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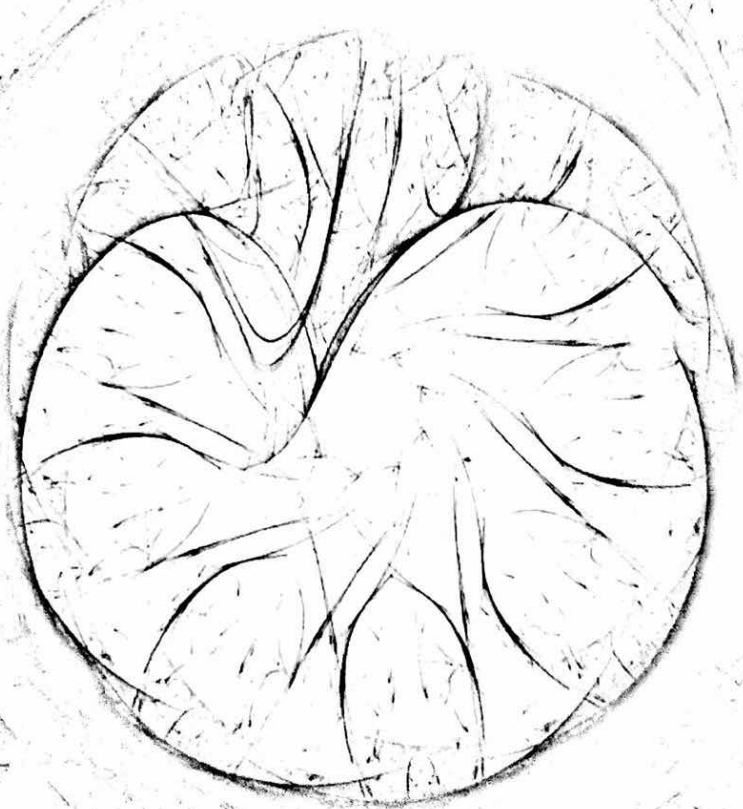
KANT'S *DOCTRINE OF RIGHT* IN THE 21ST CENTURY



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Kant's *Doctrine of Right* in the Twenty-first Century

Edited by Larry Krasnoff, Nuria Sánchez Madrid and Paula Satne

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Jordan Pascoe

The trouble with bachelors

In a curious passage in the *Doctrine of Right*, Kant remarks that the state has an obligation to care for unwanted illegitimate children by maintaining foundling homes. These, he suggests, might be funded by taxing wealthy unmarried people, 'since they are in part to blame for there being abandoned children' (*RL* §49C, 6:327).[1] This odd singling-out of unmarried people responded to a debate churning in 1790s Prussia about what rights the state had to commandeer the estates of those who had remained unmarried – and, in turn, about the role of marriage in the state.

This debate was ignited by the publication of the Prussian Legal Code, the brainchild of Frederick the Great, who envisioned a legal code so comprehensive that all potential legal problems would be covered by it. One of the most controversial features of the 1791 draft of the Code was an article that required the estates of deceased bachelors to be used by the state for charitable purposes. The bachelor provision was one of only three articles – out of a staggering 17,000 – so controversial that they led to the delay of the implementation of the Code.[2] It inspired an impassioned defence of bachelors by Königsberg mayor Theodor von Hippel, and was ultimately revised before the final implementation of the Code in 1794.[3]

Kant's ruminations about the funding of foundling homes is one of numerous remarks in the *Doctrine of Right* that respond directly to the debates surrounding the Code in the 1790s. Kant, like many public Prussian intellectuals, had engaged with the Code in the years leading up to its establishment, and he had been in correspondence with the Code's framers as early as 1789.[4] Though the influence of the French Revolution on Kant's political turn has been well established, the arguments in the *Doctrine of Right* also directly engage with the project of legal reform within Prussia.[5]

For most of the eighteenth century, marriage was a limited estate in the German states, open only to those who could demonstrate income and savings. Both Kant and von Hippel are said to have quipped that they never married because by the time they could support a wife, they were too old to have had one.[6] Absolutist German law, driven by concerns about overpopulation and the difficulties of subsistence living, had limited access to marriage and criminalized fornication outside of it. The result was a highly moralized sexual criminal code and an epidemic of extramarital sex and corresponding cases of infanticide – which, by the middle of the eighteenth century, accounted for half of all executions, and inspired Kant's remarks about the state's obligation to provide foundling homes.[7] The public furore over the execution of so many young women led Frederick the Great to fight for legal reform by removing most of the limitations on access to marriage while at the same time decriminalizing fornication for first-time offenders. Though the Code was in most ways a conservative reform, particularly in its protection of the rights of the nobility and its dependence on the heritage of Roman law, its treatment of sex and morality replaced the absolutist model of using civil law to legislate sexual morality with a new liberal conception, grounded in the assumptions that most people were sexually active, and that this sexual activity could be harnessed for the state's purposes by being confined within the institution of marriage.[8]

The bachelor provision's presence in the original version of the Code signalled this critical shift in the law's understanding of the responsibilities of citizens and the role of marriage in the state. For the first time, the law assumed that marriage was one of the primary responsibilities of citizens, one of the primary means through which individuals contributed to the well-being of the state. Those who did not marry, therefore, owed the state additional financial contributions. The new emphasis on the secular purpose of marriage positioned it as a key institution connecting citizens to the state, encouraging economic productivity, and producing a new intimate family sphere in which individuals' basic needs were met.[9] Marriage quickly became more than a universal right: it was positioned as a universal duty, a mark of good citizenship, as those

who remained unmarried by choice – as Kant's remarks illustrate – were ridiculed.[10]

This historical background may help to explain why Kant's nuanced account of marriage as a foundational element of right has been fertile ground for theorists hunting both for a philosophical defence of marriage, as well as for those seeking tools for reforming marriage as a more just institution.[11] Interest in Kant's account of marriage has exploded over the last decade, as Kantians of many stripes have drawn on Kant's arguments about sex and marriage in order to speak to contemporary negotiations about what and who marriage is for.[12] This chapter draws out the parallels between the debates about universal marriage in the 1790s and today, and situates Kant's arguments in both contexts. By comparing Kant's arguments about marriage to those of his contemporaries von Hippel and J. G. Fichte, I show that while Kant offers a useful philosophical framework for the mainstream marriage equality movement, those looking to rethink marriage's role as a feature of justice would do well to look beyond Kant.

Marriage right

In Collins's notes from the 1780s, we find a Kant preoccupied with the moral evils of sex, including the cannibalistic drive to make use of persons as things, and to set humanity aside in the name of lust (*LE* 27:385–7). Kant's discussion of sex is focused on the varying forms of sexual activity that violate our duties to ourselves, and on considering whether or not they ought to be criminalized under civil law (*LE* 27:390). Marriage, as a contract between two persons, is offered as a legal solution to this moral problem, but its purpose in this context is simply to offer a framework within which sex becomes morally permissible (*LE* 27:388–9).

In Vigilantius' notes, written in the 1790s as Kant was framing the arguments of the *Metaphysics of Morals*, his focus has changed. Here Kant asks how the sexual impulse can 'co-exist with the freedom sanctified by humanity' (*LE* 27:638). As his broader focus shifts from morality to juridical right, sex is framed not as a moral problem, but as a challenge to external freedom. Marriage, as a lawful relation of reciprocal mutual possession, thus becomes a legal institution essential to the possibility of freedom.

This argument would be fully developed in the *Doctrine of Right*, where Kant positions marriage as one of the essential features of the just state.

In so doing, Kant was responding to the Prussian debate about the nature and purpose of marriage prompted by the publication of the Code. Though the Code extended the institution of marriage, its reasons were opaque. This was, in part, because of the very nature of the Code, which was designed to cover every conceivable dispute and to resist juridical interpretation. The Code merely laid out the new requirements for marriage and did not offer underlying principles to explain the legal changes. This made the purpose of marriage a significant question for debate.

Broadly put, Prussian public intellectuals agreed that marriage was a basic building block in the architecture of the state, but disagreed about whether this was because marriage was a pre-political foundation of society that the state was bound to codify in law, or because marriage was a juridically creative institution which could be reconfigured as the demands of justice required.

Kant's former student Fichte fell in the former camp: he saw marriage as pre-political, an essential feature of natural law. 'The task of establishing or determining marriage', he argues, 'does not belong to the law of right, but rather to the much higher law of nature and reason ... regarding marriage simply as a legal association leads to inappropriate and immoral ideas.'[13] The state's role in marriage law is merely to codify the terms of entrance and exit, ensuring that women were not coerced into marriage and that that divorces respected the rights of each party.[14] The state cannot enter into any disputes between married persons, who become one person under the law.[15] Thus, it makes no sense to talk of marriage as an institution designed to produce or maintain justice, since the law cannot shape or define marriage for its own purposes.

For von Hippel, on the other hand, marriage was an essentially political institution, 'the state in miniature',[16] and so justice within the home was the starting point for justice in the state as a whole. Marriage exists, von Hippel argues, 'for the sake of the state',[17] since marriage is the means through which the state produces citizens. But this does not mean that procreation is the purpose of marriage. Von Hippel thought marriage might serve many purposes, some of which might involve sex and procreation, and some of which might not. Von Hippel was critical both of marriage in

its current form and of the reforms suggested by the Code, arguing that it was the apparatus through which the oppression of women was institutionalized and the rigid social hierarchy maintained.[18] Far from being an institution fixed by natural law, marriage was a creative institution, to be crafted by couples themselves within the terms of civic law.[19]

Like von Hippel, Kant's account of marriage in the *Doctrine of Right* rejects the notion that marriage's primary function is procreative. Kant points out that, were this the prime juridical purpose of marriage, marriages could simply be dissolved when this end was fulfilled (*RL* §24, 6:277). Instead, he argues that marriage is a legal institution designed to allow each partner the lifelong 'pleasure of using each other's sexual attributes' (*RL* §24, 6:277). He emphasizes that procreation and pleasure are both natural ends, that marriage is designed to ensure the right to both, and that 'this is necessary in accordance with pure reason's laws of right' (*RL* §24, 6:278). Despite his moral misgivings about sexual use, Kant has here positioned sex as both a natural end and a right protected by law, and argued that access to marriage is necessary to ensure that this right does not conflict with our more basic right to external freedom. In keeping with his broader project in the *Doctrine of Right*, Kant distinguishes the moral dangers of sex as a violation of one's duties to oneself from the legal quandaries sex and intimacy pose within the domain of rights. His purpose is not to defend marriage as a legal solution to a moral problem, but to argue that marriage is one of the basic institutions required to protect our right to external freedom.

In this way, Kant's account of marriage occupies the terrain between von Hippel's vision of marriage as a primarily juridical institution, and Fichte's understanding of marriage as a feature of natural law. Marriage, as the primary form of domestic right, or the 'right to a person akin to the right to a thing', is one of the three core institutions, along with property and contract right, that manage possessive rights and make up the domain of private right. These possessive rights exist prior to the state, since making choices in the world necessarily involves the use of objects outside ourselves. But these rights are merely provisional in the pre-civil condition. Juridical laws, backed by a public authority, are required to secure these rights and to transform them into rightful juridical institutions (*RL* §15, 6:264).

Thus, marriage has a pre-political form for Kant: it is a relation of lifelong mutual possession, through which partners take one another's interests and ends as their own. But like the other possessive rights Kant describes, marriage is rightful only when it is consistent with the external freedom of all, and backed by a public authority capable of coercively enforcing that freedom. While property right determines what rights I have against all other people, and contract right determines what rights I have against specific others, marriage, or domestic right, lays out the rights I have *to* another person by framing that right as a right to exclusive use. I have a right to my spouse in the sense that no one else has a right to him.

Kant's inclusion of marriage as one of the basic institutions of private right signals that this right to persons as if they were things is every bit as essential to justice as are the rights to property or to make contracts. Like the right to acquire property, it is an inevitable feature of our empirical experience transformed into a rightful relation within the civil condition. But unlike our right to acquire objects, Kant remains sceptical that our right to acquire persons for sexual use can ever be wholly consistent with our most basic rights within the state. Although he assumes that persons will try to make use of one another in this way, he also recognizes that this use is not only a debasement of humanity, as he argued in the Collins lectures. The right to a person akin to the right to a thing is, explicitly, the right to use one's partner 'as a thing', in ways that would be impermissible in any other context (*RL* Appendix 3, 6:359). The critical innovation in Kant's account of sex in the *Doctrine of Right* is the assumption that this use of a person as if he were a thing constitutes a failure to respect external freedom, even when consent is present.

Kant thus distinguishes between contract, through which a range of infringements on external freedom become permissible, and domestic right, which is the only condition under which sexual use is permissible (*RL* §24, 6:277–8).[20] And he argues that a contract to enter into prostitution cannot be binding (*RL* §26, 6:279). The point here is not that we cannot consent to sex, but that consent alone cannot manage the failure to respect external freedom that sexual use entails. Although Kant assumes that sex is natural, he also assumes that it is inconsistent with the basic structure of rights within the state.[21] Marriage, then, must create a distinct juridical space in which this kind of use is permissible.

Marriage law does this by ensuring that partners gain full and reciprocal possession of one another. This not only produces a relation of common interests, but also ensures that even when partners use each other as things, they are not using each other as *merely* a thing, since they have adopted one another's ends as their own. But because this relation is structurally similar to property, rather than contract, it also follows that married partners have rights *to* one another, but do not have rights *against* one another. From the perspective of law, married partners share ends and interests, and the law cannot distinguish the ends and interests of one partner from the other. This is borne out by Kant's account of the legal equality of married partners: despite the natural inequalities between the sexes, marriage law defines partners as abstractly equal from the perspective of law so that their mutual possession of each other is symmetrical (*RL* §26, 6:279).[22] Married partners have equal rights to one another, and equal rights to their possessions (*RL* §26, 6:278). This material equality is a feature of their shared ends and interests: if a husband possessed something individually, he would have a right *to* that object *against* his wife, which suggests that he had ends his wife did not share, which would violate their mutual possession of one another.[23] Since spouses share ends, they also share a domain of external freedom, which is the right to pursue those ends through external action. Marriage thus creates a juridical space of exclusive use and mutual interests, in which partners are allowed to use one another in ways that would violate external freedom in any other context.

This transformation of external freedom holds not only within marriage, but in all domestic relationships. The 'right to a person akin to the right to a thing' defines not only the marital relationship, but also the relationships between parents and children, and between heads of household and their servants.[24] Like the marital relationship, the parental and servant relationships include a range of intimate and embodied activities that are inconsistent with external freedom as it operates in the public sphere. The exclusive rights to other persons granted by domestic right transform external freedom, creating a juridical space within the household in which husbands, wives, children, and servants can engage in a range of intimate activities without threatening their external freedom in the public realm.

This story about the relationships within the household responded to the public debate about the degree to which the household operates as a distinct juridical space within the state. For Fichte, following Rousseau, the household operated as a miniature state of nature into which civil laws could not stray. Von Hippel thought it was a civil institution that allowed sex to remain hidden from public view. For Kant, marriage was not the sanctified natural relation envisioned by Fichte nor the civic partnership described by von Hippel. It was something of a hybrid: a juridical institution designed to contain our natural needs and urges by transforming our political rights within its walls. For Kant, juridical law did more than codify natural family relations. It created a distinct sphere of rights within the state such that those natural, intimate relations could coexist with the dignity and respect for external freedom that citizens enjoyed in other domains of life. In this sense, marriage law was a basic right and an essential feature of the just state.

A universal estate

The debates about marriage in 1790s Prussia mirror the contemporary debate about same-sex marriage in remarkable ways. In both contexts, a move to extend the right to marry produced fierce public debate about the purpose and meaning of marriage as a social institution, and about the role of law in shaping our most intimate relationships. The terrain of this debate is strikingly similar. Fichte's understanding of marriage as a natural foundation of society merely codified by natural law occupies the same discursive position as the arguments marshalled in support of the Defense of Marriage Act, which carefully positioned marriage as a fixed, pre-political feature of society. Those who defended DOMA held that marriage was not a legal institution like any other, and that the state therefore had no capacity to redefine the terms of marriage.[25] The marriage equality movement, meanwhile, advanced an argument similar to the one embedded in the Code: it doubled down on marriage as a basic right of citizens, and held that it therefore ought to be universally extended. Given that Kant's nuanced account of the necessity of marriage law developed in response to the public questions raised by the Code's move to make marriage a

universal estate, it is unsurprising that contemporary scholars have so often turned to Kant when seeking a philosophical justification for marriage as a basic right of citizens.[26]

This is not to say that Kant would have been a champion of same-sex marriage. His views on homosexuality are well known, although several philosophers have argued that a contemporary Kant, freed from historical bigotry, would have had to overcome his prejudices and defend same-sex marriage.[27] But his arguments have often been deployed to turn to the deeper debate stirred by the same-sex marriage controversy about why we need marriage *law*, as opposed to private, contractual agreements about relationships or a purely social or religious conception of marriage. Kant's arguments, moreover, offer a philosophical grounding for the claim made by the courts in several groundbreaking marriage equality decisions: that marriage is a dignity-conferring institution.[28] By confining the demeaning and cannibalistic nature of sex to the domestic realm, persons can engage in the public realm as rational beings with their dignity intact, their sex lives hidden behind juridically closed doors. This is a useful framework for contemporary debates about same-sex marriage, which have been marked by a public discomfort with homosexual sex that parallels, in many ways, Kant's uneasiness with sex in general.[29]

The question of whether marriage ought to be a universal estate was, in both contexts, spurred by the decriminalization of the sexual activity of those denied the right to marry and the anxiety that followed as this activity hovered in a liminal public space, neither prohibited by law nor sanctioned through access to marriage. Anti-fornication laws in the eighteenth century, like anti-sodomy laws in the twentieth, functioned as the legal counterpoint to marriage, keeping undesirable sex out of public spaces by proscribing illegitimate expressions of sexuality. The repeal of these statutes pushed marriage law to become the legal apparatus that discriminates between legitimate and illegitimate sex. As Katherine Franke argues, decriminalization creates a gravitational pull towards the domestication of sexuality, since marriage is the only available avenue for privatizing and legitimizing sexual relationships.[30] Kant's claims that those who wish to have sex '*must* necessarily marry' (*RL* §24, 6:278), and that non-marital sexual contracts are invalid, can be understood as responses to this new liminal legal category of legal but illegitimate sex (*RL* §25, 6:278). The

valorization of marriage as not only a right but a virtue of citizens – underscored by his passing comment about taxing unmarried people for the establishment of foundling homes (*RL* §49C, 6:327) – reveals the expanded role marriage must play in organizing permissible sexuality in the wake of legal reform. Once suspect sexualities are decriminalized, the legitimacy of state-sanctioned sexualities must be reinforced, and the right to enter the institution that grants this protected status becomes highly contested.[31]

Thus, in both contexts, arguments about the role of marriage in a just state frame marriage as a fundamental right essential to dignity, and then argue that if this is the case, marriage ought to be an institution open to all. While the contemporary debate focuses on the heterosexist limitation of marriage, the Prussian debate took up questions about class, rank, gender and social mobility. In doing so, it posed a limited but serious challenge to the protection of social class that motivated most of the Code's legal provisions. Just as the recent wave of marriage equality bills has become the most significant civil rights advance in decades, the marriage reform proposed by the Code was in many ways the Prussian expression of the social radicalism inspired by the French Revolution.

The extension of marriage as a universal estate was a remarkable feature of a legal code that was otherwise committed to upholding the distinction between *Standes*, the rigid social classes that organized eighteenth- century Prussia, and even to retaining the legal status of serfdom.[32] But the new universality of marriage was amongst the most controversial features of the Code. The 1791 draft included an article that allowed legitimate marriage across *Stände*, allowing nobles to marry peasants.[33] The most privileged classes claimed that this new openness of marriage would undermine the foundations of the aristocracy, and pushed for a modification of marriage law to limit marriage across social class to 'left-handed' or morganatic marriages, allowable only in limited cases, which prevented wives and children from claiming the social status or property of an upper-class husband.

The debate about morganatic marriage in the Code was, in the wake of the French Revolution, a deeper dispute about the role social class ought to play in a rightful juridical order, as well as a question about the role of equality within marriages. Kant is generally critical of the hereditary privilege protected by the Code, upholding instead a model of largely egalitarian citizenship.[34] He

argues that morganatic marriage 'takes advantage of the inequality of estate of the two parties to give one of them domination over the other' and argues that morganatic marriage is no different from concubinage (*RL* §26, 6:279). But if morganatic marriage is unjust, what is the solution? Should full, legitimate marriage be permitted between persons of different social standing? Can marriage, as an equal exchange of rights, produce equality, given radically different starting points, or does the reciprocity of marriage require that basic social equality is already assumed?

Despite the new emphasis on universal marriage, support for marriages that crossed social classes was limited. Fichte assumed that when a husband and wife have radically different educational backgrounds and values they will be unable to share one social world, which means that true marriage across a significant difference in social class is impossible. But if sex should occur under these circumstances, they should nevertheless marry to protect their virtue (since they are already married according to nature) and then simply divorce.[35] Von Hippel proposed that women give up social rank altogether, which would allow love matches that cross social class to become the rule rather than the problematic exception. But he, too, noted that as things stood, these marriages were inadvisable because of the discord they caused.[36] Both of these arguments are motivated by their authors' understandings of equality within marriage. Fichte concerned himself only with pragmatic questions of compatibility rather than marital equality, in part because he thought marriage was a fundamentally unequal institution in which wives are wholly subordinate to their husbands. Von Hippel's argument, on the other hand, reveals a radical commitment not only to social but to gender equality: he argues that eradicating social rank for women would also undermine the system of marital guardianship in which women are subsumed to their husbands' political and social identities.[37] Von Hippel's larger project of full and equal citizenship for women could be achieved only by dismantling both inequality within marriage and the rigid inequality of social rank.

At first glance, Kant's rejection of morganatic marriage seems motivated, like von Hippel's, by both by a criticism of the rigid and legally enforced disparity of *Stände* and a commitment to the equality of married spouses. But, in the same passage, he complicates this story about equality, arguing that

> if the question is therefore posed, whether it is also in conflict with the equality of the partners for the law to say of the husband's relation to the wife, he is to be your master (he is the party to direct, she to obey): this cannot be regarded as conflicting with the natural equality of a couple if this dominance is based only on the natural superiority of the husband to the wife in his capacity to promote the common interest of the household. (*RL* §26, 6:279)[38]

Morganatic marriage does not do the legal work of marriage in that it does not create the formal equality required to ensure that married partners share ends and interests. But this formal equality is limited and consistent with natural inequality within the household. Kant's assumption that husbands are naturally superior to their wives suggests that marriage law cannot assume an equal starting point, since men and women are not equal. The purpose of marriage law is to create equal legal standing for married partners even as their natural inequality becomes with order of the domestic sphere. Although Kant is not as explicit about this as either Fichte or von Hippel, his argument suggests that there is no legal barrier to full, legal marriage between members of different social classes.

But Kant's reference to natural inequality within the household draws our attention to a different limit on universal marriage. Although Kantian scholars tend to focus on the reciprocity and equality built into the legal form of the marriage relation, the relationships between parents and children are clearly unequal, as are those between the head of household and his servants.[39] Thus, while domestic right is juridically organized by a formal equality in which persons have reciprocal rights to one another that protect each party's rights and external freedom, that external freedom is transformed within the household, where natural inequality organizes relationships.

Given Kant's commitment to civil equality and the challenges his political philosophy presents to the rigidly hierarchical social structure of late eighteenth-century Prussia, it is worth interrogating his comments about the status of servants. While Kant places clear limits on the relationship between the head of the household and his servants in order to differentiate it from slavery and the rigid forms of serfdom that characterized the feudal order, he emphasizes the inequality present in these relationships, and the difference between the employment contract within the domestic realm and that outside it (*RL* §30, 6:283).[40]

Kant's account of the legal rights of servants raises questions about his commitment to marriage as a universal estate. The Code opened the right to marry to all citizens, including servants. While Kant does not explicitly weigh in on this provision, there are two reasons to believe that he might have resisted it. First, he uses the dependency of servants to limit their political rights, defining them as passive citizens (*RL* §46, 6:314).[41] This suggests that the inequality of servants within the household warranted limiting their access to rights outside it. Second, there is the infamous story of Kant's reaction to his servant's marriage: Kant was enraged when Lampe married without his leave, and held a grudge against him for the rest of his life.[42] According the laws of the time – prior to the establishment of the Code – Kant had the right to prohibit his servant from marrying, and his biographer notes that Kant probably would have done so had he been informed about the wedding ahead of time.[43]

Thus, although Kant's account of marriage offers a philosophical grounding for the idea that marriage is a necessary feature of the just state and an essential right of citizens, it is not clear that he envisioned marriage as a universal estate, either in our time or his own. Marriage's capacity to protect dignity by transforming external freedom within the household seems to have justified certain limits on access to the institution, and meant that Kant did not go as far as other reformers in his day in conceiving of marriage as a tool for producing social equality. For Kant, marriage law reform should protect the juridically enclosed household rather than radically rethinking the relationship between the public and domestic spheres.

Rethinking marriage

The structural features of the Kantian household ensure that intimacy, sexuality and self-care are contained and hidden from the public realm. Access to this kind of enclosed domestic realm is then essential to the dignity of persons in the public realm, where they are free to operate as rational and autonomous beings whose embodied desires and needs have been taken care of behind juridically closed doors.

In this sense, Kant does not go as far as Fichte (or, for that matter, Rousseau) in declaring the household a non-juridical space governed by natural law. If Fichte's account of marriage occupies similar discursive terrain to the contemporary defenders of DOMA, then it is unsurprising that Kant's account of marriage has been so appealing to the marriage equality movement in spite of the ways Kant may have resisted the universal extension of marriage. Although advocates of same-sex marriage fight to overturn DOMA, they in many ways agree with its premises: that marriage is an essential building block of society, a dignity-conferring institution that ensures access to a domestic realm within which intimate relations are protected and private. In order to extend access to this institution, they must first establish that marriage is a basic right of citizens, and second grant law the power to define and determine the limits of marriage law. The mainstream marriage equality movement does not challenge the centrality of marriage to the social and political order, nor push back against the various ways in which enhanced rights and benefits are attached to marriage.[44] Instead, it must recast marriage in juridical terms, grounding it in the language of basic rights and dignity and placing it within the scope of law, while retaining the social purposes of marriage and the corollary role the household plays in providing a domain of privacy. Kant's argument makes similar moves, making marriage a basic feature of the just state and a tool for organizing the rights of citizens, while codifying it in a form of right that protects the juridically distinct nature of the household and uses the transformation of external freedom within the household to enhance the capacity for dignity outside it. And by treating married persons as a united legal entity with shared ends and a shared capacity to pursue those ends, the Kantian account of marriage also provides a basis for extending rights and benefits through marriage.

The reforms suggested by Kant's account of marriage, like those advocated by the marriage equality movement, are limited. Both rely on a set of assumptions about what ought to be hidden behind closed doors in order for dignity to be possible elsewhere. We have seen that for Kant, access to an enclosed domestic realm is essential to the dignity of persons in the public realm, where they are free to operate as rational and autonomous beings whose embodied desires and needs have been taken care of behind juridically closed doors. Since *Lawrence v. Texas* the marriage equality movement in the United States has focused on the necessity of access to the legally protected domain of privacy created by marriage in order to grant homosexuals equal rights to dignity in the public

sphere. But just as marriage is not the only relationship governed by domestic right in the Kantian model, sex is not the only form of intimacy sheltered within the household by domestic right. Childcare, eldercare, self-care and a range of other reproductive labours become domestic, rather than political, projects in both the Kantian and contemporary models of the household. In both cases marriage is upheld as a basic feature of the just state even as it is used in order to further the privatization of social goods.

In both contexts, this project of privatization is aided by the rhetoric deployed to recast marriage as a juridical institution concerned with basic rights, rather than a natural institution whose primary purpose is procreation. Just as the Code emphasized that marriage was a valuable institution 'for mutual support alone', thus limiting the state's responsibility for impoverished and abandoned spouses, neoliberal policies since the 1990s have tied welfare and other social benefits to marriage, taking pressure off the public purse by increasingly treating the household as the domain of self-care. Kant's account of marriage, like the contemporary marriage equality movement, furthers these projects by framing marriage as a virtue of citizens and the institution that grants access to the enhanced privacy found within the juridically enclosed household.

A marriage equality movement that valorizes existing marriage law despite its tendency to uphold gendered and raced inequalities, unevenly distribute rights and benefits, and privatize self-care in ways that further the neoliberal project, has been a disappointment from feminist, queer and critical race perspectives.[45] As Judith Butler reminds us, it is possible to be both political and critical, to fight for marriage equality while challenging the ubiquity of marriage as the means of organizing kinship, intimacy and identity.[46] The debate about extending marriage should not be confused with the debate about marriage's purpose within the state, and arguing for marriage equality is not synonymous with challenging the neoliberal project that has used the rhetoric of marriage and family values to privatize the labour of care, pare down social services, uphold increasingly authoritarian forms of parenting and valorize a newly conservative approach to sex and reproductive rights.[47] Given the similarities between Kantian domestic right and the contemporary arguments for marriage equality, drawing on Kant in search of a philosophical grounding for marriage as a basic feature of the just state is likely to exacerbate these problems.

The limits of the Kantian approach become apparent when we compare his arguments to those of his contemporaries. Like Kant and Fichte, von Hippel emphasized the role that marriage plays in shaping the social and political order, and in the moral education of citizens. For von Hippel, however, rethinking marriage law was an important first step towards social equality and the emancipation of women. In this sense, von Hippel's vision of marriage reform as a source of social and political transformation fully takes up the challenge posed by the Code. His treatise on marriage pushed back against the inconsistencies between the progressive new marriage laws and the conservatism embedded in the Code's treatment of class, citizenship and equality. For von Hippel, marriage reform was the starting point for dismantling not only the system of guardianship that limited women's rights, but also the rigid class structure that preserved oppressive forms of social inequality. Marriage reform was a juridically creative endeavour, since the definition of marriage was not fixed by natural law, and the benefits accruing to married couples were informed by a broader conception of social justice.

By arguing that the right to marry be simply extended rather than transformed, advocates of marriage equality have hewed more closely to the Kantian model of reforming marriage law than to the example offered by von Hippel, for whom the transformation of marriage law is an opportunity for addressing wider sources of social, economic and gendered oppression. Kant's arguments, by contrast, tend to entrench patriarchal privilege and further the privatization of self-care by producing enclosed domestic sphere resistant to juridical interference. Those committed to a marriage equality movement that is both political and critical should look beyond Kant for a truly transformative philosophical framework for rethinking marriage.

Notes

1 All translations of Kant's writings are taken from the Cambridge Edition of the Works of Immanuel Kant.

2 Klaus Epstein, *The Genesis of German Conservatism* (Princeton: Princeton University Press, 1966), pp. 383–5.

3 Theodore von Hippel, *On Marriage*, trans. Timothy Sellnor (Detroit: Wayne University Press, 1994), pp. 84–91; Epstein, *The Genesis of German Conservatism*, p. 385.

4 Reidar Maliks, *Kant's Politics in Context* (Oxford: Oxford University Press, 2014), p. 76.

5 When Kant reflected on the purpose of the state in the 1780s, notably in 'Idea for a Universal History' and 'What is Enlightenment?', he did so primarily to explain how politics can help individuals to develop morally. He developed a comprehensive theory of the state only in the 1790s, which included an account of legal reform, or 'permissive laws': a gradual enforcement of just laws designed to reconcile the just state to unjust precedents and customs. For example, he argues that the state ought to gradually phase out the appointment of the nobility to government office as public opinion dictates, and infamously ponders whether capital punishment might not be warranted in cases like duelling and infanticide, where social norms are in conflict with the law (*RL* §49, General; Remarks D and E, 6:329 and 6:336; see also *PP* 8:327 and 8:347). The question of what the law ought to do in the face of well-entrenched social conventions was at the heart of the debate about the Code, which was one of several late eighteenth-century German initiatives to reform the law in response to shifts in civil society. See my 'Personhood, Protection, and Promiscuity: Some Thoughts on Kant, Motherhood, and Infanticide,' *APA Newsletter on Philosophy and Feminism* (2011) for discussion of the duelling and infanticide examples.

6 Manfred Kuehn, *Kant: A Biography* (Cambridge, Cambridge University Press, 2001), p. 117; von Hippel, *On Marriage*, p. 69.

7 Kerstin Michalik, 'The Development of the Discourse on Infanticide in the Late Eighteenth Century and the New Legal Standardization of the Offense in the Nineteenth Century', in U. Gleixner and M. W. Gray, *Gender in Transition: Discourse and Practice in German-Speaking Europe, 1750–1830* (2006), p. 52; see also Pascoe, 'Personhood, Protection, and Promiscuity'.

8 Isabel V. Hull, *Sexuality, State, and Civil Society in Germany, 1700–1815* (Ithaca: Cornell University Press,1996), p. 144.

9 Hull, *Sexuality, State, and Civil Society* , pp. 143–4.

10 Hull, *Sexuality, State and Civil Society*, p. 286.

11 See Matthew C. Altman, 'Kant on Sex and Marriage: The Implications for the Same-Sex Marriage Debate', *Kant-Studien*, 101/3 (2010), 309–30; Elizabeth Brake, *Minimizing Marriage: Marriage, Morality, and the Law* (Oxford: Oxford University Press, 2012), pp. 65–71; Lara Denis, 'From Friendship to Marriage: Revising Kant', *Philosophy and Phenomenological Research*, 63/1 (2001), 1–28; Barbara Herman, 'Could it be Worth Thinking about Kant on Sex and Marriage?', in Louise Antony and Charlotte Witt (eds), *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Boulder, CO: Westview Press (2002), pp. 49–67; Lina Papadaki, 'Kantian Marriage and Beyond: Why It Is Worth Thinking about Kant on Marriage', *Hypatia*, 25/2 (2010), 276–94; Helga Varden, 'A Kantian Conception of Rightful Sexual Relations', *Social Philosophy Today*, 22 (2006), 199–218. This explosion of interest in Kant and marriage dates back to the publication of Herman's article in 1993, the year that the same-sex marriage movement gained ground in response to *Baehr v. Lewin* and the 1993 March on Washington for Gay, Lesbian, and Bi Equal Rights and Liberation.

12 See, in particular, Altman, 'Kant on Sex and Marriage'; Kory Schaff, 'Kant, Political Liberalism, and the Ethics of Same-Sex Relations', *Journal of Social Philosophy*, 32/3 (2001), 446–62; Varden, 'A Kantian Conception of Rightful Sexual Relations'; Donald Wilson, 'Kant and The Marriage Right', *Pacific Philosophical Quarterly*, 85/1 (2004), 117.

13 Fichte, *Foundations of Natural Right*, trans. M. Baur (Cambridge: Cambridge University Press, 2000), p. 317.

14 Fichte, *Foundations of Natural Right*, pp. 317–33. Fichte argues that men cannot be wrongfully coerced into marriage, since a man who has consummated a relationship with a woman is married to her already according to the law of nature; the state is then obligated to uphold the woman's honour by coercing the man into a wedding ceremony to formalize the marriage he has already entered into under the law of nature.

15 Fichte, *Foundations of Natural Right*, p. 327.

16 Von Hippel, *On Marriage*, p. 83.

17 Von Hippel, *On Marriage*, p. 141.

18 Von Hippel's account is admittedly self-contradictory in places. Von Hippel published anonymously four editions of his treatise: the first two in the 1770s and the last two in 1792 and 1793. The earlier editions took a conservative view of the purpose of marriage and relations between the sexes, but these were radically revised in the third edition, which was published in response to the 1791 draft of the Code. Von Hippel's revisions are not consistent, however, and features of the earlier arguments are still present. I have generally followed von Hippel's translator, Timothy Sellnor, in interpreting the later editions of the text.

19 Von Hippel, *On Marriage*, pp. 121–3.

20 Arthur Ripstein takes the parent–child rather than the marital relationship as the central case of domestic right, and argues that since children cannot consent to their relationship with their parents, the right to a person akin to the right to a thing requires parents to act in their children's best interest, despite the lack of consent. Domestic

relations thus require us to take other's ends as our own in lieu of consent. Ripstein, *Force and Freedom* (Cambridge, MA: Harvard University Press, 2009), pp. 70–5.

21 In the Vigilantius notes, Kant argues that while sex is natural, all sex outside marriage nevertheless engenders shame and is obscene, and if it is done openly and publicly, then it is morally repugnant. Marriage is an essential feature of right because it creates a juridical space in which sex is permissible: married persons can have sex and retain their public dignity, which unmarried, sexually active persons cannot (27:638).

22 The equality of married persons before the law is in tension not only with Kant's references to the 'natural superiority of the husband' but also with his description of the domestic sphere as a 'a society of unequals' under the head of the household (*RL* §30, 6:283). Discussions that focus on the marital relation to the exclusion of the parent–child relation and domestic servitude tend to miss the hierarchical nature of Kantian domestic right. See my 'Domestic Labor, Citizenship, and Exceptionalism: Rethinking Kant's Woman Problem', *Journal of Social Philosophy*, 46/3 (2015), 340–56.

23 Hence the law gives a marital partner a right to retrieve a spouse in cases of abandonment or adultery (*RL* §25, 6:278). An adulterer (partner A) has not wronged partner B by violating a right against B; rather, A has disposed of B's property (A's body and person, which A jointly owns) without B's consent. But even if B consented, A could not seek sex outside of marriage, since doing so would lure C, A's partner in adultery, into a sexual relationship without full, reciprocal possession of her partner.

24 A contract to enter into domestic service 'is not just a contract to *let and hire* but a giving up of their persons into the possession of the head of the house, a lease. What distinguishes such a contract from letting and hiring is that the servant agrees *to do whatever is permissible* for the welfare of the household, instead of being commissioned for a specifically determined job' (*RL* Appendix, 3, 6:360).

25 'What proponents of DOMA took pains to emphasize was that marriage falls in a different category. Marriage is not one among many voluntary associations that citizens might choose to enter. Nor is it one among many relationships whose nature free, self-defining persons might determine for themselves' (Cheshire Calhoun, *Feminism, the Family, and the Politics of the Closet: Lesbian and Gay Displacement* (Oxford: Oxford University Press, 2000), pp. 126–7).

26 See Altman, 'Kant on Sex and Marriage'; Denis, 'From Friendship to Marriage'; Herman, 'Could it be Worth Thinking about Kant on Sex and Marriage?'; Papadaki, 'Kantian Marriage and Beyond'; Varden, 'A Kantian Conception of Rightful Sexual Relations'.

27 Altman, 'Kant on Sex and Marriage'; Schaff, 'Kant, Political Liberalism, and the Ethics of Same-Sex Relations'; Varden, 'A Kantian Conception of Rightful Sexual Relations'.

28 *Halpern v. Canada* (2003 CanLII 26403); *United States v. Windsor* (133 S. Ct. 2675, 2013); *Obergefell v. Hodges* (576 U.S., 2015).

29 See Martha Nussbaum, *From Disgust to Humanity: Sexual Orientation and Constitutional Law* (Oxford: Oxford University Press, 2010).

30 Katherine M. Franke, 'The Domesticated Liberty of Lawrence v. Texas', *Columbia Law Review*, 104/5 (2004), 1399.

31 As Michael Warner argues, marriage is always discriminatory. 'Marriage sanctifies some couples at the expense of others. It is selective legitimacy. This is a necessary implication of the institution', Warner, *The Trouble with Normal: Sex, Politics, and the Ethics of Queer Life* (Cambridge, MA: Harvard University Press, 2000), p. 82.

32 Epstein, *The Genesis of German Conservatism*, p. 378.

33 This, along with a provision that required nobles who had impregnated peasants to financially support the unwed mother and her child, and the bachelor provision, drove the public debate over the Code and required revision before its implementation in 1794. See Epstein, *The Genesis of German Conservatism*, pp. 382–4.

34 For example, he argues that the state should allow hereditary rights to offices and privileges to lapse and be gradually replaced by a meritocracy, and should tax the wealthy to provide institutional support for the poor (*RL* §49C, 6:326 and 6:329).

35 Fichte, *Foundations of Natural Right*, pp. 333–4. For Fichte, the inequality of the sexes was a natural feature of marriage, which rendered wives wholly subordinate to their husbands. It was marriage itself, rather than some naturalized conception of gender that produced this inequality: Fichte argued that widows, divorced women and independent women who had never married could vote, pursue cases in court and hold office.

36 Von Hippel, *On Marriage*, pp. 95–6.

37 Von Hippel, *On Marriage*, p. 90. Unlike Fichte, who argues that the natural structure of marriage renders women subordinate, Von Hippel argues that, despite the inequality between the spouses in law, most marriages involve, in practice, an equal respect and sharing of power. The law, he argues, ought to recognize this practical equality and reform its account of marriage accordingly (pp. 178–9).

38 This passage is often offered up as the prime example of the limits of gender equality in Kantian marriage, but Kant makes these remarks in the context of his discussion of morganatic marriage. See Carol Hay, *Kantianism, Liberalism, and Feminism: Resisting Oppression* (New York: Palgrave Macmillan, 2013), p. 51; Nancy J. Hirschmann,

Gender, Class, and Freedom in Modern Political Theory (Princeton: Princeton University Press, 2008), p. 199; Maliks, *Kant's Politics in Context*, p. 108.

39 Kant defines the domestic realm as a whole as 'a society of unequals' 'under the head of the household' and argues that while the head of household should not behave as though he owns his servants, he does have the right to retrieve them if they should run away. He argues that the domestic employment contract is distinct from standard employment contracts in that in involves 'a giving up of their persons into the possession of the head of the house, a lease' (*RL* §30, 6:283 and Appendix, 3, 6:360).

40 See nn. 24 and 39 above.

41 In making this distinction, Kant followed the architects of citizenship following the French Revolution, and the pragmatic concerns that motivated him have been widely discussed. See Howard Williams, 'Liberty, Equality and Independence', in G. Bird (ed.), *A Companion to Kant* (Malden, MA: Wiley-Blackwell, 2006), p. 367. See also Maliks, *Kant's Politics in Context*, p. 108.

42 Kuehn, *Kant: A Biography*, p. 223; John Henry Wilbrandt Stuckenberg, *The Life of Immanuel Kant* (London: Macmillan, 1986), pp. 167–8.

43 Kuehn, *Kant: A Biography*, p. 223.

44 See Lisa Duggan, 'Beyond Marriage: Democracy, Equality, and Kinship for a New Century', *The Scholar and Feminist Online* (2012); Paula Ettelbrick, 'Since When is Marriage a Path to Liberation?', *Out/Look: National Lesbian & Gay Quarterly*, 6 (1989), 14–16; Nancy D. Polikoff, *Beyond Straight and Gay Marriage: Valuing All Families under the Law* (Boston: Beacon Press, 2008); Jane S. Schacter, 'The Other Same-Sex Marriage Debate', *Chicago-Kent Law Review*, 84 (2009), 379.

45 Enakshi Dua. 'Beyond Diversity: Exploring the Ways in which the Discourse of Race has Shaped the Institution of the Nuclear Family', in E. Dua and A. Robertson (eds), *Scratching the Surface: Canadian Anti-racist Feminist Thought* (Toronto: Women's Press, 1999), 237–60; Sarah Lucia Hoagland, 'Heterosexualism and White Supremacy', *Hypatia*, 22/1 (2007), 166–85.

46 Judith Butler, 'Is Kinship Always Already Heterosexual?', *Differences: A Journal of Feminist Cultural Studies*, 13/1 (2002), 14–44.

47 See Duggan, 'Beyond Marriage'; Collins (1998); Hoagland, 'Heterosexualism and White Supremacy'.

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