Kantian Review, 18, 3, 339–362 © Kantian Review, 2013
doi:10.1017/S1369415413000149

Kant on the Law of Marriage

ALLAN BEEVER
University of South Australia
Email: Allan.Beever@unisa.edu.au

Abstract

The account of marriage Kant presents in the *Rechtslehre* strikes most readers as cold, legalistic and obsessed with sex. It seems to ignore at least nearly all of the morally valuable aspects of marriage. Consequently, most have felt that this is a feature of Kant's theory best ignored. Against this view, this article argues that Kant's focus is appropriate, that his understanding of marriage is much more romantic than is commonly thought and that it presents a thought-provoking alternative to the picture of marriage found in the modern law.

Keywords: Law, marriage, consent, sex, the right of humanity, slavery

Introduction

Few have found themselves attracted by the account of marriage Kant presents in the *Rechtslehre*. It tends to come across as 'legalistic', focusing too narrowly on the juridical aspects while ignoring the wider moral significance of marriage. It also appears to rest on an unappealing, perhaps entirely distasteful, view of the relationship between spouses. It is seemingly obsessed by sex, paying no attention to marriage's non-physical elements. It is sometimes said to result in the most objectionable consequences, so that it must be regarded as an embarrassment to both Kant himself and to those who admire his general moral philosophy.[1] Even defenders of Kant's view admit to being more than a little half-hearted.[2]

This article presents a different picture. It explains that legalistic accounts of marriage are appropriate and that they do not exclude complementary, more fully moral accounts. It then shows that Kant's theory is misunderstood because the problem to which it is addressed

is opaque. When that problem is uncovered, and when Kant's solution to it is presented, a surprising picture is revealed. Though Kant's account of marriage is built on a highly prosaic view of sex, it presents an especially romantic picture of the marriage relationship itself, a picture immeasurably more romantic than that found in the modern law. As a result, though Kant's theory cannot describe the institution of modern marriage, we can see it as presenting an ideal from a lost world, one for which many people still yearn.

The *Law* of Marriage

There is no denying that Kant's discussion focuses on legal matters. It occurs during the examination of 'rights to persons akin to rights to things' (*MS* 6: 276).[3] These rights arise in respect of three relationships: between spouses, between parents and children, and between householders and household servants. At first glance, this classification appears to imply that some people are the property of others. Thus, the view that marriage and the relationship between parents and children involve rights to persons akin to rights to things seems to reproduce the worst excesses of the Roman law conception of the family, with the paterfamilias owning his children, their spouses, their children, all of their property and so on.[4] When this is coupled with the notion that the head of a household can have similar rights to domestic servants, Kant seems also to have reproduced something like the Roman conception of slavery.

It ought to come as no surprise that this appearance is deceptive. But the allusion to the Roman law is intended. In this regard, it is important to remember that the concept of the Roman family was familiar to Kant and his contemporaries. This is in part because at least the Roman law in the *Institutes* was well known to those working on moral theory.[5] It is also because of the relationship between the Roman law, the similar (from the modern perspective, though to an historian importantly different) Germanic rules regarding the family, and the *ius commune*.

Accordingly, in his discussion, Kant takes what were to his contemporaries the familiar Roman law notions and provides them with a different spin, one designed to challenge received notions by portraying the relevant relationships as ones of equality and interdependence rather than domination under a paterfamilias or dominant male. This can be seen in his definition of these rights as being involved with 'a community of free beings who form a society of members' (*MS* 6: 276) and in his insistence that marriage is a relationship of equals (*MS* 6: 278).

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

This point helps us to see how challenges of the following kind can be met. Allegra de Laurentiis criticizes Kant's theory on the ground that it is designed to allow marriage to be thought of in proprietary and contractual terms (de Laurentiis 2000). Similarly, though partly in order to excuse Kant, Howard Williams writes, 'We need not be surprised that Kant uses the vocabulary of capitalist property relations in the context of relations between the sexes. All personal relationships were [in Kant's day] becoming more and more a matter of market relations' (Williams 1983: 117–18). Clear in these criticisms is the idea that Kant is making marriage into something that it need not have been: a legalistic institution characterized as contractual and proprietary. Kant, however, could not have seen the matter in this way, and it is important to see why.

First, for a natural lawyer such as Kant,[6] all institutions that find a place in the natural law are essentially legal, at least in part. To put this another way, Kant could not agree that he was adding law to marriage: without law marriage cannot exist. For Kant, marriage is an essentially legal institution (which is not to say that it is entirely legal), because it has a home in the natural law.

Second, even putting Kant's legal theory aside, marriage cannot be analysed as a non-legal institution. If we ignore law, not merely in the sense of the positive law of marriage but in the wider sense of enforceable rights and duties (*MS* 6: 218–21), then we cannot distinguish between marriage and 'mere' consensual partnership. This point will become clearer during the consideration of the following problem.

Third, it is wrong to think that Kant is trying to turn marriage into a legal phenomenon conceptualized in terms of property and contract. From the legal perspective, that is what marriage has always been. In particular, the claim that these thoughts were encouraged by the development of modern capitalism is mistaken. It would be true only to claim that the development of capitalism encouraged the thought that marriage should be conceptualized in terms of the modern, capitalist influenced understandings of property and contract. The idea of marriage in question is found everywhere. For the Romans, marriage followed immediately from the manifestation of a common intention to be married (Nicholas 1962: 81). In other words, marriage was a contract.[7] For the English, it was a contract with peculiar proprietary consequences. For instance, the 'earliest canonists held marriage to be effected by the physical union of man and woman in carnal copulation. They became one flesh by *commixtion sexuum*. But, since copulation could occur

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

outside marriage, a mental element was also necessary. There had to be an agreement to marry' (Baker 2002: 479). Marriage was a contract that made the partners into each other's property. As we will see, this view is echoed in Kant's account.

The general point can be expressed in this way. If marriage is a legal event concerning an agreement, then it is a contract. Similarly, if marriage is a legal event that in some way unites two people, then it is proprietary.

One important upshot of the above is that Kant's discussion of marriage in the *Rechtslehre* is not an examination of the morality of marriage understood in a wide sense (i.e. as including ethics).[8] It is not a parallel of Plato's discussion of love (Plato 2006) or Aristotle's (Aristotle 1999: 1126b–7a) or his own examination of friendship – which for good reason occurs in the *Tugendlehre* and not in the *Rechtslehre* (*MS* 6: 469–73). It is wrong to claim that Kant's discussion of marriage in the *Rechtslehre* constitutes his complete conception of marriage. It constitutes only his conception of marriage seen as a legal phenomenon. Though that discussion is interesting and has much to tell us, it does not exhaust the morality of the institution.

A further important consequence is that, in interpreting Kant's theory, we must not imagine that it is being dreamed up in abstraction from all conditions, as if he were inventing marriage in the first seconds of the state of nature. A better picture is to see him looking out of his window, noticing that certain kinds of relationship that actually occur present significant moral problems, and trying to respond to those problems. It is, then, in part a commentary on contemporary conditions. As we see, it can be used to provide a powerful commentary and argue for reform. For Kant, qua law, marriage is a solution to a moral problem that cannot be solved without it. We now turn to this problem.

Sex: The Moral Problem

The problem is that, according to Kant, any sexual activity is *prima facie* immoral. This is because 'the natural use that one sex makes of the other's sexual organs is *enjoyment*, for which one gives oneself up to the other. In this act a human being makes himself into a thing, which conflicts with the right of humanity in his own person' (*MS* 6: 278).[9] With reference to Kant's lectures (*CL* 27: 384–9), Christine Korsgaard argues that Kant's fundamental objection to sexual activity is that consenting to such activity involves allowing oneself to be made by

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

one's sexual partner into an object of that person's desires (Korsgaard 1996: 194–5; see also Kuehn 2001: 399).

In order to demonstrate why this would be wrong, Kant paints a picture of a person we probably all recognize from experience. Such a person is 'quite unconcerned for [his or her partner's] happiness, and will even plunge them into the greatest unhappiness, simply to satisfy their own inclination and appetite. … As soon as the person is possessed, and the appetite sates, they are thrown away, as one throws away a lemon after sucking the juice from it' (*CL* 27: 384). In other words, the picture is of a person who is unscrupulous in satisfying the desire for sex and has no regard for the feelings of those pursued.

Kant's argument is focused not on this person, the seducer, but rather on the person who allows himself to be used by this person, the seduced. Kant's claim is that the seduced, in allowing himself to be used by the seducer, acts inconsistently with the right of humanity in his own person (*MS* 6: 278).

> [I]f a person allows himself to be used … as an object to satisfy the sexual impulse of another, if he makes himself the object of another's desire, then he is disposing over himself, as if over a thing, and thereby makes himself into a thing by which the other satisfies his appetite, just as his hunger is satisfied on a roast of pork. (*CL* 27: 386)

The seduced treats himself as a mere thing in allowing himself to be used as a mere means to the seducer's end. Furthermore, and this is crucial for Kant's argument, the seduced allows himself to be *possessed* by the seducer. In Korsgaard's words, 'Viewed through the eyes of sexual desire another person is seen as something wantable, desirable, and, therefore, inevitably, possessable. To yield to *that* desire … is to allow yourself to be possessed' (Korsgaard 1996: 195).

It is not clear that this argument succeeds, however. The sequence from wanting to desiring to possessing is not inevitable. But, if Kant's position is not watertight, it is at least plausible. We do, after all, colloquially use the language of possession in this context. One can express the notion that one had sex with someone by saying 'I had her' for instance. It is at least plausible to suggest that these terms are not merely metaphorical but capture important aspects of the psychology of sexual behaviour. Accordingly, to allow oneself to be 'had' by another is to allow that person

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

to treat one as a thing and hence to allow that person to possess one.[10] And this is inconsistent with one's right to humanity in oneself.

Kant's position is not that all people who experience sexual desire for others fit the picture of the seducer painted above. On the contrary, he recognizes that many people who desire others sexually possess genuine (and morally valuable) affection for them (*CL* 27: 384). But Kant's claim is that all sexual desire is as described above. That is, while *A* can possess *both* genuine affection and sexual desire for *B*, *A*'s natural affection does not make her sexual desire anything other than the desire for *B* as a thing and hence *B*'s surrender to *A* remains morally problematic despite *A*'s natural affection.[11]

It follows from this picture that to allow oneself to engage in sex is to allow the violation of one's innate right, because it means allowing one's independence of the other to be destroyed by allowing that other to use one as a thing. There are two kinds of response to this position. The first is to maintain that it misdescribes the nature of sex. The second is to hold that, even if Kant's account of sex were accurate, his argument in the *Rechtslehre* fails. The first argument is examined below. The second is taken up now.

The Problem with the Legal Problem

Discussing lust in the *Tugendlehre*, Kant claims that 'In the *Rechtslehre* it was shown that the human being cannot make use of *another* person to get this [sexual] pleasure apart from a special limitation by a contract establishing the law, by which two persons put each other under obligation' (*MS* 6: 424). But that does not appear to be how the enquiry in the *Rechtslehre* is conducted at all. There, Kant maintains that the problem with extramarital sex is that 'In this act a human being makes himself into a thing, which conflicts with the right of humanity in his own person' (*MS* 6: 278). Even if that were correct, the claim in the *Tugendlehre* would not seem to follow from it.

Imagine an unmarried and sexually active couple, *A* and *B*. If the *Rechtslehre* argument succeeds, then it generates two immediate conclusions:

(1) *A* should not have sex with *B*, because that would violate the right of humanity in *A*.
(2) *B* should not have sex with *A*, because that would violate the right of humanity in *B*.

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

These conclusions seem to generate the following specifically ethical claims.

(3) It would be unethical for *A* to have sex with *B*, (also) because that would violate the right of humanity in *B*.
(4) It would be unethical for *B* to have sex with *A*, (also) because that would violate the right of humanity in *A*.

But Kant's actual conclusions are:

(5) If *A* has sex with *B*, then *A* would violate *B*'s rights.
(6) If *B* has sex with *A*, then *B* would violate *A*'s rights.

It is important to see that (1)–(4) does not imply either (5) or (6), though the maze of apparent connections between these ideas can obscure this. If we focus on *A*: that *A* has a duty to himself does not mean that *A* holds a right against *B*; that *A* has an ethical duty to *B* as a consequence of *B*'s duty to himself does not entail that *B* holds a right against *A*. Consequently, even if we accept that the *Rechtslehre* shows that extramarital sex is unethical, it does not follow that the parties violate each other's rights. Because of this, it seems easy to produce a devastating response to Kant's argument: if the parties consent, then there can be no rights violation.[12] The claim that the consent cannot be ethically given is immaterial to the relevant, legal issue.

In fact, however, this response does no damage to Kant's theory. The difficulty with the theory is not the one encountered above, but that Kant's position is obscure. It is obscure because it proceeds in two steps, the first of which remains unargued for because Kant wrongly anticipates that we will accept it as obvious. And so we would if we shared Kant's general view of sex.

This first step is the view that (extramarital) sex violates the innate right. At first, the claim that this is obscure might sound strange. It is evident that Kant thinks that sex violates the innate right. That, after all, is what he is arguing in the relevant passages. But this, I am suggesting, is a mistake. Yes, Kant thinks that sex violates the innate right. But Kant does not argue for this claim; that is not what the passages under consideration are meant to show. Rather, that thought is taken for granted. It can be taken for granted, Kant believes, because for him it seemed clear that people make each other into things when they have sex and hence that thought needed no support. The argument under examination, then, has a different aim: to defeat what would otherwise be the natural response – the one examined above – that no rights violation can occur if the parties consent.

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

Consider the following passage from Kant's lectures.

> [A] man cannot dispose over himself; he is not entitled to sell a tooth, or any of his members. But now if a person allows himself to be used for profit … then he is disposing over himself as if over a thing and thereby makes himself into a thing by which the other satisfies his appetite … Now since the other's impulse is directed to sex and not to humanity, it is obvious that the person is in part surrendering his humanity, and is thereby at risk in regards to the ends of morality.
>
> Human beings have no right, therefore, to hand themselves over for profit, as things for another's use in satisfying the sexual impulse; for in that case their humanity is in danger of being used by anyone as a thing, an instrument for the satisfaction of inclination. (*CL* 27: 386–7)

Again, on the face of it, this cannot show that engaging in sexual activity violates one's partner's rights. Kant's claim is that a person has no right (is under a duty not) to allow herself to have sex with another. But that does not entail that one person violates another's right by having sex with that person. Accordingly, Kant's position makes no sense if interpreted as an argument directly to show that one cannot have extramarital sex with another without violating that person's innate right. But, as is revealed below, it makes good sense if read as an argument to show that consent to sex cannot turn an act that would violate rights into an act that does not. Hence, the argument is meant to show that extramarital sex necessarily violates right, but show that not directly but by demonstrating the irrelevance of consent.

The task now is to understand how that argument is supposed to work. It appears to be strongly normative. It seems to be that one is obliged by the right of humanity in one's own person not to consent to extramarital sexual activity and so any purported consent is inoperative. We can see immediately that the argument cannot succeed. First, despite Kant's talk of the *right* of humanity in oneself (to be unravelled below), one cannot hold rights against oneself. Such a right could not be innate, as the only innate right guarantees 'independence from being constrained by another's choice' (*MS* 6: 237), and it is hard to see how a right against oneself could ever be acquired. Second, even if such a right did exist, it would be impossible to violate it as, as Kant tells us, *volenti non fit injuria* (one who wills it is not wronged) (*MS* 6: 313). Hence, the moral obligation not to consent to sexual activity cannot be a legal or juridical (*rechtlich*)

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

obligation and therefore does not belong in this discussion.[13] Third, even if one could hold and violate rights against oneself, that would show only that engaging in sex violates one's own rights. It would not show that such activity violates the rights of one's partner. Thus, if the argument succeeded, it would show only that each partner in extramarital sex violates her own rights, not that each partner violates the rights of the other.

Nevertheless, something of this kind appears to be Kant's argument. His claim, remember, is that it is immoral to engage in extramarital sex, because in doing so one violates the right of humanity in oneself (*MS* 6: 278) and hence that in extramarital sex the partners violate each other's rights (*MS* 6: 424). To come to terms with this, it is necessary to examine the alleged right in question.

The Right of Humanity in our own Person

The Vigilantius lecture notes present Kant distinguishing between duties of right and duties of virtue (*V* 27: 581–6). According to this account, duties of right are perfect duties that command strictly, while duties of virtue are imperfect, legislating ends but allowing agents significant latitude in the realization of those ends (*V* 27: 581–3). Duties of right are divided into the internal and the external. The latter are those perfect duties that can be legislated by others, i.e. those duties that can be enforced by coercion (*V* 27: 581).

A key feature of this picture is that it holds that duties of right can be owed to oneself: strict duties that 'we are brought to perform … through inner necessitation' (*V* 27: 600). It is also maintained that these duties are 'based on the right of humanity in our own person' (*V* 27: 601). Kant's utilizes this view to argue for limitations on human freedom. For instance, he maintains that it shows that individuals are not permitted to mutilate themselves, to sell parts of their body or to sell themselves into slavery (*VL* 27: 593–4, 601–2; see also *F* 27: 1379). Lara Denis plausibly interprets this to mean that the right limits 'what juridical duties to others we can acquire, and what juridical rights others can acquire against us, even with our consent' (Denis 2010: 187). Thus, 'Regardless of how voluntarily they have entered slavery contracts and contracts for prostitution and concubinage, for example, are unenforceable, devoid of the power to bind' (Denis 2010: 187).

This view suggests the following picture with respect to marriage. The right to humanity in one's own person has juridical effects, including

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

negativing the consent to extramarital sex. Because of this, extramarital sexual partners violate each other's rights. The problem is that Kant presents an entirely different picture in the *Rechtslehre*, a fact that seriously calls into question the usefulness of the lecture notes, and even his own notes, for interpreting his published position in this regard.

In the *Rechtslehre*, the fundamental distinction is between duties that can and cannot be enforced, the former being identified as duties of right (*MS* 6: 218–21). Moreover, right is defined as being concerned 'only with the external and indeed practical relation of one person to another' (*MS* 6: 230). Accordingly, in the *Rechtslehre*, duties of right do not include the internal duties of right from the Vigilantius lecture notes.[14] This is confirmed by Kant's insistence that there is only one innate right, the right to freedom defined as 'independence from being constrained by another's choice' (*MS* 6: 237). If the self-regarding, Vigilantius right of humanity in one's own person existed, it would be innate rather than acquired. But Kant leaves no room for such a right. Moreover, he tells us that the innate right belongs 'to every man by virtue of his humanity' (*MS* 6: 237). This suggests that the right of humanity in one's own person survives in the *Rechtslehre*, but it does not survive in the form in which it was enunciated in the Vigilantius notes. It is now a right that concerns only 'independence from being constrained by another's choice'.[15]

What is more, the *Rechtslehre* leaves no room for ethical considerations that limit 'what juridical duties to others we can acquire, and what juridical rights others can acquire against us, even with our consent' (Denis 2010: 187). There, Kant divides morality into the juridical and the ethical and insists that the former is prior to the latter. Hence, for Kant, the juridical is not founded on ethics (*MS* 6: 214, 218–21).[16] When Kant tells us in the *Rechtslehre* that extramarital sex is inconsistent with the right of humanity in one's own person, this cannot mean what it would have meant in the Vigilantius notes. It must mean that extramarital sex violates the innate right to 'independence from being constrained by another's choice'.[17] But how could that be?

Kant's answer cannot be that we are morally obliged not to consent (though we are). It must be that the relevant kind of consent is impossible. This is because consent to engage in sex cannot be understood as *morally genuine consent* given the innate right and the nature of sex according to Kant's description. In order to see why this would

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

be, it is useful to explore the differences between Kant's and John Stuart Mill's accounts of the impossibility of contracts for slavery.

Interlude: Contracts for Slavery

Famously, Mill argues that coercion is to be restricted in terms of the harm principle (Mill 2009: ch. 1, para. 9). This principle dictates that one is entitled to coerce another only if that coercion is required in order to prevent greater harm to others. Consequently, Mill insists that it is never justified to interfere with someone in order to prevent that person harming himself or to benefit that person. Hence, anti-paternalism is a necessary consequence of the harm principle (Mill 2009: ch. 1).

However, after arguing that the harm principle supports the ability to make and to be held to contracts, Mill maintains that:

> Yet, in the laws, probably, of every country, this general rule has some exceptions. … [I]t is sometimes considered a sufficient reason for releasing them from an engagement, that *it is injurious to themselves*. In this and most other civilized countries, for example, an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion. (Mill 2009: ch. 5, para. 11; emphasis added)

He goes on to argue that

> by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom. (Mill, 2009: ch. 5, para. 11)

It seems that this claim has no place in Mill's theory. If a decision to sell oneself into slavery is a voluntary choice, then it is difficult to see how it can be correct to say that it is not free. Certainly, the choice, if legally enforced, would lead to the elimination of the chooser's freedom, but that is a different point. There is no contradiction in the notion the one can freely choose now not to be free later. It may be that Mill could

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

respond to this point.[18] The focus here, however, is to highlight the quite different strategy employed by Kant.

According to Kant, 'a contract by which one party would completely renounce its freedom for the other's advantage would be self-contradictory, that is, null and void, since by it one party would cease to be a person and so would have no duty to keep the contract but would recognize only force' (*MS* 6: 283. See also *TP* 8: 292). Imagine a person who agrees to become a slave through contract. Mill's argument is that the decision to make such a contract cannot be a free one. Kant's position is that, though this decision can be a free one, if the person then becomes a slave he is no longer free and that there is something inconsistent in this.

The inconsistency can be demonstrated by imagining that this person later decides that he does not want to be a slave and leaves the custody of his master. The master then tries to recover the slave through the operation of the law. In court, the master's argument must be that the contract should be enforced against the slave. But this argument is inconsistent with the claim that the slave is a slave. This is because, if the person really is a slave, then he is a piece of property owned by his master. Therefore, as property cannot owe obligations a slave cannot, and that means that there cannot be a contract between the parties because the existence of a contract necessarily implies mutual obligation. It is incoherent to think of suing slaves for breach of contract.[19] It would be like trying to sue a corpse for breaching a contract that was made when the person was alive.[20]

One might reply that it is possible to imagine a coherent system of slavery. This system would consistently treat slaves as property rather than as contract partners. But Kant's argument is unaffected by this. First, even in this institution it would be impossible for a person to become a slave *through contract*, because asserting contractual rights against a person implies that that person has obligations and is not property. Accordingly, no one can become a slave through contract. Second, the fact that a particular form of slavery is internally coherent does not show that it is justified. Such a system would treat a class of people consistently as if they were non-persons. This would be coherent in itself, but would remain wrongful because the people treated as non-persons would nevertheless be persons.

It is possible to extend his argument to further demonstrate why it is impossible to consent to slavery. Slavery is *prima facie* inconsistent with

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

the innate right. But perhaps consent can change this. Imagine that *C* asks *D*, 'Will you be my slave from Tuesday on?' and *D* replies in the affirmative. We cannot say that *at this moment D* does not freely consent to becoming a slave or that *D*'s apparent consent is inconsistent with the idea that *D* is a free person. But what happens on Tuesday? Can we say that on Tuesday, assuming that he has not changed his mind, *D* consents to being a slave. The answer is 'yes and no'. Yes, *D* can on Tuesday consent to being a slave on Tuesday. However, if *D* is a slave then *D*'s consent cannot be morally relevant, because holding that consent to be morally relevant generates an inconsistency. The inconsistency is this. According to the view that *D* is a slave on Tuesday, though it is *prima facie* inconsistent with *D*'s innate right that he be a slave, this is negated by *D*'s consent to being a slave. This implies that *D*'s consent is morally relevant. But that could be the case only if *D* were the kind of thing whose consent or non-consent has moral relevance. In other words, *D*'s consent can be morally relevant only if *D* is a person who matters morally and is therefore not a slave.

The Legal Problem

Kant's claim regarding consent to sex is essentially the same as the position developed immediately above. Though *A* can consent to sex with *B*, that consent cannot carry any moral weight. The consent can be morally operative only if *A* is a moral person, but that is inconsistent with the sex act in which *A* becomes a thing. Accordingly, on its face, all acts of sexual intercourse are violations of the partners' innate rights, whether consented to or not.

On this view, extramarital sex violates the innate right (*MS* 6: 278), the right to 'independence from being constrained by another's choice' (*MS* 6: 237). When one has extramarital sex with another, one makes the other into a thing thereby violating that person's innate right. That conclusion cannot be negatived by one's partner's consent, because that would involve landing one in the inconsistent position of holding that it is permissible to treat someone as an object of no moral status because of an act she performed (of consenting) that was significant because she has moral status.

The Legal Problem Solved

Kant thinks that a solution to this problem can be found in the notion of reciprocity. If the difficulty is that *B* desires *A* as a thing and hence that, in surrendering to *B*, *A* allows herself to be possessed by *B*, then

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

the solution is to create a state of affairs in which *B* must also be possessed by *A*:

> [I]f I hand over my whole person to the other, and thereby obtain the person of the other in place of it, I get myself back again, and have thereby regained possession of myself; for I have given myself to be the other's property, but am in turn taking the other as my property, and thereby regain myself, for I gain the person to whom I gave myself as property. (*CL* 27: 388)

This is Kant's legal conception of marriage. Marriage is a legal contract in which the partners surrender themselves to the possession of each other and thereby become united.

It is important to note that the point about marriage is not merely that *A* and *B* give up and receive the same thing or things of the same value or importance. If I give you my watch worth £100 and you give me your necklace also worth £100, then we have a fair exchange. But marriage cannot simply be a fair exchange. If the wrong of extramarital sex lies in the fact that *A* and *B* allow the other to possess them, then it is no answer to point out that the possession is equal. The equality does not change the fact that it is possession that turns the partners into things.

Rather, Kant's point is that, in possessing the other, one gains back oneself. In allowing herself to be seduced by *B*, *A* allows *B* to possess her. But in marriage, *A* also possesses *B*. Accordingly, *A* cannot be regarded as being possessed by *B simpliciter*, because *A* also possesses *B*. In these circumstances, it is impossible to pick out an object that is possessing *A*, because the only possible object is *B* and *B* is being possessed by *A*, and it is impossible to be possessed by something you are possessing. This is what Kant means by the notion of *regaining* oneself in marriage. Marriage partners possess each other. They therefore form a normative unity (see also *Obs* 2: 242). It cannot be right, therefore, to regard one as being in the possession of the other. Or if you like, such possession would be logically circular. It is easier, though less accurate, to make this point in terms of ownership. It is impossible to be owned by something that you own. In marriage, the partners 'own' each other, and therefore no one of them 'owns' the other.

It is worth noting that, despite Kant's unattractive view of sex, he paints a remarkably romantic picture of marriage. On his understanding, because the partners possess each other in marriage, the 'two persons … constitute

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

a unity of will. Neither will be subject to happiness or misfortune, joy or displeasure, without the other taking a share in it' (*CL* 27: 388). At least on many levels, this is a deeply attractive account of the relationship between spouses, shared as an ideal by many, even if it does not reflect the modern conception of marriage and has never been reflected in positive law. Previously, the position of the common law was that the husband possessed the wife (though not completely). Today, neither possesses the other. Kant's position also implies that the partners are coequal in marriage in the sense that they are entitled to exclusive possession of each other (i.e. are able to demand faithfulness as of right) and in that their property is co-owned (*MS* 6: 278). The fact that the partners form a unity in marriage also explains why, though they enter into marriage through a kind of contract, marriage cannot be ended in the way that normal contractual relations can be. For instance, it is not possible for the partners simply to decide to cancel the marriage contract. Rather, if the unity is to be undone, a special kind of legal act is required.[21]

The Legal Consequence of Kantian Marriage

Some have held that this view produces a seriously distorted and immoral picture of marriage.[22] The point is stark. If marriage is 'the union of two persons … for lifelong possession of each other's sexual attributes' (*MS* 6: 277), then it appears that each partner has a right to the use of the other's sex organs, a right that can be enforced in court. This is, frankly, a hideous conclusion. As Jane Kneller says (though she ultimately defends Kant's theory), 'if partners have been remiss and refuse to abide by the terms of the contract, there is nothing to be done but to confiscate the goods involved and haul the contract violator to court. No wonder Kantians for two hundred years prefer to avoid altogether this little section' (Kneller 2006: 457–8). Are we really driven to this obscene conclusion?

According to this objection, the problem is generated by the *contractual* element of Kant's theory of marriage. If each partner has contracted with the other for the use of the other's sex organs, then that generates a legally enforceable right to the use of those organs.[23] Four replies defeat this objection.

First, even if the marriage contract did generate a legally enforceable right to the use of the other's sex organs, it would not follow that the remedy for the violation of that right would be what the law calls specific performance: the demand that the defendant perform his

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

contractual obligations. In other words, even if I had a right that my spouse allow me to have sex with her, it would not follow that if she refuses a court would or should force her to do so. This is particularly plain in the common law, where the default award for breach of contract is damages, not specific performance. Moreover, while specific performance is sometimes available, the common law does not in any case require the contract breaker to perform a positive service.[24] And despite the fact that specific performance is the default award in French and German law, those legal systems reach the same conclusion (Zweigert and Kötz 1998: 474–9). The reason for this in Kantian terms is that awarding specific performance in these cases would be a more fundamental breach of the defendant's freedom than the breach of contract was of the claimant's.

Second, both in law and in Kant's theory, a contract gives the partners no rights to the subject matter of the contract but rather a right that the other partner perform (*MS* 6: 271).[25] The right the contract gives is not literally a right to the other's sexual organs. This leads to the third reply. In Kant's view, the contract does not generate a right to the use of one's partner's sexual organs in the sense that one's partner must allow one to use them whenever one wants to do so. Rather, the right entails that *third parties* are not allowed to use one's partner's sex organs. In other words, the promise made is not for sex on demand but for faithfulness. We return to this shortly. Finally, fourth, the objection neglects the fact that the marriage contract is a unique form of contract in which the partners come together to form a legal unity. Spouses possess each other and jointly possess their property. This is also why the partners are unable to dissolve marriage by mutual consent. It is not possible, then, for one spouse to sue the other for breach of the contract. In the eyes of the law, this would be like trying to sue oneself.

The objection under consideration is therefore not compelling. But there is a deeper objection. This is that the supposed problems seem to be generated, not by the marriage contract, but by the fact that the marriage partners possess each other. Given this, the first three replies to the argument above fall away, as they relate specifically to the contract. The problem is this: if I have property rights, *inter alia*, to my wife's sexual organs, then I can claim them as I can claim any of my property.

A parallel to the third reply is relevant here. The possession given by marriage is intelligible not physical (the fact that we are thinking of marriage *and sex* tends to close our eyes to this), and only a

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

misunderstanding of property would make one think that, because a person has a property right to a thing, she must have a right physically to possess the thing. A landlord has property in a house but only the tenant has a right to physical possession, for example. Accordingly, my wife's refusal physically to 'deliver' her sex organs to me does not interfere with my intelligible possession of them. It is rather her 'delivering' them to another that violates my rights. And if she does so, it remains impossible for me to bring an action against her because – to repeat the fourth reply above – we constitute a legal unity. What I can do, however, is bring an action against those to whom my wife's sexual organs are 'delivered'. This is because those persons 'trespass' against my possession. As Kant puts it, 'if one of the partners in a marriage has left or given itself into someone else's possession, the other partner is justified, always and without question, in bringing its partner back under its control, just as it is justified in retrieving a thing' (*MS* 6: 278). Note that when one 'retrieves a thing', one's claim is asserted, not against the thing, but against the person wrongly in possession of the thing. Hence, the right is not, and for the reasons we have seen cannot, be enforced against the spouse or the spouse's sexual organs but only against the third party.

A right of this kind did exist at common law and still does in some jurisdictions. Modelled on the principle *per quod servitium amisit*, a man could sue the person who enticed his wife away or harboured her for the loss of her love, affection and sexual favours.[26] It was also possible for a man to sue a seducer for adultery, even if his wife was not taken from him.[27] These actions were available because husbands were held to possess proprietary rights in their wives and the defendants in the relevant circumstances were held to have violated those rights.

But it was long the case that women could not sue when their husbands had been involved in similar situations. The reason for this was that, while husbands were held to possess their wives, wives were not held to possess their husbands. Consequently, the law violated Kant's principle that marriage partners must possess *each other*. The injustice of this position came to be recognized in many jurisdictions. The right to sue for loss of love, affection and sexual favours was extended to women in England in 1923,[28] in Canada in 1946[29] (this was, however, refused in Australia[30]) and as a result of the Married Women's Acts in the United States of America.[31] While this was an apparent victory for Kantian principles, outside the USA the causes of action were eventually abolished altogether.[32] This implies that the modern law does not regard spouses as possessing each other.[33] On its face, this means that even

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

spouses violate Kantian right by having sex. But as I argue in the following section, this is not the case.

Incidentally, this analysis goes at least some of the way to explaining why marriage right is a right to a person akin – i.e. only akin – to a right to a thing. Lawyers routinely distinguish between rights *in rem* and rights *in personam*.[34] The latter are rights held as against specific persons, such as the rights generated by contract with one's contract partner that that person perform. The former are rights to things, and these rights characteristically generate rights in the holder as against a potentially unlimited and undefined class of persons. The paradigm examples are property rights that generate entitlements in the holder as against all comers. Marriage right is the result of a contract, but it resembles rights *in rem* rather than rights *in personam*.[35] As we have seen, at common law and in Kant's theory (*MS* 6: 278), marriage right is a right to a 'thing' that generates an entitlement against third parties to the marriage contract. Nevertheless, because the 'thing' is a person, the right possesses only some aspects of the character of rights *in rem*. With respect to property proper, the relationship between the right holder and the subject of the right is one of dominion: the right holder owns and the subject is owned. With respect to marriage, on the other hand, the relationship is one of equality (*MS* 6: 278). The right holder and the subject of the right form a legal unity, as the subject is also a right holder in the right holder. The distinction between property rights proper and marriage right is, of course, in the nature of the *res*. Property rights are rights to things. Marriage right is a right akin to a right to a thing, because the *res* is not a thing, a fact that conditions the nature of the right.

Sex: The Reality

Above, I suggested that we should accept as plausible Kant's suggestion that, in allowing ourselves to become the object of sexual desire, we allow ourselves to be possessed. But this possession need not be, and in modern Western societies certainly is not, legal possession. If you allow me to seduce you, it does not follow that I can sell you, destroy you, prevent others from touching you or permit them to do so, or any other of the trappings of property. In surrendering to me, you do not actually become a thing, even if we agree that you allow me to treat you *as if* you were a thing. Given that, what exactly is wrong with extramarital sex?

As we have seen, Kant argues that extramarital sex violates the partners' innate rights because, even if they are consenting, it undermines their

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

independence of each other. But this is surely a gross exaggeration. Particularly given the modern legal rules that insist on the independence of partners, even of married partners, the lack of independence is at most only partial and temporary. And when one remembers that sex must be consensual to be legal, the temptation to describe extramarital sex in Kantian terms disappears.

Moreover, while it is plausible to suggest that it is immoral to allow oneself to be treated as if one were a thing, it is important to clarify the scope of this idea. If I agree to play a sport in which my body is used to further the ends of the team, then in a certain sense I am allowing myself to be treated as a thing. If, for instance, I agree to play rugby for a team knowing that they want me because I can kick the ball well, then I am allowing myself to be used because of features of my body. But it is odd to think that there is anything wrong with that. I suggest, however, that Kant's problem with extramarital sex, hinted at above, is his belief that the seduced allows himself to be used as a *mere* means to the seducer's ends. This does not apply to agreeing to play rugby. There, I agree to be used as a means to an end – winning games, etc – but that is also part of my end in playing the game. Hence, I am not being used *merely* as a means to an end. But this is also sometimes true of extramarital sex (and also not always false of marital sex).

In order to make this clear, we can imagine an instance of extramarital sex between *A* and *B*, both of whom fit the description of the seducer at the beginning of this article. On the face of it, it is possible to argue that neither *A* nor *B* is being used merely as a means to an end by the other, because both *A* and *B* have enjoyment in sex as their end. Of course, things are not always quite so simple. *A*'s end may be to use *B* only to achieve enjoyment for *A*, and vice versa. Then they are using each other as mere means to their ends. But of course it need not always be thus. *A* and *B* may also have each other's enjoyment as their ends.

Against these kinds of replies,[36] Matthew Altman has argued:

> We must be careful not to confuse the feelings that usually accompany an attraction to someone with the desire for sex itself. Freud conceives of our desire for sex as a fundamental drive to be satisfied that is disjoined from a concern for any particular person. Evolutionary theorists explain our desire for sex as a means to perpetuate the species, an instinct that we share with other animals. (Altman 2010: 312)

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

The point, then, is that the desire for sex itself remains problematic, though it can be accompanied by many other valuable feelings, and that my argument has shifted inappropriately from the desire to the feelings.

This argument relies on an implausible psychological picture, namely that our motivational states are constituted by the aggregation of desires that come together like pancakes in a stack: we feel them all together, but they are, as they impress themselves upon us, separable. The truth surely more closely resembles tasting ingredients in a cake. Even if sexual desire pure and simple is 'disjoined from a concern for any particular person', it does not follow that those who experience sexual desire for a loved person experience any feeling so disjointed. Something like this seems to have been Kant's general view as well (see e.g. *MA* 8: 112–13), though it is not properly carried over to his discussion of sex in the *Metaphysics of Morals*. The point is more obvious with respect to evolutionary theory. I do not doubt that my sexual desire has its origin in the need to perpetuate the species, but unless I am most extraordinarily self-deceived, my sexual desire is not so motivated.

Given that we need not accept that having extramarital sex is inconsistent with the right of humanity in ourselves, we are not forced to the conclusion that the consent of sexual partners is morally irrelevant. And given that, we can see that the law is able to preserve the moral status of the partners through means other than Kant's conception of marriage. It can do so by insisting on the independence of the partners: by demanding the observance of the innate right even in marriage, for instance. So, for example, it is now the case that husbands can be convicted of raping their wives.[37] I do not mean to imply that this result would not also be reached on Kant's theory.[38] But we have reached this conclusion because we have come to view marriage partners as separate legal persons and hence, for instance, husbands are permitted to touch their wives only with their wives' consent. Indeed, it could be argued that one of the main roles of the modern legal conception of marriage is to preserve the moral *separation* of the partners by ensuring, for instance, that each partner has adequate resources if they separate.

Concluding Remarks

Thus Kant is right to notice a problem regarding sex. But it is one that can adequately be dealt with by insisting, not on the unity of sexual partners, but on their separateness. That, of course, is the option that modern societies have chosen. Ironically, they have made this choice in the name of the fundamental value driving Kant's theory: freedom.

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

Perhaps even more ironically, given the perception of Kant's theory with which this article began, the cost of the choice we have made is that, as a legal phenomenon, modern marriage is distinctly less romantic than the picture Kant painted.

According to Denis:

> If marriage were based merely on feelings, partners would lack security of possession. They would have no guarantee that their partners recognized them as anything other than objects of desire. Even if marriage were a morally binding relationship, based on duty rather than feeling, without legal sanction to back it up, partners would lack the security and the implicit recognition of equality that legal marriage provides. (Denis 2001: 12)

In the light of this discussion, we can see that, for better or for worse, as modern marriage has little concern with 'security of possession', because it provides almost no 'legal sanction to back [marriage] up', these claims come curiously close to constituting a Kantian critique of modern marriage.

Notes

1 See especially de Laurentiis 2000.

2 As is nicely revealed by the title of Herman 1993.

3 Kant's works are cited by abbreviation and volume and page number from *Immanuel Kants gesammelten Schriften, Ausgabe der königlich preußischen Akademie der Wissenschaften* (Berlin: Walter de Gruyter, 1902–). Translations used are from the *Cambridge Edition of the Works of Immanuel Kant* (Cambridge: Cambridge University Press: 1992–). Abbreviations: *BSE* = *Beobachtungen über das Gefühl des Schönen und Erhabenen* (trans. Paul Guyer, in *Anthropology, History, and Education*, ed. Robert Louden and Gunter Zöller); *C* = *Moralphilosophie Collins* (in *Lectures on Ethics*, ed. Peter Heath and J. B. Schneewind, trans. Peter Heath); *F* = *Naturrecht Feyerabend* (forthcoming, trans. Frederick Rauscher, in *Lectures and Drafts on Political Philosophy*); *MA* = *Mutmaßlicher Anfang der Menschengeschichte* (trans. Allen W. Wood, in *Anthropology, History, and Education*); *MS* = *Metaphysik der Sitten* (in *Practical Philosophy*, ed. and trans. Mary J. Gregor); *TP* = *Über den Gemeinspruch: Das mag in der Theorie richtig sein, taugt aber nicht für die Praxis* (in *Practical Philosophy*); *V* = *Die Metaphysik der Sitten Vigilantius* (in *Lectures on Ethics*, ed. Peter Heath and J. B. Schneewind, trans. Peter Heath).

4 For the Roman conception of the family, see Nicholas 1962: 64–70.

5 For analysis of the influence of Roman law on traditional moral theory, see Maine 1920: ch. 9, para. 25. Ironically, Maine traces the decline of this influence to Kant.

6 The claim that Kant is a natural lawyer is meant to imply that he acknowledges that morality is a source of law. See e.g. *MS* 6: 224, 9–30, 37.

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

7 That is, not a contract in terms of the specific legal categories of Roman law, but in the sense of a legally recognized agreement.
8 Kant was criticized on these grounds by Hegel 1991: §§75, 161–3. More recently, see Denis 2001: 1–28.
9 Gregor translates *zu dem sich ein Teil dem anderen hingibt* as 'for which one gives *itself* up to the other' (emphasis added). 'Itself', however, wrongly implies that its referent cannot be a person.
10 As Herman 1993 points out, Kant's picture of sexual attraction has much in common with some modern feminist theorists. Nevertheless, as the following section will help to make clear, it remains a highly unintuitive view (which is not to say that it is false).
11 For a recent defence of this view, see Altman 2010: 312.
12 See e.g. Schaff 2001.
13 See also Höffe 2010: 85, who maintains that the duty corresponding to this right can be ethical only.
14 This does not mean that the position advanced in the *Rechtslehre* is inconsistent with the existence of the norm that is called in the Vigilantius notes the right of humanity in one's own person. That norm does seem to survive, under a different label, in the *Tugendlehre*. For discussion of that norm see Denis 2010: 176–8.
15 The discussion of Ulpian's maxims at *MS* 6: 236 echoes the formulation in the Vigilantius notes, but that is hardly surprising as Kant takes his cue from Ulpian's presentation of those maxims.
16 The exact implication of this for Kant's theory is controversial. See e.g. O'Neill 1989: ch. 1; Willaschek 1997; Wood 2002; Guyer 2002. That matter cannot be examined here.
17 Cf Ripstein 2009: ch. 2, who makes similar points, though in a different context.
18 For an argument to this effect, see Brink 1992.
19 See also Ripstein 2009: 135–6.
20 This needs to be distinguished from the situation in which a person breaches a contract while alive and then dies where the contact is enforceable as against the estate of the deceased.
21 Incidentally, in Roman law, marriage could be ended if one of the partners declared an intention to do so. But this was because Roman marriage had virtually no legal consequence. Nicholas 1962: 80–90.
22 The difficulty was pointed out by Bertolt Brecht in his poem 'On Kant's Definition of Marriage in the Metaphysics of Morals'. Brecht 1967: IV 609. As I translate this rather loosely, I have included the German original. For a more literal translation, see Kneller 2006: 470 n. 1.

Den Pakt zu wechselseitigem Gebrauch	The contract for reciprocal using
Von den Vermögen und Geschlechtsorganen	Of the property and sex organs of each
Den der die Ehe nennt, nun einzumahnen	That he calls marriage, and as he does teach
Ercheint mir dringend and berechtigt auch.	Seems to me urgently to warrant securing.
Ich höre, einige Partner sind da säumig.	I hear that some partners are remiss
Sie haben – und ich halt's nicht fur gelogen –	They have – to this I cannot object –
Geschlectsorgane kürzlich hinterzogen:	Evaded their partner's organs for sex:

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

Das Netz hat Maschen and sie sind geräumig.	There are loopholes that one just can't miss.
Da bleibt nur: die Gerichte anzugehn	Only one thing remains: to litigate
Und die Organe in Beschlag zu nehmen.	And see that the organs are confiscate.
Vielleicht wird sich der Partner dann bequemen	Perhaps then partners will painstakingly
Sich den Kontrakt genauer anzusehn.	Study the contract more closely.
Wenn er sich nicht bequemt – ich fiircht es sehr –	If they don't trouble themselves – and of that I fear–
Muß eben der Gerichtsvollzieher her.	Then the bailiff will just have to appear.

23 As noted above, Kneller presents her own response to this problem. My argument, however, is that there is no problem to which one needs to respond.
24 *Warner Brothers Pictures v Nelson* [1937] 1 Kings Bench 209.
25 The apparent exceptions to this rule, contained in places such as ss. 16–18 of the Sale of Goods Act 1979 (UK) and §2–401(1) of the Uniform Commercial Code (US), are exceptions that prove the rule. That is, they determine that, if certain conditions are met, property passes at contract formation; but the existence of those conditions demonstrates that the contract does not by itself give property in the subject matter of the contract.
26 *Winsmore v Greenbank* (1745) Willes 577, 125 English Rep. 1330; *Emerson v Fleming* 193 South East 2d 249 (GA CA 1972).
27 *Wilton v Webster* (1835) 7 C & P 198, 173 English Rep. 87.
28 *Gray v Gee* (1923) 39 Times Law Rep. 429.
29 *Applebaum v Gilchrist* [1946] 4 Dominion Law Rep. 383 (Ont CA).
30 *Wright v Cedzich* (1930) 43 Comonwealth Law Rep. 493 (HCA).
31 For commentary, see 1984: 915–16.
32 Law Reform (Miscellaneous Provisions) Act 1970 ss. 4–5 (UK); Family Law Act 1975 (Aust) s. 120; Family Proceedings Act 1980 (NZ) s. 190; Domestic Actions Act 1975 (NZ) s. 2; *Davenport v Miller* (1990) 70 Dominion Law Rep. (4th) 181 (NBCQB).
33 See e.g. 'Abolition of the rule as to unity of spouses', s. 64 Civil Liability Act (SA).
34 The classic analysis is Hohfeld 2001.
35 Of course, property rights are routinely created by contract, though additional steps are usually required. That is the general understanding here too. It is why, for instance, medieval English law required *commixtion sexuum*. It is also echoed in the modern practice of giving the bride away – an acted out conveyance in accordance with contract (between the groom and the bride's father) through delivery.
36 Specifically those found in Williams 1983: 117–18 and Singer 2002.
37 It is remarkable, however, that this was achieved in England and Wales only in 1992. See *R v R (Rape: Marital Exemption)* [1992] 1 Appeal Cases 599 (HL).
38 For Kant, a spouse would not be able to sue another spouse for battery, for example, but that does not mean that the criminal law could not operate in this area.

References

Altman, Matthew C. (2010) 'Kant on Sex and Marriage: The Implications for the Same-Sex Marriage Debate'. *Kant-Studien*, 101, 309–30.
Aristotle (1999) *Nicomachean Ethics*. Indianapolis, IN: Hackett.
Baker, John Hamilton (2002) *An Introduction to English Legal History*. London: Butterworths.
Brecht, Bertolt (1967) *Gesammelte Werke in acht Bänden*. Frankfurt am Main: Suhrkamp Verlag.

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press

Brink, David O (1992) 'Mill's Deliberative Utilitarianism'. *Philosophy and Public Affairs*, 21, 67–103.
de Laurentiis, Allegra (2000) 'Kant's Shameful Proposition: A Hegel Inspired Criticism of Kant's Theory of Domestic Right'. *International Philosophical Quarterly*, 40, 297–312.
Denis, Lara (2001) 'From Friendship to Marriage: Revising Kant'. *Philosophy and Phenomenological Research*, 63, 1–28.
—— (2010) 'Freedom, Primacy, and Perfect Duties to Oneself'. In Lara Denis (ed.), *Kant's Metaphysics of Morals: A Critical Guide* (Cambridge: Cambridge University Press), 170–91.
Guyer, Paul (2002) 'Kant's Deduction of the Principles of Right'. In Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays* (Oxford: Clarendon Press), 23–64.
Hegel, G.W.F. (1991) *Elements of the Philosophy of Right*. Cambridge: Cambridge University Press.
Herman, Barbara (1993) 'Could it be Worth Thinking about Kant on Sex and Marriage?'. In Louise M. Antony and Charlotte Witt (eds.), *A Mind of One's Own: Feminist Essays on Reason and Objectivity* (Boulder, CO: Westview Press), 53–72.
Höffe, Otfried (2010) 'Kant's Innate Right as a Rational Criterion for Human Rights'. In Lara Denis (ed.), *Kant's Metaphysics of Morals: A Critical Guide* (Cambridge: Cambridge University Press), 71–92.
Hohfeld, Wesley Newcomb (2001) *Fundamental Legal Conceptions as Applied in Judicial Reasoning*. Dartmouth: Ashgate.
Kneller, Jane (2006) 'Kant on Sex and Marriage Right'. In Paul Guyer (ed.), *The Cambridge Companion to Kant and Modern Philosophy* (New York: Cambridge University Press), 447–76.
Korsgaard, Christine M. (1996) *Creating the Kingdom of Ends*. Cambridge: Cambridge University Press.
Kuehn, Manfred (2001) *Kant*. Cambridge: Cambridge University Press.
Maine, Henry Sumner (1920) *Ancient Law: Its Connection with the Early History of Society and its Relation to Modern Ideas*. London: John Murry.
Mill, John Stuart (2009) 'On Liberty'. In *The Basic Writings of John Stuart Mill: On Liberty, The Subjection of Women and Utilitarianism* (New York: Classic Books America), 2–128.
Nicholas, Barry (1962) *An Introduction to Roman Law*. Oxford: Clarendon Press.
O'Neill, Onora (1989) *Constructions of Reason: Explorations of Kant's Practical Philosophy*. Cambridge: Cambridge University Press.
Plato (2006) *Plato on Love: Lysis, Symposium, Phaedrus, Alcibiades, with Selections from Republic, Laws*. Indianapolis, IN: Hackett.
Ripstein, Arthur (2009) *Force and Freedom: Kant's Legal and Political Philosophy*. Boston, MA: Harvard University Press.
Schaff, Kory (2001) 'Kant, Political Liberalism, and the Ethics of Same-Sex Relations'. *Journal of Social Philosophy*, 32, 446–62.
Singer, Irving (2002) 'The Morality of Sex: Contra Kant'. In Alan Soble (ed.), *The Philosophy of Sex: Contemporary Readings* (Lanham, MD: Rowman & Littlefield), 259–72.
Willaschek, Marcus (1997) 'Why the Doctrine of Right does Not Belong in the *Metaphysics of Morals*'. *Jahrbuch für Recht und Ethik*, 5, 205–27.
Williams, Howard (1983) *Kant's Political Philosophy*. Oxford: Blackwell.
Wood, Allen W. (2002) 'The Final Form of Kant's Practical Philosophy'. In Mark Timmons (ed.), *Kant's Metaphysics of Morals: Interpretative Essays* (Oxford: Clarendon Press), 1–22.
Zweigert, Konrad, and Kötz, Hein (1998) *An Introduction to Comparative Law*. Oxford: Oxford University Press.

https://doi.org/10.1017/S1369415413000149 Published online by Cambridge University Press