
HELGA VARDEN

University of Illinois at Urbana-Champaign

A FEMINIST, KANTIAN
CONCEPTION OF THE RIGHT
TO BODILY INTEGRITY:

The Cases of Abortion and Homosexuality

INTRODUCTION

Kant himself did not provide much direct help with regard to giving a philosophical account of the legal permissibility of abortion and homosexuality, and doubtless the feminist movement has been central to illuminating this lacuna in his thought. It seems fair to say that Kant's own writings are at best confusing and at worst of no help. To wit, in the midst of a theory of justice based on a fundamental respect for each person's *innate* right to *freedom*, we are faced with Kant's brief mention of the fetus as a person upon conception, as well as his teleological and notoriously phobic statements about homosexuality.¹ Still, a considered Kantian conception of abortion and homosexuality must be consistent with the overall structure of Kant's theory of justice. I will argue that because of the analytic relation between the person and the body at the heart of Kant's political and legal theory, there is a fundamental commitment to a right to bodily integrity. This commitment entails that a consistent Kantian position defends both a right to abortion and a right to homosexual interaction. Indeed, Kant's political and legal theory affirms a feminist- and queer-friendly conception of abortion and homosexuality that is worth taking seriously.

Pregnant women and persons engaging in homosexual practices compose two groups that have been and still are among those most

severely subjected to coercive restrictions regarding their own bodies. From an historical point of view, it is a recent and rare phenomenon that a woman's right to abortion and a person's right to engage in homosexual interactions² are recognized. Today, though most Western liberal states do recognize these rights, they are under continuous challenge—sometimes by violent protest—from various political and religious movements. Moreover, though liberal theories of justice typically defend women's rights to abortion and people's rights to homosexual activity, these theories often struggle to capture the fundamental ground for these rights. For example, it appears hard for the liberal to say why and when only the woman and not the embryo/fetus has rights and why the right to certain sexual practices is not on par with rights to other preferences. Contemporary liberal theories of justice, therefore, struggle both to identify what distinguishes questions of abortion and sexual activities from other questions of right and thereby capture the gravity of the wrongdoing involved in coercively restricting homosexual interactions and abortion as such. I will argue that Kant's theory of justice is able to capture the fundamental ground for these rights in his understanding of the bodily integrity of the person. This Kantian position also presents a third alternative to the contemporary stalemate between those privileging the rights of the mother and those privileging the personhood of the embryo/fetus. Just states will neither permit nor outlaw all abortions or sexual interactions, but rather will require all such laws to be reconcilable with the protection of each person's right to freedom.

1. THE POINT OF VIEW OF JUSTICE IS NOT THE POINT OF VIEW OF ETHICS OR RELIGION

It is relatively uncontroversial to say that pregnancies and sexual activities constitute tremendously important aspects of our lives and so naturally constitute major concerns for both ethical³ and theological theories. In this chapter, however, I am concerned with neither the ethical nor religious value of pregnancies and sexual relations, nor the justifiability of various ethical and theological theories as they have been applied to these issues. Instead, I simply give an account of why, from the point of view of *justice*, it is especially wrong coercively to prevent, including by means of criminalization, abortion as such⁴ and homosexual activity. Thus, my account goes against several trends in contemporary thought.

For example, it is often assumed that an analysis of what is right and wrong from the point of view of ethics or theology will yield the same or at least similar results as an analysis from the point of view of justice. Or it is thought that conclusions drawn about what rights we have are dependent on conclusions drawn about what is ethically or religiously required. At least that is the presumption in a large proportion of the papers written on abortion and homosexual activity over the last four decades.⁵ I also challenge the view that the rights to abortion and homosexuality are the result of prudential considerations or considerations of tolerance. According to this view, only by granting these rights can we peacefully coexist in a pluralist world given our different ethical and religious ideologies.⁶

Contrary to these dominant views, I will defend the claim that we cannot deny others a right to obtain an abortion as such or to engage in homosexual activity without thereby refusing to interact with them rightfully, namely, in a way reconcilable with their innate right to freedom. Justice is not the enforcement of a subsection of people's ethical or religious duties, nor is it primarily about tolerance of different viewpoints in order to live together peaceably. Rather, justice concerns normative or rightful interaction in the world, that is, normative relations that are in principle enforceable. Even if we try, we cannot force people to be religiously good or to be ethically virtuous. All we can do through legal means is to ensure that when interacting people act in a way respectful of each other's rights. Consequently, justice requires us to look at the issues from the point of view of enforceable rights and duties, which concern rights and duties that are consistent with each person's innate right to freedom. It is therefore entirely possible that what is rightfully enforceable is not coextensive with what is ethically justifiable or religiously defensible.

At the foundation of Kant's conception of justice lies what Kant calls our "Only One Innate Right," namely each person's innate right to freedom (MM 6: 237). And each person's innate right to freedom is defined as her or his right to "independence from being constrained by another's choice... insofar as it [one's freedom] can coexist with the freedom of every other in accordance with a universal law" (ibid.).⁷ Importantly, one's right to freedom, for Kant, is something one is born with; it is not something one has before one is born. Hence, even if we concede either that the fetus is a person, as does Judith Jarvis Thomson in her seminal article on abortion, or that metaethical⁸ considerations require us to attribute personhood upon conception, as does Kant, we have not thereby established that we can justly criminalize abortion. This is not only a

point explicitly emphasized by Thomson but also one acknowledged by Kant when he maintains that the right to freedom is innate even though considerations of metaethics lead him to ascribe personhood upon conception. The important point is that conclusions of ethics are not necessarily also conclusions of justice.

According to the Kantian conception of justice, one's right to freedom is the right to have one's interactions with others restricted only by universal laws (laws of freedom). For example, whether or not Kant himself and others considered some particular sexual ends to be more or less natural (and thus more or less virtuous) than others cannot be a relevant consideration when determining which ends people have a right to set with their own bodies—alone or consensually with others. A law enforcing a particular natural end for all is a contingent restriction and not a law of freedom. Therefore, it is an unjustifiable law according to Kant's own theory. It is for these kinds of reasons that we must ignore Kant's teleological and homophobic statements when applying his theory of justice to the legal status of homosexual practices. In addition, we must make sense of Kant's puzzling claims that personhood is attributed upon conception and yet the right to freedom is innate, namely something we are born with.

The application of Kant's political and legal theory to the question of abortion and homosexuality, I argue below, turns on the fact that persons are embodied beings, which means that the limits of freedom insofar as we are persons must be extended to us insofar as we are embodied. Because we are embodied beings, and because the restrictions on abortion and homosexual activity we are considering are restrictions on what we can do with our own bodies, enforcing unjustifiable restrictions on homosexual activity and abortion denies homosexuals and women a right to freedom. What is more, it is to wrong their persons. And because the state, in establishing itself as a public authority, must provide conditions in which its citizens can interact rightfully, it cannot enforce such laws.

2. EMBODIED FREEDOM

On the Kantian account, it is in virtue of being persons, or beings deemed capable of assuming responsibility for our actions, that notions of rights and duties are possible. And it is in virtue of being embodied that we must determine how we should interact in the empirical world. Justice, then, concerns how we—embodied persons—interact and can be forced

to interact normatively in space and time. Moreover, from the point of view of justice, the fact that we are embodied entails that the relation between my person and my body must be considered “analytic,” that is, one of necessary unity.⁹ Therefore, in conceptualizing a person’s legal rights, we must think of a person and her body as one.¹⁰ Since my body and my person are always in the same spatiotemporal location, the empirical boundaries of my person are identical with those of my body. We can illustrate the necessary unity of the body and the person by contrasting it to the relation between a person and her private property. Private property is not necessarily united with my person. I may obtain private property through certain actions, and, indeed, if something is mine, then it is mine even if I am not physically holding it. And if someone takes my property a wrong is done, but not to my person. For example, if I forget my scarf at your house one evening, then the scarf is still mine even though I no longer have it with me. If you steal my scarf, you do not wrong my person since you do not touch my body, but you still wrong me by depriving me of my rightful property. In contrast, were you to forcibly grab the scarf from around my neck as I am leaving your house, not only would you wrong me by depriving me of my property, but also you would wrong my person by touching my body in unauthorized ways. From the point of view of justice, then, my embodiment entails that when you violate my bodily integrity, you wrong my person. Because violations against my body are violations against my person, they are more serious than wrongs involving my property.

Liberal theories of justice, as well as the principles underwriting liberal constitutional democracies, affirm some version of the view that everyone has an innate right to freedom, meaning that everyone has a right to set and pursue ends of his own insofar as he respects the rights of others to do the same, subject to reciprocal laws of freedom. Moreover, according to the liberal position presented above, the fact of our embodiment entails that our innate right to freedom must involve an innate right to our own bodies—as contrasted with acquired rights to material possessions (private property) we appropriate or make part of our means.¹¹ To be free in this “external” sense—or what Kant calls “external freedom”—involves using oneself (one’s embodied person) and one’s means (one’s rightful possessions) to set and pursue ends of one’s own under universal laws of freedom. Thus, when we *interact*, we are free as long as we are setting and pursuing ends of our own subject only to universal laws of freedom that restrict us reciprocally or in the same way. This, for Kant, is rightful freedom.

One way to clarify this liberal conception of freedom is to contrast it, first, with being enslaved and, second, with being deprived of rights. A slave does not have the right to set and pursue ends of his own, since the slave owner literally is seen as “owning” the slave. The slave is seen as a “rightful” possession of the slave owner, namely, as a means with which the slave owner can set and pursue his own ends. The slave is therefore not only deprived of all rights, that is, of any rights to set and pursue ends of his own, but everything the slave does, in principle, is in need of approval from the slave owner. On the Kantian conception of justice, the reason why slave laws are void is that they involve an incoherent notion of rights. Slave laws assume both that some particular persons are mere means for others (things), and so incapable of obligations, and at the same time that they are capable of obligations, and so are not mere means (things). Consequently, such “possessions” and “contracts” can never be rightfully enforced. In contrast to being enslaved, persons who are simply denied rights are not seen as belonging to anyone else, but they too lack the right to set and pursue their own ends. What is common to both cases is the denial of a right to freedom, understood as the right to set and pursue one’s own ends independently of the arbitrary choices of another but as subject only to universal laws of freedom that restrict interacting persons reciprocally.

Most commonly, the problem with coercive restrictions outlawing homosexual activity and abortion as such is not that they enslave homosexuals and women.¹² Rather, the typical problem with criminalizing these activities is that it denies women and homosexuals the right to their own bodies. And since our bodies and persons must be seen as necessarily united, such restrictions are irreconcilable with respect for one another’s person, which is the foundation of any liberal notion of rights and duties. Such restrictions involve, in other words, a refusal to interact with women and homosexuals rightfully or as persons. Consequently, a state that enforces such laws fails to set itself up as civil society, since the civil condition just is one in which all persons can interact rightfully.¹³ Such a state fails to provide conditions under which all its citizens can interact as persons or on terms consistent with each other’s innate right to freedom.¹⁴ Instead, such a state forces its subjects to interact as they would in a brutal version of the state of nature, where the many or the powerful have no intention of interacting in ways consistent with respect for everyone’s right to freedom.¹⁵ In fact, some set it as their end to deprive others of this basic right. But if anything is wrong, this is wrong, since it violates the very foundation of a liberal notion of rights and

duties. Hence, under such conditions, women and homosexuals must protect themselves from the violence perpetrated against them by others—including the state—to the best of their ability.

2.1 Abortion: Rightful Restrictions

Before applying the above conception of rightful embodied freedom to the current controversial, proposed legislation to criminalize abortion, let me first illustrate how the above Kantian conception of justice can explain why all liberal constitutional democracies firmly reject certain proposals to deny the right to abortion. As we will see, the reason why these particular proposals are rejected is primarily that they so clearly involve depriving women of their bodily integrity, though one type of proposal involves enslavement.

Consider first the enslavement case. Liberal constitutional democracies typically reject laws that subject a woman's decision regarding abortion to some other private person's choice. For example, liberal constitutional democracies do not permit laws according to which the other parent or the parents of the woman are seen as having the right to veto the woman's choice to have an abortion.¹⁶ According to the theory presented above, the reason why such restrictions are rejected is that they involve the enslavement of women. They are fundamentally inconsistent with a woman's freedom subject to universal laws, since the woman's freedom in this case is subjected to another private person's arbitrary choice (the other parent or the woman's own parents). A liberal constitutional democracy considers such laws to be fundamentally inconsistent with each citizen's rights—they are necessarily "unconstitutional"—since any liberal notion of right is inconsistent with depriving legally responsible persons of the right to make such decisions regarding themselves. To use Kantian language, such a law is fundamentally inconsistent with each citizen's innate right to freedom, which is why no just state will uphold it.

Second, no modern liberal constitutional democracies hold that women and their embryos/fetuses have equal legal status. Importantly, they all hold that the fetus acquires full legal rights only once it is born. Up until the point of birth, the life and health of the mother has priority, and therefore, if carrying the fetus to term presents a health risk to the mother, there is a right to abort. Like Kant, they all agree that the right to freedom is "innate," something a person is born with. It is not something that persons have prior to birth. Why is this so? In accordance with the

conception of rightful interaction presented above, the reason is simply that a liberal constitutional democracy requires its laws to be consistent with each citizen's right to freedom. Since we are embodied beings and since women give birth to babies, the only way to protect a woman's embodied freedom—to protect her constitutional rights as a citizen—is by giving her priority over the fetus. That is to say, in an important sense, the mother and the fetus are an analytic unity: they are necessarily united up until birth. But, since the fetus is inside the mother's body, it is united with and dependent on the mother—not the other way around. Therefore, only the mother is an independent, embodied person. The fetus is not an independently existing embodied person until it is born. To treat the fetus otherwise, that is, as an independently existing person prior to birth, is necessarily to deprive the mother of her bodily integrity and therefore of her embodied personhood. It is necessarily to treat the mother merely as a means for the fetus.¹⁷

Finally, all liberal modern constitutional democracies argue that no woman can be rightfully coerced to carry forward a pregnancy that is the result of force (rape). Again, no liberal legal system can permit any of its citizens to violate another citizen's bodily integrity and thereby force that other person to pursue a particular end (carry forward a pregnancy). To permit this would be to deprive some of its citizens—women—a right to freedom at all, or to permit the replacement of right with might.

These above examples constitute the easy cases for liberal theories, including the Kantian theory, and they do not, in my view, constitute the heart of the current controversies surrounding abortion. Indeed, both liberal positions and reasonable ethical/religious positions arguing against the right of abortion have some way of accommodating the above claims made concerning enslavement, unequal status of mother and fetus until birth, and pregnancies as a result of rape. These kinds of cases do not represent the core of the present controversy, since at least the reasonable participants in current discussions agree that they are exceptions to the general rule.¹⁸ Rather, the hard question concerns what the general rule should be: should women have a right to abortion under "normal" circumstances or not? Much of the debate focuses not only on the assumption granted in the arguments above namely, that the fetus is a person, but also on the question of whether the embryo is a person. The reason seems to be that both camps in the debate agree that if we accept that an embryo/fetus is a person—for metaethical or theological reasons—then we must also accept the general rule that abortion in all stages of embryonic/fetal development should be coercively prevented

and criminalized (again with the exceptions being cases of enslavement, protecting the life or health of the mother, and rape). Consequently, much effort on the part of those in favor of abortion focuses on challenging this assumption with regard to earlier stages of embryonic/fetal development, whereas anti-abortion defenders focus on justifying it. Thus the current debate is mired down in trying, to this point unsuccessfully, to give some sort of conclusive metaethical or theological arguments for why, why not, or at what stage we should consider the embryo/fetus a person.¹⁹

The most important challenge to the assumption that solving the metaethical or theological problem will solve the problem of whether or not abortion should be prohibited comes from Thomson, for she grants that the fetus is a person in all stages of development. She then argues famously—through the example of the violinist who gets kidnapped and hooked up to another person overnight—that it does not follow that abortion can be coercively prevented or criminalized. As is evident by now, I share Thomson's view. Nevertheless, I believe that Thomson's argument succeeds only in justifying the exceptions to the general rule outlined above, namely, the cases of prohibiting one person to have an arbitrary veto power over the pregnant woman, of the pregnant woman's priority over the fetus, and of the right to abort in cases of rape. That is, Thomson establishes why no liberal theory and constitutional democracy will permit these kinds of coercive legislation, and her reasoning seems to be quite similar to the Kantian reasoning presented above. What we are looking for, however, is the possibility of a stronger argument, one that justifies abortion also in the "normal" cases and not only in these exceptional cases.²⁰ That argument, I suggest, must tackle the harder question of whether or not it matters from the point of view of justice that the woman has permitted embryonic/fetal development to reach a certain stage. The stronger justification of a right to abortion will show that even if we grant personhood upon conception for metaethical or theological reasons, this does not entail that as a matter of justice, normal cases of abortion can be coercively prevented or criminalized. Moreover, if we can show why women must choose whether or not to abort before a certain stage of embryonic/fetal development, then we might have an argument convincing to both camps. The hope is that this argument can provide a way out of the current deadlock between pro-choice and anti-abortion activists and advocates, by driving home the point that their disagreement is about metaethical or theological positions on personhood and not about considerations of justice. Once this important

distinction is brought to light, it will be clear that the argument can satisfy most pro-choice advocates. And although it will challenge the conclusion upheld by the anti-abortionists, it proceeds from the anti-abortionists' own metaethical or theological foundation, namely that an embryo/fetus is a person upon conception.²¹

This third approach to abortion I am suggesting requires accepting the view that an analysis from the point of view of justice or right is not the same or coextensive with an analysis from the points of view of ethics or theology. As such, this is not a terribly upsetting assumption for most. After all, no major religions argue that one can be forced to become religious. One is only a religious person if one has accepted it freely, taken the religion "to heart." Moreover, everyone accepts that much of what might be considered ethically praiseworthy or blameworthy should not be made a matter of law. For example, no one thinks that it should be a matter of justice that one is generous, kind, friendly, or considerate. Rather, what will strike many as controversial, and hence what is important to show, is that the issue of abortion should be seen similarly. Abortion is one of those issues where from the point of view of justice ethical and theological arguments are not, and therefore should not be, considered directly relevant. Consequently, when we individually—as citizens, as politicians, as legislators and as judges—think about whether or not abortion should be criminalized, ethical or theological arguments should not be what settles the issue. Rather, what is important from the point of view of justice is how to make our interactions in the world just or rightful. What we ought to be thinking about when considering abortion rights is how we ensure what Kant calls "rightful interaction."

Rightful interaction concerns external freedom. External freedom requires, as we saw above, the human ability consciously to set and pursue ends of one's own in the world, which Kant also calls "choice." *External freedom*, simply put, is to subject one's choices in the empirical world (of space and time) only to universal laws of freedom. Finally, justice or right is a relation between persons' exercise of external freedom, namely, the relation enabling *interaction* under laws of freedom that restrict reciprocally. Moreover, it is because external freedom is exercised in space and time that it can be coerced, since to coerce is to hinder the exercise of external freedom—hinder the setting and pursuing of ends in the world (in space and time). Coercion is rightful, in turn, only if it enables interacting persons to exercise their external freedom under universal laws of freedom that restrict reciprocally. In fact, it is precisely because rightful interaction tracks only what is coercible that ethics and

religiosity are fundamentally beyond the proper grasp of just laws. Being religious, just as being virtuous, fundamentally requires a first-personal involvement and motivation that coercion cannot in principle reach and hence we cannot legislate it.²² It follows that having laws that prescribe virtuous or religiously inspired actions is nonsensical.²³ In addition, laws demanding religiosity or virtue are fundamentally inconsistent with setting and pursuing ends of one's own, which is to say that they are inconsistent with an individual's innate right to freedom. The innate right to freedom therefore includes the right to set and pursue immoral ends, such as undertaking stingy or unfriendly actions.

How, then, does the above conception of rightful interaction entail that abortion as such cannot be rightfully and coercively prevented or criminalized? It helps to remember that justice, and consequently legal argumentation, is limited to the kind of beings who are capable of external freedom, even if this ability is not fully developed and even if temporarily incapacitated.²⁴ In light of this consideration, it is important that at very early stages of pregnancy the embryonic cells merely divide and multiply. At this stage, there is yet no spatiotemporal being with a capacity for choice developed to protect.²⁵ At this stage there is no human capacity for or ability to act on one's own initiative, that is, engage in what I will call "spontaneous unified action" even in a minimal sense. Therefore, we simply cannot attribute legal rights upon conception even if we, for metaethical or theological reasons, want to attribute personhood. Consequently, legal personhood is limited to beings with a spatiotemporal or empirically detectable capacity for spontaneously unified action, whereas moral/religious personhood may not be so limited.

To clarify this point, let me draw an analogy to the legal discussion surrounding legal death. Even though there is significant disagreement exactly when it occurs, most states consider a person legally dead when he or she is "brain dead," meaning that there is no longer any brain activity. So, from the point of view of justice, the crucial consideration is whether or not the person is presumed (by medical experts) permanently to have lost all spatiotemporal capacity (let alone ability) spontaneously to unify action. When this happens, legal guardians have the right to end treatment. The main reason why legal guardians are not required to end treatment at this point, I believe, is to ensure that the legal system is compatible with the brain dead person's deep ethical or religious views.²⁶ Analogously, at early stages of pregnancy, when the unit of cells (the embryo) merely divides, there is no spatiotemporal human capacity or minimal ability to spontaneously unify any kind of action.²⁷ It follows

that up until this point it has not acquired any legal rights, and the decision whether or not to abort lies with the mother. In other words, we may grant that from a metaethical or religious point of view, the person already exists, say, as a being only in time or an immaterial being, but justice and the law must be restricted to regulating interaction in space and time, between beings capable of external freedom, which starts with *evidence* of a capacity spontaneously to unify action. Cells dividing at early stages of embryonic development simply cannot be ascribed such a capacity. Legal rights as such can be conferred only at the point at which the fetus has developed into a unified spatiotemporal being with minimal yet human capacities for external action. This point, therefore, is the normatively important moment from the point of view of justice and the law. Since justice and the law are limited to regulating external freedom, or interaction in space and time, justice and the law must be silent until the human capacity for minimal external action exists.

From the point of conception to the point at which the embryo/fetus is able spontaneously to unify action in this minimal sense, the fetus can have no rights and the law cannot coercively restrict abortion. Up until this point, ethical and religious considerations are what must regulate people's thoughts and actions about the matter. To legislate otherwise is to deprive women of their innate right to freedom in a most radical sense. Having coercive restrictions that require women to carry forward pregnancies before the fetus can acquire legal rights is to treat women as being subject to the law in a different way or for different reasons from anyone else. Hence, women are denied equal protection under the law.²⁸ In addition, requiring women to carry forth pregnancies before the fetus acquires legal rights deprives women of their rights to their own bodies (and thus their own persons) by forcing them to set and pursue particular bodily ends not of their own choosing.

Moreover, as in the case of legal death, there seems to be a reasonable disagreement about exactly when the point of embryonic/fetal²⁹ development occurs that confers legal rights. Indeed, there is significant, informed disagreement concerning what constitutes sufficient embryonic/fetal development even within and among states that protect women's right to abortion. For example, some advocate the time of viability, others the moment of "quickening," still others minimal consciousness or certain neurological processes, and so on. The effect of this disagreement is that states that protect women's right to abortion have different laws determining the time after which abortion is no longer legally permissible. Some states permit women to abort only up until the

eighth week, others later. Still, what is common to all these reasonable suggestions is that they focus on evidence of the development of human cells into what may be deemed a unified, minimally acting human being. Therefore, each suggestion is a reasonable empirical candidate in light of the common normative principle being applied. Furthermore, the disagreement seems not only to be reasonable, but also inevitable, since the question of when the fetus can exercise minimal unified, external action requires a normative judgment, namely, when we should ascribe movements in space and time to a fetus/embryo's spontaneous ability to unify external action. The judgment is normative in that we are ascribing actions to the fetus by saying that it seems reasonable to hold that the movements are actions initiated by the fetus rather than merely determined by cells dividing. Because we are looking for a normative principle to determine the issue, there will be more than one reasonable empirical interpretation of how the principle applies. And though some empirical suggestions are more reasonable than others, it will not be possible to determine one single empirical answer to the question.

My suggestion, then, has been twofold. First, all of the aforementioned contemporary proposals for which time is the normatively significant moment from the point of view of justice and the law can be seen as applications of the same normative principle. The principle would state something like, "the moment of embryonic/fetal development at which some legal rights are acquired is the moment that evidences a minimally acting human being." And because there is a problem of reasonable indeterminacy in trying to choose between the many reasonable, yet competing, applications of the normative principle, we find a significant diversity of legal practice in liberal constitutional states that recognize women's right to abortion. Second, because this diversity arises as a result of a *reasonable* disagreement regarding the correct application of a normative principle, only the state—and not individuals—can have the right to enforce any specific restrictions on abortion. That is to say, since many of the choices are equally reasonable, for any particular private party to make the determination is merely for that party arbitrarily to impose her choice on others.³⁰ This would result in one person being seen as having the right to subject another person's body and person to her arbitrary choices, which is inconsistent with due respect for that person's right to freedom. Since there is reasonable disagreement as to what constitutes the appropriate evidence of sufficient embryonic/fetal development, there can be rightful enforcement of one restriction over another only if the restriction is determined, applied,

and enforced by a *public* authority. Only a public authority can be seen as representing everyone and yet no one in particular, and thus only it can issue a restriction that can be deemed impartial in principle. Therefore, only a state can impose abortion restrictions on women, namely, that they can terminate their pregnancies only before a particular stage of gestation. The reason is that due to the indeterminacy in applying the normative principle, only the state can rightfully determine the time at which the embryo/fetus acquires some legal rights. Moreover, once the baby is born and hence is no longer physically dependent on the mother's body, it has full legal rights, including the right that both parents take care of it.³¹ The baby has not consented to being born, but is the result of the parents' actions and hence it is reasonable to claim that they are responsible for the baby. The parents must act on behalf of the child and teach the child, insofar as possible, what is needed for the child to become capable of choice, external freedom and rightful interaction.³²

The position presented here gives a strong defense for abortion, but only before the embryo/fetus has reached a certain legally significant point—a point in time at which it acquires some legal rights due to having developed a capability or ability to act externally (minimally understood). And this point in time must be determined by the state.³³ Therefore, up until the point at which the fetus acquires legal rights, the choice whether or not to keep the embryo/fetus lies with the pregnant woman, and if she chooses to let the fetus develop beyond this point, she must also accept that the fetus has acquired legal rights to her. Finally, it is worth pointing out that the state cannot enforce such abortion laws if it does not also make sure that those in need, whether adolescent or adults, actually have access to the resources required for abortions. It is reasonable to argue, first, that adolescents must be guaranteed information and financial help in order to make sure that they are not subjected to their parents' lack of ability or unwillingness to pay for abortions, since this would be to allow the parents to enslave their children in the sense I have described. Second, poor persons' rights to abortion must also be guaranteed by a state that enforces abortion laws. Such guarantees are necessary to ensure that poor persons have opportunities to have abortions independent of being subjected to other private person's arbitrary choices to provide them with the required means (as perhaps through charitable donations). After all, women cannot make a choice to abort without the required means. Hence, if a state imposes and enforces a deadline on abortions, as on this account it should, it must also institutionally guarantee access to the means, say, through welfare measures, that make either choice possible. If the state

were to uphold a monopoly on coercion and a legal system in which women have neither the appropriate knowledge nor the requisite actual access to services to exercise their freedom, it would fail to provide them with civil society. Instead, it would force some of its citizens to be subject to the arbitrary choices of others, namely, their private choices to provide education or charity. The state must set up its monopoly on coercion such that it is reconcilable with each person's innate right to freedom, which requires systemic institutional guarantees against being trapped in such private dependency relations. If it does not provide such institutional guarantees, it cannot justly enforce abortion laws.

2.2 Homosexual Activities: Rightful Restrictions

Somewhat surprisingly, perhaps, attempts to justify coercive restrictions on homosexual interactions, including criminalization, encounter similar kinds of problems faced by those attempting coercively to restrict abortion as such. Nevertheless, it should no longer be surprising. Because we are embodied beings, a person's innate right to freedom gives each person a right to bodily integrity. Restrictions on homosexual activity, like restrictions on abortion as such, fail to respect an individual's right to bodily integrity. The main difference between the two cases is that the argument against coercively restricting homosexual activity is simpler and more straightforward, since homosexual interactions involve consensual actions between two legally responsible embodied persons. In short, coercively preventing, including criminalizing, homosexual interaction involves denying homosexual persons sole control over their own bodies and thus also their persons. Instead, it permits homophobic persons the right to determine how other persons should use their own bodies, which is to deny interaction in a way consistent with an individual's innate right to freedom. Therefore, legal restrictions on homosexual activity aim at the annihilation of rights as such. Moreover, a state that enforces such restrictions fails to institute civil society. A "de facto" state thereby fails to set itself up as a *public* authority, for it fails to represent each of its citizens and yet no one in particular, since it posits and enforces laws that fail to treat each citizen as having an innate right to freedom. Thus, the state forces homosexual persons to stay in the pre-state condition, or the so-called "state of nature" and, indeed, in a particularly barbaric or brutal version thereof, namely, one in which there is no respect for their persons as such. Hence, homosexuals are not obliged to obey such laws, but must defend themselves, even against the state, as best they can.

As far as I can see, it is impossible to justify any particular restrictions on homosexual activity as contrasted with heterosexual activity, since any attempt to do so would result in asymmetrical restrictions by the law. For example, were homosexuality outlawed, only heterosexuals would be allowed to use their bodies in consensual sexual activity as they choose. This is not to say that there should not be any coercive restrictions regulating sexual interactions, including homosexual interactions, but that their determination will not concern whether or not the activity is homosexual or heterosexual. In addition, I believe that only the state, not private individuals, can rightfully determine, apply, and enforce these restrictions. The reason the state is essential to ensuring rightful interaction with regard to sexual relations is that here also there appear to be problems of indeterminacy, albeit of a different sort. Where indeterminacy with respect to abortion arises in the application of the normative principle governing the time at which abortion is rightful, indeterminacy with respect to the rightfulness of sexual activities seems to arise with regard to disagreements about whether or not there is consent to engage in the activity. This is why rightful sexual activity, including homosexual activity, also requires the state. That is to say, mutual consent seems to be the normative principle we all must accept as governing the rightfulness of any particular sexual interaction, as well as in all other private interactions. Yet situations arise in which there is reasonable disagreement in the application of the principle, that is, about whether or not consent has been given. For example, there are questions of required maturity, the use of alcohol and drugs, relations of power, and so on. So, unless the state, which represents both interacting parties and yet none of them (or anyone else) in particular, determines restrictions on consent and applies these restrictions when controversies arise, we appear to have another situation in which one person's choice runs roughshod over another's. The upshot of this last point is twofold: private individuals cannot be seen as having the right to determine, apply, and enforce restrictions concerning whether or not there is consent, and states that outlaw homosexual activity fail to provide rightful solutions to such disputes among its homosexual citizens.³⁴ Instead, this "de facto" state forces mere might to reign between them.

Finally, as with restrictions on abortion, this argument against restrictions on homosexual activity is irrelevant to, and therefore reconcilable with, various ethical and theological views. Because the demands of justice are not coextensive with the demands of ethics or religion, homosexual activities can still be considered vicious and/or wrong from

an ethical or religious point of view. It is also not an argument about tolerance. The reason why homosexual activity cannot be coercively restricted is not that we must tolerate our differences in order to achieve a minimum of stability and peace. In fact, it is also not an argument of the kind, "if heterosexuals have the right, then in all fairness homosexuals must have it too." Instead, the position maintains that from the point of view of *justice*, what we are after is a conception of coercion and authority that is reconcilable with each person's innate right to freedom, and according to such a conception everyone must have a right to engage in any consensual interaction, including sexual interaction. Consequently, from this point of view, ethical and religious discussions and disagreements are beside the point—as are considerations of tolerance and equal laws as such. From the point of view of justice, the problem with such restrictions on homosexual activity is that fundamentally they are irreconcilable with respect for other persons. They involve the authorization of wrongs against homosexuals' persons since they deny them a right to their own bodily integrity, which just is to deny interaction on the basis of reciprocal rights and duties at all. Therefore, no just state can criminalize homosexual interactions.

3. CONCLUDING REMARKS

The most important issue for theories of justice concerns delineating legitimate from illegitimate types of coercion—whether by individuals or by states. It follows from the above arguments that no one (state or private individual) can have the right coercively to prevent abortion or homosexual interaction as such, since such restrictions are irreconcilable with each person's innate right to freedom. Moreover, there are two reasons why these kinds of laws are constitutive of a graver injustice than many other unjust laws. First, having coercive authority with regard to how another person uses her own body is to have the right to that other person's person—and no one can have such a right. Coercive restrictions making abortion and homosexuality impossible are therefore antithetical to interaction based on reciprocal rights and duties among free persons. Second, anti-abortion and anti-homosexuality *laws*, that is, when such restrictions are posited, applied, and enforced by the state, are particularly unjust because by issuing such laws the state fails to establish itself as a public authority, namely, as an authority that represents all and yet no one in particular, and so posits, applies,

and enforces laws that enable its citizens to interact in ways irreconcilable with each citizen's innate right to freedom. By positing such laws, the state thereby denies women and homosexuals entrance into civil society. Instead, it forces them to fend for themselves in a brutal version of the state of nature.

One way to illustrate the point about the severity of the wrongdoing involved in these kinds of coercive restrictions is to see how they are structurally similar to, and yet different from, restrictions that deny some groups or particular persons the right to own private property. To have material means subject to one's own choice only (private property) is a precondition for external freedom, since it is impossible to set and pursue ends of one's own without means distinct from oneself. Without private property, therefore, there is no external freedom and no one can be seen as having the right to deny another person the right to appropriate private property. Moreover, when the state is denying some of its subjects the right to own private property, the state denies them the possibility of interacting with others in a way reciprocally respectful of their freedom, and, hence, these people are not obliged to obey the state's private property laws. In enforcing these laws, the state forces some people to stay in a brutal version of the state of nature with regard to material possessions, and so they must defend their means as best they can against others—including the "de facto" state.³⁵ In the same way that those denied a right to private property are forced to stay in a violent and brutal version of the state of nature, women and homosexuals are forced into the same condition by states that enforce laws that criminalize all abortion and homosexual acts. Both groups find themselves in situations where they must defend their rights on their own.^{36,37} The difference between denying people private property rights and denying them a right to their own bodies is that by denying people a right to their own bodies, you deny them the right to exist as persons at all. This is why the enforcement of such coercive restrictions is amongst the gravest types of wrongdoing.

Notes

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1. For example, Kant says about homosexual interaction in the “Doctrine of Right” in the *Metaphysics of Morals* that it involves an “unnatural use” of one another’s “sexual organs and capacities” (MM 6: 277). Moreover, he argues that because “such transgressions of laws...do wrong to humanity in our own person, there are no limitations or exceptions whatsoever that can save them from being repudiated completely” (ibid.). About the fetus being a person, Kant says: “For the offspring is a *person*, and it is impossible to form a concept of the production of a being endowed with freedom through a physical operation. So from a *practical point of view* it is a quite correct and even necessary idea to regard the act of procreation as one by which we have brought a person into the world without his consent and on our own initiative, for which deed the parents incur an obligation to make the child content with his condition so far as they can” (MM 6: 280). I have used Mary Gregor’s translation and edition of Immanuel Kant’s *The Metaphysics of Morals* (Cambridge University Press, 1996). I abbreviate *The Metaphysics of Morals* as “MM” in the remainder of this text.
2. Although the argument presented here can be reformulated as an argument against sodomy laws, it cannot be transformed into an argument against discrimination and oppression against queer people in general. The reason is that the argument is grounded on the importance of our embodiment, whereas other queer rights, such as the right to marry, do not have such a foundation. This is not to say, however, that there are not other Kant-inspired arguments that will do the job. See my “A Kantian Conception of Rightful Sexual Relations” for one example of such an argument.
3. For reasons that will become clear, an “ethical theory” is taken to focus on issues of morality strictly from the first-personal point of view.
4. By “abortion as such” I mean to signal that my main argument targets any argument against abortion—at any stage or for any reason whatsoever. As will become clear shortly, I do not argue that all limits on abortion are impermissible. In fact, I will defend some limits.
5. For some exemplary articles, see note 20 below.
6. This is not to say that distinguishing between analyzing an issue from the point of view of justice and from the point of view of ethics or theology is novel. In her famous article “A Defense of Abortion,” Judith Jarvis Thomson argues along similar lines. See pp. 60–61. Similarly, the stronger readings of John Rawls’s later philosophy, as found, for example, in *Justice as Fairness: A Restatement* and in *Political Liberalism*, proceed on a similar assumption. Note, however, that it is tempting to read Thompson and Rawls as defending “tolerance” arguments, meaning arguments according to which the great differences in overall moral or religious conceptions entail that justice must stay neutral amongst them. Such an interpretation is advanced by

Robert P. George in “Public Reason and Political Conflict: Abortion and Homosexuality.” I believe that this interpretation of both Rawls and Thompson is mistaken and fails to capture the strength of their positions. In contrast, with respect to Rawls, I believe that the better interpretation is the one provided by Arthur Ripstein in “Private Order and Public Justice: Kant and Rawls,” and I believe the stronger reading of Thomson follows similar interpretative lines. Consequently, I am not defending a “neutrality tolerance” argument of the kind criticized by George. My view is that it is *wrong* from the point of view of justice to deny persons a right to obtain an abortion or to engage in homosexual activity independently of conclusions drawn from the points of view of tolerance, ethics, and religion.

7. The same idea informs the Universal Principle of Right, which states: “[a]ny action is *right* if it can coexist with everyone’s freedom in accordance with a universal law, or if on its maxim the freedom of choice of each can coexist with everyone’s freedom in accordance with a universal law” (MM 6: 230–31).
8. Although these are also metaphysical considerations, I want to follow Kant’s distinction between the metaphysics of ethics (virtue) and the metaphysics of justice (right) as composing the metaphysics of morals. In *The Metaphysics of Morals* we find this distinction also in his understanding of the difference between “internal” and “external” freedom, where “internal” freedom is the domain of ethics (virtue) understood as first-personal aspects of morality, and “external” freedom is the domain of justice (right) or enforceable aspects of morality. I am here using “metaethical” to refer to the former.
9. The position defended here is silent on whether the same must be granted from the point of view of virtue.
10. We see this in Kant’s discussion of the relation involved in empirical possession: “All propositions about right are *a priori* propositions, since they are laws of reason . . . An *a priori* proposition about right with regard to *empirical possession* is *analytic*, for it says nothing more than what follows from empirical possession in accordance with the principle of contradiction, namely, that if I am holding a thing (and so physically connected with it), someone who affects it without my consent (e.g., snatches an apple from my hand) affects and diminishes what is internally mine (my freedom), so that his maxim is in direct contradiction with the axiom of right. So the proposition about empirical possession in conformity with rights does not go beyond the right of a person with regard to himself” (MM 6: 249–50). Since justice is a normative perspective tracking external interaction in space and time from the third-personal point of view, it is impossible from the point of view of justice to distinguish between a person and her body. The distinction between the person and the body is, however, available from the internal first-personal perspective, which is tied to the normative perspective of virtue and is tracked only in time.

11. I do not engage Kant's argument concerning how we acquire rightful possessions beyond our bodies, since it is irrelevant to the present discussion. I discuss this issue at length in "Kant's Non-Voluntarist Conception of Political Obligations." I deal with issues of economic justice more generally in "Kant and Dependency Relations."
12. As we shall see, however, there are some proposed restrictions on the right to abortion that can be classified as enslavement of women.
13. I expand upon this point below, but it may be useful to note that this does not entail that the state thereby fails to establish rightful relations across the board, since it may, for example, have succeeded in establishing rightful private property relations.
14. Let me reiterate that this argument is a legal-political argument, in which each person's right to freedom refers to her basic political right.
15. I use "brutal" here in the same sense that Kant uses the word "barbaric," namely, to describe actions that are fundamentally in conflict with or uninformed by reason. In *Anthropology from a Pragmatic Point of View*, Kant defines barbarism as a society in which there is "Power without freedom and law" (7: 331). Since criminalizing abortion and homosexuality is inconsistent with a respect for a person's person, it is inconsistent with basic requirements of freedom (reason). Moreover, it matters not to the brutality of the restriction whether it is enforced by a de facto state or an individual, since in enforcing a law that contradicts the fundamental ground for justice (the innate right to freedom) the state ceases to yield political obligations on this issue.
16. Although liberal democracies cannot allow consent restrictions on adults, they can require parental consent for pregnant children. Nevertheless, in a just state there will be cases in which the parents' consent or lack thereof can be overridden by the state. I deal with some of these issues in my "Kant and Dependency Relations," though more extensively in "The Priority of Rightful Care to Virtuous Care" (unpublished).
17. A Kantian liberal conception would foreclose an argument that the woman agrees to be enslaved to the fetus in becoming pregnant through consensual sex, that is, that concerns of the fetus can justifiably override her own. Like slave laws, slave contracts are void according to Kantian conception because they involve an incoherent notion of rights. Therefore, they cannot be rightfully enforced.
18. As is often pointed out in the literature, it is notable that the Catholic Church actually denies women a right to abortion even when the life of the mother is at stake.
19. See for example H. Tristram Engelhardt, Jr., "The Ontology of Abortion"; L. W. Sumner, "The Ontology of Abortion," and Michael Tooley, "Abortion and Infanticide." Moreover, whether the fetus is or is not granted the status of a person, arguments are typically provided for or against the conclusion that it is always wrong to kill it. For example, Michael Tooley argues, "One reason the question of the morality of infanticide is worth examining is

that it seems very difficult to formulate a completely satisfactory liberal position on abortion without coming to grips with the infanticide issue. The problem the liberal encounters is essentially that of specifying a cutoff point which is not arbitrary: at what stage in the development of a human being does it cease to be morally permissible to destroy it?" (p. 37–38). Tooley argues that in order to justify the criminalization of abortion as such, we must establish the moral impermissibility of it. Therefore, the two analyses (from justice and from morality) are seen as yielding the same results, which means that the analysis of justice is dependent upon the ethical analysis of abortion. See also Don Marquis, "Why Abortion is Immoral"; Norman C. Gillespie's "Abortion and Human Rights"; and Robert P. George in "Public Reason and Political Conflict" for arguments that proceed on the same assumption. For a brief overview of both kinds of arguments (for and against), see Don Marquis, "Why Abortion is Immoral" esp. pp. 183–89. Marquis grants that a fetus is not a person, but a potential person. This difference, however, is seen as irrelevant to the issue of abortion, since what makes killing immoral is that one deprives another being of a valuable future. Hence, whether one kills a potential or an actual person, the immorality of the action is the same (pp. 189–92). Michael Tooley, in "Abortion and Infanticide," famously argues that if it's correct that fetuses are not persons because they lack self-consciousness in some minimal sense, then one must not only defend the right to abortion until birth, but also the right to infanticide.

20. The argument I am providing is a type of dependency argument of the kind Thomson mentions on p. 58. If successful, it shows that a pregnant woman living under conditions in which abortion is legally secured (including economically) and choosing not to abort before the deadline as legally defined has, as Thomson says, a "special kind of responsibility for it," since in this case she has chosen to let a human being (as legally defined) become dependent upon her. My argument leaves it open whether or not pregnancies constitute the only case in which we can have a right to let another human being become dependent upon our bodies in this way.
21. Naturally, the argument will not be acceptable to those who think that there should be a right to abortion through any stage of the pregnancy or to those who deny that there is a distinction between ethics and justice. As will become clearer below, I do not, however, believe that those positions are able to produce the most coherent, convincing interpretations of the legal traditions of liberal, constitutional democracies.
22. This is why Kant argues that issues of virtue concern "internal" and not external freedom. Internal freedom is to act on universalizable maxims from a moral motivation, whereas external freedom is to set and pursue ends of one's own in the world subject to universal laws of freedom. For example, Kant argues, "In contrast to laws of nature, the... laws of freedom are called *moral laws*. As directed merely to external actions and their conformity to law they are called *juridical laws*; but if they also require that they (the laws)

- themselves be the determining grounds of actions, they are *ethical* laws, and then one says that conformity with juridical laws is the *legality* of an action and conformity with ethical laws is its *morality*." (MM 6: 220, cf. 225)
23. In Kant's terminology, the scope of justice is limited to external freedom; it cannot reach internal freedom—or first-personal freedom (MM 6: 213f, 21–20).
 24. The unconscious or comatose patient, for example, is only temporarily unable, but not permanently. In contrast, the minimally acting embryo, I will argue, has started to develop this ability.
 25. Kant would say that there is neither "outer" and "inner sense" nor "outer" and "inner use of choice." Consequently, it is also absurd to say that at this stage there exists a capacity for choice even in its minimal sense.
 26. The two exceptions to the rule are New Jersey and New York, where in addition to brain death, the heart and the lungs must also have stopped functioning before death is pronounced. For our purposes, this difference seems irrelevant, since the important point is that even though death cannot be pronounced until also the heart and lungs have stopped functioning, the legal guardians have the right to stop treatment at the point of brain death.
 27. In Kantian language, it is yet to exhibit (even minimal) capacity for spontaneous, unified external action, which is the capacity enabling "outer sense" and "outer use of choice."
 28. This would be a philosophical argument for why the 14th amendment to the US Constitution cannot permit restricting abortion in early stages of pregnancies.
 29. The distinction between embryo and fetus is usually drawn at eight weeks—a time that corresponds with many, but not all, state legislation on this issue. Consequently, for the argument pursued here, we cannot appeal to this distinction as particularly significant or determining for the issue at hand.
 30. Unreasonable applications of the principle are precluded by considerations of justice as already argued. For a more extensive treatment of the issue why the state or the public authority is the only way to solve reasonable disagreements concerning the application of principles of justice, see my "Kant's Non-Voluntarist Conception of Political Obligations."
 31. The decision whether or not to abort cannot be made dependent on the father's or the second parent's choice, since, as we saw above, this would involve enslaving women, namely, by making their freedom subject to the arbitrary choices of others. This is also why fathers or the second parent do not have parental duties until the child is born. Fathers or the second parent may have duties to the *pregnant women* before the child is born, since the father or the second parent is partially responsible for the pregnancy, but neither the father nor the second parent has rights or duties to the *fetus or child* until it is born.
 32. Once the child is born, the nature of the dependency changes since it is not physically united with the mother. Still, the mother continues to act on

behalf of the child, since the infant is not yet capable of exercising choice or external freedom responsibly—or what Kant calls “deeds” or “rightful interaction.” The scope and justification of children’s rights is naturally beyond the scope of this chapter. For a thorough account of these issues, including related redistributive issues, see my “Kant and Dependency Relations” and “The Priority of Rightful Care to Virtuous Care.”

33. For example, the position appears to support the general principle that if there is good evidence that the fetus has such serious impairments that (a) if born, it will commit the mother (and the second parent, if there is one) to the dependency relation for the rest of her life, and (b) this evidence is available only after the general deadline, then there might be an extension of the time by which the decision must be made.
34. So, to sum up, there are two wrongs involved when a state outlaws homosexual activity. On the one hand, it denies homosexuals the right to bodily integrity, which is to force them to stay in the brutal version of the state of nature. On the other hand, such a state also forces homosexuals to stay in the “normal” or normative state of nature with regard to their sexual interactions, since they are denied the possibility of a rightful authority settling issues of reasonable disagreements regarding consent.
35. The case that naturally comes to mind here is Nazi Germany’s denial of private property rights to Jews. I discuss these particular issues in “Kant’s Murderer at the Door.”
36. Indeed, if the state at some point decides to eradicate such illegitimate laws, it seems reasonable to argue that those against whom they have been enforced should be compensated. For example, women and homosexuals should be given reparation insofar as they have been subjected to oppression regarding their own bodies just as persons who at some point lose their right to private property must have a right to restoration after their private property rights have been reestablished.
37. This does not, however, entail that those who live in a state with anti-homosexuality or anti-abortion laws cannot have *any* political obligations. For example, assuming that the state has rightful private property and contract laws, homosexuals and pregnant women are politically obligated to obey these laws. They are not, however, obligated to obey the anti-homosexuality or anti-abortion laws. An interesting implication of this is that the issue of political obligations is not exclusively disjunctive. Persons may have political obligations to obey a state’s laws governing many relations, such as private property and contract laws, but nevertheless cannot be politically obligated to obey laws governing all relations, in this case sexual relations and abortion.

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