pateman emphasizes Kant’s claim that the idea of a marriage contract between equals can be regarded as consistent with the legal status of the husband to direct the union in its practical affairs. The whole question of this status arises, however, against the background of a need to reconcile it with the original “natural equality” of the parties in a marriage and the man’s legal standing here is *explicitly* premised on his presumed naturally superior practical capacities (and hence entirely contingent on this clearly false premise). Moreover, singling out this claim and emphasizing it in this manner distorts the tenor of the passage that precedes it in which

Kant explicitly repudiates polygamy, concubinage, and morganatic marriage on grounds that are very hard to interpret as anything other than a concern with the status of women in relationships of these sorts.

More generally, while Kant does have many unfortunate things to say about women, he is sadly hardly unique in this respect in the history of philosophy and it avails us little to emphasize isolated remarks of this sort at the expense of a more considered analysis of his theoretical view. In particular, Pateman's tendency to treat Kant's marriage contract as "nothing more than a contract of mutual sexual use" (Pateman, 1988, p. 170) misses one of the most striking aspects of his discussion. I argued in Section II that the marriage right Kant discusses in the Doctrine of Right is a right to the provision of a social institution defining the rights and responsibilities associated with marriage. Thus understood, marriage is not simply a matter of a private contractual agreement between consenting adults with the role of the state merely being to ensure the enforcement of *whatever* terms the parties agree to. In a rightful civil condition the *state* will set the terms of the marriage contract with the parties mutually agreeing to be bound by these externally imposed conditions. In doing so, the state will consider carefully how a relationship between the partners as persons can best be sustained, and, for the reasons discussed in Section II, the terms of the marriage contract will plausibly require a binding commitment requiring third-party formal dissolution in the event of divorce together with the kind of equal power over marital resources Kant recommends. Beyond these basic commitments, however, other terms remain to be settled by further consideration. Thus, for example, arguments could be made to adjust the ease with which divorce may be obtained and the effect of prenuptial arrangements if it is shown that they tend to erode the function of marriage in confronting us with the status of our partner as a person and requiring us to deal with them in this way.

Kant's discussion of the marriage right thus emphasizes the broader role he envisages for the state. The importance of the state lies, as we saw in Section I, in its serving to secure the

personal space within which individuals can develop their own moral personality, coming to properly understand and internalize moral principles belonging to their own wills but not necessarily determinative of them. In doing so, its powers extend beyond merely policing agreements and providing for personal security. In addition, they encompass concerns with the way in which this “space” can be compromised, including the way in which our deep and basic sexual drive affects the conduct of our lives.

What Kant ultimately offers us is therefore a *secular* argument for an institution of marriage premised on the assumption that sexual appetite threatens to compromise the kind of general external freedom it is the business of the state to preserve. His treatment of sexual appetite as inherently problematic is clearly at odds with the recent history of thinking about sex, but not, as Herman notes, out of step with a range of worries about human sexuality and the way it works through differences in power and social status seen in more recent feminist literature. What is particularly striking is the way in which the power of the state extends to a positive commitment to ensure the realization of a social culture in which individuals are meaningfully free to pursue their life plans and personal development and the form this concern takes in the present case. Clearly more can be said about the problematic structure of sexual appetites and our reasonable worries about intrusive state intervention. But, what we have seen is that Kant’s political philosophy has much more to offer than treatments like Pateman’s appreciate.

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<sup>1</sup> See also Alan Wood’s discussion of Kant on marriage and sexuality (Wood, 1999) and Lara Denis’s analysis of Kant’s views on friendship and marriage (Denis, 2001). Though critical of several aspects of Kant’s discussion, Wood thinks that he emphasizes a “darker side” to human sexuality that ought to be taken seriously. Denis compares Kant’s remarks on friendship and marriage and argues that we can construct an ideal of “moral marriage” from elements of these discussions that has much to offer.

<sup>2</sup> In fact, I think that this kind of inclusive and textured account is much more consistent with Kant’s general approach to our natural drives and interests than the kind of formal treatment sexual appetite receives in the **Lectures on Ethics**. Despite the tendency to think of Kant as

someone deeply suspicious of anything associated with our sensible nature, he routinely demonstrates a subtle appreciation of the role of appetites in human life and entertains a range of concerns with the psychological aspects of human agency. For example, he argues that having trusted friends is important to our psychological health (MM 6:470-471, PA 7:219) and warns of the harms associated with a morbid preoccupation with introspection (PA, 7:133). More generally, he is very careful to repudiate the kind of "monkish" and "fanatical" virtue that would deny the agent pleasures proper to a human life and the personal and moral space in which to pursue these (see, for example, MM, 6:409; LE 27:393; PA, 7:282).

In these passages and elsewhere, the emphasis is very much on taking account of natural and psychological facts about human beings and integrating them into a moral life in which reason governs inclinations appropriately without simply suppressing them. This language is unfortunately absent from the **Lectures on Ethics** discussion but this treatment of sexual appetite can, I think, be seen as being consistent with it.

- <sup>3</sup> This kind of legislation cannot be blocked on Kant's account by claims in terms of property rights according to which individuals own any opportunities they have to offer and are entitled to dispose of them as they see fit. A system of property is required by Kant to ensure our capacity to make rightful use of external objects as means to securing our various ends and it is therefore a postulate of reason that such a system exist. This postulate does not, however, determine the scope and limits of rights to property. These rights will be determined by a consideration of which system best secures the use of external objects that we necessarily will for a community of rational agents with originally equal claims to the use of these objects. As such, there is no natural privilege attaching to property rights of the sort libertarians tend to envisage and hence no simple warrant for the claim that it is a violation of our property rights to prohibit us from denying others various opportunities on the grounds of race or sex.
- <sup>4</sup> A thoughtful and much more comprehensive account of the problems posed by the special intimacy and dynamics of sexual relationships can be found in Onora O'Neill's discussion of this issue (O'Neill, 1979, pp. 118-122).
- <sup>5</sup> Originally based on the custom of giving a "morning gift" (a small token owed on the consummation of a sexual relationship representing the man's only obligation), morganatic marriage designates a union between a person of high rank and one of lower status in which the former's title and wealth are explicitly not transferred either to their partner or any future children of the union.
- <sup>6</sup> For more on the role of appeals to natural teleology in Kant's ethics, see Denis's comprehensive discussion of Kant's views on homosexuality, masturbation, and bestiality in "Kant on the Wrongness of 'Unnatural' Sex" (Denis, 1999).
- <sup>7</sup> The argument for this second claim is unclear and seems to consist of a number of selected quotations. I assume here that it depends upon the first claim and that the idea is thus that Kant is simply being inconsistent in treating marriage as a contractual arrangement.